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# Shattering the Silence: How Secrecy Hides Sexual Misconduct in Federal Workplaces

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*Millions of federal employees face restrictions that silence their speech about workplace sexual misconduct, all in the name of national security. Information controls, non-disclosure agreements ("NDAs"), and physical workspaces create an architecture of secrecy that is concealing sexual misconduct in the federal government, hindering effective responses, harming national security, and exposing employees to coercion by foreign governments and criminals.*

*Drawing on court filings, government documents, and interviews with federal employees, this Note sheds new light on these silencing mechanisms. As the federal workforce is remade into a national security workforce, these mechanisms are spreading throughout the government and creating barriers to sexual misconduct accountability.*

*Yet there is a path forward. Adopted in 2022, as the silencing force of NDAs became clear, the Speak Out Act voids nearly all NDAs that cover sexual misconduct. Courts should recognize that the Act's sweeping scope reaches national security NDAs, and the executive and legislative branches should*

* Yale Law School, J.D., 2025. This paper has lasted most of my time in law school. I am lucky to have had more than a dozen people—truly a village—who helped make this piece better, and I am thankful for their time and thoughts. Professors Oona Hathaway and Christine Jolls supervised much of the writing and provided extensive feedback at various stages of this project. Professor Tom Tyler offered methodological guidance. Alexandra Brodsky, Margo Darragh, Fiona Furnari, Patrick Hoerle, and Nicolas Madan read lengthy drafts and provided invaluable comments at critical points. Luke Cuomo, Richard Peay, Gabriel Klapholz, Seungmin Park, Atia Ahmed, Jack Sollows, and other editors of the *Yale Law & Policy Review* shepherded this piece to publication and provided incisive, thoughtful edits. Most importantly, to those who participated in interviews or completed a survey, sometimes anonymously: you have my immense gratitude. Thank you for trusting me with your story in pursuit of a brighter future.

*implement express carveouts to national security NDAs for sexual misconduct disclosures. Nearly a decade ago, the federal judiciary adopted similar changes to its confidentiality requirements for judicial employees, exempting all misconduct disclosures, without any negative effect. In the national security sphere too, confidentiality and accountability can—and must—go together.*

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## INTRODUCTION

In 1994, clandestine officer Janine Brookner won a $410,000 settlement from the Central Intelligence Agency ("CIA") for sexual discrimination.[1] Brookner, a former chief of station in Jamaica, then resigned.[2] That spring, her attorney wrote a column in *The Chicago Tribune*, lambasting the CIA's continued efforts to silence Brookner and warning that its overzealous secrecy was preventing scores of women in the CIA "from talking to the press about these abuses."[3] In 1990, Brookner reported her deputy for beating his wife; the agency responded by obtaining a gag order to prevent the wife from speaking publicly about her husband's beatings and from seeking private counseling.[4]

More than thirty years later, a resilient system of secrecy continues to hide workplace misconduct, including sexual harassment and sexual assault, in the civilian national security workforce. The CIA is once again embroiled in a sexual misconduct scandal, with a number of women reporting that the CIA mishandled their sexual misconduct cases and alleging "a campaign by the spy agency to keep them from speaking out."[5] In August 2023, a Virginia state court convicted a clandestine CIA officer of assaulting a female colleague, Rachel Cuda, although a jury later found him not guilty on appeal.[6] At the first trial, Cuda testified that the defendant

1. Abigail Jones, *She Was a CIA Spy. Now She's a Lawyer Battling Her Old Agency. This Is Her Story.*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/lifestyle/magazine/she-was-a-cia-spy-now-shes-a-lawyer-battling-her-old-agency-this-is-her-story/2018/06/01/5784f45e-5abe-11e8-858f-12becb4d6067_story.html [https://perma.cc/YU5L-K6PL].

2. *Id.*

3. Victoria Toensing, *How the CIA Abuses Its Code of Silence*, CHI. TRIB., May 3, 1995 (§ 1), at 23.

4. *Id.*

5. Jim Mustian & Joshua Goodman, *CIA Stairwell Attack Among Flood of Sexual Misconduct Complaints at Spy Agency*, AP NEWS (Aug. 24, 2023), https://apnews.com/article/cia-sexual-harassment-discrimination-abuse-spying-8ca2f3a4b41c9d6f3da34364aea42dad [https://perma.cc/T2ZA-U8J9].

6. *Id.*; Joshua Goodman & Jim Mustian, *A Virginia Jury Acquits an Ex-CIA Recruit in an Assault Case that Led to Sexual Misconduct Reforms*, AP NEWS (Oct. 30, 2024), https://apnews.com/article/cia-sexual-misconduct-metoo-

choked her with a scarf and tried to kiss her as she felt "blood accumulating in [her] head" and her lips tingling as if "someone had put a boulder on her chest."[7] According to Cuda's attorney, the CIA had told her that she could not speak to law enforcement or a counselor about the assault, and it sought to hinder the trial.[8] When Cuda sued the CIA in October 2023, her attorney had to submit her legal complaint for the agency to approve.[9] The CIA decided its definition of sexual assault was classified and required her attorney to remove it before allowing them to file.[10] Four months later, the agency terminated Cuda, in what her attorney called retaliation.[11]

Why has so little changed in three decades, even as the #MeToo movement has transformed other workplaces? One reason is that millions of federal employees work for entities that severely restrict their ability to discuss workplace misconduct.[12] These practical and legal restrictions come

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7cd891f162d7b81fa57dce83a78f13ac [https://perma.cc/N6AN-78Q8]; *see also* VA. CODE ANN. § 16.1-136 (2024) ("Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court . . . and . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court.").

7. Transcript of Trial Hearing at 69, Commonwealth v. Bayatpour, No. GC23032728-00 (Va. Fairfax Cnty. Gen. Dist. Ct. Aug. 9, 2023) [hereinafter Aug. 9 Transcript].

8. Complaint at 5-6, 9, Doe v. Burns, No. 23-cv-2937 (D.D.C. Oct. 3, 2023) [hereinafter Cuda Complaint].

9. Telephone Interview with Kevin Carroll, Partner, Hughes Hubbard & Reed (Nov. 16, 2023) [hereinafter Carroll Interview]; *see infra* Section I.E.1.

10. Carroll Interview, *supra* note 9.

11. Jim Mustian & Joshua Goodman, *CIA Terminates Whistleblower Who Prompted Flood of Sexual Misconduct Complaints*, AP NEWS (Feb. 8, 2024), https://apnews.com/article/cia-sexual-misconduct-harassment-spying-whistleblower-49b949a293f51416f51dca9daa9b6180 [https://perma.cc/VS82-ZRCA].

12. The Department of Defense alone employed 950,000 civilians as of 2021. *Department of Defense Civilian Employment Opportunities*, U.S. DEP'T OF DEF. (Sept. 23, 2021), https://www.defense.gov/Contact/Help-Center/Article/Article/2742213/department-of-defense-civilian-employment-opportunities [https://perma.cc/Q8G6-D3HF]. As of 2019, nearly 3 million people held security clearances, and another 1.29 million were eligible for access to classified information but did not have current access (these are often military members). NAT'L COUNTERINTELLIGENCE AND SEC. CTR., OFF. OF THE DIR. OF NAT'L INTEL., FISCAL YEAR 2019 ANNUAL REPORT ON SECURITY CLEARANCE

in many forms and are often enforced by expansive national security non-disclosure agreements ("NDAs") and an accompanying system of prepublication review of employees' and former employees' speech. By their terms and application, these NDAs reach all manner of topics, including sexual misconduct. Unfortunately, growing revelations around how private sector NDAs silence victims of sexual misconduct have made clear that they "enable cultures of impunity to fester unchecked."[13] As this Note shows, government NDAs are no different. These NDAs, along with other features of the national security secrecy architecture, cut employees off from news and social media reporting, which are "mechanisms of informal reporting that, among the unofficial options, offer the greatest hope of prompting a semblance of offender accountability, however imperfect."[14]

The spillover effects of government NDAs sweep across the federal workforce. Even where formal national security NDAs do not exist, internal regulations often require a prepublication review of workplace issues, as is the case for personnel at the State Department, the U.S. Agency for International Development, and the Department of Homeland Security ("DHS"). Moreover, contrary to common belief, the national security workforce is not a niche; in reality, more than 70% of federal civilian employees work in defense and security agencies.[15] In most states, the Department of Defense ("DoD") is the largest federal civilian employer.[16] Many employees in other agencies previously worked in defense and security roles. Once a national security employee, always a national security employee—at least in the eyes of most non-disclosure and prepublication

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DETERMINATIONS 1, 6-7 (2020), https://sgp.fas.org/othergov/intel/clear-2019.pdf [https://perma.cc/9BVW-SVPV]. As of 1996, the CIA was almost entirely civilian, and 80% of the National Security Agency ("NSA") was civilian. U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSAID-96-6, INTELLIGENCE AGENCIES: PERSONNEL PRACTICES AT CIA, NSA, AND DIA COMPARED WITH THOSE OF OTHER AGENCIES 10 (1996) [hereinafter GAO INTELLIGENCE PERSONNEL REPORT].

13. Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1183 (2020).

14. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1187-88 (2019).

15. Fiona Hill, *Public Service and the Federal Government*, BROOKINGS INST. (May 27, 2020), https://www.brookings.edu/articles/public-service-and-the-federal-government [https://perma.cc/XX2H-S9NL].

16. CURTIS COPELAND, CONG. RSCH. SERV., RL34685, THE FEDERAL WORKFORCE: CHARACTERISTICS AND TRENDS 8 (2008).

review obligations. Any effort to address sexual misconduct in the federal government must confront this dynamic.

This Note shines a light on the problem of sexual misconduct in the national security workforce, including intelligence, defense, and law enforcement agencies. It focuses on civilians, filling a gap in the literature on sexual misconduct in the DoD, where most civilian national security employees work. Sexual misconduct in the armed services has drawn significant public scrutiny and led to policy changes.[17] In contrast, the Government Accountability Office ("GAO") found the DoD's sexual misconduct response "limited" with respect to civilian employees.[18] While the DoD mandated uniform data tracking and reporting on sexual harassment in the armed forces in 2018, no similar requirement exists for DoD civilians.[19]

Sexual misconduct is widespread in the federal government. The DoD itself estimates that every year, more than 50,000 civilian DoD employees experience sexual harassment (and nearly 3,000 experience sexual assault).[20] But reporting rates are even lower in national security agencies than in the rest of the federal government. The National Security Agency ("NSA"), a DoD agency that employs more than 20,000 civilians at its headquarters alone,[21] received only four formal complaints of sexual

17. Since 2012, Congress has directed a number of changes to how the Uniform Code of Military Justice handles sexual misconduct, including taking sexual assault prosecutorial decisions away from commanders. C. Todd Lopez, *Sexual Assaults Will No Longer Be Prosecuted by Commanders*, U.S. DEP'T OF DEF. (July 2, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2681848/sexual-assaults-will-no-longer-be-prosecuted-by-commanders [https://perma.cc/4VF6-AC8L].

18. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-1113, SEXUAL HARASSMENT AND ASSAULT: GUIDANCE NEEDED TO ENSURE CONSISTENT TRACKING, RESPONSE, AND TRAINING FOR DOD CIVILIANS 77 (2021) [hereinafter GAO DOD CIVILIANS REPORT].

19. GAO DOD CIVILIANS REPORT, *supra* note 18, at 21-22 (citation omitted).

20. GAO DOD CIVILIANS REPORT, *supra* note 18, at 1 (listing the rates as 5.9% and 0.3%, respectively).

21. Ellen Nakashima & Aaron Gregg, *NSA's Top Talent Is Leaving Because of Low Pay, Slumping Morale and Unpopular Reorganization*, WASH. POST (Jan. 2, 2018) https://www.washingtonpost.com/world/national-security/the-nsas-top-talent-is-leaving-because-of-low-pay-and-battered-morale/2018/01/02/ff19f0c6-ec04-11e7-9f92-10a2203f6c8d_story.html [https://perma.cc/68YW-C52F].

harassment in a decade, twice in 2013 and twice in 2021.[22] That rate is less than one-sixth of the federal government average for sexual harassment complaints.[23]

The disparity between the prevalence and reporting of sexual misconduct should be a wake-up call to the problem's magnitude in the national security workforce. Addressing this issue is urgent not only due to the direct harm that victims of misconduct experience but also due to its ripple effects on national security. First, the federal government will continue to lose qualified employees if it does not effectively prevent and respond to misconduct. Women who face harassment are 6.5 times more likely to leave their jobs,[24] and sexual harassment leads to high turnover costs.[25] Second, rooting out misconduct is critical to guarding the national security workforce against compromise by foreign governments and

22. *No FEAR Act & Data*, NAT'L SEC. AGENCY/CENTRAL SEC. SERV., https://www.nsa.gov/Culture/Diversity-Equity-Inclusion-Accessibility/No-Fear-Act-Data [https://perma.cc/WA4M-3HFB]. These years refer to fiscal years. Data is missing without explanation for the first quarter of Fiscal Year 2022.

23. For the NSA, the rate equals one sexual harassment complaint per 50,000 employees. The rate for the federal government as a whole is one per 7,730 employees. (There were 506 complainants alleging sexual harassment in 2020. *Annual Reports on the Federal Workforce, Including Data Tables,* EQUAL EMP. OPPORTUNITY COMM'N (2020), https://www.eeoc.gov/federal-sector/reports/annual-reports-federal-workforce-including-data-tables [https://perma.cc/8YTC-F8Z4] (download "Table B-8: FY 2020 Complaints Filed Basis and Issues - Grand Total" by clicking on "Download Fiscal Year 2020 Annual Report Complaints Tables" under "Fiscal Year 2020 Annual Report on the Federal Work Force Part 1: EEO Complaint Processing Activity"). There were 14,081 total EEO complainants, 0.36% of the workforce. *Id.* (download "Table B-1: FY 2020 Total Work Force, Counselings, and Complaints" by clicking on "Download Fiscal Year 2020 Annual Report Complaints Tables" under "Fiscal Year 2020 Annual Report on the Federal Work Force Part 1: EEO Complaint Processing Activity"). Thus, the rate of sexual harassment complainants as a percentage of the federal workforce is 506÷14,081*0.36%.)

24. Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333, 344 (2017).

25. *See infra* notes 337-340 and accompanying text; *cf.* Robert H. Faley, Deborah Erdos Knapp, Gary A. Kustis & Cathy L. Z. Dubois, *Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army*, 13 J. BUS. & PYSCH., 461, 474 (1999).

criminal actors. When a foreign intelligence agency obtains knowledge or evidence of sexual misconduct by federal employees, particularly information unknown to the federal government or public, it can use that information to compromise, blackmail, or coopt perpetrators with access to sensitive information, operations, or decisions.[26] In showing these risks, this Note demonstrates another way by which the existing system of national security secrecy actually "undermines national security."[27]

Part I of this Note shows how the national security workforce's special information, speech, and employment rules hinder accountability for sexual misconduct in these workplaces and shroud details of the problem in secrecy. It contains examples and cases drawn from the author's interviews and surveys of eight former and current national security employees who experienced or were aware of sexual misconduct; from public court filings and transcripts in several recent cases; and from government documents describing internal policies and prepublication procedures. Part II discusses the implications of these observations on the sufficiency of the government's response to sexual misconduct, on national security, and on other government workplaces. Part III offers a path forward via executive and legislative actions to shatter this pernicious silence. This includes the first analysis—drawing on interviews with drafters—of how the Speak Out Act, a recently enacted limitation on NDAs, applies to government employees. This bipartisan law provides a blueprint for how to realign employment structures to shed a light on sexual misconduct in the federal government.

## I. INADEQUATE ACCOUNTABILITY FOR SEXUAL MISCONDUCT IN THE NATIONAL SECURITY WORKFORCE

This Part begins with the theoretical mechanisms by which secrecy fuels and hides sexual misconduct. It then provides evidence of these mechanisms, highlighting various features of the national security workforce that create informational barriers, limit employment protections, and restrict employee speech. Finally, in support of these

26. This Note adds to the literature on blackmail by showing its relationship with sexual harassment. *See, e.g.*, James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 672 (1984) ("To get what he wants, the blackmailer uses leverage that is less his than someone else's. . . . And selling the right to inform others of embarrassing (but legal) behavior involves suppressing the interests of those other people.").

27. Oona A. Hathaway, *Secrecy's End*, 106 MINN. L. REV. 691, 767 (2021).

claims, it provides new data and analysis based on court filings and the author's interviews. These documents and new interviews elevate victims' perspectives and shed rare light on hidden workplace dynamics.

### A. The New National Security Workforce

Secrecy is spreading, with restrictions on public-sector employees' speech now rampant in federal, state, and local governments.[28] In the federal government, secrecy fits within a renewed paradigm of national security that has increasingly "dominate[d] other federal spheres of influence" since the 1930s.[29] As national security considerations spread to new areas,[30] the accompanying secrecy and silencing mechanisms documented here risk becoming ascendant.

Secrecy's spread means that national security employment is expanding. At one end are traditional intelligence and operations personnel with access to the most sensitive information, Sensitive Compartmented

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28. *See, e.g.*, Frank D. LoMonte, *Putting the 'Public' Back into Public Employment: A Roadmap for Challenging Prior Restraints That Prohibit Government Employees from Speaking to the News Media*, 68 U. KAN. L. REV. 1, 40-41 (2019) ("Amid a swirl of media attention to sexual harassment in state legislatures across the country, the chief of staff for the Colorado Senate distributed a memo reminding Senate staffers that, unless approved by Senate leadership, 'no Senate employee, including aides, interns and volunteers may grant interviews to the press.'" (quoting Bente Birkeland, *Emails Warn Workers at Colorado Capitol Not to Speak to Press,* KUNC (Mar. 13, 2018), https://www.kunc.org/post/emails-warn-workers-colorado-capitol-not-speak-press [https://perma.cc/AM4H-36TK])). This trend is occurring even as scholars have documented its pathologies and sometimes called for "[t]aking the idea of ending the system of secrecy seriously." Hathaway, *supra* note 27, at 697.

29. Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1577, 1657 (2011).

30. *See, e.g.*, *id.* at 1575 (describing the national security apparatus's proclaimed "focus on trade, travel, organized crime, domestic intelligence gathering and dissemination, terrorism, public health, and natural disasters" (citing BARACK OBAMA, NATIONAL SECURITY STRATEGY 14 (2010))); Philip Zelikow, *The Transformation of National Security: Five Redefinitions*, NAT'L INT., Spring 2003, at 17, 19-20 (2003) ("[T]he Bush Administration, following on but surpassing the Clinton Administration, has consistently identified poverty, pandemic disease, biological and genetic dangers, and environmental degradation as significant national security threats.").

Information ("SCI").[31] There is no public number of how many people have signed agreements to access SCI, but a fair estimate of the number of *current* holders of SCI eligibility alone is 950,000, based on investigation data indicating that the vast majority of Top Secret clearance holders have SCI eligibility.[32] The number of individuals with past SCI eligibility and subject to the strictest prepublication requirements is almost certainly in the millions.

At the other end are a growing number of federal employees who have lower security clearances, work on issues deemed sensitive or related to national security, or both. For instance, a commissary clerk is considered a sensitive role.[33] These employees may not face every single silencing mechanism detailed below—some of them do not face formal prepublication review requirements, for instance—but the silencing mechanisms usually still exist. Some of these employees work in agencies (e.g., the Department of State) that require prepublication review regardless of whether they have access to sensitive information. The spread of information controls to unclassified materials exposes these employees to various silencing mechanisms, such as a workplace environment that naturally lacks witnesses.[34]

This Note refers to these two groups of federal employees collectively as "national security employees" or "the national security workforce," and they comprise the majority of the federal workforce.[35] While the remaining federal employees face similar informational *demands*, they do not

31. Information can be classified as Confidential, Secret, or Top Secret based on the expected damage to national security from unauthorized disclosure. *See* Exec. Order No. 13526 § 1.2(a), 3 C.F.R. 298 (2010). Various compartments further control the distribution of classified information.

32. DEF. COUNTERINTELLIGENCE & SEC. AGENCY, FY21 ADJUDICATIONS YEAR IN REVIEW ANNUAL REPORT 4 (2022), https://www.dcsa.mil/Portals/91/Documents/pv/DODCAF/resources/FY21-Adjudications-Year-in-Review-Annual-Report.pdf [https://perma.cc/RY6R-Z76U] (listing 123,619 cases closed for Top Secret/SCI clearances and 56,124 closed for Top Secret ones). Multiplying this ratio (0.69) by the number of people with Top Secret clearances in 2019 gives 950,849. *See* FISCAL YEAR 2019 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS, *supra* note 12, at 7 (1,384,060 individuals with Top Secret eligibility).

33. *See infra* note 344 and accompanying text.

34. *See infra* Section I.B.2.

35. *See supra* note 15.

experience secrecy-linked *barriers* to gathering information and seeking accountability.

A broader definition of the national security workforce indicates that the number of people impacted by these policies is far higher than commonly understood. It also calls for devoting more attention to the pathologies of the national security workforce, even beyond the problem of sexual misconduct, because as the national security workforce expands, so too will its pathologies (e.g., reduced reporting and knowledge about matters of public concern). This expansion means that the employment law literature must pay greater attention to the national security aspects of federal employment, a gap this Note begins to fill.

Conceptually, this Note shows how secrecy fuels and hides sexual misconduct in two ways. First, secrecy strengthens perpetrators' control over victims and employers.[36] Elements of the secrecy regime—information control, prepublication review, and physical workspace restrictions—bolster the "unfettered, subjective authority" that "fosters sex-based harassment."[37] The more secrecy elements any given work assignment has, the stronger this dynamic.

