REFORM OF THE INTELLIGENCE COMMUNITY PREPUBLICATION REVIEW PROCESS:

BALANCING FIRST AMENDMENT RIGHTS AND NATIONAL SECURITY INTERESTS

Christopher E. Bailey*

Over the past 15 years, the American public has seen a spate of current and former intelligence officers publishing memoirs, articles, and academic works regarding U.S. national security and their own experiences working in government. In some respects, this new "cottage industry" has advanced public understanding of the important threats facing the United States and the government's response to such threats. In other respects, however, these works have also raised a risk that such publications could impair U.S. national security by exposing intelligence sources, methods, and classified activities. Hence, the Director of National Intelligence ("DNI") should examine the prepublication review process used by various intelligence agencies. In fact, a reform of the intelligence community ("IC") prepublication review process would help advance U.S. national security while also ensuring minimal impairment of the First Amendment rights of government employees, military personnel, and contractors.

* Mr. Christopher E. Bailey is a faculty member at the National Intelligence University specializing in national security law, processes, intelligence ethics, and strategy. He is a 2008 graduate of NIU's Denial & Deception Advanced Studies Program and the U.S. Army War College. He is licensed to practice law in California and the District of Columbia, and is a member of the National Security Law Committee, American Bar Association. He has LLM degree in National Security & U.S. Foreign Relations Law from the George Washington University School of Law where is he is currently a candidate for the SJD degree. All statements of fact, analysis, or opinion are the author's and do not reflect the official policy or position of the National Intelligence University, the Department of Defense or any of its components, or the U.S. government.

The DNI can remedy some of the current problems of overbroad and inconsistent regulations through clear regulatory guidance that helps management officials and employees alike meet both fiduciary and ethical obligations when it comes to protecting classified information. First, the DNI should publish a current, publicly available regulatory standard. Second, the DNI should establish a clearly articulated, dual-track approach for current and former employees. Next, the DNI should mandate that each agency establish—and publicize—an appropriate administrative appeals process. Finally, the DNI should conduct extensive outreach activities to ensure that employees understand prepublication review processes and procedures, as well as appropriate avenues for lodging whistleblower complaints.

INTRODUCTION

Imagine two persons who want the same unclassified government document from an intelligence agency, and both persons believe that the release of that document would serve U.S. national security interests through a better-informed citizenry. The first person is a current government employee who holds a top secret clearance and was the author of that document; the second person is an American citizen, perhaps a noted journalist.[1] The two requestors will use two very different

[1] A government employee may have a proprietary interest in a manuscript or article, particularly if the material has been prepared after work hours or after

processes to obtain the document. The employee will use an administrative process, known as a request for prepublication review, which varies considerably by agency within the intelligence community and allows for considerable discretion on the part of the employee's supervisory chain, either in requiring edits or blocking release. The employee may receive clearance for his or her product within weeks or a few months, but in the event of a denial will be obligated to bring a civil action in federal district court.[2] The outside journalist will request that same document under the Freedom of Information Act ("FOIA"), and the government will be obligated to process that request

leaving government service, while other products may reflect work in the course and scope of government employment (e.g., an article prepared during a government sponsored education or training program). In the latter case, the government employee cannot profit from the publication, although he may have a personal interest in seeing the material published. Pfeiffer v. CIA, 721 F. Supp. 337, 339-40 (D.C. Cir. 1989). Jack Pfeiffer, a retired CIA historian, sought release of a report he had written—while working for the agency—dealing with the Agency's internal investigation of the 1961 Bay of Pigs Operation. *Id.* at 338. Initially, the agency denied declassification of that report under EO 12,356, as well as its release under the Freedom of Information Act (citing the deliberative process privilege under 5 U.S.C. § 552(b)(5)). *Id.* Pfeiffer then asked the agency to undertake a pre-publication review of the report, which the agency declined to do, stating that the procedure did not apply to a work created in the course of an employee's official duties, as opposed to a work that had been prepared for nonofficial publication in a personal capacity but might reflect information acquired through his government employment. *Id.* The district court granted summary judgment, holding that Pfeiffer had no right to prepublication review or mandatory declassification under EO 12,356, and that his continued possession of a copy of that report was wrongful, thus obligating him to return it. *Id.* Subsequently, the Court of the Appeals affirmed that decision, holding that the pre-publication review process did not apply because the government had a property interest in the report and that Pfeiffer was compelled to return his copy as a matter of equity "for he obtained it only by violating his fiduciary duty to the CIA." Pfeiffer v. CIA, 60 F.3d 861, 865 (D.C. Cir. 1995) (citing Snepp v. United States, 444 U.S. 507, 510 (1980)).

[2] A government employee, as a prevailing party in a civil action to challenge a censorship action of the government, may receive an award of reasonable attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Under the statute, an applicant for attorney's fees must file an application within 30 days of the final judgment in the civil action. 28 U.S.C. § 2412 (d)(1)(B). Moreover, the federal district court must determine whether "the position of the United States was substantially justified or . . . special circumstances make an award unjust." 28 U.S.C. § 2412 (d)(1)(A).

under tightly controlled standards.[3] The journalist might not receive a copy of that document until several years later,[4] but in the event of a whole or partial denial will have the right to file a civil complaint against the government in federal district court. If the court decides in his or her favor, the journalist may also receive an award of attorney's fees.[5] In short, two distinct processes facilitate the release of an unclassified document held by the government. In a situation like the one proffered here, the processes can produce remarkably different results, both in terms of the timeliness and the content of the material that is released.

---

[3] The Freedom of Information Act, 5 U.S.C. § 552. *See* WENDY GINSBERG, CONG. RESEARCH SERV., R43924, FREEDOM OF INFORMATION ACT LEGISLATION IN THE 114TH CONGRESS: ISSUE SUMMARY AND SIDE-BY-SIDE ANALYSIS 2 (2016) (reviewing pending legislation that would increase public access to government documents, to include establishing a statutory "presumption of openness" in government). *See also* David Sarvadi, *What You Need to Know About the FOIA Improvement Act of 2016*, NAT'L. L. REV. (June 21, 2016), http://www.natlawreview.com/article/what-you-need-to-know-about-foia-improvement-act-2016 (discussing various aspects of the pending legislation).

[4] STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 1 (Jan. 2016) (describing a "culture of unrepentant noncompliance with Federal law and disrespect for the FOIA process, which resulted in the deletion of potentially responsive records and inexplicable delays," sometimes as long as ten years, on the part of Executive branch departments and agencies). The Defense Intelligence Agency ("DIA"), for example, has reported that it has some requests that have been pending for 10-15 years, based upon the complexity and volume of material requested, but has been making significant efforts to reduce its backlog. DEF. INTELLIGENCE AGENCY, 2015 DOD CHIEF FOIA OFFICER REPORT 24, available in the agency's FOIA Electronic Reading Room, http://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room. However, the Department of Defense ("DoD") Chief FOIA Officer report for 2015 indicates that "[44] percent of the 32 DoD Component FOIA offices either reduced their backlogs or ended FY 2014 with a backlog of zero." DEP'T OF DEF., CHIEF FREEDOM OF INFORMATION ACT OFFICER REPORT FOR 2015, at 27 (2015), http://open.defense.gov/Portals/23/Documents/2015_ACFO_Report_FINAL_REPORT.pdf. This DoD report demonstrates that some agencies experience a much higher volume of requests for release under the FOIA and that other agencies have a minimal backlog in processing such requests. *Id.*

[5] In enacting the FOIA, Congress provided, as a means of encouraging the release of documents, that a federal district court could "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552 (a)(4)(E).

While these two processes serve vastly different government interests, considerable evidence demonstrates problems with the prepublication review process that can be remedied either through an administrative regulation by the Director of National Intelligence ("DNI") or through the passage of new legislation by Congress. On one hand, the prepublication review process has been established by regulation (or directive) in many agencies based originally upon two federal appellate decisions.[6] The process is designed to balance the government's national security interests, including the protection of intelligence sources and methods,[7] with the employee's free speech rights under the First Amendment. Several recent cases, including Anthony Shaffer's 2010 publication of "Operation Dark Heart"[8] and Matt Bissonnette's 2014 publication of "No Easy Day,"[9] suggest frustrations with the inconsistent management

[6] United States v. Marchetti (two cases), 466 F.2d 1309, 1313 (4th Cir. 1972) (holding that a former employee of the Central Intelligence Agency was bound by an employment agreement to submit any writings, fictional or non-fictional, to the agency for pre-publication review); Snepp v. United States, 444 U.S. 507, 514 (1980) (holding that a constructive trust is a proper remedy for disgorging the profits of one who abuses a confidential position by failing to submit material for pre-publication review).

[7] Under 50 U.S.C. § 3024(i), the Director of National Intelligence is responsible for "[protecting] intelligence sources and methods from unauthorized disclosure." Moreover, there is ample evidence that the unauthorized disclosure (leak) of classified information can do significant damage to national security. Tom Gjelten, *Does Leaking Secrets Damage National Security?*, NPR (June 12, 2012, 5:08 AM), http://www.npr.org/2012/06/12/154802210/does-leaking-secrets-damage-national-security.

