No. 21-791

In the

Supreme Court of the United States

TIMOTHY H. EDGAR, ET AL.,

Petitioners,

v.

AVRIL D. HAINES, IN HER OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE FORMER NATIONAL SECURITY OFFICIALS AND CO-AUTHORS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are six individuals with a direct stake in this litigation—they all have had writings subjected to national security prepublication review by the federal government and face future reviews under the lifetime obligations imposed by the current prepublication review regimes. Five *amici* are former government employees who have had broad experience with various national security and intelligence agencies; the sixth is a co-author of a former government employee who never voluntarily agreed to governmental review but has been subjected to its abuses. *Amici*'s involvement with prepublication review spans decades and covers multiple presidential administrations.

Amici recognize that prepublication review in some form is necessary to protect properly classified information, but each agrees with Petitioners that the current vast and vague system with limited oversight desperately needs reform. *Amici* have experienced first-hand the abuse, manipulation, delay, and censorship engendered by the current review regimes. Their First Amendment right to speak has been inappropriately abridged, largely without effective

[1] *Amici* notified the parties of their intent to file this brief at least 10 days before the due date. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief.

judicial recourse. Public discourse on matters of national security, war, and peace has been less informed and misinformed as a result.

Amici write to present their experiences with prepublication review to underscore the compelling need for the Court to review this case. The harms being inflicted by the defects in the current prepublication review regime are neither hypothetical nor limited to those experienced by Petitioners. They are endemic to the system as it now exists.

In alphabetical order, *amici* are:

Maria Hartwig, professor of psychology at the John Jay College of Criminal Justice and a co-author of Petitioner Mark Fallon.

Valerie Plame, former intelligence officer in the Central Intelligence Agency for more than two decades.

Michael Richter, former intelligence officer in the Defense Intelligence Agency from 2003 to 2011 and detailed to the Office of the Director of National Intelligence from 2006 to 2008.

Anthony Shaffer, former Lieutenant Colonel with the United States Army who worked as a civilian employee of the Defense Intelligence Agency while serving as an Army Reserve Officer from 1995-2006 and served two tours in Afghanistan in 2001-2004.

Ali Soufan, former counterterrorism investigator with the Federal Bureau of Investigation from 1997 to 2005.

Thomas Willemain, former sabbatical visitor with the Mathematics Research Group at the National Security Agency (NSA) from 2007 to 2008, who has also served as an Expert Statistical Consultant to the NSA and a member of the Adjunct Research Staff at the Institute for Defense Analyses Center for Computing Sciences (IDA/CCS).

SUMMARY OF THE ARGUMENT

The prepublication review obligations currently imposed on all employees and contractors of U.S. national security and intelligence agencies violate the First Amendment rights of both those subjected to lifetime review mandates and the citizens who want to hear from them. The personal experiences of *amici* confirm that Petitioners' objections to the system of prepublication review, as it exists today, are neither theoretical nor insubstantial.

The prepublication review regimes are vastly overbroad, lack procedural safeguards, and vest broad discretion in the agencies to censor speech under vague and malleable standards, with no meaningful oversight. As a result, pre-publication review is regularly subject to abuse—agencies manipulate, delay, and suppress speech they disfavor on matters of utmost public concern.

Prepublication review does not need to work this way. Yet the current regimes persist, because agencies find their ability to delay, rewrite, and limit the things written by their former employees a useful

way avoid embarrassment, conceal wrongdoing, and manipulate public opinion

The system will continue to work this way unless this Court steps in to enforce well-established First Amendment standards that are routinely violated by the existing review regimes.

ARGUMENT

THE CURRENT PREPUBLICATION REVIEW REGIME VIOLATES THE FIRST AMENDMENT AND IS IN DESPERATE NEED OF REFORM

A. Broad Discretion and a Lack of Procedural Safeguards Engender Administrative Abuse

The vague standards and broad discretion granted under existing prepublication review regimes, combined with their lack of binding deadlines and other procedural safeguards, and an absence of effective judicial oversight, inevitably produce reviews rife with administrative abuse.

1. Valerie Plame: Unbounded discretion yields capricious demands and inordinate delay in CIA review.

Ms. Plame resigned from the Central Intelligence Agency (CIA) in early 2006 after her identity as a covert operations officer was leaked in retaliation for an op-ed by her husband, Ambassador Joseph Wilson, that had disclosed that President Bush made a false statement during his 2003 State of the Union

address.[2] When she sought prepublication review of her memoir, Valerie Plame Wilson, *Fair Game* (2007), Ms. Plame was subjected to a years-long punitive and capricious process by the CIA.

