

# 07-4244-CV

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United States Court of Appeals  
*for the*  
Second Circuit

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VALERIE PLAME WILSON and SIMON & SCHUSTER INC.,

*Plaintiffs-Appellants,*

– v. –

J. MICHAEL McCONNELL, in his official capacity as Director of National  
Intelligence, Central Agency, and GENERAL MICHAEL V. HAYDEN,  
in his official capacity as Director of Central Intelligence Agency,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICAN  
PUBLISHERS, INC., AMERICAN BOOKSELLERS  
FOUNDATION FOR FREE EXPRESSION, AMERICAN  
SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF  
ALTERNATIVE NEWSWEEKLIES, ASSOCIATION OF  
AMERICAN UNIVERSITY PRESSES, FREEDOM TO READ  
FOUNDATION, MAGAZINE PUBLISHERS ASSOCIATION,  
PUBLIC CITIZEN, INC., PUBLISHERS MARKETING  
ASSOCIATION, RADIO-TELEVISION NEWS DIRECTORS  
ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, AND SOCIETY OF PROFESSIONAL  
JOURNALISTS IN SUPPORT OF APPELLANTS**

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## **CORPORATE DISCLOSURE STATEMENT**

None of the amici curiae has a corporate parent or is owned ten percent or more by any publicly held corporation.

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## **INTRODUCTION AND INTEREST OF THE AMICI**

This case involves a prior restraint on the publication by Appellants of truthful information that is readily – and permanently – available to the public. As such, it implicates First Amendment principles of the highest importance to the Amici, who represent publishers of books, magazines, and newspapers; newspaper editors; journalists; libraries and librarians; the electronic news media; and the reading public.<sup>1</sup> The District Court, in granting the government’s motion for summary judgment, held that the Central Intelligence Agency (“CIA” or the “Agency”) had the right to censor former covert agent Valerie Plame Wilson from including in her memoir Fair Game: My Life as a Spy, My Betrayal by the White House (2007) (“Fair Game”) the pre-2002 dates of her federal service, notwithstanding the fact that the same information already had been injected into the public domain and will remain there regardless of the outcome of this litigation. The government justifies this restraint on Wilson’s (and her publisher Simon & Schuster’s) First Amendment rights by posing a threat to national security if she were allowed to publish what the Agency claims is – and the District Court found to be – classified information.

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<sup>1</sup> All parties have consented to the filing of this brief. A complete list and description of the Amici is provided in the Appendix.

The District Court based its ruling on two findings: (1) the information at issue was properly classified despite its having been transmitted by the CIA to Wilson in a February 10, 2006 letter in unclassified form and subsequently published in the Congressional Record; and (2) the information was never “officially acknowledged” by the Agency. As a result of the District Court’s decision, any member of the public can access and freely disseminate the pre-2002 dates of Wilson’s CIA employment, but Wilson herself cannot. This Court should be highly skeptical of this perverse result.

Amici do not take issue with the high level of deference to which CIA classification decisions ordinarily are entitled. See Wilson v. McConnell, 501 F. Supp. 2d 545, 553 (S.D.N.Y. 2007) (citing cases). They do not suggest that courts routinely should second-guess plausible agency explanations for classification decisions. Moreover, because Amici are not privy to the classified CIA affidavit on which the District Court based its finding that the information was properly classified, they cannot address directly the sufficiency of the Agency’s justifications for the challenged censorship. But the circumstances presented here – Wilson is seeking to publish under her own name autobiographical information that is readily

accessible to the public – demand searching judicial scrutiny of those justifications.

Specifically, the Agency should be required to demonstrate that the prohibition on publication by Appellants – and *only* Appellants – of public-domain information is narrowly tailored to advance a sufficiently compelling government interest in national security to warrant a prior restraint. As the cases discussed below make clear, the public dissemination of the precise information at issue cripples the Agency’s ability to make that extraordinarily demanding showing. Because the District Court failed to engage in this First Amendment-sensitive analysis, instead relying on cases that are easily distinguishable, its decision should be reversed.