[8] ANTHONY SHAFFER, OPERATION DARK HEART: SPYCRAFT AND SPECIAL OPS ON THE FRONTLINES OF AFGHANISTAN—AND THE PATH TO VICTORY (2010). *See also* Kevin Gosztola, *In First Amendment Case over Afghan War Memoir, Justice Department Asks Judge to End Lawsuit*, SHADOW PROOF (May 1, 2013), https://shadowproof.com/2013/05/01/in-first-amendment-case-over-afghan-war-memoir-justice-department-asks-judge-to-end-lawsuit (claiming government abuses of the classification system).

[9] MARK OWEN (MATT BISSONNETTE), NO EASY DAY: THE FIRSTHAND ACCOUNT OF THE MISSION THAT KILLED OSAMA BIN LADEN (2014). *See also* Adam Goldman, *Justice Department Drops Second Criminal Investigation into Navy SEAL Matt Bissonnette*, WASH. POST (May 31, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/05/31/justice-department-drops-second-criminal-investigation-into-navy-seal-matt-bissonnette (explaining that Bissonnette had been facing

practices, delays, and allegedly politically-inspired censorship of the prepublication review process.[10] In fact, congressional oversight committees have repeatedly called upon the DNI to issue new community-wide guidance and report on issues in the review process.[11]

On the other hand, the FOIA is a 1966 statute passed by Congress to provide for the disclosure of previously unreleased government documents. The FOIA was designed to ensure accountability and transparency in government, promoting an informed citizenry.[12] The Act defines the government records

two separate criminal prosecutions, one related to his book *No Easy Day* which had not been submitted for pre-publication review and a second one accusing him of illegal profits related to his work as a consultant for a video game company while on active duty). Bissonnette has recently pursued a legal action against the attorney who had advised him that he did not need to comply with the DoD pre-publication review requirements. Melissa Maleske, *$8M Bin Laden Book Malpractice Suit Fails, Attys Say*, LAW360 (Jan. 23, 2015, 5:56 PM), http://www.law360.com/articles/614543/8m-bin-laden-book-malpractice-suit-fails-attys-say.

[10] *See generally* Christopher R. Moran & Simon D. Willmetts, *Secrecy, Censorship, and Beltway Books: The CIA's Publications Review Board*, 24 INT'L J. OF INTELLIGENCE AND COUNTERINTELLIGENCE 239 (2011) (interviewing the former chairman of the CIA's Publications Review Board).

[11] *Compare* FEINSTEIN, INTELLIGENCE AUTHORIZATION ACT FOR 2013, S. REP. NO. 112-192 at 8 (2012) (calling upon the DNI in Section 507 to "prescribe regulations and requirements specifying the responsibilities of Intelligence Community personnel with access to classified information, including regulations and other requirements relating to contact with the media, non-disclosure agreements, prepublication review, and disciplinary actions."), *with* NUNES, INTELLIGENCE AUTHORIZATION ACT FOR 2017, H.R. REP. NO. 114-573 at 7 (2016) (recognizing "the perception that the pre-publication review process can be unfair, untimely, and unduly onerous and that these burdens may be at least partially responsible for some individuals 'opting out' of the mandatory review process. The Committee further understands that IC agencies' pre-publication review mechanisms vary, and that there is no binding, IC-wide guidance on the subject.").

[12] Memorandum of January 21, 2009 – Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 26, 2009) (Presidential memorandum directing all Executive branch agencies to adopt a presumption of openness and directing the Attorney General to adopt new FOIA guidelines). *See also* U.S. Attorney Gen., Memorandum to Heads of Executive Departments and Agencies, on the Freedom of Information Act (FOIA) (Mar. 19, 2009) (rescinding earlier guidelines and establishing new standards in favor of openness and improved FOIA operations).

that are subject to disclosure, outlines a mandatory disclosure process, allows nine exemptions to disclosure, and provides for federal court jurisdiction to review agency denials, potentially awarding attorney's fees and costs to the aggrieved requestor. Indeed, extensive federal case law dictates how FOIA cases should be handled, and the Department of Justice has authored a detailed guide for FOIA practitioners.[13]

A series of federal cases, as well as some public commentary, suggests problems in the prepublication review process with respect to employee obligations and the vague review standards used by the government.[14] Critics of the review process include three former directors of the Central Intelligence Agency ("CIA"): Admiral Stansfield Turner,[15] General Michael Hayden,[16] and Leon Panetta.[17] Panetta apparently became so frustrated with the process that he sent his book to his editor before it had completed the Publication Review Board ("PRB") process—raising the issue of whether he violated his own nondisclosure agreement.[18] One critic said:

Clearly, the government has a legitimate interest in preventing disclosure of classified information. But the current

---

[13] *DOJ Guide to the Freedom of Information Act*, DEP'T OF JUSTICE (July 23, 2014), https://www.justice.gov/oip/doj-guide-freedom-information-act [hereinafter *DOJ Guide to FOIA*].

[14] SUSAN L. MARET & JAN GOLDMAN, GOVERNMENT SECRECY: CLASSIC AND CONTEMPORARY READINGS 98 (2009).

[15] James Bamford, *Stansfield Turner and the Secrets of the CIA*, WASH. POST (June 9, 1985), https://www.washingtonpost.com/archive/entertainment/books/1985/06/09/stansfield-turner-and-the-secrets-of-the-cia/f4139b9a-6cc8-4b8e-9d5c-d194245f5aa9.

[16] Benjamin Good, *We Need to Know More About How the Government Censors Its Employees*, ACLU (Mar. 10, 2016, 3:00 PM), https://www.aclu.org/blog/speak-freely/we-need-know-more-about-how-government-censors-its-employees.

[17] Greg Miller, *Panetta Clashed with CIA over Memoir, Tested Agency Review Process*, WASH. POST (Oct. 21, 2014), https://www.washingtonpost.com/world/national-security/panetta-clashed-with-cia-over-memoir-tested-agency-review-process/2014/10/21/6e6a733a-5926-11e4-b812-38518ae74c67_story.html.

[18] LEON PANETTA, WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE (2014).

prepublication review process is too expansive, slow and susceptible to abuse. The damage it does to First Amendment values is pervasive but nearly invisible to the public. In an era characterized by endless war and a bloated secrecy bureaucracy, the restrictions on commentary and criticism about government policies and practices pose an intolerable cost to our democracy.[19]

Thus, this article proposes that the current prepublication review process for intelligence community agencies can be reformed using lessons learned from the FOIA. Such reform would help balance the need to protect national security information with the right of government employees to seek release of documents that would promote a better-informed citizenry.

The DNI should issue new regulatory guidance to the intelligence community regarding the prepublication review process, perhaps similar to the current "DOJ Guide to the Freedom of Information Act."[20] The DOJ guide provides a "comprehensive legal treatise of the FOIA's procedural requirements, exemptions, and litigation considerations. It contains a detailed analysis of the key judicial opinions issued on the FOIA."[21] This useful reference is readily accessible to the general public, providing important information for both lay persons and attorneys navigating what can be an arcane process for the uninitiated. Similarly, detailed regulatory guidance by the DNI would help eliminate some of the current problems with overbroad or vague prepublication review requirements, allowing both management officials and employees alike to meet

[19] Jack Goldsmith & Oona A. Hathaway, *The Government's Prepublication Review Process is Broken*, WASH. POST (Dec. 25, 2015), https://www.washingtonpost.com/opinions/the-governments-prepublication-review-process-is-broken/2015/12/25/edd943a8-a349-11e5-b53d-972e2751f433_story.html?utm_term=.c37cdfe6fd74. *See also* Jack Goldsmith & Oona A. Hathaway, *More Problems with Prepublication Review*, LAWFARE (Dec. 28, 2015, 12:00 PM), https://www.lawfareblog.com/more-problems-prepublication-review (detailing multiple specific issues with the current prepublication review process).

[20] *DOJ Guide to FOIA*, *supra* note 13.

[21] *Id.*

their fiduciary and ethical obligations. Such guidance should provide clear submission requirements for employees, including what types of documents must be submitted and to whom, while also requiring that each agency maintain some level of transparency and accountability in its processes. The DNI can adopt best practices from several agencies: the CIA, with its dual-track approach for current and former employees and its laudable outreach efforts to promote employee understanding of PRB process and procedures; the NSA, with its current, publicly available regulatory standard; and others.

I. THE PREPUBLICATION REVIEW PROCESS

A. Introducing the Prepublication Review Process

The prepublication review process is an important means by which the intelligence community protects its classified information while advancing national security interests. Some books, such as Herbert Yardley's 1931 work about the government's code breaking efforts[22] and Phillip Agee's post-Vietnam books that revealed the identity and location of about 2,000 intelligence officers operating abroad, have caused considerable damage and irreparable injury to U.S. interests.[23] In Yardley's case, the government considered various legal options to prevent the publication of his planned book, but executive branch officials concluded that existing law did not permit such a prior restraint on speech (e.g., the government did not then use nondisclosure agreements).[24]

---

[22] HERBERT O. YARDLEY, THE AMERICAN BLACK CHAMBER (1931).