Second, this secrecy removes the pathway for informal accountability and cultural change.[38] Culture is important because much sexual misconduct is "clearly harassing" but does not meet the high threshold for legal recourse.[39] Cultural awareness and shifts depend on information from victims speaking out. Anonymous accounts of misconduct and workplace climates have been key to discovering workplaces with impunity for sexual misconduct and to identifying serial abusers during the #MeToo movement.[40] But limitations on public and anonymous speech remove one

36. *Cf.* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 214 (2010) (describing how the state secrets doctrine is used "to hide officials' bad behavior").

37. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 52 (2018).

38. *See* Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 633 (2020) (arguing silencing cuts the pathway of inspiring others to speak out).

39. Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 427 (2020).

40. *See* Tuerkheimer, *supra* note 14, at 1186 ("[W]hen anonymous women make accusations in the Shadow Court of Public Opinion, these accusations can launch formal processes that may also lead to consequences if an accuser can be identified."); *infra* note 192.

of the most effective pathways to organizational change. Thus, this Note expands the literature on government secrecy not only by showing how secrecy hinders accountability for sexual misconduct but also by demonstrating that public-sector employees' speech is critical because that speech underlies informal, indirect accountability mechanisms. Indeed, lawsuits, media coverage, and outreach to congressional oversight committees have driven the recent changes at the CIA.[41]

### B. Informational Barriers in the National Security Workplace

Information is the heart of the American adversarial justice system. Parties must marshal evidence at every stage of a judicial proceeding, a structural dynamic that is particularly strong in sexual misconduct cases. This Section shows the importance of information to bringing and winning a harassment claim and details how distinctive features of the national security workplace heighten the informational barriers.

Under Title VII of the Civil Rights Act of 1964, establishing a hostile work environment demands fact-intensive proof that unwelcome conduct occurred, that it was tied to a person's sex, and that the employer had actual or constructive knowledge.[42] The conduct must be severe or pervasive, a high bar that "require[s] . . . separat[ing] actionable harm from 'merely unpleasant conduct'"[43] and excludes "simple teasing, offhand comments, and off-color jokes."[44] When an employee seeks to show that harassment is pervasive, every piece of evidence—corroborating witnesses, emails, audio or video recordings, employer records—becomes critical to creating this mosaic of behavior and to showing that a workplace is "objectively hostile."[45] Collecting and showing the reliability of that evidence is a difficult

41. *See* Goodman & Mustian, *supra* note 6 (referencing a bipartisan House Intelligence Report and agency reforms and saying that "[Cuda's] decision to take the case outside the spy agency emboldened at least two dozen female CIA employees to come forward to authorities and Congress over the past two years with their own stories").

42. *See, e.g.*, Laurent-Workman v. Wormuth, 54 F.4th 201, 210 (4th Cir. 2022).

43. Sheriff v. Midwest Health Partners, P.C., 619 F.3d 923, 930 (8th Cir. 2010) (quoting Moring v. Ark. Dep't of Corr., 243 F.3d 452, 456 (8th Cir. 2001)).

44. *Laurent-Workman*, 54 F.4th at 211 (quoting E.E.O.C. v. Fairbrook Med. Clinic, P.A., 609 F.3d 320, 328 (4th Cir. 2010)).

45. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

feat for any employee, particularly because harassment might not involve formal records.

A variety of structural features further heighten the need for information. First, courts struggle to apply the severe-or-pervasive standard, and they sometimes erroneously dismiss hostile work environment claims.[46] Even for meritorious plaintiffs, appeals are expensive, lengthy, and complex, leaving many employees effectively stuck with trial court decisions. For those employees, presenting more evidence of their claims than the legal standard technically requires is sometimes a practical necessity.

Second, employment lawyers often operate on a contingency basis and know these dynamics, so they may decline to take cases where employees lack overwhelming evidence—particularly because Title VII payouts are low, punitive damages require "malice or reckless indifference," and even compensatory damages have a low cap.[47]

Third, informal judicial practices make it hard to determine which harassment claims will succeed, in turn deterring even those potential plaintiffs who would, in fact, have information sufficient to win their claims. Judges generally write explanations when they grant motions for summary judgment (usually in favor of the defendant)—but not when they deny those motions.[48] As one former federal judge has observed, this "leads to the development of decision heuristics . . . that serve to justify prodefendant outcomes."[49] In other words, courts' summary-judgment customs signal to prospective plaintiffs what *gaps* in information will lead a judge to rule against them, but they leave opaque what information judges consider *sufficient* to try a case on its facts. This uncertainty pushes plaintiffs to obtain "extra" facts than may be necessary.

For national security employees, the physical workspace restrictions, compartmentalization, and information classification turn the already

46. *See, e.g.*, *Laurent-Workman*, 54 F.4th at 206-08 (vacating district court's decision "that Laurent-Workman's complaint set forth insufficient factual allegations to support a hostile work environment claim").

47. 42 U.S.C. § 1981a(b) (2018); U.S. COMM'N ON C.R., FEDERAL #METOO: EXAMINING SEXUAL HARASSMENT IN GOVERNMENT WORKPLACES 117-18 (2020) [hereinafter FEDERAL #METOO], https://www.usccr.gov/files/pubs/2020/04-01-Federal-Me-Too.pdf [https://perma.cc/29K9-TZXU] (quoting testimony of Debra Katz, Partner, Katz, Marshall & Banks).

48. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 110 (2012) (citations omitted).

49. *Id.*

difficult informational requirements of a Title VII claim into a Herculean task.

1. Physical Workspace Features

National security employees frequently work in special physical spaces, with security and access restrictions that can both foster misconduct and make it more difficult to obtain proof that it occurred. Many employees of the Intelligence Community ("IC"), DoD, and other parts of the U.S. government that handle SCI work in Sensitive Compartmented Information Facilities ("SCIFs"); indeed, they often have no choice.[50] These facilities are everywhere, from the halls of Congress to U.S. military bases and embassies abroad.[51] Entire facilities are built as SCIFs and rented out.[52] There are strict security requirements for SCIFs, including prohibitions on personal electronic devices (and most government-issued portable electronic devices), as well as on "Wi-Fi, Bluetooth, cellular, image capturing, video recording, or audio recording capabilities or wearable devices."[53] Even employees without SCI access may use these spaces at various points to access non-compartmented classified information. Secure rooms that allow

50. Lauren C. Williams, *The Pentagon's Lead Intelligence Agency Has an HR Problem*, DEFENSE ONE (Nov. 29, 2022), https://www.defenseone.com/defense-systems/2022/11/pentagons-lead-intelligence-agency-has-hr-problem/380273 [https://perma.cc/3XRB-Z5KX] (quoting the Defense Intelligence Agency's chief of staff as saying "in the mission space in DIA, you're gonna have to be in a SCIF").

51. Daniel Newhauser, *The Rooms Where Congress Keeps Its Secrets*, THE ATLANTIC (May 28, 2015), https://www.theatlantic.com/politics/archive/2015/05/the-rooms-where-congress-keeps-its-secrets/451554 [https://perma.cc/YN4B-6278].

52. Gloria Llyod, *New Geospatial Classified Facility Downtown Is Fully Leased, with 500 Jobs Attached*, ST. LOUIS BUS. J. (May 19, 2022), https://www.bizjournals.com/stlouis/news/2022/05/19/st-louis-scif-geospatial-classified-nga-downtown.html [https://perma.cc/A2TN-HR2H].

53. U.S. DEF. INFO. SYS. AGENCY, CYBER AWARENESS CHALLENGE 2022: SCI AND SCIFS (2022), https://dl.dod.cyber.mil/wp-content/uploads/trn/online/disa_cac_2022_final_web/pdf/DISA_CAC2022_SCI_SCIF.pdf [https://perma.cc/7NMN-S32W].

work with far less sensitive Secret material also have strict security that limits access and prohibits personal electronic devices.[54]

The extensive use of SCIFs and other secure rooms creates several evidentiary problems. First, it removes the possibility for employees who experience sexual misconduct to record the misconduct. It also means that there are often no surveillance cameras, which are common in other workplaces. Second, this absence facilitates harassment and other misconduct because employees are aware that they can make comments or behave inappropriately with no possibility of being caught on surveillance or surreptitious tapes.

Recordings have become critical evidence of sexual misconduct. They played a prominent role in R. Kelly's sexual assault trial.[55] In a police sting, Harvey Weinstein admitted to a woman (who was secretly taping him) that he had groped her the day before.[56] Roger Ailes's misconduct was common knowledge for years, but "[t]he culture of fear at Fox [News] was such that no one would dare come forward."[57] In response, anchor Gretchen Carlson spent a year recording Ailes's sexual harassment.[58] The recordings, along with other "audio tapes recorded by multiple women," hastened settlement

54. U.S. DEP'T OF HOMELAND SEC., OPEN STORAGE AREA STANDARDS FOR COLLATERAL CLASSIFIED INFORMATION 9 (2005), https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_11046_open_storage_area_standards_for_collateral_classified_information.pdf [https://perma.cc/G6NP-GX65] ("Portable Electronic Devices (PEDs) shall not be introduced into an open storage area without written approval [in rare situations].").

55. Althea Legaspi, *R. Kelly Jury Shown Graphic Video Clips of Star Allegedly Sexually Abusing Minor*, ROLLING STONE (Aug. 19, 2022) https://www.rollingstone.com/music/music-news/r-kelly-jury-graphic-videos-chicago-federal-child-pornography-trial-1234578642 [https://perma.cc/6KMH-SE4V].

56. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/3TDD-6T5E].

57. Gabriel Sherman, *The Revenge of Roger's Angels*, N.Y. MAG. (Sept. 5, 2016), https://nymag.com/intelligencer/2016/09/how-fox-news-women-took-down-roger-ailes.html [https://perma.cc/EB8C-KWLD].

58. *Id.*

talks and increased the settlement amount.[59] Fox eventually settled for $20 million and issued a public apology.[60] Elsewhere in the private sector, the National Labor Relations Board observed in 2015 that no-recording "policies prevent 'employees . . . documenting unsafe workplace equipment or hazardous working conditions . . . or documenting inconsistent application of employer rules' without management approval."[61] Indeed, digitally documenting activities or comments that constitute misconduct facilitates tangible relief for those who endure that misconduct—an opportunity for justice that national security employees largely lack.

In addition, separated spaces in which national security employees work may exacerbate sexual misconduct. Isolation is a risk factor for sexual misconduct,[62] which increases the danger for the many national security employees who work in isolated or remote geographic workplaces, including military bases and embassies. In an interview, one former DoD employee described how enclosed and classified workspaces contributed to her isolation and were often where she faced sexual harassment.[63] The classified space at her workplace was so small that she was physically forced to be up against whoever else was there. "I felt particularly vulnerable there," she explained.[64] To avoid having to be in that space with certain colleagues (including one who harassed her), she arranged to use

59. Sarah Ellison, *Exclusive: Inside the Fox News Bunker*, VANITY FAIR (Aug. 8, 2016), https://www.vanityfair.com/news/2016/08/exclusive-inside-the-fox-news-bunker-roger-ailes [https://perma.cc/Q955-GEPW]; Zoom Interview with Julie Roginsky, Co-Founder, Lift Our Voices (Mar. 27, 2024) [hereinafter Roginsky Interview] (saying Carlson would not have gotten the outcome she did without tapes).

60. Michael M. Grynbaum & John Koblin, *Fox Settles with Gretchen Carlson over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 7, 2016), https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html [https://perma.cc/A6Q4-C3FZ].

61. Whole Foods Mkt. Grp., Inc. v. NLRB, 691 F. App'x 49, 51 (2d Cir. 2017) (citing Caesars Ent., 362 N.L.R.B. 1690, 1693 (2015)).

62. *See, e.g.*, FEDERAL #METOO, *supra* note 47, at 115 ("Isolated work environments are vulnerable to bad behavior.").

63. Interview with Former DoD Employee 1 (Dec. 2023); Survey Response from Former DoD Employee 1 (Dec. 2023).

64. Survey Response from Former DoD Employee 1 (Dec. 2023).

the classified space only when she could be there with a different colleague she trusted.[65]

But the negative effect of isolated, enclosed spaces is only exacerbated in classified spaces, not unique to them. "At times," the former DoD employee said, the enclosed nature of certain workspaces "was the specific enabler."[66] She recounted an incident in an enclosed military base workspace where she was alone with a male colleague; when someone knocked, that colleague said, "if you hear moaning, don't keep knocking."[67] The fact that they were alone in this space was integral to the harassment itself and emboldened him.[68] For more than a year after this and other incidents of harassment from the same colleague, she dreaded going to work; she stayed late and came in early to avoid him.[69] Being alone with a colleague, a common occurrence in national security environments, makes it easier for a perpetrator to claim that something did or did not happen. In other words, it increases a harasser's ability to control the narrative,[70] even in unclassified workplaces such as this one.

The sharply delineated roles, information, and access in the government contribute to this isolation problem. Restricted spaces, classified or otherwise, have a predictable rhythm and access list, according to the former DoD employee, making it easy to know employees' movements and then to target them.[71] She experienced this firsthand. In an incident where someone took nonconsensual images of her changing on a military base, she believed that the perpetrators only risked getting caught *because* it was an isolated, poorly trafficked location.[72] A second former DoD employee also described points in her career during which she avoided areas or ensured she went there with colleagues to limit inappropriate behavior.[73] Although neither of these people described a significant impact on job performance,

65. Interview with Former DoD Employee 1 (Dec. 2023).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Cf. supra* note 37 and accompanying text.

71. Interview with Former DoD Employee 1 (Dec. 2023); Survey Response from Former DoD Employee 1 (Dec. 2023).

72. Interview with Former DoD Employee 1 (Dec. 2023).

73. Interview with Former DoD Employee 2 (Dec. 2023).

avoiding areas is likely to harm victims' ability to do their jobs, particularly when their jobs require them to be in sensitive or enclosed areas.

2. Compartmentalization and "Need to Know"

The compartmented nature of national security work also means that employees often have legitimate reasons to engage one-on-one with coworkers in closed spaces. Workplaces and meetings are built on the principle of involving only those who "need to know" specific information.[74] The ubiquity of one-on-one interactions can ensure that there are no witnesses for inappropriate behavior and turn any allegation into one person's word against another's. In hierarchical government workplaces, this can enable higher-level employees to engage in misconduct with impunity. Without proof, few will believe a lower-ranked employee who alleges misconduct by a superior.

Moreover, national security employees are trained to spot how conversations and interactions may be overheard or recorded.[75] This training further sensitizes employees to the organizational secrecy of their environment, which helps those who wish to exploit that secrecy engage in misconduct without leaving evidence.

The sensitive nature of the national security workplace also silences potential witnesses, as the government's actions in *Zummer v. Sallet* illustrate. This recent case involved Federal Bureau of Investigation ("FBI") Special Agent Michael Zummer, who had investigated a Louisiana district attorney soliciting sexual favors from criminal defendants in exchange for

74. *See, e.g.*, Exec. Order No. 13,526 § 4.1(a)(3), 3 C.F.R. 298 (2010) (requiring that a "person has a need to know the [classified] information" in order to access it); U.S. DEP'T OF DEF., CYBER AWARENESS CHALLENGE 2022, at 3 (2022), https://dl.dod.cyber.mil/wp-content/uploads/trn/online/disa_cac_2022_final_web/pdf/DISA_CAC2022_InformationSecurity.pdf [https://perma.cc/EZ26-YM8S] (annual training instructing employees to "[e]nsure all information receivers have . . . official need-to-know before transmitting [controlled unclassified information]").

75. As one example, a U.S. military guide on Operational Security cautions against "[c]onducting work-related conversations in common areas or public places where people without a need to know are likely to overhear the discussion." U.S. NAVY & U.S. MARINE CORPS, NTTP 3-13.3M/MCTP 3-32B, OPERATIONS SECURITY § 3.5 (2017), https://media.defense.gov/2020/Oct/28/2002524943/-1/-1/0/NTTP-3-13.3M-MCTP-3-32B-OPSEC-2017.PDF [https://perma.cc/4TPJ-E5K5].

favorable judicial rulings.[76] Concerned about conflicts of interest and wrongdoing among the prosecutors, Zummer sought to send a letter in his personal capacity to the federal court hearing a plea sentencing in the case.[77] Pursuant to his NDA, Zummer sent the letter to the FBI's prepublication office, which at first refused to even review it. Ultimately, even though "the FBI would not clear Zummer to release the letter to the court *in any form*," he decided to send the letter to the court anyway.[78] The FBI then suspended his security clearance, explaining that he could no longer be trusted to receive sensitive information, even though he had not disclosed any sensitive information.[79] The national security workforce prizes secrecy, and communication outside of a work unit, agency, or community elicits distrust. Even authorized disclosure of misconduct might be seen as a betrayal and result in formal retaliation or informal restriction of information and opportunities.[80] This culture of secrecy foreseeably deters employees from talking about their experiences, even internally, which is a barrier to victims identifying other victims and witnesses—and to those people being willing to speak out. While secrecy is not unique to the national security workplace, the ubiquity, necessity, and scale of national security secrecy are unparalleled.

3. Classified Information and Identities

Another problem for national security employees is a common law doctrine known as the state secrets privilege, which can bar jurisdiction[81] or evidentiary disclosure.[82] When the government invokes state secrets, courts often will dismiss complaints on the basis that a plaintiff cannot make a prima facie case or that cross-examination or pleadings could reveal national security information.[83]

76. Zummer v. Sallet, 37 F.4th 996, 1000 (5th Cir. 2022).

77. *Id.* at 1001.

78. *Id.* (emphasis added).

79. *Id.* at 1002 ("FBI management said it could not trust him to learn new classified information because of his 'position that information [he] personally gather[s] in the performance of [his] duties . . . may be disclosed [in his capacity] as a private citizen.'" (alterations in original)).

80. *See infra* notes 299-301 and accompanying text.

81. Totten v. United States, 92 U.S. 105, 107 (1875).

82. United States v. Reynolds, 345 U.S. 1, 10 (1953).

83. Donohue, *supra* note 36, at 194, 197.

Emblematic of this practice is *Tilden v. Tenet*, a CIA sex discrimination case.[84] The district court reviewed a classified declaration from the CIA, concluded that the lawsuit could not proceed without disclosing state secrets, and proceeded to—in the court's words—"deny the Plaintiff a forum under Article III of the Constitution for adjudication of her claim."[85] The court made this decision despite the fact that the employee's counsel had a security clearance.[86] It held that

> the security of our nation's secrets is too important to be left to the good will and trust of even a member of the Bar of this Court. Upon reviewing the [CIA] Director's classified declaration, the Court finds that an *in camera* trial, utilizing court staff with security clearances, and swearing all participants to secrecy would not sufficiently safeguard the secrets.[87]

The federal government has repeatedly used the state secrets doctrine to preclude employment complaints, even in cases where it is not a party.[88] For instance, the federal government once successfully invoked it to stop a retaliation claim by a defense contractor.[89]

Intelligence agencies classify some employees' identities (known as putting them under cover) and the locations (sometimes even the country) where they work, meaning a perpetrator's identity or location may be a state secret.

When the former Deputy Director of the CIA tried to publish a book about the CIA's counterterrorism efforts, CIA officials sought to censor

84. 140 F. Supp. 2d 623, 626 (E.D. Va. 2000).

85. *Id.* at 627.

86. *Id.*

87. *Id.*

88. *See, e.g.*, Molerio v. FBI, 749 F.2d 815, 819-20 (D.C. Cir. 1984) (affirming dismissal on state secrets grounds of a Title VII complaint alleging racial discrimination by the FBI); Sterling v. Tenet, 416 F.3d 338, 341-42 (4th Cir. 2005) (affirming dismissal on state secrets grounds of a racial discrimination and security clearance retaliation complaint by a CIA employee because proving discrimination would require disclosing the classified names of his colleagues).

89. Donohue, *supra* note 36, at 105 (citing United States *ex rel.* Schwartz v. TRW, Inc., 211 F.R.D. 388 (C.D. Cal. 2002)).

details about his "overseas assignment."[90] The CIA routinely uses security classification to defeat discrimination and employment claims. One court explained in dismissing a case that "[m]any of the witnesses would necessarily be covert CIA operatives. Forcing such individuals to participate in a judicial proceeding – or even to give a deposition – risks their cover."[91] This was apparently true even if the witnesses used pseudonyms or followed a protective procedure. Every CIA employee must notify the agency when retaining an attorney,[92] and any employees under cover must receive approval from the CIA before their attorneys may know their classified employment affiliation.[93]

This provides broad power to the federal government to defeat lawsuits by claiming employees' affiliations are classified. In one decades-long lawsuit against the CIA, the agency belatedly admitted that one defendant's cover had been lifted years before the successful dismissal of that defendant on state-secrets grounds.[94] The government eventually agreed to a multimillion-dollar settlement,[95] which would not have been reached without the defendant's identity because the dismissal would have stood.

Where it cannot resort to the state secrets doctrine, the federal government sometimes seeks protective orders to limit access to information.[96] For instance, in one recent lawsuit over sex discrimination and retaliation for reporting sexual harassment at the State Department, the government proposed and received a broad protective order for any non-public information that "would materially affect" the State Department's

90. Email from Michael Morell, Former Deputy Director of the CIA, to the CIA (June 13, 2014, 11:21 PM) https://www.documentcloud.org/documents/6491859-C06785827 [https://perma.cc/435W-CNAQ].