There were no clear rules for how the CIA review process would be conducted, so Ms. Plame asked the agency to review her manuscript on a rolling basis to facilitate a publication deadline, and was told it would be. When Ms. Plame subsequently submitted the manuscript for her memoir, the CIA repeatedly pressured her to replace it with a work of fiction. When she declined to do so, the CIA reneged on its promise to review her chapters on a rolling basis, thereby delaying publication, and conducted the review to make it as painful as possible. Among other things, the CIA refused to meet with Ms. Plame while her attorney was present, and repeatedly ignored her requests for status updates, leaving her in the dark about where the review process stood. Ms. Plame had no realistic access to the courts while this protracted, non-final agency action played out under unwritten rules—a situation prevalent in current review regimes. *See* Pet. 5-7.

The lack of oversight also enabled the CIA to insist on capricious redactions unrelated to the protection of classified information. For example, the agency ordered the removal of information relating to Ms. Plame's dates of service, which were relevant and significant to points she wished to make, even though the dates had already been disclosed in a letter

[2] *See Wilson v. CIA*, 586 F.3d 171, 175-77 (2d Cir. 2009).

written on CIA letterhead, signed by a CIA officer, bearing no classification markings, sent through ordinary first-class mail, and published in the congressional record.[3] The agency also forbade her from using the term "chief of station," even though the CIA permitted former case officer Larry Devlin to publish a memoir titled *Chief of Station, Congo* (2007) the year before.

After significant delay, Ms. Plame's memoir was published in October 2007, but with large portions blacked out. To underscore the lack of any national security-based reason to so massively censor her book, the publisher hired an investigative reporter to write an eighty-four-page afterword drawn entirely from information in the public domain that filled in the holes demanded by the CIA.[4]

2. Anthony Shaffer: Lack of clear procedures permits DIA to use review as a tool of retaliation.

In the early days of the war in Afghanistan, Lt. Col. Shaffer led a black-ops team on the forefront of military efforts to block the Taliban's resurgence. Years later, he wrote a book providing a first-hand account of the failures that in his view turned the tide and prevented the U.S. from winning that war: Anthony Shaffer, *Operation Dark Heart* (2010).

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[3] *See id.* at 189, 195; *id*. at 200 (Katzmann, J., concurring in the judgment).

[4] *See* Wilson, *Fair Game*, *supra*, at ix.

Long before Lt. Col. Shaffer submitted his manuscript for prepublication review, he had testified before various congressional committees about bureaucratic failures that prevented the intelligence agencies from foiling the 9/11 plot.[5] Lt. Col. Shaffer also testified that the Defense Intelligence Agency (DIA) had removed him from active intelligence officer status in retaliation for his protected disclosures to the 9/11 Commission.[6]

Lt. Col. Shaffer's subsequent prepublication review process was tainted by similar DIA retaliation and abuse. He initially submitted the manuscript for review by the Army Reserve in 2009 as required by his earlier employment agreement.[7] The manuscript was approved for publication without major difficulties on January 4, 2010.[8] Lt. Col. Shaffer then submitted the manuscript to his publisher.

After the Army Reserve approved the book, former DIA Director Patrick Hughes wrote an endorsement for it, a step that apparently alerted the DIA to the

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[5] *See, e.g.*, *National Security Whistleblowers in the Post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Rels. of the H. Comm. on Gov't Reform*, 109th Cong. 122-32; 207-12 (2006).

[6] *Id*. at 122-24.

[7] *Shaffer v. Def. Intel. Agency*, 102 F. Supp. 3d 1, 4 (D.D.C. 2015).

[8] *Id.*

existence of the book. The DIA then injected itself into the prepublication review on its own initiative.[9]

On August 6, 2010, nearly nine months after the Army Reserve had cleared the manuscript, the Army Reserve backtracked and revoked publication approval, because the DIA asserted that the manuscript "contained a significant amount of classified information."[10] DIA insisted that the publisher not proceed with publication.[11] Eschewing basic principles of fundamental fairness, the DIA then refused to provide Lt. Col. Shaffer an unredacted copy of his own manuscript, thwarting his participation in the review process. It also flatly refused to examine public information proffered by Lt. Col. Shaffer to show that the DIA's classification determinations were plainly erroneous.