[23] PHILIP AGEE, INSIDE THE COMPANY: CIA DIARY (1975). *See also* PHILIP AGEE & LOUIS WOLF, DIRTY WORK: THE CIA IN WESTERN EUROPE (1978); Scott Shane, *Philip Agee, 72, Is Dead; Exposed Other C.I.A. Officers*, N.Y. TIMES (Jan. 10, 2008), http://www.nytimes.com/2008/01/10/obituaries/10agee.html?_r=0. Agee's books, as well as the books published by others, exposed the names and personal information about U.S. intelligence officers operating in Europe, leading the U.S. Congress to pass the Intelligence Identities Protection Act of 1982 (50 U.S.C. §§ 421–426). *Id.* In fact, this bill was popularly known at the time as the "Anti-Agee Bill." CHRISTOPHER ANDREW, THE SWORD AND THE SHIELD: THE MITROKHIN ARCHIVE AND THE SECRET HISTORY OF THE KGB 234 (1999).

[24] DAVID KAHN, THE READER OF GENTLEMEN'S MAIL: HERBERT O. YARDLEY AND THE BIRTH OF AMERICAN CODEBREAKING 106-112 (2004) (chronicling the story of a man left

Yardley's book did, however, cause Congress to pass a new statute prohibiting such disclosures of code material.[25] In Agee's case, the CIA had used nondisclosure agreements, but the government apparently decided not to enforce his agreement in federal court, likely because the books were first published abroad and Agee never returned to the United States.[26] Eventually, the government found a more effective means of addressing the problem, largely through enforcement of the employee's nondisclosure agreement in federal district court and through an invigorated prepublication review process.[27]

Generally, the executive branch has sought to control classified information through Executive orders,[28] as well as secrecy agreements in which employees agree to protect classified information and to submit materials for prepublication review.[29] The federal courts have consistently upheld employee

unemployed by the decision of the Secretary of State to abolish the code breaking unit; lacking a government pension and needing a means to support his family, Yardley decided to write a book about his experiences).

[25] *Id.* at 158-71.

[26] *See* Christopher Moran, *Turning Against the CIA: Whistleblowers During the 'Time of Troubles'*, 100 J. OF THE HIST. ASSOC. 251, 260-66 (2015) (examining how the CIA responded to the revelations of three "intelligence apostates," Victor Marchetti, Philip Agee and Frank Snepp). *Compare* ANDREW, *supra* note 23, at 230-34 (recounting how the KGB used Agee's books to support its "active measures" against U.S. interests worldwide), *with* CHRISTOPHER ANDREW & VASILI MITROKHIN, THE WORLD WAS GOING OUR WAY: THE KGB AND THE BATTLE FOR THE THIRD WORLD: NEWLY REVEALED SECRETS FROM THE MITROKHIN ARCHIVE 103-04 (2000) (discussing how Agee first approached Soviet and then Cuban intelligence, and how his books damaged U.S. interests).

[27] *See* John Hollister Hedley, *Secrets, Free Speech, and Fig Leaves*, 41 STUD. IN INTELLIGENCE 75, 77 (2007) (noting that the CIA used a less systematic process before 1976, managed by the Office of Security rather than a formal PRB, for review of non-official publications authored by employees).

[28] Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010) (discussing Classified National Security Information and revoking the earlier Executive Order 12,958 issued April 17, 1995).

[29] The government currently uses two non-disclosure agreements to protect information classified pursuant to Executive Order 13,526: Standard Form 312, which is prescribed by the Director of National Intelligence, and Form 4414. Standard Form 312, Classified Information Nondisclosure Agreement (last revised July 2013), https://fas.org/sgp/othergov/sf312.pdf [hereinafter SF 312]; Form 4414, Sensitive Compartmented Information Nondisclosure Agreement (last revised

agreements to submit materials for prepublication review, finding that such agreements serve as a reasonable balance between the government's interest in protecting intelligence sources and methods[30] and an employee's First Amendment right to publish unclassified information. However, case law suggests problems with how the prepublication review process has been managed. This situation leaves government employees at risk in terms of what must be submitted for review and the manner in which the government must process that request.

Since 9/11, the publication of books and articles on U.S. national security has become a "cottage industry" for former intelligence officers.[31] Thus, a failure to comply with obligations

Dec. 2013), https://fas.org/sgp/othergov/intel/sf4414.pdf [hereinafter Form 4414]. Under the SF 312, the employee agrees that he will not divulge classified information unless he has verified that the recipient has been properly authorized by the government to receive it, or that he has "been given prior written notice of authorization from the United States Government or Agency ... responsible for the classification of information or last granting [him/her] a security clearance that such disclosure is permitted." Under the Form 4414, ¶ 4, the employee agrees to submit materials—relating to SCI (Sensitive Compartmented Information)—intended for public disclosure, including works of fiction, for security review by the Department or Agency that last authorized his access to classified information or material. In the next paragraph, the employee also acknowledges that the purpose of such review is to give the government a "reasonable opportunity" to determine whether the submitted material contains classified information. The Form 4414 then states that the agency/department to which the employee has made his/her submission will act upon it, to include any interagency coordination within the intelligence community, and make a response within a reasonable time, "not to exceed 30 working days from date of receipt." *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSID-91-106FS, INFORMATION SECURITY: FEDERAL AGENCY USE OF NONDISCLOSURE AGREEMENTS (1991) (explaining that the use of nondisclosure agreements began as a result of a now suspended 1983 National Security Decision Directive that had been issued by President Ronald Reagan and that such agreements are now widely used throughout government); *see generally* Michael L. Charlson, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 CAL. L. REV. 962, 966-70 (1984) (reviewing the expanding use of non-disclosure agreements and pre-publication review during the Reagan administration, and offering several alternatives to government review such as tightened security programs, post-publication sanctions, and administrative actions for current employees).

[30] 50 U.S.C. § 3024(i) (2012).

[31] Rebecca H., *The 'Right to Write' in the Information Age*, 60 STUD. IN

under a non-disclosure agreement can have very serious civil, criminal, and administrative consequences for current and former government employees.[32] In one recent case, Matt Bissonnette, writing under the pen name Mark Owen, a former Navy SEAL who had written a first-hand account of the May 2011 mission that killed Osama bin Laden, agreed to forfeit over $6.6 million based upon his failure to comply with prepublication review requirements.[33]

B. Case Law

The modern prepublication review process is based primarily upon several federal appellate cases that established the fiduciary obligation of both current and former government employees to submit materials for government review prior to publication. Moreover, an employee who breaches his or her obligation is subject to the imposition of a constructive trust—without regard to whether classified information has been disclosed—against all proceeds of that publication. Nonetheless, some important questions regarding employee and government obligations remain unanswered, such as an employee's obligation in cases requiring review by multiple agencies and whether employees can discuss previously leak documents.

INTELLIGENCE 15 (2016) (examining the broken process and recommending some practical reform steps).

[32] 18 U.S.C. § 793(d) (2012) (making government employees who make unauthorized disclosures of classified information to persons not authorized to receive it, such as a magazine or book publisher, subject to criminal prosecution); *see also* United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988) (the defendant had provided purloined imagery of a Soviet aircraft carrier under construction to *Jane's Defense Weekly*; Morison was convicted under both the theft and espionage statutes, and was sentenced to two years in prison).

[33] *Ex-Navy SEAL to pay feds $6.6 million to settle suit over book on bin Laden raid*, FOX NEWS (Aug. 20, 2016), http://www.foxnews.com/us/2016/08/20/ex-navy-seal-to-pay-feds-6-6-million-to-settle-suit-over-book-on-bin-laden-raid.html; *see also* Adam Goldman and Dan Lamothe, *Justice Department drops second criminal investigation into Navy SEAL Matt Bissonnette,* WASH. POST (May 31, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/05/31/justice-department-drops-second-criminal-investigation-into-navy-seal-matt-bissonnette.

The 1972 *Marchetti* case represents the first effort by the executive branch to enforce a prepublication review agreement—a prior restraint on free speech under the First Amendment—against a former intelligence officer in federal court.[34] Victor Marchetti had worked for the CIA from 1955 to 1969, and he had signed a secrecy agreement pledging not to divulge any classified information.[35] Later, when he terminated his employment, Marchetti signed an oath in which he acknowledged that the unauthorized disclosure of classified information was prohibited by law and agreed not to divulge "any information relating to the national defense and security" without prior written approval from the agency.[36] Still, after his resignation and without prior approval, he published books and articles, appeared on television shows, and gave interviews to the press, all related to the policies and practices of the agency and his experiences as an intelligence officer.[37]

The government initiated a civil action in federal district court, seeking an injunction against Marchetti. A three-judge appellate panel acknowledged the government's right to protect classified information, finding that Marchetti owed a fiduciary obligation to the government by operation of his employment agreement and imposing any burden of obtaining judicial review upon him.[38] While the court granted the injunction sought by the government regarding any fictional or nonfictional writings related to the agency or intelligence matters, it also made several other critical points. First, the court observed that the government's need for secrecy was such that the court probably would have found an implied agreement had one not been formally expressed.[39] Second, the court said that it would have declined enforcement of an agreement "to the extent that it purports to prevent disclosure of unclassified information. . . ."[40]

---

[34] United States v. Marchetti, 466 F.2d 1309, 1311 (4th Cir. 1972).
[35] *Id.* at 1312.
[36] *Id.*
[37] *Id.* at 1313. *See* Moran, *supra* note 26, at 255-60 (chronicling Marchetti's background and experiences with the CIA's PRB process).
[38] *Marchetti*, 466 F.2d at 1316-17.
[39] *Id.* at 1316.
[40] *Id.* at 1317.