Amici are not in a position to ascribe a political motivation to the censorship at issue, notwithstanding the well-known adversarial relationship between Wilson and the Bush administration. But it surely is relevant that the censorship occurred in connection with a book about the effort by officials and supporters of the Bush administration to discredit Wilson and her husband, former Ambassador Joseph Wilson, following the publication of an op-ed article by Mr. Wilson in the New York Times that challenged President Bush’s claim that Iraq had sought to obtain uranium from Niger. See, e.g., Fair Game at 139. That effort included senior

government officials leaking Wilson's status as a covert agent to the press in 2003. The irony of this case, therefore, is that it involves the government's effort to censor purportedly classified public-domain information from a book that describes the wrongful disclosure to the media of classified information by senior government officials. See A-620-21 (¶¶ 1-8). In fact, Fair Game addresses two forms of serious government malfeasance: first, the twisting of intelligence concerning Iraqi weapons capability to justify going to war and, second, the leaking of Wilson's status as a covert agent after her husband took issue with the administration's portrayal of that intelligence.

Appellants' claims thus go to the heart of the First Amendment. As the Supreme Court has stated: "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . ." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). Because this case involves government censorship of a text critical of the manner in which the government led the country into war, it squarely implicates this core purpose of the First Amendment. Indeed, the words of Justice Black, concurring in New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring), are apt:

[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

As a general matter, the absence of meaningful judicial scrutiny of classification decisions could allow government agencies to offer pretextual reasons for censoring critics of government policy, like Wilson, from expressing views the government does not like. There is particular reason for such concern here. The decision to require Wilson to redact her pre-2002 dates of service from the manuscript apparently was imposed by senior Agency management on the CIA's Publication Review Board (PRB), the chairman of which "didn't understand the reasons for the decision." Fair Game at 269. See also A-630 (¶¶ 51-54) (citing evidence that PRB officials believed prohibiting Wilson from disclosing her pre-2002 dates of service was "absurd" and "ludicrous" but that Agency management had intervened and that the final decision rested with the Office of the Director); A-300.

This suggests the possibility of a decision driven by political, rather than genuine national security, concerns.

A more fundamental problem with the District Court's ruling, however, is its failure to recognize that the prior restraint is rendered unconstitutional by the fact that public disclosure diminishes, if not destroys entirely, its efficacy. This error warrants reversal and entry of summary judgment for Appellants.

## **ARGUMENT**

### **I. PUBLIC DISCLOSURE OF THE CENSORED INFORMATION UNDERMINES THE RATIONALE FOR THE CIA'S PRIOR RESTRAINT**

The Supreme Court stated in Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931), that it is “the chief purpose of the [First Amendment’s] guaranty to prevent previous restraints upon publication.” Although the protections of the First Amendment are by no means so limited, a prior restraint is considered the most grievous intrusion on the First Amendment, as it silences a speaker altogether. See Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976) (“prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights”). Accordingly, the Supreme Court has stated that “[a]ny

system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” New York Times Co., 403 U.S. at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); United States v. Quattrone, 402 F.3d 304, 309 (2d Cir. 2005).

A prior restraint on the publication of truthful information is permissible only in the narrowest, most compelling circumstances. See, e.g., Near, 283 U.S. at 716 (citing preventing obstruction of recruiting or publication of sailing dates or number and location of troops during wartime, enforcement of obscenity laws, and protecting against incitements to acts of violence or the forceful overthrow of government as among the “exceptional cases” in which a prior restraint is permissible); United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis. 1979) (“few things, save grave national security concerns, are sufficient to override First Amendment interests”).

Consonant with the recognition that national security is a government interest of the highest importance, an exception to the law’s profound hostility to prior restraints allows the government to prevent the publication or dissemination of classified information. Thus, in Snepp v. United States, 444 U.S. 507 (1980), the Supreme Court upheld the CIA’s

right to enforce the breach of a secrecy agreement by Snepp, a former CIA agent, who had failed to submit a manuscript for pre-publication review.

The Court observed that the CIA can seek to protect “substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment,” id. at 510, and it held that Snepp “should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources.” Id. at 511.

However, whereas the government has a right to censor publication of properly classified information, it has no right to censor publication of unclassified materials or information obtained from public sources. McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983). When the information in question is derived from public sources, “the agent’s special relationship of trust with the government is greatly diminished if not wholly vitiated.” Id.