Stymied by this lack of due process, Lt. Col. Shaffer had no recourse but to sue the DIA in the District Court for the District of Columbia.[12] Four years of litigation later, the DIA was forced to concede that one of Lt. Col. Shaffer's original proffers during the review process—his congressional testimony—

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[9] *Id.*

[10] *Id.*

[11] *Id.* The DIA went so far as to pay the publisher $47,500 to destroy copies of the title's first run. *See* Lynn Andriani, *St. Martin's Issues Statement on Revised 'Operation Dark Heart,'* Publishers Weekly (Sept. 30, 2010), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/44658-st-martin-s-issues-statement-on-revised-operation-dark-heart.html.

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

constituted an official acknowledgement of the information disclosed, precluding the DIA's claims of classification over significant portions of the book.[13] The court scolded the DIA for its procedures in the review process and for failing to accept Lt. Col. Shaffer's proffer during that review:

> Lt. Col. Shaffer did not have access to records of the official release or to DOD employees involved in making the release decision, but Defendants clearly did. They had access to the relevant files, officials, and former officials and they did *nothing* to locate individuals with knowledge of the key facts. 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.[14]

B. Vague Standards and Limited Judicial Review Enable Viewpoint Discrimination

In principle, the prepublication review regimes authorize agencies only to prevent their employees and former employees from publishing information that could harm national security. In practice, vague procedural and substantive standards, and an insulation from meaningful judicial oversight

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[13] *Id.* at 12.

[14] *Id.*

provided by this Court's holding in *Snepp v. United States*, 444 U.S. 507 (1980), allow reviewers to censor speech based on its viewpoint rather than its impact on national security. These same traits also allow the current review regimes to manipulate public discourse through delay, obfuscation, and selective disclosure. Agencies can and do use prepublication review authority to avoid embarrassment, advance their political agendas, and prevent meaningful public oversight, as *amici* have experienced firsthand.

1. Ali Soufan: Misuse of vague standards and broad discretion in CIA review used to manipulate public debate.

Ali Soufan was a top FBI terrorism investigator at the time of the 9/11 attacks. In 2002, he was tasked with interrogating Abu Zubaydah, the first suspected al-Qaeda leader captured by the CIA. Taken to a CIA black site, he questioned the detainee for several weeks before leaving in protest after the CIA took control of the interrogation and began using its so-called "enhanced interrogation techniques" (EITs), now widely understood as torture.[15]

Several years later Mr. Soufan published a book recounting his role in our nation's efforts to combat terrorism: Ali H. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda* (2011). The book contains a narrative account of America's successes and failures against al-Qaeda,

[15] *See* Ali Soufan, *The Black Banners (Declassified)*, 373, 422-23 (2020).

providing information essential to understanding that terrorist group and how it succeeded on 9/11.

Before publication, Mr. Soufan was required to submit his manuscript to the FBI for prepublication review pursuant to a standard agreement he signed as an FBI employee.[16] The FBI approved the manuscript largely as written, but then forwarded it to the CIA.[17] With no enforceable deadlines, the CIA prolonged its review and required large sections of the FBI-approved manuscript to be removed, purportedly because they disclosed classified information.[18]

Soufan's original manuscript discussed, among other things, his role in the FBI's interrogation of Abu Zubaydah, the process by which FBI interrogators were able to win Zubaydah's confidence and elicit actionable intelligence without the use of torture, and the intense disputes that arose about the efficacy of the EITs used when CIA contractors took charge of the interrogation.[19] Applying capricious, malleable and opaque standards, the CIA instructed Mr. Soufan to remove from the manuscript true, newsworthy information about the interrogation and treatment of Abu Zubaydah.

Facing a publishing deadline, Mr. Soufan quickly sought to have the CIA reconsider its decision, but the

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[16] *Id*. at xv.

[17] *Id*.

[18] *Id*.

[19] *See* Soufan, *Black Banners*, *supra*, at 373-435.

agency refused.[20] On September 12, 2011, *Black Banners* was published with all information the CIA had objected to simply blacked out. A lawsuit was later brought against the CIA for effectively gagging Mr. Soufan in violation of the First Amendment.[21] This ultimately allowed him to publish an unredacted version of his book in 2020: Ali Soufan, *The Black Banners (Declassified)* (2020).