Here, however, the court did not address the propriety of the classification system itself, leaving open the issue of whether Marchetti could be prohibited from divulging information that had not been properly classified. Third, the court determined that "[Marchetti] may not disclose information obtained by him during the course of his employment which is not already in the public domain."[41] This statement does not answer the question of whether current or past government employees can discuss previously leaked government documents without affirming or denying the accuracy of such materials. Finally, the court obligated the CIA to act promptly in its review of employee material, indicating in dicta that "the maximum period for responding after the submission for approval should not exceed thirty days."[42]

Like Victor Marchetti, Frank Snepp had been employed by the CIA, had executed a voluntary secrecy agreement as an express condition of his employment, and had breached his obligation to obtain prepublication review of his 1977 book "Decent Interval," in which he discussed certain CIA activities in South Vietnam.[43] The government then brought a breach of contract action to enforce the secrecy agreement, seeking an injunction and an order imposing a constructive trust for the government's benefit upon all profits that he might earn from the proceeds of his book.[44] The district court found that Snepp "had willfully, deliberately and surreptitiously breached his position of trust" by causing the publication of his book without prior approval from the agency.[45] Moreover, the court found that he had misled CIA officials into believing that he would submit the

---

[41] *Id.*

[42] *Id.*

[43] FRANK W. SNEPP, DECENT INTERVAL: AN INSIDER'S ACCOUNT OF SAIGON'S INDECENT END TOLD BY THE CIA'S CHIEF STRATEGY ANALYST IN VIETNAM (1977).

[44] United States v. Snepp, 456 F. Supp. 176, 177 (E.D. Va. 1978). *See* Moran, *supra* note 26, at 266-73 (examining Snepp's legal struggles with the CIA). Moran argues that Frank Snepp was a victim of circumstances, with his revelations about CIA wrongdoing coming on the heels of earlier damaging disclosures about the CIA. In fact, two prior CIA officers (Miles Copeland, 1974; Joseph Burckholder, 1976) had published books without approval and neither had been punished. *Id.* at 270.

[45] *Snepp*, 456 F. Supp. at 179.

book for prepublication clearance.[46] The district court then enjoined future breaches of the agreement and imposed a constructive trust on Snepp's profits.[47] On review, the fourth circuit upheld the injunction, but concluded that the record did not support the imposition of a constructive trust.[48] The court noted that the government had conceded for purposes of litigation that Snepp's book did not contain any classified information, thus reaching the implicit conclusion that the fiduciary obligation extended only to safeguarding classified material.[49]

Subsequently, the Supreme Court held in a 6-3 per curiam decision that Snepp had violated his fiduciary obligation to the agency and that the proceeds of that breach should be impressed with a constructive trust.[50] In fact, the Court reasoned that "[w]hether Snepp violated his trust does not depend upon whether his book actually contained classified information."[51] Thus, Snepp's failure to submit his book for prepublication review impaired the agency's obligation to perform its statutory duty to protect intelligence sources and methods from unauthorized disclosure.[52] In other words, former intelligence officers cannot rely on their own judgment about what information must be protected, but must allow their former employers the opportunity to determine for themselves what must be protected and what can be released.[53]

The Court further reasoned that a traditional remedy, such as nominal, actual, or punitive damages, would not serve the government's interests.[54] Nominal damages would have

---

[46] *Id.*
[47] *Id.* at 182. By one estimate, Snepp was obligated to surrender an estimated $140,000 to the government. Moran & Willmetts, *supra* note 10, at 240.
[48] Snepp v. United States, 595 F.2d 926, 929, 935-36 (4th Cir. 1979).
[49] *Id.*
[50] Snepp v. United States, 444 U.S. 507, 510 (1980).
[51] *Id.*
[52] *Id.* at 509 (1980). *See* CIA v. Sims, 471 U.S. 159, 188 (1985) (allowing the Director of Central Intelligence broad discretion in protecting intelligence sources and methods in responding to requests made under the FOIA).
[53] *Snepp*, 444 U.S. at 511.
[54] *Id.* at 514-15.

been hollow and without deterrent effect; actual damages would have required the government to prove tortious conduct, possibly through the revelation of classified information; and punitive damages would have been speculative and would not have provided a reliable deterrent against future breaches. The Court then summarily concluded that a constructive trust was the most appropriate means of protecting the government and the former intelligence officer from unwarranted risks.[55] Thus, if an author seeks to publish a book without prior approval, even though that book contains no classified information, the government can go to court to block publication or seize the profits.

In dissent, Justice Stevens argued that a constructive trust was inappropriate. Snepp had not disclosed confidential information and the "profits from his book [were not] in any sense a product of his failure to submit the book for prepublication review."[56] Thus, according to Justice Stevens, even if Snepp had submitted his book for prior clearance, the government's authority to censor it would have been limited to classified information and the government "would have been obligated to clear the book for publication in precisely the same form as it now stands."[57] Justice Stevens also argued that the agency did not have the authority to redact "unclassified information on the basis of its opinion that publication may be 'detrimental to vital national interests' or otherwise 'identified as harmful.'"[58] In any case, Justice Stevens objected to the Court's decision in the absence of a full briefing and oral argument.[59]

In *McGehee v. Casey*, a 1983 decision of the U.S. Court of Appeals for the District of Columbia, a former CIA officer challenged the agency's classification and censorship scheme.[60] Like Marchetti and Snepp before him, McGehee had signed a

[55] *Id.* at 515-16.
[56] *Id.* at 521 (Stevens, J., dissenting).
[57] *Id.*
[58] *Id.* at 522.
[59] Snepp v. United States, 444 U.S. 507, 517 (1980).
[60] McGehee v. Casey, 718 F.2d 1137, 1139 (D.C. Cir. 1983).

secrecy agreement when he was employed by the agency.[61] Later, after he had submitted a draft article for prepublication review, he was informed that the draft contained classified information and that the agency was withholding permission to publish.[62] Subsequently, he sought judicial review in federal district court, challenging the constitutionality of the agency's classification scheme and the propriety of classifying portions of his article under that scheme.[63] Here, both the district court and the U.S. Court of Appeals for the District of Columbia followed *Snepp* and held that the secrecy agreement was a reasonable means of protecting important national security interests. However, unlike Snepp, McGehee had submitted his manuscript for prepublication review. Hence, both courts considered the substantive process and criteria by which the agency classified and censored the writings of former employees.

The U.S. Court of Appeals for the District of Columbia made two important holdings in this case. Initially, the court held that the agency's censorship of classified information contained in the writings of former officers did not violate the First Amendment.[64] In other words, as with Marchetti and Snepp before him, the court upheld the propriety of McGehee's secrecy agreement and the prepublication review process itself. Next, the court noted that McGehee had a strong First Amendment interest in ensuring that agency censorship of his article was limited to material that had been properly classified by the government.[65] The court then articulated a standard of review for prepublication review cases involving censored material. First, the court explained that "reviewing courts should conduct a *de novo* review of the classification decision, while giving deference to reasoned and detailed CIA explanations of the

[61] *Id.* at 1139.
[62] *Id.*
[63] *Id.* at 1140.
[64] *Id.*
[65] *McGehee,* 718 F.2d at 1148 (citing Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975) for the proposition that material should be censored by the court only if it is found to be both classified and properly classifiable under the Executive order).

classification decision."[66] Second, the court believed that "courts should require that CIA explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification."[67] Third, the court anticipated that an "*in camera* review of agency affidavits, followed if necessary by further judicial inquiry, will be the norm."[68] Finally, the court held that in McGehee's case, the material marked as "secret" could be reasonably expected to cause serious damage to national security, and censorship was thus warranted.[69]

Shaffer v. Defense Intelligence Agency involved a former civilian employee of the Defense Intelligence Agency ("DIA") who had obtained prepublication review in his capacity as an Army Reserve officer, but failed to obtain approval from either the DIA or any other intelligence agency.[70] Lieutenant Colonel Anthony Shaffer had worked as a civilian employee of the DIA from 1995 to 2006 while simultaneously serving in the Army Reserve. The Army Reserve mobilized him from December 2001 to June 2004, during which time he completed two tours in Afghanistan.[71] In 2007, after he had left the DIA and his clearance had been revoked , he teamed with a ghostwriter to prepare a memoir of his experiences entitled "Operation Dark Heart," a book that was eventually accepted for publication by St. Martin's Press.[72] In March 2009, Shaffer notified his Army Reserve chain-of-