It bears noting that the First Amendment rights of a former CIA agent seeking permission to disclose information in his or her possession are greater than those of plaintiffs in FOIA cases seeking access in order to disclose information, as in, for example, Morley v. C.I.A., No. 06-5382, 2007 WL 4270576 (D.C. Cir. Dec. 7, 2007), Wolf v. C.I.A., 473 F.3d 370

(D.C. Cir. 2007), Krikorian v. Dep't of State, 984 F.2d 461 (D.C. Cir. 1993), and Fitzgibbon v. C.I.A., 911 F.2d 755 (D.C. Cir. 1990). As the McGehee court stated: “Th[e] difference between seeking to obtain information and seeking to disclose information already obtained raises McGehee’s constitutional interests . . . above the constitutional interests held by a FOIA claimant.” McGehee, 718 F.2d at 1147. The McGehee court explained: “McGehee wishes to publish information he possesses, and the CIA wishes to silence him . . . . McGehee . . . has a strong first amendment interest in ensuring that CIA censorship of his article results from a *proper* classification of the censored portions.” Id. at 1147-1148 (emphasis in original). See also United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir. 1972) (“[T]he First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship.”).

In McGehee, the D.C. Circuit held that in order to overcome McGehee’s First Amendment right to publish information contained in an article he had written on CIA disinformation programs, the Agency was required to provide a “reasoned and detailed” explanation of its classification decision. The court stated:

While we believe courts in securing such determinations should defer to CIA judgment as to the harmful results of publication, they must nevertheless satisfy themselves from the record, *in camera* or otherwise, that the CIA in fact had good reason to classify, and therefore censor, the materials at issue. Accordingly, the courts should require that CIA explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification. These should not rely on a “presumption of regularity” if such rational explanations are missing.

Id. at 1148-1149. The court acknowledged that courts reviewing CIA classification decisions “cannot second-guess CIA judgments on matters in which the judiciary lacks the requisite expertise,” id. at 1149, but it stated that they “must assure themselves that the reasons for classification are rational and plausible ones.” Id. Applying this standard, the court concluded that the CIA’s affidavits provided “reason to believe that disclosure of the censored portions of McGehee’s article could reasonably be expected to cause serious damage to the national security,” id., and it upheld the classification decision.

Here, as in McGehee, Wilson complied with the Agency’s pre-publication review requirement by submitting her manuscript to the PRB. The only redactions required by the PRB that she challenges are those relating to her pre-2002 dates of CIA service. She does so on the ground

that – unlike the information at issue in McGehee, Marchetti, and other cases involving CIA prior-review censorship – these facts already had entered the public domain. See Wilson, 501 F. Supp. 2d at 549 (noting that the government “does not contest that the information is . . . in the public domain”); id. at 550 (describing how the material contents of the CIA’s February 10, 2006 letter to Wilson entered the Congressional Record and noting that it also is accessible on the Internet through the Library of Congress’s website); A-36-40; A-438-43; A-624 (¶¶ 24-27); A-628 (¶ 47); A-631 (¶ 63). Therefore, even if the District Court were correct to conclude that the information at issue was neither declassified nor “officially acknowledged” by the Agency, this case presents the additional issue of whether, given that the information already is in the public domain, the Agency had a sufficiently “good reason” for censoring it, McGehee, 718 F.2d at 1148, to survive First Amendment scrutiny.

For reasons set forth in Appellants’ brief, the District Court’s conclusions that (i) the circumstances by which the dates-of-service information contained in the Agency’s February 10, 2006 letter became public did not constitute “official acknowledgement” of the information by the Agency, see Wilson, 501 F. Supp. 2d at 555-60, and (ii) the information was properly classified despite having been placed irretrievably into the

public domain, id. at 554-55, were erroneous as a matter of law and inconsistent with undisputed record facts. But whether or not the government formally waived its right to classify the information, the undisputed fact that it is no longer secret (through no fault of Appellants (see A-16 (¶ 22); A-623-28) largely, if not entirely, undermines the government's justification for abridging Appellants' First Amendment rights.