Once the material removed from the book in 2011 became public, many of the CIA's assertions of classification as justification for blocking disclosure could be seen as pretextual. For example, less than a year after censoring from Mr. Soufan's book most of a chapter about the interrogation of Abu Zubaydah, the CIA allowed its former director of the National Clandestine Service, Jose Rodriguez, to publish a detailed account of that same interrogation.[22] It permitted a similar account by Dr. James Mitchell, the architect of the CIA's torture program, a few years later.[23]

Rodriguez and Mitchell's perspectives sharply diverge from Mr. Soufan's over the relative value of the techniques used by the FBI in interrogating Abu

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[20] Soufan, *Black Banners (Declassified)*, *supra*, at xv-xvi.

[21] *See* Compl., *Bonner v. CIA*, No. 1:18-cv-11256 (S.D.N.Y. Dec. 3, 2018).

[22] *See* Jose Rodriguez, Hard Measures: *How Aggressive CIA Actions After 9/11 Saved American Lives*, 54-71 (2012).

[23] *See* James E. Mitchell, *Enhanced Interrogation: Inside the Minds and Motives of the Islamic Terrorists Trying to Destroy America*, 22-79 (2016).

Zubaydah and the EITs used by the CIA, a crucial issue in the public debate over the use of torture. The CIA redacted Mr. Soufan's descriptions of the interrogation, claiming it disclosed classified sources and methods, but allowed Rodriguez and Mitchell to describe the interrogation in detail. For example, the CIA forbade Mr. Soufan from publishing that his interrogation method involved "establishing rapport," with Abu Zubaydah,[24] but allowed Mitchell to use those precise words,[25] and Rodriguez to describe the FBI's technique as "attempts at rapport building."[26]

The only difference between how the authors described the technique was how they evaluated its efficacy. Mr. Soufan described his technique as effective in producing actionable intelligence,[27] while Mitchell sought to refute the "misleading impression" that Abu Zubaydah had given up "treasure troves of information" to the FBI, a view also advanced by Rodriguez.[28] The CIA even allowed Mitchell to refer to Mr. Soufan by name as one of Abu Zubaydah's interrogators but required Mr. Soufan to remove throughout his book the names of all interrogators,

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[24] Soufan, *Black Banners (Declassified)*, *supra*, at 400; *see also* Soufan, *Black Banners*, *supra*, at 400 (containing corresponding redaction).

[25] Mitchell, *Enhanced Interrogation*, *supra*, at 28.

[26] Rodriguez, *Hard Measures*, *supra*, at 57.

[27] *See* Soufan, *Black Banners (Declassified)*, *supra*, at 394-95.

[28] *See* Mitchell, *Enhanced Interrogation*, *supra*, at 27-28; Rodriguez, *Hard Measures*, *supra*, at 58.

including the first-person pronoun that would reveal his presence at the black site.[29]

The censoring of Mr. Soufan was part of a now well-documented effort by the CIA to justify its use of EITs in the face of intense public scrutiny. The Senate Select Committee on Intelligence concluded in its seminal report that "[t]he CIA coordinated the release of classified information to the media, including inaccurate information concerning the effectiveness of the CIA's enhanced interrogation techniques."[30] Mr. Soufan's experience shows how the malleable procedural and substantive standards used in the current review process, combined with an absence of effective judicial oversight, enable such inappropriate manipulation of the public discourse.

2. Thomas Willemain: Vague prepublication review standards permit efforts to suppress author's views.

Thomas Willemain, a software entrepreneur and statistics professor, served as a sabbatical visitor with the Mathematics Research Group at the National Security Agency (NSA) from 2007 to 2008. He subsequently spent several summers as an Expert Statistical Consultant to the NSA and as a member of the Adjunct Research Staff at an affiliated classified research think tank, the Institute for Defense

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[29] *Compare, e.g.*, Mitchell, *Enhanced Interrogation*, *supra*, at 22, 27, *with* Soufan, *Black Banners*, *supra*, at 379-92; Soufan, *Black Banners (Declassified)*, *supra*, at 373-92.

[30] *See* S. Rep. No. 113-288, at xvii (2014).

Analyses Center for Computing Sciences (IDA/CCS). Professor Willemain later was motivated to write a memoir of his time in the intelligence community. He wanted to "help counter the intensely negative views of the NSA in the media and popular fiction" and to encourage more academics to become sabbatical visitors at both the NSA and IDA/CCS.[31] Professor Willemain hoped that his memoir, *Working on the Dark Side of the Moon: Life Inside the National Security Agency* (2017), would shed light on the valuable work of the "'grunt' level" within the agency.[32]

To his surprise, Professor Willemain faced a "contentious prepublication review experience" rife with ambiguous procedures and broad censorship discretion.[33] His manuscript was subject to parallel reviews at the NSA and IDA/CCS.[34] The process was arduous.