[66] *McGehee,* 718 F.2d at 1148. *See also* Stillman v. CIA, 319 F.3d 546 (D.C. Cir. 2003) (the trial court abused its discretion in finding that the plaintiff's counsel, Attorney Mark Zaid, had a right to access to the classified manuscript so that he could challenge the classification decision; the case was remanded for an *ex parte* assessment of the classification issue).
[67] *McGehee,* 718 F.2d at 1148.
[68] *Id.* at 1149.
[69] *Id.* at 1149-50.
[70] Shaffer v. Def. Intelligence Agency, 102 F. Supp. 3d 1, 3 (D.C.D. 2015).
[71] Shaffer v. Def. Intelligence Agency, Decl. of Anthony Shaffer, Ex. B to Defs.' Second Mot. for Summ. J., Civil Action No.: 10-2119 (RMC), filed Apr. 26, 2013 [hereinafter Decl. of Anthony Shaffer].
[72] *See generally* ANTHONY SHAFFER, OPERATION DARK HEART: SPYCRAFT AND SPECIAL OPS ON THE FRONTLINES OF AFGHANISTAN—AND THE PATH TO VICTORY (2010). This September 2010 edition of the book is the heavily censored version that was eventually published after the book went through pre-publication review by the government.

command of his pending book and received guidance on the prepublication review process.[73] Rather than submitting his book to the DIA for clearance, he obtained prepublication approval through his Army Reserve command in January 2010.[74]

The DIA learned about the planned publication of the book on May 27, 2010, but was unable to obtain a copy until July of that year.[75] The DIA found that the book contained significant classified information related to the CIA, the National Security Agency ("NSA"), and the U.S. Special Operations Command.[76] Subsequently, based upon an August 6, 2010, demand letter sent by the DIA Director, the Army Reserve command revoked its earlier approval of the book and the publisher agreed to delay distribution.[77] Shaffer then began negotiating with DIA and Department of Defense ("DoD") officials about possible changes to the manuscript. The DoD paid $50,000 to purchase and destroy the entire 10,000-copy first printing of the book, eventually allowing a second printing with 433 redacted passages to go forward.[78] The publisher was unable to retrieve all copies of the unredacted book.[79] Finally, on December 14,

[73] Decl. of Anthony Shaffer, *supra* note 71, at 5-7.
[74] Shaffer v. Def. Intelligence Agency, Civil Action No.: 10-2119 (RMC), filed Feb. 11, 2012 (memorandum opinion).
[75] Def. Intelligence Agency, Memorandum on Harm to National Security from Unauthorized Disclosure of Classified Information by U.S. Army Reserve Lieutenant Colonel (LTC) Anthony Shaffer in His Book "Operation Dark Heart" (Aug. 6, 2010) [hereinafter DIA Memorandum]. *See also* Scott Shane, *Pentagon Plan: Buying Books to Keep Secrets*, N.Y. TIMES (Sept. 9, 2010), http://www.nytimes.com/2010/09/10/us/10books.html (noting that the unredacted book reportedly contained the names of two American intelligence officers, as well as information pertaining to signals intelligence activities).
[76] DIA Memorandum, *supra* note 75; *see also* Shane, *supra* note 75.
[77] Decl. of Anthony Shaffer, *supra* note 71, at 8-9.
[78] Scott Shane, *Pentagon Eases Stance on Army Officer's Book Revealing Afghanistan Intelligence Secrets*, LEDGER (Jan. 26, 2013, 8:27 AM), http://www.theledger.com/news/20130125/pentagon-eases-stance-on-army-officers-book-revealing-afghanistan-intelligence-secrets.
[79] Alex Spillius, *Pentagon Destroyed 10,000 Copies of Army Officer's Book*, THE TELEGRAPH (Sept. 26, 2010, 10:25 PM), http://www.telegraph.co.uk/news/

2010, due to a difference of opinion over the censorship of certain passages, Shaffer filed a civil complaint alleging that the defendants had deprived him of First Amendment rights by classifying a substantial portion of his book.[80]

On August 3, 2012, Shaffer submitted a formal request through the DoD's Office of Security Review ("OSR") for another classification review so that he could proceed with a foreign language edition of his book.[81] Eventually, as a result of an OSR review and further negotiations, the government agreed that 198 of the 433 passages redacted in the September 2010 edition were properly declassified. Shaffer also agreed to use substitute language for 73 passages and delete 139 passages, with only 23 passages remaining in dispute. While Shaffer identified some material as available in open source publications, he could not provide pinpoint citations for certain disclosures in the book; in turn, the OSR claimed that it could not conduct a meaningful review without those citations.[82] On January 19, 2013, the OSR concluded that none of the material in the 23 passages, Shaffer's February 2006 testimony before the House Armed Services Committee, or Shaffer's Bronze Star narrative had been officially declassified.[83]

The defendants then filed a motion for summary judgment for ex parte, in camera review, but the court concluded that the briefing was inadequate as to both the classified nature of the congressional testimony and the Bronze Star narrative.[84] The district judge decided the case using the standard of review in *McGehee*. First, the judge explained that "when a manuscript contains information that is unclassified, wrongly-classified, or derived from public sources, the Government may not censor

worldnews/northamerica/usa/8026220/Pentagon-destroyed-10000-copies-of-army-officers-book.html; *see also* Shaffer v. Def. Intelligence Agency, 102 F. Supp. 3d 1, 5 (D.D.C. 2015).

[80] *Shaffer*, 102 F. Supp. 3d at 5.

[81] *Id.* at 6.

[82] *Id.*

[83] *Id.* at 7.

[84] *Id.* at 7-8.

such material."[85] Second, she concluded that classified information could be disclosed, despite an objection from the government, "if the information has been officially acknowledged, that is, if (1) the same, (2) specific information (3) already has been made public through an official and documented disclosure."[86] The judge explained that a "plaintiff asserting a claim of prior disclosure bears the initial burden of pointing to specific information in the public domain that appeared to duplicate that being withheld."[87] Finally, the judge held that the February 2006 congressional testimony had been officially released,[88] but that the Bronze Star narrative[89] and the material in the 23 contested passages had not.[90] Moreover, the judge sharply criticized the DIA for its delay in confirming that

[85] *Id.* at 9. Section 1.7 of Executive Order 13,526 precludes the classification of information "(1) to conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency," further limiting an agency's authority to censor the works of past or present employees. Exec. Order No. 13,526, *supra* note 28.

[86] *Shaffer*, 102 F. Supp. 3d at 9; *see also* Exec. Order No. 13,526, *supra* note 29, at § 1.1(c) ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."). This means that material that is in the public domain as a result of an unauthorized disclosure, such as WikiLeaks, cannot be cited or used by a past or present employee. A similar three-prong standard is used by the district courts in FOIA cases to determine when information in the public domain has been officially acknowledged. *Compare* Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (noting that books published by former CIA employees, even though submitted to the agency for pre-publication review, do not constitute official release or acknowledgement for purposes of the FOIA), *with* Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (discussing a three-part test and also noting that even though certain information may already reside in the public domain it does not eliminate the possibility that additional disclosures could cause harm to intelligence sources, methods and operations). One interesting issue involves whether the publication of General Michael Hayden's autobiography, which contains references to targeted killings and presumably went through pre-publication review, could constitute an official acknowledgment of such activities. Cody M. Poplin, *ACLU Releases Letter in ACLU v. CIA Regarding Disclosures in Gen. Hayden's New Book*, LAWFARE (Feb. 16, 2016, 4:51 PM), https://www.lawfareblog.com/aclu-releases-letter-aclu-v-cia-regarding-disclosures-gen-haydens-new-book.

[87] *Shaffer*, 102 F. Supp. 3d at 9 (citation omitted).

[88] *Id.* at 12.

[89] *Id.* at 14.

[90] *Id.*

the congressional testimony had in fact been cleared for release several years earlier,[91] raising a serious question whether the agency had been negligent in its record-keeping. The judge emphasized that the "Defendants' blinkered approach to the serious First Amendment questions raised here caused Defendants to take an erroneous legal position on classification, wasting substantial time and resources of the parties and the Court."[92] Thus, Shaffer could seek attorney's fees and costs under the Equal Access to Justice Act.[93]

Shaffer raises several critical practice points. First, the case illustrates that current or past government employees have a "one-stop" obligation for obtaining prepublication review pursuant to a non-disclosure agreement. Using either the Standard Form ("SF") 312 or the Form 4414, the employee or former employee must submit material for clearance to the agency that last authorized his access to classified information or material.[94] That agency then has an obligation to act upon that request, including any interagency coordination, and to respond within a reasonable time. In Shaffer's case, it was apparent that he completed his book after he had left his employment with the DIA. Indeed, he submitted that manuscript to his Army Reserve command more than three years after the revocation of his top secret clearance and his departure from the agency. Thus, one could reasonably conclude—assuming that the Army Reserve was the last agency to grant him a security clearance—that he had met his prepublication review obligation. However, the Army Reserve approving officials failed to conduct appropriate interagency coordination before giving their approval, probably because of their inexperience in such matters. Still, the DIA acted in a timely manner with its demand that the Army Reserve command revoke its approval before the book could be widely distributed to purchasers.

---

[91] *Id.* at 12.
[92] *Id.* Presumably, the trial judge was indicating that the defendants' management of the prepublication review process with respect to Shaffer's First Amendment interests, at least in relation to the previously released congressional testimony, was narrow-minded and inexcusable.
[93] *See* Equal Access to Justice Act, 28 U.S.C. § 2412(a)-(b) (2012).
[94] *See* SF 312, *supra* note 29; Form 4414, *supra* note 29.