91. *Sterling*, 416 F.3d at 347.

92. Interview with Former CIA Officer (Dec. 2024).

93. *See infra* note 172.

94. Donohue, *supra* note 36, at 172, 175-76 (citing Horn v. Huddle, 699 F. Supp. 2d 236 (D.D.C. 2010)).

95. Donohue, *supra* note 36, at 179-82.

96. A classic example is *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), which rejected a trial court's use of a protective order to conceal material that the anti-Vietnam War plaintiffs alleged showed illegal CIA surveillance. *Compare* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 3-4 (1983) (criticizing *Halkin*'s use of First Amendment considerations in protective order litigation), *with* Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1790 (2014) (praising *Halkin*'s approach).

interests.[97] This type of overbroad protective order withholds valuable workplace information from third parties, who cannot know whether discovery information is relevant to their own claims.

### C. Fewer Civil Service Protections

Beyond these informational barriers, national security employees face procedural barriers to accountability. Congress has granted the CIA Director almost unlimited discretion to summarily fire any employee.[98] The Secretary of Defense has similar power—delegable to various senior officials, including the heads of the NSA and the Defense Intelligence Agency ("DIA")—to terminate any civilian defense intelligence employee.[99] The use of this authority varies: A 1996 GAO report asserted that such terminations "never occurred" at the NSA and the DIA, although both agencies said they would have used the authority in some instances had employees not resigned.[100] The CIA did not fully cooperate with the GAO or let it review case files, so the frequency with which it uses this specific provision to end employment is unknown—but it does use it.[101]

Even where national security employees lose their jobs or experience other adverse employment actions through normal agency processes, however, their recourse is limited. Most federal civil service employees are protected from punishment or termination without cause and can appeal adverse employment actions to the Merit Systems Protection Board ("MSPB"), [102] an independent, adjudicative executive agency.[103] However, employees of the State Department Foreign Service, FBI, CIA, and defense intelligence components are explicitly excluded from these statutory

97. Protective Order at 1-2, Ruppe v. Blinken, No. 17-2823 (D.D.C. Dec. 27, 2018).

98. 50 U.S.C. § 3036(e)(1) (2018). The Supreme Court has found a narrow limit on this discretion for constitutional claims. *See infra* notes 116-117 and accompanying text.

99. 10 U.S.C. § 1609(a), (e) (2018).

100. GAO INTELLIGENCE PERSONNEL REPORT, *supra* note 12, at 4, 41.

101. *Id.* at 4, 6, 15.

102. 5 U.S.C. § 7513(d) (2018).

103. Pub. L. No. 94-454, § 202, 92 Stat. 1111 (1978) (codified as amended at 5 U.S.C. §§ 1201-1209).

protections.[104] Civilian national security employees also have fewer remedies than their ex-military counterparts.[105] Excluded from the exclusion—in other words, eligible for MSPB review—are preference-eligible veterans working for defense intelligence components.[106] Statutes similarly withhold from intelligence employees the right to appeal claims of whistleblower retaliation.[107]

There are sensible policy reasons for these exclusions, but their inconsistent nature—not applying to certain veterans and to many nonintelligence national security employees—suggests that those reasons cannot justify the current statutory regime. As the GAO concluded, "there are no national security reasons for the distinction between veteran and nonveteran employees at NSA and DIA."[108] Regardless of their ultimate merit, the diminished legal rights available to many civilian national security employees underscore the importance of informal methods for speaking out about misconduct.

Beyond its lack of jurisdiction over these adverse-action and retaliation claims, the MSPB also has no authority to review denials or revocations of security clearances—or employment decisions that depend upon holding a

104. 5 U.S.C. § 7511(b)(6), (7), (8) (2018). The MSPB held that this exclusion applies to civilian defense intelligence personnel, regardless of whether they are actually employed by a defense intelligence component. Johnson v. Dep't of the Army, 2007 M.S.P.B. 233, ¶ 14 (2007), *aff'd*, 297 Fed. App'x 965 (Fed. Cir. 2008).

105. While this is a difference between civilians and veterans, most of the dynamics in this Note apply equally to servicemembers, who work with sensitive information and must be eligible for security clearances. Indeed, some individuals interviewed for this Note were servicemembers. Servicemembers also face additional sexual misconduct risks and accountability barriers, including the prevalence of insular, austere deployments and limitations on military liability under the *Feres* doctrine. *See* Feres v. United States, 340 U.S. 135 (1950). *But see* Spletstoser v. Hyten, 44 F.4th 938 (9th Cir. 2022) (holding that certain sexual misconduct is not incident to military service and thus not barred by the *Feres* doctrine).

106. 5 U.S.C. § 7511(b)(8) (2018). Preference-eligible veterans employed by the Foreign Service and the CIA apparently still cannot appeal adverse actions to the MSPB. *Id.* § 7511(b)(6), (7), (8).

107. *See* Czarkowski v. MSPB, 390 F.3d 1347, 1348 (Fed. Cir. 2004) (describing how employees of the FBI, CIA, DIA, NGA, NSA, and other intelligence agencies "have been exempted from Board appeal rights under [5 U.S.C.] section 2302(a)(2)(C) of the [Whistleblower Protection Act]").

108. GAO INTELLIGENCE PERSONNEL REPORT, *supra* note 12, at 33.

security clearance, something that most national security positions require. The Supreme Court in *Department of the Navy v. Egan* held in 1987 that "it is not reasonably possible for an outside nonexpert body to review the substance of . . . a [security clearance] judgment."[109] There, a Navy laborer was seeking to reverse his firing after he failed to receive a security clearance, and the Court decided that the MSPB could not review the substance of the security clearance revocation.[110] *Egan* interspersed broad pronouncements of separation-of-powers principles with statutory analysis, leaving it murky whether Congress could, in some cases, make security-clearance-linked employment decisions subject to MSPB reviewability.[111] In any event, the Federal Circuit has similarly held that the MSPB cannot review security clearance decisions—and the often accompanying loss of employment—when employees allege they faced illegal retaliation for whistleblowing.[112]

Judicial review is similarly limited. For instance, courts refuse to review employment decisions when an employee alleges an agency's security clearance decision was motivated by a discriminatory factor under Title VII.[113] The D.C. Circuit explained that determining if the federal government had a legitimate reason to take the adverse personnel action would "run[] smack up against *Egan*" because it would require evaluating the reasons for the security clearance denial.[114]

Some courts recognize a narrow exception to judicial non-reviewability of security clearance decisions for constitutional issues and procedural due process claims.[115] In 1988, the Supreme Court held in *Webster v. Doe* that a CIA employee fired for homosexuality was not precluded under the National

109. 484 U.S. 518, 529 (1988).

110. *Id.* at 521-26.

111. *See id.* at 530 (observing that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs").

112. Hesse v. Dep't of State, 217 F.3d 1372, 1374 (Fed. Cir. 2000).

113. *See, e.g.*, Ryan v. Reno, 335 168 F.3d 520, 524 (D.C. Cir. 1999) (holding that "an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII").

114. *Id.*

115. *See* Max Jesse Goldberg, *Security-Clearance Decisions and Constitutional Rights*, YALE L.J.F. 55, 55 (Sept. 5, 2022) (arguing the constitutional exception is "an emerging exception").

Security Act from challenging his dismissal.[116] The Court explained that Congress must be explicit if it intends for a statute to be "construed to deny any judicial forum for a colorable constitutional claim."[117] *Webster* has led to considerable handwringing by federal courts as they try to square the "enigmatic decision" with *Egan*'s limitations on review of security clearances.[118] The Third Circuit "read[s] *Egan* and *Webster* together as holding that Article III courts have jurisdiction to hear 'constitutional claims arising from the clearance revocation process,' even though the merits of that revocation cannot be reviewed," a stance shared by many circuits.[119] Courts construe this exception narrowly, however; for instance, the Fifth Circuit recently reasoned in *Zummer* that separation-of-powers concerns with a court *reviewing* a constitutional claim involving a security clearance might justify avoiding that "constitutional quandary" altogether.[120]

Courts will also hear challenges that an agency did not follow its own procedures in a security clearance or related employment action, although agencies' extensive discretion in this area makes any such challenge difficult. Because statutes and regulations do not create a right to a security clearance, procedural due process in a security clearance may require nothing at all, potentially not even notice.[121] A 2021 ruling in the Eastern

116. 486 U.S. 592, 596-97 (1988).

117. *Id.* at 603.

118. Zummer v. Sallet, 37 F.4th 996, 1008 (5th Cir. 2022).

119. El-Ganayni v. U.S. Dep't of Energy, 591 F.3d 176, 183 (3d Cir. 2010); *see also, e.g.*, Dubbs. v. C.I.A., 866 F.2d 1114, 1120 (9th Cir. 1989) (allowing review of whether "the CIA unconstitutionally discriminates against gays by treating homosexual conduct, but not heterosexual conduct, [as] a negative factor in individual security clearance determinations"); Nat'l Fed'n of Fed. Emps. v. Greenberg, 983 F.2d 286, 290 (D.C. Cir. 1993) (explaining that the government was entitled only to "judicial deference, not immunity from judicial review of constitutional claims" in how it gathered information from security clearance holders).

120. *Zummer*, 37 F.4th at 1012 ("[T]here is a serious question about the constitutionality of a district court's deciding claims like Zummer's. So even if we had grave doubts about the constitutionality of precluding judicial review of a class of constitutional claims, it still would not be appropriate to adopt a consciously narrow reading of the CSRA under *Doe*, only to wander right into another constitutional quandary.").

121. *See, e.g.*, Jamil v. Sec'y, Dep't of Def., 910 F.2d 1203, 1208 (4th Cir. 1990) ("The defendants provided him with notice that they intended to revoke his security clearance for 'financial irresponsibility.' Jamil complains that that notice was

District of Virginia was typical in observing that a published Office of the Director of National Intelligence ("ODNI") policy on security clearance denial "is policy 'guidance,' which by its terms 'does not create or confer on any person or entity any right to administrative or judicial review.'"[122] Similarly, terminating employment often requires nothing more than notice, a response opportunity, access to an attorney, and a written decision that need only point to the lack of a security clearance.[123]

The rationale for these limitations is, again, understandable, but the implications are breathtaking. A supervisor or another government official can retaliate by interfering in the security clearance process, leading to an employee's loss of employment, and the fired employee will have no civil service or judicial recourse. In 2014, Congress finally passed legislation prohibiting the use of security clearance decisions as reprisal against employees, outlining a process for an employee to appeal that decision within her own agency—and eventually appeal that decision externally to an inspector general review panel.[124] However, this process provides much less recourse than appeals of ordinary personnel actions. Convening the external review panel is at the discretion of the Inspector General of the Intelligence Community, and the panel can only make non-binding recommendations to the agency that took the adverse action.[125] Security clearance suspensions lasting less than one year are never appealable (even internally).[126] For all reviews, the agency has a significantly lower burden of proof to justify its action than in ordinary actions alleging retaliation.[127]

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inadequate, but has not referred to any rule or regulation granting him the right to any notice at all, much less more substantial notice than he received.").

122. Mowery v. Nat'l Geospatial Intel. Agency, 550 F. Supp. 3d 303, 312 n.13 (E.D. Va. 2021) (quoting the ODNI policy).

123. *See Jamil*, 910 F.2d at 1208 (describing the steps needed to fire a DoD civilian for cause under 5 U.S.C. § 7513 (2018)).

124. Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, § 602, 128 Stat. 1390 (codified as amended at 50 U.S.C. §§ 3236, 3341).

125. 50 U.S.C. § 3236(c)(1), (d)(1), (d)(2)(A) (Supp. I 2020).

126. 50 U.S.C. § 3341(b)(7)(B) (2018).

127. Retaliation for protected disclosures occurs if the protected disclosure "was a contributing factor in the adverse security clearance or access determination taken against the individual, *unless the agency demonstrates by a preponderance of the evidence* that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the

A Senate report addressing identical language proposed in 2012 explained that "it is appropriate to alter the burden of proof when the employee appeals an adverse security clearance determination within the agency."[128] It said that

> even if an employee shows that a protected disclosure was a contributing factor in a security clearance determination, the agency will nevertheless prevail if it "demonstrates by a preponderance of the evidence [lower than whistleblower cases' conventional "clear and convincing evidence"] that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[129]

Agencies may only rarely need that deferential standard, as they can preclude any employee recourse whatsoever by suspending security clearances rather than revoking or denying them.[130]

The limited external reviewability is also a significant issue with proving retaliation—and obtaining a remedy. Even when retaliation claims are substantiated, jurisdictional limits may prevent national security employees from receiving relief. Parts of the executive branch can punish employees for what they deem unauthorized disclosure of information with little recourse. The MSPB's inability to review security clearance revocation, combined with similarly limited judicial review, can foreclose meaningful external recourse.

*Zummer* shows how these reviewability limitations can effectively remove civil service protections for employees with security clearances. When the FBI suspended Zummer's security clearance in September 2016, his employment was "automatically suspended without pay."[131] As an FBI employee, Zummer also needed permission to work any other job while suspended, but the FBI withheld permission.[132] Ultimately, more than a year

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United States in the instant matter." 50 U.S.C. § 3341(j)(4)(C) (2018) (emphasis added).

128. S. REP. NO. 112-155, at 38 (2012).

129. *Id.*

130. *See* Hathaway, *supra* note 27, at 739 (describing the impossibility of appealing a security-clearance suspension).

131. Zummer v. Sallet, 37 F.4th 996, 1002 (5th Cir. 2022).

132. *Id.*

later, in 2018, the FBI revoked Zummer's security clearance, accusing him of "untrustworthy or unreliable behavior in the unauthorized release of sensitive government protected information."[133]

Zummer sought relief in federal court, including reinstatement of his security clearance and employment; the court dismissed most of his claims, disclaiming jurisdiction over security-clearance-linked actions.[134] However, when the court refused to dismiss the claim seeking an order that the FBI allow him to release the letter, the FBI relented, settling and allowing him to release the entire letter.[135] Unsurprisingly, in light of *Egan*'s bar on the MSPB reviewing security clearance actions,[136] Zummer did not appeal the security clearance and employment actions to the board. As the Fifth Circuit observed: "Though the MSPB generally can order an agency to reinstate a covered employee, Zummer may not just ask it to do that here. The MSPB would have to reinstate his security clearance first. That's a problem for Zummer."[137] It is a problem not only for Zummer but for most national security employees who seek to disclose misconduct.

This case illustrates how the government acts aggressively to punish employees who disclose misconduct without government permission, which employees sometimes must obtain from the very individual accused of misconduct. Here, the government punished Zummer even though it later approved the disclosure and even though the disclosure was initially only to a federal court, not to news media or a broader public. An employee who experiences sexual misconduct at work and attempts to warn others could lose her job if she does not first seek and receive permission from her employer. Even if she does receive permission, a supervisor or employer could retaliate against her. In either case, she would have only limited, flawed recourse—at best. As Zummer's case and the interviews in Section I.E demonstrate, employees are facing security clearance retaliation for disclosing misconduct to officials in the criminal justice system.

133. *Id.*

134. *Id.* at 1002-03.

135. *Id.* at 1003.

136. *See supra* text accompanying note 109.

137. *Zummer*, 37 F.4th at 1004.

### D. NDAs and Prepublication Review Chill Employees' Speech on Sexual Misconduct

*Zummer* involved allegations of prosecutorial misconduct, but government NDAs and accompanying prepublication review also chill speech on sexual misconduct. This Section catalogs that chilling effect, a foreseeable consequence of prepublication review, which has long drawn criticism as overbroad and arbitrarily applied.[138]

#### 1. Breadth and Ubiquity

Recent years have illuminated perpetrators' widespread use of broad NDAs to silence victims and witnesses of sexual misconduct.[139] They are often unreasonably broad: one of Weinstein's NDAs expressly restricted an employee's discussions with her therapist.[140] While NDAs are sometimes innocuous, "[w]rongdoers weaponize NDAs to silence victims and conceal potential criminality."[141] In response to these myriad issues, some scholars have argued that courts should rule certain NDAs unenforceable as unconscionable or against public policy because they undermine values of truth and agency.[142] The truth- and agency-value frames illustrate the extensive third-party harm from NDAs covering sexual misconduct. The NDAs hide "data that would . . . help[] expose the empirical prevalence of sexual harassment at work" and delay accountability.[143] They also increase other employees' risk of harm. Had one Weinstein accuser's "allegations . . . not been so thoroughly concealed, then it is likely that women who were later harassed or assaulted by Weinstein would have reached different conclusions about him and altered their behavior accordingly."[144]

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138. Kevin Casey, *Till Death Do Us Part: Prepublication Review in the Intelligence Community*, 115 COLUM. L. REV. 417, 419, 440, 443-44, 450-51 (2015).

139. *See, e.g.*, Roginsky Interview, *supra* note 59 (describing how her NDA with the New Jersey state government had prevented her from sharing sexual misconduct that she witnessed).

140. Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1116 (2020) (citations omitted).

141. *Id.* at 1139.

142. *Id.* at 1113 (collecting references); *id.* at 1156-57.

143. *Id.* at 1180.

144. *Id.*

In the public sector, the federal government is also using settlement and employment NDAs to silence victims of sexual misconduct. The State Department has required female employees who settle sexual misconduct claims to sign NDAs.[145] For years, the DHS did not include statutorily required language on whistleblower protections in nearly three-quarters of its settlement agreements, thousands of which it signed annually.[146] Its employment NDAs routinely suffered a similar flaw.[147] More recently, the White House sought to require sweeping NDAs banning discussion of any nonpublic, unclassified information gleaned during employment.[148] The Justice Department even sued a former volunteer to enforce one of these agreements.[149]

Recognizing the detrimental impact of NDAs on sexual misconduct accountability, Congress has taken sweeping action. In 2022, with unanimous support in the Senate, it passed the Speak Out Act.[150] This law

145. Individual 2, Public Statement to the U.S. Commission on Civil Rights on Federal #MeToo: Examining Sexual Harassment in Government Workplaces (June 10, 2019), https://securisync.intermedia.net/us2/s/folder?public_share=Cw5d2N47Zoq3vCkv3tuRjg0011ef58&id=L1B1YmxpYyBDb21tZW50cw%3D%3D [https://perma.cc/86FN-2AKE] ("I am also aware of a number of Foreign Service women who received financial settlements from the Department of State and these included required signing of Non Disclosure Agreements.").

146. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-73 DHS, NON-DISCLOSURE FORMS AND SETTLEMENT AGREEMENTS DO NOT ALWAYS INCLUDE THE REQUIRED STATEMENT FROM THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012, at 5, 7 (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-08/OIG-18-73-Aug18.pdf [https://perma.cc/WFZ8-GVT6]. These were settlement agreements on any topic but almost certainly included settlements for sexual misconduct.

147. *Id.* at 4.

148. Tyler Valeska, Michael Mills, Melissa Muse & Anna Whistler, *Nondisclosure Agreements in the Trump White House*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM § III(C) (Jan. 28, 2021), https://nyujlpp.org/quorum/nondisclosure-agreements-trump-white-house [https://perma.cc/6PG9-CM4W].

149. Anna Schechter & Tom Winter, *Justice Department Sues Author over Book About Her Relationship with Melania Trump*, NBC NEWS (Oct. 13, 2020), https://www.nbcnews.com/politics/justice-department/justice-department-sues-author-over-book-about-her-relationship-melania-n1243229 [https://perma.cc/J4X4-TJLY].

150. Speak Out Act, Pub. L. No. 117-224, §§ 1-5, 136 Stat. 2290 (2022) (codified at 42 U.S.C. §§ 19401-19404).

invalidates any nondisclosure clause preventing an employee from speaking about unlawful sexual misconduct.[151] It applies broadly to any nondisclosure clause that meets certain conditions (e.g., signature before a dispute arises).[152] Neither congressional statements nor floor debates addressed its applicability to government employees; Section III.A argues that the Act reaches all employees, private and public.

But amid the novel, untested language of the Speak Out Act, the background legal framework for public-sector employees' speech continues. Under an approach known as the *Pickering* test, restrictions on a federal employee's speech must balance the employee's interest in speaking on matters of public concern and the government's interest in promoting an efficient workforce.[153] While speech restrictions on most government employees are "tailored temporally and in scope,"[154] little tailoring is needed when the government asserts a national security interest. In such cases, the government's interest is not as an employer promoting an efficient workforce but as a government protecting national security, and it receives broad (although not limitless) deference in that role.[155]

For national security employees, speech restrictions are the opposite of tailored. Most national security employees are subject to an extensive national security NDA and prepublication regime, a system which has the secondary effect of hindering employees from speaking out about sexual misconduct. Under Executive Order ("EO") 13526, a person must have a signed NDA to receive access to classified information.[156] EO 13526, its implementing regulations,[157] and the standard NDA they require (Standard Form 312) do not include explicit prepublication provisions.[158] However, many government agencies' policies require prepublication review.[159]

151. 42 U.S.C. § 19403 (Supp. IV 2023).

152. *Id.*

153. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1963).

154. Baumann v. District of Columbia, 795 F.3d 209, 212, 217 (D.C. Cir. 2015) (upholding a suspension of a police officer who released recorded police communications on this rationale and stressing the officer's ability to comment publicly).

155. Valeska et al., *supra* note 148, § III(A).

156. Exec. Order No. 13,526 § 4.1(a), 3 C.F.R. 298 (2010).

157. 32 C.F.R. § 2001.80(d)(2) (2022).

