20-1568

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY H. EDGAR; RICHARD H. IMMERMAN; MELVIN A. GOODMAN; ANURADHA BHAGWATI; MARK FALLON,

Plaintiffs–Appellants

v.

JOHN RATCLIFFE, in his official capacity as Director of National Intelligence; GINA HASPEL, in her official capacity as Director of the Central Intelligence Agency; MARK T. ESPER, in his official capacity as Secretary of Defense; PAUL M. NAKASONE, in his official capacity as Director of the National Security Agency,

Defendants–Appellees

On appeal from the United States District Court for the District of Maryland — No. 8:19-cv-00985 (Hazel, J.)

JOINT APPENDIX

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Docket Entries

APPEAL,CLOSED

U.S. District Court
District of Maryland (Greenbelt)
CIVIL DOCKET FOR CASE #: 8:19-cv-00985-GJH

Edgar et al v. Coats et al
Assigned to: Judge George Jarrod Hazel
Case in other court: USCA, 20-01568
Cause: 28:1331 Violation of Constitutional Rights

Date Filed: 04/02/2019
Date Terminated: 05/07/2020
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
04/02/2019	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0416-7926763.), filed by Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon. (Attachments: # 1 Civil Cover Sheet, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons)(Rocah, David) (Entered: 04/02/2019)
04/02/2019	2	MOTION to Appear Pro Hac Vice for Brett Max Kaufman (Filing fee $100, receipt number 0416-7926828.) by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 04/02/2019)
04/02/2019	3	MOTION to Appear Pro Hac Vice for Vera Eidelman (Filing fee $100, receipt number 0416-7926858.) by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 04/02/2019)
04/02/2019	4	MOTION to Appear Pro Hac Vice for Naomi Gilens (Filing fee $100, receipt number 0416-7926866.) by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 04/02/2019)
04/02/2019	5	MOTION to Appear Pro Hac Vice for Alex Abdo (Filing fee $100, receipt number 0416-7926872.) by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 04/02/2019)
04/02/2019	6	MOTION to Appear Pro Hac Vice for Ramya Krishnan (Filing fee $100, receipt number 0416-7926880.) by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 04/02/2019)
04/02/2019	7	MOTION to Appear Pro Hac Vice for Jameel Jaffer (Filing fee $100, receipt number 0416-7926890.) by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 04/02/2019)
04/02/2019	8	MOTION for Other Relief *to Omit Home Addresses from Caption* by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Rocah, David) (Entered: 04/02/2019)
04/02/2019	9	Summons Issued 21 days as to Daniel Coats, Gina Haspel, Paul M. Nakasone, and

		Patrick M. Shanahan. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons) (km4s, Deputy Clerk) (Entered: 04/02/2019)
04/03/2019	10	PAPERLESS ORDER granting 2 Motion to Appear Pro Hac Vice on behalf of Brett Max Kaufman. Attorney Brett Max Kaufman will receive a separate email with the previously issued CM/ECF login and password. Signed by Clerk on 4/3/2019. (srds, Deputy Clerk) (Entered: 04/03/2019)
04/03/2019	11	PAPERLESS ORDER granting 3 Motion to Appear Pro Hac Vice on behalf of Vera Eidelman. Directing attorney Vera Eidelman to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic-case-filing-registration. Signed by Clerk on 4/3/2019. (srds, Deputy Clerk) (Entered: 04/03/2019)
04/03/2019	12	PAPERLESS ORDER granting 4 Motion to Appear Pro Hac Vice on behalf of Naomi Gilens. Directing attorney Naomi Gilens to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic-case-filing-registration. Signed by Clerk on 4/3/2019. (srds, Deputy Clerk) (Entered: 04/03/2019)
04/03/2019	13	QC NOTICE: 5 Motion to Appear Pro Hac Vice filed by Mark Fallon, Timothy H. Edgar, Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati needs to be modified. See attachment for details and corrective actions needed regarding the signature(s) on the motion. (srds, Deputy Clerk) (Entered: 04/03/2019)
04/03/2019	14	QC NOTICE: 6 Motion to Appear Pro Hac Vice filed by Mark Fallon, Timothy H. Edgar, Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati needs to be modified. See attachment for details and corrective actions needed regarding the signature(s) on the motion. (srds, Deputy Clerk) (Entered: 04/03/2019)
04/03/2019	15	QC NOTICE: 7 Motion to Appear Pro Hac Vice filed by Mark Fallon, Timothy H. Edgar, Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati needs to be modified. See attachment for details and corrective actions needed regarding the signature(s) on the motion. (srds, Deputy Clerk) (Entered: 04/03/2019)
04/03/2019	16	CORRECTED MOTION to Appear Pro Hac Vice for Alex Abdo by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman. The fee has already been paid.(Rocah, David) (Entered: 04/03/2019)
04/03/2019	17	CORRECTED MOTION to Appear Pro Hac Vice for Ramya Krishnan by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman. The fee has already been paid.(Rocah, David) (Entered: 04/03/2019)
04/03/2019	18	CORRECTED MOTION to Appear Pro Hac Vice for Jameel Jaffer by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman. The fee has already been paid.(Rocah, David) (Entered: 04/03/2019)
04/09/2019	19	PAPERLESS ORDER granting 16 Corrected Motion to Appear Pro Hac Vice on behalf of Alex Abdo. Attorney Alex Abdo will receive a separate email with the previously issued CM/ECF login and password. Signed by Clerk on 4/9/2019. (srds, Deputy Clerk) (Entered: 04/09/2019)
04/09/2019	20	PAPERLESS ORDER granting 17 Corrected Motion to Appear Pro Hac Vice on behalf

		of Ramya Krishnan. Directing attorney Ramya Krishnan to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic-case-filing-registration. Signed by Clerk on 4/9/2019. (srds, Deputy Clerk) (Entered: 04/09/2019)
04/09/2019	21	PAPERLESS ORDER granting 18 Corrected Motion to Appear Pro Hac Vice on behalf of Jameel Jaffer. Attorney Jameel Jaffer will receive a separate email with the previously issued CM/ECF login and password. Signed by Clerk on 4/9/2019. (srds, Deputy Clerk) (Entered: 04/09/2019)
05/06/2019	22	SUMMONS Returned Executed by Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon. Daniel Coats served on 4/5/2019, answer due 6/4/2019.(Abdo, Alex) (Entered: 05/06/2019)
05/06/2019	23	SUMMONS Returned Executed by Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon. Gina Haspel served on 4/5/2019, answer due 6/4/2019.(Abdo, Alex) (Entered: 05/06/2019)
05/06/2019	24	SUMMONS Returned Executed by Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon. Patrick M. Shanahan served on 4/5/2019, answer due 6/4/2019.(Abdo, Alex) (Entered: 05/06/2019)
05/06/2019	25	SUMMONS Returned Executed by Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon. Paul M. Nakasone served on 4/5/2019, answer due 6/4/2019.(Abdo, Alex) (Entered: 05/06/2019)
05/31/2019	26	Consent MOTION for Extension of Time *and to Enter Stipulated Briefing Schedule* by Daniel Coats, Gina Haspel, Paul M. Nakasone, Patrick M. Shanahan (Attachments: # 1 Text of Proposed Order Granting Consent Motion to Extend Time for Initial Response and to Enter Stipulated Briefing Schedule)(White, Neil) (Entered: 05/31/2019)
06/03/2019	27	NOTICE of Appearance by Serena Orloff on behalf of All Defendants (Orloff, Serena) (Entered: 06/03/2019)
06/07/2019	28	PAPERLESS ORDER granting 26 Consent Motion for Extension of Time. Defendants may file a motion to dismiss on or before June 14, 2019; Plaintiffs' opposition may be filed on or before July 16, 2019; and Defendants may reply on or before August 2, 2019. (Entered: 06/07/2019)
06/14/2019	29	Consent MOTION for Leave to File Excess Pages *in Support of Motion to Dismiss* by Daniel Coats, Gina Haspel, Paul M. Nakasone, Patrick M. Shanahan (Attachments: # 1 Proposed Order)(Orloff, Serena) (Entered: 06/14/2019)
06/14/2019	30	MOTION to Dismiss by Daniel Coats, Gina Haspel, Paul M. Nakasone, Patrick M. Shanahan (Attachments: # 1 Memorandum in Support, # 2 Affidavit with Exhibit A, # 3 Proposed Order)(Orloff, Serena) (Entered: 06/14/2019)
06/17/2019	31	PAPERLESS ORDER granting 29 Motion for Leave to File Excess Pages. Signed by Judge George Jarrod Hazel on 6/17/2019. (jw2s, Deputy Clerk) (Entered: 06/17/2019)
07/16/2019	32	Consent MOTION for Leave to File Excess Pages *in Opposition to Defendants' Motion to Dismiss* by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 07/16/2019)

07/16/2019	33	RESPONSE in Opposition re 30 MOTION to Dismiss filed by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman. (Attachments: # 1 Affidavit with Appendix)(Rocah, David) (Entered: 07/16/2019)
07/23/2019	34	MOTION for Leave to File *Brief as Amicus Curiae in Support of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss* by Center for Ethics and the Rule of Law (Attachments: # 1 Attachment)(Woodward, Gordon) (Entered: 07/23/2019)
07/23/2019	35	Local Rule 103.3 Disclosure Statement by Center for Ethics and the Rule of Law (Woodward, Gordon) (Entered: 07/23/2019)
08/02/2019	36	REPLY to Response to Motion re 30 MOTION to Dismiss filed by Daniel Coats, Gina Haspel, Paul M. Nakasone, Patrick M. Shanahan.(Orloff, Serena) (Entered: 08/02/2019)
08/02/2019	37	Consent MOTION for Leave to File Excess Pages by Daniel Coats, Gina Haspel, Paul M. Nakasone, Patrick M. Shanahan (Attachments: # 1 Proposed Order)(Orloff, Serena) (Entered: 08/02/2019)
08/05/2019	38	PAPERLESS ORDER granting 37 Motion for Leave to File Excess Pages. Signed by Judge George Jarrod Hazel on 8/5/2019. (jw2s, Deputy Clerk) (Entered: 08/05/2019)
09/04/2019	39	MOTION to Withdraw by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 09/04/2019)
09/09/2019	40	Request for Hearing/Trial *on Pending Motion to Dismiss* (Krishnan, Ramya) (Entered: 09/09/2019)
10/15/2019	41	PAPERLESS ORDER granting 39 Motion to Withdraw. Signed by Judge George Jarrod Hazel on 10/15/2019. (jw2s, Chambers) (Entered: 10/15/2019)
02/12/2020	42	MOTION to Appear Pro Hac Vice for Meenakshi Krishnan (Filing fee $100, receipt number 0416-8510289.) by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman(Rocah, David) (Entered: 02/12/2020)
02/14/2020	43	QC NOTICE: 42 Motion to Appear Pro Hac Vice filed by Mark Fallon, Timothy H. Edgar, Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati needs to be modified. See attachment for details and corrective actions needed regarding missing or incomplete information. (srd, Deputy Clerk) (Entered: 02/14/2020)
02/20/2020	44	CORRECTED MOTION to Appear Pro Hac Vice for Meenakshi Krishnan by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman. The fee has already been paid.(Rocah, David) (Entered: 02/20/2020)
02/21/2020	45	PAPERLESS ORDER granting 44 Corrected Motion to Appear Pro Hac Vice on behalf of Meenakshi Krishnan. Directing attorney Meenakshi Krishnan to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic-case-filing-registration. Signed by Clerk on 2/21/2020. (srd, Deputy Clerk) (Entered: 02/21/2020)
04/16/2020	46	MEMORANDUM OPINION. Signed by Judge George Jarrod Hazel on 4/15/2020. (tds, Deputy Clerk) (Entered: 04/16/2020)

04/16/2020	47	ORDER granting 8 Plaintiffs' Motion to Omit Home Addresses from Caption;granting 30 Defendants' Motion to Dismiss; granting 32 Plaintiffs' Unopposed Motion for Leave to File Excess Pages; granting 34 The Center for Ethics and Rule of Law's Motion for Leave to File Brief as Amicus Curiae; and directing the Plaintiffs to notify the Court within 14 days of this Order if they intend to submit a Motion for Leave to Amend the Complaint. Signed by Judge George Jarrod Hazel on 4/15/2020. (tds, Deputy Clerk) (Entered: 04/16/2020)
05/07/2020	48	ORDER dismissing with prejudice 1 Plaintiffs' Complaint for Declaratory and Injunctive Relief; and directing the Clerk to CLOSE this Case. Signed by Judge George Jarrod Hazel on 5/6/2020. (tds, Deputy Clerk) (Entered: 05/07/2020)
05/12/2020	49	NOTICE OF APPEAL as to 46 Memorandum Opinion, 48 Order Dismissing Case by Anuradha Bhagwati, Timothy H. Edgar, Mark Fallon, Melvin A. Goodman, Richard H. Immerman. Filing fee $ 505, receipt number 0416-8648074.(Rocah, David) (Entered: 05/12/2020)
05/14/2020	50	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 49 Notice of Appeal. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to http://www.ca4.uscourts.gov and click on Forms & Notices.(nu, Deputy Clerk) (Entered: 05/14/2020)
05/20/2020	51	USCA Case Number 20-1568 for 49 Notice of Appeal filed by Mark Fallon, Timothy H. Edgar, Melvin A. Goodman, Richard H. Immerman, Anuradha Bhagwati. Case Manager - Richard H. Sewell (nus, Deputy Clerk) (Entered: 05/20/2020)

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Complaint for Declaratory and Injunctive Relief (ECF 1), filed April 2, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

TIMOTHY H. EDGAR
Providence, RI*

RICHARD H. IMMERMAN
700 Locust Street
Philadelphia, PA 19106

MELVIN A. GOODMAN
5002 Nahant Street
Bethesda, Montgomery County, MD
20816

ANURADHA BHAGWATI
New York, NY*

MARK FALLON
Brunswick, Georgia*

Plaintiffs,

v.

DANIEL COATS, in his official capacity as Director of National Intelligence
Office of the Director of National Intelligence
Washington, DC 20511

GINA HASPEL, in her official capacity as Director of the Central Intelligence Agency
Central Intelligence Agency
Washington, DC 20505

(continued on next page)

Civil Action No. _____

* In a concurrently filed motion, Plaintiffs Timothy H. Edgar, Anuradha Bhagwati, and Mark Fallon have requested a waiver of their obligations under Local Rule 102.2(a) to provide their home addresses in the caption of this complaint.

PATRICK M. SHANAHAN, in his official capacity as Acting Secretary of Defense
Department of Defense
1400 Defense Pentagon
Washington, DC 20301

PAUL M. NAKASONE, in his official capacity as Director of the National Security Agency
National Security Agency
9800 Savage Road
Fort Meade, MD 20755

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a challenge to a far-reaching system of prior restraints that suppresses a broad swath of constitutionally protected speech, including core political speech, by former government employees. The system, known as "prepublication review," exposes millions of former intelligence-agency employees and military personnel to possible sanction if they write or speak about their government service without first obtaining the government's approval. Under this system, government officials review and censor tens of thousands of submissions every year.

2. As prominent legal scholars have noted, and as the government's own documents confirm, the system is "racked with pathologies." Jack Goldsmith & Oona Hathaway, *The Government's System of Prepublication Review Is Broken*, Wash. Post (Dec. 25, 2015), https://perma.cc/2JST-ZJ52. Many agencies impose prepublication review obligations on former employees without regard to their level of access to sensitive information. Submission requirements and review standards are vague, overbroad, and leave former employees uncertain or unaware of their obligations. Manuscript review frequently takes weeks or even months. Agencies' censorial decisions are often arbitrary, unexplained, and influenced by authors'

viewpoints. And favored officials are sometimes afforded special treatment, with their manuscripts fast-tracked and reviewed more sympathetically. As a result of the system's dysfunction, many would-be authors self-censor, and the public is denied access to speech by former government employees that has singular potential to inform public debate about government policy.

3. This system of censorship cannot be squared with the First Amendment. The government has a legitimate interest in protecting bona fide national-security secrets, and several statutes impose after-the-fact criminal penalties on those who disclose classified information unlawfully. But the imposition of a prior restraint is an extreme measure—one that can be justified only in truly extraordinary circumstances and, even then, only when the restraint is closely tailored to a compelling government interest and accompanied by procedural safeguards designed to avoid the dangers of a censorship system. To survive First Amendment scrutiny, a requirement of prepublication review would have to, at a minimum, apply only to those entrusted with the most closely held government secrets; apply only to material reasonably likely to contain those secrets; provide clear notice of what must be submitted and what standards will be applied; tightly cabin the discretion of government censors; include strict and definite time limits for completion of review; require censors to explain their decisions; and assure that those decisions are subject to prompt review by the courts. The prepublication review system, in its current form, has none of these features.

4. Plaintiffs Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon are former employees of the Office of the Director of National Intelligence, the Central Intelligence Agency, and the Department of Defense. Between them, they served in the intelligence community and the military in a diversity of roles for almost

a century. All of them have drafted publications subject to prepublication review. Most of them have submitted written works for review in the past. All of them intend to continue writing works subject to review. And, without the intervention of this Court, all of them will be forced to choose between submitting material to an unconstitutional censorship regime and risking sanction in the future. They seek a declaration that Defendants' prepublication review regimes are unconstitutional and an injunction against the application of these regimes to them.

Jurisdiction and Venue

5. This action arises under the First and Fifth Amendments to the U.S. Constitution.

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over causes of action arising under the U.S. Constitution. The Court has authority to grant declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and under the Court's inherent equitable jurisdiction.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because one Plaintiff resides in this judicial district and Defendants are officers of the United States sued in their official capacities.

Parties

8. Timothy H. Edgar is an expert on cybersecurity and a former employee of the Office of the Director of National Intelligence ("ODNI"). He resides in Rhode Island. He has submitted written work to the ODNI in the past and at least some of his manuscripts have been referred to the Central Intelligence Agency ("CIA") and the National Security Agency ("NSA") for additional review.

9. Richard H. Immerman is a historian with expertise in U.S. foreign relations and a former employee of the ODNI. He resides in Pennsylvania. He has submitted written work to the

ODNI in the past and at least one of his manuscripts has been referred to the CIA for additional review.

10. Melvin A. Goodman is an expert on the former Soviet Union and a former employee of the CIA. He resides in Maryland. He has submitted written work to the CIA in the past and at least one of his manuscripts has been referred to the Department of Defense ("DOD") for additional review.

11. Anuradha Bhagwati is a writer, activist, and Marine Corps veteran who founded SWAN, the Service Women's Action Network, an organization that raises awareness of and conducts advocacy on issues of sexual violence in the military and gender equality in the armed services. She resides in New York. She was not made aware of her prepublication review obligation until recently, and she has not submitted written work to the DOD in the past.

12. Mark Fallon is an expert on counterterrorism, counterintelligence, and interrogation and a former employee of the Naval Criminal Investigative Service. He resides in Georgia. He has submitted written work to the DOD in the past, and at least two of his manuscripts have been referred to other DOD components and agencies outside of the DOD for additional review.

13. Defendant Daniel Coats is the Director of National Intelligence. He has ultimate authority over the ODNI's prepublication review regime. He is sued in his official capacity.

14. Defendant Gina Haspel is the Director of the CIA. She has ultimate authority over the CIA's prepublication review regime. She is sued in her official capacity.

15. Defendant Patrick M. Shanahan is the Acting Secretary of Defense. He has ultimate authority over the DOD's prepublication review regime. He is sued in his official capacity.

16. Defendant Paul M. Nakasone is the Director of the NSA, which is a component of the DOD. He has authority over the NSA's prepublication review regime. He is sued in his official capacity.

Facts

Origins and Metastasis of the Prepublication Review System

17. Since its establishment in 1947, the CIA has required employees to sign secrecy agreements as a condition of employment and again upon their resignation from the agency. Although the terms of these agreements have varied over time, the agreements have generally prohibited CIA employees from publishing manuscripts without first obtaining the agency's consent.

18. In the 1950s and 1960s, when comparatively few former CIA employees sought to publish manuscripts, the agency handled prepublication review informally through its Office of Security and Office of General Counsel. In the 1970s, however, partly as a result of the Vietnam War and the executive-branch abuses of power exposed and documented by the Church and Pike Committees, many more former agency employees began writing, often critically, about the agency and its activities. In 1976, in the wake of a Fourth Circuit ruling that allowed the CIA to enforce a prepublication review agreement against a former employee named Victor Marchetti, CIA Director George H.W. Bush established the Publications Review Board to review the non-official publications of current employees. The next year, when Stansfield Turner succeeded Bush as CIA Director, Turner expanded the Board's authority to reach publications by former employees.

19. The 1980s were a critical period in the evolution of prepublication review. In 1980, a divided Supreme Court decided *Snepp v. United States*, 444 U.S. 507 (1980), affirming the imposition of a constructive trust on proceeds earned by a former CIA officer who had

published a book without submitting it for review. The ruling—unsigned and issued without the benefit of oral argument or even briefing on the merits—was widely criticized by prominent voices across the political spectrum.

20. Emboldened by *Snepp*, in 1983 President Reagan issued National Security Decision Directive 84 ("Directive 84"), which mandated that intelligence agencies require all persons authorized to access Sensitive Compartmented Information ("SCI") to sign a nondisclosure agreement as a condition of access. The directive provided that "[a]ll such agreements must include a provision for prepublication review to assure deletion of SCI and other classified information." In a 1983 report, the General Accounting Office estimated that the provision would affect approximately 128,000 people—in addition to an undisclosed number of CIA and NSA employees.

21. Directive 84 provoked an intense and bipartisan backlash in Congress. In October 1983, Senator Charles Mathias, Republican of Maryland, proposed a rider on a State Department appropriations measure to delay the implementation of the directive's prepublication review provision. Mathias told the Senate: "We must insure that the free speech rights of our most experienced public servants are not restricted unnecessarily. . . . [C]ongressional consideration must precede the implementation of the censorship plan." The House and Senate agreed, voting to approve the rider in November. Two months later, Representative Jack Brooks, Democrat of Texas, introduced legislation to prohibit most agencies from imposing prepublication review requirements. The bill was referred to the House Committee on Post Office and Civil Service, and subcommittee hearings were held in February. However, on March 20, 1984, one day before the bill's formal consideration by the full committee, President Reagan suspended Directive 84's prepublication review mandate. As a result, Brooks's bill was removed from the full committee's

schedule. As a 1988 report of the House Committee on Government Operations, chaired by Brooks, noted: "It appeared as if there would be no need for legislation prohibiting prepublication review contracts because the Administration had decided not to implement that policy."

22. President Reagan's suspension of the prepublication review mandate did not, however, suspend agencies' existing prepublication review requirements or prohibit the agencies from imposing new ones. The agencies continued to require employees to sign Form 4193, a standard-form contract that the Reagan administration had introduced in 1981 without informing Congress, and that imposed essentially the same prepublication review obligations that Directive 84 would have imposed. A General Accounting Office survey found that, at the end of 1985, at least 240,776 individuals had signed SCI nondisclosure agreements with prepublication review requirements, and an updated survey from 1988 found that about 450,000 current and former employees had signed such agreements. Neither survey included employees (current or former) of the CIA or the NSA.

23. Over the past five decades, the prepublication review system has expanded on every axis.

24. First, more agencies impose prepublication review requirements on their former employees. When the Supreme Court decided *Snepp*, the only U.S. intelligence agencies that imposed prepublication review obligations on former employees were the CIA and the NSA. Today, every U.S. intelligence agency imposes a lifetime prepublication review requirement on at least some subset of former employees.

25. Second, these agencies impose prepublication review obligations on more categories of people. Most agencies once imposed lifetime prepublication review obligations

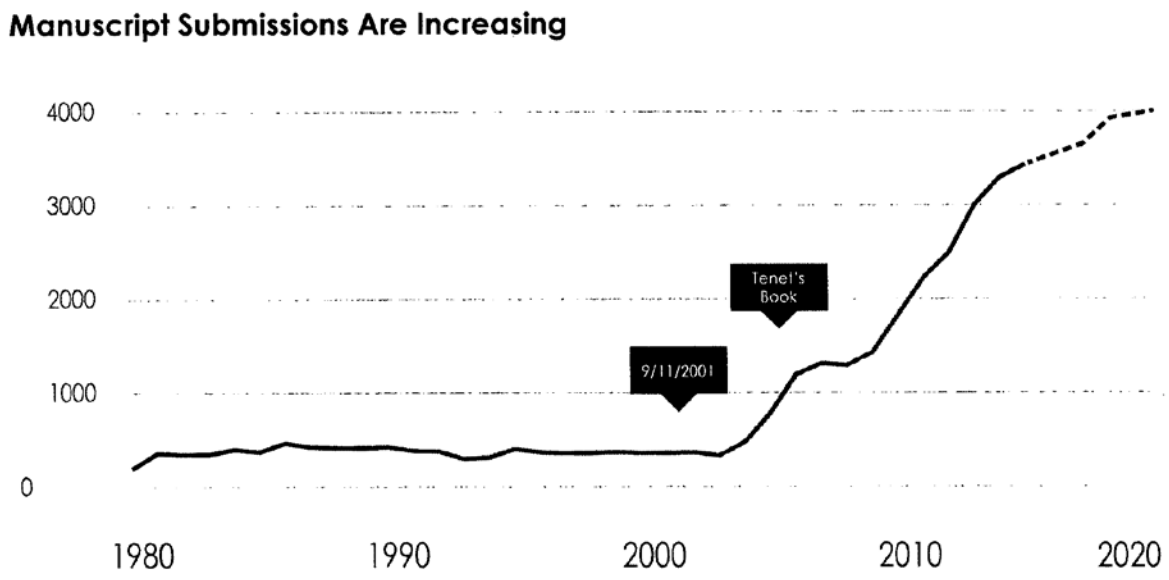
only on individuals with access to SCI, and the number of employees with SCI was "a very small fraction of Government employees who [had] access to classified information generally," as Deputy Assistant Attorney General Richard K. Willard testified in 1983. Now, however, many agencies impose such obligations even on employees who have never had access to SCI or to classified information of any kind. Whereas the DOD, for example, once imposed lifetime prepublication review obligations only on employees with access to SCI—111,167 people in 1983—it now imposes these obligations on all 2.9 million of its employees, including civilian employees, active duty military personnel, and reservists.

26. Third, the amount of information that is classified has expanded dramatically. In 1980, the year *Snepp* was decided, original and derivative classification authorities made 16 million classification decisions. In 2017, they made 49.5 million. The increase in the number of classified secrets has meant a corresponding expansion in the reach of prepublication review regimes—an expansion that is of especial concern because, as is widely acknowledged, a substantial fraction of classified secrets is classified improperly or unnecessarily.

27. Fourth, agency prepublication review regimes have become increasingly complex. The CIA prepublication review obligations that the Supreme Court considered in *Snepp* were purely contractual. Today, the intelligence agencies impose prepublication review requirements through a confusing tangle of contracts, regulations, and policies. Moreover, the basic features of prepublication review—including submission and review standards, review timelines, and appeals processes—vary widely across agencies, which further complicates the process for former employees who must submit to more than one agency, and also for those who submit to only one agency but are told, as they very often are, that their manuscript has been referred to other agencies for additional review. Against this background, former employees frequently have

difficulty determining what their submission obligations are, and what standards will be applied to their manuscripts.

28. Fifth, the amount of material being submitted for prepublication review has steadily increased. For example, in 1977, the CIA received 43 submissions for prepublication review. In 2015, by contrast, the agency received more than 8,400 submissions for prepublication review, including about 3,400 manuscripts, according to a draft report of the CIA Inspector General obtained by the American Civil Liberties Union ("ACLU") and the Knight First Amendment Institute at Columbia University ("Knight Institute") under the Freedom of Information Act ("FOIA"). Another document released under FOIA indicates that the number of pages reviewed by the CIA each year increased from about 1,000 in the mid-1970s to 150,000 in



2014. Other agencies have seen similarly dramatic increases.

***Figure 1**: Graph from CIA Inspector General report produced to the ACLU and the Knight Institute in FOIA litigation*

29. Finally, in part because so much more material is submitted to them, agencies now take much more time to complete their reviews. In a 1983 congressional hearing, then–Chairman of the CIA's Publications Review Board Charles Wilson testified that the CIA's 30-day time limit for completion of reviews was "met in virtually all cases but a very few," and that the average review took just 13 days. Review takes much longer today, perhaps because staffing has not kept pace with the sharp increase in submissions. According to the draft CIA IG report cited above, "[w]ith today's volumes, complexity, and drive for immediacy, [the Publications Review Board] is struggling with achieving timeliness, and to some extent thoroughness/quality." The report states: "[B]ook-length manuscripts received today are currently projected to take over a year because of the complexity and large book backlog."

30. In part because of the expansion described above, and in part because of factors described more fully below, the prepublication review system has become dysfunctional. Recognizing this, in 2017 the House and Senate Intelligence Committees instructed the DNI to prepare, within 180 days of enactment of the Intelligence Authorization Act for that year, a new prepublication review policy that would apply to all intelligence agencies and that would "yield timely, reasoned, and impartial decisions that are subject to appeal." The new policy, the committees said, should require each intelligence agency to develop and maintain a prepublication review policy that identifies the individuals whose work is subject to prepublication review, provides guidance on the types of information that must be submitted for review, provides for a "prompt and transparent" appeals process, includes guidelines for the assertion of "interagency equities," and summarizes the measures the agency may take to enforce its policy. Twenty-three months have passed, however, and the DNI has not published or formulated such a policy.

Defendants' Prepublication Review Regimes

31. Defendants' prepublication review regimes differ in their particulars, but each of them restrains far more speech than can be justified by any legitimate government interest.

CIA

32. The CIA imposes overlapping submission requirements that, taken together, are vague, confusing, and overbroad.

a. Through Standard Form 312, "Classified Information Nondisclosure Agreement," the CIA requires all agency employees with access to classified information who are "uncertain about the classification status of information" to "confirm from an authorized official that the information is unclassified before [they] may disclose it." *See* Standard Form 312 § 3.

b. Through Form 4414, "Sensitive Compartmented Information Nondisclosure Agreement," the CIA requires all agency employees with access to SCI to submit for prepublication review "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 or that [the author has] reason to believe are derived from SCI." *See* Form 4414 § 4.

c. Through the standard CIA secrecy agreement—a document that has not been released publicly but that is summarized on the CIA's website—the agency requires all CIA officers, as a condition of employment, to submit for prepublication review "any and all materials they intend to share with the public that are intelligence related."

d. Finally, through Agency Regulation ("AR") 13-10, "Agency Prepublication Review of Certain Material Prepared for Public Dissemination," the CIA requires

all "former Agency employees and contractors, and others who are obligated by CIA secrecy agreement," to submit for prepublication review any material "that mentions CIA or intelligence data or activities or material on any subject about which the author has had access to classified information in the course of his employment or other contact with the Agency." *See* AR 13-10 § 2(b)(1), (e)(1).

e. A document provided by the CIA to the ACLU and the Knight Institute in FOIA litigation states that the agency "will not provide a copy of a secrecy agreement or nondisclosure agreement to an author who requests one they signed," even though such agreements "are typically not classified."

33. The CIA's prepublication review regime fails to meaningfully cabin the discretion of the agency's censor, the Publications Review Board. Collectively, Standard Form 312, Form 4414, the CIA secrecy agreement, and AR 13-10 give the Board discretion to censor information that it claims is classified without regard to, for example, whether disclosure of the information would actually cause harm to the nation's security, whether the former employee acquired the information in question in the course of employment, whether the information is already in the public domain, and whether any legitimate interest in secrecy is outweighed by the public interest in disclosure. In addition, when the Board refers manuscripts to other agencies for review, other agencies censor manuscripts submitted by former CIA employees on the basis of review standards that are not disclosed. *See* SF-312 § 3; Form 4414 §§ 4–5; AR 13-10 § 2(c)(1), (f)(2).

34. The breadth and vagueness of the CIA's review standards invite capricious and discriminatory enforcement, and in practice the Board's censorship decisions are often arbitrary or influenced by the author's viewpoint. For example, former intelligence-community employees

who wrote books criticizing the CIA's torture of prisoners apprehended in the "war on terror" have complained publicly that their books were heavily redacted even as former CIA officials' supportive accounts of the same policies were published without significant excisions of similar information. In 2012, the CIA opened an internal investigation into whether the agency's prepublication review regime was being misused to suppress speech critical of the agency. According to the *Washington Post*, the investigation was sparked by "growing concern in the intelligence community that the review process is biased toward agency loyalists, particularly those from the executive ranks." The CIA has not released or publicly described the investigation's findings.

35. The CIA's prepublication review regime does not require the Publications Review Board to provide authors with reasons for its decisions, even in unclassified form, and on information and belief the Board generally does not do so.

36. The CIA's prepublication review regime fails to assure prompt agency review. To the extent that the regime provides deadlines for review or the adjudication of appeals, these deadlines are merely aspirational. As noted above, the CIA itself estimates that review of book-length manuscripts will take a year—a duration of time that dissuades would-be authors from setting pen to paper and dissuades would-be publishers from signing book contracts with former agency employees. In some cases, review has taken considerably longer than one year. For example, a manuscript by former CIA analyst Nada Bakos was reportedly under review for almost twice that time.

37. The CIA's prepublication review regime also fails to require the government to initiate judicial review of censors' decisions and fails to guarantee that review is prompt.

DOD

38. The DOD imposes overlapping submission requirements that, taken together, are vague, confusing, and overbroad.

a. As a prerequisite to accessing classified information, the DOD requires employees to sign Standard Form 312, which is described above.

b. As a prerequisite to accessing SCI, the DOD requires employees to sign Form 4414, which is described above, DD Form 1847-1, "Sensitive Compartmented Information Nondisclosure Statement," or both. Like Form 4414, DD Form 1847-1 requires all agency employees with access to SCI to submit for prepublication review "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 or that [the author has] reason to believe are derived from SCI." *See* DD Form 1847-1 § 4.

c. The DOD has also adopted Directive 5230.09, "Clearance of DoD Information for Public Release," and Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release," which together require all former agency employees and all former active or reserve military service members to submit for prepublication review "any official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to [the agency]." The directive defines "official DoD information" to encompass "[a]ll information that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD employees as part of their official duties or because of their official status within the Department." Such information must be submitted for

review if, for example, it "[i]s or has the potential to become an item of national or international interest"; "[a]ffects national security policy, foreign relations, or ongoing negotiations"; or "[c]oncerns a subject of potential controversy among the DoD Components or with other federal agencies." *See* Directive 5230.09 § 4(b); *id.* Glossary, pt. II; Instruction 5230.29 § 3; *id.* Enclosure 3 § 1. As a "Frequently Asked Questions" document issued by the DOD emphasizes, "[a]ll current, former, and retired DoD employees and military service members (whether active or reserve) who have had access to DoD information or facilities, must submit DoD information intended for public release . . . for review and clearance."

39. The DOD's prepublication review regime fails to meaningfully cabin the discretion of the agency's review board, the Defense Office of Prepublication and Security Review. Collectively, Standard Form 312, Form 4414, DD Form 1847-1, and the DOD's directive and instruction give the DOD's review board discretion to censor information without regard to, for example, whether the information is classified, whether disclosure of the information would actually cause harm to the nation's security, whether the former employee acquired the information in question in the course of employment, whether the information is already in the public domain, and whether any legitimate interest in secrecy is outweighed by the public interest in disclosure. For example, the DOD's directive and instruction seem to contemplate that submissions from former employees may be subject to both "security review" (intended to "protect[] classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operations security") and "policy review" (which seeks to "ensure[]

that no conflict exists with established policies or programs of the DoD or the U.S. Government"). In addition, when the DOD's review board refers manuscripts to other agencies for review, other agencies censor manuscripts submitted by former DOD employees on the basis of standards that are not disclosed. *See* SF-312 § 3; Form 4414 §§ 4–5; DD Form 1847-1 §§ 4–5; Instruction 5230.29 § 3; *id.* Enclosure 3 § 1.

40. The breadth and vagueness of the DOD's review standards mean that the DOD review board's decisions are frequently arbitrary and that the DOD and DOD components often disagree as to what must be censored. For example, when former reserve Army officer Anthony Shaffer submitted his memoir for review, the Army reviewed the manuscript and cleared it with modest changes. Several months later, however, the Defense Intelligence Agency saw a copy, showed it to the NSA and other agencies, and decided that some 250 passages had to be redacted. Redactions included information that was readily available on Wikipedia as well as other publicly available information, such as the name and abbreviation of the Iranian Revolutionary Guard Corps and the fact that "sig int" means "signals intelligence."

41. The DOD's prepublication review regime does not require the DOD's review board to provide authors with reasons for its decisions, even in unclassified form, and on information and belief the review board generally does not do so.

42. The DOD's prepublication review regime fails to assure prompt agency review. To the extent that the regime provides deadlines for review or the adjudication of appeals, these deadlines are merely aspirational. As documents produced to the ACLU and the Knight Institute in FOIA litigation show, the DOD's prepublication review process frequently takes many weeks or even months. *See* Instruction 5230.29, Enclosure 3 §§ 3(a), 4(b). For example, in 2014 former ODNI and Defense Intelligence Agency officer Michael Richter lodged an administrative appeal

with the DOD that took over seven months to adjudicate. This, despite the fact that the appeal "require[d] analysis of one sentence, in one paragraph, citing one document"—and the author's insistence that he had "only learned of [the excised] information by virtue of having access to the New York Times website."