NSA policy states that a final determination on prepublication review would be issued, "as practicable . . . within 25 business days,"[35] but Professor

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[31] Thomas R. Willemain, *A Personal Tale of Prepublication Review*, Lawfare (Jan. 10, 2017), https://www.lawfareblog.com/personal-tale-prepublication-review [hereinafter Willemain].

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Cent. Sec. Serv., *Review of NSA/CSS Information Intended for Public Release Purpose and Scope*, Nat. Sec. Agency (May 10, 2013), https://www.nsa.gov/portals/75/documents/news-

Willemain quickly learned that the deadline was nonbinding. He submitted a draft manuscript on March 31, 2016.[36] Nearly two months later, on May 24, 2016, Professor Willemain received a phone call that was "largely intended to pressure [him] to withdraw the manuscript."[37] On this call Professor Willemain was told for the first time that his contract forbade him to profit from his time at the NSA, and thus he had to stop writing. This statement was patently false. The relevant section of Professor Willemain's employment contract prohibited profits from only one source: insider trading.[38] He offered to donate profits from the book to charity, but never received a response.

After yet another month, Professor Willemain had not received comments on the manuscript as promised by mail, and he called the reviewers. Professor Willemain was informed that the reviewers had changed their minds about providing written comments, requiring him to meet in-person.[39] Without his inquiring, it is unclear if he ever would have been told about the agency's change in position.

Professor Willemain was then "summoned" to NSA headquarters in Fort Meade, Maryland, for an "in-

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features/declassified-documents/nsa-css-policies/Policy_1-30.pdf.

[36] Willemain.

[37] *Id.*

[38] *Id.*

[39] *Id.*

person grilling" on June 29, 2016.[40] Professor Willemain then submitted a revised manuscript, which was banned from publication on September 14, 2016.[41] The reviewers nonetheless suggested another round of redactions.[42] Only after implementing them was Professor Willemain permitted to move forward with publication.[43] These delays prevented Professor Willemain from sharing a sample of the manuscript with prospective publishers, none of whom would consider engaging Professor Willemain without a sample.[44]

Beyond the protracted delay, Professor Willemain found the process fraught with vague standards and lacking civility—a system "designed to discourage authors from writing in the first place."[45] Reviewers questioned why he insisted on writing and "made [their] displeasure clear."[46] Professor Willemain recalled that "the process made [him] feel like both an annoyance and a pariah. Prepublication review is supposed to be about safeguarding sensitive information, not bullying authors out of telling their stories."[47]

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

Vague review standards resulted in a process littered with bizarre demands. Reviewers worked from the premise that *everything* Professor Willemain encountered on the job was "for official use only" and therefore redactable, regardless of classification status, even when the information was learned through private conversations with colleagues and had nothing to do with national security or the agency.[48] Each specific objection had to be adjudicated separately; many were baseless. At times, the reviewers objected to material so plainly outside the scope of a security review that Professor Willemain suspected the IDA/CCS Director may have wanted to keep his memoir—the first book about IDA/CCS—from being published to avoid a blemish on his tenure.

Professor Willemain was told to redact information that was publicly available in official government sources—even information available on the IDA/CCS website.[49] He was told to remove language describing IDA/CCS's mission and work with the NSA that remains available on its website today.[50] Reviewers also asked Professor Willemain to remove material that had previously been declassified and disclosed by

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[48] *Id.*

[49] *Id.*

[50] *See Center for Computing Sciences*, Inst. For Def. Analyses, https://www.ida.org/en/ida-ffrdcs/center-for-communications-and-computing/center-for-computing-sciences ("This Center works closely with the [NSA] and with U.S. industry on the development of high-performance computing platforms . . . .").

NSA in a court document.[51] In these instances, Professor Willemain successfully challenged the redaction requests, but they prolonged the prepublication review process and delayed publication of his book.