158. Casey, *supra* note 138, at 431 (citations omitted).

159. Casey, *supra* note 138, at 431-39.

Moreover, Form 4414, the standard agreement needed to access SCI, explicitly requires prepublication review.[160]

In 1980, in *Snepp v. United States*, the Supreme Court ruled that non-disclosure agreements and their associated prepublication responsibilities do not violate the First Amendment.[161] The agreement upheld in *Snepp* prohibited a former CIA employee from publishing anything "relating to the Agency" without prior permission.[162]

That scope was characteristically broad; for instance, the modern CIA Secrecy Agreement requires submission of "any writing or other preparation in any form . . . which contains any mention of intelligence data or activities."[163] The ODNI prepublication regime requires submission of anything "that discusses . . . national security,"[164] even if not based on or related to an employee's job. Similarly, the DoD expansively defines public disclosure as "disclosure to one or more persons who do not have the appropriate access authorization, security clearance, and need-to-know to

160. *Form 4414*, U.S. GOV'T § 4 (Dec. 2013), https://www.dni.gov/files/NCSC/documents/Regulations/FORM%204414_Rev_12-2013_fillable.pdf [https://perma.cc/F2C7-EC4N] ("I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI.").

161. 444 U.S. 507, 510-11 (1980).

162. *Id.* at 508 (citation omitted).

163. *Form 368*, CENT. INTEL. AGENCY ¶ 5 (Jan. 2017), available at Joint Appendix at 54, Edgar v. Haines, 2 F.4th 298 (4th Cir. 2021) (No. 20-1568). This is far broader than the language in Form 4414, the standard non-disclosure agreement for SCI. *See supra* note 160.

164. OFF. OF THE DIR. OF NAT'L INTEL., INSTRUCTION NO. 80.04: ODNI PRE-PUBLICATION REVIEW OF INFORMATION TO BE PUBLICLY RELEASED 2 (Aug. 9, 2016) [hereinafter ODNI PRE-PUBLICATION INSTRUCTION], https://www.dni.gov/files/documents/instruction8004.pdf [https://perma.cc/P8ZZ-CBN8].

receive protected information."[165] This is so general that even consulting with attorneys could qualify if the government asserts some information is "protected." Former federal employees appear to believe as much, with one former Navy SEAL alleging his attorney's request for an unreviewed publication exposed him to criminal prosecution.[166] And the CIA told one victim that any communications with her attorney about allegations of a case officer's sexual misconduct outside of the workplace needed to be precleared by the agency.[167]

Government policies go further. In conducting prepublication review, DoD will deny personnel who are students or faculty members at colleges or universities the right to publicly share their papers if "DoD interests are . . . jeopardized" or "the author [in]accurately portrays official policy."[168] That same policy defines "official DoD information" as encompassing "[a]ll information . . . acquired by DoD personnel as part of their official duties or because of their official status within DoD."[169] The DoD mandates that any such information "that pertains to military matters, national security issues,

165. *Frequently Asked Questions for Department of Defense Prepublication Security and Policy Reviews*, DEF. OFF. OF PREPUBLICATION AND SEC. REV., https://www.esd.whs.mil/Security-Review/PrePublication-and-Manuscripts [https://perma.cc/M8RQ-47KS]. Federal government sources have conflicting definitions of public disclosure. DoD Instruction 5230.29, for instance, defines "public release" as "making information available to the public with no restrictions on access to or use of the information," a far narrower definition. U.S. DEP'T OF DEF., INSTRUCTION NO. 5230.29, SECURITY AND POLICY REVIEW OF DOD INFORMATION FOR PUBLIC RELEASE 11 (Feb. 8, 2022) [hereinafter DoD 5230.29 PREPUBLICATION PROCEDURES], https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodi/523029p.pdf [https://perma.cc/TH8Y-JPHD].

166. Bissonnette v. Podlaski, 138 F. Supp. 3d 616, 620 (S.D.N.Y. 2015) ("By requesting that Plaintiff send him a copy of the raw manuscript, Podlaski exposed [Plaintiff] to criminal prosecution because Plaintiff gave Podlaski confidential information he was not authorized to receive or possess." (alteration in original) (citing the complaint)).

167. Interview with Former CIA Officer (Dec. 2024).

168. U.S. DEP'T OF DEF., INSTRUCTION NO. 5230.09, CLEARANCE OF DOD INFORMATION FOR PUBLIC RELEASE 4 (Jan. 25, 2019), https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/523009p.pdf [https://perma.cc/9JRP-25UK].

169. *Id.* at 6.

or subjects of significant concern to the DoD will undergo a prepublication review before release."[170]

Taken together, what does this maze of definitions and cross-references mean? To the extent a claim of misconduct "pertains to military matters" or is "of significant concern to the DoD" and involves conduct that took place in the workplace (thus making information about it "official DoD information"), it falls under this overbroad policy. An employee[171] who is the victim of sexual misconduct needs official approval to discuss the misconduct with anyone, even a spouse, police officer, pastor, attorney,[172] or medical professional.[173] Ironically, if an employee *does* want to publicly discuss the experience of harassment or assault at work, that employee

170. *Id.* at 3.

171. In recent litigation, the government asserted to the U.S. District Court for the District of Maryland, the Fourth Circuit, and the U.S. Supreme Court that the policies and criteria outlined in Department of Defense Instruction 5230.09 only applied to current employees, not former employees. Memorandum of Law in Support of Defendants' Motion to Dismiss at 22, Edgar v. Haines, 454 F. Supp. 3d 502 (D. Md. 2020) (No. 19-cv-0985); Brief for Appellees at 37, Edgar v. Haines, (4th Cir. 2020) (No. 20-1568); Brief for the Respondents in Opposition at 22-23, Edgar v. Haines, 142 S. Ct. 2737 (2022) (No. 21-791).

172. The CIA has special procedures for consulting an attorney due to the potentially classified nature of employees' identities. *See* CENT. INTEL. AGENCY, SECURITY GUIDANCE FOR REPRESENTATIVES (2009) [hereinafter CIA SECURITY GUIDANCE], https://sgp.fas.org/othergov/intel/rep.pdf [https://perma.cc/YYY8-SARU] (providing guidance to legal representatives who were given Secret-level approval to know the classified association of an employee with the CIA). It is unclear if other agencies have similar procedures. A GAO report in 1996 said the NSA and the DIA, unlike the CIA, "will not initiate security clearance actions solely for the purpose of employee representation." GAO INTELLIGENCE PERSONNEL REPORT, *supra* note 12, at 39. In any case, the policies by their terms cover attorneys.

173. Compounding this issue, DoD civilians are restricted in the medical treatment they can receive for sexual assault at military medical treatment facilities. GAO DOD CIVILIANS REPORT, *supra* note 18, at 50-51. Generally, DoD civilian victims of sexual assault will be referred to community-based support. *Id.* at 51. However, those personnel lack clearances, meaning the terms of the prepublication policies will prohibit disclosure of any medically necessary information even tangentially related to the workplace, potentially leading to reticence to use these referred services.

might only be able to use the prepublication process once she has "the full and final text of material proposed for release."[174]

Prepublication obligations exist in many parts of the government independent of national security NDAs, even as they incorporate national security criteria. Internal personnel manuals require *all* State Department and U.S. Agency for International Development ("USAID") employees to submit for a national security review any personal, public communications "[p]ertaining to . . . the Department's mission (including policies . . . [or] operations of the Department of State or USAID)."[175] These policies apply regardless of an employee's role and cover even communications unrelated to the employee's job, so long as they touch on some aspect of the agency's operations—such as an IT technician who wants to speak to a local newspaper about raising funds for orphans of Russia's war in Ukraine. A key goal of the review is to check for "classified or other protected information," but there also appears to be a review for *Pickering* compliance,[176] essentially using a national security justification for prepublication review to shift the *Pickering* burden. Instead of the employee having the right to speak and then facing consequences for any speech that violates government policies, employees here must pre-clear their speech with the government. The DHS, the third-largest federal employer, similarly requires all current and former personnel to preclear personal publications that contain "DHS Information," a broad category that includes any "information . . . acquired by DHS personnel as part of their official duties or status, and . . . restricted from disclosure by law, regulation or policy."[177]

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174. DoD 5230.29 PREPUBLICATION PROCEDURES, *supra* note 165, at 8.

175. 3 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 4171(a), (c) (2017) [hereinafter 3 FAM], https://fam.state.gov/FAM/03FAM/03FAM4170.html [https://perma.cc/3YG9-LGC2]. Also covered are communications "reasonably . . . expected to affect the foreign relations of the United States." *Id.* That is broad enough to include even *non-workplace* misconduct claims against senior diplomats (e.g., if a senior diplomat assaults a junior diplomat at a personal party).

176. *Id.* § 4176.4.

177. U.S. DEP'T OF HOMELAND SEC., DIRECTIVE NO. 110-03, REVIEW OF UNOFFICIAL PUBLICATIONS CONTAINING DHS INFORMATION 3, 1-1 (2019), https://www.dhs.gov/sites/default/files/publications/mgmt/public-affairs/mgmt-dir_110-03-review-unofficial-publications-containing-dhs-info_rev-00.pdf [https://perma.cc/KDS4-C7MP]. What is information "restricted from disclosure by law, regulation or policy"? This includes "unclassified information of a sensitive nature, . . . the unauthorized disclosure

Prepublication obligations often last for life and—unlike traditional employment NDAs—operate as a prior restraint on speech that would otherwise easily clear a *Pickering* balancing test. For instance, the Sixth Circuit has called criticism of a city's administrative practices "surely protected speech" that needs no *Pickering* analysis.[178] But a former DoD employee lodging the same administrative criticism would seemingly be obligated to submit his speech for government approval or rejection. This is despite the public value of speech by current and former employees.[179]

To be sure, many former employees resort to noncompliance with NDAs.[180] The government can seek injunctions and any proceeds from publication, as it attempted when former National Security Adviser John Bolton published a book before receiving prepublication review approval.[181] That is more difficult where there is no disclosure of classified information, and most former employees do not make money from their publications. Nevertheless, the biggest chilling effect is the unilateral, essentially unreviewable government authority to fire, refuse to hire, or revoke the clearance of someone for noncompliance with prepublication review. For current employees and many former employees, noncompliance can be a career-ender.

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of *which could adversely impact a person's privacy or welfare*." U.S. DEP'T OF HOMELAND SEC., DIRECTIVE NO. 11042.1, SAFEGUARDING SENSITIVE BUT UNCLASSIFIED (FOR OFFICIAL USE ONLY) INFORMATION (2005) https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_110421_safeguarding_sensitive_but_unclassified_information.pdf [https://perma.cc/7LJW-SWAZ] (emphasis added).

178. Valeska et al., *supra* note 148, § III(G) (quoting Hudson v. City of Highland Park, 943 F.3d 792, 798 (6th Cir. 2019)).

179. *See* Casey, *supra* note 138, at 423 (describing the value of speech by former and current Intelligence Community employees).

180. *See, e.g.*, Jack Goldsmith & Oona A. Hathaway, *Good Governance Paper No. 5: Prepublication Review — How to Fix a Broken System*, JUST SECURITY (Oct. 19, 2020), https://www.justsecurity.org/72943/good-governance-paper-no-5-prepublication-review-how-to-fix-a-broken-system [https://perma.cc/S8DN-RKTV] ("Former government officials often decide to go ahead and publish without seeking prepublication review because the process is so cumbersome, slow, and often unfair.").

181. Dan Mangan & Kevin Breuninger, *Justice Department Drops Lawsuit, Criminal Probe Over John Bolton's Book on Trump*, CNBC (June 16, 2021), https://www.cnbc.com/2021/06/16/doj-drops-lawsuit-over-john-bolton-book-on-trump.html [https://perma.cc/EKQ7-MU4U].

Indeed, national security NDAs demonstrably chill discussion of workplace misconduct by current and former government employees.[182] In 2019, former national security employees challenged the government's prepublication review implementation as facially unconstitutional.[183] One plaintiff stated that "prepublication review has dissuaded him from writing some pieces."[184] The Fourth Circuit ultimately ruled for the government,[185] but it found that the former government employees had shown the policies "chilled . . . [their] right to free expression" and were "likely to deter a person of ordinary firmness from the exercise of First Amendment rights."[186]

National security NDAs even chill speech to government entities about sexual misconduct. When the U.S. Commission on Civil Rights ("USCCR"), an entity of the federal government, held a hearing in 2019 on sexual misconduct in the federal government, State Department employees feared that their NDAs prohibited communication with USCCR staff.[187] They "state[d] that the State [Department] has told them that they could get fired if they tell USCCR, Congress or other [government] agencies about sexual harassment at the State [Department]" because "sexual harassment behavior can be considered 'internal' information," and they sought guidance and intervention from the USCCR's General Counsel.[188] CIA employees have experienced similar threats in communicating with attorneys and Congress.[189]

182. *Cf.* Hathaway, *supra* note 27, at 758 (arguing unclear standards for prosecutions related to classified information chill speech).

183. Edgar v. Coats, 454 F. Supp. 3d 502 (D. Md. 2020), *aff'd sub nom*. Edgar v. Haines, 2 F.4th 298 (4th Cir. 2021), *cert denied*, 142 S. Ct. 2737 (2022).

184. Complaint at 25, Edgar v. Coats, 454 F. Supp. 3d 502 (D. Md. 2020) (No. 19-cv-985).

185. *Edgar*, 454 F. Supp. 3d at 532.

186. *Edgar*, 2 F.4th at 310 (quoting Benham v. City of Charlotte, 635 F.3d 129, 135 (4th Cir. 2011)).

187. FEDERAL #METOO, *supra* note 47, at 134.

188. Individual 6, Public Statement to the U.S. Commission on Civil Rights on Federal #MeToo: Examining Sexual Harassment in Government Workplaces (May 9, 2019), https://securisync.intermedia.net/us2/s/folder?public_share=Cw5d2N47Zoq3vCkv3tuRjg0011ef58&id=L1B1YmxpYyBDb21tZW50cw%3D%3D [https://perma.cc/P9H2-FVAQ].

189. *See infra* Section I.E.1.

Most of this Note's interview and survey participants did not consider contacting a media outlet or talking publicly. Most preferred acting internally, if at all. But several also believed they could not speak publicly about sexual misconduct, even if they wanted to do so. One interviewee thought that approval was required while currently employed but not afterward. Another national security employee said that "going to the media in any capacity . . . was heavily discouraged" for policy, non-press staff.[190] And one intelligence officer was categorical: any "media disclosure would violate my NDA."[191]

2. Anonymity Limitations

The prepublication process also critically hinders, if not vitiates, the possibility of anonymous statements. These include statements *in support of* an account. Such statements are particularly important to identifying serial abusers,[192] in part because they can spur additional investigation.[193] Imagine one employee publicly accuses an agency official of misconduct. If other employees wish to corroborate the initial employee's account, or provide their own instances of similar misconduct, they must go through the preclearance process.[194] The CIA's Secrecy Agreement warns that failing to identify sources "may by itself result in denial of permission to publish or

190. Survey Response from National Security Policy Component Staffer (Oct. 2023).

191. Survey Response from Intelligence Officer 1 (Dec. 2023).

192. *See, e.g.*, Tuerkheimer, *supra* note 14, at 1175, 1178 (describing how informal reporting, including anonymous reporting, facilitates uncovering patterns and serial abusers).

193. *Cf.* MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 1 (AM. BAR ASS'N 2024) ("An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.").

194. A typical example occurred in the first successful suit of sexual discrimination against the CIA, by Brookner. A clandestine officer anonymously supported Brookner's character and rebutted the claims the agency was investigating against her. Tim Weiner, *C.I.A. Colleagues Call Fallen Star a Bias Victim*, N.Y. TIMES (Sept. 14, 1994), https://www.nytimes.com/1994/09/14/us/cia-colleagues-call-fallen-star-a-bias-victim.html [https://perma.cc/4Y8W-2CYT] (quoting a "longtime clandestine officer, who still works for the agency and so did not want to be identified"). This type of critical corroboratory or contradictory evidence requires prepublication review under national security NDAs.

otherwise disclose . . . information."[195] The ODNI's prepublication policies categorically prohibit anonymous sources.[196] That policy applies equally to former and current personnel and extends to "[a]ny information . . . intended for release outside of the [government], regardless of the medium by which it will be released (i.e., written, voice, or electronic) that discusses any information related to the ODNI, the IC, or national security."[197] That means that a former ODNI employee would be prohibited from writing an opinion piece about sexual misconduct at ODNI that included anonymous accounts shared by colleagues. Even more worryingly, the policy would also prohibit that former employee from providing anonymous declarations or corroboration to any disclosure of that misconduct outside of official channels, even to legal counsel or non-federal law enforcement.

Similarly, beyond contradicting or corroborating a specific account, a federal employee may want to anonymously raise awareness of an environment of misconduct or impunity. This is particularly true where employees fear that being identified will lead to reputational damage and informal retaliation by colleagues, a common concern.[198] While anonymous accusations against specific individuals pose due process and accuracy issues, anonymous accounts of misconduct or workplace climates do not present the same issues, and they play an important role in organizational accountability.[199]

Importantly, national security employees have a further interest in anonymity beyond other victims of sexual misconduct. Revealing their affiliation or the specific nature of their work assignment, even if not classified, may put them at risk of physical or virtual targeting by foreign,

195. *Form 368*, *supra* note 163, ¶ 6.

196. ODNI PRE-PUBLICATION INSTRUCTION, *supra* note 164, § 6(A)(2) ("Individuals are not authorized to use anonymous sourcing.").

197. ODNI PRE-PUBLICATION INSTRUCTION, *supra* note 164, §§ 4, 5(D).

198. *See, e.g.*, OFF. OF INSPECTOR GEN., U.S. DEP'T OF STATE, ESP-20-06, EVALUATION OF THE DEPARTMENT'S HANDLING OF SEXUAL HARASSMENT REPORTS 14 (2020) ("Employees in interviews also expressed fear that reporting sexual harassment could harm their careers, either through overt retaliation or through the creation of a negative stigma and damage to the reporter's 'corridor reputation.'").

199. *See supra* notes 40, 192.

terrorist, and criminal entities.[200] Employees considering filing an external complaint against their employer or informally seeking to bring attention to workplace issues will need to weigh the added risks of broadcasting their national security positions.[201]

In certain instances, intelligence employees can publish their accounts under a pseudonym. This is common with covert U.S. government employees whose identities are classified; in those cases, the government may even require a pseudonym.[202] But it is unclear if the government would take steps to protect the identity of an employee seeking to speak out anonymously if that employee's real identity were *not* classified. Even with covert employees, the government still knows their identities and shares them internally, so prepublication review at least requires foregoing anonymity vis-à-vis the government.[203]

Anonymous speech has a revered place in America. In the Supreme Court's words, "[a]nonymity is a shield from the tyranny of the

200. *See, e.g.*, J.J. Green, *Foreign Spies Target Personal Data of U.S. Government Employees*, WTOP NEWS (Dec. 1, 2014), https://wtop.com/j-j-green-national/2014/12/foreign-spies-target-personal-data-of-us-government-employees [https://perma.cc/6HEL-3BPD] (describing how foreign intelligence agencies seek personal information of U.S. government employees to target the employees for recruitment); *FACT SHEET: President Biden Signs Executive Order to Prohibit U.S. Government Use of Commercial Spyware that Poses Risks to National Security*, WHITE HOUSE (Mar. 27, 2023), https://www.presidency.ucsb.edu/documents/fact-sheet-president-biden-signs-executive-order-prohibit-us-government-use-commercial [https://perma.cc/XBJ8-QGJ9] (describing counterintelligence and security risks to federal employees and noting "U.S. Government personnel overseas have been targeted by commercial spyware").

201. *See, e.g.*, Memorandum Opinion and Order at 2, Bird v. Barr, No. 19-1581 (D.D.C. July 3, 2019) ("Each moving plaintiff . . . highlights the concomitant risks posed to her safety and career in law enforcement and intelligence agencies, and potential operations of those agencies, should her name, position, location, and other personal details be made publicly available.").

202. *See, e.g.*, Plaintiff United States' Motion for Immediate Relief to Name Defendant by Pseudonym at 1, United States v. Jones, No. 10-cv-00765 (E.D. Va. July 9, 2010), available at https://sgp.fas.org/jud/jones/pseudonym.pdf [https://perma.cc/C37H-U69S] (requesting that the court allow the United States to sue a CIA employee by the pseudonym under which he published a book and order the parties and any third parties to redact his true name in filings).

203. *See, e.g.*, 3 FAM, *supra* note 175, § 4176.3(c) ("In all cases, an employee must disclose his or her identity to the relevant Department reviewers.").

majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression."[204] Victims of sexual misconduct can sometimes even proceed pseudonymously in civil suits—as plaintiffs and witnesses.[205] Federal employees should not be denied the opportunity to anonymously describe sexual misconduct they or others face, so long as they still safeguard classified information.

3. Undue Employer Control

In carrying out prepublication review, many agencies apply stricter review standards to communications by current employees.[206] For instance, the CIA does not review only for disclosure of classified information but also to withhold information that "could: (a) reasonably be expected to impair the author's performance of his or her job duties, (b) interfere with the authorized functions of the CIA, or (c) have an adverse effect on the foreign relations or security of the United States."[207] Moreover, every non-resume publication by a current employee must receive mandatory review and "concurrence" from an employee's "immediate supervisor."[208] State Department reviewers similarly consult with employees' immediate superiors when deciding whether current employees can make public communications in their personal capacities, although they do not require their approval.[209]

It is startling that publishing allegations of misconduct—including by superiors—may require review or approval by those same superiors. One

204. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

205. Jayne S. Ressler, *Anonymous Plaintiffs and Sexual Misconduct*, 50 SETON HALL L. REV. 955, 998 (2020) (collecting current examples); *see* Roe v. Howard, 917 F.3d 229, 233 n.2, 237 n.5 (4th Cir. 2019) (describing the district court's decision to let the plaintiff, a victim of sexual abuse, proceed anonymously and to let another corroborating victim testify anonymously).