It is a fundamental precept of First Amendment jurisprudence that a content-based regulation of speech “must be narrowly tailored to promote a compelling Government interest.” United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000). See also Elrod v. Burns, 427 U.S. 347, 362 (1976) (“a significant impairment of First Amendment rights must survive exacting scrutiny”). Either restraining or punishing the publication of lawfully obtained, truthful information “requires the highest form of state interest to sustain its validity.” Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979). Near, supra, and New York Times, supra, establish that a specific and imminent threat to national security is one such compelling interest.

But even a claimed threat to national security must be closely scrutinized before a prior restraint can be authorized. In New York Times the Court refused to impose a prior restraint even where the materials at

issue (the so-called Pentagon Papers) were stolen and related to national security, specifically the prosecution of the war in Vietnam. In his concurring opinion, Justice Brennan emphasized the extraordinary showing the government must make to justify a prior restraint, stating that “only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.” 403 U.S. at 726-27 (Brennan, J., concurring).

Where CIA censorship of classified information from manuscripts submitted by former agents has been upheld, the government’s compelling interest in the censorship was inextricably tied to the fact that the information was secret. See, e.g., Snepp, 444 U.S. at 510 n.3 (noting that the government “has a compelling interest in protecting . . . the secrecy of information important to our national security”); Marchetti, 466 F.2d at 1313 (“we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs”); id. at 1316-17 (“the Government’s need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment”); McGehee, 718 F.2d at 1143 (“We hold that the CIA censorship of ‘secret’

information contained in former agents' writings and obtained by former agents during the course of CIA employment does not violate the first amendment.”).

By contrast, where the information is in the public domain, the justification for its classification disappears. As the Marchetti court observed, if classified information already had been publicly disclosed, Marchetti “should have as much right as anyone else to republish it.” Marchetti, 466 F.2d at 1318. See also id. at 1317 (“Marchetti . . . may not disclose classified information obtained by him during the course of his employment *which is not already in the public domain.*”) (emphasis added); Snepp, 444 U.S. at 513 n.8 (“if in fact information is unclassified *or in the public domain*, neither the CIA nor foreign agencies would be concerned”) (emphasis added).<sup>2</sup>

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<sup>2</sup> This case is unlike Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975). Although the court there stated that classified information obtained by the CIA is not in the public domain unless it has been officially disclosed, see id. at 1370, Knopf nowhere suggests that what the court had in mind was the type of narrow and technical (and erroneous) view of “official disclosure” taken by the District Court in this case. Knopf rejected the argument that rumor, speculation, and press reports based on undisclosed sources could bring classified information within the public domain; it nowhere addressed the very different situation here, where information was released in an unclassified letter signed by a CIA official and indisputably was placed into the public domain. See Wilson, 501 F. Supp. 2d at 549.

The Supreme Court has made clear that public availability of the information the government seeks to censor in order to keep it secret invalidates the censorship by rendering it ineffective as a means of advancing the asserted government interest. In Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977), for example, the Court struck down a state-court injunction prohibiting the news media from publishing the name or photograph of an 11-year-old boy being tried in juvenile court where the judge had permitted reporters and other members of the public to attend a hearing in the case. The Court held that once the information was “publicly revealed” the state court could not constitutionally prevent its dissemination. Id. at 311. Similarly, in Nebraska Press, the Court struck down a prior restraint directed at information that had been disclosed in open court, holding that “once a public hearing had been held, what transpired there could not be subject to prior restraint.” 427 U.S. at 567-68. Likewise, in Smith, supra, the Court struck down a West Virginia statute that criminalized the publication, without written approval of the juvenile court, of the name of a youth charged as a juvenile offender. In finding that the statute would not accomplish its stated purpose, the Court cited the fact that it restricted only newspapers and that three radio stations had announced the alleged assailant’s name before the defendant newspaper had published it.

443 U.S. at 104-05. The Court thus concluded that “even assuming the statute served a state interest of the highest order, it does not accomplish its purpose.” Id. at 105.

Consistent with the above rulings, this Court, in Quattrone, struck down an order prohibiting the media from disclosing the names of jurors where the jurors’ names had been read aloud in open court.

“Regardless of restrictions on the press, therefore,” the Court stated, “any member of the public present in the courtroom could have learned the jurors’ names and disseminated that information as widely as possible.” 402 F.3d at 312. Accordingly, the Court concluded that the order “constituted an unlawful prior restraint in violation of appellants’ First Amendment rights.” Id.