Reviewers appeared to redact material purely to protect institutional and personal reputations. IDA/CCS insisted on redacting things that could be seen as criticisms of the agency. For example, Professor Willemain sought to include several workplace anecdotes to "humanize the technical experts working at CCS" and illustrate team spirit, such as describing a hundred PhDs deliberately shouting wrong answers to a "very silly computer security test."[52] But IDA/CCS objected to these anecdotes as showing an undignified image of the organization.[53] Similarly deemed unacceptable was any discussion of crimes committed in their own homes by agency personnel experiencing psychological breakdowns, even though the crimes had presumably been reported in the local media.

By putting unjustified holes in the manuscript and requiring extensive negotiations over them, the reviewers forced a publication delay and increased the burden of the review process.

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[51] Willemain.

[52] *Id.*

[53] *Id.*

C. Broad and Unending Review Obligations Chill Speech Entirely Unrelated to National Security

The impact of the current prepublication review process on public discourse is immense. Agencies impose a lifetime obligation on employees to submit writings for clearance, and extend their authority to control speech on topics far beyond things learned in the course of employment. The time, burden, and cost of the process deters many from expressing publicly their knowledge that would inform and enlighten public debate.

1. Michael Richter: Current regimes permit expansive control over speech unrelated to employment.

Michael Richter served as an intelligence officer in the DIA from 2003 to 2011. During the prepublication review process for an article he wrote after leaving government service, the Department of Defense (DOD) subjected his speech to review for content to which he had no exposure whatsoever while in government, retroactively and unilaterally expanding the scope of his non-disclosure obligations.

In October 2012, after resigning from government service and entering private practice as an attorney, Mr. Richter traveled to Guantanamo Bay as a nongovernmental observer to the pretrial proceedings before the Military Commission adjudicating charges against the alleged mastermind of the 2002 USS Cole

bombing.[54] He later drafted an article on the proceedings for *The New Jurist*.[55]

Mr. Richter submitted a draft of the article for prepublication review on January 27, 2014. He did not receive a response until March 6, 2014, more than thirty days after the deadline. DIA's response was to instruct Mr. Richter to delete or revise one paragraph "citing a classified document that had likely been leaked by former Army Pfc. Bradley Manning or Edward Snowden . . . [and] is on the *New York Times* website—and perhaps elsewhere."[56]

Mr. Richter had worked as a Russian foreign policy analyst and never saw the classified document or worked on anything remotely related to the subject of that document as an intelligence officer.[57] He only learned of the document as a private citizen.

The contested paragraph fell plainly outside the scope of Mr. Richter's non-disclosure agreement, which only covered information learned as a

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[54] Michael Richter, *It's Not Top-Secret If You Can Google It*, WALL ST. J. (Dec. 4, 2014, 7:09 pm ET), https://www.wsj.com/articles/michael-richter-its-not-top-secret-if-you-can-google-it-1417738195 [hereinafter Richter].

[55] *See* Michael P. Richter, *Comedy and Terror in Guantanamo Bay*, NEW JURIST (Oct. 10, 2014), https://newjurist.com/comedy-and-terror-in-gtmo.html.

[56] Richter.

[57] *See id.*

consequence of possessing a security clearance.[58] Mr. Richter therefore administratively appealed the redaction demand, noting that the document he referenced was widely available in the public domain and that he was incapable of authenticating the document or providing insight into its contents based on information he had acquired during his government employment. Mr. Richter even made clear in his draft article that he never saw the document until after he left government and cited the *New York Times* concerning its contents.

Although his appeal involved only one paragraph, Mr. Richter did not receive a response for more than seven months. The appeal was then rejected. DIA justified its decision pursuant to a policy issued by the Office of the Under Secretary of Defense for Intelligence on June 7, 2013[59]—two years *after* Mr. Richter left government service.[60] The memorandum

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[58] *Id.* The Defense Office of Prepublication and Security Review's (DOPSR) frequently asked questions state that DoD personnel "have a lifelong responsibility to submit for prepublication review any information intended for public disclosure that is or may be based on *protected information gained while associated with the Department*." Executive Services Directorate, *Frequently Asked Questions for Department of Defense Prepublication Security and Policy Reviews*, WASH. HEADQUARTERS SERVS., https://www.esd.whs.mil/Security-Review/PrePublication-and-Manuscripts/ (emphasis added).

[59] *See Memorandum for DOD Security Directors: Notice to DoD Employees and Contractors on Protecting Classified Information and the Integrity of Unclassified Government Information Technology Systems*, Dep't of Def. (June 7, 2013), https://sgp.fas.org/othergov/dod/notice.pdf.