206. Casey, *supra* note 138, at 435.

207. CENT. INTEL. AGENCY, AR 13-10, AGENCY PREPUBLICATION REVIEW OF CERTAIN MATERIAL PREPARED FOR PUBLIC DISSEMINATION § g(2) (May 10, 2013), available at Plaintiffs' Cross-Motion for Partial Summary Judgment and Opposition to Defendant CIA's Motion for Summary Judgment (Exhibit D) at 25, Am. C.L. Union v. CIA, 2021 WL 5505448 (D.D.C. June 21, 2016) (No. 16-cv-01256), ECF No. 55-3 [hereinafter CIA'S 2013 PREPUBLICATION POLICY].

208. *Id.* § g(4).

209. 3 FAM, *supra* note 175, § 4176.3(a)(1), (a)(2).

reason why is that a person's colleagues are likely experts on the classification of specialized material. Indeed, the NSA's prepublication policies state that its review office, "as needed, will: . . . [c]oordinate with NSA[] subject matter experts,"[210] who are likely personnel who know the submitter. However, the approach may allow an agency to preview misconduct allegations and prepare internally to respond publicly. This is particularly concerning because agency review sometimes extends to how a disclosure reflects on the government; one former senior intelligence officer stated that "it is not uncommon for the [CIA] to send a manuscript to the [National Security Council] to review for sensitive 'policy content' – classified or not."[211]

The approval process creates a one-sided opportunity for an agency and officials accused of misconduct to control what information others hear about those allegations. Agencies selectively and publicly use their influence and control of classification decisions to advance their positions,[212] a factor that likely further dissuades employees from speaking out about sexual misconduct through existing processes. Indeed, although almost all CIA official publications must go through prepublication review, the agency has categorically excluded its own court filings from review.[213] Forcing only plaintiffs to go through prepublication review worsens the already uneven standard. At the same time, the CIA refuses to let plaintiffs' attorneys

210. NAT'L SEC. AGENCY, NSA/CSS POLICY 1-30, REVIEW OF NSA/CSS INFORMATION INTENDED FOR PUBLIC RELEASE § 11(c)(1) (Feb. 2, 2021), https://media.defense.gov/2021/Oct/18/2002875198/-1/-1/0/NSACSS_POLICY_1-30_20210202.PDF [https://perma.cc/2HJM-942E].

211. Jack Goldsmith & Oona Hathaway, *The Scope of the Prepublication Review Problem, and What to Do About It*, LAWFARE (Dec. 30, 2015), https://www.lawfareblog.com/scope-prepublication-review-problem-and-what-do-about-it [https://perma.cc/C6YD-J96F].

212. *See, e.g.*, Hathaway, *supra* note 27, at 750-52 (collecting examples of selective declassification). One example describes how the CIA not only selectively declassified but also exerted its influence on former employees' public interactions. Adam Goldman & Matthew Rosenberg, *How the C.I.A. Is Waging an Influence Campaign to Get Its Next Director Confirmed*, N.Y. TIMES (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/us/politics/gina-haspel-cia-director-influence-campaign.html [https://perma.cc/T44W-5UHA] ("To promote a more positive view of Ms. Haspel, the agency has declassified secrets about her life as a globe-trotting spy and encouraged former clandestine officers — typically expected to remain quiet even in retirement — to grant interviews.").

213 CIA'S 2013 PREPUBLICATION POLICY, *supra* note 207, § e(5).

prepare classified pleadings, telling one attorney that the "CIA will not . . . allow the use of classified information in a civil proceeding."[214] As demonstrated above, the agency can and does use the state secrets privilege to dismiss these claims. But there is no check on its own lawyers including classified information in filings.

The inherent discretion in prepublication decisions is exactly the type of "unconstrained, subjective authority" that *fuels* harassment.[215] In the sexual misconduct context, such supervisory and organizational control is inappropriate and misplaced.

### E. Case Studies and Interview Data

How are government agencies exercising this control to silence victims of sexual misconduct? A review of hundreds of court documents unearthed allegations that the CIA and the FBI abused their national security authority to silence and punish victims of sexual misconduct, including through security clearance retaliation and limits on their ability to plead allegations in federal court. Interviews with former and current national security employees provide additional context to these allegations and show the positive impact of a proper response to sexual misconduct.

Interviewing was a particularly tricky process due to the sensitivity of the topic and the opaqueness of participants' employment. The approach involved a variation on snowball sampling, a common approach with hidden populations.[216] The author identified potential participants, contacted them, and asked them to share the survey/interview form with others who might have experienced or known about sexual misconduct in these

214. Donohue, *supra* note 36, at 200 n.642 (citation omitted).

215. *See* Schultz, *supra* note 37, at 50 ("Harassment is fueled by employment systems that give higher-ups unchecked, subjective authority to make or break other people's careers on their own subjective say-so, without the use of objective criteria or external oversight to constrain their judgments."). Employers' prepublication control illustrates how the unchecked discretion dynamic extends temporally to *post*-employment control.

216. *See, e.g.*, Marinus Spreen, *Rare Populations, Hidden Populations, and Link-Tracing Designs: What and Why?* 36 BULL. MÉTHODOLOGIE SOCIO. 34, 41 (1992) ("The use of some kind of snowball design as an expedient for locating members of a special population has been thoroughly developed for locating members of rare populations, which probably is due to the 'easy to reach' dimension."); *see generally* Lee A. Goodman, *Snowball Sampling*, 32 ANNALS MATHEMATICAL STAT. 148 (1961).

workplaces. For instance, the author's outreach to lawyers who publicly represent clients who have experienced sexual misconduct led some lawyers to share the form with their clients or participate on their clients' behalf. Participants were allowed to participate anonymously to protect their true identities, even from the author. Surveys and interviews generally used a semi-structured questionnaire approved by Yale's Institutional Review Board as part of its overall study oversight.

1. CIA Sexual Assault Reports

Rachel Cuda was a 35-year-old, hearing-impaired CIA Clandestine Service Trainee.[217] In July 2022, she alleged, a male CIA colleague came up behind her in a stairwell, choked her with a scarf, and tried to forcibly kiss her.[218] After she fled, he pursued her, tried again to wrap the scarf around her neck, and forcibly kissed her.[219] Two days later, Cuda reported the assault to multiple CIA offices, which warned her not to report it to law enforcement or discuss it with a counselor, even as the agency later acknowledged its legal obligation to refer criminal sexual misconduct allegations to law enforcement.[220] In September 2022, the agency warned Cuda that she could not discuss the assault with *anyone* and said doing so might be illegal.[221] Her attorney called this order "completely unlawful" and a violation of recently adopted prohibitions on NDAs covering sexual misconduct.[222]

217. Cuda Complaint, *supra* note 8, at 3.

218. *Id.* at 4.

219. *Id.* at 4-5.

220. *Id.* at 5-6; Daniel Lippman, *CIA in Congress' Crosshairs Over Alleged Mishandling of Sex Assault Cases*, POLITICO (Apr. 21, 2013), https://www.politico.com/news/2023/04/21/cia-congress-alleged-sexual-assault-cases-mishandling-00093268 [https://perma.cc/L8XR-SLXM] ("The [senior CIA] official said the agency is required by law to refer allegations of criminal sexual misconduct to law enforcement.").

221. Cuda Complaint, *supra* note 8, at 9; Carroll Interview, *supra* note 9 (confirming the CIA ordered her not to discuss her assault with *anyone*).

222. Carroll Interview, *supra* note 9. The federal Speak Out Act only took effect in December 2022, but Virginia had adopted a similar prohibition on NDAs covering allegations of sexual misconduct. 2019 Va. Acts 282.

By reporting quickly, Cuda hoped to see if video footage existed that she could show to law enforcement.[223] If there were cameras, she testified, then "somebody could just look at it and see what happened."[224] The stairwell had no cameras, however, and her lawyer said this lack of cameras may have been why she was assaulted there, with the alleged assailant seemingly leveraging the isolated location to avoid witnesses and security footage.[225]

But, in case there were any witnesses, the CIA, referencing Cuda's NDA obligations, hastened to tell her she could not provide their names to law enforcement.[226] When she repeatedly asked for guidance on how to contact law enforcement in compliance with her NDA, the agency did not answer.[227] Later, "the CIA claimed that [the] FBI would not respond to CIA's repeated requests to report a crime."[228] Ordinarily, if law enforcement had any doubt about a sexual misconduct allegation, they would ask for outcry witnesses—people she had told about the incident—but, according to the CIA, she would not be able to answer.[229] Despite these obstacles, Cuda successfully reported her assault allegations to law enforcement, and after a criminal trial in August 2023, a Virginia state judge convicted the defendant of assault, a verdict that a jury later overturned on *de novo* appeal.[230]

During the trial, the CIA, although it was not a party and never formally intervened, used its control over information to help the defendant. There was no discovery order in the case,[231] but the agency "selectively edited" Cuda's messages to a colleague "to make them appear salacious" and then provided incomplete printouts solely to the defense.[232] For instance, Cuda sent one message about feeling sore after a fitness workout with a colleague, but the CIA provided the message out of context, "as if her remarks referred instead to feeling sore after sex with that colleague."[233]

223. Aug. 9 Transcript, *supra* note 7, at 5 (testimony of Cuda).

224. Aug. 9 Transcript, *supra* note 7, at 20.

225. Carroll Interview, *supra* note 9.

226. Cuda Complaint, *supra* note 8, at 9.

227. *Id.*

228. Cuda Complaint, *supra* note 8, at 10.

229. Carroll Interview, *supra note* 9.

230. *See* Commonwealth v. Bayatpour, No. GC23032728-00 (Va. Fairfax Cnty. Gen. Dist. Ct. Aug. 23, 2023); *supra* note 6 and accompanying text.

231. Aug. 9 Transcript, *supra* note 6, at 102.

232. Cuda Complaint, *supra* note 8, at 15.

233. Cuda Complaint, *supra* note 8, at 16.

In the months after she reported her assault internally, made her criminal report, and lawfully testified before a House oversight committee about CIA efforts to stymie accountability, Cuda faced retaliation from the CIA, which warned her of "consequences" for contacting the House.[234] According to her lawyer, that retaliation continued and culminated in her termination.[235] She sued the agency in October 2023 for retaliating against her by disclosing her messages in violation of the Privacy Act, investigating her for pretextual reasons, and downgrading her performance evaluation.[236]

Only Cuda's complaint was far from ordinary. CIA employees whose affiliation is classified must be represented by attorneys who have themselves signed a secrecy agreement.[237] These attorneys are usually former national security employees. Cuda's attorney is no exception, and because of his prior U.S. government employment, he is subject to a national security NDA and prepublication obligations.[238] The secrecy agreement also requires that the attorneys submit any "court filing" to the CIA for prepublication review.[239] So Cuda's complaint—alleging that the CIA mishandled her sexual misconduct report and was continuing to punish her—had to go to the CIA itself for a decision about whether she could file and what she could say in it. Among the changes the CIA insisted on was removing the agency's definition of sexual assault, which it claimed was classified.[240] Yet the agency "repeatedly refused to give any rationale" for why its definition of sexual assault would be classified.[241]

After Cuda made her allegations, the CIA insisted that sexual misconduct is "not . . . a pervasive problem" and "not . . . widespread."[242] But what makes her case unusual is neither her allegations, the CIA's indifference toward them, nor its willingness to misuse tools of national

234. Cuda Complaint, *supra* note 8, at 13.

235. Carroll Interview, *supra* note 9; Mustian & Goodman, *supra* note 11.

236. Cuda Complaint, *supra* note 8, at 13. The parties later agreed to dismiss the case, perhaps due to a settlement, but they provided no public explanation. *See* Stipulation of Dismissal, Doe v. Burns, No. 23-2937 (D.D.C. June 20, 2024).

237. *See supra* note 172.

238. Carroll Interview, *supra* note 9.

239. *See* CIA SECURITY GUIDANCE, supra note 172, at 4.

240. Carroll Interview, *supra* note 9; *see also* Cuda Complaint, *supra* note 8, at 7.

241. Carroll Interview, *supra* note 9.

242. Lippman, *supra* note 220.

security to protect an accused perpetrator and the agency from accountability. Rather, it is unusual because it played out in a public courtroom and became the subject of media and congressional scrutiny. This scrutiny has encouraged other victims to speak out and focused policymakers' attention on addressing barriers to sexual misconduct accountability in the national security workforce. Cuda's case is a sign of the misconduct and retaliation allegations that government NDAs conceal—and the potential power of freeing victims' voices.

Jane Doe is one of the victims who came forward in the months following Cuda's allegations with her own sexual assault allegations. Although the incident did not occur on agency premises or involve agency operations or information, it involved a clandestine CIA case officer posted overseas, and at least three other agency case officers were potential victims.[243] A more senior employee who was not alone in bringing formal accusations against the case officer, Doe had every reason to believe that the agency would "act quickly and systematically," as CIA Director Bill Burns had pledged.[244] If the CIA would take any sexual misconduct allegations seriously, would this not be it? Instead, the opposite occurred. These victims' experiences show how the CIA used its classification, cover, and security clearance authority to silence and punish sexual misconduct reports.

Just months after Director Burns appointed a new director of his Sexual Assault Prevention and Response Office, a victim advocate in that office refused to take notes when Doe first reached out.[245] The CIA employee told Doe that taking notes would make Doe uncomfortable, even after Doe requested it.[246] The same victim advocate then incorrectly told Doe that filing a restricted report with the CIA would mean that Doe would give up

243. Interview with Former CIA Officer (Dec. 2024).

244. Press Release, Cent. Intel. Agency, CIA Taking Steps to Address Handling of Allegations of Sexual Assault and Harassment (May 11, 2023), https://www.cia.gov/stories/story/cia-taking-steps-to-address-handling-of-allegations-of-sexual-assault-and-harassment [https://perma.cc/PPM8-NFG4].

245. Interview with Former CIA Officer (Dec. 2024). The office was renamed the Sexual Harassment/Assault Response and Prevention Office (SHARP). Press Release, William J. Burns, Dir., Cent. Intel. Agency, CIA Strengthening Response to Reports of Sexual Assault and Sexual Harassment (July 2, 2024), https://www.cia.gov/stories/story/cia-strengthening-response-to-reports-of-sexual-assault-and-sexual-harassment [https://perma.cc/T64H-NKG9].

246. Interview with Former CIA Officer (Dec. 2024).

the right to make an independent report to law enforcement.[247] Restricted agency reports restrict what the agency will do,[248] not the actions of the employees who make a report, but another CIA victim advocate in the same office also told a different victim that restricted reports meant that the victim could not report to law enforcement.[249] This suggests systemic misunderstanding or mischaracterization of the internal reporting process by the office charged with overseeing it.

Doe then met with officers in the CIA's Threat Management Unit, the agency's internal security organ, who told her they could only act on the security threat that Doe was raising if she agreed to be interviewed by security officers without any witness or attorney present.[250] The agency initially cited an internal regulation that it claimed barred attorneys from being present, although that regulation only required that attorneys hold a security clearance before being allowed on CIA grounds.[251] When pressed, the CIA repeatedly said that refusing victims legal counsel during interviews was simply a "best practice."[252] The CIA's Office of Security provided no support for that claim, which is at odds with the DoD's statutorily mandated practice of allowing victims to have counsel present at interviews.[253] Despite a subsequent, explicit warning from the Senate Select Committee on

247. *Id.*

248. *See* Press Release, William J. Burns, *supra* note 245 ("Restricted reports . . . are privileged and will normally not result in a referral to law enforcement or commencement of a formal administrative investigation . . . ."); Intelligence Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 7339(c), 137 Stat. 1056 (codified at 50 U.S.C. § 5352(d)) (describing restricted reports at the CIA).

249. Interview with Former CIA Officer (Dec. 2024).

250. *Id.*

251. *Id.*

252. *Id.*

253. 10 U.S.C. § 1044e(b)(6) (2018) (authorizing special victims' counsel to "[r]epresent[] the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense"); *see* U.S. DEP'T OF DEF., INSTRUCTION NO. 1030.04, SPECIAL VICTIMS' COUNSEL PROGRAM § 2.3(c) (2024) (requiring "that military criminal investigators and trial counsel provide notice of the availability of [special victims' counsel] before interviewing, or requesting a statement from, any person who satisfies one or more eligibility standard in [10 U.S.C. § 1044(e)(2)] regarding an alleged sex-related offense," absent certain exigent circumstances).

Intelligence, the CIA's Office of Security has continued to demand that victims participate in videotaped, attorney-less interviews before it will initiate investigations—even as the CIA allows those accused of sex crimes to bring their attorneys to every interview.[254]

Faced with these internal roadblocks, Doe sought to make a report to law enforcement. Although the CIA's Office of Security is supposed to have an embedded FBI agent to handle these types of cases, the office either could not or would not provide the FBI contact's information.[255] Instead, the CIA's Office of Security provided the open, nonsecure phone number for the FBI and—along with the CIA's Office of General Counsel—warned Doe that if she told law enforcement the name of the alleged perpetrator, her security clearance would be revoked for mishandling classified information.[256] After Doe's attorney intervened, the CIA agreed that Doe could report the name to local law enforcement.[257]

Nevertheless, three days after Doe made that law enforcement report, the CIA's Office of General Counsel told Doe that she had mishandled classified information in giving his name to law enforcement.[258] Indeed, the CIA has accused multiple victims of mishandling classified information by making law enforcement reports that the agency had itself authorized, speaking with the agency's congressional oversight committees, not preclearing every attorney-client communication, or stating in polygraph examinations that they had not mishandled classified information.[259] In Doe's case, the Office of Security responded to her unclassified emails and reports by officially marking them as Secret—even though the allegations were unrelated to agency information or operations and the perpetrator's name was not included in many of these communications—and then accused her of mishandling classified information by recounting her assault to her attorney.[260]

Ultimately, the CIA determined that the case officer did not pose a threat and continues to employ him.[261] That comes despite the Office of Security

254. Interview with Former CIA Officer (Dec. 2024).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

never interviewing any of the victims and the U.S. State Department kicking him out of his overseas assignment after learning of the accusations and of a non-CIA victim.[262]

Doe's case shows how the artifacts of secrecy can hide serial abusers as they victimize people outside of the agency, as the case officer here allegedly did. More generally, the CIA response demonstrates the severity of the secrecy barriers that employees face. It lends credence to victims' concerns that reporting and speaking out about sexual misconduct will threaten their security clearances and jobs.[263] Finally, it shows the scale of alleged government abuse of its national security powers to dissuade and retaliate against victims for their sexual misconduct reports—even when those victims are represented by experienced counsel.

### 2. FBI Incidents

In December 2017, according to a legal complaint, FBI Supervisory Special Agent ("SSA") Charles Dick sexually assaulted Rebecca Troster, an FBI analyst, at a work party.[264] During a photo, he placed his hand above her breast; after she removed it, he repeatedly simulated anal and vaginal penetration through her jeans and licked her neck, face, and ear.[265] She

262. *Id.* The U.S. Ambassador has the authority to bar nearly any federal employee from traveling to a country on official business. 2 U.S. DEP'T OF STATE, FOREIGN AFFAIRS HANDBOOK § FAH-2 H-114(a) (2024), https://fam.state.gov/fam/02fah02/02fah020110.html [https://perma.cc/Y3BM-8HG9].

263. *Cf.* Jenna McLaughlin & Sean D. Naylor, *How a Brutal Assault Led a Woman to One of the CIA's Most Valuable Russian Spies*, YAHOO NEWS (May 1, 2021), https://www.yahoo.com/news/how-a-brutal-assault-led-a-woman-to-one-of-the-ci-as-most-valuable-russian-spies-090022725.html [https://perma.cc/S3MA-TRMY] (describing how a sexual assault victim, a government contractor, was "reluctant" to report the assault to police because she feared it could impact her security clearance investigation); Survey Response from Lisa Sales, Former Lead Associate, Booz Allen Hamilton (Dec. 20, 2024) (confirming this concern). Booz Allen fired Sales after she spoke to *Yahoo News* about that assault, in what Sales has alleged was retaliation for recounting her experience to the media. Amended Complaint ¶ 4, Sales v. Booz Allen Hamilton, Inc., No. 23-cv-1621 (E.D. Va. Mar. 14, 2024).

264. Complaint at 4, Troster v. Barr, No. 20-cv-3584 (D.D.C. Dec. 9, 2021).

265. *Id.* at 5.

quickly reported it to her FBI supervisor and local police, and in January 2018, Virginia police arrested Dick for sexual battery.[266]

But after telling her supervisor about the assault, Troster was told to move to another office, instructed to avoid certain parts of Quantico, and put on a temporary duty assignment.[267] The Office of Inspector General ("OIG") told her it would likely delay the investigation so Dick could retire; indeed, the FBI refused to investigate until the end of the criminal trial.[268] This refusal allowed him to retire without employment consequences. She later alleged that "[i]t is the policy and practice of the FBI and its OIG to allow senior executives accused of sexual assault to quietly retire with full benefits [and] without prosecution."[269]

Troster brought suit for a hostile work environment and retaliation. She had expeditiously contacted an Equal Employment Opportunity ("EEO") counselor and initially requested mediation; the FBI subsequently sent her a message suggesting she needed to file a formal EEO complaint only if she had not completed mediation.[270] The government thus argued that her later EEO claim was untimely.[271] It also claimed that the sexual assault Troster alleged was "not sufficiently severe or pervasive" to support a hostile work environment claim.[272]

At a hearing, federal district court Judge Leonie Brinkema had none of it. She found that Troster "was misled by the [FBI] HR people in terms of the right-to-sue timing," refused to dismiss the hostile work environment and retaliation claims, and added, "I'm really shocked that the FBI would have handled this situation the way it did."[273] The judge urged the government to

266. *Id.* at 6.