Next, *Shaffer* highlights the importance of an author's use of pinpoint citations (i.e., ample footnoting) throughout any work proffered for prepublication review. A plaintiff, as well as his attorney, has no "constitutional right" to review classified material as a means of challenging a classification decision, as attorney Mark Zaid tried to do in both the *Stillman*[95] and *Shaffer* cases.[96] Indeed, courts will give deference to the government's classification decisions during in camera proceedings, and a plaintiff will likely have to argue his case from the unclassified material available to him. The case also demonstrates that the government can only censor properly classified material and may be obligated to pay attorney's fees and costs to a prevailing plaintiff.

Finally, *Shaffer* leaves unanswered some questions regarding an agency's obligation to conduct prepublication review within a reasonable amount of time. While the FOIA imposes a similar requirement for speedy processing of requests,[97] an agency might have a backlog of work and might not be able to complete the review, particularly for lengthy or complex products, within 30 days. At least one commentator has noted that an agency's failure to act in good faith in processing a request might constitute a waiver of its review rights.[98] Indeed,

---

[95] Stillman v. CIA, 319 F.3d 547 (D.C. Cir. 2003).

[96] Shaffer v. Def. Intelligence Agency, 102 F. Supp. 3d 1, 5 (D.C.D. 2015).

[97] *See* 5 U.S.C. § 552(a)(6)(A) (2012) (imposing a 20-day requirement, extendable on written notice, for an agency to respond to a documentary request).

[98] *See* Charlson, *supra* note 29, at 988 (citing Freedman v. Maryland, 380 U.S. 51, 58-59 (1965) (reviewing the timeliness provisions in a Maryland film censorship statute)). *But see* Gregory Levey, *Interview with an Ex-Spy: Ishmael Jones on His Book, the C.I.A., and the Lawsuit*, THE NEW YORKER (Oct. 25, 2010), http://www.newyorker.com/books/page-turner/interview-with-an-ex-spy-ishmael-jones-on-his-book-the-c-i-a-and-the-lawsuit (Jones—then a former agency employee—had sent his book to the CIA PRB, but alleged that the PRB could not identify any classified information, leading him to publish unapproved material in defiance of the PRB's express denial of permission to do so). Nonetheless, in the CIA's subsequent case against Jones for violating his nondisclosure agreement, the trial judge refused to consider any claims that the CIA had not acted in good faith or in a timely manner. Josh Gerstein, *CIA Wins Suit Against Ex-Officer Who Published Unapproved Book*, POLITICO (June 28, 2011, 12:28 PM), http://www.politico.com/

such a waiver could occur if there were evidence that an agency processed requests in other than a "first-in, first-out" manner, held a particular animus, or made unreasonable demands on the author.[99] Still, an agency should not be limited to processing requests solely on a "first-in, first-out" basis; some requests may be time sensitive, such as a scheduled conference or an op-ed piece, and regular processing might deprive an employee of the opportunity. Thus, an agency should make best efforts to accommodate time-sensitive requests.

In general, case law indicates that courts will demand strict compliance on the part of a current or former employee with his or her obligations under a secrecy or nondisclosure agreement. As indicated by the *Shaffer* and *Ishmael Jones* cases, courts will require that the employee exhaust administrative remedies, as well as judicial review, before proceeding with a publication—regardless of whether that work contains classified information. But it also stands to reason that the government

blogs/under-the-radar/2011/06/cia-wins-suit-against-ex-officer-who-published-unapproved-book-037093. In fact, in a June 2011 order, the district court granted summary judgment—for the first time in a pre-publication review case—for the government. Reporter's Transcript: Motions Hearing at 20-21, United States v. Jones, No. 10-765 (E.D. Va. June 15, 2011). Subsequently, the court ordered permanent injunctive relief and the imposition of a constructive trust to prevent Jones from breaching his secrecy agreement and fiduciary duty with the CIA. United States v. Jones, No. 1:10-cv-00765-GBL-TRJ, at 1 (E.D. Va. Apr. 18, 2012).

[99] In Shaffer's case, he had made earlier allegations that DoD officials had mismanaged an important antiterrorist program, Able Danger, and he claimed reprisal—to include the September 2005 revocation of his security clearance—for certain disclosures that he had made about that program. By 2006, however, the DoD Inspector General had concluded that Shaffer's allegations could not be substantiated. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., CASE H05L97905217, REPORT OF INVESTIGATION: ALLEGED MISCONDUCT BY SENIOR DOD OFFICIALS CONCERNING THE ABLE DANGER PROGRAM AND LIEUTENANT COLONEL ANTHONY A. SHAFFER, U.S. ARMY RESERVE (2006). Subsequently, Shaffer claimed a need to discuss classified information with his attorney (Mark Zaid) concerning both Able Danger and the report of the DoD Inspector General; here, the district court concluded that Shaffer had a First Amendment right to discuss information with his "attorney when such sharing is necessary for an attorney to advise his client of his rights." Shaffer v. Def. Intelligence Agency, 601 F. Supp. 2d 16, 26 (D.D.C. 2009). Thus, by the time Shaffer attempted to publish his book in 2010, the parties were well acquainted with each other.

itself should be held to strict compliance standards, especially as it applies to materials that it claims to be either classified or classifiable.

C. Current Intelligence Community Management of the Prepublication Review Process

By statute, the DNI has overall responsibility for establishing objectives, priorities, and guidance for the 17 agencies, offices, and elements that comprise the intelligence community, even if the DNI lacks full supervisory authority, direction, and control over the day-to-day policies and practices of people working in the community.[100] Indeed, nine of the component members of the community,[101] as well as over 80 percent of the personnel and budget, are assigned to the DoD.[102] Thus, while the DNI can help shape community policies and practices, he also shares authorities and responsibilities with multiple cabinet-level officials. In any case, the current efforts of the DNI, the CIA, and the DoD likely provide a fair representation of PRB efforts in the community as a whole.

The current policy letter from the Office of the Director of National Intelligence ("ODNI") applies to civilian and military personnel employed by the ODNI; personnel detailed or assigned to the ODNI from other government agencies are obligated to submit material through their home agency for prepublication review.[103] In any case, this policy letter does not serve as a community-wide implementation policy. This broadly written policy letter, which does not except any category of non-official publication, clearly states 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

---

[100] *See generally* Responsibilities and Authorities of the Director of National Intelligence, 50 U.S.C. § 3024 (2015) (enumerating the responsibilities and budgetary, personnel and tasking authorities of the DNI).

[101] *See* Definitions, 50 U.S.C. § 3003 (2013).

[102] ROBERT KENNEDY, OF KNOWLEDGE AND POWER: THE COMPLEXITIES OF NATIONAL INTELLIGENCE 19 (2008).

[103] OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, INSTRUCTION 80.04, ODNI PRE-PUBLICATION REVIEW OF INFORMATION TO BE PUBLICLY RELEASED 1, 3 (2014).

security of the U.S. are not adversely affected by publication."[104] While current employees are obligated to obtain supervisor approval before submitting the product for review, this policy letter makes no distinction between the review standards applicable to current and former employees.[105] The ODNI Information Management Division has, however, issued a set of frequently asked questions about the prepublication review process.[106] This set of questions provides several examples of materials that must be submitted and indicates that works unrelated to intelligence and national security do not require review. Again, this set of questions does not differentiate between the standards applicable for current and former government employees, much less contractors.

The CIA has a full-time PRB that currently serves as the arbiter of manuscripts and materials submitted by current and former employees for public dissemination.[107] The PRB operates under an agency regulation with the same dual-track approach that was initiated in 1976.[108] On one hand, the currently available 2006 regulation states that it applies to "all intelligence-related materials intended for public dissemination."[109] On the other hand, the regulation explicitly

[104] *Id.* at 1.
[105] *See id.*
[106] *See generally Pre-Publication Review—Frequently Asked Questions*, *Info. Mgmt. Div.*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, https://www.odni.gov/files/documents/Pre%20Pub%20FAQs.pdf (last visited May 23, 2017).
[107] *See* Central Intelligence Agency, *CIA Prepublication Review in the Information Age*, *in* 55 STUD. IN INTELLIGENCE 9, 9-10 (2011) [hereinafter *CIA Prepublication Review in the Information Age*].
[108] *See id.* at 13 (describing the standards for the review of products submitted by current and former employees). *See also* CENT. INTELLIGENCE AGENCY, AGENCY PREPUBLICATION REVIEW OF CERTAIN MATERIAL PREPARED FOR PUBLIC DISSEMINATION (2006) [hereinafter CIA PREPUBLICATION REVIEW]. This redacted copy of the CIA's 2006 Prepublication Review regulation is filed with the federal district court in the case of *United States v. Jones*. Plaintiff United States' Partial Motion for Summary Judgment as to Liability and Motion to Discuss Defendant Jones' Counterclaim at Exhibit B, United States v. Jones, No. 1:10-cv-00765-GBL-TRJ (E.D. Va. Apr. 12, 2011). This detailed and useful regulation describes the organization and functioning of the PRB, as well as its processes and procedures for the review of products submitted by current and former employees.
[109] CIA PREPUBLICATION REVIEW, *supra* note 108, at 2.