43. The DOD's prepublication review regime also fails to require the government to initiate judicial review of censors' decisions and fails to guarantee that review is prompt.

NSA

44. The NSA imposes overlapping submission requirements that, taken together, are vague, confusing, and overbroad.

a. As a prerequisite to accessing classified information, the NSA requires employees to sign Standard Form 312, which is described above.

b. As a prerequisite to accessing SCI, the NSA requires employees to sign Form 4414, which is described above.

c. The NSA has also adopted NSA/CSS Policy 1-30, "Review of NSA/CSS Information Intended for Public Release," which requires all former NSA employees to submit for prepublication review any material, other than a resume or other job-related document, "where [it] contains official NSA/CSS information that may or may not be UNCLASSIFIED and approved for public release." "Official NSA/CSS information" is defined to include "[a]ny NSA/CSS, DoD, or IC information that is in the custody and control of NSA/CSS and was obtained for or generated on NSA/CSS' behalf during the course of employment or other service, whether contractual or not, with NSA/CSS." While the policy does not define "approved for public release," it seems to contemplate that information

may be unclassified but not approved for release. *See* NSA/CSS Policy 1-30 §§ 2, 6(b), 29.

45. The NSA's prepublication review regime fails to meaningfully cabin the discretion of the agency's censors, known as Prepublication Review Authorities. Indeed, the NSA's policy does not directly address what information may be censored. Collectively, Standard Form 312, Form 4414, and the NSA's policy give reviewing officials discretion to censor information without regard to, for example, whether the information is classified, whether disclosure of the information would actually cause harm to the nation's security, whether the former employee acquired the information in question in the course of employment, whether the information is already in the public domain, and whether any legitimate interest in secrecy is outweighed by the public interest in disclosure. In addition, when the NSA refers manuscripts to other agencies for review, other agencies censor manuscripts submitted by former NSA employees on the basis of standards that are not disclosed. *See* SF-312 § 3; Form 4414 §§ 4–5; NSA/CSS Policy 1-30 § 12(e).

46. In part because of the breadth and the vagueness of the NSA's review standards, the censorship decisions of reviewing officials are often arbitrary. For example, in 2017 former NSA employee and contractor Thomas Reed Willemain published a memoir "motivated, in part by a hope that [he] could counter the intensely negative views of the NSA in the media and popular fiction." According to a blogpost that Willemain wrote for a national-security website, NSA censors made redactions that "sometimes border[ed] on the ridiculous," excising facts that were publicly available, including facts that were "obvious and apparent." In one instance, they redacted a fact that the agency had previously declassified in a court filing.

47. The NSA's prepublication review regime does not require reviewing officials to provide authors with reasons for their decisions at first instance, even in unclassified form, and on information and belief reviewing officials generally do not do so.

48. The NSA's prepublication review regime provides no assurance of prompt agency review. Although the regime provides a firm deadline for adjudication of appeals, it does not include one for initial determinations. As documents produced to the ACLU and the Knight Institute in FOIA litigation show, review frequently takes many weeks or even months.

49. The NSA's prepublication review regime also fails to require the government to initiate judicial review of censors' decisions and fails to guarantee that review is prompt.

ODNI

50. The ODNI imposes overlapping submission requirements that, taken together, are vague, confusing, and overbroad.

a. As a prerequisite to accessing classified information, the ODNI requires employees to sign Standard Form 312, which is described above.

b. As a prerequisite to accessing SCI, the ODNI requires employees to sign Form 4414, which is described above.

c. As a prerequisite to accessing information or material "that is classified, or is in the process of a classification determination," the ODNI requires employees to sign Form 313, "Nondisclosure Agreement for Classified Information," which directs them to submit for prepublication review "any writing or other preparation in any form" which "contains any mention of intelligence data or activities, or which contains any other information or material that might be based upon [information or material that is classified, or is in the process of a classification

determination, and that was obtained pursuant to the agreement]." *See* Form 313 §§ 3, 5.

d. The ODNI has also adopted Instruction 80.04, "ODNI Pre-publication Review of Information to be Publicly Released," which requires all former agency employees, regardless of their level of access to sensitive information, to submit "all official and non-official information intended for publication that discusses the ODNI, the IC [Intelligence Community], or national security." *See* ODNI Instruction 80.04 § 6.

51. The ODNI's prepublication review regime fails to meaningfully cabin the discretion of the agency's censor, the Director of the Information Management Division. Collectively, Standard Form 312, Form 4414, Form 313, and the ODNI's instruction give the Director discretion to censor information without regard to, for example, whether the information is classified, whether disclosure of the information would actually cause harm to the nation's security, whether the former employee acquired the information in question in the course of employment, whether the information is already in the public domain, and whether any legitimate interest in secrecy is outweighed by the public interest in disclosure. Indeed, the ODNI's instruction imposes no limitations whatsoever on the Director's power to censor. It states only that "the goal of pre-publication review is to prevent the unauthorized disclosure of information, and to ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication." In addition, when the Director refers manuscripts to other agencies for review, other agencies censor manuscripts submitted by former ODNI employees on the basis of standards that are not disclosed. *See* SF-312 § 3; Form 4414 §§ 4–5; ODNI Instruction 80.04 § 3.

52. The breadth and vagueness of the ODNI's review standards invite capricious and discriminatory enforcement.

53. The ODNI's prepublication review regime does not require the Director of the Information Management Division to provide reasons for his or her decisions, and on information and belief the Director generally does not do so.

54. The ODNI's prepublication review regime provides no assurance of prompt agency review. To the extent that the regime provides deadlines for review or the adjudication of appeals, these deadlines are merely aspirational. As documents produced to the ACLU and the Knight Institute in FOIA litigation show, review frequently takes many weeks or even months.

55. The ODNI's prepublication review regime also fails to require the government to initiate judicial review of censors' decisions and fails to guarantee that review is prompt.

Plaintiffs

Timothy H. Edgar

56. Timothy H. Edgar, a resident of Rhode Island, is an expert on cybersecurity and a former employee of the ODNI. He is currently a Senior Fellow at the Watson Institute for International and Public Affairs and Academic Director of the Executive Master's Program in Cybersecurity at Brown University.

57. Earlier in his career, Mr. Edgar was a visiting fellow at the Watson Institute (from 2013 to 2015), a fellow and adjunct lecturer at Boston University (from 2014 to 2015), and an adjunct professor at Georgetown University Law Center (from 2012 to 2013). Prior to his government service, he was National Security Policy Counsel at the American Civil Liberties Union (from 2001 to 2006). He received a B.A. in History from Dartmouth College and a J.D. from Harvard Law School.

58. Mr. Edgar was an employee of the ODNI from 2006 to 2013. From June 2006 to August 2009, he served in the newly created position of Deputy for Civil Liberties, supporting the Director of National Intelligence by reviewing new surveillance authorities, government watchlists, and sensitive programs. From August 2009 to November 2010, he was detailed to the White House National Security Staff as Director of Privacy and Civil Liberties, focusing on cybersecurity, open government, and data privacy initiatives. From November 2010 to December 2012, he was a Senior Associate General Counsel at the ODNI. He formally resigned from the agency in June 2013.

59. Mr. Edgar obtained a Top Secret/Sensitive Compartmented Information ("TS/SCI") security clearance in 2006. He signed a nondisclosure agreement with the ODNI in order to obtain this security clearance. He held his TS/SCI clearance continuously until June 2013.

60. As an employee of the ODNI, Mr. Edgar submitted for review official material prepared for public appearances that he made on behalf of the government. He also submitted syllabi for courses that he taught in his personal capacity at Brown University in 2013 and Georgetown University Law Center in 2012.

61. Since leaving the ODNI, Mr. Edgar has submitted to the ODNI blog posts and op-eds that have appeared in major publications, including the *Guardian*, the *Los Angeles Times*, the *Wall Street Journal*, and the *Lawfare* national-security blog, where he is a contributing editor.

62. On October 10, 2016, Mr. Edgar submitted via e-mail to the ODNI's prepublication review office a manuscript for the book *Beyond Snowden: Privacy, Mass Surveillance, and the Struggle to Reform the NSA*. Although some portions of the manuscript

were based on his personal experiences, Mr. Edgar relied on and cited in the manuscript declassified documents for pertinent details.

63. After Mr. Edgar submitted the manuscript, the ODNI informed him that it had referred the manuscript to both the CIA and the NSA for additional review. Despite multiple inquiries, he was unable to communicate directly with reviewing officials at the CIA and the NSA.

64. On January 12, 2017, the ODNI informed Mr. Edgar that he could publish the manuscript only if he redacted or excised certain material. Some of the redactions related to events that had taken place, or issues that had arisen, after Mr. Edgar had left government. Others related to facts that were widely discussed and acknowledged though perhaps not officially confirmed. Although he disagreed with some of the mandated redactions, Mr. Edgar decided against challenging them because, partly as a result of the three-month review, he had already pushed back his publication date from the spring to the fall, and he worried that pushing the publication date back further would make some of the analysis and insights in his book outdated or less relevant to ongoing public debates. In addition, because he believed that maintaining a good relationship with reviewers at the ODNI was important to getting future manuscripts cleared in a timely fashion, he believed it would be counterproductive to challenge requested edits or redactions because doing so could harm that relationship.

65. Mr. Edgar plans to continue writing about matters relating to intelligence and cybersecurity, and he anticipates submitting at least some of this writing to the ODNI for prepublication review. Given the subjects he writes about, Mr. Edgar expects that any manuscripts he submits to the ODNI for review may also be referred to the NSA, the CIA, or other agencies, as happened with his now-published book.

66. Mr. Edgar believes that the ODNI's current prepublication review regime requires him to submit far more than he should be required to submit. He finds the ODNI's submission requirements to be vague and confusing, and as a result he is uncertain as to the exact scope of his submission obligations. He also fears that the delay associated with prepublication review, including interagency referrals, will hinder his career as an academic and impede his ability to participate effectively in public debate on matters involving his areas of expertise. The delay and uncertainty associated with prepublication review has dissuaded him from writing some pieces that he would otherwise have written, and has caused him to write others differently than he would otherwise have written them. Based on his knowledge of other former employees' experiences with prepublication review, and his understanding of the broad discretion that the prepublication review system invests in government censors, he believes that the ODNI, the CIA, and the NSA might have taken longer to review his book if they had perceived the book to be unsympathetic to the intelligence community. He is concerned that government censors will be less responsive to him if he writes books that are perceived to be critical.

Richard H. Immerman

67. Richard H. Immerman, a resident of Pennsylvania, is a historian with expertise in U.S. foreign relations and a former employee of the ODNI. He was a professor of history at Temple University for over two decades before he retired in 2017. He is now Professor of History, Emeritus; Edward J. Buthusiem Family Distinguished Faculty Fellow in History, Emeritus; and Marvin Wachman Director Emeritus of the Center for the Study of Force and Diplomacy.

68. Earlier in his career, Professor Immerman was the Francis W. DeSerio Chair of Strategic Intelligence, Department of National Security and Strategy, at the U.S. Army War College. He was also the 40th President of the Society for Historians of American Foreign

Relations. He has published twelve books on U.S. foreign policy, intelligence, and national security, as well as dozens of book chapters and academic articles. He received a B.A. in Government from Cornell University, an M.A. in U.S. History from Boston College, and a Ph.D. in U.S. Diplomatic History from Boston College.

69. Professor Immerman joined the ODNI on a temporary sabbatical from his faculty position at Temple University. From 2007 to 2009, he served as the Assistant Deputy Director of National Intelligence, Analytic Integrity and Standards, in which capacity he was responsible for establishing mechanisms to improve analytic integrity and standards across the intelligence community. During the same period, he served as the Analytic Ombudsman for the ODNI, working with analysts on a confidential basis to raise concerns about the production of finished intelligence products. His chief priorities were to address allegations of politicization and/or the suppression of dissent.

70. Shortly after returning to Temple University in 2009, Professor Immerman accepted an invitation to serve on the Department of State's Advisory Committee on Historical Diplomatic Documentation (often referred to as the Historical Advisory Committee, or "HAC"). In 2010, he became chairman of the HAC, a position he continues to hold. The HAC's primary responsibility is overseeing publication of the *Foreign Relations of the United States* book series.

71. Professor Immerman obtained a TS/SCI security clearance through the ODNI in 2007. He signed a nondisclosure agreement with the ODNI in order to obtain this security clearance. In 2011 or 2012, Professor Immerman signed a separate nondisclosure agreement with the CIA because of his ongoing responsibilities with the HAC.

72. Since leaving the ODNI, Professor Immerman has submitted to the ODNI book manuscripts, articles, papers, public talks, and academic syllabi.

73. On January 25, 2013, Professor Immerman submitted via e-mail to the ODNI's prepublication review office a manuscript for the book *The Hidden Hand: A Brief History of the CIA*. The manuscript did not refer, directly or indirectly, to any classified information that Professor Immerman obtained in the course of his employment with the ODNI or the Department of State, and Professor Immerman cited public sources for all factual propositions.

74. The ODNI acknowledged receipt three days after Professor Immerman submitted the manuscript, but it took almost three months before Professor Immerman was informed that the agency had referred part of his manuscript to the CIA for additional review. Several weeks later, the ODNI informed him that the CIA was reviewing the entire manuscript. He contacted the CIA, but personnel at that agency were unable to provide him with information about the status of the agency's review or the contact information of any reviewing officials.

75. On July 12, 2013, nearly six months after Professor Immerman's initial submission, the ODNI informed Professor Immerman that he could publish his manuscript only with extensive redactions mandated by the CIA. All of the mandated redactions related to information for which Professor Immerman had cited public sources. Some redactions related to information that had been published previously by government agencies themselves, including the CIA. Many of them related to events that had taken place, or issues that had arisen, after Professor Immerman had left government. In some instances, the ODNI directed Professor Immerman to excise citations to newspaper articles that he had come across in the course of his research. In other instances, the ODNI directed Professor Immerman to delete entire passages relating to information that he had obtained from public sources. For example, the ODNI directed him to excise numerous portions of the manuscript relating to the CIA's use of drones.

The agency also instructed him to redact words communicating judgments and arguments that he considered fundamental to his conclusions as a trained historian.

76. The ODNI did not provide Professor Immerman with any explanation for the CIA's mandated redactions.

77. Professor Immerman appealed the agency's prepublication review determination to the ODNI's Information Management Division. Several weeks later, that office informed him that he could publish a significant portion of the text that the prepublication review office had previously instructed him to redact.

78. In September 2013, Professor Immerman arranged to meet with two reviewing officials from the CIA in person. At this meeting, the officials agreed with Professor Immerman that some of the redactions were unnecessary, and they authorized him to publish additional text with revised wording, but they reaffirmed their view that other redactions were necessary. Although Professor Immerman disagreed, he decided to publish *The Hidden Hand* with these remaining redactions to avoid further delay, and his book was in fact published in 2014. In the end, after his persistent challenges and communications with reviewing officials at the ODNI and the CIA, Professor Immerman received approval to publish roughly eighty percent of the material that the agencies had originally redacted. The process of prepublication review took ten months and would have taken longer if Professor Immerman had not ultimately decided to publish the manuscript rather than to continue to challenge redactions that he believed to be unjustified.

79. Professor Immerman plans to continue publishing academic articles, books, and op-eds, at least some of which will trigger prepublication review obligations under the ODNI's current prepublication review regime. For example, Professor Immerman is in the process of

drafting an academic article about the influence of intelligence on the policy-making process. He is also conducting research on the contribution of intelligence to negotiations on strategic arms limitation from the Nixon through Reagan administrations, and intends to write a book on the subject. He anticipates submitting these manuscripts for prepublication review.

80. But for the dysfunction of the prepublication review system, however, Professor Immerman would publish more. Professor Immerman believes that the ODNI's prepublication review regime requires him to submit for review far more than he should be required to submit; that the ODNI's and the CIA's arbitrary and unjustified redactions will diminish the value of any work that he does submit; and that the time required for prepublication review will make it more difficult for him to contribute in a timely way to public debates. He has considered writing academic articles using the research he has already conducted for his book, and he has considered writing op-eds about the intelligence community and the current administration. Concerns about the burdens and uncertainties associated with prepublication review, however, have dissuaded him from writing these pieces.

Melvin A. Goodman

81. Melvin A. Goodman, a resident of Maryland, is an expert on the former Soviet Union and its foreign policy in developing countries that were not aligned with either the Western Bloc or the Eastern Bloc during the Cold War. He spent forty-two years in government service, including as a division chief in the CIA and a professor of international security at the National War College. Now semi-retired, he teaches courses in international relations at Johns Hopkins University, and writes books and opinion columns about international security. Mr. Goodman holds a B.A. in history from Johns Hopkins University, an M.A. in history and a

Ph.D. in diplomatic history from Indiana University, and an M.A. in military science from the National War College.

82. Mr. Goodman began his government career in 1955 as a cryptographer for the U.S. Army, coding and deciphering sensitive messages. From 1966 to 1990, he served in the CIA as an analyst, senior analyst, branch chief, and division chief in the Directorate of Intelligence on Soviet Foreign Policy. During that service, from 1974 to 1976, he spent two years on detail at the Department of State. The primary focus of his work was on Soviet foreign policy in non-aligned countries, including in the Middle East, Asia, and Africa. From 1986 to 2004, Mr. Goodman was a professor at the National War College, where he served as Director of the National Security Program.

83. Mr. Goodman held a TS/SCI security clearance throughout his entire government career. His clearance level never changed during his government service. His clearance expired in 2006, two years after he retired from the National War College.

84. When Mr. Goodman joined the CIA in 1966 and first gained his security clearance, he signed a secrecy agreement that contained a provision relating to prepublication review. The provision required "specific prior approval by the Agency" of any "publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment by the Agency."

85. Since leaving the CIA, Mr. Goodman has submitted multiple works to the CIA for prepublication review.

86. At times, Mr. Goodman has not submitted for review shorter pieces of writing, such as op-ed articles, that were time-sensitive and that he was confident did not contain classified information or other information that he had obtained during his employment with the

CIA. On at least six occasions after publishing an op-ed, Mr. Goodman received letters from the CIA reminding him of his prepublication review obligations. One such letter, sent in 2009, threatened to refer the matter to the Department of Justice, stating: "The Agency is consulting with the Department of Justice to evaluate the legal remedies it has to ensure that you comply with your secrecy agreement."

87. Mr. Goodman has published nine books and has submitted each manuscript to the CIA for prepublication review. The agency has referred one of these manuscripts to other agencies, including the DOD and the Department of State, for additional review. He repeatedly asked the CIA for the contact information of the reviewers at these other agencies, but the CIA declined to provide them to him. These departments were even slower than the CIA in reviewing the manuscript.

88. Generally, the CIA has sent Mr. Goodman's manuscripts back to him in the mail with redactions, edits, and suggestions for alternative language. Frequently, Mr. Goodman believed the CIA's redactions were overbroad and unjustified. He has often sent the agency "reclamas"—that is, requests asking agency staff to reconsider their proposed redactions and edits—explaining the reasons why publication should be allowed. Typically, the agency has failed to respond to these reclamas.

89. For most of Mr. Goodman's books, the prepublication review process typically took less than two months. In 2017, however, the CIA took eleven months to review a manuscript of his latest book, *Whistleblower at the CIA*. In the manuscript, Mr. Goodman provided an account of his experience as a senior CIA analyst. The lengthy review process caused significant difficulties with Mr. Goodman's publisher, which at one point threatened to cancel his book contract in part because of the delays.

90. Mr. Goodman believes that all of the changes to *Whistleblower at the CIA* that the agency demanded were intended to spare the agency embarrassment, not to protect classified information. In various passages of the draft manuscript, Mr. Goodman discussed widely reported aspects of U.S. government policy, including the government's recent use of armed drones overseas. Mr. Goodman's commentary was not based on personal knowledge of these activities—which Mr. Goodman did and does not have, as he has lacked access to CIA information since 1986—but was based on press accounts, which he cited in his manuscript. The agency demanded that he not discuss these matters in his manuscript at all. The agency did not provide any written explanation for its demands.

91. Because the excisions and changes to the manuscript demanded by the CIA were so substantial, Mr. Goodman decided not to file a reclama but rather to meet in person with the CIA's censor. His efforts to persuade the agency to reconsider its demands, however, were unsuccessful. Mr. Goodman reluctantly removed all of the passages that the censor had flagged.

92. In a recently submitted manuscript, Mr. Goodman self-censored and avoided discussing certain public-source information about current CIA Director Gina Haspel. Mr. Goodman would have liked to discuss information about Ms. Haspel that he learned as a member of the public, not as a former agency employee. However, he chose not to include any such content in the manuscript in order to avoid conflict with and delays from the agency's prepublication review office.

93. Consistent with his practice in the past, Mr. Goodman intends to submit those portions of any future manuscripts that deal with intelligence matters. He remains concerned that CIA censors will demand that he redact material unwarrantedly, as it did with his last book, and

that the delay associated with prepublication review will jeopardize his book contracts and render his publications less relevant to quickly evolving public debates.

Anuradha Bhagwati

94. Anuradha Bhagwati, a resident of New York, is a writer, activist, and former Marine Corps officer. She is the founder of SWAN, the Service Women's Action Network, a member-driven community advocacy network for service women. She is also the founder of and an instructor at Yoga for Vets NYC, the longest-running yoga and meditation program for military servicemembers and veterans in New York City. She recently published *Unbecoming: A Memoir of Disobedience*, a memoir that centers on her confrontation of misogyny, racism, and sexual violence during her military service, as well as her advocacy on related issues after leaving the Marines. Ms. Bhagwati received a B.A. in English from Yale University and an M.P.P. from the Harvard University Kennedy School of Government. She is currently pursuing an M.F.A. in creative writing from Hunter College in New York City.

95. After beginning graduate school, Ms. Bhagwati left academia and joined the Marine Corps in October 1999. Shortly after joining the Marines, she attended officer training at Officer Candidates School in Quantico, Virginia. In 2001, she became a communications officer, and from 2001 to 2002 Ms. Bhagwati served as a platoon commander of a radio platoon in Okinawa, Japan. Between 2002 and 2004, she became an executive officer and company commander of a training company at Marine Combat Training Battalion, School of Infantry (East), at Camp LeJeune, North Carolina. After leaving the Marines in 2004, Ms. Bhagwati served in the Individual Ready Reserve for three years.

96. Ms. Bhagwati obtained a Secret security clearance after graduating from the Communications Information Systems Officer Course and getting assigned to her first unit as a platoon commander. As a former DOD employee, Ms. Bhagwati is subject to the prepublication

review requirement imposed by Directive 5230.09 and Instruction 5230.29. Until recently, Ms. Bhagwati was not aware of that prepublication review obligation. She learned of that obligation on the eve of the publication of her recent memoir through conversations with undersigned counsel.

97. Ms. Bhagwati is a frequent and vocal public advocate for the rights of servicemembers and veterans. She has advocated on military issues on Capitol Hill, testifying before Congress alongside high-ranking military officers, and she has worked with DOD employees in relevant policy offices on issues of sexual assault and discrimination in the military. She has published more than a dozen op-eds and opinion pieces about her experiences in the military and her military advocacy work, in publications like the *New York Times*, the *Washington Post*, *Politico*, and *Foreign Affairs*. She has appeared on national television multiple times discussing issues related to her advocacy.

98. In March 2019, Ms. Bhagwati published *Unbecoming: A Memoir of Disobedience*, a chronicle of her time in the Marines that includes policy recommendations and advocacy based on her own experiences with misogyny, racism, and sexual violence in the military. Like all of her published work and public advocacy, the memoir was heavily influenced by her personal experiences as a servicewoman.

99. Ms. Bhagwati plans to continue her advocacy through written publications and public appearances. She has no plans to submit any future work to prepublication review, because she is certain that her future publications, as with her prior ones, will not contain classified information. Nonetheless, under the current regime, the DOD might at any point choose to sanction her for failing to submit to prepublication review.

Mark Fallon

100. Mark Fallon, a resident of Georgia, is an expert on counterterrorism, counterintelligence, and interrogation who has spent more than three decades in government service, principally with the Naval Criminal Investigative Service ("NCIS"). After retiring from government service in 2010, he served as the Chair of the High-Value Detainee Interrogation Group ("HIG") Research Committee between 2011 and 2016. He currently serves as a consultant for government agencies, academic researchers, lawyers, and non-governmental organizations. He holds a B.S. from Roger Williams College (now Roger Williams University).

101. Mr. Fallon joined the NCIS in 1981 after having spent two years at the U.S. Marshals Service. At the NCIS, he worked on a broad array of criminal, counterterrorism, and counterintelligence investigations. Over a period of 27 years, he served in a number of field positions at the NCIS, from street agent to Special Agent in Charge, and served on numerous joint-service assignments and task forces. After the attacks of September 11, 2001, he served as the Deputy Commander and Special Agent in Charge of the Criminal Investigation Task Force to investigate alleged terrorists for trials before military commissions. He also served as the Tactical Commander for the NCIS USS Cole Task Force, which was responsible for investigating the attack on the USS Cole in Yemen; as a special advisor to the Office of the Secretary of the Navy in the establishment of the Office for the Administrative Review of Detained Enemy Combatants; and as a special advisor to U.S. Central Command. Mr. Fallon was the NCIS Deputy Assistant Director for counterterrorism from 2004 to 2005, when he became the NCIS Deputy Assistant Director for Training and Director of the NCIS Training Academy. In 2008, he was appointed to the Senior Executive Service. From 2008 to 2010, he served as the Assistant Director of the Federal Law Enforcement Training Center within the Department of Homeland Security.

102. Mr. Fallon obtained a Top Secret security clearance in 1981, upon joining the NCIS, and held it continuously until departing the Department of Homeland Security in 2010. He obtained a TS/SCI security clearance during his career at the NCIS. He then obtained a TS/SCI security clearance again in 2011, when beginning work for the HIG, and in 2017, for consulting work he engages in with the U.S. government.

103. Since he left government service, Mr. Fallon has published op-eds, articles, columns, and a book. He has submitted many of these to the DOD for prepublication review.

104. In 2016, Mr. Fallon completed a book, *Unjustifiable Means*, about the George W. Bush administration's policies relating to the interrogation and torture of prisoners, and about the experience of public servants like him who had opposed the policies. He believed his assessment of the torture policies, and his account of his experience in government, could help the public better evaluate proposals relating to interrogation and serve as a template for leadership training for other officials to make critical leadership decisions during crisis. The book relied on information declassified by the government and on the voluminous public record relating to the Bush administration's policies and their consequences. Mr. Fallon was confident that the book did not contain properly classified information.

105. When he began writing *Unjustifiable Means* in 2014, Mr. Fallon consulted former NCIS colleagues about whether he was required to submit the manuscript for prepublication review. One advised him that he had not submitted his own manuscript, and the others advised that they did not believe he was required to submit it.

106. Through his own research, Mr. Fallon learned of the Defense Office of Prepublication and Security Review. That office advised him over the telephone in June 2016 that the prepublication review process was "voluntary" and intended to aid authors. On

October 4, 2016, however, he received an email from a DOD official who claimed that she had noticed on Amazon.com that *Unjustifiable Means* was forthcoming and asked whether he had submitted it. The official stated that Mr. Fallon was required to submit his works for review. The official also enclosed the DOD's prepublication review directive and instruction in her email. On January 3, 2017, the official advised him by email that, while DOD policies provide that review will be completed within 30 to 45 working days, "the truth is that in most cases it takes a bit longer."

107. Mr. Fallon submitted his manuscript to the DOD's review board the following day. He had intended to publish the book at the start of the Trump administration in order to contribute to the public debate about torture, which had become a major issue during the 2016 U.S. presidential campaign. However, after considering both the time period specified in the DOD's policies and the additional information provided in the DOD official's January 3, 2017 email, Mr. Fallon and his publisher agreed to a publication date of March 7, 2017.

108. On January 11, 2017, the DOD's review board informed Mr. Fallon that its review of his manuscript was complete but that the manuscript would have to be reviewed by other agencies as well. The reviewing official in charge of reviewing Mr. Fallon's book refused to tell him which agencies. When he told that officer that the book was scheduled to be published on March 7, 2017, however, the officer assured Mr. Fallon that the DOD would do everything it could to complete review by that date.

109. Prior to his planned publication date, Mr. Fallon emailed the reviewing official at least eight times. In these emails, he reminded the officer that delay would force his publisher to push back his publication date, and that pushing back the publication date would require him to

cancel book tours, signing events, and speaking engagements. Mr. Fallon continued to regularly contact the DOD's review board about his manuscript.

110. The DOD informed Mr. Fallon that review of his book was complete on August 25, 2017—eight months after he submitted it. Even then, however, the DOD told Mr. Fallon that he could not publish the book without making 113 separate excisions. In Mr. Fallon's view, the excisions were arbitrary, haphazard, and inconsistent, and, at least in some instances, seemingly intended to protect the CIA from embarrassment. Some of them related to material that had been published in unclassified congressional reports. Some were news articles Mr. Fallon had cited.

111. Although Mr. Fallon believed that all of the excisions were unnecessary and unjustified, he decided not to challenge them to avoid pushing back his publication date again. Senior government officials, including President Trump, had been musing publicly about resurrecting torture policies, and it was important to Mr. Fallon that his book be published while it was still possible to influence the public debate on this subject. The book was ultimately published on October 24, 2017.

112. Mr. Fallon's prepublication review experience with *Unjustifiable Means* was so time-consuming, costly, and exhausting that he is unsure whether he is willing to embark on writing another book. Mr. Fallon was in fact forced to cancel events and travel, and to incur personal costs as a result. His publisher threatened to cancel his contract for non-delivery and told him that publishing books by government officials was "not worth it" because of the unpredictability of the prepublication review process. The review process was so stressful for Mr. Fallon that for a time he discontinued certain consulting work while he waited for the review to be completed. Mr. Fallon also paid a premium after the book was cleared in order for his

editors to work to finalize publication on a tight timeframe. And his publisher informed him that the delayed publication date made it less likely that bookstores would choose to carry or promote the book.

113. Mr. Fallon has submitted numerous shorter works for prepublication review since the publication of *Unjustifiable Means*. For example, Mr. Fallon is currently in the process of publishing a manuscript titled *The HIG Project: The Road to Scientific Research on Interrogations* as a chapter in a forthcoming book titled *Interrogation and Torture: Research on Efficacy and Its Integration with Morality and Legality*. Mr. Fallon and his co-author contracted with the book's editors to provide a draft of the chapter by November 1, 2018. Mr. Fallon submitted the chapter for DOD review on August 10, 2018, and he and his co-author followed up with the office repeatedly over a period of several months. On December 11, 2018, more than a month after Mr. Fallon's draft deadline, the ACLU and the Knight Institute sent a letter to the DOD's review board on Mr. Fallon's behalf, expressing concerns about the delay. On January 14, 2019, the Defense Intelligence Agency's review board informed Mr. Fallon's co-author that the DOD's review board was waiting for a response from the FBI.

114. On February 11, 2019, prepublication review of *The HIG Project* was completed, and the chapter was cleared for publication with redactions. All of the redacted material, however, was material that Mr. Fallon had heard at unclassified public meetings with the HIG Research Committee. Mr. Fallon believes that the redactions were motivated by political disagreement with Mr. Fallon and his co-author's perspective on torture and work on the HIG Research Committee.

115. Mr. Fallon plans to continue submitting to the DOD any draft op-eds, articles, columns, and books that he writes in the future.

116. In Mr. Fallon's experience, prepublication review has been haphazard and opaque, and communication from the DOD has been sporadic and unhelpful.

117. In Mr. Fallon's experience, the personnel in the DOD's review board appear to have no control or influence over the other agencies to which they send authors' works for review, and there appears to be a lack of accountability from those offices to the DOD.

118. Mr. Fallon's experiences with prepublication review continue to negatively impact him and deny him the opportunity to contribute to the public debate over breaking news. He would like to publish op-eds in newspapers about current affairs, but his experiences with the review process have discouraged him from trying to do so because of potential delays and unjustified objections by the agency. Mr. Fallon has declined offers to author op-eds and write articles on topics of public concern in response to breaking news because such events require an immediate response in light of the ever-changing news cycle. In addition, Mr. Fallon is unsure how his prepublication review obligations apply in academia—for example, whether he must submit for review edits he makes to the work of other people, or whether an entire piece written by someone else becomes subject to review if he adds one or two sentences. This uncertainty hinders Mr. Fallon's work and his ability to engage with his colleagues.

119. Finally, Mr. Fallon worries that the government will retaliate against him by stripping his security clearance if he does not strictly comply with prepublication review requirements. This is especially concerning to Mr. Fallon because his consulting work depends on his access to classified information.

Causes of Action

120. Defendants' prepublication review regimes violate the First Amendment because they invest executive officers with sweeping discretion to suppress speech and fail to include procedural safeguards designed to avoid the dangers of a censorship system.

121. Defendants' prepublication review regimes are void for vagueness under the First and Fifth Amendments because they fail to provide former government employees with fair notice of what they must submit for prepublication review and of what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement.

Request for Relief

1. Declare that Defendants' prepublication review regimes violate the First and Fifth Amendments to the Constitution;

2. Enjoin Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from continuing to enforce Defendants' prepublication review regimes against Plaintiffs, or any other person;

3. Award Plaintiffs their costs and reasonable attorneys' fees in this action; and

4. Grant Plaintiffs such other relief as this Court may deem just and proper.

April 2, 2019

Respectfully submitted,

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* *pro hac vice* application forthcoming

Declaration of Antoinette B. Shiner, Information Review Officer, Litigation Information Review Office, Central Intelligence Agency, with Exhibit A (ECF 30-2), filed June 14, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

TIMOTHY H. EDGAR, et al., Plaintiffs, v. DANIEL COATS, in his official capacity as Director of National Intelligence, et al., Defendants.	Case No. 19-cv-00985 (GJH)

DECLARATION OF ANTOINETTE B. SHINER,
INFORMATION REVIEW OFFICER,
LITIGATION INFORMATION REVIEW OFFICE,
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at Central Intelligence Agency ("CIA" or "Agency"). I have held this position since 19 January 2016 and have worked at CIA since 1986.

2. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010). This means that I am authorized to assess the current, proper classification of

CIA information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations. As the IRO for LIRO, I am authorized to release official Agency information during the course of any litigation.

3. Through the exercise of my official duties, I am aware of this civil action. I make this declaration based upon my personal knowledge and information made available to me in my official capacity.

4. Attached hereto as Exhibit A is a true and correct copy of Form 368, entitled Secrecy Agreement. All CIA employees are required to sign Form 368 as a condition of employment when entering on duty.

* * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of June 2019.

Antoinette B. Shiner

Antoinette B. Shiner
Information Review Officer
Litigation Information Review Office
Central Intelligence Agency

EXHIBIT A

SECRECY AGREEMENT

1. I, _____ (print full name), hereby agree to accept as a prior condition of my being employed by, or otherwise retained to perform services for, the Central Intelligence Agency, or for staff elements of the Director, Central Intelligence (hereinafter collectively referred to as the "Central Intelligence Agency"), the obligations contained in this agreement.

2. I understand that in the course of my employment or other service with the Central Intelligence Agency I may be given access to information or material that is classified or is in the process of a classification determination in accordance with the standards set forth in Executive Order 13526 (75 Fed. Reg. 707), or any successor thereto as amended or superseded, or other applicable Executive order, that if disclosed in an unauthorized manner would jeopardize intelligence activities of the United States Government. I accept that by being granted access to such information or material I will be placed in a position of special confidence and trust and will become obligated to protect the information and/or material from unauthorized disclosure.

3. In consideration of being employed or otherwise retained to provide services to the Central Intelligence Agency, I hereby agree that I will never disclose in any form or manner, to any person not authorized by the Central Intelligence Agency to receive it, any information or material in either of the following categories:

a. information or material received or obtained in the course of my employment or other service with the Central Intelligence Agency that is marked as classified or that I know is classified.

b. information or material received or obtained in the course of my employment or other service with the Central Intelligence Agency that I know is in the process of a classification determination.

4. I understand that it is my responsibility to consult with appropriate management authorities in the component or Directorate that employs me or has retained my services, or with the Central Intelligence Agency's Publications Review Board if I am no longer employed or associated with the Agency, in order to ensure that I know 1) whether information or material within my knowledge or control that I have reason to believe might be in either of the categories set forth in paragraph 3 is considered by the Central Intelligence Agency to fit in either of those categories; and 2) whom the Agency has authorized to receive such information or material.

5. As a further condition of the special confidence and trust reposed in me by the Central Intelligence Agency, I hereby agree to submit for review by the Central Intelligence Agency any writing or other preparation in any form, including a work of fiction, which contains any mention of intelligence data or activities, or contains any other information or material that might be based on either of the categories set forth in paragraph 3, that I contemplate disclosing publicly or that I have actually prepared for public disclosure, either during my employment or other service with the Central Intelligence Agency or at any time thereafter, prior to discussing it with or showing it to anyone who is not authorized to have access to the categories set forth in paragraph 3. I further agree that I will not take any steps towards public disclosure until I have received written permission to do so from the Central Intelligence Agency.