Other courts also have refused to impose prior restraints against disclosure of publicly available information. See, e.g., Boston Firefighters Union v. WHDH TV, Channel 7, No. A.C.2007-J-455, 2007 WL 4259762 at \*2 (Mass. Appeals Ct. Oct. 5, 2007) (denying motion for preliminary injunction to prevent television station from broadcasting information from autopsy reports of deceased firefighters where “no other party was made subject to the injunction, and . . . there ha[d] been wide dissemination of the autopsy results in the past twenty-four hours”); State v. Dourousseau, 32

Media L. Rep. 1701 (Fla. Cir. Ct. 2004) (denying request of criminal defendant for prior restraint on further disclosure of sensitive discovery materials previously released pursuant to newspaper's public records request; noting that court "is not in a position to unring any bells" and that newspaper already had published two lengthy articles using the disclosed records and other sources and already had posted certain materials on its website).

Also instructive regarding the constitutionality of the prior restraint imposed here is the Progressive case, 467 F. Supp. 990. The court there entered a preliminary injunction against publication of a magazine article about how to make a hydrogen bomb, but the injunction was lifted after the same information was published elsewhere. See Howard Moreland, "The Holocaust Bomb: A Question of Time," available at <http://www.fas.org/sgp/eprint/morland.html> (visited Jan. 11, 2008). The focus of the court's analysis was on whether the information in the article, which the court found was "analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint," 467 F. Supp. at 996, was available in the public domain. After a thorough review of the record, the court's entry of an injunction rested expressly on its finding that "not all the data [contained in

the article] is available in the public realm in the same fashion, if it is available at all.” Id. at 995. Here, by contrast, the same information that the CIA maintains must be classified and censored is in the public domain. Had the Progressive court made a comparable factual finding, it would not have enjoined publication. Indeed, the government there recognized that the injunction was unjustified once the same information had entered the public domain, and it dropped the case.<sup>3</sup>

In sum, the District Court’s decision conflicts with the body of precedent in which courts have rejected as ineffective and thus unconstitutional prior restraints on the dissemination of publicly available information, even in the face of an asserted compelling government interest in the censorship.

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<sup>3</sup> As noted above, see supra n.2, Knopf, 509 F.2d 1362, is distinguishable, as that case did not involve information that the Agency released in unclassified form and later sought to classify after it was permanently injected into the public domain. See id. at 1365 (noting testimony of CIA deputy directors that the deleted information “was classified from the inception of the program or from the time of the witness’ first contact with it and was still classified”). Thus, dictum in Knopf that “[a]s long as [the information] remains classified . . . there should be no further judicial inquiry,” id. at 1371, does not apply here. To the extent Knopf can be read to hold that no First Amendment scrutiny of classification decisions rendered in connection with secrecy agreements is appropriate, see id., it is inconsistent with McGehee, and this Court should decline to follow it.

## II. APPELLANTS' FIRST AMENDMENT RIGHTS DO NOT TURN SOLELY ON WHETHER THE INFORMATION HAS BEEN OFFICIALLY ACKNOWLEDGED

The District Court's statement that "nothing in the law or its policy requires the CIA to officially acknowledge what those in the public may think they know," Wilson, 501 F. Supp. 2d at 559, is inapt. Appellants are not requesting that the Agency again officially acknowledge Wilson's dates of service; rather, they are seeking the right to publish it themselves because the dates already were officially acknowledged in unclassified form on Agency letterhead by a CIA manager. See A-155, 229, 403-04, 406, 643 ¶ 10). This case is therefore distinguishable from cases in which official acknowledgement is premised on unofficial disclosures by someone other than the agency responsible for safeguarding the information at issue.