[60] Richter.

provides that "[c]lassified information . . . in the public domain remains classified and must be treated as such until it is declassified by an appropriate U.S. government authority."[61] Because the document cited in Mr. Richter's draft had not been declassified, DIA said it could not approve his piece for publication, even though it did not dispute that the banned paragraph contained no information learned by Mr. Richter as a consequence of possessing his clearance.[62]

By applying the policy retroactively to Mr. Richter, DoD unilaterally re-wrote and expanded without his consent his non-disclosure agreement and prevented him from discussing information that was otherwise freely available to all members of the public.[63] Notably, even the policy used to justify silencing Mr. Richter was misapplied because it only pertained to current government employees,[64] and Mr. Richter was not, at that time, an employee of the federal government.

After exhausting his administrative remedies, Mr. Richter was left with no option beyond potentially filing a time-consuming and expensive lawsuit. The article instead was published with the contested paragraph redacted—even though it should not have been subject to DOD review in the first place and contained no nonpublic information.

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[61] *Memorandum for DOD Security Directors*, *supra*.

[62] *See* Richter.

[63] *See id*.

[64] *Memorandum for DOD Security Directors*, *supra*.

2. Maria Hartwig: Demands of the current review process inhibit valuable collaborations.

Professor Hartwig has never worked for a national security agency and thus is not subject to prepublication review. However, her research on the psychology of interrogation requires her to collaborate with people who have conducted interrogations—who themselves may be subject to prepublication review. Her co-authored publications must therefore undergo prepublication review, including the parts she writes independently.

Earlier this year, Professor Hartwig submitted a piece she co-wrote with Petitioner Mark Fallon to commemorate the twentieth anniversary of the 9/11 attacks. This still-unpublished article was under review for nearly three months before it was approved, nearly three times longer than the thirty-day deadline. By the time the short article was cleared for review, it was no longer timely and too late to commemorate the anniversary.

There is no conceivable reason why the review should have taken so long, but no enforceable deadline currently exists. The article was short, and the government ordered no changes to it. The government also gave no explanation for the delay.

Professor Hartwig's experience with the prepublication review process has deterred her from co-writing academic pieces with former officials subject to prepublication review (with the exception of Mr. Fallon, a regular collaborator). This hampers her

research and deprives both the public and the government of valuable information about interrogation, a topic of significant public interest.

Professor Hartwig's experience exemplifies two fundamental problems with prepublication review as currently practiced. First, delays frequently deprive publications of their newsworthiness. Second, the cumbersome nature of the process, whether politically motivated or not, chills speech on matters of public concern.

D. Flaws in Current Review Regimes Continue to be Exploited in Ways that Violate the First Amendment

The vague standards, broad discretion, and lax or non-existent procedural guidelines in current review regimes that led to the abuses experienced by *amici* continue to be exploited in ways that plainly violate the First Amendment. Most recently, litigation reveals how flaws in the current regimes continue to be coopted. High-level officials, former National Security Advisor John Bolton and former Secretary of Defense Mark Esper, have both objected to efforts to block them from presenting their honest views and opinions in memoirs about their experiences in leadership positions.

In Bolton's case, the coopting was transparently designed to influence the outcome of the 2020 election. While the prepublication review process for his memoir, *The Room Where It Happened* (2020), was ongoing, President Trump tweeted that "[w]e're going to try and block the publication of the book . . . [a]fter

I leave office, he, can do this, But not [while I am] in the White House."[65]

This resulted in a prepublication review process described as "fundamentally flawed" by the career expert in government classification policy and practice who oversaw the review, Ellen Knight.[66] After Knight and her team had completed an intensive review process and told Bolton that all classified information was removed from a revised manuscript, and after the normal review authorities had signed off, the review was taken over by a political appointee with no prepublication review experience.[67] He flagged hundreds of passages for redaction that either were not actually classified or had originally appeared in classified documents but were previously disclosed.[68]

This second review by a political appointee was conducted without Bolton's or Knight's knowledge, and was enabled by the lack of clear procedures for

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[65] Josh Dawsey *et al.*, *Trump Wants To Block Bolton's Book, Claiming Most Conversations Are Classified*, Wash. Post (Feb. 21, 2020), https://www.washingtonpost.com/politics/trump-wants-to-block-boltons-book-claiming-all-conversations-are-classified/2020/02/21/6a4f4b34-54d1-11ea-9e47-59804be1dcfb_story.html.