6. I understand that the purpose of the review described in paragraph 5 is to give the Central Intelligence Agency an opportunity to determine whether the information or material that I contemplate disclosing publicly contains any information or material that I have agreed not to disclose. I further understand that the Agency will act upon my submission and make a response to me within a reasonable period of time. I further understand that if I dispute the Agency's initial determination on the basis that the information or material in question derives from public sources, I may be called upon to specifically identify such sources. My failure or refusal to do so may by itself result in denial of permission to publish or otherwise disclose the information or material in dispute.

7. I understand that all information or material that I may acquire in the course of my employment or other service with the Central Intelligence Agency that fits either of the categories set forth in paragraph 3 of this agreement are and will remain the property of the United States Government unless and until otherwise determined by an appropriate official or final ruling of a court of law. I agree to surrender anything constituting, containing or reflecting such information or material upon demand by an appropriate official of the Central Intelligence Agency, or upon conclusion of my employment or other service with the Central Intelligence Agency.

8. I agree to notify the Central Intelligence Agency immediately in the event that I am called upon by judicial or congressional authorities, or by specially established investigatory bodies of the executive branch, to testify about, or provide, information or material that I have agreed herein not to disclose. In any communication with any such authority or body, I shall observe all applicable rules or procedures for ensuring that such information and/or material is handled in a secure manner.

9. I understand that nothing contained in this agreement prohibits me from reporting intelligence activities that I consider to be unlawful or improper directly to the Intelligence Oversight Board established by the President, or to any successor body that the President may establish, or to the Select Committee on Intelligence of the House of Representatives or the Senate. I recognize that there are also established procedures for bringing such matters to the attention of the Agency's Inspector General or to the Director, Central Intelligence. In making any report referred to in this paragraph, I will observe all applicable rules or procedures for ensuring the secure handling of any information or material that may be involved. I understand that any such information or material continues to be subject to this agreement for all other purposes and that such reporting does not constitute public disclosure or declassification of that information or material.

10. I understand that any breach of this agreement by me may result in the Central Intelligence Agency taking administrative action against me, which can include temporary loss of pay or termination of my employment or other service with the Central Intelligence Agency. I also understand that if I violate the terms of this agreement, the United States Government may institute a civil proceeding to seek compensatory damages or other appropriate relief. Further, I understand that the disclosure of information that I have agreed herein not to disclose can, in some circumstances, constitute a criminal offense.

11. I understand that the United States Government may, prior to any unauthorized disclosure that is threatened by me, choose to apply to any appropriate court for an order enforcing this agreement. Nothing in this agreement constitutes a waiver on the part of the United States to institute a civil or criminal proceeding for any breach in this agreement by me. Nothing in this agreement constitutes a waiver on my part of any possible defenses I may have in connection with either civil or criminal proceedings that may be brought against me.

12. In addition to any other remedy to which the United States Government may become entitled, I hereby assign to the United States Government all rights, title, and interest in any and all royalties, remunerations and emoluments that have resulted or will result or may result from any divulgence, publication or revelation of information or material by me that is carried out in breach of paragraph 5 of this agreement or that involves information or material prohibited from disclosure by the terms of this agreement.

13. I understand and accept that, unless I am provided a written release from this agreement or any portion of it by the Director, Central Intelligence or the Director's representative, all the conditions and obligations accepted by me in this agreement apply both during my employment or other service with the Central Intelligence Agency, and at all times thereafter.

14. I understand that the purpose of this agreement is to implement the responsibilities of the Director, Central Intelligence, particularly the responsibility to protect intelligence sources and methods, as specified in the National Security Act of 1947, as amended.

15. These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

16. I understand that nothing in this agreement limits or otherwise affects any provision of criminal or other law that may be applicable to the unauthorized disclosure of classified information, including the espionage laws (sections 793, 794 and 798 of title 18, United States Code) and the Intelligence Identities Protection Act of 1982 (P.L. 97-200; 50 U.S.C., 421 *et seq.*).

17. Each of the numbered paragraphs and lettered subparagraphs of this agreement is severable. If a court should find any of the paragraphs or subparagraphs of this agreement to be unenforceable, I understand that all remaining provisions will continue in full force.

18. I make this agreement in good faith and with no purpose of evasion.

19. This agreement shall be interpreted under and in conformance with the law of the United States.

_____
Signature

_____
Date

The execution of this agreement was witnessed by the undersigned, who accepted it on behalf of the Central Intelligence Agency as a prior condition of the employment or other service of the person whose signature appears above.

WITNESS AND ACCEPTANCE:

_____
Signature

_____
Printed Name

_____
Date

Declaration of Alex Abdo with Exhibits A–L (ECF 33-1), filed July 16, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

TIMOTHY H. EDGAR et al., *Plaintiffs*, v. DANIEL COATS, in his official capacity as Director of National Intelligence, et al., *Defendants*.	Case No. 8:19-cv-00985 (GJH)

DECLARATION OF ALEX ABDO

I, Alex Abdo, a member of the Bar of the State of New York, declare under penalty of perjury as follows. I am the litigation director of the Knight First Amendment Institute at Columbia University, and I represent Plaintiffs in this matter. I submit this declaration in support of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss. Attached to this declaration are true and correct copies of the following documents[1]:

CIA

AR 13-10, *Agency Prepublication Review of Certain Material Prepared for Public Dissemination* (June 25, 2011) .....A

Keeping Secrets Safe: The Publications Review Board, CIA (Nov. 1, 2018), https://www.cia.gov/about-cia/publications-review-board [https://perma.cc/QLU9-X7RK] .....B

[1] Exhibits A, H, I, and J were produced by the government to the American Civil Liberties Union and the Knight First Amendment Institute in response to a Freedom of Information Act request.

DOD

DD Form 1847-1, *Sensitive Compartmented Information Nondisclosure Statement* (Dec. 1991), https://fas.org/sgp/othergov/dd_1847_1.pdf [https://perma.cc/Q63X-PJXD] C

DOD Directive 5230.09, *Clearance of DoD Information for Public Release* (Apr. 14, 2017), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/523009p.pdf [https://perma.cc/L727-VKR7] ..... D

DOD Instruction 5230.09, *Clearance of DoD Information for Public Release* (Jan. 25, 2019), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/523009p.pdf [https://perma.cc/ZYU8-ZFHS] ..... E

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NSA

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ODNI

Form 313, *Nondisclosure Agreement for Classified Information* (Dec. 2016) I

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Shared non-disclosure agreements

Standard Form 312, *Classified Information Nondisclosure Agreement* (July 2013), https://fas.org/sgp/othergov/sf312.pdf [https://perma.cc/29QD-3ZZB] .....K

Form 4414, *Sensitive Compartmented Information Nondisclosure Agreement* (Dec. 2013), https://fas.org/sgp/othergov/intel/sf4414.pdf [https://perma.cc/28RJ-N364].....L

Dated: July 16, 2019

Respectfully submitted,

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EXHIBIT A:

AR 13-10, *Agency Prepublication Review of Certain Material Prepared for Public Dissemination*

(June 25, 2011)

Approved for Release on 18-Sep-2018, FOIA Case #DF-2018-00189
Approved for Release: 2017/04/06 C06652547

(U) Disseminating or sharing any part of this document outside CIA must comply with AR 10-16.

AR 13-10 (U//~~AIUO~~) AGENCY PREPUBLICATION REVIEW OF CERTAIN MATERIAL PREPARED FOR PUBLIC DISSEMINATION (Formerly AR 6-2)

AGENCY REGULATION SERIES 13 (SPECIAL REPORTING REQUIREMENTS/RESTRICTIONS), PUBLISHED ON 25 JUNE 2011

Regulation Summary

Ingested from Regulations.cia on 10 May 2013

Policy

REVISION SUMMARY: 25 June 2011
This regulation supersedes AR 6-2, dated 19 July 2010.
AR 6-2 is revised to clarify the prepublication review criteria applicable to the submissions of current CIA employees and contractors and to reflect current organizational titles, existing Board membership, and updated citations to certain applicable authorities.
Boldfaced text in this regulation indicates revisions.

(b)(3) CIAAct

This regulation was written by ***the Office of*** *the Chief Information Officer,*

2. (U//~~AIUO~~) AGENCY PREPUBLICATION REVIEW OF CERTAIN MATERIAL PREPARED FOR PUBLIC DISSEMINATION

(U//AIUO) SYNOPSIS. This regulation sets forth CIA policies and procedures for the submission and review of material proposed for publication or public dissemination by current and former employees and contractors and other individuals obligated by the CIA secrecy agreement to protect from unauthorized disclosure certain information they obtain as a result of their contact with the CIA. This regulation applies to all forms of dissemination, whether in written, oral, electronic, or other forms, and whether intended to be an official or nonofficial (that is, personal) publication.

a. (U//~~AIUO~~) AUTHORITY. The National Security Act of 1947, as amended, the Central Intelligence Agency (CIA) Act of 1949, as amended, and Executive Order 12333, **as amended,** require the protection of intelligence sources and methods from unauthorized disclosure. Executive Order 13526, requires protection of classified information from unauthorized disclosure. 18 U.S.C. section 209 prohibits a federal employee from supplementation of salary from any source other than the U.S. Government as compensation for activities related to the employee's service as a Government employee. The *Standards of Ethical Conduct for Employees of the Executive Branch* (5 C.F.R. 2635) are the Government-wide ethics regulations that govern Federal employees. Those regulations include restrictions on outside activities and compensation for teaching, speaking, and writing related to official duties. In Snepp v. U.S., 444 U.S. 507 (1980), the Supreme Court held that individuals who have been authorized access to CIA information, the public disclosure of which could harm the national security, hold positions of special trust and have fiduciary obligations to protect such information. These obligations are reflected in this regulation and in CIA secrecy agreements.

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b. (U//~~AIUO~~) GENERAL REQUIREMENTS AND DEFINITIONS

(1) The CIA requires all current and former Agency employees and contractors, and others who are obligated by CIA secrecy agreement, to submit for prepublication review to the CIA's Publications Review Board (PRB) all intelligence-related materials intended for publication or public dissemination, whether they will be communicated in writing, speeches, or any other method; and whether they are officially sanctioned or represent personal expressions, except as noted below.

(2) The purpose of prepublication review is to ensure that information damaging to the national security is not disclosed inadvertently; and, for current employees and contractors, to ensure that neither the author's performance of duties, the Agency's mission, nor the foreign relations or security of the U.S. are adversely affected by publication.

(3) The prepublication review requirement does not apply to material that is unrelated to intelligence, foreign relations, or CIA employment or contract matters (for example, material that relates to cooking, stamp collecting, sports, fraternal organizations, and so forth).

(4) Agency approval for publication of nonofficial, personal works (including those of current and former employees and contractors and covered non-Agency personnel) does not represent Agency endorsement or verification of, or agreement with, such works. Therefore, consistent with cover status, authors are required, unless waived in writing by the PRB, to publish the following disclaimer:

"All statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or views of the Central Intelligence Agency (CIA) or any other U.S. Government agency. Nothing in the contents should be construed as asserting or implying U.S. Government authentication of information or CIA endorsement of the author's views. This material has been reviewed by the CIA to prevent the disclosure of classified information."

(5) Those who are speaking in a nonofficial capacity must state at the beginning of their remarks or interview that their views do not necessarily reflect the official views of the CIA.

(6) A nonofficial or personal publication is a work by anyone who has signed a CIA secrecy agreement (including a current and former employee or contractor), who has prepared the work as a private individual and who is not acting in an official capacity for the Government.

(7) An official publication is a work by anyone who has signed a CIA secrecy agreement, (including a current employee or contractor), such as an article, monograph, or speech, that is intended to be unclassified and is prepared as part of their official duties as a Government employee or contractor acting in an official capacity.

(8) "Publication" or "public dissemination" in this context means:

(a) for nonofficial (that is, personal) works -- communicating information to one or more persons; and

(b) for official works -- communicating information in an unclassified manner where that information is intended, or is likely to be, disseminated to the public or the media.

(9) Covered non-Agency personnel means individuals who are obligated by a CIA secrecy agreement to protect from unauthorized disclosure certain information they obtain as a result of

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their contact with the CIA.

c. (U//~~AIUO~~) THE PUBLICATIONS REVIEW BOARD

(1) The PRB is the Agency body charged with reviewing, coordinating, and formally approving in writing all proposed nonofficial, personal publications that are submitted for prepublication. It is also responsible for coordinating the official release of certain unclassified Agency information to the public. The Board consists of a Chair and senior representatives from the Director of CIA Area, the National Clandestine Service (NCS), the Directorate of Support, the Directorate of Science and Technology, **and** the Directorate of Intelligence. **There is a nonvoting Executive Secretary and** the Office of General Counsel (OGC) provides a nonvoting legal advisor.

(2) The PRB shall adopt and implement all lawful measures to prevent the publication of information that could damage the national security or foreign relations of the U.S. or adversely affect the CIA's functions or the author's performance of duties, and to ensure that individuals given access to classified information understand and comply with their contractual obligations not to disclose it. When the PRB reviews submissions that involve the equities of any other agency, the PRB shall coordinate its review with the equity-owning agency.

(3) The PRB Chair is authorized unilaterally to represent the Board when disclosure of submitted material so clearly would not harm national security that additional review is unnecessary or when time constraints or other unusual circumstances make it impractical or impossible to convene or consult with the Board. The Chair may also determine that the subject of the material is so narrow or technical that only certain Board members need to be consulted.

(4) During the course of PRB deliberations, the views of the equity-owning Board member regarding damage to national security and appropriateness for publication will be given great weight. In the even the PRB Chair and other Board members disagree as to whether the publication of information could damage the national security or if the *Studies in Intelligence* Editorial Board Chair disagrees with a PRB decision under section g(2) below that an article is inappropriate for publication, the PRB Chair, or Director of the Center for the Study of Intelligence, will have 15 days to raise the issue to the Chief, IMS for review, highlighting the equity-owner's concerns. If no resolution is reached at that level, the C/IMS will have 15 days to raise the matter to the Associate Deputy Director of the Central Intelligence Agency (ADD/CIA) for a final decision. When there is a disagreement whether information should be approved for publication, it will not be so approved until the issue is resolved by the C/IMS or the ADD/CIA. However, if the issue is not raised to the C/IMS or the ADD/CIA within the applicable time limits, the views of the equity-owning Board member will be adopted as the decision of the PRB (or in those cases where the *Studies of Intelligence* Editorial Board Chair disagrees with the PRB decision and the issue is not raised within applicable time limits, the PRB decision will be final).

d. (U//~~AIUO~~) CONTACTING THE PRB

(1) Former employees and contractors and other covered non-Agency personnel must submit covered nonofficial (personal) materials intended for publication or public dissemination to the PRB by mail, fax, or electronically as follows:

For U.S. Mail:

CIA Publications Review Board

[redacted] (b)(3) CIAAct

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Washington, DC 20505

For Overnight Delivery (for example, FedEx, UPS, and so forth):

[redacted] (b)(3) CIAAct

Facsimile: [redacted] (b)(3) CIAAct

Email: [redacted] (b)(3) CIAAct

Phone: [redacted] (b)(3) CIAAct

(2) Current employees and contractors must submit covered nonofficial and official materials intended for publication or public dissemination to the PRB by mail, fax, or electronically as follows:

Internal Mail: [redacted] (b)(3) CIAAct

Classified Facsimile: [redacted] (b)(3) CIAAct

Email: Lotus Note to: [redacted] (b)(3) CIAAct

Secure Phone: [redacted] (b)(3) CIAAct

(3) Current employees and contractors intending to publish or speak on a nonofficial, personal basis must also complete and submit to the PRB an electronic cover memorandum identifying their immediate supervisor or contracting officer. The PRB will notify the appropriate Agency manager or contracting officer, whose concurrence is necessary for publication.

(4) Review Timelines. As a general rule, the PRB will complete prepublication review for nonofficial publications within 30 days of receipt of the material. Relatively short, time-sensitive submissions (for example, op-ed pieces, letters to the editor, and so forth) will be handled as expeditiously as practicable. Lengthy or complex submissions may require a longer period of time for review, especially if they involve intelligence sources and methods issues. Authors are strongly encouraged to submit drafts of completed works, rather than chapters or portions of such works.

e. (U//~~AIUO~~) WHAT IS COVERED

(1) Types of Materials. The prepublication review obligation applies to any written, oral, electronic, or other presentation intended for publication or public dissemination, whether personal or official, that mentions CIA or intelligence data or activities or material on any subject about which the author has had access to classified information in the course of his employment or other contact with the Agency. The obligation includes, but is not limited to, works of fiction; books; newspaper columns; academic journal articles; magazine articles; resumes or biographical information on Agency employees (submission to the PRB is the exclusive

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procedure for obtaining approval of proposed resume text); draft *Studies in Intelligence* submissions (whenever the author is informed by the *Studies* editor that the draft article is suitable for *Studies* Editorial Board review); letters to the editor; book reviews; pamphlets; scholarly papers; scripts; screenplays; internet blogs, e-mails, or other writings; outlines of oral presentations; speeches; or testimony prepared for a Federal or state or local executive, legislative, judicial, or administrative entity; and Officers in Residence (OIRs) speeches and publications (although oral and written materials prepared by OIRs exclusively for their classroom instructional purposes are not covered, OIRs must take particular care to ensure that any anecdotes or other classroom discussions of their Agency experiences do not inadvertently reveal classified information). Materials created for submission to the Inspector General and/or the Congress under the Whistleblower Protection Act and CIA implementing regulations are nonofficial, personal documents when they are initially created and the author is entitled to seek a review by the PRB to determine if the materials contain classified information and, if so, the appropriate level of classification of the information. If, at any point during or after the whistleblower process, the author wishes to disseminate his whistleblower complaint to the public, the author must submit his complaint to the PRB for full prepublication review under this regulation. If the author is a current employee or contractor who intends to disseminate his whistleblower complaint to the public, the author must also obtain PRB review of his materials under paragraph g below.

(2) Review of Draft Documents. Written materials of a nonofficial, personal nature covered by the regulation must be submitted to the PRB at each stage of their development before being circulated to publishers, editors, literary agents, co-authors, ghost writers, reviewers, or the public (that is, anyone who does not have the requisite clearance and need-to-know to see information that has not yet been reviewed, but may be classified). This prepublication review requirement is intended to prevent comparison of different versions of such material, which would reveal the items that the Agency has deleted. For this reason, PRB review of material only after it has been submitted to publishers, reviewers, or other outside parties violates the author's prepublication review obligation. The Agency reserves the right to conduct a post-publication review of any such material in order to take necessary protective action to mitigate damage caused by such a disclosure. Such post-publication review and action does not preclude the U.S. Government or the CIA from exercising any other legal rights otherwise available as a result of this prepublication violation. Additionally, the Agency reserves the right to require the destruction or return to CIA of classified information found to have been included in earlier versions of a work regardless of the form of the media involved (for example, paper, floppy disk, hard disk, or other electronic storage methods).

(3) Public Presentations.

(a) With respect to current and former employees and contractors and covered non-Agency personnel making intelligence-related speeches, media interviews, or testimony, they must submit all notes, outlines, or any tangible preparatory material to the PRB for review. Where no written material has been prepared specifically in contemplation of the speech, interview, or oral testimony, the individual must contact the PRB Chair or his representative to provide a summary of any and all topics that it is reasonable to assume may be discussed, and points that will or may be made. Unprepared or unrehearsed oral statements do not exempt an individual from possible criminal liability in the event they involve an unauthorized disclosure of classified information.

(b) In addition, with respect to current employees and contractors making official or nonofficial oral intelligence-related statements to the media or to groups where the media will likely be

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in attendance, prior to granting interviews or making public appearances, the speaker shall contact the PRB for guidance. The PRB will coordinate the review of proposed speeches or media interviews with the component involved, the Office of Public Affairs for guidance regarding media or press relations, and other offices as necessary.

(c) Current employees who must make court appearances or respond to subpoenas must contact OGC for guidance.

(4) Official Publications. The publication or public dissemination of official Agency information by any means, including electronic transmissions, such as internet and unclassified facsimile, is subject to prepublication review. In addition to the types of materials listed in paragraph e(1) above, official publications subject to this review include unclassified monographs; organizational charts; brochures; booklets; flyers; posters; advertisements; films; slides; videotapes; or other issuances, irrespective of physical media such as paper, film, magnetic, optical, or electronic, that mention CIA or intelligence data or activities or material on any subject about which the author has had access to classified information in the course of his employment or other association with the Agency.

(5) Exclusions. Not included within the scope of this regulation are CIA court filings; regular, serial publications such as the CIA *World Fact Book;* or documents released pursuant to official declassification and release programs such as the Freedom of Information Act or the 25-Year Automatic Declassification Program under Executive Order **13526**. Nor do these procedures apply to official documents intended to be disseminated only to other Federal Government entities (that is, responses to other Federal agencies and Congressional entities -- except for unclassified "constituent replies" that will remain covered by this regulation).

(6) Additional PRB Guidance. It is not possible to anticipate all questions that may arise about which materials require prepublication review. Therefore, it is the author's obligation to seek guidance from the PRB on all prepublication review issues not explicitly covered by this regulation.

f. (U//~~AIUO~~) PREPUBLICATION REVIEW GUIDELINES FOR FORMER EMPLOYEES AND CONTRACTORS, AND COVERED NON-AGENCY PERSONNEL

(1) All material proposed for publication or public dissemination must be submitted to the PRB Chair, as described in paragraph d(1) above. The PRB Chair will have the responsibility for the review, coordination, and formal approval in writing of submissions in coordination with appropriate Board members. The PRB Chair will provide copies of submitted material to all components with equities in such material, and will also provide copies to all Board members and, upon request, to any Directorate-level Information Review Officer.

(2) The PRB will review material proposed for publication or public dissemination solely to determine whether it contains any classified information. Permission to publish will not be denied solely because the material may be embarrassing to or critical of the Agency. Former employees, contractors, or non-Agency personnel must obtain the written approval of the PRB prior to publication.

(3) When it is contemplated that a co-author who has not signed a CIA secrecy agreement will contribute to a publication subject to prepublication review, the final version of the publication must clearly identify those portions of the publication that were authored by the individual subject to the secrecy agreement. Where there is any ambiguity concerning which individual wrote a section, and the section was not submitted for review, the Agency reserves the right to

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consider the section to be entirely written by the individual subject to the secrecy agreement and therefore in violation of the individual's prepublication review obligations.

(4) When otherwise classified information is also available independently in open sources and can be cited by the author, the PRB will consider the fact in making its determination on whether that information may be published with the appropriate citations. Nevertheless, the Agency retains the right to disallow certain open-source information or citations where, because of the author's Agency affiliation or position, the reference might confirm the classified content.

g. (U//~~AIUO~~) PREPUBLICATION REVIEW GUIDELINES FOR CURRENT EMPLOYEES AND CONTRACTORS

(1) All **covered** material **proposed for publication or public dissemination** must be submitted to the PRB Chair, as described in paragraph d(2) above. The PRB Chair will have the responsibility for the review, coordination, and formal approval in writing of submissions in coordination with the author's supervisor and other offices as necessary. The PRB Chair will provide copies of submitted material to all components with equities in such material, and will also provide copies to all Board members and, upon request, to any Directorate-level Information Review Officer.

(2) Additional Review Criteria. Appropriateness. For current employees and contractors, in addition to the prohibition on revealing classified information, the Agency is also legally authorized to deny permission to publish any official or nonofficial materials on matters set forth in paragraphs e(1) and e(4) above that could:

(a) reasonably be expected to impair the author's performance of his or her job duties,

(b) interfere with the authorized functions of the CIA, or

(c) have an adverse effect on the foreign relations or security of the United States.

These additional review criteria ensure that material is not published that could adversely affect the Agency's ability to function as an employer and carry out its national security mission. Because these criteria principally concern the Agency's authority as an employer to promote an effective work place and to protect the integrity of its mission, they apply only to the submissions of current CIA employees and contractors.

When a current CIA officer engages in public discussion of internal organizational operations, policies, and information, it could in certain circumstances interfere with CIA's ability, as an employer, to promote an effective work place and carry out its mission. When a current CIA officer engages in public discussion of current foreign relations issues or intelligence-related matters, it could in certain circumstances provide a factual basis for some to reasonably question whether the CIA was properly carrying out its independent, objective, and apolitical intelligence functions.

The determination of whether any particular publication could impair the author's performance of his or her duties, interfere with authorized CIA functions, or adversely affect the foreign relations or security of the United States must be assessed case-by-case in terms of the content of the manuscript, as well as the overall context and prevailing circumstances, including but not limited to, consideration of the currency of the subject matter; whether the subject matter is a matter of public concern; the degree

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to which the topic is related to the author's official duties; whether the material submitted for review is required for a course at an accredited U.S. educational institution at any academic level and, if so, whether distribution is intended to extend beyond classroom use; and whether, in light of the assignment in which the author serves, the inclusion or exclusion of the disclaimer described in paragraph b(4) above can mitigate any concerns. The Agency will exercise its authority to deny permission to publish on the basis of any such determination only when the determination is made in writing and clearly identifies or describes how publication could create a significant risk of impairing the author's performance of his or her job duties, interfering with the authorized functions of the CIA, or adversely affecting the foreign relations or security of the United States.

Prior to drafting a manuscript intended for nonofficial publication, current CIA officers are encouraged to consult with the Board regarding the proposed topic or subject matter. In addition, current CIA officers must comply with any applicable component policies and procedures relating to consultation with management prior to the drafting of a manuscript, prior to submitting a manuscript to the Board, or during the prepublication review process. Any consultation with the Board or management may not necessarily result in Agency approval to publish the submitted manuscript.

(3) Outside Activities Approval Request. Current employees and contractors must also complete a Form 879 (Outside Activity Approval Request) **in accordance with Agency Regulation 10-15.**

(4) Review Process:

(a) Nonofficial publications. For all nonofficial publications, current employees must complete and submit to the PRB a cover memorandum identifying their immediate supervisor or contracting officer. The PRB will notify these individuals, whose concurrence is necessary for publication.

(b) Unclassified official publications. For all unclassified official publications that are covered by this regulation, current employees or contractors must first coordinate the document or speech with their management chain. Once initial management acceptance has been made, the employee must then submit the **proposed** publication to the PRB for final review and approval. (*Classified* official publications are not covered by this regulation and, therefore, are not required to be submitted to the PRB for review.)

(c) Resumes. This requirement for management review and concurrence does not apply for resumes, which must be sent to the PRB, which will coordinate their approval with the appropriate equity-owning component and Directorate-level Information Review Officer. The employee must obtain the written approval of the PRB prior to any dissemination of the resume outside of the CIA.

(5) OGC Ethics Review for Executive Branch Employees. As part of the prepublication review process, and after PRB/management review of proposed publications is completed, the PRB will initiate a further review by OGC/**Ethics Law Division (OGC/ELD)** to determine if any ethics issues are raised under the *Standards of Ethical Conduct for Employees of the Executive Branch*. These Government-wide regulations and Agency Regulation 13-2 **limit the use of nonpublic information and** provide that an employee shall not receive compensation from any source other than the Government for teaching, speaking, or writing relating to the

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employee's official duties. Additionally, OGC/ELD will also review proposed publications by current employees to ensure there is no violation of the criminal statute, 18 U.S.C. section 209, which prohibits an employee from receiving any salary or any contribution to or supplementation of salary from any source other than the U.S. as compensation for services as a Government employee. Specifically, employees may not receive outside compensation for any article, speech, or book written or produced as part of their official duties.

h. (U//~~AIUO~~)APPEALS

(1) If the PRB denies all or part of a proposed nonofficial publication, the author may submit additional material in support of publication and request reconsideration by the PRB. In the event the PRB denies the request for reconsideration, the author may appeal. PRB decisions involving nonofficial publications may be appealed to the ADD/CIA within 30 days of the decision. Such an appeal must be in writing and must be sent to the PRB Chair. Appeal documentation must include the material intended for publication and any supporting materials the appealing party wishes the ADD/CIA to consider. The PRB Chair will forward the appeal and relevant documentation through the components that objected to publication of the writing or other product at issue. The Director or Head of Independent Office will affirm or recommend revision of the decision affecting his or her component's equities and will forward that recommendation to OGC. OGC will review the recommendations for legal sufficiency and will make a recommendation to the ADD/CIA for a final Agency decision. The PRB Chair is responsible for staff support to the ADD/CIA. The ADD/CIA will render a written final decision on the appeal. Best efforts will be made to complete the appeal process within 30 days from the date the appeal is submitted.

(2) This regulation is intended to provide direction and guidance for those persons who have prepublication review obligations and those who review material submitted for nonofficial or official publication. Nothing contained in this regulation or in any practice or procedure that implements this regulation is intended to confer, or does confer, any substantive or procedural right of privilege on any person or organization beyond that expressly stated herein.

i. (U//~~AIUO~~) BREACH OF SECRECY AGREEMENT. Failure to comply with prepublication review obligations can result in the imposition of civil penalties or damages. When the PRB becomes aware of a potential violation of the CIA secrecy agreement, it will notify OGC and the Office of Security (OS). After the OS review and investigation of the case is completed, if further action is deemed warranted, the OS will refer the matter to OGC, which will report all potentially criminal conduct to the Department of Justice (DoJ) and consult with DoJ regarding any civil remedies that may be pursued.

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EXHIBIT B:

Keeping Secrets Safe: The Publications Review Board, CIA

(last updated Nov. 1, 2018)

About CIA

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Keeping Secrets Safe: The Publications Review Board

All CIA officers, as a condition of employment, sign the standard CIA secrecy agreement when entering on duty. All contractors sign a secrecy agreement that is consistent with the terms and conditions of their contract. A secrecy agreement doesn't oblige officers and contractors to absolute silence, but it does require them to keep national security secrets for as long as the US Government deems the information to be classified. This is a lifelong obligation. In order to help avoid the damage to national security and to the Agency's mission that disclosing classified information would inflict, the CIA created the Publications Review Board (PRB) to preview materials produced by CIA personnel- former and current (both employees and contractors) - to determine if they contain such classified information before they are shared with publishers, blog-subscribers, a TV audience, ghost-writers, co-authors, editors, family members, assistants, representatives, or anyone else not authorized to receive or review such classified information.

What Must Be Submitted to the PRB?

Current and former CIA officers and contractors who have signed the standard CIA secrecy agreement are required to submit to the PRB any and all materials they intend to share with the public that are intelligence related, such as materials that mention the CIA or intelligence activities, or that concern topics to which they had access to classified information while employed at or performing contractual work for CIA. This submission requirement extends beyond the sub-set of topics they may have had immediate responsibility for on a day-to-day basis.

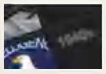
> **Publishing**: Publishing is more than having a printing house bind copies of a book. It means communicating by any means (including orally or electronically), information regardless of form to any person or entity other than the CIA's PRB or a US Government official authorized by the CIA to receive such information for prepublication review. This encompasses materials including but not limited to: book reviews, Op-ed pieces, scholarly papers, scripts, screenplays, blogs, speeches, and other materials. Thus, material covered by a CIA Secrecy Agreement requiring prepublication review must be submitted and approved prior to discussing the material with or showing it to individuals such as a publisher, co-author, agent, editor, ghost-writer, personal representative, family member, or assistant.
>
> **Relating to CIA or intelligence activities**: Not everything former and current CIA officers and contractors write requires prepublication review. For example, the prepublication requirement does not apply to material such as gardening, wine tasting, stamp collecting, sports and so forth, because they are outside of the purview of the CIA mission or intelligence. However, commentary on matters such as intelligence operations or tradecraft (even fictional works), foreign intelligence, foreign events of intelligence interest, one's career, scientific or technological developments discussed in an intelligence context, and other topics that touch upon CIA interests or responsibilities need PRB approval.

Why Do Materials Need To Be Reviewed?

In addition to protecting national security, the PRB is also protecting CIA officers and contractors from legal liability. For instance, one may unwittingly share insights on events and capabilities that are thought to be public knowledge, but in fact have not been officially released by the CIA or the US Government. Accidental disclosure is still disclosure, and opens a person up to possible civil or criminal penalties. The PRB helps current and former CIA officers and contractors avoid this by identifying problematic material and working with them to find ways to make their points, while avoiding classified information disclosure. For instance, PRB staff often compare declassified material found at the CIA's FOIA Reading Room and CIA.gov with materials submitted for review.

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What Kind of Information Might Be Classified?

As outlined in **Executive Order 13526** (sec. 1.4), the following categories of information may be classified if unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security:

- military plans, weapons systems, or operations;
- foreign government information;
- intelligence activities (including covert action), intelligence sources or methods, or cryptology;
- foreign relations or foreign activities of the United States, including confidential sources;
- scientific, technological, or economic matters relating to the national security;
- United States Government programs for safeguarding nuclear materials or facilities;
- vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
- the development, production, or use of weapons of mass destruction.

In combination with these criteria, authors are encouraged to ask the following questions during the writing process to get an idea of what information the PRB is protecting:

"As worded, does the text reveal classified information? Why is this information classified [or not]?"

"Would releasing this information damage national security or harm CIA's intelligence sources and methods?"

Some individual pieces of information may not cause national security damage when standing alone, but can do so if compiled with other information. Also, the PRB is not authorized to release official records or text from Government documents. Individuals seeking such information may submit a FOIA or Privacy Act Request using the procedures found **here** and **here**, respectively.

Resume Prepublication Review

One of the challenges of a career in intelligence is composing a resume that doesn't reveal any secrets. Although many details of the Agency's work are classified, a lot of information about **CIA jobs** are publicly available. These occupational descriptions are great examples of what current and former Agency officers can share about their work, and provide a good basis on which to prepare resumes and memoirs that will smoothly pass through the prepublication review process. In addition, the guidelines below may be generally helpful for avoiding content that is problematic for prepublication review. Remember – some things CANNOT be used:

- **Countries** – Use regional terms instead of specific cities or countries.
- **Agency-specific** - Use general training or software descriptions as opposed to the specific names or titles, which may be classified.
- **Names** - Do not use names of people and/or places. Please contact the Publications Review Board before using Agency colleagues as references.
- **Numbers** – Use general terms to describe budget information and/or personnel information (e.g., "hundreds" or "millions" or "several")
- **Office** - Do not use organizational names below the office level (e.g., avoid group or branch names).
- **Technical details** - Use general terms instead of the specific details.

How To Reach Us?

The PRB exists to help protect against unauthorized disclosures, but ultimately, each CIA officer or contractor is responsible for protecting any classified information they possess. Should a CIA officer or contractor publish materials that contain classified information – either because they did not comply with the PRB's changes or because they chose to bypass the PRB process by not submitting their manuscript for PRB pre-publication review – they could be subject to possible civil and criminal penalties. Cooperating with pre-publication review helps keep CIA officers, contractors, and the Agency safe.

Former Agency officers and contractors who need to contact the PRB regarding items to be reviewed can do so through the **Contact CIA** page. (If using the web form, please be sure to fill out the form completely, including your full legal name and email address where you can be reached).

Posted: Jan 07, 2016 12:40 PM
Last Updated: Nov 01, 2018 11:27 AM

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- Center for the Study of Intelligence
- Freedom of Information Act Electronic Reading Room
- Kent Center Occasional Papers
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EXHIBIT C:

DD Form 1847-1, *Sensitive Compartmented Information Nondisclosure Statement*

(Dec. 1991)

SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE STATEMENT

PRIVACY ACT STATEMENT

AUTHORITY: EO 9397, November 1943 (SSN).

PRINCIPAL PURPOSE(S): The information contained herein will be used to precisely identify individuals when it is necessary to certify their access to sensitive compartmented information.

ROUTINE USE(S): Blanket routine uses, as published by Defense Intelligence Agency in the Federal Register.

DISCLOSURE: Voluntary; however, failure to provide requested information may result in delaying the processing of your certification.

SECTION A

An Agreement Between _____ and the United States.
(Printed or Typed Name)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information or material protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. I have been advised that unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I understand that it is my responsibility to consult with appropriate management authorities in the Department or Agency that last authorized my access to SCI, whether or not I am still employed by or associated with that Department or Agency or a contractor thereof, in order to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be SCI, or related to or derived from SCI, is considered by such Department or Agency to be SCI. I further understand that I am also obligated by law and regulation not to disclose any classified information or material in an unauthorized fashion.

4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, 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 or that I

4. *(Continued)* have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose the contents of such preparation to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the preparation submitted pursuant to paragraph 4 set forth any SCI. I further understand that the Department or Agency to which I have made a submission will act upon them, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and removal from a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement, including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys' fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will remain the property of the United States Government unless and until otherwise determined by an appropriate official or final ruling of a

8. *(Continued)* court of law. Subject to such determination, I do not now, nor will I ever, possess any right, interest, title or claim whatsoever to such information. I agree that I shall return all materials that may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all the conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. These restrictions are consistent with and do not supersede conflict with or otherwise alter the employee obligations, rights, or liabilities created by Executive Order 12356; Section 7211 of Title 5, United States Code (governing disclosures to Congress); Section 1034 of Title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); Section 2302(b)(8) of Title 5, United States Code, as amended by the Whistleblower Protection Act

11. *(Continued)* (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 USC 421 et seq.) (governing disclosures that could expose confidential Government agents), and the statutes which protect against disclosure that may compromise the national security, including Section 641, 793, 794, 798, and 952 of Title 18, United States Code, and Section 4(b) of the Subversive Activities Act of 1950 (50 USC Section 783(b)). The definitions, requirements, obligations, rights, sanctions and liabilities created by said Executive Order and listed statutes are incorporated into this agreement and are controlling.

12. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12356, as amended, so that I may read them at this time, if I so choose.

13. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

14. This Agreement shall be interpreted under and in conformance with the laws of the United States.

15. I make this Agreement without any mental reservation or purpose of evasion.

16. TYPED OR PRINTED NAME *(Last, First, Middle Initial)*	**17. GRADE/RANK/SVC**	**18. SOCIAL SECURITY NO.**	**19. BILLET NO.** *(Optional)*
20. ORGANIZATION	**21. SIGNATURE**		**22. DATE SIGNED** *(YYMMDD)*

FOR USE BY MILITARY AND GOVERNMENT CIVILIAN PERSONNEL

SECTION B

The execution of this Agreement was witnessed by the undersigned, who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

23. TYPED OR PRINTED NAME *(Last, First, Middle Initial)*	**24. ORGANIZATION**	
25. SIGNATURE		**26. DATE SIGNED** *(YYMMDD)*

FOR USE BY CONTRACTORS/CONSULTANTS/NON-GOVERNMENT PERSONNEL

SECTION C

The execution of this Agreement was witnessed by the undersigned.

27. TYPED OR PRINTED NAME *(Last, First, Middle Initial)*	**28. ORGANIZATION**	
29. SIGNATURE		**30. DATE SIGNED** *(YYMMDD)*

SECTION D

This Agreement was accepted by the undersigned on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

31. TYPED OR PRINTED NAME *(Last, First, Middle Initial)*	**32. ORGANIZATION**	
33. SIGNATURE		**34. DATE SIGNED** *(YYMMDD)*

DD FORM 1847-1, DEC 91 (BACK)

EXHIBIT D:

DoD Directive 5230.09, *Clearance of DoD Information for Public Release*

(Apr. 14, 2017)

Department of Defense
DIRECTIVE

NUMBER 5230.09
August 22, 2008
Certified Current Through August 22, 2015
Incorporating Change 2, April 14, 2017

DCMO

SUBJECT: Clearance of DoD Information for Public Release

References: See Enclosure 1

1. PURPOSE. This Directive reissues DoD Directive (DoDD) 5230.09 (Reference (a)) to update policy and responsibilities for the security and policy review process for the clearance of official DoD information proposed for official public release by the Department of Defense and its employees under DoDD 5105.02 (Reference (b)).

2. APPLICABILITY AND SCOPE

a. This Directive applies to:

(1) OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the "DoD Components").

(2) All DoD personnel.

b. This Directive does NOT apply for provisions governing review of:

(1) Prepared statements, transcripts of testimony, questions for the record, inserts for the record, budget documents, and other material provided to congressional committees that may be included in the published records. (DoD Instruction (DoDI) 5400.04 (Reference (c)) applies.)

(2) Information before publication or disclosure by DoD contractors. (DoD 5220.22-M and DoD Manual 5200.01 (References (d) and (e)) apply.)

(3) Official information in litigation. (DoDD 5405.2 (Reference (f)) applies.)

(4) Release of official DoD information to the news media. (DoDD 5122.05 (Reference (g)) applies.)

3. DEFINITIONS. Terms used in this Directive are defined in the glossary.

4. POLICY. It is DoD policy that:

a. Accurate and timely information is made available to the public and the Congress to help the analysis and understanding of defense strategy, defense policy, and national security issues.

b. Any official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the Department of Defense shall be reviewed for clearance prior to release.

c. The public release of official DoD information is limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate governmental interest, as authorized by References (e), (f), and (g) and DoDDs ~~5230.24,~~ 5230.25, 5400.07, 5400.11, 5205.02E, and 5500.07; DoDI*s* 5230.27*, 5230.24,* and ~~DoDI~~ 5200.01; DoD *Manual* 5400.*0*7~~-R,~~ DoD 5400.11-R; DoD 5500.7-R; International Traffic in Arms Regulations; Executive Order 13526; section 4353 of Title 22, United States Code (U.S.C.); and Executive Order 13556 (References (h) through (v), respectively).

d. Information released officially is consistent with established national and DoD policies and programs, including DoD Information Quality Guidelines (Reference (w)).

e. To ensure a climate of academic freedom and to encourage intellectual expression, students and faculty members of an academy, college, university, or DoD school are not required to submit papers or materials prepared in response to academic requirements for review when they are not intended for release outside the academic institution. Information intended for public release or made available in libraries to which the public has access shall be submitted for review. Clearance shall be granted if classified information is not disclosed, DoD interests are not jeopardized, and the author accurately portrays official policy, even if the author takes issue with that policy.

f. Retired personnel, former DoD employees, and non-active duty members of the Reserve Components shall use the DoD security review process to ensure that information they submit for public release does not compromise national security.

g. DoD personnel, while acting in a private capacity and not in connection with their official duties, have the right to prepare information for public release through non-DoD fora or media. This information must be reviewed for clearance if it meets the criteria in DoDI 5230.29 (Reference (x)). Such activity must comply with ethical standards in References (q) and (r) and may not have an adverse effect on duty performance or the authorized functions of the Department of Defense.

5. RESPONSIBILITIES. See Enclosure 2.

6. RELEASABILITY. **Cleared for public release.** This Directive is available on the DoD Issuances Website at http://www.dtic.mil/whs/directives.

7. EFFECTIVE DATE. This Directive is effective February 22, 2012.

Gordon England
Deputy Secretary of Defense

Enclosures
1. References
2. Responsibilities

Glossary

ENCLOSURE 1

REFERENCES

(a) DoD Directive 5230.9, "Clearance of Department of Defense (DoD) Information for Public Release," April 9, 1996 (hereby canceled)
(b) DoD Directive 5105.02, "Deputy Secretary of Defense," February 18, 2015
(c) DoD Instruction 5400.04, "Provision of Information to Congress," March 17, 2009
(d) DoD 5220.22-M, "National Industrial Security Program Operating Manual," February 28, 2006, as amended
(e) DoD Manual 5200.01, "DoD Information Security Program," February 24, 2012, ~~as amended~~ *date varies by volume*
(f) DoD Directive 5405.2, "Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses," July 23, 1985
(g) DoD Directive 5122.05, "Assistant Secretary of Defense for Public Affairs (ASD(PA))," September 5, 2008
(h) DoD Instruction 5200.01, "DoD Information Security Program and Protection of Sensitive Compartmented Information (SCI)," ~~October 9, 2008, as amended~~ *April 21, 2016*
(i) DoD Instruction 5230.24, "Distribution Statements on Technical Documents," August 23, 2012*, as amended*
(j) DoD Directive 5230.25, "Withholding of Unclassified Technical Data from Public Disclosure," November 6, 1984, as amended
(k) DoD Instruction 5230.27, "Presentation of DoD-Related Scientific and Technical Papers at Meetings," ~~October 6, 1987~~ *November 18, 2016*
(l) DoD Directive 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008
(m) DoD *Manual* 5400.*0*7~~-R~~, "DoD Freedom of Information Act *(FOIA)* Program," ~~September 4, 1998~~ *January 25, 2017*
(n) DoD Directive 5400.11, "DoD Privacy Program," October 29, 2014
(o) DoD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007
(p) DoD Directive 5205.02E, "DoD Operations Security (OPSEC) Program," June 20, 2012
(q) DoD Directive 5500.07, "Standards of Conduct," November 29, 2007
(r) DoD 5500.07-R, "Joint Ethics Regulation (JER)," August 1, 1993, as amended
(s) International Traffic in Arms Regulations (ITAR), Department of State, current edition
(t) Executive Order 13526, "Classified National Security Information," December 29, 2009
(u) Section 4353 of Title 22, United States Code
(v) Executive Order 13556, "Controlled Unclassified Information," November 4, 2010
(w) DoD Information Quality Guidelines, current edition[1]
(x) DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release," August 13, 2014
(y) DoD Directive 5105.53, "Director of Administration and Management (DA&M)," February 26, 2008

[1] Available at www.defensegov/pubs/dodiqguidelines.aspx.

(z) DoD Directive 5105.82, "Deputy Chief Management Officer (DCMO) of the Department of Defense," October 17, 2008
(aa) Deputy Secretary of Defense Memorandum, "Reorganization of the Office of the Deputy Chief Management Officer," July 11, 2014
(ab) DoD Directive 5110.04, "Washington Headquarters Services (WHS)," March 27, 2013
(ac) Title 10, United States Code

ENCLOSURE 2

RESPONSIBILITIES

1. DIRECTOR OF ADMINISTRATION OF THE OFFICE OF THE DEPUTY CHIEF MANAGEMENT OFFICER *(DCMO)* OF THE DEPARTMENT OF DEFENSE ~~(DCMO)~~. Under the authority, direction, and control of the DCMO, and in accordance with DoDD 5105.53, DoDD 5105.82, and Deputy Secretary of Defense Memorandum (References (y), (z), and (aa)), the Director of Administration of the Office of the DCMO acts as the appellate authority for the DoD security and policy review process.

2. DIRECTOR, WASHINGTON HEADQUARTERS SERVICES (WHS). Under the authority, direction, and control of the DCMO and through the Director of Administration of the Office of the DCMO, the Director, WHS:

a. Monitors compliance with this Directive.

b. Develops procedures and review guidelines for the security and policy review of information intended for public release in coordination with offices of the OSD Principal Staff Assistants.

c. Implements the DoD security review process through the Defense Office of Prepublication and Security Review (DOPSR) in accordance with DoDD 5110.04 (Reference (ab)).

3. INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE. The Inspector General of the Department of Defense, as an independent and objective officer in the Department of Defense, is exempt from the policy review provisions of this Directive. As necessary, information may be submitted for security review prior to public release.

4. HEADS OF THE DoD COMPONENTS. The Heads of the DoD Components shall:

a. Provide prompt guidance and assistance to the Director, WHS, when requested, for the security or policy implications of information proposed for public release.

b. Establish policies and procedures to implement this Directive in their Components. Designate the DoD Component office and point of contact for implementation of this Directive and provide this information to the DOPSR.

c. Forward official DoD information proposed for public release to the Director, WHS, for review, including a recommendation on the releasability of the information per Reference (x).

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

DCMO	Deputy Chief Management Office of the Department of Defense
DoDD	DoD Directive
DoDI	DoD Instruction
DOPSR	Defense Office of Prepublication and Security Review
U.S.C.	United States Code
WHS	Washington Headquarters Services

PART II. DEFINITIONS

The following terms and their definitions are for the purposes of this Directive only.

DoD personnel:

Any DoD civilian officer or employee (including special Government employees) of any DoD Component (including any nonappropriated fund activity).

Any active duty Regular or Reserve military officer, warrant officer, and active duty enlisted member of the Army, the Navy, the Air Force, or the Marine Corps.

Any Reserve or National Guard member on active duty under orders issued pursuant to Title 10, U.S.C. (Reference (ac)).

Any Reserve or National Guard member performing official duties, including while on inactive duty for training or while earning retirement points, pursuant to Reference (ac), or while engaged in any activity related to the performance of a Federal duty or function.

Any faculty member in a civil service position or hired pursuant to Reference (ac) and any student (including a cadet or midshipman) of an academy, college, university, or school of the Department of Defense.

Any foreign national working for a DoD Component except those hired pursuant to a defense contract, consistent with labor agreements, international treaties and agreements, and host-country laws.

information. Any communication or representation of knowledge such as facts, data, or opinions in any medium or form.

official DoD information. All information that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD employees as part of their official duties or because of their official status within the Department.

review for clearance. The process by which information that is proposed for public release is examined for compliance with established national and DoD policies and to determine that it contains no classified or export-controlled information. Release of information to the public, cleared by the DOPSR, is the responsibility of the originating office.

EXHIBIT E:

DoD Instruction 5230.09, *Clearance of DoD Information for Public Release*

(effective Jan. 25, 2019)

DoD Instruction 5230.09

Clearance of DoD Information for Public Release

Originating Component:	Office of the Chief Management Officer of the Department of Defense
Effective:	January 25, 2019
Releasability:	Cleared for public release. Available on the Directives Division Website at http://www.esd.whs.mil/DD/.
Reissues and Cancels:	DoD Directive 5230.09, "Clearance of DoD Information for Public Release," August 22, 2008, as amended
Approved by:	Lisa W. Hershman, Acting Chief Management Officer

Purpose: This issuance reissues the 2008 directive as a DoD instruction in accordance with the authority in DoD Directive (DoDD) 5105.82 and the February 1, 2018 Secretary of Defense Memorandum to establish policy and assign responsibilities for the security and policy review process for the clearance of official DoD information proposed for official public release by the DoD and its employee.

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY.

a. This issuance applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the "DoD Components").

b. This issuance does not apply for provisions governing review of:

(1) Prepared statements, transcripts of testimony, questions for the record, inserts for the record, budget documents, and other material provided to congressional committees that may be included in the published records in accordance with DoD Instruction (DoDI) 5400.04.

(2) Information before publication or disclosure by DoD contractors in accordance with DoD 5220.22-M and Volumes 1-4 of DoD Manual (DoDM) 5200.01.

(3) Official information in litigation in accordance with DoDD 5405.2.

(4) Release of official DoD information to media organizations in accordance with DoDD 5122.05.

(5) Release of visual imagery, captured by DoD personnel on personal equipment, to media organizations in accordance with DoDI 5040.02.

(6) Release of information requested pursuant to Section 552 of Title 10, United States Code (U.S.C.) (also known as "the Freedom of Information Act") and Section 552 of Title 10, U.S.C. (also known as "the Privacy Act").

1.2. POLICY. It is DoD policy that:

a. Accurate and timely information is made available to the public and the Congress to help with analysis and understanding of defense strategy, defense policy, and national security issues.

b. Any official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the DoD will undergo a prepublication review before release.

c. The Office of the Inspector General of the Department of Defense, as an independent and objective component in the DoD, is exempt from the policy review provisions of this issuance. As necessary, information may be submitted for prepublication review before public release.

d. The public release of official DoD information is limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate

governmental interest, as authorized by DoDDs 5122.05, 5205.02E, 5230.25, 5400.07, 5400.11, 5405.2, and 5500.07; DoDIs 5200.01, 5230.24, and 5230.27; Volumes 1-4 of DoDM 5200.01 and DoDM 5400.07; DoD 5400.11-R; DoD 5500.07-R; Chapter I, Subchapter M, Parts 120 through 130 of Title 22, Code of Federal Regulations; Executive Orders 13526 and 13556; and Section 4353 of Title 22, U.S.C.

e. Information released officially is consistent with established national and DoD policies and programs.

f. To ensure a climate of academic freedom and to encourage intellectual expression, DoD personnel who are students or faculty members of an academy, college, university, or DoD school:

(1) Are not required to submit for prepublication review papers or materials prepared in response to academic requirements when they are not intended for release outside the academic institution. However, these individuals remain obligated to ensure their work contains no classified, sensitive or controlled unclassified sources consistent with their nondisclosure agreements.

(2) Will submit materials for prepublication review if they are intended for public release or will be made available in public libraries. Clearance will be granted if classified information is not disclosed, controlled unclassified information is not disclosed, DoD interests are not jeopardized, and the author accurately portrays official policy, even if the author takes issue with that policy.

g. Retired and separated Service members, former DoD employees and contractors, and non-active duty members of the Reserve Components will use the DoD prepublication review process to ensure that information they intend to release to the public does not compromise national security as required by their nondisclosure agreements. Those who forgo the prepublication review process and inadvertently, negligently, or willfully disclose classified information may be subject to an unauthorized disclosure investigation and legal action.

h. DoD personnel, while acting in a private capacity and not in connection with their official duties, may prepare information for public release through non-DoD venues or media. This information must undergo a prepublication review if it meets the criteria in DoDI 5230.29. Such activity must comply with ethical standards in DoDD 5500.07 and DoD 5500.07-R and may not have an adverse effect on duty performance or the authorized functions of the DoD.

SECTION 2: RESPONSIBILITIES

2.1. DIRECTOR OF ADMINISTRATION OF THE OFFICE OF THE CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF DEFENSE (OCMO). Under the authority, direction, and control of the Chief Management Officer of the Department of Defense and in accordance with DoDD 5105.53, DoDD 5105.82, and the July 11, 2014 and February 1, 2018 Deputy Secretary of Defense memorandums, the Director of Administration of the OCMO acts as the appellate authority for the DoD security and policy review process.

2.2. DIRECTOR, WASHINGTON HEADQUARTERS SERVICES (WHS). Under the authority, direction, and control of the Chief Management Officer of the Department of Defense and through the Director of Administration of the OCMO, the Director, WHS:

a. Monitors compliance with this issuance.

b. Develops procedures and reviews guidelines for the security and policy review of information intended for public release in coordination with offices of the OSD Principal Staff Assistants.

c. Implements the DoD prepublication review process through the Defense Office of Prepublication and Security Review in accordance with DoDD 5110.04.

2.3. DOD COMPONENT HEADS. The DoD Component heads:

a. Provide prompt guidance and assistance to the Director, WHS, when requested, for the security or policy implications of information proposed for public release.

b. Establish policies and procedures to implement this issuance in their Components. Designate the DoD Component office and point of contact for implementation of this issuance and provide this information to the Defense Office of Prepublication and Security Review.

c. Forward official DoD information proposed for public release to the Director, WHS, for review, including a recommendation on the releasability of the information in accordance with DoDI 5230.29.

GLOSSARY

G.1. ACRONYMS.

DoDD	DoD directive
DoDI	DoD instruction
DoDM	DoD manual
OCMO	Office of the Chief Management Officer of the Department of Defense
U.S.C.	United States Code
WHS	Washington Headquarters Services

G.2. DEFINITIONS. These terms and their definitions are for the purpose of this issuance.

DoD personnel.

Any DoD civilian officer or employee (including special government employees) of any DoD Component (including any nonappropriated fund activity).

Any individual hired by or for any DoD Component through a contractual arrangement.

Any active duty Regular or Reserve military officer, warrant officer, and active duty enlisted member of the Military Services.

Any Reserve or National Guard member on active duty under orders issued pursuant to Title 10, U.S.C.

Any Reserve or National Guard member performing official duties, including while on inactive duty for training or while earning retirement points, pursuant to Title 10, U.S.C., or while engaged in any activity related to the performance of a federal duty or function.

Any faculty member in a civil service position or hired pursuant to Title 10, U.S.C. and any student (including a cadet or midshipman) of an academy, college, university, or school of the DoD.

Any foreign national working for a DoD Component consistent with labor agreements, international treaties and agreements, and host-country laws.

information. Any communication or representation of knowledge such as facts, data, or opinions in any medium or form.

official DoD information. All information that is in the custody and control of the DoD, relates to information in the custody and control of the DoD, or was acquired by DoD personnel as part of their official duties or because of their official status within DoD.

prepublication review. The process by which information that is proposed for public release is examined by the Defense Office of Prepublication and Security Review for compliance with established national and DoD policies and to determine whether it contains any classified, export-controlled or other protected information. It is the responsibility of the originating office to ensure that this prepublication review is followed and that clearance is granted prior to the release of the information to the public.

REFERENCES

Code of Federal Regulations, Title 22, Chapter I, Subchapter M, Parts 120 through 130
Deputy Secretary of Defense Memorandum, "Reorganization of the Office of the Deputy Chief Management Officer," July 11, 2014
Deputy Secretary of Defense Memorandum, "Disestablishment of the Deputy Chief Management Officer and Establishment of the Chief Management Officer," February 1, 2018
DoD 5220.22-M, "National Industrial Security Program Operating Manual," February 28, 2006, as amended
DoD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007
DoD 5500.07-R, "Joint Ethics Regulation (JER)," August 30, 1993, as amended
DoD Directive 5105.53, "Director of Administration and Management (DA&M)," February 26, 2008
DoD Directive 5105.82, "Deputy Chief Management Officer (DCMO) of the Department of Defense," October 17, 2008
DoD Directive 5110.04, "Washington Headquarters Services (WHS)," March 27, 2013
DoD Directive 5122.05, "Assistant To the Secretary of Defense for Public Affairs (ATSD(PA))," August 7, 2017
DoD Directive 5205.02E, "DoD Operations Security (OPSEC) Program," June 20, 2012
DoD Directive 5230.25, "Withholding of Unclassified Technical Data from Public Disclosure," November 6, 1984, as amended
DoD Directive 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008
DoD Directive 5400.11, "DoD Privacy Program," October 29, 2014
DoD Directive 5405.2, "Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses," July 23, 1985
DoD Directive 5500.07, "Standards of Conduct," November 29, 2007
DoD Instruction 5040.02, "Visual Information (VI)," October 27, 2011, as amended
DoD Instruction 5200.01, "DoD Information Security Program and Protection of Sensitive Compartmented Information (SCI)," April 21, 2016
DoD Instruction 5230.24, "Distribution Statements on Technical Documents," August 23, 2012, as amended
DoD Instruction 5230.27, "Presentation of DoD-Related Scientific and Technical Papers at Meetings," November 18, 2016, as amended
DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release," August 13, 2014, as amended
DoD Instruction 5400.04, "Provision of Information to Congress," March 17, 2009
DoD Manual 5200.01, Volume 1, "DoD Information Security Program: Overview, Classification, and Declassification," February 24, 2012
DoD Manual 5200.01, Volume 2, "DoD Information Security Program: DoD Information Security Program: Marking Of Classified Information," February 24, 2012, as amended

DoD Manual 5200.01, Volume 3, "DoD Information Security Program: Protection Of Classified Information," February 24, 2012, as amended

DoD Manual 5200.01, Volume 4, "DoD Information Security Program: Controlled Unclassified Information (CUI)," February 24, 2012

DoD Manual 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 25, 2017

Executive Order 13526, "Classified National Security Information," December 29, 2009

Executive Order 13556, "Controlled Unclassified Information," November 4, 2010

Secretary of Defense Memorandum, "Disestablishment of the Deputy Chief Management Officer and Establishment of the Chief Management Officer," February 1, 2018

United States Code, Title 10

United States Code, Title22, Section 4353

EXHIBIT F:

DoD Instruction 5230.29, *Security and Policy Review of DoD Information for Public Release*

(Apr. 14, 2017)

Department of Defense
INSTRUCTION

NUMBER 5230.29
August 13, 2014
Incorporating Change 1, April 14, 2017

DCMO

SUBJECT: Security and Policy Review of DoD Information for Public Release

References: See Enclosure 1

1. PURPOSE. In accordance with the authority in DoD Directive (DoDD) 5105.53 (Reference (a)), *DoDD 5105.82 (Reference (b)),* and Deputy Secretary of Defense Memorandum (Reference (~~b~~*c*)), this instruction reissues DoD Instruction (DoDI) 5230.29 (Reference (~~c~~*d*)) to implement policy established in DoDD 5230.09 (Reference (~~d~~*e*)), assigns responsibilities, and prescribes procedures to carry out security and policy review of DoD information for public release.

2. APPLICABILITY. This instruction:

a. Applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this instruction as the "DoD Components").

b. Does not apply to the Office of the Inspector General of the Department of Defense. The Inspector General of the Department of Defense, as an independent and objective officer in the DoD, is exempt from the policy review provisions of this instruction. As necessary, information may be submitted for security review before public release.

3. POLICY. In accordance with Reference (~~d~~*e*), it is DoD policy that a security and policy review will be performed on all official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the DoD.

4. RESPONSIBILITIES. See Enclosure 2.

5. PROCEDURES. Enclosure 3 contains clearance requirements, submission procedures, time limits, information concerning review determinations, and appeals.

6. RELEASABILITY. **Cleared for public release**. This instruction is available on the ~~Internet from the~~ DoD Issuances Website at http://www.dtic.mil/whs/directives.

7. EFFECTIVE DATE. This instruction~~:~~ *is effective August 13, 2014.*

~~a. Is effective August 13, 2014.~~

~~b. Will expire effective August 13, 2024 if it hasn't been reissued or cancelled before this date in accordance with DoDI 5025.01 (Reference (e)).~~



David Tillotson III
Assistant Deputy Chief Management Officer

Enclosures
1. References
2. Responsibilities
3. Procedures

Glossary

ENCLOSURE 1

REFERENCES

(a) DoD Directive 5105.53, "Director of Administration and Management (DA&M)," February 26, 2008
(b) DoD Directive 5105.82, "Deputy Chief Management Officer (DCMO) of the Department of Defense," October 17, 2008
(~~b~~*c*) Deputy Secretary of Defense Memorandum, "Reorganization of the Office of the Deputy Chief Management Officer," July 11, 2014
(~~c~~*d*) DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release," January 8, 2009 (hereby cancelled)
(~~d~~*e*) DoD Directive 5230.09, "Clearance of DoD Information for Public Release," August 22, 2008, as amended
~~(e) DoD Instruction 5025.01, "DoD Issuances Program," June 6, 2014~~
(f) DoD Instruction 5400.04, "Provision of Information to Congress," March 17, 2009
(g) DoD Instruction 5230.24, "Distribution Statements on Technical Documents," August 23, 2012*, as amended*
(h) DoD Directive 5230.25, "Withholding of Unclassified Technical Data from Public Disclosure," November 6, 1984, as amended
(i) Parts 120-130 of Title 22, Code of Federal Regulations (also known as "The International Traffic in Arms Regulations (ITAR)")
(j) DoD Directive 5205.02E, "DoD Operations Security (OPSEC) Program," June 20, 2012
(k) DoD Manual 5200.01, "DoD Information Security Program," ~~February 24, 2012, as amended~~ *date varies by volume*
(l) Deputy Secretary of Defense Memorandum, "Congressional Testimony Coordination and Clearance Procedures," January 17, 2012[1]
(m) DoD Instruction 2205.02, "Humanitarian and Civic Assistance (HCA) Activities," June 23, 2014
(n) DoD Instruction 3000.05, "Stability Operations," September 16, 2009
(o) DoD Directive 5122.05, "Assistant Secretary of Defense for Public Affairs (ASD(PA))," September 5, 2008
(p) DoD Instruction 8550.01, "DoD Internet Services and Internet-Based Capabilities," September 11, 2012
(q) DoD Instruction 5230.27, "Presentation of DoD-Related Scientific and Technical Papers at Meetings," ~~October 6, 1987~~ *November 18, 2016*
(r) DoD Instruction 3200.12, "DoD Scientific and Technical Information Program (STIP)," August 22, 2013
(s) DoD Manual 3200.14, Volume 1, "Principles and Operational Parameters of the DoD Scientific and Technical Information Program (STIP): General Processes," March 14, 2014

[1] Available at http://www.dtic.mil/whs/esd/osr

ENCLOSURE 2

RESPONSIBILITIES

1. DIRECTOR OF ADMINISTRATION*, OFFICE OF THE DEPUTY CHIEF MANAGEMENT OFFICER (DCMO) OF THE DEPARTMENT OF DEFENSE (DA ODCMO)*. Under the authority, direction, and control of the ~~Deputy Chief Management Officer (~~DCMO~~) of the Department of Defense~~, the ~~Director of Administration~~ *DA ODCMO* acts as the appellate authority for the DoD security and policy review process.

2. DIRECTOR, WASHINGTON HEADQUARTERS SERVICES (WHS). Under the authority, direction, and control of the DCMO, through the ~~Director of Administration~~ *DA ODCMO*, the Director, WHS:

a. Monitors compliance with the procedures established in Enclosure 3 of this instruction for the security and policy review of official DoD information.

b. Provides for the timely security and policy review of official DoD information proposed for public release that is originated by, in, or for the DoD, including statements intended for open presentation before the Congress and other material submitted to the Congress in accordance with DoDI 5400.04 (Reference (f)).

c. Provides for the timely policy review of official DoD information that is originated by the DoD for presentation before a closed session of the Congress and other classified material submitted to the Congress in accordance with Reference (f).

d. Coordinates, as necessary, with the DoD Component staffs when reviewing official DoD information for public release clearance to ensure accuracy and currency of existing policy and security guidance.

e. Responds to requests for review of information submitted by DoD personnel acting in a private capacity or submitted voluntarily by non-DoD sources to ensure that classified information is not disclosed. This review will also address technology transfer and public releasability of technical data in accordance with DoDI 5230.24, DoDD 5230.25, and parts 120 through 130 of Title 22, Code of Federal Regulations (References (g), (h), and (i)).

f. Supports other Executive Department and non-DoD agency security review programs in the release of information to the public that may contain DoD equities.

3. OSD AND DOD COMPONENT HEADS. The OSD and DoD Component heads:

a. Ensure Component compliance with this instruction, and issue any guidance necessary for the internal administration of the requirements prescribed in Enclosure 3 of this instruction.

b. Ensure prompt Component guidance and assistance to the Chief, Defense Office of Prepublication and Security Review (DOPSR), when requested, on any information proposed for public release.

c. Exercise Component clearance authority for information not specified in section 1 of Enclosure 3 of this instruction. This authority may be delegated to the lowest level competent to evaluate the content and implications of public release of the information.

d. Ensure that Component-specific documents, including official correspondence, are reviewed internally and that information not specified in Enclosure 3 of this instruction is reviewed for operations security and information security in accordance with DoDD 5205.02E and DoD Manual 5200.01 (References (j) and (k)) before public release. This review will also address technology transfer and public releasability of technical data in accordance with References (g), (h), and (i).

e. Ensure Component compliance with the guidelines of the Deputy Secretary of Defense Memorandum (Reference (l)) concerning the coordination and clearance process of Congressional testimony to facilitate timely security and policy review.

f. Ensure effective information sharing between the Component and designated mission partners in accordance with DoDI 2205.02 and DoDI 3000.05 (References (m) and (n)).

g. Ensure that Component release of DoD information to news media representatives is in accordance with DoDD 5122.05 (Reference (o)).

ENCLOSURE 3

PROCEDURES

1. CLEARANCE REQUIREMENTS. The security review protects classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operations security. The policy review ensures that no conflict exists with established policies or programs of the DoD or the U.S. Government. Official DoD information that is prepared by or for DoD personnel and is proposed for public release will be submitted for review and clearance if the information:

a. Originates or is proposed for release in the National Capital Region by senior personnel (e.g., general or flag officers and Senior Executive Service) on sensitive political or military topics;

b. Is or has the potential to become an item of national or international interest;

c. Affects national security policy, foreign relations, or ongoing negotiations;

d. Concerns a subject of potential controversy among the DoD Components or with other federal agencies;

e. Is presented by a DoD employee who, by virtue of rank, position, or expertise, would be considered an official DoD spokesperson; or

f. Contains technical data, including data developed under contract or independently developed and subject to potential control in accordance with Reference (i), that may be militarily critical (as defined in the Glossary) and subject to limited distribution, but on which a distribution determination has not been made.

2. SUBMISSION PROCEDURES

a. Detailed Procedures. These procedures apply to all information required to be submitted to DOPSR for clearance:

(1) A minimum of three hard copies of material, in its final form, will be submitted, together with a signed DD Form 1910, "Clearance Request for Public Release of Department of Defense Information," located at the DoD Forms Management Program website at http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm, to:

Chief, Defense Office of Prepublication and Security Review
1155 Defense Pentagon
Washington, D.C. 20301-1155

(2) If the material is fewer than 100 pages long, one soft copy of the unclassified material and the DD Form 1910 may be submitted by e-mail to whs.pentagon.esd.mbx.secrev@mail.mil instead of the requirements of paragraph 2a(1) of this enclosure.

(3) Any material submitted for review will be approved by an authorized government representative of the submitting office to indicate that office's approval of the material for public release. Contractors may not sign the DD Form 1910.

(4) All information submitted for clearance to DOPSR must first be coordinated within the originating DoD Component to ensure that it:

(a) Reflects the organization's policy position.

(b) Does not contain classified, controlled unclassified, or critical information requiring withholding.

(c) Is reviewed for operations security in accordance with References (j) and (k).

(d) Is reviewed to ensure there is no risk of releasing classified, controlled unclassified, operations security, or critical information if the information is aggregated with other publicly available data and information in accordance with References (j) and (k).

(5) Only the full and final text of material proposed for release will be submitted for review. Drafts, notes, outlines, briefing charts, etc., may not be submitted as a substitute for a complete text. DOPSR reserves the right to return draft or incomplete documents without action.

(6) Abstracts to be published in advance of a complete paper, manuscript, etc., require clearance. Clearance of an abstract does not fulfill the requirement to submit the full text for clearance before its publication. If an abstract is cleared in advance, that fact, and the DOPSR case number assigned to the abstract, will be noted on the DD Form 1910 or other transmittal when the full text is submitted.

b. Other Requirements. The requirements of References (f) and (l) will apply to the processing of information proposed for submission to Congress.

c. Website Publication. Information intended for placement on websites or other publicly accessible computer servers that are available to anyone requires review and clearance for public release if it meets the requirements of section 1 of this enclosure and DoDI 8550.01 (Reference (p)). Website clearance questions should be directed to the Component's website manager. Review and clearance for public release is not required for information to be placed on DoD controlled websites or computer servers that restrict access to authorized users.

d. Basic Research. Submitters will comply with the DoD guidance on basic scientific and technical research review in DoDI 5230.27 (Reference (q)).

e. Federally Funded Research and Engineering. Submitters will comply with the DoD guidance in federally funded research and engineering in DoDI 3200.12 and DoDI 3200.14 (References (r) and (s)), which requires submitters to send the final published document or final author's referenced manuscript to the Defense Technical Information Center (DTIC).

3. TIMELINES FOR SUBMISSION

a. Prepublication Security and Policy Review Requests

(1) Submit speeches and briefings to DOPSR at least 5 working days before the event at which they are to be presented. Additional time may be needed for complex or potentially controversial speeches due to coordination requirements.

(2) Other material (e.g., papers and articles) will be submitted to DOPSR at least 10 working days before the date needed. The length, complexity, and content will determine the number of agencies required to review the document and, consequently, the time required for the complete review process.

(3) Technical papers will be submitted to DOPSR at least 15 working days before the date needed. More time may be needed if DOPSR determines that the material is complex or requires review by agencies outside of the DoD.

(4) Manuscripts and books will be submitted to DOPSR at least 30 working days before the date needed and before submission to a publisher. More time may be needed if DOPSR determines that the material is complex or requires review by agencies outside of the DoD.

(5) DOPSR reserves the right to return documents without action if insufficient time is allowed for prepublication review.

b. Congressional Security and Policy Review Requests. Security and policy review of material submitted by the DoD to Congress will be provided to DOPSR in these timeframes to allow for a thorough review for DoD to comply with the congressional committee or subcommittee mandates:

(1) Statements: 5 days before submission to the DoD Office of Legislative Counsel in accordance with References (f) and (l).

(2) A minimum of 5 working days for these requests:

(a) Questions for the Record.

(b) Inserts for the Record.

(c) Advance Policy Questions.

(d) Selected Acquisition Reports.

(e) Budget documents (in accordance with Reference (f)).

(f) Classified transcripts only (in accordance with Reference (f)).

(g) Reprogramming actions.

(h) Congressional reports.

4. REVIEW DETERMINATIONS AND APPEALS

a. General. Information reviewed for release to the public will result in one of these determinations:

(1) Cleared for Public Release. The information may be released without restriction by the originating DoD Component or its authorized official. DOPSR may require a disclaimer to accompany the information, as follows: "The views expressed are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government."

(2) Cleared "With Recommendations" for Public Release. Optional corrections, deletions, or additions are included. Although DOPSR has no responsibility for correcting errors of fact or making editorial changes, obvious errors may be identified in the text and noted as "recommended." These corrections are not binding on the author or submitter.

(3) Cleared "As Amended" for Public Release. Amendments, made in red, are binding on the submitter. Red brackets identify information that must be deleted. If the amendments are not adopted, then the DoD clearance is void. When possible, alternative wording is provided to substitute for the deleted material. Occasionally, wording will be included that must be added to the text before public release. A disclaimer, as shown in paragraph a(1) of this section, may also be required.

(4) Not Cleared for Public Release. The information submitted for review may not be released.

b. Appeals. All amendments or "not cleared" determinations may be appealed in writing by the requester within 60 days to DOPSR. The appeal must contain the basis for release of information denied during the initial determination. All appeals will be resolved at the lowest practical level and as quickly as possible. In accordance with Reference (a), the ~~Director of Administration~~ *DA ODCMO* serves as the appellate authority for any denials or redactions that may be contested. When the appellate authority makes a final determination, a written response will be promptly forwarded to the requester.

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

DA ODCMO	*Director of Administration, Office of the Deputy Chief Management Officer of the Department of Defense*
DCMO	Deputy Chief Management Officer *of the Department of Defense*
DoDD	DoD directive
DoDI	DoD instruction
DOPSR	Defense Office of Prepublication and Security Review
WHS	Washington Headquarters Services

PART II. DEFINITIONS

These terms and their definitions are for the purpose of this instruction.

authorized government representative. A government employee who possesses the authority to communicate a particular component's policies and recommendation for public release.

militarily critical. Information will be considered militarily critical if it addresses any of these subjects or affects the operations security thereof:

New weapons or weapons systems, or significant modifications or improvements to existing weapons or weapons systems, equipment, or techniques.