As courts have recognized, publication by former Agency employees is not understood to carry the imprimatur of the Agency, even if the publication is subject to prior review. See Afshar v. Dep't of State, 702 F.2d 1125, 1134 (D.C. Cir. 1983) ("These books, frequently written in the first person, are received as the private product of their authors, like any other memoirs . . . . The fact of CIA approval does not usually figure prominently in their marketing or in their reception."); Public Citizen v. Dep't of State, 11 F.3d 198, 201-202 (D.C. Cir. 1993) ("Afshar squarely

rejected the argument that statements in books written by former C.I.A. agents could be considered *official* disclosures that had placed information in the public domain.”) (emphasis in original).<sup>4</sup> This conclusion is reinforced by the disclaimer on the copyright page of Fair Game that nothing in the contents of the book “should be construed as asserting or implying U.S. Government authentication of information or Agency endorsement of the author’s views.” In short, publication by Appellants would not seem to present a danger of “official acknowledgment [that] could damage national security.” Public Citizen, 11 F.3d at 201.

Insofar as the Agency already has officially acknowledged Wilson’s dates of service with the CIA (see A-37), there should be no question of Appellants’ right to include that information in the text of Fair Game. But their right to do so should not turn solely on whether the information has been officially acknowledged, given the government’s

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<sup>4</sup> The objection that confirmation of the information by Wilson – “one in a position to know,” Knopf, 509 F.2d at 1370 – would “lend credence to it,” id., and make it impossible for the government to deny its accuracy is a tenuous basis for censorship because Wilson’s stated desire to publish the information, which is available to the public, already effectively has confirmed its accuracy. In any event, unlike the rumors and speculations at issue in Knopf, a CIA personnel official’s written statement about Wilson’s dates of employment, provided in the context of the resolution of an issue of pension eligibility, hardly needs Wilson’s imprimatur to give it “credence.”

minimal interest in preventing *Wilson alone* from disseminating it and the force of her (and her publisher's) countervailing First Amendment rights. The District Court appears to have elevated form over substance, attempting to adhere (albeit erroneously) to the letter of the "official acknowledgement" doctrine and to the requirements for classification but reaching a result incompatible with fundamental First Amendment principles.

As noted above, when information comes from public sources, "the agent's special relationship of trust with the government [as to that information] is greatly diminished if not wholly vitiated." McGehee, 718 F.2d at 1141. Although the circumstances here are different – the information is not derived from public sources but rather became public via the Agency's letter – there nevertheless is a greatly diminished government interest in restricting its publication. Indeed, it is hard to imagine the circumstances in which a prior restraint on the publication of public-domain information previously released by the government – whether or not officially acknowledged – would prevail over a former agent's First Amendment rights, and Amici are aware of no cases that would support such a result. Cf. Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1306 (1983) (Brennan, Circuit Justice) ("Our precedents make clear . . . that far more justification than appears on this record would be necessary to show that this

categorical permanent prohibition against publishing information already in the public record was ‘narrowly tailored to serve that interest,’ if indeed any justification would suffice to sustain a permanent order.”).

### **III. MEANINGFUL JUDICIAL REVIEW IS NECESSARY TO ENSURE THAT CLASSIFICATION IS NOT USED TO CENSOR GOVERNMENT CRITICS**

The censorship at issue in this case is extensive. Redactions appear throughout the text of Fair Game, and a number of pages are redacted in their entirety. *See, e.g., Fair Game* at 72-73, 103-04, 133-36. The District Court’s opinion indicates that these redactions relate to the single issue of Wilson’s pre-2002 dates of service. *See Wilson*, 501 F. Supp. 2d at 549 (“the classified information the PRB identified in [the memoir] relates to a *single issue*”) (emphasis in opinion); A-23 (¶ 49). Thus, the censorship in question here, although relating to a discrete fact, has significantly impaired Wilson’s ability to describe relevant events in her life that intersect with issues of profound public consequence.

Any suggestion that the censorship is inconsequential because the information can be obtained elsewhere would be misguided. The government cannot justify improper censorship on the ground that others are not censored. Wilson has a compelling interest in telling her own life story, including the “outing” by senior government officials that ended her twenty-

year career at the CIA, from her unique perspective. As she states in the book: “I wasn’t seeking to reveal classified information that could harm our national security – I simply wanted to tell my personal story, which included [redacted] years of public service to my country.” Fair Game at 269.

Wilson’s central (if involuntary) involvement in a controversy that reached to the highest levels of the federal government makes her right to use the information concerning her dates of CIA service in writing about that controversy of paramount importance, and it should impose on the government a correspondingly weighty burden to justify censoring her – and her alone – from doing so.