267. *Id.*

268. Complaint, *supra* note 264, at 7-8; Third Amended Complaint at 9, Troster v. Garland, No. 21-cv-1410 (E.D. Va. Apr. 22, 2022).

269. Third Amended Complaint, *supra* note 268, at 9.

270. Third Amended Complaint, *supra* note 268, at 4; Transcript of Proceedings Held on February 18, 2022, at 4, Troster v. Garland, No. 21-cv-1410 (E.D. Va. Feb. 18, 2022) [hereinafter Troster Transcript].

271. Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss at 3, Troster v. Garland, No. 21-cv-1410 (E.D. Va. Jan. 11, 2022).

272. Reply Memorandum of Law in Support of Defendant's Motion to Dismiss at 14-15, Troster v. Garland, No. 21-cv-1410 (E.D. Va. Jan. 31, 2022).

273. Troster Transcript, *supra* note 270, at 4-7.

settle, warning that the case would otherwise go to a trial where, she suggested, a jury would be sympathetic to Troster.[274]

Six months later, the government settled.[275] But its default approach was to punish the victim and protect the assailant, attempt to get her complaint dismissed as untimely, and downplay the assault. The government seemingly settled because the judge refused to dismiss the claims and forecasted that the case would go to trial.

Unfortunately, the government often refuses to recognize misconduct. Troster's attorney filed another suit the same day against the FBI, this time alleging years-long abuse of a Jane Doe by FBI Special Agent in Charge John Smith, the head of an FBI field office and former section chief of the FBI's human resources office. Smith's abuse included repeatedly sexually assaulting her and referring her to an OIG investigation.[276]

Smith sought to control Doe through every means possible: referencing his HR connections, surveilling her, insisting she leave her phone on speaker all day so he could listen to her, and threatening to kill her and himself if she spoke out.[277] The constant audio surveillance is horrifying, and it is also a security nightmare that could have exposed sensitive information to third parties, since Smith forced her "to keep him on speaker" during her work events.[278]

Although it was only one part of his broader abuse, Smith also hijacked the security process and protocols to harass and punish Doe. After receiving a Top Secret/SCI clearance, Doe was placed into a security risk management program "due to her connections in an ethnic minority community" and was required to take an extra polygraph test.[279] According to the complaint, "[n]o other FBI employee" was placed into the security risk management

274. *Id.* at 8-9 (referencing, among other things, "the environment in which we live" and "the new and improved sensitivity to these issues of discrimination in the workplace").

275. Unopposed Motion to Voluntarily Dismiss, Troster v. Garland, No. 21-cv-1410 (E.D. Va. Sept. 16, 2022).

276. First Amended Complaint at 8-9, 11-12, Doe v. Barr, No. 20-cv-3553 (D.D.C. Dec. 9, 2020).

277. First Amended Complaint, *supra* note 276, at 6, 14; Third Amended Complaint at 8, Doe v. Garland, No. 20-cv-3553 (E.D. Va. Jan. 12, 2022).

278. First Amended Complaint, *supra* note 276, at 14.

279. First Amended Complaint, *supra* note 276, at 6; Fourth Amended Complaint at 7, Doe. v. Garland, No. 20-cv-3553 (E.D. Va. Nov. 4, 2022).

program, "including a white male colleague who had family overseas."[280] She filed EEO complaints over racial, ethnic, and religious discrimination, but she later abandoned them because she feared "further retaliation by the FBI and . . . Smith and further abuse by . . . Smith as well as physical and mental threats made by . . . Smith about her engaging in the EEO process."[281] After her ex-husband had a mental health incident that led law enforcement to come to her home, Smith insisted she had to disclose information about the incident to him due to his position.[282] When she did so, he reported her to the OIG in an attempt to get her fired and "gain complete control and submission" through her financial vulnerability.[283]

Smith also used isolation as a tactic to be alone with Doe, and he leveraged this required time alone together to sexually assault her. He "single[d] out [Doe] by calling her into his office and demanding [she] attend certain [hours-long] meetings with him," and he would order the male colleagues she tried to bring with her—potential witnesses to his abuse—to leave.[284]

Rather than addressing this misconduct after it became aware of it, the FBI continued to punish her. The FBI opened a criminal, allegedly pretextual investigation based on allegations of mortgage fraud involving a transaction that she had already disclosed to the FBI during her background investigation.[285] The FBI then fired her for not being transparent about her relationship with Smith, and an internal review board upheld that dismissal.[286] That decision came even though she claimed she only "withheld information for fear of [her] life," as Smith had threatened to kill her if she spoke out.[287] During the appeal, the FBI refused to interview

280. First Amended Complaint, *supra* note 276, at 6.

281. First Amended Complaint, *supra* note 276, at 5-6. It is not fully clear if the EEO complaint was specifically related to the security investigations.

282. Fourth Amended Complaint at 9, Doe. v. Garland, No. 20-cv-3553 (E.D. Va. Nov. 4, 2022).

283. *Id.* at 9.

284. *Id.* at 8.

285. *Id.* at 15-16.

286. Memorandum Opinion at 3, Doe. v. Garland, No. 20-cv-3553 (E.D. Va. Oct. 25, 2022).

287. Fourth Amended Complaint at 23, Doe. v. Garland, No. 20-cv-3553 (E.D. Va. Nov. 4, 2022)

witnesses Doe put forward, "instead relying exclusively on [the] testimony of [Smith]" and ignoring the abuse she experienced.[288]

A third FBI case is a pending lawsuit alleging sex-based discrimination and sexual harassment at the FBI's training academy for special agents and intelligence analysts.[289] Erika Wesley was an Intelligence Analyst Trainee who noticed a special agent "targeting and harassing" a colleague and decided to report it to the unit chief, Kellie Holland.[290] Holland warned Wesley "that her coming forward would not go without consequence" and then placed a negative mark on Wesley's record.[291]

When Wesley decided to join the lawsuit against the FBI, the agency punished her instead of addressing her allegations. A senior official in her office threatened to terminate her, instructing Wesley's supervisor that "[s]he needs to go" because of her EEO complaints and participation in the lawsuit.[292] The official later reassigned her and referred her to internal investigators.[293]

The retaliation included security clearance consequences, as the FBI suspended Wesley's clearance while it carried out the internal investigation; because the security clearance is a requirement of employment, she was suspended without pay for 14 months.[294] The FBI eventually restored her security clearance, although months later, it fired her.[295] She included these details in her amended complaint against the FBI but told the federal court that she "cannot fully plead the details of this investigation due to the FBI's requirement that she agree to certain nondisclosure provisions."[296] It is stunning that an agency can tolerate sexual harassment of an employee, retaliate against her for lawfully reporting it, and then—as she seeks recourse—use an NDA to prevent her from telling a federal judge about the nature of that retaliation.

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288. *Id.* at 24.

289. Fourth Amended Complaint at 1-2, Bird v. Garland, No. 19-cv-1581 (D.D.C. June 22, 2022).

290. *Id.* at 39.

291. *Id.*

292. *Id.* at 40.

293. *Id.* at 41.

294. *Id.* at 42.

295. *Id.* at 42-43.

296. *Id.* at 42 n.1.

### 3. Additional Trends

The interview and survey data revealed a few additional notable trends among participants, including fear of retaliation (often prompted by witnessing retaliation against others), fear that retaliation would affect those connected to the person making a report, and greater hesitation to report on senior employees.

Many participants worried more about professional retaliation from reporting sexual misconduct than about secrecy-linked retaliation. A current DoD employee experienced sexual assault but ultimately decided not to report it in part because she feared she would be excluded from the professional opportunity of a deployment and would face informal retaliation.[297] She pointed out that "the problem with most retaliation is that it's not that traceable. I don't know all the things for which I wasn't considered."[298]

Others echoed that fear of untraceable retaliation. A former DoD employee watched with alarm as a colleague, an intelligence officer, reported sexual misconduct in his unit and received less access to operational information and planning meetings.[299] Often, she explained, reporting leads to denial of information and opportunities, not to security clearance revocation.[300] Witnessing this retaliation heightened her own fear of retaliation, which drove her not to report almost all of the sexual harassment she faced. Even if she raised concerns anonymously, "there was always a fear that it would somehow come back to me."[301] Indeed, the one time she reported severe misconduct (the nonconsensual pictures of her changing), a senior leader who was not supposed to know her identity contacted her; the outreach was to check on her but nevertheless underscored that anonymous reporting was not truly anonymous.[302] Similarly, another former DoD employee spoke with a chaplain about

297. Survey Response from DoD Employee 1 (Oct. 2023).

298. *Id.*

299. Interview with Former DoD Employee 1 (Dec. 2023).

300. *Id.*

301. *Id.*

302. *Id.* She reported this particular incident because the person wasn't known, so she did not fear retaliation from her colleagues (as she did if she reported on the actions of a respected, influential colleague).

misconduct she experienced. This "was immediately reported to the installation commander despite promises of confidentiality."[303]

The first former DoD employee's fear of retaliation kept her from reporting a senior colleague for harassment. Because she was too afraid to say anything, he is still a DoD employee and likely still harassing people.[304] Another former DoD employee also described misconduct as likely continuing because someone was never held accountable. She experienced repeated inappropriate comments and physical contact from a senior commander. At one point, the commander shook everyone's hands but declined hers. "Oh no, you don't get a handshake. You get a hug," he said, and then he proceeded to hug her.[305] She believes that this commander has harassed other people, and today he is one of the DoD's most senior officers.[306] But she decided not to report it at the time because she worried it could affect a colleague's relationship with the commander.[307] That echoes concerns expressed by the first former DoD employee that reporting might lead to retaliation against the many personnel under her, not just her.[308]

The status of the harasser was a key factor in how victims responded. The first former DoD employee explained that the colleague who harassed her was senior and highly regarded. If certain people with worse reputations had harassed her, "they would have been eaten alive, and I could have reported it and it wouldn't have been tolerated."[309]

Contrasting poor responses with effective ones reveals how government employers miss opportunities to build and retain trusted workforces when they fail to take employee misconduct seriously. When one national security employee reported sexual harassment and gender discrimination to her direct superior, she "very much trusted [her] . . . to handle the situation."[310] Indeed, upper management handled the incident "so quickly and directly," she recounted, "that I actually felt more

303. Survey Response from Former DoD Employee 3 (Oct. 2023).

304. Interview with Former DoD Employee 1 (Dec. 2023).

305. Interview with Former DoD Employee 2 (Dec. 2023).

306. *Id.*

307. *Id.*

308. Interview with Former DoD Employee 1 (Dec. 2023).

309. Interview with Former DoD Employee 1 (Dec. 2023)

310. Survey Response from National Security Policy Component Staffer (Oct. 2023).

comfortable at work . . . I knew going forward that they would have my back if needed."[311]

These stories provide important insight into employees' experiences after they experience or witness sexual misconduct. An effective response to sexual misconduct in the federal government depends on hearing more of them.

## II. TAKING STOCK: SECRECY'S CONSEQUENCES

This Part highlights structural, non-secrecy barriers to sexual misconduct accountability and details the consequences of the secrecy-linked silencing mechanisms for accountability and national security. It then uses the judiciary as an example of how these silencing mechanisms exist in other workplaces.

### A. Victims' Stories Drive Change

Despite decades of efforts, sexual misconduct remains high in the federal workforce.[312] However, as the USCCR concluded in 2020, "there is a lack of research" and "a dearth of" data on sexual harassment in the federal workforce.[313] This limited understanding of sexual misconduct in the federal government is even weaker regarding the subset of the national security civilian workforce. In November 2017, nearly three years before the USCCR report, a group of 223 women in national security signed a letter under the banner #metoonatsec.[314] They criticized agencies' sexual harassment policies, which, they said, "are weak, under enforced, and can favor perpetrators."[315] "The existence of policies, even good ones," they

311. *Id.*

312. FEDERAL #METOO, *supra* note 47, at 9.

313. *Id.* at 3, 9 (describing "a lack of research specifically focusing on how sexual harassment affects federal workers, and what agencies are doing to protect people on the job"). Even the USCCR's investigation only focused on two agencies.

314. Gina Abercrombie-Winstanely et al., #Metoonatsec: An Open Letter on Sexual Harassment in National Security (Nov. 28, 2018), https://www.scribd.com/document/365758768/Metoonatsec-Open-Letter-on-Sexual-Harassment-in-National-Security [https://perma.cc/3EHC-4JPV].

315. *Id.* at 1.

continued, "is not enough."[316] Recognizing the reticence of many employees to come forward, two of their five recommendations were "mechanisms to collect data on claims and publish them anonymously" and "private channels to report abuse without fear of retribution."[317]

Within the DoD, despite guidance requiring it, "the military services are not consistently tracking or maintaining data on informal complaints of sexual harassment made through the [military] process, including complaints that involve DoD federal civilian employees as complainants or alleged offenders."[318] Similarly, many reports of sexual assaults of DoD civilians are not tracked or included in an existing, centralized DoD database of sexual assaults.[319] These data limitations hinder the DoD's ability to know the scope of civilian-involved sexual misconduct and respond appropriately.[320]

Moreover, since 2015, federal law has mandated that the DoD biannually survey federal civilians about sexual misconduct and discrimination.[321] However, unlike similar surveys of servicemembers, this survey was shared inconsistently across the DoD and not publicly disseminated online.[322] According to the GAO, "DOD leadership has intentionally limited their distribution within and outside of the department."[323]

Response mechanisms are also lacking. Many components of the DoD, including the Navy, Air Force, and DIA, were not complying with the Equal Employment Opportunity Commission's anti-harassment program requirements as of 2017-2019.[324] They also treat civilians' sexual misconduct complaints vastly differently. Under a unique statutory interpretation, the Navy denies most civilians access to a command

316. *Id.*

317. *Id.* at 2.

318. GAO DOD CIVILIANS REPORT, *supra* note 18, at 23.

319. *Id.* at 27-29 (explaining when sexual assaults of civilians may be tracked in the database).

320. *Id.* at 31.

321. *Id.* at 37.

322. *Id.* at 41-42.

323. *Id.* at 42.

324. *Id.* at 44.

investigation response to sexual harassment complaints.[325] For sexual assault, many DoD components lack a prevention and response program, meaning "civilians employed by these components may have limited mechanisms to report work-related sexual assault" and inconsistent access to response services.[326]

Strengthening bureaucratic procedures for addressing complaints is insufficient. Those employees who take the risky step of filing a formal complaint will find themselves at a disadvantage compared to their counterparts in non-sensitive government positions or in the private sector. They will need their employer's permission to speak publicly about the details of their complaint, making it harder for them to marshal the resources and support that might come from external or public attention to their cases. Because of this possibility, national security NDAs may discourage even formal reporting.

There is also little trust in the existing complaint processes, demonstrated by vanishingly low reporting rates. The lack of trust extends beyond formal complaints, dragging down even the rate of informal complaints.[327] As an Army independent investigator found, "the lack of confidence in the system . . . absolutely . . . affects the reporting of [these] incidents [of sexual misconduct]."[328] The lawyer for one victim described the CIA's EEO office as "a mechanism for deflection and interference . . . with complaints."[329]

325. The statute is 10 U.S.C. § 1561 (2018). GAO DoD CIVILIANS REPORT, *supra* note 18, at 46-47.

326. *Id.* at 54.

327. *See, e.g.*, GAO DoD CIVILIANS REPORT, *supra* note 18, at 19 (showing that the number of informal complaints at the DIA was approximately equal to the low number of formal complaints); MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN FEDERAL WORKPLACES: UNDERSTANDING AND ADDRESSING THE PROBLEM 28 (2022), https://www.mspb.gov/studies/studies/Sexual_Harassment_in_Federal_Workplaces_Understanding_and_Addressing_the_Problem_1987037.pdf [https://perma.cc/LCL5-RUL5] (noting employees sought to change jobs or locations perhaps due to feared retribution).

328. U.S. Dep't of Def., *Army Leaders Brief Reporters on Fort Hood Review*, DEF. VISUAL INFO. DISTRIB. SERV. 28:43 (Dec. 8, 2020) https://www.dvidshub.net/video/775714/army-leaders-brief-reporters-fort-hood-review [https://perma.cc/XKL4-UYF5]. The Secretary of the Army appointed the committee in the aftermath of the 2020 murder of Specialist Vanessa Guillén.

329. Lippman, *supra* note 220 (alteration in original).

These reporting barriers and gaps make it particularly important for employees to be able to share their experiences more widely. Public scrutiny of internal problems may help unearth them sooner, and even the possibility of victims speaking out about their experiences will incentivize agencies to improve their prevention and response efforts.[330] Of course, accountability is not only formal. An employee may prefer to raise awareness of widespread workplace issues without filing a formal complaint. Under the existing rules, an employee who shuns formal complaints—perhaps due to their high legal, procedural, and informational barriers—and instead speaks out informally may face substantial financial costs. She might follow the prepublication processes described above and publish an article or talk to someone about these issues. But waiting for and challenging the potential redactions would be costly and time intensive.

As the #MeToo movement has shown, public scrutiny can snowball revelations of misconduct, prompt resignations, and lead to culture shifts—even when the evidence necessary to meet the high legal bar is not available.[331] News media investigations are critical to this process. A 2018 PBS investigation of the U.S. Forest Service[332] led to vows of action from the agency head and congressional scrutiny.[333] The House Oversight Committee, citing continued "reports of misconduct, sexual harassment, and retaliation," called a public hearing.[334] These stories underscore the human impact. In the words of one of the sponsors of the Speak Out Act, former Representative Cheri Bustos, "[a]s humans, we relate to stories more

330. *Cf.* Interview with a Legal Organization Familiar with the Speak Out Act (Mar. 2024) (explaining that the Act successfully changed the incentive structure for employers' treatment of employees who experience misconduct).

331. *See* Tuerkheimer, *supra* note 14, at 1184 ("[W]e have witnessed how informal reporting can contest entrenched cultural norms.").

332. Elizabeth Flock & Joshua Barajas, *They Reported Sexual Harassment. Then the Retaliation Began*, PBS NEWS (Mar. 1, 2018), https://www.pbs.org/newshour/nation/they-reported-sexual-harassment-then-the-retaliation-began [https://perma.cc/5559-XERZ].

333. Juliet Linderman, *Forest Service Chief Vows to Rid Agency of Sexual Harassment*, AP NEWS (Nov. 15, 2018) https://apnews.com/article/657eab8103724660b34bc737781e3644 [https://perma.cc/LM86-L73N].

334. *Examining Misconduct and Retaliation at the U.S. Forest Service*, COMM. ON OVERSIGHT & GOV'T REFORM (Nov. 15, 2018), https://oversight.house.gov/hearing/examining-misconduct-and-retaliation-at-the-u-s-forest-service [https://perma.cc/SE48-FTKK].

than facts and figures."[335] Victims' testimony to the House Judiciary Committee was a major motivator of congressional support for the Act, and the committee's ability to even hear that testimony required it to issue friendly subpoenas to several witnesses.[336] However, when secrecy exacerbates employees' fear of retaliation, this media, public, and congressional scrutiny becomes significantly harder to muster.

### B. National Security Consequences

The unintentional chilling of national security employees' discussion of workplace sexual misconduct causes significant harm to these employees. Beyond these individual impacts, it also has concerning implications for national security. Most directly, competent employees leave when sexual misconduct is not addressed, leading to high turnover costs and exacerbating the existing national security recruitment and retention crisis in the federal government.[337] Hiring a new national security employee is expensive. In addition to standard recruitment costs, the government spends more than $5,000 each time it conducts a background investigation for a candidate's Top Secret security clearance.[338] That is nearly twice the cost of each periodic reinvestigation of a current employee,[339] which is infrequent and increasingly rare.[340] Economic cost aside, certain national

335. Email from Cheri Bustos, Former U.S. Rep., to author (Dec. 6, 2023, 11:55 AM EST) (on file with author).

336. Interview with Republican Congressional Aide (Feb. 2024); Interview with a Legal Organization Familiar with the Speak Out Act (Mar. 2024).

337. *See, e.g.*, Loren DeJonge Schulman, *Managing the National Security Workforce Crisis*, CENT. FOR A NEW AM. SEC. (May 15, 2019) (discussing existing workforce issues).

338. *See About Our Billing Rates*, DEF. COUNTERINTELLIGENCE & SEC. AGENCY, https://www.dcsa.mil/Personnel-Security/Billing-Rates-Resources [https://perma.cc/3ZRK-EXVH] (listing a standard Tier 5 Top Secret investigation base rate as $5,355).

339. *See id.* (listing a Tier 5 Top Secret reinvestigation as costing $2,935).