Military operations and significant exercises of national or international significance.

Command, control, communications, computers, intelligence, surveillance, and reconnaissance; information operations and cyberspace; weapons of mass destruction; improvised explosive devices; and computer security.

Military activities or application in space; nuclear weapons, including nuclear weapons effects research; defense from chemical and biological warfare and threats; initial fixed weapons basing; and arms control treaty implementation.

Any other contemporary topic that is designated by the DoD Component head.

public release. The act of making information available to the public with no restrictions on access to or use of the information. Authorization and release of information to the public, cleared by DOPSR, is the responsibility of the originating office.

EXHIBIT G:

Frequently Asked Questions for Department of Defense Security and Policy Reviews, DOD (Mar. 2012)

USCA4 Appeal: 20-1568 Doc: 21 Filed: 08/14/2020 Pg: 112 of 213
Case 8:19-cv-00985-GJH Document 33-1 Filed 07/16/19 Page 52 of 87

Frequently Asked Questions for Department of Defense Security and Policy Reviews

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What is a security and policy review?
A security and policy review, or pre-publication review, is the process by which information proposed for public release is examined to ensure compliance with DoD and national policies and to determine that it contains no classified, controlled unclassified, or export-controlled information.

Why are these reviews necessary?
The purpose of the security and policy review is to ensure information damaging to the national security is not inadvertently disclosed.

Who must submit materials intended for publication for review by DoD components to Office of Security Review (OSR) for review?
All current, former, and retired DoD employees, contractors, and military service members (whether active or reserve) who have had access to DoD information or facilities. DoD information includes any work that relates to military matters, national security issues, or subjects of significant concern to DoD in general, such as spy novels or biographical accounts of operational deployments and wartime experiences. Publications about gardening, cooking, sports, and crafts and the like do not need to undergo pre-publication reviews if there is no association with the author's current or former DoD affiliation.

What must go through the security and policy pre-publication review process?
- Books
- Manuscripts and theses
- Biographies
- Articles
- Book reviews/Op-Ed pieces
- Audio/video materials
- Speeches/Presentations
- Press releases/Website updates
- Conference panels/briefings
- Research papers
- Other media

How long will it take?
Specific timelines are addressed in DoDI 5230.29, Enclosure 3, para 3, "Time limits." Note that manuscripts should be submitted for pre-publication review early enough to allow at least 30 working days for the review. Actual review time will vary based on content.

Where do I send my request and what should it include?
First, conduct an Operations Security (OPSEC) review through the Component OPSEC Manager in accordance with DoDM 5205.02.

Then, conduct a pre-publication review. DoDI 5230.29, Enclosure 3, para 2, "Submission Procedures" details what is required. DD Form 1910 is used by active duty personnel and government officials. A signed letter should be submitted by someone in the private sector and will need to include the following:
- Name
- Contact information (address, phone number, email address)
- Information title or subject
- Intended audience or publication
- Specific deadline, if applicable
- Written consent from all-DoD affiliated personnel named in your material, if applicable.

Include a minimum of three unbound paper copies, or if submitted electronically, one soft copy, of each document in its final form submitted for review.

How does the process work?
The DoD component's security review liaison office (for security/policy review) and their pre-publication release official will:
- Confirm the request qualifies as a pre-publication review and that all required information is included.
- Forward to OSR all requests containing information defined under DoDI 5230.29, Enclosure 3, para 1, in final form.
- Coordinate with other DoD components or offices as necessary prior to submission.

What will happen if I do not submit my material for review?
You may be subject to administrative or legal action.

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Reference: USD(I) Memo, "Security and Policy Reviews of Articles, Manuscripts, Books and Other Media Prior to Public Release," April 26, 2011
https://www.intelink.gov/sites/ousdi/hcis/sec/icdirect/information/default.aspx

SUBMISSION METHODS

Completed packages should be forwarded to your DoD component organization for initial security review by your public release official.

Personnel assigned to the Office of the Secretary of Defense should forward packages to the Office of Security Review (OSR) – 2A534 - Pentagon or send them to the following address:

Standard mail:
Department of Defense
Attn: Office of Security Review
1155 Defense Pentagon
Washington, DC 20301-1155

Courier:
OSD Mail Room in the Pentagon (3C843)

Email:
NIPR – secrev1@whs.mil (unclassified)
SIPR – ofoisrsr@whs.smil.mil (FOUO and classified up to SECRET)
JWICS – OfficeofSecurity@osdj.ic.gov (All)

Telephone: (703)-614-5001

Fax: (703)-614-4956
Classified Fax: (703)-614-4966

OSR Website:
www.dtic.mil/whs/esd/osr/index.htm

DOD POLICY FOR SECURITY AND POLICY REVIEWS

Current DoD policy issuances, references and forms governing publication reviews can be found at the OSR Website:
www.dtic.mil/whs/esd/osr/index.htm

These include the following:
DoD Directive 5230.09, "Clearance of DoD Information for Public Release"

DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release"

DD Form 1910, "Clearance Request for Public Release of Department of Defense Information"

Related DoD security policy issuances can be found at the DoD issuances website:
http://www.dtic.mil/whs/directives/

DoD Manual 5200.01 (Vol. 1 - 4) "DoD Information Security Program"

DoD Manual 5205.02, "DoD Operations Security Program Manual"

For questions on security/policy review submissions or status updates, contact the OSR Help Desk at 703-614-5001.

For questions on information security policy, contact Security Directorate, OUSD(I) at 703-604-2764.

Security and Policy Reviews of Articles, Manuscripts, Books and Other Media Prior to Public Release

Frequently Asked Questions

Department of Defense
Security Directorate
Office of the Under Secretary of Defense
for Intelligence
5000 Defense Pentagon
Washington, DC
20301-5000

EXHIBIT H:

NSA/CSS Policy 1-30, *Review of NSA/CSS Information Intended for Public Release*

(revised May 12, 2017)

Approved for Release on 18-Sep-2018, FOIA Case #DF-2018-00189

NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
NSA/CSS POLICY 1-30

Issue Date: 13 May 2015
Revised: 12 May 2017

REVIEW OF NSA/CSS INFORMATION INTENDED FOR PUBLIC RELEASE

PURPOSE AND SCOPE

This document sets forth the policy, procedures, and responsibilities governing the *prepublication review* of *official NSA/CSS information* intended for *public release* by current and former NSA/CSS *affiliates* in either an *official capacity* or a *private capacity*. This policy also implements Department of Defense (DoD) Directive 5230.09, "Clearance of DoD Information for Public Release" (Reference a).

This policy applies to all current and former NSA/CSS affiliates and reflects lifetime obligations agreed to in *non-disclosure agreements*.

/s/
ELIZABETH R. BROOKS
Chief of Staff

_____/s/_____
Endorsed by
Associate Director for Policy

Policy 1-30 is approved for public release.
000088

Approved for Release on 18-Sep-2018, FOIA Case #DF-2018-00189

Policy 1-30 Dated: 13 May 2015

DISTRIBUTION:
P12
P13
P131
P134 (Vital Records)

This Policy supersedes NSA/CSS Policy 1-30 dated 10 May 2013. The Chief, Policy approved an administrative update on 12 May 2017 to update organizational designators for NSA21. OPI: Information Security and Classification Division, P131, 972-2534 (secure) or (443)-634-4094 (non-secure).

POLICY

1. Public release in an official capacity:

a. NSA/CSS makes certain accurate and timely information available to the public to promote accountability for and understanding of its activities. The public release of official NSA/CSS information shall be limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate Government interest (Reference a). All current NSA/CSS affiliates shall submit for prepublication review all official NSA/CSS information intended for public release in their official capacity. The prepublication review process includes both a classification review and a review that determines whether the information intended for public release: is consistent with established NSA/CSS, DoD, and Intelligence Community policies and programs; is consistent with information security standards established by the Office of Information Management (OIM, P13); and conforms to NSA/CSS corporate messaging standards as determined by Strategic Communications (P2).

b. Official NSA/CSS information prepared as part of official duties and approved for public release will be used in accordance with DoD Directive (DoDD) 5500.07, "Standards of Conduct" (Reference b), and DoD 5500.7-R, "Joint Ethics Regulation (JER)" (Reference c), which preclude such use for monetary or nonmonetary personal gain.

2. Public release in a private capacity: NSA/CSS affiliates acting in a private capacity, and not in connection with their official duties, may prepare information for public release without management approval or policy review provided that the affiliate:

a. Violates no laws or regulations;

b. Maintains ethical standards and compliance with References b and c;

c. Uses only information that is UNCLASSIFIED and approved for public release;

d. Uses no information in which NSA/CSS may have intellectual property rights and must file a new patent application with the U.S. Patent and Trademark Office thereon

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or lose the right to do so (i.e., the information, if publicly released, does not establish a date by which NSA/CSS must file a new patent application (e.g., 1 year after public release)); and

e. Uses a disclaimer on any material in which an NSA/CSS affiliation is cited, stating that the views and opinions expressed are those of the affiliate and do not reflect those of NSA/CSS.

3. Information available from both classified and open sources:

a. Official NSA/CSS information appearing in the public domain shall not be automatically considered UNCLASSIFIED or approved for public release.

b. Where information intended for public release is available to the NSA/CSS affiliate from classified sources and also independently from open sources, the affiliate may be permitted to release the information if the affiliate can cite an adequate open-source publication where the specific information is available – only if release of the information by the affiliate at the time of review will not cause additional damage to national security through confirmation of previous unauthorized releases. The appropriate *Prepublication Review Authority* shall exercise discretion in making such determinations on a case-by-case basis and may consider the following as factors in the decision:

1) The sensitivity of the information from classified sources;

2) The number and currency of the previous releases;

3) The level of detail previously exposed;

4) The source of the previous releases (whether authoritative and acknowledged or an anonymous leak);

5) The submitter's access to classified sources; and

6) The authority and credibility afforded by the affiliate's NSA/CSS experience.

4. Official NSA/CSS organizational logos: A *logo* may be created in accordance with NSA/CSS Policy 10-7, "NSA/CSS Multimedia Information" (Reference d). Once Graphics Services (P2212) creates a proof of the logo, it must be reviewed and approved for public release in an official capacity as set forth in this policy. Once approved for public release, a logo may be used for official NSA/CSS operational, promotional, or morale-building purposes.

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PROCEDURES

5. For public release in official capacity:

a. Information intended for public release in an NSA/CSS affiliate's official capacity (including, but not limited to, books, articles, videos, speeches, conference briefings, Internet postings, biographies, book reviews, cooperative education (co-op) reports, press releases, research papers, and organizational logos) is subject to prepublication review.

b. Before publicly disclosing his or her NSA/CSS affiliation, a current affiliate preparing material for public release in an official capacity shall seek operations security (OPSEC) guidance from his or her Staff Security Officer (SSO) and solicit a *name check* from Chief, NSA/CSS Cover Office (X073) in accordance with NSA/CSS Policy 1-18, "NSA/CSS Cover Program" (Reference e).

c. Whenever practicable, to preclude the inadvertent spillage of classified information onto unclassified systems, NSA/CSS affiliates acting in an official capacity shall use a TOP SECRET classified information system (e.g., NSANet, JWICS) to draft the full material intended for public release. Notes, outlines, or other partial information may not be substituted for the full material intended for public release in order to avoid the possibility of classification due to compilation.

d. Current NSA/CSS affiliates acting in an official capacity shall first submit, for management review and approval, all official NSA/CSS information intended for public release.

e. Upon receipt of management approval for public release (which may be in the form of a digitally signed email), a current NSA/CSS affiliate acting in an official capacity submits the following to a local *Classification Advisory Officer (CAO)* for an initial classification determination: the full material intended for public release, management approval, and written consent from NSA/CSS affiliates identified in the information to have any NSA/CSS affiliation publicly revealed. A complete list of CAOs can be found on NSANet ("go cao").

f. Upon determining the information to be UNCLASSIFIED, the CAO sends a digitally signed email to the affiliate containing that determination.

g. Following procedures established by the Prepublication Review Authority, either the affiliate or the local CAO then forwards the full and final material intended for public release (with all classification markings and/or handling instructions removed), management approval, classification determination, written consent from affiliates identified in the information to have any NSA/CSS affiliation publicly revealed (if applicable), technical review (if applicable), and contracting officer approval (if applicable) to the appropriate NSA/CSS Prepublication Review Authority for the final prepublication review determination.

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h. The appropriate Prepublication Review Authority shall:

1) As necessary, coordinate with other information owners should the material contain information not under his or her purview;

2) Refer the information for review to organizations external to NSA/CSS, if required;

3) Coordinate, as appropriate, a review with the Public Affairs Office (PAO, P21) to determine that information intended for public release in an affiliate's official capacity conforms to NSA/CSS corporate messaging standards;

4) When necessary, request a technical review by a subject matter expert to determine that the information intended for public release is accurate;

5) When necessary, request a review by the NSA/CSS Office of the General Counsel (OGC) to determine that the information intended for public release contains no information in which NSA/CSS may have intellectual property rights and may file a patent application thereon; and

6) If the current NSA/CSS affiliate acting in an official capacity is a *Senior Leader*, coordinate with the Information Security and Classification Division (P131) to obtain prepublication approval from the Defense Office of Prepublication and Security Review (DOPSR).

i. The appropriate Prepublication Review Authority will issue, as practicable, a final determination to the affiliate within 25 business days of receipt of all required information and supporting documentation.

6. For public release in a private capacity:

a. Resumes, associated cover letters, work-related biographies (bios), and curriculum vitae (CVs) intended for any public use: Current and former NSA/CSS affiliates shall submit résumés, associated cover letters, work-related bios, and CVs intended for public release to the Information Security and Classification Division (P131) for review according to procedures published on the Information Security and Classification Division (P131) Web site and on nsa.gov to determine whether they contain *NSA/CSS protected information*.

1) Before publicly disclosing his or her NSA/CSS affiliation in such a document, a current affiliate shall seek OPSEC guidance from an SSO and solicit a name check from Chief, X073.

2) Whenever practicable and with supervisory approval, to preclude the inadvertent spillage of classified information onto unclassified systems, current NSA/CSS affiliates acting in a private capacity may use a TOP SECRET classified information system (e.g., NSANet, JWICS) to draft the full version of such documents intended for public release. Notes, outlines, or other partial

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information may not be substituted for the full material intended for public release in order to avoid the possibility of classification due to compilation.

3) A current affiliate shall have such documents first reviewed by an organizational CAO before submitting it to P131.

4) Former affiliates shall submit such documents per instructions in paragraph 6.b.4.

5) Résumés are not subject to management approval or policy review.

b. Other than résumés: Current and former NSA/CSS affiliates may prepare material for public release that meets all of the requirements stated in paragraph 2. This includes, but is not limited to, books, articles, videos, speeches, conference briefings, Internet postings, book reviews, co-op reports, press releases, research papers, and organizational logos. However, prepublication review is required where compliance with the requirements of paragraph 2 is in doubt (i.e., where the material contains official NSA/CSS information that may or may not be UNCLASSIFIED and approved for public release). Before publicly disclosing an NSA/CSS affiliation, a current affiliate shall seek OPSEC guidance from an SSO and solicit a name check from Chief, X073.

1) Whenever practicable and with supervisory approval, to preclude the inadvertent spillage of classified information onto unclassified systems, current NSA/CSS affiliates acting in a private capacity may use a TOP SECRET classified information system (e.g., NSANet, JWICS) to draft the full material intended for public release. Notes, outlines, or other partial information may not be substituted for the full material intended for public release in order to avoid the possibility of classification due to compilation.

2) A current affiliate with access to a TOP SECRET classified network (e.g., NSANet, JWICS) shall request review by his or her organization's CAO of the full material intended for public release. After review, the organization's CAO will send the full and final material and the initial determination to the appropriate Prepublication Review Authority for a second review.

3) Current affiliates without access to a TOP SECRET classified network (e.g., NSANet, JWICS) may submit the full and final material intended for public release via another classified system (e.g., SIPRNet) to the appropriate Prepublication Review Authority according to established procedures.

4) Former affiliates without access to a TOP SECRET classified network (e.g., NSANet, JWICS) shall submit the full and final material intended for public release in hardcopy to:

NSA/CSS
ATTN: P131, Prepublication Review
9800 Savage Road

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Suite 6932
Fort George G. Meade, MD 20755-6248

5) The appropriate Prepublication Review Authority shall create an official record of the documents reviewed and the determinations made.

6) As necessary, the appropriate Prepublication Review Authority shall coordinate with other information owners when the material contains information under their purview.

7) The appropriate Prepublication Review Authority shall, as practicable, issue the determination to the affiliate within 25 business days of receipt.

7. Appeal of a prepublication review determination:

a. A prepublication review determination may be appealed in writing to the Chief, OIM within 20 business days of receipt of the determination. At OIM's discretion, an additional 30 business days may be allowed to file a written appeal, provided that the affiliate files a written notice of intent to appeal within 20 business days of receipt of the initial determination and presents justification to support an extension. The affiliate making the appeal shall specifically identify the disputed portions of the initial determination and the reasons for appeal – and shall include any supporting information that the Chief, OIM should consider.

b. In support of OIM, the Information Security and Classification Division (P131) will, if necessary, schedule meetings with the NSA OGC and/or the information owners to review the disputed information and, within 30 business days of receipt of the appeal, advise the affiliate making the appeal of the Chief's OIM final determination and, to the extent consistent with national security, the reasons for any OIM determination adverse to the affiliate's interests.

c. The final determination by the Chief, OIM may not be further appealed.

RESPONSIBILITIES

8. A current NSA/CSS affiliate acting in an official capacity shall:

a. Before disclosing his or her NSA/CSS affiliation, solicit a name check from Chief, X073 in accordance with Reference e;

b. Seek OPSEC guidance from an SSO regarding the possible consequences of disclosing his or her NSA/CSS affiliation;

c. Submit for prepublication review all materials intended for public release according to the procedures specified in paragraph 5;

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d. As applicable, obtain written consent from each affiliate identified in the information to have his or her NSA/CSS affiliation publicly revealed; and

e. In accordance with established procedures, submit to the appropriate Prepublication Review Authority his or her requests for prepublication review along with all required information identified in paragraph 5.g..

9. Current NSA/CSS affiliates acting in a private capacity shall:

a. Before disclosing their NSA/CSS affiliation, solicit name checks from Chief, X073 in accordance with Reference e;

b. Seek OPSEC guidance from an SSO regarding the possible consequences of disclosing their NSA/CSS affiliation;

10. Current and former NSA/CSS affiliates acting in a private capacity shall:

a. Submit for prepublication review all materials intended for public release according to the procedures specified in paragraph 6;

b. Notify NSA/CSS of any request to comment on any unofficial NSA/CSS-related information (e.g., to review a book by a non-Government author prior to publication, to review an article). The NSA/CSS affiliate shall regard his/her comments as a proposed unofficial publication subject to review, as provided by this policy. If the appropriate Prepublication Review Authority determines that all or part of the text being commented on must be reviewed in order to evaluate the comments, the affiliate shall obtain permission from the author before submitting relevant parts of any unpublished text to NSA/CSS for review; and

c. As applicable, obtain written consent from each affiliate identified in the information to have his or her NSA/CSS affiliation publicly revealed.

11. Classification Advisory Officers (CAOs) shall:

a. Conduct an initial classification review of information submitted by an affiliate in their supported organizations, in accordance with current NSA/CSS classification and declassification guidance;

b. Provide the affiliate with a digitally signed email message or, if email is not practicable, an appropriately classified letter containing the classification determination; and

c. In accordance with established procedures and on behalf of the affiliate, submit a request for prepublication review to the appropriate Prepublication Review Authority (see paragraph 5.g.).

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12. Prepublication Review Authorities shall:

a. Assist the CAO, when necessary, in resolving classification disputes;

b. Coordinate reviews, as appropriate, with PAO for conformance to messaging standards;

c. If the current NSA/CSS affiliate acting in an official capacity is a Senior Leader, coordinate with the Information Security and Classification Division (P131) to obtain prepublication approval from the DOPSR;

d. Coordinate prepublication reviews with any other NSA/CSS offices as required by, and specified in, this policy;

e. Coordinate prepublication reviews with external information owners (e.g., U.S. Government, foreign government), as appropriate;

f. Conduct, as practicable, final prepublication reviews of all information intended for public release within 25 business days of receipt;

g. Notify the affiliate in writing of the determination; and

h. Maintain all required electronic and hardcopy official records related to prepublication review determinations in accordance with this policy and NSA/CSS Policy 1-6, "Records Management Program" (Reference f);

13. The Information Security and Classification Division (P131) shall perform all of the functions of a Prepublication Review Authority (see paragraph 12) and shall:

a. Serve as the sole approval authority for the public release of personal résumés;

b. Coordinate with the DOPSR to obtain public release approval when the current NSA/CSS affiliate acting in an official capacity is a Senior Leader;

c. Review and approve or disapprove management directives and any other procedures developed to implement this policy;`

d. Maintain accountability and a database for all required electronic and hardcopy official records related to prepublication review determinations in accordance with Reference f; and

e. Administratively assist the Chief, OIM in the processing of prepublication review appeals.

14. The Research Director, in addition to the responsibilities in paragraph 15, shall:

a. Issue management directives to implement this policy that have been approved by the Information Security and Classification Division (P131);

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b. Provide a monthly accounting of prepublication review cases to the Information Security and Classification Division (P131); and

c. Grant the Information Security and Classification Division (P131) access to any databases used for the electronic storage and tracking of prepublication review cases.

15. The Directors, Cryptologic Center Commanders/Chiefs, and Field Commanders/ Chiefs shall:

a. Develop a process, consistent with the provisions in this policy, for ensuring the proper prepublication review of official NSA/CSS information intended for public release;

b. Ensure that personnel under their supervision are made aware of the requirements of this policy; and

c. Ensure that subordinates' requests for management review and approval of official NSA/CSS information intended for public release pursuant to paragraph 5.b are completed in a timely manner.

16. The Security and Counterintelligence Group (A5) shall:

a. Ensure that, during initial indoctrination, all affiliates are informed of their lifelong responsibility to safeguard NSA/CSS protected information and of the procedures for prepublication review;

b. Ensure that all affiliates are reminded of their lifetime prepublication review responsibilities prior to signing their security debriefing forms at the end of their affiliation with the Agency; and

c. Via SSOs, provide OPSEC guidance to current affiliates regarding the possible consequences of publicly disclosing their NSA/CSS affiliation when preparing official NSA/CSS information for public release in either an official or private capacity.

17. The Office of General Counsel (OGC) shall:

a. Provide legal advice to a Prepublication Review Authority when material intended for public release contains any information in which NSA/CSS may have intellectual property rights and may file a patent application thereon;

b. Ensure, in coordination with the Business Management and Acquisition Directorate (B), that contracts contain necessary provisions to require compliance with the provisions of this policy by contractors and their employees; and

c. Provide legal advice and guidance to the Information Security and Classification Division (P131) and Chief, OIM during the appeal process, as necessary and as required.

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18. The Business Management and Acquisition Directorate (BM&A) shall ensure, in coordination with the OGC, that contracts contain necessary provisions to require compliance with the provisions of this policy by contractors and their employees.

19. The Public Affairs Office (PAO) shall, as appropriate, perform a review on all information intended for public release in an official capacity within 10 business days of receipt to ensure that information intended for public release conforms to current NSA/CSS messaging standards as determined by Strategic Communications.

20. The Chief, NSA/CSS Cover Office (X073) shall conduct name checks as requested by current affiliates preparing official NSA/CSS information for public release in either an official or private capacity in accordance with Reference e.

REFERENCES

21. References:

a. DoDD 5230.09 "Clearance of DoD Information for Public Release," dated 22 August 2008.

b. DoDD 5500.07, "Standards of Conduct," dated 29 November 2007.

c. DoD 5500.7-R, "Joint Ethics Regulation (JER)," dated 1 August 1993.

d. NSA/CSS Policy 10-7, "NSA/CSS Multimedia Information," dated 12 August 2009 and revised 1 May 2013.

e. NSA/CSS Policy 1-18, "NSA/CSS Cover Program," dated 6 March 2014.

f. NSA/CSS Policy 1-6, "Records Management Program," dated 19 November 2014.

g. Executive Order 13526, "Classified National Security Information," dated 25 January 2010.

h. Public Law No. 86-36 (codified as amended in 50 U.S.C. § 3605), "National Security Agency Act of 1959."

i. 5 U.S.C § 552, "Freedom of Information Act."

DEFINITIONS

22. Affiliate – A person employed by, detailed to, or assigned to NSA/CSS, including a member of the U.S. Armed Forces; an expert or consultant to NSA; an industrial or commercial contractor, licensee, certificate holder, or grantee of NSA, including all subcontractors; a personal services contractor; or any other category of person who acts for or on behalf of NSA/CSS as determined by the Director, NSA/Chief, CSS. (Source: NSA/CSS Policy Glossary)

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23. Classification Advisory Officer (CAO) – An individual trained to properly apply classification rules and guidance and who assists other employees in the proper marking and protection of classified and protected information. The Information Policy and Classification Division (P131) administers the CAO Program and registers CAOs. For more information "go CAO."

24. Logo – An unclassified graphical representation of an NSA/CSS-related special office, mission, program, or project.

25. Name Check – A review of past assignments, including assignments to other agencies and participation in educational programs, to determine the classification of an individual's name in association with NSA/CSS (Reference e).

26. Nondisclosure Agreement (NdA) – A lifetime obligation to safeguard all protected information, to submit all information intended for publication and/or public release for prepublication review, and to report any *unauthorized disclosure* of protected information. NSA/CSS affiliates are legally bound and obligated by any NdAs they sign for access to NSA/CSS information. They shall not confirm or deny information about NSA/CSS that appears in the public domain without prior approval through the classification or prepublication process.

27. NSA/CSS Protected Information – Information obtained as a result of a relationship with NSA/CSS, that is:

a. Classified or in the process of a classification determination pursuant to the standards of Executive Order 13526 (Reference g), or any successor order, and implementing regulations. It includes, but is not limited to, intelligence information, sensitive compartmented information (intelligence sources and methods), and cryptologic information (information concerning information systems security and signals intelligence); or

b. Unclassified, appearing in any form or compilation, which NSA/CSS may withhold from public disclosure under authority of the National Security Agency Act of 1959 (Reference h) or by reason of being either excluded or exempted from the mandatory disclosure requirements of the Freedom of Information Act (Reference i). (Source: NSA/CSS Policy Glossary)

28. Official Capacity – Acting on behalf of NSA/CSS.

29. Official NSA/CSS Information – Any NSA/CSS, DoD, or IC information that is in the custody and control of NSA/CSS and was obtained for or generated on NSA/CSS' behalf during the course of employment or other service, whether contractual or not, with NSA/CSS.

30. Prepublication Review – The overall process to determine that information proposed for public release contains no protected information and, where applicable, is consistent with established NSA/CSS, DoD, and IC policies and programs; conforms to NSA/CSS messaging standards as determined by Strategic Communications; and, in consultation with the NSA OGC,

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Acquisition, Research, and Technology Law Practice, as appropriate, contains no information in which NSA/CSS may have intellectual property rights and may file a patent application thereon.

31. Prepublication Review Authority – Officials in organizations who are delegated the authority to make determinations on prepublication reviews. The Information Security and Classification Division (P131) serves as the corporate-level Prepublication Review Authority and as such has the authority to make a determination on any prepublication review and has sole authority for the prepublication review of personal résumés, associated cover letters, bios, and CVs. The Chief, Office of Information Management (OIM, P13) has officially delegated Prepublication Review Authority to the Research Directorate for review of RD-related, non-résumé material and/or non-résumé material submitted by RD personnel.

32. Private Capacity – Acting on behalf of oneself and not in association with NSA/CSS.

33. Public Release – The decision to give permission to retain, or to show or reveal official NSA/CSS information whether orally, in writing, or through any other medium, to one or more persons who otherwise do not have the appropriate access authorization, security clearance, and/or need to know to receive such information upon determination that the release will not harm the national security or another legitimate Government interest.

34. Senior Leader – A Defense Intelligence Senior Executive Service (DISES) employee, a Defense Intelligence Senior Level (DISL) employee, or the military equivalent of a DISES or DISL employee.

35. Unauthorized Disclosure – Absent a public release, the communication or physical transfer of protected information to one or more unauthorized recipients who do not have appropriate access authorization, security clearance, and/or need to know to receive such information.

EXHIBIT I:

Form 313, *Nondisclosure Agreement for Classified Information*

(Dec. 2016)

Approved for Release on 18-Sep-2018, FOIA Case #DF-2018-00189

NONDISCLOSURE AGREEMENT FOR CLASSIFIED INFORMATION

1. I, _____ (print full name), hereby agree to accept the obligations contained in this agreement as a prior condition of my being given access to information or material by the United States Government (U.S. Government) that is classified, or is in the process of a classification determination, in accordance with the standards set forth in Executive Order 13526 as amended or superseded, or other applicable Executive order.

2. I understand that such information if disclosed in an unauthorized manner would jeopardize intelligence activities of the U.S. Government. I accept that by being granted access to such information or material I will be placed in a position of special confidence and trust and become obligated to protect that information and/or material from unauthorized disclosure.

3. In consideration for being provided access to information or material by the U.S. Government that is classified, or is in the process of a classification determination in accordance with the standards set forth in Executive Order 13526 as amended or superseded, or other applicable Executive order, I hereby agree that I will never disclose in any form or any manner, to any person not authorized by the U.S. Government to receive it, any information or material in either of the following categories:

a. information or material, including oral communications, received or obtained pursuant to this agreement with the U.S. Government that is marked as classified or that I have been informed or otherwise know is classified;

b. information or material, including oral communications, received or obtained pursuant to this agreement with the U.S. Government that I have been informed or otherwise know is in the process of a classification determination.

4. I understand that it is my responsibility to consult with appropriate management authorities in the U.S. Government component that has sponsored my access, or with the prepublication review component of the agency that gave or sponsored my access to classified information if I am no longer associated with the U.S. Government, in order to know: 1) whether information or material within my knowledge or control that I have reason to believe might be in either of the categories set forth in paragraph 3 is considered by the U.S. Government to fit in either of those categories; and, 2) whom the U.S. Government has authorized to receive such information or material.

5. As a further condition of the special confidence and trust reposed in me by the U.S. Government, I hereby agree to submit for review by the U.S. Government, any writing or other preparation in any form, including a work of fiction, which contains any mention of intelligence data or activities, or which contains any other information or material that might be based upon either of the categories set forth in paragraph 3, that I contemplate disclosing publicly or that I have

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actually prepared for public disclosure, either during my service with the U.S. Government or at any time thereafter, prior to discussing it with or showing it to anyone who is not authorized to have access to the categories set forth in paragraph 3. I further agree that I will not take any steps toward public disclosure until I have received written permission to do so from the U.S. Government.

6. I understand that the purpose of the review described in paragraph 5 above is to give the U.S. Government an opportunity to determine whether the information or material that I contemplate disclosing publicly contains any information or material that I have agreed not to disclose in accordance with paragraph 3. I further understand that the U.S. Government will act upon my submission and make a response to me within a reasonable time. I further understand that if I dispute the U.S. Government's initial determination on the basis that the information in question derives from public sources, I may be called upon to specifically identify such sources. My failure or refusal to do so may itself result in denial of permission to publish or otherwise disclose the information or material in dispute. I further understand that when otherwise classified information is also available independently in open sources and can be cited by the author the U.S. Government will consider that fact in making its determination on whether the information may be published with the appropriate citations, but I recognize that the U.S. Government retains the right to disallow certain open-source information or citations where, because of the author's U.S. Government affiliation and position the reference might confirm the classified content.

7. I understand that all information or material that I may acquire pursuant to this agreement with the U.S. Government that fits either of the categories set forth in paragraph 3 of this agreement are and will remain the property of the U.S. Government unless or until otherwise determined by an authorized Executive branch official or final ruling of a court of law. I agree that I will not use such information or material for any personal or non-official purposes. I also agree to surrender anything constituting, containing or reflecting such information or material upon the conclusion of my employment or other service with the U.S. Government. I further agree to surrender anything constituting, containing, or reflecting such information or material, upon demand by an appropriate official of the U.S. Government.

8. I agree to notify the U.S. Government immediately in the event that I am called upon by judicial or Congressional authorities, or by specially established investigatory bodies of the Executive branch, to testify about, or provide, information or material that I have agreed herein not to disclose. In any legally authorized communications with any such authority or body, I shall observe all applicable rules or procedures for ensuring that information and/or material that is classified or in the process of a classification determination is handled in a secure manner.

9. I understand that nothing contained in this agreement prohibits me from reporting intelligence activities that I consider to be unlawful or improper directly to the Intelligence Oversight Board established by the President, or to any successor body that the President may establish, or to the Senate Select Committee on Intelligence or the House Permanent Select Committee on Intelligence. I recognize that there are also established procedures for bringing such matters to the attention of Inspector General of the agency that gave or sponsored my access to classified information or to the head of the agency that gave or sponsored my access to classified

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information. In making any report referred to in this paragraph, I will observe all applicable rules and procedures for ensuring the secure handling of any information or material that may be involved. I understand that any such information or material continues to be subject to this agreement for all other purposes and that such reporting does not constitute public disclosure or declassification of that information or material.

10. I understand that any breach of this agreement by me may result in the U.S. Government taking administrative action against me, if applicable, which can include suspension or termination of my security clearance and relationship with the U.S. Government. I understand that if I violate the terms of this agreement, the U.S. Government may institute a civil proceeding to seek damages or other appropriate relief. Further, I understand that the disclosure of information that I have agreed herein not to disclose can, in some circumstances, constitute a Federal criminal offense.

11. I understand that the U.S. Government may, prior to any unauthorized disclosure that is threatened by me, choose to apply to any appropriate court for an order enforcing this agreement. Nothing in this agreement constitutes a waiver on the part of the United States to institute a civil or criminal proceeding for any breach of this agreement by me. Nothing in this agreement constitutes a waiver on my part of any possible defenses I may have in connection with either civil or criminal proceedings that may be brought against me.

12. In addition to any other remedy to which the U.S. Government may become entitled, I hereby assign to the U.S. Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any divulgence, publication, or revelation of information or material by me that is carried out in breach of paragraph 5 of this agreement or that involves information or material prohibited from disclosure by the terms of this agreement.

13. I understand and accept that, unless I am provided a written release from this agreement or any portion of it by the head of the agency that gave or sponsored my access to classified information or his or her authorized representative, all the conditions and obligations accepted by me in this agreement apply during my service with the U.S. Government, and at all times thereafter.

14. I understand that the purpose of this agreement is to implement the protection of intelligence sources and methods under the National Security Act of 1947, as amended, and Executive Order 12333, as amended.

15. Nothing in this agreement bars disclosures to Congress or disclosures to an authorized official of an executive agency that are deemed essential to reporting of a violation of United States law.

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16. I understand that nothing in this agreement limits or otherwise affects any provision of criminal or other law that may be applicable to the unauthorized disclosure of classified information, including the espionage laws (sections 793, 794 and 798 of title 18, United States Code) and the Intelligence Identities Act of 1982 (P.L. 97-200; 50 U.S.C. §3121 *et. seq.*).

17. Each of the numbered paragraphs and lettered subparagraphs of this agreement is severable. If a court should find any paragraphs or subparagraphs of this agreement to be unenforceable, I understand that all remaining provisions will continue in full force.

18. I make this agreement in good faith, and with no purpose of evasion.

19. This agreement shall be interpreted under and in conformance with the law of the United States.

_____
Signature

_____
Date

_____
Social Security Number (See Notice below)

The execution of this agreement was witnessed by the undersigned, who accepted it on behalf of the U.S. Government as a prior condition of access to classified information by the person whose signature appears above.

WITNESS AND ACCEPTANCE:

_____
Signature

_____
Printed Name

_____
Date

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NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above or 2) determine that your access to the information indicated has terminated. Although disclosure of your SSN is not mandatory, your failure to do so may impede the processing of such certifications or determinations, or possibly result in the denial of your being granted access to classified information.

EXHIBIT J:

Instruction 80.04, Revision 2, *ODNI Pre-Publication Review of Information to Be Publicly Released*

(effective Aug. 9, 2016)

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
INSTRUCTION 80.04
Category 80 - Information and Records Management
Office of Primary Responsibility: Assistant Director of National Intelligence for Policy and Strategy/ Information Management Division
Revision 2

SUBJECT: ODNI PRE-PUBLICATION REVIEW OF INFORMATION TO BE PUBLICLY RELEASED

1. AUTHORITIES: The National Security Act of 1947, as amended; and other applicable provisions of law.

2. REFERENCES: Executive Order (E.O.) 12333, as amended; E.O. 13526; *Intelligence Community Markings System Register and Manual*; and the *Office of the Director of National Intelligence (ODNI) Classification Guide.*

3. PURPOSE: This Instruction establishes the requirements and responsibilities in the ODNI for pre-publication review of all information that is to be released publicly. The goal of pre-publication review is to prevent the unauthorized disclosure of information, and to ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication. This Instruction replaces ODNI Instruction 80.04, *ODNI Pre-publication Review of Information to be Publicly Released*, dated April 8, 2014.