provides that it does not apply to "materials unrelated to intelligence, foreign relations or CIA employment or contract matters. . . ."[110] Also, while the PRB reviews a broad range of materials, including resumes and academic products prepared by current employees, it apparently takes a more lenient approach to student theses or dissertations read only by professors or classmates.[111] However, one CIA senior officer on assignment to the PRB noted that the PRB process is complicated by "opinions of managers equally ignorant of the prepublication rules or, in other words, all those exactly like [him] before [his] arrival at the CIA's PRB."[112]

The DoD has two current regulatory documents, DoD Directive 5230.09 and DoD Instruction 5230.29, regarding the release of information to the public.[113] DoD Directive 5230.09, effective March 16, 2016, provides that the release of DoD "information is limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate governmental interests. . . ."[114] Moreover, in an effort to "ensure a climate of academic freedom and to encourage intellectual expression," the directive makes an exception from the review process for academic materials that are "not intended for release outside the academic institution."[115] The directive also provides that "[c]learance 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."[116] This directive acknowledges that DoD personnel have a right—"while acting in a private capacity and not in connection with official duties"—to prepare information for public release, but defers to the

110 *Id.*
111 *CIA Prepublication Review in the Information Age*, *supra* note 107, at 17.
112 *Id.* at 9-10.
113 *See generally* U.S. DEP'T OF DEF., DIRECTIVE NO. 5230.09, CLEARANCE OF DOD INFORMATION FOR PUBLIC RELEASE (2008) [hereinafter DOD DIRECTIVE NO. 5230.09]; U.S. DEP'T OF DEF., INSTRUCTION NO. 5230.29, SECURITY AND POLICY REVIEW OF DOD INFORMATION FOR PUBLIC RELEASE (2014) [hereinafter DOD INSTRUCTION NO. 5230.29].
114 DOD DIRECTIVE NO. 5230.09, *supra* note 113, at 2.
115 *Id.* at 2.
116 *Id.*

prepublication review standards set in DoD Instruction 5230.29.[117] In turn, DoD Instruction 5230.29 requires a security review of all speeches, briefings, technical papers, manuscripts, books, and other materials prepared by current employees for public release; it provides detailed guidance on clearance requirements, timelines for submission, review determinations, and appeals.[118] In any case, the CIA regulation, DoD Directive 5230.09, and DoD Instruction 5230.29 make no exception for materials unrelated to a person's government employment.

In spite of the DoD's two relatively clear documents, the DoD Inspector General ("IG") recently found that neither the directive nor instruction were uniformly applied across the Department.[119] The IG surveyed policies and practices across 11 combatant commands and 4 intelligence agencies (the NSA, the DIA, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency), but provided little specific information about any problems that it identified.[120]

In sum, considerable variation exists across the intelligence community with respect to what materials a current or former employee must submit for prepublication review, and by what standards the government will process that submission. While some variation is a positive attribute, in that some agencies may have varying interests and requirements, it also leaves employees at risk for inconsistent and even

---

[117] *Id.*

[118] DOD INSTRUCTION NO. 5230.29, *supra* note 113, at 6-9.

[119] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. DODIG-20160-101, REVIEW OF THE POLICIES FOR PREPUBLICATION REVIEW OF DOD CLASSIFIED OR SENSITIVE INFORMATION TO ENSURE NO DOD SENSITIVE OR CLASSIFIED INFORMATION IS RELEASED TO THE MEDIA 1 (2016).

[120] The NSA does, however, have a publicly available policy letter that sets out in ample detail the policies and standards for prepublication review of submissions by current and past employees. NAT'L SEC. AGENCY & CENT. SEC. SERV., NSA/CSS POLICY NO. 1-30, REVIEW OF NSA/CSS INFORMATION INTENDED FOR PUBLIC RELEASE PURPOSE AND SCOPE (2015). By contrast, the most recent and publicly available DIA policy letter on this issue is dated 2006. DEF. INTELLIGENCE AGENCY, DIA INSTRUCTION 5400.300, PREPUBLICATION REVIEW OF INFORMATION PREPARED FOR PUBLIC RELEASE (2006).

discriminatory review at the hands of uninformed or hostile management officials.

D. Legal Assessment

The current prepublication review process leaves open many questions that should be clearly addressed in new ODNI regulatory guidance to the intelligence community, much like the "DOJ Guide to the Freedom of Information Act."[121] Such a repository of policy guidance and best practices across the intelligence community would help management officials address problems that are new, at least to them. The ODNI should provide clear guidance on the extent of employee obligations. Thus, the ODNI should clarify whether the obligation applies to unclassified material that is clearly unrelated to the government work, such as cookbooks, certain works of fiction, resumes, Facebook postings, blogs, e-mails, and academic works submitted directly to a professor.[122] Moreover, the ODNI should clarify employee obligations in multi-agency cases. For instance, while the DIA undoubtedly had a right to review Anthony Shaffer's manuscript in the prepublication review process, it is not clear whether Shaffer or the Army Reserve command had the obligation to send that manuscript to the agency.

The ODNI guidance should require each agency to maintain some level of transparency and accountability in its processes, through publicly available policy guidance or the use of status letters, so that requestors know when delays are related to a work backlog or the complexity of the submission.

---

[121] *DOJ Guide to FOIA*, *supra* note 13.

[122] Spy fiction can obviously be problematic in that some authors, such as John LeCarre or Graham Greene, have written works that are either semi-autobiographical or use true stories to illustrate intelligence sources and methods under the guise of fiction. In the case of the resumes, e-mails and academic works, an employee should not be required to submit such material for review unless there is some reason to believe that it might have national security implications or receive broader dissemination outside the intended recipients. Still, an agency could reduce its own backlog and help employees by posting guidance for employees in preparing such material, and then allowing the employee some latitude in whether to request an actual review.

Additionally, the CIA PRB has engaged in laudable efforts to educate its workforce through articles in the agency's in-house publication "Studies in Intelligence." The outreach activities of the CIA PRB offer a value-added service to both managers and employees alike in terms of ensuring that the workforce understands what must be reviewed, the appropriate standards of review, and how employee can appeal an adverse decision. The DNI guidance should clearly articulate the legal basis for a dual-track approach to review (current and former employees), as well as the standards and appeal rights applicable to each track. Each agency should have an expedited process for reasonable time-sensitive requests.

Additionally, the mosaic theory should be limited in the classification of employee material.[123] This method of classification, a practice subject to abuse through over-classification, is sharply limited in FOIA cases to prevent government officials from obstructing document releases through unjustifiable claims that material is classified, when in fact officials might simply seek "to conceal violations of law, inefficiency, or administrative error … [and] prevent embarrassment to a person, organization, or agency. . . ."[124] Hence, an agency should also apply that "reasonably segregable" standard to prepublication cases, requiring supervisory officials

[123] *See generally* David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L. J. 628 (2005). According to Richards J. Heuer, a former CIA expert with extensive experience in intelligence analysis, the mosaic theory permits an analyst to collect small, possibly even isolated pieces of unclassified information "that, when put together like a mosaic or jigsaw puzzle, eventually enable analysts to perceive a clear picture of reality." RICHARDS J. HEUER, PSYCHOLOGY OF INTELLIGENCE ANALYSIS 62 (1999). Thus, the government may sometimes argue that the aggregation of unclassified information in an author's otherwise unclassified work should not be released because such aggregation would allow an outsider to reach classified (classifiable) conclusions. In that respect, a PRB should properly consider whether material is already classified or classifiable, as the CIA apparently concluded in the case of Ishmael Jones' book. *See generally* George Levey, *supra* note 97.

[124] Exec. Order No. 13,526, *supra* note 28.

to classify only the minimum amount of material possible and allowing the employee the greatest amount of discretion.[125]

Employees contemplating the submission of material to a prepublication review board would be well advised to keep several practice points in mind. Initially, all employee work product should be amply sourced, to ensure that the information is unclassified or publicly acknowledged, and submitted through the employee's supervisor to the PRB well in advance of any scheduled publication dates or speaking engagements. Some language can be caveated or generalized to avoid any appearance that the author is offering a classified view or attempting to speak for the government. If faced with classified material, the employee could request release of the source documents through the FOIA, or if the classified material involves older sources, the employee could request a Mandatory Declassification Review pursuant to Executive Order 13,526.[126] It may well be, as claimed by Ishmael Jones in his fight with the CIA over the publication of his book "The Human Factor,"[127] that the government sometimes seeks to block a planned publication because it contains information that spotlights violations of the law or is otherwise embarrassing to the government.[128]

---

[125] 5 U.S.C. § 552(b) (requiring the release of "any reasonably segregable portion of a record."). *See also Segregating and Marking Documents for Release in Accordance with the Open Government Act*, U.S. DEP'T OF JUSTICE (SEPT. 14, 2014), https://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-segregating-and-marking-documents-release-accordance-open (A federal court will generally review the propriety of agency segregability determinations even if the plaintiff in a FOIA action does not actually request that it do so.).