340. *See* David Vergun, *All DOD Personnel Now Receive Continuous Security Vetting*, U.S. DEP'T OF DEF. (Oct. 5, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2800381/all-dod-personnel-now-receive-continuous-security-vetting [https://perma.cc/BDA4-V2L9] (discussing DoD's continuous vetting program that is replacing periodic reinvestigations).

security employees recruited for specialized skillsets may be irreplaceable.[341]

Improper handling of sexual misconduct also leaves employees vulnerable to blackmail. This is not an idle risk, as is clear from the alarm raised by seemingly consensual misconduct, like adultery,[342] and from criminal actors' recent release of a school district's sexual misconduct complaints as a blackmail technique, which brought media scrutiny of the district's responses.[343] Coercion of federal employees is of significant concern in the national security space, and the Federal Circuit in *Kaplan v. Conyers* pointed to the potential for blackmailing of federal employees in extending *Egan* to prohibit MSPB review of eligibility to be a commissary clerk. [344]

341. *See, e.g.*, H. PERMANENT SELECT COMM. ON INTEL., THE CHINA DEEP DIVE: A REPORT ON THE INTELLIGENCE COMMUNITY'S CAPABILITIES AND COMPETENCIES WITH RESPECT TO THE PEOPLE'S REPUBLIC OF CHINA 33 (2020), https://irp.fas.org/congress/2020_rpt/chinadeep.pdf [https://perma.cc/K3X5-YRQ2] (calling Mandarin Chinese proficiency a "critical skill[]" and calling on the IC to "codify and nurture cadres of officers with China-focused expertise").

342. *See, e.g.*, Shane Harris, *Secret Service Prostitution Scandal: One Year Later*, WASHINGTONIAN (Mar. 25, 2013), https://www.washingtonian.com/2013/03/25/secret-service-prostitution-scandal-one-year-later [https://perma.cc/YH8L-FK2A] ("The Secret Service's own training manuals specifically warned against adultery, because from a security standpoint, 'the potential for undue influence or duress exists.'").

343. *See* Frank Bajak, Heather Hollingsworth & Larry Fenn, *Ransomware Criminals Are Dumping Kids' Private Files Online After School Hacks*, AP NEWS (July 5, 2023), https://apnews.com/article/schools-ransomware-data-breach-40ebeda010158f04a1ef14607bfed9b0 [https://perma.cc/FZ3J-N3C7] (describing how the ransomware actors published "[a] handwritten note naming three students involved in one of the sexual abuse complaints"); Mark Keierleber, *Minneapolis Data Breach a 'Worst-Case Scenario' After Ransomware Attack*, THE 74 (May 5, 2023), https://www.the74million.org/article/from-campus-rape-cases-to-child-abuse-reports-worst-case-data-breach-rocks-mn-schools [https://perma.cc/TVZ4-E9BP] ("[A] middle school English teacher accused of gazing at students' bodies and touching them inappropriately was placed on paid administrative leave while district investigators conducted their inquiry. Investigators determined the complaint was substantiated, but the middle school's website still lists the teacher in its staff directory.").

344. 733 F.3d 1148, 1151, 1165 (Fed. Cir. 2013) ("[T]he intelligence community may view certain disparaging information concerning an employee as a

The existing literature on blackmail in the national security context focuses on *Webster v. Doe*, where the CIA "had concluded that [the employee's] homosexuality presented a security threat."[345] Historically, "'the most frequently discussed ideal type of blackmail victim'" were gay and lesbian individuals.[346] Several commentators post-*Webster* refuted the federal government's arguments that homosexuality presented a blackmail risk.[347]

Societal shifts—what one scholar has referred to as "an extraordinary cultural moment of resistance against sexual harassment"[348]—have made allegations of sexual misconduct a real and growing basis for blackmail. As society increasingly punishes and represses sexual misconduct, revealing such misconduct becomes more damaging to perpetrators, who, "in order to maintain secrecy, will be willing to sacrifice more and be willing to do things the rest of society would regard as harmful."[349]

The case of Rob Porter illustrates this dynamic. Porter served as President Donald Trump's staff secretary, an obscure but powerful position that manages the flow of information to the President and is "at the vortex of presidential action" in the White House.[350] By virtue of that role, the staff secretary usually receives access to some of the most sensitive classified information in the U.S. government.[351] Porter resigned after media reports

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vulnerability which can be used to blackmail or coerce information out of the individual.").

345. 486 U.S. 592, 595 (1988).

346. Lindgren, *supra* note 26, at 684 (quoting MIKE HEPWORTH, BLACKMAIL 42 (1975)).

347. *See, e.g.*, Anthony W. Swisher, *Nobody's Hero: On Equal Protection, Homosexuality, and National Security*, 62 GEO. WASH. L. REV. 827, 853 (1994) ("The government should not be allowed to deny a security clearance to a homosexual applicant because of a belief that all homosexuals are subject to blackmail or are sexually promiscuous."); Mark Damian Hoerrner, *Fire at Will: The CIA Director's Ability to Dismiss Homosexual Employees as National Security Risks*, 31 B.C. L. REV. 699, 740 (1990).

348. Schultz, *supra* note 215, at 24.

349. Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861, 876 (1998).

350. Karen M. Hult & Kathryn Dunn Tenpas, *The Office of the Staff Secretary*, 31 PRESIDENTIAL STUD. Q. 262, 263 (2001).

351. *Id.* at 264 ("White Houses differ as to whether national security and other highly sensitive materials are put through the 'staff system.'"). Even in administrations such as George H.W. Bush's, where "some NSC, National

brought attention to his two ex-wives' allegations that he verbally harassed and physically abused them, including by once physically pulling his second wife out of the shower.[352] His first wife "told the FBI she believed Porter's history would make him easy to blackmail."[353] Foreign intelligence services that obtained evidence of such abuse or of additional allegations could have threatened to publicize it if Porter did not provide sensitive information or use his access to their benefit.

Such blackmail is only possible because the secrecy regime redistributes leverage from the victim to the perpetrator.[354] In this sense, blackmail of perpetrators of sexual misconduct is consistent with many scholars' analysis of blackmail. [355] Secrecy thus causes further indirect harm to victims of sexual misconduct by facilitating retaliation and empowering others to join the perpetrator's fraud against victims and society (by motivating foreign and criminal actors to aid the perpetrator in concealing the misconduct).[356]

Porter's case also highlights how misconduct need not be completely secret to serve as a basis for blackmail. The FBI's background investigation had identified abusive behavior, but Porter only resigned after the allegations received widespread media coverage, including publication of a

Security Council, matters, some highly confidential matters . . . would go to the president more directly, through the national security adviser," most national security matters would still go through the staff secretary. *Id.* (quoting Bush's staff secretary).

352. Alleen Brown, Ryan Grim & Matthew Cole, *How Powerful Men Helped Rob Porter Keep His White House Job After Learning He Abused Former Partners*, THE INTERCEPT (Feb. 9, 2018), https://theintercept.com/2018/02/09/rob-porter-white-house-job-powerful-men-clearance-kelly [https://perma.cc/V7BU-4JU4].

353. *Id.*

354. *See supra* note 37 and accompanying text.

355. It usurps the interests of the state, public, and misconduct victim. *See* Lindgren, *supra* note 26, at 672; *see also* Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 564 (1983) (describing the blackmailer and the perpetrator joining together to participate in the perpetrator's fraud against the victim and the government).

356. *Cf.* Epstein, *supra* note 355, at 564 ("Moreover, suppose Blackmail, Inc. recognizes that its ability to extract future payments from *V* depends upon *T* being kept in the dark. As it is a full-service firm, it can do more than collect moneys from *V*. It can also instruct him in the proper way to arrange his affairs in order to keep the disclosures from being made . . . .").

photo showing his first wife's blackened eye.[357] Following Porter's departure and news media reporting on the number of interim security clearances, the White House began requiring certain officials to "provide any other information . . . which could . . . be used to coerce or blackmail you."[358]

These are not theoretical concerns. Foreign governments actively collect and use incriminating information to blackmail federal employees. In 2015, the Office of Personnel Management ("OPM") announced the cybertheft of nearly 20 million individuals' background investigation records, including complete copies of Standard Form 86 and some "findings from interviews conducted by background investigators."[359] U.S. government officials publicly attributed the cyberattack to China.[360] Standard Form 86, titled "Questionnaire for National Security Positions," runs more than 100 pages and requires disclosure of any reasons a person was fired or quit to avoid being fired, among other information.[361] If an employee left because of "charges or allegations of misconduct," the person must detail those accusations.[362] As a congressional investigation into the OPM hack put it, these forms and investigations "are designed to identify the type of information that could be used to coerce an individual to betray their country."[363] The very nature of intelligence operations and secret coercion

357. Brown, Grim & Cole, *supra* note 352.

358. Ken Dilanian, *White House Officials Are Asked If They Are Vulnerable to Blackmail*, NBC NEWS (Feb. 15, 2018), https://www.nbcnews.com/politics/white-house/white-house-officials-are-asked-if-they-are-vulnerable-blackmail-n848456 [https://perma.cc/XXA3-BWCF].

359. *Cybersecurity Incidents*, U.S. OFF. OF PERS. MGMT., https://web.archive.org/web/20230602111604/https://www.opm.gov/cybersecurity/cybersecurity-incidents [https://perma.cc/836B-ZU7X].

360. *See, e.g.*, Julianne Pepitone, *China Is 'Leading Suspect' in OPM Hacks, Says Intelligence Chief James Clapper*, NBC NEWS (June 25, 2015), https://www.nbcnews.com/tech/security/clapper-china-leading-suspect-opm-hack-n381881 [https://perma.cc/2QVC-ZCTX].

361. *Standard Form 86: Questionnaire for National Security Positions*, U.S. OFF. OF PERSONNEL MANAGEMENT § 13A.5 (Nov. 2016), https://www.opm.gov/forms/pdf_fill/sf86.pdf [https://perma.cc/B7XX-YXYV].

362. *Id.*

363. H. COMM. ON OVERSIGHT AND GOV'T REFORM, THE OPM DATA BREACH: HOW THE GOVERNMENT JEOPARDIZED OUR NATIONAL SECURITY FOR MORE THAN A GENERATION: MAJORITY STAFF REPORT, at v (2016), https://oversight.house.gov/wp-

makes it difficult to quantify the coercion risk.[364] To the extent foreign and criminal actors do use such coercion, however, unaddressed sexual misconduct creates real security vulnerabilities.

Finally, failing to address sexual misconduct will lead to more cases in state courts, which do not have the same rigorous procedures for protecting classified information as federal courts do under the Classified Information Procedures Act ("CIPA").[365] Cuda's case illustrates this risk. There, the CIA's efforts to hamper the investigation meant that the case ended up as a misdemeanor in state court,[366] with a higher risk of classified information disclosure and no U.S. government role. The clandestine officers' identities were public—and widely reported during the jury retrial—and the trial proceedings are filled with examples of the parties and the court struggling to protect classified information. **"**I know you don't want us to refer to it," Cuda apologized as she began to talk about her employer.[367]

During the initial trial, the defense attorney repeatedly asked to exclude the press from the courtroom so the sketch artist could not sketch the defendant; to justify his request, the attorney invoked the CIA's authority and suggested he would have sought their intervention if he had known a sketch artist would be at the trial.[368] Closure would have been an

content/uploads/2016/09/The-OPM-Data-Breach-How-the-Government-Jeopardized-Our-National-Security-for-More-than-a-Generation.pdf [https://perma.cc/R73Q-TP52].

364. *See, e.g.*, *id.* at vi ("The intelligence and counterintelligence value of the stolen background investigation information for a foreign nation cannot be overstated, nor will it ever be fully known."); *see also* Smith, *supra* note 349, at 885 ("[T]he nature and extent of actual blackmail transactions are not very well understood, because of the interest in secrecy on the part of both blackmailer and victim."). *But see* Stan A. Taylor & Daniel Snow, *Cold War Spies: Why They Spied and How They Got Caught*, 12 INTEL. & NAT'L SEC. 101, 106 (1997) (finding "only four cases of betrayal brought on by blackmail").

365. *See infra* note 385 (discussing CIPA).

366. *See* Lippman, *supra* note 220 (victim's counsel Carroll saying federal law enforcement should have charged "felony sex assault"); Carroll Interview, *supra* note 9 (explaining a forensic exam would likely have shown soft tissue damage to her neck, which would have supported a felony charge).

367. Aug. 9 Transcript, *supra* note 7, at 92.

368. Transcript of Trial Hearing at 6, 10-11, Commonwealth v. Bayatpour, No. GC23032728-00 (Va. Fairfax Cnty. Gen. Dist. Ct. Aug. 23, 2023) [Aug. 23 Transcript].

extraordinary remedy,[369] and the defense attorney eventually modified his request to prohibit sketches of any witness for "national security purposes."[370] A brief recess and extended arguments on the defense request occurred, during which the defense counsel noted he "can see the sketch artist drawing as I'm speaking."[371] Without any request from the federal government, and with no position taken by the state prosecutor, the judge ultimately prohibited only sketches of the defendant.[372] Despite this prohibition on *drawing* the sketch, the very next day, the Associated Press *published* a courtroom sketch of the defendant.[373]

Of course, state courts could issue protective orders even for classified information. In the civil realm, the U.S. government has historically asserted the state secrets doctrine in both federal and state courts,[374] and state courts likely cannot force the federal government to provide classified information. But if federal government inaction leads to more state criminal proceedings, that will risk classified information disclosure in testimony and court filings.

### C. Secrecy in Other Government Workplaces

Victims and witnesses of sexual misconduct in workplaces that prize secrecy face a similar reputational risk of breaking that silence as national security employees.[375] Consider employees of judicial chambers. Some law clerks must sign NDAs.[376] Because "[a] core value of the legal profession,

369. *See* Press-Enterprise Co. v. Superior Ct. of Cal., 464 U.S. 501, 510 (1984) (requiring "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored").

370. Aug. 23 Transcript, *supra* note 368, at 13, 15.

371. *Id.* at 14.

372. *Id.* at 16.

373. *See* Mustian & Goodman, *supra* note 5 (sketch in the article).

374. S. REP. NO. 110-442, at 21 (2008) (describing the "current practice").

375. *See* Aliza Shatzman, *The Clerkships Whisper Network: What It Is, Why It's Broken, and How to Fix It*, 123 COLUM. L. REV. F. 110, 116-17 (2023) ("Law clerks are actively dissuaded from sharing negative clerkship experiences, fearing reputational harm that will hinder their ability to secure their next jobs as well as retaliation by the judges who mistreated them.").

376. *See* Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 LAW & SOC. INQUIRY 741,

and the judiciary especially, is confidentiality,"[377] law clerks are reluctant to share when they experience misconduct. The structure of the legal profession itself can hide and facilitate sexual harassment.[378] As in the national security space, elements of secrecy conceal the scope of sexual misconduct. Law clerks and other judicial employees are similar to national security employees in that they face limited redress opportunities,[379] isolated work environments that lack witnesses,[380] and non-independent adjudication of misconduct complaints.[381] Pointing to some of these factors, judicial accountability advocate and former law clerk Aliza Shatzman has argued that "[t]he dearth of data in this space allows judges to get away with misconduct."[382] When law clerks who are victims of sexual misconduct are silenced, it directly and indirectly deters others from speaking out.[383]

A shared factor in judicial and national security workplaces is isolation and the need for frequent one-on-one interactions. In describing her own experience facing harassment at the hands of a judge, Shatzman recounted how he would sometimes ask her to remain late "so he could berate me when no one was around to witness it."[384] Asking only one clerk to stay late is the type of action that rightly does not raise eyebrows in a judicial chambers but that can be leveraged by abusive supervisors to ensure no witnesses to their misconduct.

The judiciary is another example of national security bleeding into other workplaces. Judicial staff need to obtain security clearances to work on proceedings involving classified information, such as criminal trials or Foreign Intelligence Surveillance Act matters, and employees may move in

743-44 (2014) (describing Supreme Court clerks' obligation to sign "a confidentiality agreement").

377. Renee Knafe Jefferson, *Judicial Ethics in the #MeToo World*, 89 FORDHAM L. REV. 1197, 1210 (2021).

378. Litman & Shah, *supra* note 38, at 602.

379. Shatzman, *supra* note 376, at 121 (noting many federal judicial employees do not enjoy Title VII protections).

380. Litman & Shah, *supra* note 38, at 618.

381. Aliza Shatzman, *Untouchable Judges? What I've Learned About Harassment in the Judiciary, and What We Can Do to Stop It*, 29 UCLA J. GENDER & L. 161, 205 (2022) (criticizing the system of judges adjudicating complaints against their colleagues on the same court).

382. Shatzman, *supra* note 376, at 119.

383. *See* Litman & Shah, *supra* note 38, at 633.

384. Shatzman, *supra* note 382, at 166.

and out of the judicial and national security workforces.[385] Shatzman's own experience entailed the judge who harassed her later interfering in her federal security clearance process by "ma[king] negative statements about [her] during [her] background investigation," which led to the revocation of her job offer.[386]

That incident illustrates yet again how harassers seek to harass and coerce silence by interfering in the background investigation process, which is a common prerequisite to obtaining and maintaining federal employment in the national security space. Facilitating blackmail of, and impunity for, misbehaving employees is the perverse spillover effect of the national security secrecy regime—a far cry from its intended purpose.

## III. A PATH FORWARD

In a recent press release, the CIA said that the occurrence of sexual misconduct is not classified and that NDAs do not prohibit contacting law enforcement about a crime.[387] That is a welcome acknowledgment, but it has seemingly had little impact on the CIA's actions.[388] This Part argues that broader, binding action is both possible and necessary.

First, as Section III.A shows, the Speak Out Act's plain terms and surrounding context indicate that its existing provisions apply to government NDAs. However, because a court might demand an express congressional statement, and to immediately address the chilling effect, Congress should pass clarifying legislation. Second, the executive branch should modify its NDAs and enforcement policies to explicitly preclude their application to sexual misconduct. Executive action has the advantage of avoiding any concerns about separation of powers that might accompany legislative or judicial action. However, it has drawbacks, notably that new

385. The Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3 §§ 1-16), sets out guidelines for criminal proceedings that could involve classified information. Guidelines revised by Chief Justice Roberts in 2010 pursuant to CIPA make clear that judicial staff—but not judges—may require security clearances. 18 U.S.C. app. 3 § 9 note (2018) ¶ 4. Eleven Article III federal judges also sit on the Foreign Intelligence Surveillance Court, and three sit on the Foreign Intelligence Surveillance Court of Review. 50 U.S.C. § 1803(a)-(b) (2018).

386. Shatzman, *supra* note 376, at 140; Shatzman, *supra* note 382, at 170.

387. Press Release, Cent. Intel. Agency, *supra* note 245.

388. *See, e.g.*, *supra* text accompanying notes 256-260.

agency leadership and presidential administrations can rescind policy guidance[389] and routinely modify classification rules.[390]

Interbranch consensus is ideal, with legislative enactments complementing executive action—either by codifying or encouraging executive action. The executive branch is zealous in asserting its prerogative to set national security employment requirements,[391] and it recently described congressional direction of a new prepublication policy as a "request."[392] Legislative action is thus most likely to succeed if coordinated with the executive branch. Similar to the initial adoption of national security whistleblower protections, in which the President issued a policy directive that Congress then codified,[393] action by the executive branch followed by legislative codification would provide the most sustainable path forward. Codification is a frequent strategy for entrenching reforms, even in the absence of separation of powers issues.[394]

Both changes would encourage employees to speak out about the sexual misconduct they experience, come forward (even anonymously) as

389. *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement [https://perma.cc/7GYL-UV7Q] (rescinding earlier policies directing prosecutors to use their discretion to not prosecute certain violations of federal drug law relating to marijuana).

390. REP. OF THE COMM'N ON PROTECTING AND REDUCING GOV'T SECRECY, S. DOC NO. 105-2, at 11 (1997) (describing how every post-World War II president except Kennedy modified the classification system).

391. For instance, when President George W. Bush signed major intelligence legislation in 2004, he included a signing statement taking issue with "provisions of the Act . . . [that] purport to regulate access to classified national security information." Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 3 PUB. PAPERS 3119 (Dec. 17, 2004).

392. *See infra* note 414 and accompanying text.

393. In 2012, President Barack Obama issued Presidential Policy Directive 19, which expanded some Whistleblower Protection Enhancement Act protections to national security employees. WHITE HOUSE, PRESIDENTIAL POLICY DIRECTIVE/PPD-19, PROTECTING WHISTLEBLOWERS WITH ACCESS TO CLASSIFIED INFORMATION (2012). Congress then codified some of these protections with the Intelligence Authorization Act for Fiscal Year 2014. *See supra* note 125 and accompanying text.

394. *See, e.g.*, S. REP. NO. 114-4, at 3 (2015) (justifying codification of Freedom of Information Act practices previously established by executive order to ensure their use "under any administration").

witnesses to sexual misconduct they see, and counter the silencing effects of growing governmental secrecy.

### A. Clarify the Speak Out Act's Application to Federal Employees

Courts should, as a matter of statutory interpretation, make clear that the provisions of the Speak Out Act apply to government employees and NDAs. The Act, a response to NDAs that had silenced victims of Harvey Weinstein, Roger Ailes, and others, is brief. A few short paragraphs are all that is needed to invalidate most NDAs that restrict someone from speaking about sexual misconduct. The Act's language, while sweeping, is unambiguous: when certain conditions regarding the allegations are met, "*no* nondisclosure clause" is valid.[395] The meaning of the word "no" is expansive.[396] Section 3 of the law defines a nondisclosure clause as "a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct."[397] This language evinces no distinction based on the type of employer or contract, a purposefully high level of generality.[398] Interviews with those involved in the bill's adoption confirm this reading. Former Rep. Bustos explained that "[t]he intent for the Speak Out Act was to be as comprehensive as possible, at least with the Democratic lead sponsors."[399] An aide to one of the Act's Republican co-sponsors confirmed there was a hope the Act would apply to the federal workforce and said the co-sponsors knew that was one of the "use cases" for it.[400] Simply put, members of Congress assumed that federal employees were covered.[401] Even if Congress did intend to exempt

395. Speak Out Act § 4(a), 42 U.S.C. § 19403 (Supp. IV 2023) (emphasis added).

396. *Cf.* United States v. Gonzales, 520 U.S. 1, 5 (1996) ("Read naturally, the word 'any' has an expansive meaning . . . .").