4. APPLICABILITY: This Instruction applies to current and former ODNI permanent cadre employees; ODNI staff reserve (i.e., time-limited) cadre employees, including Highly Qualified Experts; federal civilian detailees; military detailees; Intergovernmental Personnel Act detailees; Presidential appointees; assignees; and contractors. In accordance with any relevant agreement by the ODNI and other government agencies (OGAs), this Instruction also applies to OGA employees providing service support to the ODNI. The above listed group will be referred to collectively as "individuals" in this Instruction.

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5. DEFINITIONS:

A. **Chatham House Rule:** An understanding, spoken or unspoken, that during academic discussions, the topics discussed and opinions relayed will NOT be attributed to individuals or organizations. This rule is intended to allow the free discussion of academic ideas and opinions without attribution.

B. **Non-official publication:** The category of publications created by individuals for personal, professional, or commercial use that will be made available to the public (e.g., resumes, books, op-eds, personal blogs, performance evaluation reports [PERs] for personal use).

C. **Official publication:** The category of publications created by individuals as part of their duties on behalf of the ODNI, the DNI, the Intelligence Community (IC), or the U.S. Government (USG) that will be made available to the public (e.g., speeches, newsletters, official web pages, outreach documents, brochures).

D. **Publication:** Any information created in part (co-authored) or wholly by individuals intended for release outside the control of the USG, regardless of the medium by which it will be released (i.e., written, voice, or electronic) that discusses any information related to the ODNI, the IC, or national security.

E. **Release:** Allowing information to be made available to the public.

6. POLICY: The ODNI has a security obligation and legal responsibility under E.O. 12333 and E.O. 13526 to safeguard sensitive intelligence information and prevent its unauthorized publication as defined in paragraph 5.D. The Director, Information Management Division (D/IMD), serves as the ODNI authority for approval of all ODNI public release reviews. All individuals are required to submit all official and non-official information intended for publication that discusses the ODNI, the IC, or national security. Any 'For Official Use Only' (FOUO) information intended for State, Local, Tribal, and Public Sector (SLTP) must be approved by the IMD. The IMD will coordinate, as necessary, with the Assistant DNI for Partner Engagement (ADNI/PE) on any FOUO information to be shared with foreign partners. FOUO information disseminated within the USG (e.g., Departments of State, Defense, Homeland Security, Treasury) does not require an IMD review. Pre-publication review must be conducted before any uncleared individuals can receive the information, and before the material is sent for peer review via unclassified channels. This Instruction does not release individuals from their obligation to fully comply with nondisclosure agreements (NDAs), nor does it authorize individuals to alter the terms of such agreements. In case of any conflict between this Instruction and an NDA, the NDA shall govern. ODNI pre-publication reviews will be executed as follows:

A. **Pre-submission**: Individuals must initiate a request for approval for the publication of information and conform to the following guidance:

(1) Classification: The individual initiating the request must ensure all draft documents

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are correctly classified and portion marked prior to submission for review. See the *IC Markings System Register and Manual* and the current *ODNI Classification Guide* for guidance on correct classification and markings.

(2) Sourcing: Correct unclassified sourcing is critical in executing pre-publication review. Individuals must not use sourcing that comes from known leaks, or unauthorized disclosures of sensitive information. The use of such information in a publication can confirm the validity of an unauthorized disclosure and cause further harm to national security. Individuals are not authorized to use anonymous sourcing.

(3) The Public Affairs Office (PAO) will ensure that official information intended for public release is consistent with the official ODNI position or message. The PAO will approve or disapprove the use of official ODNI seals and letterhead associated with the intended release, as deemed appropriate.

(4) Individuals must obtain supervisor approval for official publication requests, in accordance with internal review requirements of their component, before submitting information for pre-publication review.

(5) Contractual deliverables that will be publicly released must receive approval of the Contracting Officer (CO) or the Contracting Officer's Technical Representative (COTR) prior to submission for pre-publication review. The written approval from the CO or COTR must be included in the submission for review.

(6) Individuals must, prior to participating in open discussion venues such as forums, panels, round tables, and questions and answer (Q&A) sessions, either in-person or online, comply with the following conditions:

(a) Individuals must obtain approval from the PAO to represent the ODNI in any capacity at any public forum.

(b) Individuals expecting to engage in unstructured or free-form discussions about operations, business practices, or information related to the ODNI, the IC, or national security must prepare an outline of the topics to be discussed or the agenda to be followed, and provide to the IMD anticipated potential questions and ODNI responses.

(7) Disclaimer: Approval of non-official publications does not imply endorsement by the ODNI, IC, or national security. Any opinions offered by individuals must be clearly marked as official ODNI or USG positions, or contain a disclaimer that the opinions are not those of the ODNI or USG. The following disclaimer is an example for a non-official publication created by an individual who expresses an opinion about the ODNI, IC, or USG:

"The views expressed in (this publication/these remarks) are the author's and do not imply endorsement by the Office of the Director of National Intelligence or any other U.S. Government agency."

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Disclaimers are not required for PERs, resumes, bios, or as others exempted by the D/IMD.

B. **Submission**: Individuals must submit requests electronically via email to DNI-Pre-Pub. Requests must include results from all previous pre-publication requests for the same information. Publication requests made through the Outside Activities Report (OAR) database must also include a separate email submission to DNI-Pre-Pub@cia.ic.gov (classified) or DNI-Pre-Pub@dni.gov (unclassified) for final approval. Exceptions are as follows:

(1) Former individuals assigned to the ODNI who, lacking access to classified email, will submit requests to DNI-Pre-Pub@dni.gov and ensure their publications have been clearly sourced to unclassified information prior to transmittal.

(2) Detailees and assignees will submit requests for non-official publications to their home agency, provided the home agency has an established publication review process. The IMD will assist those detailees and assignees uncertain of how to submit requests to their home agency.

(3) The Director, Intelligence Advanced Research Projects Agency (D/IARPA), or designee, is delegated the authority to review and publicly disseminate official IARPA technical publications independent of the review process outlined in this Instruction.

C. **Review:**

(1) The IMD will lead the coordination with all USG agencies and internal ODNI subject matter experts (SMEs) that have equities in a submitted request. The IMD will de-conflict any issues on responses from separate agencies and from within the ODNI, and will provide a single and final response to the requester.

(2) Timelines for review are determined by type of request, complexity of subject, SME time constraints, and requester deadlines. General time lines for reviews are:

(a) For Official Publications: The IMD will complete a review of official publication requests no later than 15 business days from the receipt of the request, as priorities and resources allow.

(b) For Non-Official Publications: The IMD will complete a review of non-official publication requests no later than 30 calendar days from the receipt of the request, as priorities and resources allow.

(3) Requesters must not assume approval in cases where the IMD's reply has not been received by the time guidelines described in this Instruction. It is the responsibility of the requester to protect the information until a formal approval is provided.

D. **Re-submission:** In the event that a request for public release is denied in whole or in part by the IMD, the requester may resubmit the request to the IMD for a second review. The

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resubmittal must include results from the initial pre-publication requests, and must include additional information and/or a revised draft.

E. **Appeal:** If publication is denied by the IMD for a second time, the requester may submit a written appeal to the IMD no later than 30 calendar days from the date of the denial. The IMD will coordinate the appeal process. Appeal documentation must include the information intended for publication and any supporting materials to be considered. The IMD will provide the information to the Chief Management Officer (CMO) for final decision. The CMO will receive support from any USG agency and internal ODNI SMEs in the appeal decision, as appropriate. The CMO will issue a final decision, through the IMD, to the requester as time and resources allow.

F. **Consequences for non-compliance:** Failure to comply with this Instruction may result in the imposition of civil and administrative penalties, and may result in the loss of security clearances and accesses.

G. **Non-attribution during discussions (Chatham House Rule):** Individuals who participate in environments where the Chatham House Rule applies are not authorized to discuss information or topics that are not authorized for public release. Information that is deemed sensitive or classified due to attribution to the IC or USG cannot be discussed under the Chatham House Rule.

7. RESPONSIBILITIES:

A. The Chief Management Officer will:

(1) Provide oversight for this policy and the pre-publication review process.

(2) Issue final decisions on all formal appeals from requesters.

B. The Director, Information Management Division, or designee, will:

(1) Implement this Instruction.

(2) Serve as the approval authority for public release of ODNI information to the public, based on classification, policy, and other applicable authorities.

(3) Coordinate timely pre-publication reviews with all appropriate ODNI components and USG agencies. This includes obtaining, as necessary, additional information from the requester, clarification of purpose, and to make a final determination.

(4) Provide all staff support to the CMO in the appellate process, to include the preparation of all necessary appeal information to be presented to the CMO.

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(5) Maintain records for all pre-publication review requests, dispositions, and associated actions.

C. The Director, Public Affairs Office, or designee, will:

(1) Determine if individuals are authorized to officially represent the ODNI, the IC, or USG publicly.

(2) Review official publications for accuracy, clarity, and consistency of ODNI message as part of the pre-publication review process.

D. The Director, Intelligence Advanced Research Projects Agency, or designee, will exercise authority granted in this Instruction to review and publicly disseminate any official IARPA technical publications independent of the review process outlined in this Instruction.

E. Component Directors will, when requested by the D/IMD, designate one or more component SMEs as appropriate, either permanently or on a case-by case basis, to participate in pre-publication reviews. SMEs will limit the scope of their reviews to their component's area of expertise, and provide comments solely on the appropriateness of the information under review for public release.

8. EFFECTIVE DATE: This Instruction is effective upon signature.

Mark W. Ewing
Chief Management Officer

9 August 2016
Date

EXHIBIT K:

Standard Form 312, *Classified Information Nondisclosure Agreement*

(revised July 2013)

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

AN AGREEMENT BETWEEN AND THE UNITED STATES

(Name of Individual - Printed or typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 13526, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in sections 1.1, 1.2, 1.3 and 1.4(e) of Executive Order 13526, or under any other Executive order or statute that requires protection for such information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; or termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of sections 641, 793, 794, 798, *952 and 1924, title 18, United States Code; *the provisions of section 783(b}, title 50, United States Code; and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all classified information to which I have access or may obtain access by signing this Agreement is now and will remain the property of, or under the control of the United States Government unless and until otherwise determined by an authorized official or final ruling of a court of law. I agree that I shall return all classified materials which have, or may come into my possession or for which I am responsible because of such access: (a) upon demand by an authorized representative of the United States Government; (b) upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance or that provided me access to classified information; or (c) upon the conclusion of my employment or other relationship that requires access to classified information. If I do not return such materials upon request, I understand that this may be a violation of sections 793 and/or 1924, title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

10. These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

(Continue on reverse.)

11. These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 13526 (75 Fed. Reg. 707), or any successor thereto section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b) (8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud , abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); sections 7(c) and 8H of the Inspector General Act of 1978 (5 U.S.C. App.) (relating to disclosures to an inspector general, the inspectors general of the Intelligence Community. and Congress); section 103H(g)(3) of the National Security Act of 1947 (50 U.S.C. 403-3h(g)(3) (relating to disclosures to the inspector general of the Intelligence Community); sections 17(d)(5) and 17(e)(3) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403g(d)(5) and 403q(e)(3)) (relating to disclosures to the Inspector General of the Central Intelligence Agency and Congress); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, *952 and 1924 of title 18, United States Code, and *section 4 (b) of the Subversive Activities Control Act of 1950 (50 U.S.C. section 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive Order and listed statutes are incorporated into this agreement and are controlling.

12. I have read this Agreement carefully and my questions, if any, have been answered. I acknowledge that the briefing officer has made available to me the Executive Order and statutes referenced in this agreement and its implementing regulation (32 CFR Part 2001 , section 2001 .80(d)(2)) so that I may read them at this time, if I so choose.

* NOT APPLICABLE TO NON-GOVERNMENT PERSONNEL SIGNING THIS AGREEMENT.

SIGNATURE	DATE	SOCIAL SECURITY NUMBER *(See Notice below)*

ORGANIZATION (IF CONTRACTOR, LICENSEE, GRANTEE OR AGENT, PROVIDE: NAME, ADDRESS, AND, IF APPLICABLE, FEDERAL SUPPLY CODE NUMBER) *(Type or print)*

WITNESS		ACCEPTANCE	
THE EXECUTION OF THIS AGREEMENT WAS WITNESSED BY THE UNDERSIGNED.		**THE UNDERSIGNED ACCEPTED THIS AGREEMENT ON BEHALF OF THE UNITED STATES GOVERNMENT.**	
SIGNATURE	DATE	SIGNATURE	DATE
NAME AND ADDRESS *(Type or print)*		NAME AND ADDRESS *(Type or print)*	

SECURITY DEBRIEFING ACKNOWLEDGEMENT

I reaffirm that the provisions of the espionage laws, other federal criminal laws and executive orders applicable to the safeguarding of classified information have been made available to me; that I have returned all classified information in my custody; that I will not communicate or transmit classified information to any unauthorized person or organization; that I will promptly report to the Federal Bureau of Investigation any attempt by an unauthorized person to solicit classified information, and that I (have) (have not) (strike out inappropriate word or words) received a security debriefing.

SIGNATURE OF EMPLOYEE	DATE

NAME OF WITNESS *(Type or print)*	SIGNATURE OF WITNESS

NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Number (SSN) is Public Law 104-134 (April 26, 1996). Your SSN will be used to identify you precisely when it is necessary to certify that you have access to the information indicated above or to determine that your access to the information indicated has been terminated. Furnishing your Social Security Number, as well as other data, is voluntary, but failure to do so may delay or prevent you being granted access to classified information.

STANDARD FORM 312 BACK (Rev. 7-2013)

EXHIBIT L:

Form 4414, *Sensitive Compartmented Information Nondisclosure Agreement*

(revised Dec. 2013)

Print Form

Apply appropriate classification level and any control markings (if applicable) when filled in.

(U) SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement between _____ and the United States.
(*Name – Printed or Typed*)

1. (U) Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information or material protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or is in process of a classification determination under the standards of Executive Order 13526 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. (U) I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information or material have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. (U) I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I understand that it is my responsibility to consult with appropriate management authorities in the Department or Agency that last authorized my access to SCI, whether or not I am still employed by or associated with that Department or Agency or a contractor thereof, in order to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be, or related to or derived from SCI, is considered by such Department or Agency to be SCI. I further understand that I am also obligated by law and regulation not to disclose any classified information or material in an unauthorized fashion.

4. (U) In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, 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 or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose the contents of such preparation with, or show it to, anyone who is not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

5. (U) I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the preparation submitted pursuant to paragraph 4 sets forth any SCI. I further understand that the Department or Agency to which I have made a submission will act upon it, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. (U) I have been advised that any breach of this Agreement may result in my termination of my access to SCI and removal from a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. (U) I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorney's fees incurred by the United States Government may be assessed against me if I lose such action.

8. (U) I understand that all information to which I may obtain access by signing this Agreement is now and will remain the property of the United States Government unless and until otherwise determined by an appropriate official or final ruling of a court of law. Subject to such determination, I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials that may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code.

9. (U) Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed on me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. (U) Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other

Apply appropriate classification level and any control markings (if applicable) when filled in.

conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. (U) I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798 and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 13526, as amended, so that I may read them at this time, if I so choose.

12. (U) I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

13. (U) These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

14. (U) These restrictions are consistent with and do not supersede conflict with or otherwise alter the employee obligations rights or liabilities created by Executive Order13526; or any successor thereto, Section 7211 of Title 5, United States Code (governing disclosures to Congress); Section 1034 of Title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosures to Congress by members of the Military); Section 2302(b)(8) of Title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosure of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents), sections 7(c) and 8H of the Inspector General Act of 1978 (5 U.S.C. App.) (relating to disclosures to an inspector general, the inspectors general of the Intelligence Community; and Congress); section 103H(g)(3) of the National Security Act of 1947 (50 U.S.C. 403–3h(g)(3) (relating to disclosures to the inspector general of the Intelligence Community); sections 17(d)(5) and 17(e)(3) of the CIA Act of 1949 (50 U.S.C. 403q(d)(5) and 403q(e)(3)) (relating to disclosures to the Inspector General of the Central Intelligence Agency and Congress): and the statutes which protect agent disclosure which may compromise the national security, including Section 641, 793, 794, 798, and 952 of Title 18, United States Code, and Section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. Section 783(b)). The definitions, requirements, obligations, rights, sanctions and liabilities created by said Executive Order and listed statutes are incorporated into this Agreement and are controlling.

15. (U) This Agreement shall be interpreted under and in conformance with the law of the United States.

16. (U) I make this Agreement without any mental reservation or purpose of evasion.

_____ _____
Signature *Date*

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

WITNESS and ACCEPTANCE: _____ _____
Signature *Date*

SECURITY BRIEFING / DEBRIEFING ACKNOWLEDGMENT

_____ _____ _____ _____ _____ _____
_____ _____ _____ _____ _____ _____
(Special Access Programs by Initials Only)

_____ _____ _____
SSN (See Notice Below) Printed or Typed Name Organization

BRIEF Date_____

I hereby acknowledge that I was briefed on the above SCI Special Access Program(s):

_____
Signature of Individual Briefed

DEBRIEF Date_____

Having been reminded of my continuing obligation to comply with the terms of this Agreement, I hereby acknowledge that I was debriefed on the above SCI Special Access Program(s):

_____
Signature of Individual Briefed

I certify that the briefing presented by me on the above date was in accordance with relevant SCI procedures.

_____ _____
Signature of Briefing/Debriefing Officer SSN (See notice below)

_____ _____
Printed or Typed Name Organization (Name and Address)

(U) NOTICE: The Privacy Act, 5 U.S.C. 522a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397, as amended. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information Indicated above, 2) determine that your access to the information has terminated, or 3) certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure to do so may Impede such certifications or determinations.

FORM 4414 (Rev. 12-2013)

Memorandum Opinion (ECF 46), filed April 16, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

TIMOTHY H. EDGAR, *et al.*,	*	
Plaintiffs,	*	
v.	*	**Case No.: GJH-19-985**
DANIEL COATS, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

Former national security professionals Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon ("Plaintiffs") bring this action against the Director of National Intelligence, the Director of the Central Intelligence Agency, the Secretary of Defense, and the Director of the National Security Agency ("Defendants"), challenging the constitutionality of the agencies' prepublication review ("PPR") regimes, which require current and former employees to submit materials they intend to publish to the agencies if they concern certain subjects. The Complaint, ECF No. 1, alleges that the regimes are void for vagueness under the First and Fifth Amendments and violate the First Amendment by investing the agencies with excessive discretion to suppress speech and failing to include necessary procedural safeguards. Defendants have moved to dismiss the Complaint. ECF No. 30. Also pending before the Court are a motion by three Plaintiffs to omit their home addresses from the caption in their Complaint, ECF No. 8, and a third party's Motion for Leave to submit an amicus brief, ECF No. 34. No hearing is necessary. *See* Loc. R. 105.6 (D. Md.). For the following reasons, all of the pending motions will be granted and the action will be dismissed.

I. BACKGROUND[1]

In reviewing the Complaint's allegations, the Court first discusses each of the Plaintiffs before turning to the structure and operation of Defendants' PPR regimes.

A. Plaintiffs

Plaintiff Edgar, a Rhode Island resident, is a cybersecurity expert who was employed by the Office of the Director of National Intelligence (the "ODNI") from 2006 until his resignation in June 2013. ECF No. 1 ¶¶ 56, 58. At various points during his time at ODNI, Edgar served in roles including Deputy for Civil Liberties and Senior Associate General Counsel. *Id.* ¶ 58. In 2009 and 2010, he was detailed to the White House National Security Staff as Director of Privacy and Civil Liberties. *Id.* After signing a nondisclosure agreement with the ODNI, Edgar obtained a Top Secret/Sensitive Compartmented Information ("TS/SCI") security clearance in 2006, which he held continuously until June 2013. *Id.* ¶ 59.

During his employment, Edgar submitted for PPR official material prepared for public appearances he made on behalf of the government and syllabi for Brown University and Georgetown University Law Center courses he taught in 2012 and 2013. *Id.* ¶ 60. Since his departure from the agency, Edgar has submitted to the ODNI blog posts and op-eds that have appeared in major publications, including the *Guardian*, the *Los Angeles Times*, and the *Wall Street Journal*, and on the *Lawfare* national security blog. *Id.* ¶ 61. On October 10, 2016, Edgar submitted to the ODNI's PPR office a book manuscript entitled *Beyond Snowden: Privacy, Mass Surveillance, and the Struggle to Reform the NSA*. *Id.* ¶ 62. Some portions of the manuscript were based on his personal experiences, but Edgar relied on and cited declassified documents "for pertinent details." *Id.*

[1] Unless otherwise stated, these facts are taken from the Complaint, ECF No. 1, and are presumed to be true.

After Edgar submitted the manuscript, the ODNI informed him that it was referred to the Central Intelligence Agency ("CIA") and the National Security Agency ("NSA") for additional review. *Id.* ¶ 63. Edgar was unable to communicate directly with reviewing officials at those agencies despite multiple inquiries. *Id.* On January 12, 2017, the ODNI informed Edgar that he could publish the manuscript only if he redacted or excised certain material. *Id.* ¶ 64. Some of the redactions related to events that had taken place or issues that had arisen after Edgar had left government, while others related to facts that were widely discussed and acknowledged if not officially confirmed. *Id.*

Edgar disagreed with some of the redactions but decided not to challenge them. *Id.* He had already delayed his publication date, partly because of the three-month PPR process, and worried that delaying it further would make some of the analysis and insights in his book outdated or less relevant to ongoing public debates. *Id.* He also sought to maintain a good relationship with the ODNI reviewers because of concerns that future publications would be subject to greater delays if he did not. *Id*. In the future, Edgar plans to continue writing about intelligence and cybersecurity matters and anticipates submitting at least some of these materials for PPR. *Id.* ¶ 65. He expects that any manuscripts he submits may be referred to the NSA, CIA, or other agencies, as happened with *Beyond Snowden*, which has now been published. *Id.*

Edgar believes that the ODNI's PPR regime requires him to submit an excessive amount of material and finds the agency's submission requirements to be vague and confusing, leaving him uncertain of the exact scope of his submission obligations. *Id.* ¶ 66. He fears that the delay associated with PPR will hinder his career as an academic and impede his ability to participate effectively in public debates on matters involving his area of expertise. *Id.* He further alleges that the delay and uncertainty associated with PPR has dissuaded him from writing some pieces that

he otherwise would have written and caused him to write others differently than he otherwise would have. *Id.* Finally, he believes that the ODNI, CIA, and NSA might have taken longer to review his book if they had perceived it to be unsympathetic to the intelligence community. *Id.* He is also concerned that "government censors will be less responsive to him if he writes books that are perceived to be critical." *Id.*

Plaintiff Immerman, a Pennsylvania resident, is a historian with expertise in U.S. foreign relations who retired in 2017 after holding a series of distinguished academic posts. *Id.* ¶¶ 67–68. From 2007 to 2009, he took leave from his faculty position at Temple University to serve at the ODNI as the Assistant Deputy Director of National Intelligence, Analytic Integrity and Standards, and as the agency's Analytic Ombudsman. *Id.* ¶ 69. After signing a nondisclosure agreement with the ODNI, Immerman obtained TS/SCI clearance in 2007. *Id.* ¶ 71. In 2009, shortly after returning to Temple, Immerman accepted an invitation to serve on the U.S. Department of State's Advisory Committee on Historical Diplomatic Documentation (referred to as the "HAC"), of which he became chairman in 2010. *Id.* ¶ 70. In 2011 or 2012, Immerman signed a nondisclosure agreement with the CIA related to his HAC responsibilities. *Id.* ¶ 71.

Since leaving the ODNI, Immerman has submitted book manuscripts, articles, papers, public talks, and academic syllabi to the agency for PPR. *Id.* ¶ 72. On January 25, 2013, Immerman emailed to the ODNI's PPR office a manuscript entitled *The Hidden Hand: A Brief History of the CIA*. *Id.* ¶ 73. The manuscript did not directly or indirectly refer to any classified information that Immerman obtained while employed with the ODNI or Department of State and cited public sources for all factual propositions. *Id.* The ODNI acknowledged receipt three days after Immerman's email. *Id.* ¶ 74. Nearly three months later, Immerman was informed that the agency had referred part of the manuscript to the CIA for additional review. *Id.* Several weeks

after that, the ODNI informed him that the CIA was reviewing the entire manuscript. *Id.* Immerman contacted the CIA but was unable to obtain information about the review. *Id.*

On July 12, 2013, the ODNI informed Immerman that he could publish the manuscript only with extensive redactions mandated by the CIA, all of which related to information for which Immerman had cited public sources. *Id.* ¶ 75. Some redactions related to information that government agencies including the CIA had published previously, and many related to events that had taken place or issues that had arisen after Immerman left government. *Id.* In some instances, the ODNI directed Immerman to excise citations to newspaper articles, while in others the ODNI directed Immerman to delete passages relating to information he had obtained from public sources, including information about the CIA's use of drones. *Id.* The ODNI also instructed him to redact words communicating judgments and arguments he considered fundamental to his conclusions as a trained historian. *Id.* The agency did not provide Immerman with any explanation for the mandated redactions. *Id.* ¶ 76.

Immerman appealed the PPR office's determination to the agency's Information Management Division, which several weeks later informed him that he could publish a significant portion of the text that the PPR office had directed him to redact. *Id.* ¶ 77. In September 2013, Immerman was able to meet with two reviewing officials from the CIA. *Id.* ¶ 78. The officials agreed with Immerman that some of the redactions were unnecessary and authorized him to publish additional text with revised wording but reaffirmed their view that other redactions were required. *Id.* ¶ 78. Immerman disagreed but decided to proceed with publishing with the redactions in place to avoid further delay. *Id.* The draft that was eventually published, after a ten-month review process, included approximately eighty percent of the material that the agencies had originally redacted. *Id.*

Immerman plans to continue publishing articles, books, and op-eds, some of which will trigger his PPR obligations under the ODNI's regime. *Id.* ¶ 79. At the time the Complaint was filed, Immerman was drafting an academic article on the influence of intelligence on the policymaking process and was conducting research on the contribution of intelligence to negotiations on strategic arms limitation from the Nixon through Reagan administrations, on which he intends to write a book that he will submit for PPR. *Id.* Immerman asserts that he would publish more "[b]ut for the dysfunction of the [PPR] system." *Id.* ¶ 80. He believes that the regime requires submission of far more material than should be required, that the ODNI's and CIA's "arbitrary and unjustified redactions" will diminish the value of the work he submits, and that the time required for review will make it more difficult for him to contribute to public debates in a timely way. *Id.* Finally, he has been dissuaded by "[c]oncerns about the burdens and uncertainties associated" with PPR from writing academic articles and op-eds about research he has conducted for his book and the intelligence community and current administration. *Id.*

Plaintiff Goodman, a Maryland resident, is an expert on the former Soviet Union who spent 42 years in government, including 34 years at the CIA's Directorate of Intelligence on Soviet Foreign Policy and as a professor of international security at the National War College. *Id.* ¶¶ 81–82. Goodman held a TS/SCI clearance until he left government in 2006. *Id.* ¶ 83. When Goodman first joined the CIA in 1966 and gained his clearance, he signed a secrecy agreement that included a provision relating to PPR. *Id.* ¶ 84. Since leaving the CIA in 1986, Goodman has submitted multiple works to the agency for PPR, though in some cases he has not submitted shorter pieces, including op-eds, that were time-sensitive and that he was confident did not contain classified information or other information he obtained during his employment. *Id.* ¶¶ 82, 85–86. On at least six occasions after publishing an op-ed, Goodman received letters from the

CIA reminding him of his PPR obligations, including a 2009 letter threatening to refer him to the Department of Justice. *Id.* ¶ 86.

Goodman has published nine books and has submitted each manuscript to the CIA for PPR. *Id.* ¶ 87. One of the manuscripts was referred to other agencies for additional review, including the Department of Defense ("DOD") and the Department of State. *Id.* Despite Goodman's requests, the CIA declined to provide contact information for reviewers at the other agencies, who operated more slowly than the CIA. *Id.* In general, the CIA has mailed Goodman's manuscripts back to him with redactions, edits, and suggestions for alternative language. *Id.* ¶ 88. Goodman has frequently believed the CIA's redactions were overbroad and unjustified and has often sent the agency requests known as "reclamas" asking the agency to reconsider their redactions and edits and explaining why publication should be allowed. *Id.*

The PPR process has taken less than two months for most of Goodman's books. *Id.* ¶ 89. In 2017, however, the CIA took eleven months to review a manuscript entitled *Whistleblower at the CIA* in which Goodman provided an account of his experience as a senior CIA analyst. *Id.* In part because of the delay, Goodman's publisher at one point threatened to cancel his contract. *Id.* All of the changes to the manuscript that the CIA eventually mandated, Goodman believes, were intended to protect the agency from embarrassment rather than to protect classified information. *Id.* ¶ 90. The manuscript discussed aspects of U.S. policy, including the use of armed drones overseas, of which Goodman has no personal knowledge; his commentary in the book was based on cited press accounts. *Id.* The CIA demanded that Goodman not discuss these matters at all, however, and did not provide a written explanation. *Id.* Goodman met with a CIA official but was unable to persuade the agency to reconsider and thus decided to remove the passages to which the agency had objected. *Id.* ¶ 91.

Goodman recently submitted a manuscript in which he alleges that he self-censored and avoided discussing certain public source information about current CIA Director and Defendant Gina Haspel. *Id.* ¶ 92. Goodman learned the information at issue as a member of the public but chose not to include it in the manuscript to avoid delays and conflicts with the CIA's PPR office. *Id.* ¶ 92. Consistent with his past practice, Goodman intends to submit portions of any future manuscripts that deal with intelligence matters but remains concerned that the agency will redact material unwarrantedly and that the PPR delay will jeopardize his book contracts and render his publications less relevant to evolving public debates. *Id.* ¶ 93.

Plaintiff Bhagwati, a New York resident, is a writer, activist, and former Marine Corps officer. *Id.* ¶ 94. Bhagwati obtained a Secret security clearance in the early 2000s. *Id.* ¶¶ 95–96. As a former DOD employee, Bhagwati is subject to the PPR requirements imposed by multiple DOD policies. *Id.* ¶ 96. In March 2019, Bhagwati published a memoir discussing her experiences with misogyny, racism, and sexual violence during her military service, but only learned of her PPR obligations on the eve of publication through conversations with her counsel in this action. *Id.* ¶¶ 94, 96, 98. She has also published more than a dozen op-ed and opinion pieces about her experiences in the Marine Corps and advocacy work she has performed on issues of sexual assault and discrimination in the military. *Id.* ¶ 97. She plans to continue her advocacy through written publications and public appearances but has no plans to submit any future work for PPR because she is certain that her future publications will not contain classified information. *Id.* ¶ 99.

Finally, Plaintiff Fallon, a Georgia resident, is a counterterrorism, counterintelligence, and interrogation expert who spent more than three decades in government service, primarily with the Naval Criminal Investigative Service ("NCIS"). *Id.* ¶ 100. Fallon served at the NCIS from 1981 to 2008, including in a number of senior leadership positions, before serving two

years at the Department of Homeland Security, which he departed in 2010. *Id.* ¶ 101. Between 2011 and 2016, he served as the chair of the High-Value Detainee Interrogation Group ("HIG") Research Committee. *Id.* ¶ 100. Fallon obtained a Top Secret security clearance in 1981 when he joined the NCIS and held it continuously until 2010. *Id.* ¶ 102. He also obtained and held TS/SCI clearance during his career at NCIS, obtained it again in 2011 when he began work for the HIG, and obtained another in 2017 for consulting work he engages in with the U.S. government. *Id.*

Fallon has published op-eds, articles, columns, and a book since leaving government service, many of which he submitted to the DOD for PPR. *Id.* ¶ 103. In 2016, Fallon completed a book titled *Unjustifiable Means* about the George W. Bush administration's policies relating to "interrogation and torture of prisoners" and the experiences of public servants, including Fallon, who had opposed the policies. *Id.* ¶ 104. The book relied on information the government had declassified and on public record materials relating to "the Bush administration's policies and their consequences." *Id.* Fallon "was confident that the book did not contain properly classified information." *Id.* When he began writing the book in 2014, Fallon consulted former NCIS colleagues about PPR, one of whom stated that he had not submitted his own manuscript and the rest of whom advised him that they did not believe he was required to submit his. *Id.* ¶ 105.

In June 2016, Fallon contacted the DOD's PPR office after discovering it through his own research and was advised that the PPR process was voluntary and intended to aid authors. *Id.* ¶ 106. On October 4, 2016, however, Fallon received an email from a DOD official stating that she had noticed Fallon's forthcoming book on Amazon.com, asking if he had submitted it for PPR, and informing him that he was required to submit his works for review. *Id.* The official attached the DOD's PPR policies. *Id.* On January 3, 2017, the official advised Fallon by email that while DOD policies provide that review will be completed within 30 to 45 working days,

"the truth is that in most cases it takes a bit longer." *Id.* Fallon submitted his manuscript the following day. *Id.* ¶ 107. Given the expected length of the review, Fallon and his publisher agreed to a publication date of March 7, 2017. *Id.*

On January 11, 2017, the DOD PPR office informed Fallon that its review of the manuscript was complete but that review by other agencies was necessary as well, though the reviewing official would not identify the agencies. *Id.* ¶ 108. After Fallon noted his publication date, the official assured him that the DOD "would do everything it could to complete review by that date." *Id.* Fallon emailed the reviewing official at least eight times prior to the planned publication date, stressing that delay would force the date to be pushed back, which would require cancelling book tours and speaking engagements. *Id.* ¶ 109. The DOD did not inform Fallon that review was complete until August 25, 2017. *Id.* ¶ 110. It also required Fallon to make 113 separate excisions from the book if he wished to proceed with publication. *Id.*

In Fallon's view, "the excisions were arbitrary, haphazard, and inconsistent, and, at least in some instances, seemingly intended to protect the CIA from embarrassment." *Id.* Some related to material published in unclassified congressional reports while others concerned news articles Fallon had cited. *Id.* While Fallon believed that all of the excisions were unnecessary and unjustified, he decided not to challenge them to avoid delaying publication further. *Id.* ¶ 111. Fallon had originally intended to publish the book at the start of the Trump administration after torture became a major issue during the 2016 U.S. presidential campaign and it was important to him to publish "while it was still possible to influence the public debate on this subject." *Id.* ¶¶ 107, 111. Though Fallon was forced to cancel events and travel, and his publisher at one point threatened to cancel his contract for non-delivery, the book was eventually published on October 24, 2017. *Id.* ¶¶ 111–12.

Fallon asserts that his PPR experience with *Unjustifiable Means* "was so time-consuming, costly, and exhausting that he is unsure whether he is willing to embark on writing another book." *Id.* ¶ 112. Cancellations of his travel and events cost him personally and he "paid a premium after the book was cleared in order for his editors to work to finalize publication on a tight timeframe." *Id.* Fallon also discontinued certain consulting work while waiting for review to be completed, and his publisher informed him that the delay in publication made it less likely that bookstores would choose to carry or promote the book. *Id.* Since the publication of *Unjustifiable Means*, however, Fallon and a co-author drafted and submitted a new manuscript entitled *The HIG Project: The Road to Scientific Research on Interrogations*, which will be a chapter in a forthcoming book. *Id.* ¶ 113.

Fallon submitted the piece for review by the DOD on August 10, 2018 and along with his co-author followed up with the PPR office repeatedly over several months. On January 14, 2019, Fallon's co-author was informed by the review board of the Defense Intelligence Agency that the DOD's review board was waiting for a response from the Federal Bureau of Investigation ("FBI"). *Id.* On February 11, 2019, PPR of the manuscript was completed and it was cleared for publication with redactions. *Id.* ¶ 114. All of the redacted material, however, was information that Fallon had heard at unclassified public meetings with the HIG Research Committee. *Id.* Fallon believes that the redactions were motivated by political disagreement with his and his co-author's perspective on torture and the HIG Research Committee's work. *Id.*

In Fallon's experience, PPR "has been haphazard and opaque, and communication from the DOD has been sporadic and unhelpful." *Id.* ¶ 116. Fallon has come to believe that the DOD's PPR officials "have no control or influence over the other agencies to which they send authors' works for review" and that there is "a lack of accountability from those offices to the DOD." *Id.*

¶ 117. While Fallon plans to continue submitting to the DOD any op-eds, articles, columns, and books he writes in the future, he alleges that his experiences with PPR "continue to negatively impact him and deny him the opportunity to contribute to the public debate over breaking news." *Id.* ¶¶ 115, 118. Specifically, because of his concerns about potential delays and unjustified agency objections that arise with PPR, Fallon has declined offers to author op-eds and write articles on breaking news and topics of public concern because they require an immediate response. *Id.* ¶ 118. He also is unsure how his PPR obligations apply in academic settings, including whether he must submit edits and additions he makes to the work of others, which hinders his work and ability to engage with his colleagues. *Id.* Finally, Fallon worries that the government will retaliate against him by stripping his security clearance, which he requires for his consulting work, if he does not strictly comply with PPR requirements. *Id.* ¶ 119.