[126] Exec. Order No. 13,526, *supra* note 28, at § 3.5 (permitting the submission of requests for the declassification of all information that was classified under it or its predecessor orders with the exception of materials subject to pre-publication review pursuant to an approved nondisclosure agreement); *Id.* at § 5.3 (permitting the appeal of agency decisions, within certain limitations, that were made in response to these review requests); *see Mandatory Declassification Review Appeals*, NAT'L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/declassification/iscap/mdr-appeals.html.

[127] ISHMAEL JONES, THE HUMAN FACTOR: INSIDE THE CIA'S DYSFUNCTIONAL INTELLIGENCE CULTURE (2008) (painting an unflattering portrait of the National Clandestine Service, often describing senior officials as "Mandarins" who were risk-adverse and more interested in advancing their career goals than in accomplishing the organizational mission).

[128] United States v. Ishmael Jones, No. 1:10-cv765 (E.D. Va. Apr. 12, 2011).

Nonetheless, the current or former employee cannot ignore his obligations under the nondisclosure agreement; an employee must pursue administrative relief and judicial review before proceeding with any publication.

Currently, an aggrieved employee can file a complaint in federal district court under the Administrative Procedures Act seeking judicial review of the agency action.[129] Here, the attorney representing a government employee should have access to classified information, at least with respect to pending employment law issues and scheduled hearings, but such an attorney probably does not need routine access to classified information to assist his client with prepublication issues (i.e., with respect to the judge's in camera review of the government's classification decision). In fact, the plaintiff should have ample unclassified source material—readily available in the public domain—to support his manuscript.

Finally, three different types of sanctions are available in prepublication review cases. First, as the Court indicated in *Snepp*, the use of a constructive trust can be an effective deterrent.[130] The fact that Matt Bissonnette has had to pay the government over $6.6 million in a high publicity case involving his book "No Easy Day" should act as a deterrent to other government employees contemplating publication without first approaching an agency PRB. Second, a person could be subject to criminal prosecution, as the government originally sought in 1931 with Herbert Yardley[131] and eventually obtained in 1984 with Samuel Morison.[132] In fact, even the threat of criminal prosecution could have a chilling effect on the willingness of government employees to assume a litigation risk in publishing works without prior approval. Third, the government can pursue administrative sanctions against a current employee,

[129] 5 U.S.C. § 706(1) (2012) (showing that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed").
[130] *See* Snepp v. United States, 456 F. Supp. 176, 182 (E.D. Va. 1978).
[131] DAVID KAHN, THE READER OF GENTLEMEN'S MAIL: HERBERT O. YARDLEY AND THE BIRTH OF AMERICAN CODEBREAKING 106-12 (2004).
[132] United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988) (including convictions under both the theft and espionage statutes).

including a revocation of clearance, reprimand, reduction in grade, or reassignment of duties.

Next, there are questions about the propriety of additional civil sanctions, such as the surrender of government contributions to a person's federal pension benefits.[133] This remedy seems both onerous and vindictive considering the absence of executive or ODNI guidance on the standards for agency review, the risk of inconsistent review of works commenting unfavorably on government activities,[134] and the absence of evidence that current remedies have been ineffective in compelling compliance with nondisclosure obligations. In other words, evidence does not suggest that an ineffective sanctions regime has been a causal factor in recent employee non-compliance with nondisclosure obligations.

II. WHAT SHOULD THE DNI DO?

Government officials should seek an equitable, timely review process for employee submissions that ensures the protection of intelligence sources, methods, and activities while permitting the greatest latitude to employee publications. Indeed, the intelligence community has a "highly, culturally attuned, increasingly youthful workforce"[135] that expects to express views and opinions in traditional (e.g., books, journals, and newspapers) and non-traditional (e.g., Twitter, Facebook, and blogs) fora. In turn, the government has an obligation to

---

[133] FEINSTEIN, INTELLIGENCE AUTHORIZATION ACT FOR 2013, S. REP. NO. 112-192 at 8 (2012).

[134] *See* Kevin Casey, *Till Death Do Us Part: Prepublication Review in the Intelligence Community*, 115 COLUM. L. REV. 417, 440-51 (2015) (examining the discretion accorded to prepublication review officials and anecdotal evidence from various authors suggesting discriminatory enforcement based upon whether or not the writer is viewed as critical or supportive of his agency). *See also* Jack Goldsmith & Oona Hathaway, *The Scope of the Prepublication Review Problem, and What to Do About It*, LAWFARE (Dec. 30, 2015, 10:00 AM), https://lawfareblog.com/scope-prepublication-review-problem-and-what-do-about-it (citing one former senior intelligence official as saying that "if the agency doesn't like a manuscript, there's a good chance an excuse will be found to delay or redact it. If the substance is favorable from the agency's perspective, an author might get preferential treatment.").

[135] *CIA Prepublication Review in the Information Age*, *supra* note 107, at 9.

ensure the timely, consistent, and fair processing of requests made by current and former employees.

The ODNI can remedy some of the current problems with overbroad and inconsistent regulations through clear regulatory guidance that helps management officials and employees alike meet both fiduciary and ethical obligations. First, the ODNI should publish a current, publicly available regulatory standard, much like that used by the NSA.[136] This standard should be applicable across the intelligence community, particularly with respect to civilian employees, military personnel, and contractors serving in billets funded through the National Intelligence Program. This standard should be readily available to current and former employees on the agency's unclassified website, perhaps in the Electronic Reading Room that each agency is required to maintain under the FOIA.[137] Clearly, the lack of a current and publicly available policy directive can only inhibit and frustrate current and former employees.

Second, the ODNI should establish a clearly articulated, dual-track approach, much like that used by the CIA.[138] The DNI should limit the use of the mosaic theory as a means of classifying material in employee works submitted for prepublication review. Instead, the DNI should require the use of the "reasonably segregable" standard used in FOIA cases.[139] Current employees should be subject to reasonable restrictions, beyond what is considered classified or classifiable by Executive Order 13,526, but such restrictions should be tightly circumscribed to prevent abuse by management officials. In that respect, employees should submit draft products through their supervisory chain to ensure that it will not impair the author's

136 *See* OFFICE OF THE INSPECTOR GEN., *supra* note 119.

137 The Freedom of Information Act, 5 U.S.C. § 552(a)(2); *see also* Exec. Order No. 13,392, 70 Fed. Reg. 242 (Dec. 19, 2005) (finding that a "citizen-centered and results-oriented approach [would] improve service and performance, thereby strengthening compliance with the FOIA, and [would] help avoid disputes and related litigation").

138 *See CIA Prepublication Review in the Information Age*, *supra* note 107, at 9-12.

139 5 U.S.C. § 552(b).

duty performance, interfere with agency function, or have an adverse impact on U.S. foreign relations. Such restrictions, however, should be spelled out in agency regulations. Moreover, PRB officials should apply a strict scrutiny standard to protect against overbroad claims that an otherwise unclassified work might be objectionable, thus allowing some latitude for employees to comment on matters of legitimate public interest in connection with their employment.[140] In other words, if a management official objects to the publication of otherwise unclassified information, he should be required to explain the problem with specificity in relation to the organizational mission.

Next, the ODNI should mandate that each agency establish—as well as publicize—an appropriate administrative appeals process. While the 30-day standard provided for in *Marchetti*[141] and in Form 4414[142] is likely unworkable in practice for many agencies facing a backlog of lengthy and complex requests, the process should have some level of transparency to protect against managerial abuse directed at perceived malcontents who want to publish embarrassing commentary or expose violations of the law.[143] In fact, the agency IG should have a role in overseeing prepublication procedures to reduce managerial abuse.[144] Indeed, an aggrieved employee or former employee who wants to "whistleblow" should have a protected

[140] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (rejecting the position that public employees "may be constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation [of the government department/agency] in which they work").
[141] United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972).
[142] Form 4414, *supra* note 29.
[143] Exec. Order No. 13,526, *supra* note 28.
[144] *See* PRESIDENTIAL POLICY DIRECTIVE, PPD-19, PROTECTING WHISTLEBLOWERS WITH ACCESS TO CLASSIFIED INFORMATION (2012) (ensuring that intelligence community employees can effectively report waste, fraud, and abuse while protecting classified national security information); *see also* Daniel P. Meyer, *The Wasp's Nest: Intelligence Community Whistleblowing & Source Protection*, 8 J. NAT'L SECURITY L. & POL'Y 1 (2015) (examining whistleblower and source protection in the intelligence community).

means to do so without facing recriminations from his or her supervisory chain.

Finally, the ODNI should conduct extensive outreach activities to ensure that employees understand the prepublication review processes and procedures, as well as appropriate avenues for lodging whistleblower complaints. Here, the CIA, through its in-house publication "Studies in Intelligence," has conducted laudable efforts to educate its workforce that could be replicated by other agencies.

III. CONCLUSION

The current standards and processes used by the intelligence community to manage prepublication reviews is a patch-work of regulations, rules, and managerial practices, with varying application by agency and probably even by managers within a single agency. This undoubtedly creates room for employee error and managerial abuse. The DNI can, and indeed should, create clear and consistent standards and processes across the community, even if allowing some variation for unique intelligence community entities. Doing so would likely expedite required reviews while promoting employee confidence in the fairness and timeliness of the overall review process.