397. 42 U.S.C. § 19402(1) (Supp. IV 2023).

398. Interview with Republican Congressional Aide (Feb. 2024) (describing "an intentionality in the vagueness").

399. Email from Cheri Bustos to author, *supra* note 336. Asked about limitations with respect to government employees, she said: "Other than issues of national security, I am not sure I see limitations." *Id.* Its applicability to national security NDAs was my next question, which may have affected her answer.

400. Interview with Republican Congressional Aide (Feb. 2024).

401. Interview with a Legal Organization Familiar with the Speak Out Act (Mar. 2024).

government or national security NDAs, the Supreme Court has refused to limit broad statutory language to a narrower congressional purpose.[402]

Moreover, to the extent there is any ambiguity, "the broader context of the statute"[403] suggests that Congress intended to provide no exemption to the government. Under a section titled "Continued Applicability of Federal, State, and Tribal Law," Congress explicitly states that the Speak Out Act "shall not be construed to supersede a provision of Federal, State, or Tribal Law that *governs the use of pseudonyms* in the filing of claims involving sexual assault or sexual harassment disputes."[404] That this limited carveout for pseudonyms is the only exception provided for under such an expansive heading suggests that Congress intended for the law to otherwise set a new federal standard. In other words, Congress considered when conflicting federal laws should control and settled on only one circumstance.

Section 19403(d) has one general exception: The Act does not "prohibit an employer . . . from protecting trade secrets or proprietary information."[405] Classified information and trade secrets are distinct categories, separated out in a number of statutes, including those outlining the disclosure of government information.[406] There may be instances where trade secrets are also classified, particularly where the government is contracting out the development or production of new military equipment

402. Brogan v. United States, 522 U.S. 398, 403 (1998) ("But it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself.").

403. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

404. 42 U.S.C. § 19403(c) (Supp. IV 2023) (emphasis added).

405. *Id.* § 19403(d).

406. Freedom of Information Act § (b)(1)(A), (b)(4), 5 U.S.C. § 552 (2018); 44 U.S.C. § 2204(a)(1)(A), (a)(4) (2018) (excluding, in different sections, trade secrets and classified information from disclosure of presidential records); 26 U.S.C. § 6110(c)(2), (c)(4) (2018) (same but for Internal Revenue Service records); *see also* Aaron Burstein, *Trade Secrecy as an Instrument of National Security? Rethinking the Foundations of Economic Espionage*, 41 ARIZ. ST. L.J. 933, 961 (2009) (arguing that the design and structure of trade secrets laws are fundamentally incompatible with those of national security information regulations).

or technology.[407] However, those would be rare exceptions, and in most cases the trade secrets provision of the Speak Out Act would be fully inapplicable.

Considering the plain meaning of the statute and congressional intent to provide only explicitly delineated exceptions, courts should refuse to enforce any government non-disclosure or secrecy agreement with respect to an employee's disclosure of sexual misconduct. Nevertheless, where the government enforces an NDA by terminating a security clearance and employment, a court might hold those decisions unreviewable under *Egan*.[408] The court could argue that *Egan* articulates a clear-statement rule for congressional limits on executive national security powers and then find that Congress did not speak clearly here.[409] Moreover, the chilling effect of NDAs that this Note documents means that federal employees will hesitate to risk speaking out under the untested protections of the Speak Out Act.

Therefore, Congress should amend the Speak Out Act to make clear that its enforceability bar covers sexual misconduct disputes by federal employees, including those in the national security workforce. This could be as simple as revising the definitions in Section 3 to add the clause "including those signed by the U.S. government" after the phrase "contract or agreement." A more confined revision could add a Section devoted solely to government employees and their NDAs, clarifying that only statements about sexual misconduct are excluded from NDAs and that the legislation does not authorize the disclosure of classified or controlled unclassified information ("CUI"). For example, the following is possible statutory language:

> Section 19403 of title 42, United States Code, is amended by adding at the end the following: "(e) Applicability to Government Employees.—This Act applies to all agreements signed by the United States Government, including those with federal employees and contractors. Agreements that meet the requirements of subsection (a) shall not be enforced to prevent personnel from speaking about sexual harassment or sexual assault disputes as defined herein or to discipline personnel for disclosures about such

407. *See* Grant H. Frazier & Mark B. Frazier, *Taming the Paper Tiger: Deterring Chinese Economic Cyber-Espionage and Remediating Damage to U.S. Interests Caused by Such Attacks*, 30 S. CAL. INTERDISC. L.J. 33, 47 (discussing trade secrets that may be national security information).

408. *See supra* note 109 and accompanying text.

409. *See supra* note 110 and accompanying text (discussing the unclear implications of *Egan*).

> disputes that do not follow nondisclosure or prepublication provisions. This Act shall not be construed to authorize the disclosure of classified information."

One objection to any such congressional effort is the possibility of opposition from the executive branch. The Supreme Court in *Egan* held that the President's "authority to classify and control access to information bearing on national security . . . flows primarily from [Article II's] constitutional investment of power in the President and exists quite apart from any explicit congressional grant."[410] Three months later, in *National Federation of Federal Employees v. United States*, the D.C. district court struck down as unconstitutional federal legislation restricting certain national security NDAs.[411] On appeal, the Supreme Court remanded the case without addressing the constitutional issue.[412]

The extent of congressional power to regulate national security NDAs is unsettled, but even if the executive branch could resist judicial enforcement, congressional action would probably force the executive branch's hand.[413] Moreover, in the years since *Egan* and *National Federation*, Congress has been actively involved in shaping national security NDAs. As part of the Intelligence Authorization Act of 2017, Congress directed that "the [Director of National Intelligence] shall issue an IC-wide policy regarding pre-publication review" within 180 days.[414] The ODNI ultimately issued a policy

410. Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).

411. 688 F. Supp. 671, 685 (D.D.C. 1988), *vacated in part as moot and remanded on other grounds sub nom.* Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989).

412. *Am. Foreign Serv. Ass'n*, 490 U.S. at 158.

413. *See* Valeska et al., *supra* note 149, § II(C); Jeremy Stahl, *Is It Normal for White House Officials to Sign Nondisclosure Agreements?*, SLATE (Aug. 14, 2018), https://slate.com/news-and-politics/2018/08/trump-white-house-ndas-are-these-nondisclosure-agreements-normal.html [https://perma.cc/A8J3-4RB8] (describing how congressional pressure led to the revision of NDAs despite the initial court loss in *National Federation*).

414. 163 CONG. REC. 7419 (2017) (Division N—Intelligence Authorization Act for Fiscal Year 2017).

in July 2024,[415] after the Department of Justice ("DOJ") told the Supreme Court that the ODNI was responding to the "congressional request."[416]

Even earlier, as part of the Whistleblower Protection Enhancement Act of 2012, Congress specified the text of national security NDAs, requiring them to include exceptions and to state that statutory carveouts for certain communications "are incorporated into this agreement and are controlling."[417] It stipulated that any NDA that did not include such language "may not be implemented or enforced to the extent such policy, form, or agreement is inconsistent with [those requirements]."[418]

That law's employee protections and contractual requirements defined "agency" narrowly to explicitly exclude intelligence community employees.[419] Congress subsequently codified similar personnel protections for intelligence community employees, with the notable exception of any language regulating NDAs for these employees.[420] However, this absence of NDA language implies not legislative reticence but instead a recognition that the previous law's nondisclosure provisions already applied to intelligence employees. The 2012 law requires the specific language for "Standard Forms 312 and 4414 . . . and any other nondisclosure policy, form, or agreement of the Government."[421] Part of this section discusses intelligence activities, suggesting that Congress was cognizant of the broader reach of this provision.[422] Indeed, legislators' intention for this part of the Whistleblower Protection Enhancement Act to apply across the federal government is evident from the Senate committee report, which categorically states that the law's mandatory provisions reach "*all* federal nondisclosure policies, forms and agreements."[423] Finally,

415. Memorandum from Dir. of Nat'l Intel., re Clarification of Requirement Included in Intelligence Community Directive 711, Prepublication Reviews (July 12, 2024), https://www.dni.gov/files/documents/ICD/ICD-711-Prepublication-Reviews.pdf [https://perma.cc/C57F-VF8L].

416. Brief for the Respondents in Opposition, *supra* note 171, at 33.

417. Whistleblower Protection Act of 2012, 5 U.S.C. § 2302(b)(13) (2018).

418. *Id.* § 2302(a)(3)(A).

419. *Id.* § 2302(a)(2)(C)(ii).

420. Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, §§ 601-604, 128 Stat. 1390, 1414-22 (codified as amended at 50 U.S.C. §§ 3234, 3341).

421. 5 U.S.C. § 2302 note (2018) (Nondisclosure Policies, Forms, and Agreements).

422. *Id.*

423. S. REP. NO. 112-155, at 45 (2012) (emphasis added).

because Standard Form 312 and Form 4414 are standardized forms, the executive branch effectively incorporates this mandatory language for all employees, implicitly acknowledging Congress's authority to require specific language in the text of national security NDAs—even for intelligence employees.

In sum, a single short paragraph would suffice to confirm the Speak Out Act's breadth. No binding case law defines Congress's power in this space, in part because the Supreme Court has counseled avoiding the constitutional issue.[424] But interbranch convention and history, including the executive branch's acquiescence to Congress regulating these areas of national security employment, demonstrate the legislative branch's authority to take this action.[425]

### B. Take Executive Action Disclaiming Government NDAs' Application to Sexual Misconduct

Nevertheless, the two branches' shared responsibility for national security counsels in favor of pairing any legislative enactment with executive action. This approach would avoid any separation-of-powers issue. The executive branch should revise all prepublication policies and government NDAs to disclaim application to sexual misconduct allegations. For instance, such policies and NDAs, including Standard Form 312 and Form 4414, could add the following stipulation:

> I understand that nothing in this agreement prohibits an employee from disclosing or alleging sexual misconduct publicly or to those without access to [CUI/classified information/SCI], so long as such disclosures do not contain [CUI/classified information/SCI]. I recognize that I may choose to make such disclosures without going through any otherwise obligatory prepublication process, but I have been advised that I remain civilly and criminally responsible

424. *See* Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153, 161 (1989) (rebuking the district court for reaching the constitutional question).

425. Under the historical gloss approach, interbranch convention must persist to be meaningful. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 18 (2020). However, duration is measured with respect to the existence of the practice, and "modern practice can potentially qualify as gloss even if it differs from earlier practice." *Id.* at 19. The relatively modern nature of prepublication review and the classification system—and the fights that take place in many areas—makes this recent interbranch practice in a narrow sphere more compelling.

> for any unauthorized disclosure of [CUI/classified information/SCI] that results from any such disclosure.

This short addition would allow—but not require—employees to bypass the prepublication review process for disclosures of sexual misconduct. At the same time, it would explicitly retain employees' contractual obligation not to disclose protected information. The pairing creates a presumption that employee speech on sexual misconduct will not endanger national security, and it continues to protect sensitive and classified information in instances where that is not the case.

Sexual misconduct exemptions from a contractual commitment to confidentiality are eminently feasible, as events in the similarly secrecy-sensitive judiciary show. In 2017, Heidi Bond went public about experiencing sexual harassment as a law clerk to then-Ninth Circuit Judge Alex Kozinski. At the time, the Code of Conduct for Judicial Employees contained a lifelong duty of confidentiality extending to "any information you receive through your clerkship that is not part of the public record" and prohibiting disclosure to any person, including "family, friends, and former colleagues."[426] As with the broad language of national security policies, this expansive language on its face applied to personal misconduct that takes place during a clerkship—regardless of severity. Bond described how she believed the language limited her discussion of what she experienced, even with a therapist, and she called for exempting certain misconduct from the duty of confidentiality.[427]

After Bond and others publicly shared details about Kozinski's misconduct, the federal judiciary revised its law clerk handbook and the Code of Conduct to exempt outside discussion of misconduct.[428] The new, current language includes the following qualification:

426. FEDERAL JUDICIAL CENTER, MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 5 (2d ed. 2011), https://oscar.uscourts.gov/assets/Maintaining_the_Public_Trust__Ethics_for_Federal_Judicial_Law_Clerks_2011.pdf [https://perma.cc/5TD7-2QKJ].

427. Heidi Bond, *Kozinski*, COURTNEY MILAN (Dec. 8, 2017), https://www.courtneymilan.com/metoo/kozinski.html [https://perma.cc/664U-8X3C].

428. Debra Cassens Weiss, *Revision to Federal Law Clerk Handbook Addresses Sex Harassment Complaints*, ABA J. (Dec. 19, 2017), https://www.abajournal.com/news/article/revision_to_federal_law_clerk_handbook_addresses_sex_harassment_complaints [https://perma.cc/Y3RW-BBXY].

> This general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.[429]

Nearly eight years after this change, there have been no reports that the exemption has led to any unauthorized disclosure of confidential information. Instead, it appears that judicial employees, sensitized as they are to the importance of confidentiality, can properly distinguish between protected information about individual cases and decision-making (on the one hand) and details of sexual misconduct that involve no sensitive information (on the other). National security employees likely can do so as well.[430] Indeed, the CIA trusts its own attorneys to distinguish classified and unclassified information without prepublication review,[431] and it has exempted a list of people from standard prepublication review obligations when they publish on certain topics.[432] There is no reason sexual misconduct could not be one of these exempted topics.

The national security context may be different due to heightened secrecy concerns. An inadvertent disclosure of a covert operative's identity could place lives at risk and damage the nation's ability to protect itself from external threats. But unauthorized disclosures of sensitive judicial information also put judges and juries at risk,[433] and it is hard to imagine a

429. ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 3, § 320, Canon 3.D(3) (2022), https://www.uscourts.gov/sites/default/files/guide-vol02a-ch03.pdf [https://perma.cc/NZ86-FJB4].

430. Government employees routinely do this as part of their job duties when they derivatively classify materials. Exec. Order No. 13,526 § 2.2, 3 C.F.R. 298, 305 (2010).

431. *See supra* note 213 and accompanying text.

432. Plaintiffs' Cross-Motion for Partial Summary Judgment and Opposition to Defendant CIA's Motion for Summary Judgment (Exhibit B: (U) Review Exemption – Definition and Author Cases (May 6, 2009)) at 5, Am. C.L. Union v. Cent. Intel. Agency, 2021 WL 5505448 (D.D.C. June 21, 2016) (No. 16-cv-01256), ECF No. 55-3. The exemption is also "based on an established record of prepublication review compliance," *id.*, although no explanation of the criteria for this appears in the CIA document.

433. *See, e.g.*, Maria Cramer & Jesus Jiménez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-

more fundamental interest in American democracy than "the integrity of judicial proceedings."[434] Despite this risk, the judiciary adopted a carveout that implicitly authorizes disclosure of confidential information as part of sexual misconduct disclosure, an even stronger exemption than the one this Note proposes.

In contrast, this Note's proposal would explicitly bar any disclosure of classified information as part of sexual misconduct disclosures. The executive branch's criminal and civil enforcement authority to pursue unauthorized disclosure of classified information would remain untouched after the proposed change to national security NDAs. This undiminished enforcement authority would continue to deter any unauthorized disclosure of classified information, and it would incentivize employees whose sexual misconduct allegations realistically might involve classified information to voluntarily participate in the prepublication process.

If the executive branch categorically refuses to weaken its vast prepublication powers, however, it could—as a less impactful alternative—issue policy statements declaring that it will not penalize government employees who publicly discuss details of sexual misconduct in the workplace. This is particularly important for adjudication of security clearances, for which the DNI sets "the single, common adjudicative criteria."[435] The DNI should issue adjudicative guidance instructing security clearance adjudicators not to consider adversely government employees' statements or publications related to sexual misconduct.[436] This would go far to undermine the chilling effect, but it is less effective than an NDA revision because adjudicative agencies inconsistently apply DNI

arrest.html [https://perma.cc/4TVW-X3DM] (describing how a leak of a draft Supreme Court abortion ruling motivated a man to try to kill a Supreme Court justice and led to other threats of violence); U.S. DEP'T OF HOMELAND SEC., NATIONAL TERRORISM ADVISORY SYSTEM BULLETIN (June 7, 2022), https://www.dhs.gov/sites/default/files/ntas/alerts/22_0607_S1_NTAS-Bulletin_508.pdf [https://perma.cc/9HUT-BBUA] (warning, after the draft opinion leaked, that "individuals who advocate both for and against abortion have, on public forums, encouraged violence").

434. STATEMENT OF THE COURT CONCERNING THE LEAK INVESTIGATION, U.S. SUP. CT. (Jan. 19, 2023), https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf [https://perma.cc/7X6J-ZMDZ].

435. OFF. OF THE DIR. OF NAT'L INTEL., SECURITY EXECUTIVE AGENT DIRECTIVE 4, NATIONAL SECURITY ADJUDICATIVE GUIDELINES (June 8, 2017).

436. This should apply to any government employee, contractor, or affiliate that is subject to the above directive.

guidance.[437] Similarly, the DOJ regularly issues policy statements signaling if, how, and when it intends to enforce criminal and civil statutes. The DOJ asserts that its policy statements "are non-binding and do not create legal rights or obligations,"[438] so they are not a panacea. Nevertheless, in some cases, that guidance includes non-enforcement policies directing federal prosecutors not to investigate or prosecute certain activities.[439] Modeled on this guidance, the DOJ should direct its components not to enforce government NDAs or prepublication agreements against any victim of sexual misconduct who speaks about that misconduct. The direction should allow enforcement for employees who in fact disclose classified information, which would sufficiently deter improper disclosures and protect national security interests.

By expressly removing sexual misconduct from the reach of non-disclosure and prepublication prohibitions, action by the policymaking branches would reduce the chilling effect of these restrictions. The changes would make clear that victims of sexual misconduct in national security workplaces are not prohibited from contacting law enforcement, telling their family, or seeking legal advice about the misconduct they experience.[440] Liberated discussions will likely spur more reporting, provide a clearer picture of sexual misconduct in federal workplaces, and enable prevention and response efforts. That will, in turn, diminish the national security and financial costs embedded in current policies.

437. *See, e.g.*, EDWARD MAGUIRE, OFF. OF THE DIR. OF NAT'L INTEL., (U) CRITICAL INTELLIGENCE COMMUNITY MANAGEMENT CHALLENGES 2 (2008), https://irp.fas.org/news/2009/04/odni-ig-1108.pdf [https://perma.cc/SLA7-JP5X] (noting that Inspector General "reports have identified the need for the DNI to place stronger emphasis on . . . imposing accountability for compliance with DNI directives").

438. Press Release, U.S. Dep't of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements [https://perma.cc/3C24-ULKH].

439. *See, e.g.*, Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Just., re Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [https://perma.cc/PCF3-V4W5].

440. *See* Mustian & Goodman, *supra* note 5 ("The victim reported the incident to the CIA within 48 hours, only to feel she was victimized again when the agency told her not to go to law enforcement or even tell her family.").

## CONCLUSION

Misconduct is nothing new, and the issues outlined here exist in other contexts. They apply to the full spectrum of workplace misconduct, of which sexual misconduct is only a small part.[441] If secrecy continues its spread, so will these silencing mechanisms.

In the national security context, however, sexual misconduct poses heightened risks. Beyond the clear and lasting harm to individuals, it imperils America's ability to recruit and retain a trusted, competent national security workforce. The U.S. is less safe because it has lost current and prospective employees over its failure to effectively prevent and respond to sexual misconduct. At a time when the U.S. and its allies face "the most severe and complex security environment since the end of World War II,"[442] it cannot afford to permit unaccountability for sexual misconduct. As the Supreme Court has put it, "no governmental interest is more compelling than the security of the Nation."[443] Freeing employees to discuss the sexual harassment and assault they face is a national security imperative. It will help ensure employee safety, an equal workforce, and a secure nation—and it is what those who serve the nation deserve.

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441. *See, e.g.*, Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 513 (2018) ("As of 2016, sexual harassment charges represent only about a quarter of all harassment charges filed with the EEOC.").

442. Jens Stoltenberg & Kishida Fumio, *Joint Statement Issued on the Occasion of the Meeting Between H.E. Mr Jens Stoltenberg, NATO Secretary General and H.E. Mr Kishida Fumio, Prime Minister of Japan*, N. ATL. TREATY ORG. (Jan. 31, 2023), https://www.nato.int/cps/en/natohq/opinions_211294.htm [https://perma.cc/3QZY-7XQQ]; *see* Press Release, Off. of Sen. Roger Wicker, Wicker Leads Armed Services Republicans in Defense Intelligence, Worldwide Threats Hearing (May 4, 2023), https://www.wicker.senate.gov/2023/5/wicker-leads-armed-services-republicans-in-defense-intelligence-worldwide-threats-hearing [https://perma.cc/7VLC-TXSE] ("The United States is confronted with the most complex and dangerous global security environment since the Second World War.").

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