The PRB took the position that Wilson’s use of the information in combination with other facts presented a threat to national security. See A-114 (“The first 124 pages of your manuscript are replete with statements that may be unclassified standing alone, but they become classified when they are linked with a specific time, such as an event in your personal life, or are included in another context that would reveal classified information.”). Given the strong constitutional presumption against prior restraints and the public availability of Wilson’s dates of service, this opaque rationale for censoring historical information must survive an extremely demanding level of First Amendment scrutiny.

The overly broad nature of the government’s censorship – and the District Court’s error in mechanically (and erroneously) relying on the “official acknowledgement” doctrine – is highlighted by the fact that Fair Game contains an afterword written by a reporter, Laura Rozen, based on public sources and interviews with persons other than Wilson, that “recounts portions of Ms. Wilson’s life and career that she was unable to include herself,” Fair Game at ix, including the date she joined the CIA. See id. at 315. The government, therefore, must demonstrate that the revelation of Wilson’s dates of service *by Wilson* would harm national security in a manner that the revelation of the same information by someone else would not.<sup>5</sup>

This Court has alluded to “governmental interests in preventing further or even repeated disclosure [of classified information] and slight public interest in mere repetition,” United States v. Pappas, 94 F.3d 795, 802 (2d Cir. 1996), but allowing Wilson to use the information in her memoir would not be “mere repetition”; it would be allowing her to recount the full

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<sup>5</sup> There is, moreover, no suggestion that Wilson’s disclosure of the information was somehow improper and that she is now seeking to bootstrap on some misconduct of her own to undermine the government’s right and ability to classify it, as there was in Pappas. See Pappas, 94 F.3d at 802; Appellants’ Br. 39-40.

duration of her own long CIA service, and the retributive security breach that abruptly ended it, in her own words.

As noted, the adversarial relationship between Wilson and the Bush administration suggests the possibility that the Agency advanced (or was forced to advance) pretextual reasons for the classification in order to censor a critic of the government. This politically charged context surrounding the Agency's pre-publication review of Fair Game bolsters the need for meaningful judicial review of the disputed redactions.

This is not the first time a critic of the Executive branch's post-9/11 conduct has been hampered by belated classification of material that already was irretrievably available in the public domain. In 2002, Sibel Edmonds, a former FBI translator, made extremely serious allegations of corruption, incompetence, security lapses, and cover-ups in the translation unit in which she had worked. See Edmonds v. United States, 436 F. Supp. 2d 28, 30-31 (D.D.C. 2006); Edmonds v. United States, 323 F. Supp. 2d 65, 68-69 (D.D.C. 2004).<sup>6</sup> Those allegations led the Senate Judiciary

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<sup>6</sup> According to a recent article in *The American Conservative*, Edmonds' allegations were corroborated by anonymous letters written by FBI employees. One of those letters cited transcripts of wiretaps in which Marc Grossman, former ambassador to Turkey and undersecretary of state of political affairs from 2001 to 2005, warned a Turkish Embassy official that Brewster Jennings, which was being used at the time as a cover by Wilson,

Committee to request and receive two unclassified briefings from the Department of Justice relating to Edmonds' allegations. Some of the information in those briefings was discussed in letters from Senators Leahy and Grassley to Justice Department officials in which they expressed concern over the FBI's failure adequately to investigate Edmonds' allegations. Those letters were posted on the Senators' websites and otherwise made widely available on the Internet. See generally Complaint for Declaratory and Injunctive Relief, Project on Government Oversight v. Ashcroft, C.A. No. 1:04CV01032 (JDB) (D.D.C. filed June 23, 2004), available at <http://www.pogo.org/p/government/pogovsashcroft.html> (visited Jan. 20, 2008). Nearly two years later, after Edmonds had sued the government to challenge her termination, the FBI suddenly announced to staff of the Judiciary Committee that it now considered some of the information from the two briefings to be classified, notwithstanding that it had been in the public domain for an extended period of time. See id. ¶¶ 2,

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was a CIA weapons proliferation cover company. See Philip Giraldi, "Found in Translation: FBI whistleblower Sibel Edmonds spills her secrets," American Conservative (Jan. 28, 2008), available at [http://www.amconmag.com/2008/2008\\_01\\_28/article.html](http://www.amconmag.com/2008/2008_01_28/article.html) (visited Jan. 22, 2008).