B. PPR Regimes

1. Historical Background

Plaintiffs assert that since its establishment in 1947, the CIA has required employees to sign secrecy agreements when they join and leave the agency that generally prohibit publication of manuscripts without obtaining agency consent. *Id.* ¶ 17. The number of such manuscripts increased markedly in the 1970s, leading the agency to create a Publications Review Board to review manuscripts by current employees. *Id.* ¶ 18. The Board's jurisdiction was expanded to reach submissions by former employees in 1977. *Id.*

In 1980, the Supreme Court decided *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), affirming the imposition of a constructive trust on proceeds earned by a former CIA officer who had published a book without submitting it for PPR. *Id.* ¶ 19. In 1983, President Reagan issued National Security Decision Directive 84, which mandated that intelligence

agencies require all persons with access to Sensitive Compartmented Information ("SCI") sign a nondisclosure agreement with a PPR provision. *Id.* ¶ 20. The Directive received significant bipartisan criticism from Congress and was suspended after legislation that would have prohibited most agencies from imposing PPR requirements was considered in hearings by a House subcommittee. *Id.* ¶ 21. Agencies continued to require employees to sign a form imposing essentially the same PPR requirements, however. *Id.* ¶ 22.

Plaintiffs further allege that the PPR system "has expanded on every axis" over the past several decades. *Id.* ¶ 23. Specifically, every U.S. intelligence agency now imposes a lifetime PPR requirement on at least some subset of former employees, PPR obligations are imposed on broader categories of employees, including those who never had access to SCI or any other classified information, the amount of information that is classified has "expanded dramatically," PPR regimes have become increasingly complex and varied across agencies, and the amount of material submitted for PPR has steadily increased, as has the amount of time agencies take to complete their reviews. *Id.* ¶¶ 24–29.

Plaintiffs highlight that the DOD, for example, imposes PPR obligations on all 2.9 million of its employees, that classification authorities made 49.5 million classification decisions in 2017, that the CIA received 8,400 PPR submissions in 2015, including 3,400 manuscripts, and that a draft report by the CIA Inspector General suggested that book-length manuscripts were projected to require a year to review. *Id.* ¶¶ 25–26, 28–29. Plaintiffs assert that as a result of these expansions, "the prepublication review system has become dysfunctional." *Id.* ¶ 30. The Complaint notes that the House and Senate Intelligence Committees instructed the Director of National Intelligence ("DNI") in 2017 to prepare a new PPR policy that would apply to all

intelligence agencies but that the DNI had not published or formulated such a policy as of the filing of the Complaint. *Id.*

2. Current Regimes

The Complaint then describes the PPR policy regimes of the CIA, the DOD, the NSA, and the ODNI, each of which Plaintiffs allege "restrains far more speech than can be justified by any legitimate government interest." *Id.* ¶ 31. According to the Complaint, each agency requires employees with access to classified information to complete Standard Form 312, "Classified Information Nondisclosure Agreement." *Id.* ¶¶ 32a, 38a, 44a, 50a. The form requires all covered employees who are "uncertain about the classification status of information" to "confirm from an authorized official that the information is unclassified before [they] may disclose it." *Id.* ¶ 32a (alteration in original). Employees with access to SCI must also complete Form 4414, "Sensitive Compartmented Information Nondisclosure Agreement," which requires all covered employees to submit for PPR "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 or that [the author has] reason to believe are derived from SCI." *Id.* ¶ 32b (alteration in original).[2]

Each agency also maintains additional secrecy and PPR policies. First, the CIA requires that all officers submit for PPR "any and all materials they intend to share with the public that are intelligence related," according to the agency's website. *Id.* ¶ 32c. Additionally, through Agency Regulation ("AR") 13-10, titled "Agency Prepublication Review of Certain Material Prepared for Public Dissemination," the CIA requires all "former Agency employees and contractors, and others who are obligated by CIA secrecy agreement," to submit for PPR any material "that mentions CIA or intelligence data or activities or material on any subject about

[2] Plaintiffs allege that DOD alternatively or additionally requires employees with access to SCI to complete form DD Form 1847-1, which is similar to Form 4414. ECF No. 1 ¶ 38b.

which the author has had access to classified information in the course of his employment or other contact with the Agency." *Id.* ¶ 32d. According to documents obtained through Freedom of Information Act litigation by Plaintiffs' counsel, the CIA "will not provide a copy of a secrecy agreement or nondisclosure agreement to an author who requests one they signed," even though such agreements "are typically not classified." *Id.* ¶ 32e.

The CIA's PPR authority is known as the Publications Review Board. *Id.* ¶ 33. Plaintiffs allege that Standard Form 312, Form 4414, the CIA secrecy agreement, and AR 13-10 collectively "give the Board discretion to censor information that it claims is classified without regard" to considerations including "whether disclosure of the information would actually cause harm to the nation's security, whether the former employee acquired the information in question in the course of employment, whether the information is already in the public domain, and whether any legitimate interest in secrecy is outweighed by public interest in disclosure." *Id.* ¶ 33. Plaintiffs also assert that when the Board refers manuscripts by former CIA employees to other agencies for review, other agencies censor the manuscripts on the basis of undisclosed review standards. *Id.*

Plaintiffs further allege that "the breadth and vagueness of the CIA's review standards invite capricious and discriminatory enforcement" and that "in practice the Board's censorship decisions are often arbitrary or influenced by the author's viewpoint." *Id.* ¶ 34. For example, Plaintiffs assert, former intelligence community employees "who wrote books criticizing the CIA's torture of prisoners apprehended in the 'war on terror' have complained publicly that their books were heavily redacted even as former CIA officials' supportive accounts of the same policies were published without significant excisions of similar information." *Id.* According to Plaintiffs, the CIA in 2012 opened an internal investigation into whether its PPR regime was

being misused to suppress speech critical of the agency, but the agency has not released or publicly described its findings. *Id.* Finally, Plaintiffs allege that: the regime does not require the Board to provide authors with reasons for its decisions and that the Board generally does not do so; that deadlines for adjudication of appeals are merely aspirational and that the regime fails to assure prompt review; and that the regime fails to require the government to initiate judicial review of PPR decisions and to guarantee that such review is prompt. *Id.* ¶¶ 35–37.

Plaintiffs' general allegations about the DOD, NSA, and ODNI regimes are similar to those about the CIA's. Plaintiffs allege that each regime "imposes submission requirements that, taken together, are vague, confusing, and overbroad," *id.* ¶¶ 38, 44, 50; that each regime "fails to meaningfully cabin the discretion" of the agency's PPR authority and instead grants to the authority "discretion to censor information" without regard to the same interests that Plaintiffs allege the CIA Publications Review Board is not required to consider, *id.* ¶¶ 39, 45, 51; that the agencies refer manuscripts to other agencies that do not disclose their review standards, *id.* ¶¶ 39, 45, 51; that the "breadth and vagueness" of the agencies' standards mean that the agencies' PPR decisions are often or frequently "arbitrary" or "invite capricious and discriminatory enforcement," *id.* ¶¶ 40, 46, 52; and that the regimes do not require the PPR authorities to provide authors with reasons for their decisions, *id.* ¶¶ 41, 47, 53; provide no assurance of prompt review, *id.* ¶¶ 42, 48, 54; and fail to require the government to initiate judicial review of PPR decisions or to guarantee that such review is prompt, *id.* ¶¶ 43, 49, 55.

The Complaint also makes additional specific allegations about each agency. According to the Complaint, the DOD maintains two relevant policies: Directive 5230.09, "Clearance of DoD Information for Public Release," and Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release." *Id.* ¶ 38c. Together, the policies require all former agency

employees and all former active or reserve military service members to submit for PPR "any official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to [the agency]." *Id.* (alteration in original). "[O]fficial DoD information" is defined broadly to include "[a]ll information that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD employees as part of their official duties or because of their official status within the Department." *Id.* (alteration in original).

Such information must be submitted if, for example, it "[i]s or has the potential to become an item of national or international interest"; "[a]ffects national security policy, foreign relations, or ongoing negotiations"; or "[c]oncerns a subject of potential controversy among the DoD Components or with other federal agencies." *Id.* (alterations in original). PPR is performed at the agency by the Defense Office of Prepublication and Security Review ("DOPSR"), which the agency's policies indicate conducts both "security review" for protecting classified information and "policy review" to ensure that materials do not conflict with DOD or government policies or programs. *Id.* ¶ 39. Plaintiffs allege that DOD components "often disagree as to what must be censored," and that review "frequently takes many weeks or even months" and can result in required redactions of readily available public information. *Id.* ¶ 40.

With respect to the NSA, Plaintiffs allege that the agency has adopted NSA/CSS Policy 1-30, "Review of NSA/CSS Information Intended for Public Release," which requires all former NSA employees to submit for PPR any material, other than a resume or job-related document, "where [it] contains official NSA/CSS information that may or may not be UNCLASSIFIED and approved for public release." *Id.* ¶ 44c (alteration in original). "Official NSA/CSS information" is defined to include "[a]ny NSA/CSS, DoD, or IC information that is in the custody and control

of NSA/CSS and was obtained for or generated on NSA/CSS' behalf during the course of employment or other service, whether contractual or not, with NSA/CSS." *Id.* (alteration in original). Plaintiffs further allege that "the censorship decisions" of "the agency's censors, known as Prepublication Review Authorities," are "often arbitrary" and can result in required redactions of publicly available facts, and that "review frequently takes many weeks or even months." *Id.* ¶¶ 45–46, 48.

Finally, with respect to the ODNI, Plaintiffs allege that the agency requires employees to sign Form 313, titled "Nondisclosure Agreement for Classified Information," as a prerequisite to accessing information or material that is classified or in the process of a classification determination. *Id.* ¶ 50c. The form directs employees to submit for PPR "any writing or other preparation in any form" that "contains any mention of intelligence data or activities, or which contains any other information or material that might be based upon [information or material that is classified, or is in the process of a classification determination, and that was obtained pursuant to the agreement]." *Id.* (alteration in original).

PPR at the ODNI is conducted by the Director of the Information Management Division. *Id.* ¶ 51. The ODNI has also adopted Instruction 80.04, "ODNI Pre-publication Review of Information to be Publicly Released," which "requires all former agency employees, regardless of their level of access to sensitive information, to submit 'all official and non-official information intended for publication that discusses the ODNI, the IC [Intelligence Community], or national security." *Id.* ¶ 50d (alteration in original). The Instruction, Plaintiffs allege, "imposes no limitations whatsoever on the Director's power to censor," stating only that "the goal of pre-publication review is to prevent the unauthorized disclosure of information, and to ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by

publication." *Id.* Plaintiffs finally allege that review under the ODNI regime "frequently takes many weeks or even months." *Id.* ¶ 54.

Plaintiffs filed their Complaint on April 2, 2019. ECF No. 1. The Complaint asserts two causes of action. *Id.* ¶¶ 120–21. First, Plaintiffs assert that Defendants' PPR regimes "violate the First Amendment because they invest executive officers with sweeping discretion to suppress speech and fail to include procedural safeguards designed to avoid the dangers of a censorship system." *Id.* ¶ 120. Plaintiffs then allege that the regimes "are void for vagueness under the First and Fifth Amendments because they fail to provide former government employees with fair notice of what they must submit for prepublication review and of what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement." *Id.* ¶ 121. For relief, the Complaint seeks a declaration that the PPR regimes violate the First and Fifth Amendments and an injunction barring Defendants and individuals associated with them from continuing to enforce the regimes "against Plaintiffs, or any other person." *Id.* at 41.[3]

Concurrent with the filing of their Complaint, three of the five Plaintiffs filed a Motion to omit their home addresses from the caption of the Complaint, ECF No. 8, and a supporting memorandum, ECF No. 8-1. On June 14, 2019, Defendants filed a Motion to Dismiss the Complaint. ECF No. 30. Plaintiffs filed a response in Opposition on July 16, 2019. ECF No. 33.[4] A third party, the Center for Ethics and the Rule of Law, submitted a Motion for Leave to file an amicus brief in support of Plaintiffs on July 23, 2019, ECF No. 34, accompanied by a copy of the

[3] Pin cites to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that system.
[4] Plaintiffs also concurrently filed a consent motion for leave to file an opposition that exceeds the page limit set by the Local Rules. ECF No. 32. The motion will be granted.

proposed brief, ECF No. 34-1. Finally, Defendants filed a Reply in support of dismissal on August 2, 2019. ECF No. 36. Defendants have not opposed any of the pending motions.[5]

II. STANDARD OF REVIEW

"A district court should grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 645 (4th Cir. 2018) (quoting *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999)). "The burden of establishing subject matter jurisdiction rests with the plaintiff." *Demetres v. East West Constr.*, 776 F.3d 271, 272 (4th Cir. 2015). "When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), 'the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *Evans*, 166 F.3d at 647 (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). Article III standing is a prerequisite to subject matter jurisdiction. *See Beyond Sys., Inc. v. Kraft Foods, Inc.*, 777 F.3d 712, 715 (4th Cir. 2015).

To state a claim that survives a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The "mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6)." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012). To determine whether a claim has crossed "the

[5] The Court notes that neither Plaintiffs nor Defendants have raised that some of the named Defendants no longer hold their positions. The issue is immaterial to disposition of the pending motions, however, because all Defendants are sued in their official capacities and substitution of a public official party's successor is automatic under Federal Rule of Civil Procedure 25(d). *See Maryland v. United States*, 360 F. Supp. 3d 288, 318 (D. Md. 2019).

line from conceivable to plausible," the Court must employ a "context-specific" inquiry, drawing on the court's "experience and common sense." *Iqbal*, 556 U.S. at 679–80 (quoting *Twombly*, 550 U.S. at 570). The Court accepts "all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). The Court must "draw all reasonable inferences in favor of the plaintiff." *Id.* at 253 (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). "[B]ut [the Court] need not accept the legal conclusions drawn from the facts, and . . . need not accept as true unwarranted inferences, unreasonable conclusions or arguments." *Id.* (first alteration in original) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)).

III. DISCUSSION

Before addressing Defendants' Motion to Dismiss the Complaint, the Court first considers the other pending motions, neither of which Defendants have opposed. First, the Motion to Omit Home Addresses from Caption filed by Plaintiffs Edgar, Bhagwati, and Fallon ("Movants") asks the Court to waive the requirement of this District's Local Rule 102.2(a) that a complaint include the names and addresses of all parties. ECF No. 8. As the Court noted in *Casa de Maryland, Inc. v. Trump*, the Fourth Circuit has held that while the public has an important interest in open judicial proceedings, "compelling concerns relating to personal privacy or confidentiality may warrant some degree of anonymity." No. GJH-18-845, 2018 WL 1947075, at *1 (D. Md. Apr. 25, 2018) (quoting *Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014)).

The Fourth Circuit has identified several factors for courts to consider in balancing the need for open proceedings against litigants' privacy concerns, including:

> Whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to

> preserve privacy in a matter of sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent nonparties; the ages of the person whose privacy interests are sought to be protected; whether the action is against a governmental or private party: and, relatedly, the risk of unfairness to the opposing party from allowing an action against it to procced anonymously.

Pub. Citizen, 749 F.3d at 273 (quoting *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)). In *Casa de Maryland*, the Court found that these factors favored allowing the plaintiffs, who challenged a federal immigration policy decision that resulted in rescission of their lawful immigration status, to omit their addresses. 2018 WL 1947075 at *1–*2. The Court also found that the plaintiffs' addresses had no bearing on the merits of their action and that shielding them from public view would not prejudice the government defendants. *Id.* at *2.

Here, Movants assert that they reasonably fear for their physical safety and that of their family members "in light of the passion that may be inflamed by this lawsuit against high-ranking government actors." ECF No. 8-1 at 2. Bhagwati notes that she is an activist who conducts public advocacy on issues of misogyny, racism, and sexual violence in the military and has been subject to stalking and repeated online attacks, which she asserts are common responses to advocacy on such issues. *Id.* at 2–3. Fallon states that his professional history as a senior official investigating al-Qaeda members and terrorist attacks creates heightened dangers of physical harm to him and his family if his home address is made public. *Id.* at 3. Finally, Edgar asserts that he resides with young children and fears for their safety if his address is disclosed. *Id.*

While the Movants' rationales for withholding their addresses align with the *Public Citizen* factors to varying degrees, the Court finds that granting the motion is warranted given the limited countervailing public interests at play. As in *Casa de Maryland*, Plaintiffs' addresses "are of minimal import to furthering the openness of judicial proceedings." 2018 WL 1947075 at *2.

Given that the Complaint extensively describes each Movant's professional background and identifies their state of residence, there can be little if any confusion about their identities, and any ambiguity that did exist would not be remedied by ordering disclosure of their home addresses. Further, there is no indication of any prejudice to Defendants from allowing Movants to withhold their addresses, which is underscored by Defendants' lack of any opposition to the motion. Nor is it apparent that the addresses are relevant to any questions before the Court. *See Casa de Maryland*, 2018 WL 1947075, at *2. For these reasons, the Court will grant the motion.

Also pending is the unopposed motion by non-party the Center for Ethics and the Rule of Law ("CERL") for leave to file an amicus brief in support of Plaintiffs. ECF No. 34. "Decisions about whether and how to allow amicus participation in federal district court are left to the discretion of the trial judge." *Md. Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731, at *8 (D. Md. Feb. 3, 2017) (citing *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014)). "Amicus briefs have been 'allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.'" *Wheelabrator Balt., L.P. v. Mayor & City Council of Balt.*, No. GLR-19-1264, 2020 WL 1491409, at *1 n.1 (D. Md. Mar. 27, 2020) (quoting *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996)).

CERL states that it is a non-partisan institute at the University of Pennsylvania Law School "dedicated to preserving and promoting ethics and the rule of law in national security, democratic governance, and warfare." ECF No. 34 at 2.[6] Among other activities, it holds conferences and events and publishes various academic materials "at the intersection of national security and ethics." *Id.* CERL asserts that these activities and others demonstrate that it has a

[6] CERL states that Plaintiff Fallon is a member its Advisory Council but was not involved in drafting the proposed amicus brief. ECF No. 34 at 2 & n.2.

"special interest in the outcome of [this] suit" and expertise in the subject matter at issue. *Id.* (alteration in original) (quoting *Bryant*, 923 F. Supp. at 728). Finally, CERL states that its brief "would provide the Court with important background information about the chilling effect of Defendants' prepublication regimes on academics, national security professionals and the general public." *Id.* at 3–4.

CERL's motion for leave is compliant with this Court's Standing Order 2018-07, which prescribes that such motions must state the movant's interest, the reason why the brief is desirable and why the matters asserted are relevant to disposition of the case, and whether a party's counsel authored the brief in whole or in part or contributed money to fund its preparation or submission. The proposed brief is also compliant with the requirements of the Standing Order in that it is fewer than 15 pages, complies with other applicable Local Rules, and was filed within seven days after the principal brief of the party being supported. For these reasons, and because the motion is unopposed, the Court will grant the Motion for Leave and accept the proposed amicus brief, ECF No. 34-1. Having considered the non-dispositive motions, the Court now turns to Defendants' Motion to Dismiss.

A. Standing

Defendants first move to dismiss the Complaint under Rule 12(b)(1) on the ground that Plaintiffs lack standing and that the Court therefore lacks subject matter jurisdiction. "Article III of the U.S. Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' " *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017) (quoting U.S. Const. art. III, § 2). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)). "To invoke federal jurisdiction, a plaintiff bears the burden of establishing the three 'irreducible

minimum requirements' of Article III standing." *Id.* (quoting *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013)). The plaintiff must demonstrate "(1) an injury in fact (i.e., a 'concrete and particularized' invasion of a 'legally protected interest'); (2) causation (i.e., a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is 'likely' and not merely 'speculative' that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)." *David*, 704 F.3d at 333 (alterations in original) (quoting *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273–74 (2008)). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

The parties dispute standing in somewhat divergent terms. Defendants argue that Plaintiffs have failed to identify any future concrete harm that they are likely to encounter as a result of the deficiencies they claim exist in the PPR regimes at issue. ECF No. 30-1 at 23–24. Discerning two theories of standing in the Complaint – one based on potential for publication delays and the other based on chill to Plaintiffs' speech – Defendants assert that neither identifies an adequately concrete harm. *Id.* at 24. Plaintiffs' Opposition makes clear that Plaintiffs do not pursue a theory based entirely on delayed publication, however, and the Court therefore does not discuss it further. Plaintiffs instead advance three theories of standing: that they are subject to government licensing schemes that invest executive officers with overly broad discretion, which by itself confers standing; that Defendants' PPR regimes have a chilling effect on protected speech; and that Plaintiffs face a credible threat of sanctions if they refuse to submit their work for PPR. ECF No. 33 at 13–14.

Plaintiffs' licensing scheme theory argues that the PPR regimes are akin to prior restraint statutes that place "unbridled discretion in a government official over whether to permit or deny expressive activity" and are thus subject to facial challenges. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755 (1988). Under that doctrine, "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 759. Such schemes give rise to "two major First Amendment risks": "self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* On the basis of this doctrine, the Supreme Court has permitted facial challenges to, for example, an ordinance giving a mayor "unfettered discretion" to deny or condition permits for newspaper display racks on public property, *id.* at 772, and a Maryland statute requiring submission of films to a state review board before exhibiting them, *Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

While there is some superficial resemblance between the provisions challenged in these cases and the PPR regimes at issue here, Plaintiffs' attempt to fit their Complaint under this doctrine in order to demonstrate standing is unconvincing. First, PPR as Plaintiffs have described it cannot plausibly be understood as a licensing scheme. Plaintiffs have not alleged that the PPR schemes at issue require them to obtain licenses to engage in any expressive conduct at all, as is the case in the typical licensing challenge that tests "the states' and municipalities' longstanding authority to license activities within their borders." *Am. Entertainers, L.L.C. v. City of Rocky Mount*, 888 F.3d 707, 719 (4th Cir. 2018). Rather, they must submit for review materials that discuss the subjects of their work as former federal intelligence professionals pursuant to

agreements they have signed. While Plaintiffs might validly question whether the scope and extent of that requirement is proper, the established concept of a "licensing scheme" does not capture the constraints under which Plaintiffs allege that they operate.

Underscoring this point is that Plaintiffs are not plausibly comparable to the paradigmatic newspaper publishers and theater owners that have brought challenges to licensing regimes. *See Midwest Media Prop., L.L.C. v. Symmes Township*, 503 F.3d 456, 473 (6th Cir. 2007) (noting the Supreme Court's observation that "newspapers, radio stations, movie theaters and producers" are "often those with the highest interest and the largest stake in a First Amendment controversy" (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 n.11 (1981)). Such entities would have no interaction with the government with respect to their expressive activities but for the challenged regulations. In contrast, Plaintiffs here are former government employees who voluntarily took on their PPR obligations as a condition of their employment and their access to protected government information. *Cf. John Doe, Inc. v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008) (rejecting an analogy between PPR requirements for former CIA employees and a statute barring telecommunications firms from disclosing that they received subpoenas from the FBI, explaining that unlike the former employees the firms "had no interaction with the Government until the Government imposed its nondisclosure requirement upon [them]"). And Plaintiffs do not dispute the government's basic power to restrict release of classified information by those entrusted with it. For these reasons, Plaintiffs' attempt to fit PPR under licensing scheme doctrine for standing purposes is unavailing.

Plaintiffs' chilling effect theory, in contrast, stands on firmer ground. As a key initial note, because Plaintiffs seek prospective relief, their standing burden is different from the typical case. "Because '[p]ast exposure to illegal conduct does not in itself show a present case or

controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects,' a plaintiff seeking 'declaratory or injunctive relief . . . must establish an ongoing or future injury in fact.'" *Davison v. Randall*, 912 F.3d 666, 677 (4th Cir. 2019) (alterations in original) (quoting *Kenny v. Wilson*, 885 F.3d 280, 287–88 (4th Cir. 2018)). Plaintiffs' burden is lessened here, however, because of the nature of their claims. "Significantly, [the Fourth Circuit]—along with several other circuits—has held that 'standing requirements are somewhat relaxed in First Amendment cases,' particularly regarding the injury-in-fact requirement." *Id.* at 678 (quoting *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013)).

"In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of 'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'" *Cooksey*, 721 F.3d at 235 (alterations in original) (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)). "Although '[s]ubjective or speculative accounts of such a chilling effect are not sufficient . . . a claimant need not show he ceased those activities altogether to demonstrate an injury in fact.'" *Kenny*, 885 F.3d at 289 n.3 (alterations in original) (quoting *Cooksey*, 721 F.3d at 236). "Instead, '[g]overnment action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights,'" rendering the chilling effect "objectively reasonable." *Id.* (alterations in original) (quoting *Cooksey*, 721 F.3d at 236). If the government conduct meets that threshold, "there is an ongoing injury in fact." *Kenny*, 885 F.3d at 288.

Plaintiffs assert that the alleged breadth and vagueness of the PPR regimes, "the absence of time limits for completion of review, and the severity and variety of sanctions for failure to submit" would likely lead an objectively reasonable speaker "to submit more material than the government has constitutional authority to require authors to submit, avoid writing about

subjects that the government might regard as sensitive . . . and write about these subjects differently in order to avoid provoking the government's censors." ECF No. 33 at 18. Plaintiffs further claim that uncertainty about the time required for review "would also be likely to deter a reasonable speaker from attempting to write manuscripts meant to respond to breaking news, or meant to engage with fast-moving public debates," and from writing longer pieces for commercial publishers that require authors to commit to deadlines. *Id.* at 18–19.

These allegations are facially plausible. Importantly, beyond mere hypotheticals, Plaintiffs partly premise the likelihood of such objective effects on the fact that some of them have self-censored in precisely these ways. Most notably, as Plaintiffs describe, the Complaint alleges that some Plaintiffs, including Edgar, Immerman, Goodman, and Fallon, have simply decided not to write about certain topics as a result of their past experiences with PPR. *Id.* at 19 (citing ECF No. 1 ¶¶ 66, 80, 92–93, 112, 118–19). They have also elected to accept required redactions and publish their work in altered and limited form rather than proceed with appeals of the redactions out of concern for further delaying publication or risking their relationships with PPR officials whom they may encounter again the future. *Id.* (citing ECF No. 1 ¶¶ 64, 78, 110, 119). These allegations demonstrate that Plaintiffs have been deterred from exercising their First Amendment rights in ways persons of ordinary fitness who are subject to the PPR regimes at issue plausibly would be.

Defendants respond that Plaintiffs' claims of chill are belied by the fact that Plaintiffs have published extensively and intend to continue doing so despite the inadequacies they allege in the PPR regimes. *Id.* (citing ECF No. 1 ¶¶ 61, 65, 72, 79, 85, 93, 103, 115). This argument is unpersuasive. As the Court has noted, "a claimant need not show [he] ceased [First Amendment] activities altogether to demonstrate an injury in fact" as long as the claimed chill to those

activities is objectively reasonable. *Cooksey*, 721 F.3d at 236 (first alteration in original) (quoting *Benham*, 635 F.3d at 135). Defendants next argue that Plaintiffs' claims of chill are not objectively reasonable because Plaintiffs' decisions not to write about certain topics or to accept redactions they disagree with are "based on a mere preference to avoid potential disagreement, the possibility of delays in the publication process, or uncertainty." ECF No. 30-1 at 28. Plaintiffs contend that their decisions are reasonable responses to the breadth and vagueness of the PPR regimes, uncertainty about the time required for manuscript review, and the risk of sanctions for failure to submit. ECF No. 33 at 20.

Defendants rely on *The Baltimore Sun Co. v. Ehrlich*, in which the Fourth Circuit affirmed the dismissal of a First Amendment claim by two reporters challenging the Governor of Maryland's ban on state staff speaking with them. 437 F.3d 410, 413 (4th Cir. 2006). The ban in that case was imposed because the Governor's press office felt the reporters were not "objectively" reporting on the administration. *Id.* at 413. The court explained that "[i]t would be inconsistent with the journalist's accepted role in the 'rough and tumble' political arena to accept that a reporter of ordinary firmness can be chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting." *Id.* at 419 (quoting *Eaton v. Menely*, 379 F.3d 949, 956 (10th Cir. 2004)). It is unclear how that reasoning bears on Plaintiffs' claims here. Plaintiffs are not journalists claiming viewpoints in their reporting will be "chilled" because politicians refuse to engage with them in response to perceived unfair criticisms. *Id.* at 417. Rather, Plaintiffs allege that they are former public servants who seek to engage in public discourse surrounding the topics of their expertise but whose writings are subject to redactions and who face threats to their livelihood and potentially severe sanctions for failure to comply

with PPR requirements. Their decisionmaking therefore is plausibly premised on more than a preference to avoid mere "disagreement[s]." ECF No. 30-1 at 28.

Defendants next assert that because of the presumption that government officials properly discharge their duties absent clear evidence to the contrary, Plaintiffs' alleged concerns about PPR reviewers being less responsive if Plaintiffs' writings criticize the government are misplaced. While such a presumption exists in some contexts, *see Nardea v. Sessions*, 876 F.3d 675, 680 (4th Cir. 2017), its application here would not undermine Plaintiffs' other alleged reasons for self-censorship, which stem from the structure of the PPR regimes rather than conduct by individual reviewers. Finally, Defendants make the peculiar argument that Plaintiffs are not chilled but rather benefitted by PPR because review of their work prior to publication protects them from punishment for having published classified information. ECF No. 30-1 at 29. Even if Defendants were correct that the existence of a PPR system provides this counterintuitive incidental benefit to authors, however, that does not negate the other sources of chill caused by the alleged flaws in the specific PPR regimes at issue here.

Because Plaintiffs have plausibly alleged that features of the PPR regimes result in a chilling effect on the exercise of First Amendment rights, Plaintiffs have made a sufficient showing of an injury in fact to proceed.[7] With respect to the redressability prong of standing, Defendants' only argument is that a judicial order could not set time limits for review in a way that would remedy the harms Plaintiffs allege. ECF No. 30-1 at 28. This claim is unconvincing

[7] Because Plaintiffs' theory based on chilling effect is sufficient to demonstrate standing, the Court need not consider at length Plaintiffs' alternative "credible threat of enforcement" theory. Under such a theory, plaintiffs can demonstrate standing by showing that "they intend to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy they wish to challenge, and that there is a 'credible threat' that the policy will be enforced against them when they do so." *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018) (quoting *Kenny*, 885 F.3d at 288). The Court notes, however, that like Plaintiffs' licensing scheme argument, credible threat of enforcement is an awkward fit for this case because Plaintiffs do not state a desire to engage in conduct that is specifically proscribed by government policy, but rather express confusion and uncertainty about PPR policies with which Plaintiffs are willing to comply but for the regimes' alleged vagueness and other flaws.

for two reasons. First, the redressability requirement is met "when the court's decision would reduce 'to some extent' plaintiffs' risk of additional injury." *Carter v. Fleming*, 879 F.3d 132, 138 (4th Cir. 2018) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007)). Additionally, the lack of certainty about the duration of review is only one factor contributing to the chill Plaintiffs allege, the remainder of which Defendants do not directly address.

To be sure, Plaintiffs' arguments supporting redressability are somewhat nebulous. In their Opposition, Plaintiffs assert that they seek a declaration that the PPR regimes violate the First and Fifth Amendments and "an injunction prohibiting Defendants from sanctioning them for failure to comply with these regimes." ECF No. 33 at 22.[8] Plaintiffs then state that "[i]f the Court were to afford Plaintiffs this relief, Defendants would presumably revise their prepublication review regimes to bring these regimes into alignment with the First and Fifth Amendments." ECF No. 33 at 22. Unspecified as that prediction is, a declaration that features of the PPR regimes are unconstitutional would necessitate that Defendants implement reforms to the regimes to remedy their potential constitutional defects. Because the court's decision need only reduce "'to some extent' plaintiffs' risk of additional injury" to satisfy the redressability prong, Plaintiffs' allegations are generally sufficient to proceed. *Carter*, 879 F.3d at 138 (quoting *Massachusetts*, 549 U.S. at 526).

The speculative nature of Plaintiffs' redressability arguments, however, relates to other alleged deficiencies that Defendants raise in Plaintiffs' claims and the relief Plaintiffs request. Defendants first argue that Plaintiffs lack standing to assert that PPR must apply only to narrow categories of former employees and only to material reasonably likely to contain "the most closely held government secrets" because Plaintiffs and their written work fall into those

[8] That statement notably differs from the Complaint's request for injunctive relief barring enforcement of the regimes against anyone, an issue to which the Court returns below. *See* ECF No. 1 at 41.

categories and therefore would not be impacted by the limitations Plaintiffs seek. ECF No. 30-1 at 30–31. Elsewhere in their brief, however, Defendants argue that *all* classified information is considered "closely held" under Executive Orders establishing the classification system. *Id.* at 38. This apparent conflict indicates that Defendants' argument here is essentially an attempt to derail Plaintiffs' standing through a grammatical technicality rather than a substantive objection.

Defendants then assert that Plaintiffs' works are reasonably likely to contain classified information, as indicated by the fact that Plaintiffs' past works have been redacted. *Id.* at 31. A core claim of Plaintiffs' suit, however, is that those redactions were frequently without basis, and further that the regimes require submission of more than just materials likely to contain classified information. Defendants' argument is therefore unpersuasive. Next, Defendants argue that Plaintiffs lack standing to challenge features of the regimes that apply only to current employees. *Id.* at 32. Plaintiffs make clear in their Opposition that they do not intend to do so, though they acknowledge Defendants' correct assertion that one of the DOD policies the Complaint cites, Directive 5230.09, has been replaced by a new policy, Instruction 5230.09. ECF No. 33 at 16 n.3, 17 n.4. Finally, Defendants assert that Plaintiffs lack standing to challenge a provision of the NSA policy relating to information "in the custody and control of NSA/CSS," because none of the Plaintiffs alleges that they were employed by the NSA. ECF No. 30-1 at 33. Given that the ODNI has referred Plaintiff Edgar's writings to the NSA in the past, however, *see* ECF No. 1 ¶¶ 63–65, Plaintiffs have adequately alleged that they are impacted by that agency's PPR regime.

Defendants also argue that Plaintiffs lack standing to bring their vagueness claim because Plaintiffs have identified no circumstance in which uncertainty about the scope of their PPR obligations has caused or is likely to cause them any tangible harm, and that they rather are well aware of their need to submit materials for PPR and have adhered to those obligations. *Id.* at 33.

As the merits portion of Plaintiffs' brief notes, however, a provision may be impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)). Plaintiffs allege that their works have been arbitrarily redacted and excised, in part because of discrimination against the viewpoints they contain. *See* ECF No. 1 ¶¶ 75, 77, 90, 110–11, 114. Because Plaintiffs have plausibly alleged a resulting chilling effect on future expression, Plaintiffs have drawn a sufficient link between the harms they assert and their vagueness claim.

Defendants' final standing argument is that Plaintiffs lack standing to seek an injunction barring enforcement of the PPR regimes "against Plaintiffs, or any other person." ECF No. 30-1 at 34 (quoting ECF No. 1 at 41). As Defendants note, the Supreme Court has recently reaffirmed that "a plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (alteration in original) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). That "a plaintiff [has] demonstrated harm from one particular inadequacy in government administration" does not authorize a court "to remedy *all* inadequacies in that administration." *Lewis*, 518 U.S. at 357. Defendants also raise the separation of powers concerns inherent in reviewing government policies for protecting national security. Generally, "[a]bsent a clear expression by Congress to the contrary, courts should not 'intrude upon the authority of the Executive in military and national security affairs.'" *Clarke v. DynCorp Int'l, LLC*, No. JFM-12-03267, 2014 WL 4269075, at *3 (D. Md. Aug. 28, 2014) (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988)).

In response, Plaintiffs note several cases in which courts have nonetheless reviewed executive action concerning national security when the government's conduct has implicated fundamental individual liberties. ECF No. 33 at 23 (citing *Boumediene v. Bush*, 553 U.S. 723,

797 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *United States v. U.S. Dist. Court* (*Keith*), 407 U.S. 297 (1972); *United States v. Moussaoui*, 382 F.3d 453, 469 (4th Cir. 2004)). The Court need not wade into the interplay between these weighty principles, however, because as noted previously, Plaintiffs have retreated from the maximal relief requested in their Complaint and now characterize the remedy they seek as a declaration that the PPR regimes are constitutionally flawed and "an injunction prohibiting Defendants from sanctioning [Plaintiffs] for failure to comply with these regimes." *Id.* at 22. Equitable relief that barred penalties solely against these Plaintiffs and that granted Defendants time to address any constitutional deficiencies the Court identified with the PPR regimes would not substantially implicate the separation of powers concerns Defendants raise. The Court will accordingly proceed.

B. Ripeness

Before addressing the merits of Plaintiffs' Complaint, Defendants also raise the additional justiciability challenge that Plaintiffs' claims are unripe. "The question of whether a claim is ripe 'turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983)). "As with standing, ripeness is a question of subject matter jurisdiction." *Id.* (citing *Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013)). Defendants here assert that "Plaintiffs do not take issue with any current prepublication review decision, and their abstract fears about how the system might operate in the future are therefore divorced from any immediate, concrete factual setting." ECF No. 30-1 at 35–36. Defendants' argument thus essentially reduces to the claim that no challenge to PPR should be allowed to proceed except for after-the-fact appeals in individual cases of agency review.