[66] *See* Ex. A at 3, 12, Defendant's Notice of Filing in Support of Pending Motions to Dismiss and to Defer Consideration of Plaintiff's Motion for Summary Judgment, *United States v. Bolton*, No. 1:20-cv-1580-RCL (D.D.C. Sept. 23, 2020).

[67] *Id.* at 7, 8, 10, 12.

[68] *Id.* at 12-13.

the conduct of reviews.[69] After the NSC failed to respond substantively to multiple requests by Bolton for an update on the status of its review, and facing a publishing deadline, he eventually sent the revised manuscript to his publisher in reliance on Knight's statement that it contained no classified information.[70] The government then sued Bolton, seeking a temporary restraining order to block publication.[71] The court denied the motion,[72] and the book was published.

Subsequent efforts were made to block publication for political purposes, including the initiation of a grand jury investigation.[73] In June 2021, under a new presidential administration, DOJ dismissed the civil litigation and closed the grand jury investigation.[74]

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[69] *Id.*

[70] Chuck Cooper, *The White House vs. John Bolton*, Wall St. J. (June 10, 2020, 2:32 PM ET), https://www.wsj.com/articles/the-white-house-vs-john-bolton-11591813953.

[71] *United States v. Bolton*, 468 F. Supp. 3d 1, 3 (D.D.C. 2020).

[72] *Id.* at 7.

[73] *See* Katie Benner, *Justice Dept. Opens Criminal Inquiry Into John Bolton's Book*, N.Y. Times (Sept. 15, 2020), https://www.nytimes.com/2020/09/15/us/politics/john-bolton-book-criminal-investigation.html.

[74] *See* Spencer S. Hsu & Josh Dawsey, *Justice Dept. Drops John Bolton Book Lawsuit, Won't Charge the Ex-Security Aide Who Became Trump's Scathing Critic*, Wash. Post (June 16, 2021), https://www.washingtonpost.com/local/legal-issues/bolton-book-lawsuit-dismissed/2021/06/16/e16e367a-ced4-11eb-8cd2-e95230cfac2_story.html?utm_campaign=06_20_2021&utm_medium=email&utm_source=tpfp_newsletter&utm_content=washington_post_article.

This simply underscores how the lack of clear substantive standards and defined procedures in the prepublication review process can be exploited for reasons unrelated to the protection of classified information or national security. A similar manipulation is alleged in a more recent lawsuit. In a case filed shortly before the submission of this Brief, former Defense Secretary Mark Esper alleges that DOD utilized "unduly vague" standards and an arbitrary review process to remove material from a memoir reflecting on his time as Secretary for reasons having nothing to do with the protection of national security.[75]

According to the Complaint, Esper's memoir is scheduled to be published in May 2022.[76] Esper is "confident" that nothing in the manuscript he submitted to the DOD in May 2021 "contains classified information or compromises national security."[77] Nevertheless, following a protracted, six-month review, the Department directed him, without explanation, to remove "multiple words, sentences and paragraphs from approximately 60 pages of the manuscript."[78] Among other things, Esper says the Department,

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[75] *See* Compl. ¶¶ 13, 21, *Esper v. Dep't of Def.*, No. 21-cv-03119, (D.D.C. Nov. 28, 2021).

[76] *Id.* ¶ 6.

[77] *Id.* ¶ 10.

[78] *Id.*

> asked me to not quote former President Trump and others in meetings, to not describe conversations between the former president and me, and to not use certain verbs or nouns when describing historical events. I was also asked to delete my views on the actions of other countries, on conversations I held with foreign officials and regarding international events that have been widely reported. Many items were already in the public domain; some were even published by DOD.[79]

Esper's lawsuit objects that being required to alter or remove this material "not only grossly exceeds the purpose of the process, but doing so would be a serious injustice to important moments in history that the American people need to know and understand."[80]

These ongoing abuses flow directly from the defects in the current review process. Lax procedural and substantive standards permit agencies to spin facts and censor personal views of those whose expert opinions the public is most in need of hearing. *Cf. City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*) (noting that "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public

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[79] *Id.*

[80] *Id.*

employers" that are "of substantial concern to the public").

Certiorari should be granted so that this Court can address the ongoing violation of the First Amendment rights of both those subject to the mandatory, lifetime constraints and the public who want to hear from them.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari*.

Respectfully submitted,

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[81] This brief does not purport to express the views of Yale Law School, if any.