As the Fourth Circuit has explained, however, "[m]uch like standing, ripeness requirements are also relaxed in First Amendment cases." *Cooksey*, 721 F.3d at 240 (citing *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995)). "Indeed, 'First Amendment rights . . . are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill.'" *Id.* (quoting *Gonzales*, 64 F.3d at 1500). Plaintiffs' standing here is premised on precisely such a chill, and "standing and ripeness should be viewed through the same lens." *Id.* As discussed previously, Plaintiffs have plausibly alleged that they have declined to write about certain topics as a result of past experiences with PPR and have accepted redactions rather than challenged them in the interest of timely contributing to public debates. *See* ECF No. 1 ¶¶ 64, 66, 78, 80, 92–93, 110, 112, 118–19. In other words, Plaintiffs are currently subject to PPR regimes that they reasonably allege require them to self-censor. Accordingly, Plaintiffs' claims challenging the alleged constitutional infirmities in those regimes are ripe for adjudication.

C. Merits

1. First Amendment Claim

The Court thus turns to the merits of Plaintiffs' claims, beginning with the primary claim that features of Defendants' PPR regimes violate the First Amendment. While Plaintiffs discuss several ways in which they allege the regimes contravene constitutional speech protections, the overarching theme is that the regimes constitute "a far-reaching system of prior restraints" that invest reviewing agencies with excessive discretion, allowing them to require submission of materials that do not include classified information and unwarrantedly demand redactions and excisions. ECF No. 33 at 8; *see also* ECF No. 1 ¶ 120. Defendants argue that the PPR regimes

are not prior restraints and that the sole reason PPR authorities require changes to submissions is that they contain classified material. ECF No. 30-1 at 44. To the extent that the regimes require submission and redaction of materials that may not include classified information, Defendants contend, the Supreme Court in *Snepp v. United States* found such requirements fully consistent with the First Amendment. *See id.* at 38–39 (citing *Snepp*, 444 U.S. at 511–13). The Court first discusses *Snepp* before turning to its implications for Plaintiffs' claim.

Snepp involved a former CIA agent who published a book about his experiences without submitting it to the agency for PPR, violating agreements he had signed when he joined and departed the agency. 444 U.S. at 507–08. In the first agreement, Snepp promised "that he would 'not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." *Id.* at 508. In the departure agreement, Snepp "reaffirmed his obligation 'never' to reveal 'any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative.'" *Id.* at 508 n.1.

The government brought suit to enforce the agreements after Snepp published his book. *Id.* at 508. In ruling for the government, the trial court "enjoined future breaches of Snepp's agreement" and "imposed a constructive trust on Snepp's profits," finding that Snepp had breached fiduciary obligations to the agency. *Id.* (citing 456 F. Supp. 176, 180–82 (E.D. Va. 1978)). The Fourth Circuit affirmed in part and reversed in part, lifting the imposition of the trust based on the government's concession that the book contained no classified intelligence and the court's finding that Snepp had a First Amendment right to publish unclassified information. *Id.* at 509–10 (citing 595 F.2d 926, 935–36 (4th Cir. 1979)). "In other words," the Supreme Court

explained, the Fourth Circuit "thought that Snepp's fiduciary obligation extended only to preserving the confidentiality of classified material." *Id.* at 510.

The Supreme Court ruled in favor of the government and reinstated the constructive trust, concluding that the agreement Snepp signed when he joined the CIA made clear that he "was entering a trust relationship" and "specifically imposed the obligation not to publish *any* information relating to the Agency without submitting the information for clearance." *Id.* at 510–11 (emphasis in original). Whether Snepp violated that trust, the Court explained, did not depend on "whether his book actually contained classified information." *Id.* at 511. The Court noted that the lower courts "found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified." *Id.* at 511–12.

"When a former agent relies on his own judgment about what information is detrimental," the Court further noted, "he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful." *Id.* at 512. In view of these principles, and unchallenged evidence in the record that "Snepp's book and others like it [had] seriously impaired the effectiveness of American intelligence operations," the Court approved the lower courts' conclusions that "Snepp's breach of his explicit obligation to submit his material—classified or not—for prepublication clearance has irreparably harmed the United States Government." *Id.* at 512–13. The Court concluded that in order to deter future breaches of trust similar to Snepp's, a constructive trust was the appropriate remedy. *Id.* at 515–16.

While it was not the primary focus of its opinion, the Court also addressed and rejected Snepp's argument that the agreement he signed when he joined the CIA was "unenforceable as a

prior restraint on protected speech." *Id.* at 509 n.3. The Court agreed with the Fourth Circuit that the agreement was "an 'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure, 50 U.S.C. § 403(d)(3)." *Id.* (alteration in original) (citing 595 F.2d at 932).[9] The Court also explained that "even in the absence of an express agreement . . . the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Id.* (citing *U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973)).

Finally, the Court declared that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," and concluded that "[t]he agreement that Snepp signed is a reasonable means for protecting this vital interest." *Id.* In responding to arguments made in a dissent, the Court described the logic of PPR, explaining that while "neither the CIA nor foreign agencies would be concerned" if information that "in fact . . . is unclassified or in the public domain" is published, "[t]he problem is to ensure in advance, and by proper procedures, that information detrimental to national interest is not published." *Id.* at 513 n.8. "Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world." *Id.* The Court finally rejected the suggestion that its holding would "allow[] the CIA to 'censor' its employees' publications," finding that Snepp's agreement "requires no more than a clearance procedure subject to judicial review." *Id.*

[9] That statutory duty is now vested in the Director of National Intelligence and codified at 50 U.S.C. § 3024(i)(1).

Defendants argue persuasively that *Snepp* controls this case. ECF No. 37 at 8–11. In short, Defendants maintain that *Snepp* established a reasonableness standard for evaluating federal employee speech restrictions that further the government's compelling interest in protecting classified information, and that the PPR regimes here satisfy that standard in both their scope and the procedures they utilize. ECF No. 30-1 at 36–37; ECF No. 37 at 8–9. Defendants' position is supported by case law from the D.C. and Second Circuits recognizing that *Snepp* confirmed both the constitutionality of PPR generally and that federal employees' agreements not to disclose classified information waive First Amendment rights to publish that material. *See Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (holding that a former employee of a federal laboratory who signed a PPR agreement had "no first amendment right to publish" classified information"); *Wilson v. CIA*, 586 F.3d 171, 183–84 (2d Cir. 2009) (accepting and applying the holding of *Stillman* to a former CIA agent).

Both Circuits have also held, echoing *Snepp*, that the CIA's PPR requirement "is not . . . a 'system of prior restraints' in the classic sense." *Wilson*, 586 F.3d at 183 (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971)); *McGehee v. Casey*, 718 F.2d 1137, 1147–48 (D.C. Cir. 1983) (holding that "neither the CIA's administrative determination nor any court order in this case constitutes a prior restraint in the traditional sense upon [the plaintiff] or any other party"). The Second Circuit in *Wilson* also noted two key additional Supreme Court precedents, both of which cite generally to *Snepp* in discussing the permissibility of restrictions on government employee speech. *See* 586 F.3d at 183. In *United States v. Aguilar*, the Court stated that when a government employee "voluntarily assume[s] a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. 593, 606

(1995) (citing *Snepp*, 444 U.S. 507). Similarly, in *United States v. National Treasury Employees Union* ("*NTEU*"), the Court noted that it has "recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." 513 U.S. 454, 465 (1995) (citing *Snepp*, 444 U.S. 507).

Plaintiffs ask the Court to disregard this body of case law and treat Defendants' PPR regimes as presumptively unconstitutional prior restraints under the framework established by the Supreme Court in 1965 in *Freedman v. Maryland*. ECF No. 33 at 24–25. As mentioned previously, the Court in that case rejected a Maryland statute that required approval from a state board before publicly exhibiting films but set no time limit for the board's review and did not assure prompt judicial review. 380 U.S. at 54–55, 58. The Court held that to comply with the First Amendment, a system requiring prior submission of films must include "procedural safeguards" that both place on the censoring authority the burden of proving the film is unprotected expression and require the censor to either grant a license or file a court action to "assure a prompt final judicial decision." *Id.* at 58–59. Plaintiffs also argue, citing the Supreme Court's rejection of a parade permit ordinance in *Shuttlesworth v. City of Birmingham*, that the PPR regimes must include "narrow, objective, and definite standards to guide the [reviewing] authority." ECF No. 33 at 25 (citing 394 U.S. 147, 150–52 (1969)).

Plaintiffs' position is simply untenable in light of *Snepp*. The Court there unquestionably rejected the argument that the CIA's PPR regime was a prior restraint and upheld the validity of Snepp's agreements "not to divulge *classified* information and not to publish *any* information without prepublication clearance." 444 U.S. at 508, 509 n.3. Multiple courts of appeals have recognized and applied that holding, *see Wilson*, 586 F.3d at 183; *McGehee*, 718 F.2d at 1147–48 (D.C. Cir. 1983); *see also Stillman v. CIA*, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) (citing

Snepp and stating that "[t]he Supreme Court has already decided that a prepublication review requirement imposed on a government employee with access to classified information is not an unconstitutional prior restraint."). Plaintiffs make several arguments here to attempt to persuade the Court to depart from these precedents. None are persuasive.

First, Plaintiffs observe that the Fourth Circuit characterized the CIA's PPR regime as a "prior restraint" in *United States v. Marchetti*, a 1972 decision upholding the secrecy agreement of a former CIA employee and affirming an injunction barring him from violating it by publishing materials discussing his work without submitting them for PPR. 466 F.2d 1309, 1311–13 (4th Cir. 1972). While that is an accurate summary of the decision, it is at best doubtful whether *Marchetti*'s reasoning survived *Snepp*, given the Supreme Court's rejection of Snepp's argument to that effect and its conclusion that the CIA could have imposed restrictions on disclosure "even in the absence of an express agreement." 444 U.S. at 509 n.3. Moreover, even if *Marchetti* does remain intact, the court there upheld the CIA's PPR system, noting that under *Freedman*, "some prior restraints in some circumstances are approvable of course" and that "the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure." 466 F.2d at 1316–17 (citing *Freedman*, 380 U.S. 51).

Plaintiffs next attempt to distinguish the D.C. and Second Circuit cases that Defendants cite on the ground that they involved as-applied challenges to PPR while Plaintiffs' challenge here is facial. ECF No. 33 at 26. Plaintiffs neglect to explain the significance of that distinction, however, and as Defendants correctly observe, plaintiffs bringing facial challenges have a *greater* burden than those merely challenging application of a provision to themselves. *See United States v. Stevens*, 559 U.S. 460, 472–73 (2010); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008) (citing *United States v. Salerno*, 481 U.S.

739 (1987)). Plaintiffs also attempt to undermine *Snepp* by characterizing its First Amendment analysis as "a cursory footnote" and by noting that the Court decided the case without oral argument or briefing on the merits. ECF No. 33 at 40–41. This Court will decline to discard a controlling Supreme Court precedent on such grounds.

More substantively, Plaintiffs argue that *Snepp* was decided on narrow grounds specific to Snepp's role as a former CIA agent with access to "some of the government's most closely held secrets," thus leaving open questions about whether PPR requirements could constitutionally be applied to other CIA employees or employees of other agencies. *Id.* at 40–41. Plaintiffs further argue that the Court in *Snepp* "had no occasion to consider the constitutionality of the specific features of the CIA's regime at issue here, let alone the specific features of the other agencies' regimes," nor "the scope of the CIA's submission requirement" or of its "review standards." *Id.* at 40. In essence, Plaintiffs ask the Court now to limit *Snepp* to its facts. The Court will decline to do so for three reasons.

First, it is apparent that for the Court in *Snepp*, the structure of the CIA's PPR regime and the scope of its requirements were irrelevant in light of the obligations contained in the agreements Snepp had voluntarily signed, both of which the Court took care to quote in their entirety. *See* 444 U.S. at 507–08 & n.1. The Court was plainly aware that Snepp's secrecy agreements barred him from publishing *any* information about the CIA or his employment there, classified or not, but nonetheless found those requirements consistent with the First Amendment. *Id.* at 508. The Court emphasized that the government's concessions that Snepp had a general right to publish unclassified information and that his book contained no classified material did not "undercut[] [the government's] claim that Snepp's failure to submit to prepublication review was a breach of his trust." *Id.* at 511. In short, the Court's analysis indicates that it took into

account the broad scope of the agency's submission and review requirements and found they created no obstacle to enforcing the PPR agreements Snepp had entered.

Second, Plaintiffs offer little basis to distinguish between Snepp and other CIA employees or employees of other agencies. Plaintiffs assert that in his role at CIA, Snepp had access to some of the government's "most closely held secrets," a phrase Plaintiffs use repeatedly in their briefing but fail to define. ECF No. 33 at 40. While Plaintiffs correctly note the Court's statement that "[f]ew types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties," that statement served to support the possibility that Snepp's trust relationship with the CIA would exist even without a written agreement. ECF No. 33 at 40 (quoting 444 U.S. at 511 n.6). The primary focus of the decision, however, was Snepp's breach of his secrecy agreements, and there is no indication that the ruling was intended to be limited to CIA employees in Snepp's position. *See Nat'l Fed'n of Fed. Emps. v. United States*, 695 F. Supp. 1196, 1201 (D.D.C. 1988) ("That the agreement in *Snepp* covered only 'secret' information and was executed only by CIA employees does not change the gravity of the government's interest in assuring the secrecy of national security information, nor do these distinctions render the [federal employee nondisclosure] agreements [challenged in this action] a less reasonable means for protecting that interest").

Finally, even if Plaintiffs were correct that *Snepp* was a narrow decision that concerned only high-level CIA employees, the considerations that Plaintiffs assert the Court failed to address in the case have little bearing on the constitutionality of other PPR regimes unless they qualify as prior restraints under *Freedman* and its progeny. Those considerations include the permissible scope of a submission requirement, permissible purposes of review, and "procedural protections that might be constitutionally required." ECF No. 33 at 41. Because Plaintiffs derive

those concerns from prior restraint doctrine, and because *Snepp* found that doctrine does not apply in this context, that *Snepp* did not raise them is not a distinguishing limitation of the decision but rather an expected feature.

Because none of Plaintiffs' arguments distinguishing *Snepp* or limiting its reach are persuasive, Plaintiffs remain bound by its holding that prior restraint doctrine does not apply to PPR regimes imposed to prevent publication of classified information. Accordingly, Plaintiffs' arguments that the regimes at issue here do not meet the requirements of prior restraint doctrine must fail. Such arguments constitute the majority of Plaintiffs' Opposition to Defendants' Motion to Dismiss: Plaintiffs assert that Defendants' "submission and censorship standards are vague, subjective, and overly broad" – as opposed to the "narrow, objective, and definite" requirement set by the Supreme Court in *Shuttlesworth* – and "lack constitutionally required procedural safeguards" that the Court established in *Freedman*. *See* ECF No. 33 at 26–27, 36. Because those requirements are inapplicable or irrelevant in light of *Snepp*, Plaintiffs' many arguments relying on them cannot support their First Amendment claim.

Plaintiffs are therefore left with demonstrating that the PPR regimes fail the reasonableness test that the Court established in *Snepp*. They attempt to do so unconvincingly and in conclusory fashion by citing to considerations discussed in *Marchetti*, the continued viability of which this Court has already questioned. *Id.* at 43–44. Plaintiffs alternatively turn to a separate body of First Amendment doctrine concerning restrictions on the speech of public employees. In *Pickering v. Board of Education of Township High School District 205*, the Supreme Court explained that if the speech of public employees "is of public concern, courts [assessing such restrictions under the First Amendment] must balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the

State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Liverman v. City of Petersburg*, 844 F.3d 400, 406–07 (4th Cir. 2016) (second alteration in original) (quoting 391 U.S. 563, 568 (1968)).

In its subsequent decision in *NTEU*, the Court "addressed how courts should apply Pickering when a generally applicable statute or regulation (as opposed to a post-hoc disciplinary action) operates as a prior restraint on speech." *Id.* at 407. As the Fourth Circuit has explained,

> NTEU involved a statute that prohibited federal employees from accepting any compensation for giving speeches or writing articles, even when the topic was unrelated to the employee's official duties. See [513 U.S.] at 457. Emphasizing that the honoraria ban impeded a "broad category of expression" and "chills potential speech before it happens," the Court held that "the Government's burden is greater with respect to this statutory restriction on expression than with respect to [the] isolated disciplinary action[s]" in Pickering and its progeny. Id. at 467, 468. Accordingly, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." Id. at 468, (quoting Pickering, 391 U.S. at 571). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Id. at 475.

Id.

Citing case law from the Seventh and Second Circuits, Plaintiffs here assert that *NTEU* "effectively limits *Snepp* to its facts" and that Defendants' PPR regimes fail the test that case establishes. ECF No. 33 at 43. Plaintiffs' arguments fail on both counts. First, both of the cases on which Plaintiffs rely specifically note *Snepp* and the distinct concerns at play with the speech of individuals who have access to classified information and are subject to PPR, such as Plaintiffs in this case, as opposed to government personnel generally. In *Wernsing v. Thompson*, the Seventh Circuit noted that *Snepp* was decided in a "context[] where the government presumably has a heightened interest in preempting certain types of speech." 423 F.3d 732, 749

(7th Cir. 2005). While the court noted that *Snepp* "predated the Supreme Court's more exacting pronouncements on prior restraints in *NTEU*" and another case, that dictum does not purport to make a definitive statement about how *Snepp* may have been modified in a way that would support Plaintiffs' claim. *Id.*

Plaintiffs also point to the Second Circuit's decision in *Harman v. City of New York*, in which that court held that a city policy restricting public comments by certain agency employees was inconsistent with *Pickering* and *NTEU*. 140 F.3d 111, 124–25 (2d Cir. 1998). In rejecting the defendants' claim that the challenged policies were necessary to protect the confidentiality of the agencies' cases and clients, the court distinguished *Snepp*, stating "that case concerned materials 'essential to the security of the United States and—in a sense—the free world.'" *Id.* at 122 (quoting 444 U.S. at 512 n.7). The court also observed that "[c]ourts traditionally grant great deference to the government's interests in national defense and security." *Id.* (citing *Brown v. Glines*, 444 U.S. 348 (1980)). Because the issues at play here deal with matters of national defense and security and not local agencies, *Harman* provides little support for Plaintiffs' position.

Plaintiffs' argument that the PPR regimes fail the *NTEU* test is similarly unpersuasive. Quoting from *NTEU*, Plaintiffs state that the regimes implicate the core political speech of "a vast group of present and future employees," although incidentally no Plaintiff here is a member of that group. ECF No. 33 at 44 (quoting *NTEU*, 513 U.S. at 468). Plaintiffs then draw on a D.C. Circuit opinion adding detail to the *NTEU* test, stating that "the public's interest in hearing this speech is 'manifestly great,' because 'government employees are in a position to offer the public unique insights into the workings of government.'" *Id.* (quoting *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995) (en banc)). Finally, Plaintiffs state that "Defendants' regimes are not 'narrowly

tailored to serve the government's asserted interest,'" noting that courts have applied such a requirement in *NTEU* analysis. *Id.* (quoting *Wolfe v. Barnhart*, 446 F.3d 1096, 1106–07 (10th Cir. 2006)).

In support of this tailoring claim, Plaintiffs argue that "[t]he only legitimate interest served by [PPR] is the prevention of inadvertent disclosures by employees who submit to review," which Plaintiffs assert would be "served most directly" by statutes criminalizing disclosure of sensitive information and by "the availability of administrative and civil sanctions for those who mishandle such information." *Id.* at 44–45. "Any residual need for prepublication review can be served by a system far more tailored than Defendants' current regimes," Plaintiffs conclude. *Id.* at 45. Plaintiffs fail to describe the nature of such a system, however, except perhaps by unstated reference to their prior restraint arguments. Moreover, this argument appears to at least suggest, if not outright assert, that no PPR regime could be sufficiently narrowly tailored to satisfy the First Amendment. That claim cannot be correct unless *NTEU* effectively abrogated *Snepp*, a holding that the Court has no basis to reach here.

Further, Plaintiffs' argument that Defendants have only a narrow interest in preventing inadvertent disclosure ignores the Supreme Court's pronouncements in *Snepp* about the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality" that justifies PPR. 444 U.S. at 509 n.3; *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1441 (D.C. Cir. 1996) (upholding a PPR regime for employees of the State Department and related agencies and noting this component of *Snepp* as speaking to the government's interests). Plaintiffs' assertion that penalties for unauthorized disclosures are adequate to serve the government's interest similarly ignores *Snepp*'s explanation that "[t]he problem is to ensure *in advance*, and by proper procedures, that

information detrimental to national interest is not published" and that "[w]ithout a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world." 444 U.S. at 513 n.8 (emphasis in original); *see also Weaver*, 87 F.3d at 1442 (citing *Snepp* and stating that "advance review is plainly essential to preventing dissemination" of classified information).

In short, as with their prior restraint arguments, accepting Plaintiffs' position under *NTEU* requires the Court to essentially treat *Snepp* as obsolete. Plaintiffs' desire for the Court to do so is clear in their additional argument that the Court should look past *Snepp* because of the expansion and evolution of PPR over the last four decades. *See* ECF No. 33 at 41. But as Plaintiffs are of course aware, while the Supreme Court may question and reexamine its precedents in light of societal change and the passage of time, this Court has no such power. While the allegations Plaintiffs have made about the inadequacies and breadth of the challenged PPR regimes do not appear inaccurate or implausible, *Snepp* remains the precedent governing the Court's evaluation of Plaintiffs' First Amendment claim, and Plaintiffs have failed to demonstrate that the regimes do not meet its low threshold of reasonableness. Accordingly, Plaintiffs' First Amendment claim will be dismissed.[10]

2. Vagueness Claim

The Court finally turns to Plaintiffs' vagueness claim, which asserts that the PPR regimes are void for vagueness under the First and Fifth Amendments because they fail to provide former

[10] It also bears mention that the wholesale reforms to PPR that Plaintiffs seek to obtain from the Court in this claim strain at the limits of the judiciary's role, particularly given the national security context. *See Egan*, 484 U.S. at 530 (1988). Both that concern and the Court's inability to sidestep *Snepp* limit the force of arguments made in the amicus brief submitted by CERL, which describes how lengthy PPR delays chill contributions to public discourse by former officials and discourage national security experts from entering the government. ECF No. 34-1. Whatever the merits of these assertions, they are more properly directed to the branches of government empowered to create and execute public policy rather than to simply evaluate its consistency with the Constitution.

government employees with fair notice of what they must submit for PPR and what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement. ECF No. 1 ¶ 121. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.*

Plaintiffs assert that the PPR regimes at issue here fail on both counts because language used in describing what former employees must submit for review is ambiguous and because the regimes "are vague with respect to what the agencies may censor," which "has facilitated arbitrary and discriminatory application to the writings of Plaintiffs and others." ECF No. 33 at 45–46. The Court considers these arguments in turn. First, in arguing that the regimes fail to give fair notice of former employees' PPR obligations, Plaintiffs point to several phrases in the agency policies at issue that they allege are impermissibly vague in describing the subjects or content that render a work subject to PPR. ECF No. 33 at 27–29. For the CIA, these include the requirement in its AR 13-10 policy mandating submission of materials that: are "intelligence related;" that "mention[] CIA or intelligence data or activities; or that are "on any subject about which the author has had access to classified information in the course of his employment." *Id.* at 27 (citing ECF No. 1 ¶¶ 32c, 32d); *see* ECF No. 33-1 at 8.

For the DOD, Plaintiffs quote submission requirements for any information that "relates to information in the custody and control of the [DOD], or was acquired . . . as part of their

official duties within [DOD]" if the information "pertains to military matters, national security issues, or subjects of significant concern to [the agency]." ECF No. 33 at 28 (alterations in original) (quoting ECF No. 1 ¶ 38c); *see* ECF No. 33-1 at 23, 29, 41.[11] Plaintiffs next raise the NSA's Policy 1-30, pointing to the requirement that former NSA/CSS affiliates "acting in a private capacity" must submit material for PPR whenever there is "doubt" as to whether "NSA/CSS information" in the material is "UNCLASSIFIED" and "approved for public release." ECF No. 33 at 28 (quoting ECF No. 1 ¶ 44c); *see* ECF No. 33-1 at 57, 61. Plaintiffs note that the policy states that "Official NSA/CSS information appearing in the public domain shall not be automatically considered UNCLASSIFIED or approved for public release." ECF No. 33 at 28 (quoting ECF No. 1 ¶ 44c); *see* ECF No. 33-1 at 58.

Plaintiffs also raise two ODNI policies. The agency's Instruction 80.04 requires former employees to submit "all official and non-official information intended for publication that discusses the ODNI, the IC, or national security." ECF No. 33 at 28 (quoting ECF No. 1 ¶ 50(d)); *see* ECF No. 33-1 at 76–77. Additionally, the ODNI's Form 313 requires former employees who had access to classified information to submit any material that "might be based upon [information that is classified or is in the process of a classification determination]." ECF No. 33 at 28–29 (alteration in original) (quoting ECF No. 1 ¶ 50(c)); *see* ECF No. 33-1 at 70–71. Finally, Plaintiffs point to the obligations in Form 4414, in which all of the agencies require former employees who had access to SCI to submit any material "that contains or purports to

[11] As mentioned previously, Plaintiffs acknowledge that one of the two DOD policies quoted by the Complaint was replaced and superseded in January 2019. ECF No. 33 at 28 n.9. Plaintiffs have included both versions of the policy, as well as copies of each of the other policies at issue, as exhibits to their Opposition. *See* ECF No. 33-1 at 21–39. The DOD language at issue, however, has not changed between the prior and current policies. *Compare id.* at 23, 29 *with id.* at 33, 36.

contain any . . . description of activities that . . . relate to SCI." *Id.* at 29 (alterations in original) (quoting ECF No. 1 ¶¶ 32b, 38b, 44b, 50b); *see* ECF No. 33-1 at 86.

Plaintiffs assert that phrases in these policies, including "intelligence related" in the CIA policy, "relates to," "pertains to," "subjects of significant concern to [the agency]" in the DOD's policies, "might be based upon" and "in the process of a classification determination" in the ODNI's policy, and "relate to" in Form 4414, are impermissibly vague. ECF No. 33 at 29–31, 45. Beyond case law generally describing vagueness doctrine, Plaintiffs cite only one controlling authority in support of their position, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The Supreme Court there rejected a state professional responsibility rule on pretrial publicity, which allowed lawyers to speak only to the "general" nature of a claim or defense "without elaboration," on the ground that "general" and "elaboration" were "both classic terms of degree." 501 U.S. at 1048–49, 1061–62. Plaintiffs' contention that the phrases at issue here are similarly vague terms of degree is simply incorrect as a grammatical matter.

Instead of case law, Plaintiffs focus on describing the wide body of material that the policies currently require Plaintiffs to submit and on offering hypothetical examples of works by former employees that would be subject to the submission requirements despite a low likelihood of containing classified information. *See* ECF No. 33 at 30–32. These arguments indicate that Plaintiffs' primary objection to the policies is their breadth rather than any difficulties Plaintiffs have in understanding what they require. While the policies do appear to reach a wide range of publications by Plaintiffs and other former employees, Plaintiffs fail to persuasively demonstrate how that leads to a constitutional concern outside of the prior restraint context.[12] Plaintiffs'

[12] The Court notes Defendants' arguments with respect to overbreadth doctrine, ECF No. 36 at 14–21, but aside from a brief footnote, ECF No. 33 at 36 n.1, the Court does not read Plaintiffs' Opposition to assert such a theory separate from Plaintiffs' prior restraint argument.

objections thus appear best directed at efforts to amend the policies administratively or legislatively rather than to invalidate them under the First or Fifth Amendments.

Two further points raised by Defendants further demonstrate the lack of merit to Plaintiffs' claim. First, courts have recognized that a regulated party's ability to obtain prospective guidance from an agency before penalties are imposed mitigates concerns about a policy's "allegedly unconstitutional vagueness." *U.S. Telecomm. Ass'n v. FCC*, 825 F.3d 674, 738–39 (D.C. Cir. 2016) (citing *DiCola v. FDA*, 77 F.3d 504, 508 (D.C. Cir. 1996)). As Plaintiffs' own allegations demonstrate, Plaintiffs have such an ability by contacting the PPR office of their former employing agency to inquire about submission requirements. *See* ECF No. 1 ¶ 106; *see also* ECF No. 33-1 at 7–8, 16, 53. Second, the Fourth Circuit has found that statutory language describing protected government information in broad or general terms presents a lessened vagueness concern when individuals responsible for understanding the statute's meaning are intelligence professionals. *See United States v. Morison*, 844 F.2d 1057, 1074 (4th Cir. 1988) (rejecting a vagueness challenge to the phrase "relating to the national defense" in an Espionage Act prosecution on the ground that the defendant was an "experienced intelligence officer" who had "expertise in the field of governmental secrecy and intelligence operations" and had been instructed on "regulations concerning the security of secret national defense materials"). That principle squarely applies to Plaintiffs here.

In support of their second claim that the regimes' vagueness facilitates arbitrary and discriminatory enforcement, Plaintiffs cite provisions from agency policies describing standards for review of submissions. The CIA's AR-10 policy provides that the agency's review board will review material "solely to determine whether it contains any classified information." ECF No. 33 at 32; *see* ECF No. 33-1 at 10. It is difficult to see how that clear standard invites arbitrary and

discriminatory enforcement given its narrowness and specificity. With respect to the DOD, Plaintiffs note provisions of Instruction 5230.09 and Instruction 5230.29, which according to Plaintiffs together provide that DOD will conduct PPR of former employees' submissions through both "security review," which "protects classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operations security," as well as through an additional review for information "requiring protection in the interest of national security or other legitimate governmental interest" and for "any classified, export-controlled or other protected information." ECF No. 33 at 32; *see* ECF No. 33-1 at 33–34, 37, 46.

As the Court noted in discussing Plaintiffs' standing, Defendants contend that some of these requirements apply only to current DOD personnel, while Plaintiffs insist that they apply to former employees as well. ECF No. 30-1 at 32; ECF No. 33 at 28 n.9, 32; ECF No. 36 at 16–17. The Court need not settle this dispute, however, because if Plaintiffs are correct, their vagueness argument is in fact weakened because the disputed policies give additional guidance to DOD PPR reviewers and further cabin their discretion. In other words, if these provisions indeed apply to Plaintiffs and other former employees as Plaintiffs ask the Court to conclude, the risk of "arbitrary and discriminatory enforcement" is reduced because the policies increase the degree to which the DOD has "provide[d] explicit standards for those who apply them." *Hill v. Coggins*, 867 F.3d 499, 513 (4th Cir. 2017) (quoting *Grayned*, 408 U.S. at 108–09).

Plaintiffs then assert that neither the NSA nor the ODNI policies provide any standard of review for submissions by former employees, though they note the statement in ODNI's policy that "[t]he goal of [PPR] is" not only to "prevent the unauthorized disclosure of information" but also to "ensure the ODNI's mission and the foreign relations or security of the U.S. are not

adversely affected by publication." ECF No. 33 at 32 (quoting ECF No. 1 ¶ 51); *see* ECF No. 33-1 at 76. Plaintiffs appear to overlook, however, that a section of the ODNI policy titled "Policy" states that "[t]he ODNI has a security obligation and legal responsibility" under Executive Orders governing intelligence and classification "to safeguard sensitive intelligence information and prevent its unauthorized publication." ECF No. 33-1 at 77. Also, as Defendants observe and Plaintiffs reference elsewhere in their filings, the ODNI nondisclosure agreement for classified information, Form 313, states that the purpose of PPR is "to give the U.S. Government an opportunity to determine whether the information or material that I contemplate disclosing publicly contains any information" that "is marked as classified or that I have been informed or otherwise know is classified" or "is in the process of a classification determination." ECF No. 36 at 22 (quoting ECF No. 33-1 at 70–71). Taken together, these materials appear to set out reasonable limitations and guidance for PPR by the ODNI.

Plaintiffs also appear to overlook NSA policy language. The first paragraph of NSA/CSS Policy 1-30 states that "[t]he public release of official NSA/CSS information shall be limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate Government interest," which is followed by a citation to DOD Directive 5230.09. ECF No. 33-1 at 57, 66. The paragraph further explains that PPR "includes both a classification review" and a review for consistency with NSA "policies and programs" and specifically identified "information security standards" and "corporate messaging standards." *Id.* To be sure, these policies set out an expansive scope of considerations for PPR reviewers to consider. But given their relative specificity, they cannot plausibly be read as so vague that they impermissibly facilitate arbitrary and discriminatory enforcement. Finally, Plaintiffs cite the fact that all of the agencies review submissions for the presence of SCI if the

author had access to it as an employee. ECF No. 33 at 33.[13] In no way can that requirement be construed as vague or allowing for the unchecked exercise of discretion.

Plaintiffs have thus fallen short of plausibly demonstrating that the challenged policies raise constitutional concerns under either of the two vagueness frameworks. The Court notes that they have also failed to link the redactions and excisions from their own works that they allege were arbitrary and discriminatorily motivated to a challenge to the PPR regimes as a whole. *See* ECF No. 1 ¶¶ 66, 80, 88, 89, 110, 114. Nor have they responded to Defendants' observation that no Plaintiff has pursued judicial review of a PPR decision, as they are entitled to do. *See, e.g.*, *Berntsen v. CIA*, 618 F. Supp. 2d 27 (D.D.C. 2009). While the Court appreciates the delay in publication that judicial review could entail, Plaintiffs have not demonstrated that such a delay on its own renders the PPR regimes constitutionally infirm, nor that review in a specific case would not be a more effective means of reviewing the alleged vagueness of a given PPR policy than a facial challenge. In any event, because none of the avenues that Plaintiffs have pursued for their vagueness claim are viable, the claim will be dismissed.

[13] While Plaintiffs do not cite the specific policy imposing this requirement, Defendants appear to be correct in speculating that Plaintiffs are referring to Form 4414, the SCI nondisclosure agreement, which provides that "the purpose of [PPR] . . . is to give the United States a reasonable opportunity to determine whether the preparation submitted . . . sets forth any SCI." ECF No. 36 at 22 (quoting ECF No. 33-1 at 86).

IV. CONCLUSION

For the foregoing reasons, the Court will grant Plaintiffs' Motion for Permission to Omit Home Addresses From Caption, ECF No. 8, Defendants' Motion to Dismiss, ECF No. 30, Plaintiffs' Unopposed Motion for Leave to File Excess Pages, ECF No. 32, and CERL's Motion for Leave to File Brief as Amicus Curiae, ECF No. 34. A separate Order shall issue.

Date: April 15, 2020

/s/
GEORGE J. HAZEL
United States District Judge

Order (ECF 47), filed April 16, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

TIMOTHY H. EDGAR, *et al.*,	*	
Plaintiffs,	*	
v.	*	**Case No.: GJH-19-985**
DANIEL COATS, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * *

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is **ORDERED** by the United States District Court for the District of Maryland that:

1. Plaintiffs' Motion for Permission to Omit Home Addresses from Caption, ECF No. 8, is **GRANTED**;
2. Defendants' Motion to Dismiss, ECF No. 30, is **GRANTED**;
3. Plaintiffs' Unopposed Motion for Leave to File Excess Pages, ECF No. 32, is **GRANTED**;
4. The Center for Ethics and the Rule of Law's Motion for Leave to File Brief as Amicus Curiae, ECF No. 34, is **GRANTED**; and
5. Plaintiffs shall notify the Court within 14 days of this Order if it intends to submit a Motion for Leave to Amend the Complaint. If Plaintiffs intends to file such a Motion, rather than submitting an Amended Complaint, Plaintiff shall first submit a letter no more than 4 pages in length articulating how it would intend to address the Court's concerns. A conference call will then be scheduled during which the Court will determine if further briefing is necessary.

Dated: April 15, 2020

/s/
GEORGE J. HAZEL
United States District Judge

Order (ECF 48), filed May 7, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

TIMOTHY H. EDGAR, *et al.*,	*	
Plaintiffs,	*	
v.	*	**Case No.: GJH-19-985**
DANIEL COATS, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * *

ORDER

In its April 15, 2020 Order in this case, ECF No. 47, the Court granted Defendants' Motion to Dismiss, ECF No. 30, and directed Plaintiffs to notify the Court within 14 days if they intended to submit a Motion for Leave to Amend the Complaint.

That period having passed without Plaintiffs providing such notice to the Court, it is **ORDERED** by the United States District Court for the District of Maryland that:

1. Plaintiffs' Complaint for Declaratory and Injunctive Relief, ECF No. 1, is **DISMISSED WITH PREJUDICE**; and
2. The Clerk **SHALL CLOSE** this case.

Dated: May 6, 2020

/s/
GEORGE J. HAZEL
United States District Judge

Notice of Appeal (ECF 49), filed May 12, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

TIMOTHY H. EDGAR *et al.*, *Plaintiffs*, v. RICHARD A. GRENELL *et al.*, *Defendants*.	No. 8:19-cv-985 (GJH)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiffs in the above-captioned case—Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon—hereby appeal to the United States Court of Appeals for the Fourth Circuit from this Court's memorandum opinion and order, entered respectively on April 16 and May 7, 2020, granting Defendants' motion to dismiss Plaintiffs' complaint. *See* ECF Nos. 46, 48.

May 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2020, I electronically filed the foregoing Plaintiffs' Notice of Appeal with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing.

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