12.<sup>7</sup> In its complaint challenging the reclassification on, inter alia, First Amendment grounds, the Project on Government Oversight alleged that the reclassification of the documents had “stifled public discussion regarding the adequacy of the FBI’s translation capabilities and Ms. Edmonds’ reports of problems in the translation unit where she worked,” id. ¶ 21, and was intended to impair Edmonds’ ability to prosecute her case. Id. ¶ 20. On February 18, 2005, the Department of Justice dropped its opposition and declared the three letters at issue to be publicly releasable. See Letter from Vesper Mei to Michael T. Kirkpatrick, Feb. 18, 2005, available at <http://www.pogo.org/p/government/pogovsashcroft.html> (visited Jan. 20, 2008).<sup>8</sup>

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<sup>7</sup> The government successfully moved to dismiss Edmonds’ suit by invoking the state secrets privilege. See Edmonds, 323 F. Supp. 2d 65. The state secrets order put in place in 2002 by the Department of Justice reportedly was requested by the State Department and the Pentagon, which employed persons Edmonds had identified as being involved in criminal activities. See Giraldi, supra n.6.

<sup>8</sup> Another troubling example of political meddling in a pre-publication review process – a process that “should work without political oversight or influence,” Fair Game at 276 – is the White House having ordered the CIA to heavily censor publicly available information from an op-ed article by Flynt Leverett on U.S. policy toward Iran. See id. at 276-78. Amici note that these efforts to maintain the secrecy of government information occurred in the context of increasing classification of documents by the federal government and what some have claimed to be excessive reliance by the government on the state secrets privilege in litigation in the post-9/11

“National security” cannot be a magic wand the CIA is allowed to wave over its efforts to censor former intelligence officers, who may be in a position to offer especially penetrating insights into the merits and execution of the government’s foreign policy. See New York Times, 403 U.S. at 719 (Black, J., concurring) (“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”); see also Mitchell v. Forsyth, 472 U.S. 511, 523 (1985) (“[T]he label of ‘national security’ may cover a multitude of sins.”). This is particularly true where the information sought to be classified is no longer secret, which calls into serious question whether the reasons for classification are “rational and plausible,” i.e., whether the agency had “good reason” to censor. McGehee, 718 F.2d at 1149. As shown above, the strong First Amendment presumption against prior restraints imposes a virtually insurmountable obstacle to making such a showing in this case.

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period. See OpenTheGovernment.org, “Secrecy Report Card 2006: Report Finds Government Still More Secretive,” available at <http://www.openthegovernment.org/article/articlereview/193/1/68?TopicID> (visited Jan. 24, 2008); “Pressure Grows to Limit the State Secrets Privilege,” Secrecy News, Jan. 24, 2008, available at [http://fas.org/blog/secrecy/2008/01/pressure\\_grows\\_to\\_limit\\_the\\_st.html](http://fas.org/blog/secrecy/2008/01/pressure_grows_to_limit_the_st.html) (visited Jan. 24, 2008); Josh White, “Greater Use of Privilege Spurs Concern,” Wash. Post, Jan. 29, 2008, at A17.

Because the prior restraint imposed on Appellants will not prevent the public from gaining access to the information the Agency seeks to classify, this Court has the latitude to accommodate Appellants' First Amendment rights in a way the courts in McGehee and other cases relied upon by the District Court could not. Protection of those rights requires reversal.

### **CONCLUSION**

For the reasons set forth above and in Appellants' brief, the decision below should be reversed with instructions to enter summary judgment for Appellants.

Respectfully submitted,

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February 5, 2008

**CERTIFICATE OF COMPLIANCE**  
**WITH FED. R. APP. P. 32(a)(7)(B)**

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that the foregoing brief complies with Fed. R. App. P. 29(d) and 32(a)(7)(B). I make this representation based upon the fact that the word processing equipment used to generate the brief indicates that the brief, excluding those portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 6,352 words. The font in this brief is Times New Roman, 14 point.

Dated: February 5, 2008

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R. Bruce Rich

## **APPENDIX: THE AMICI**

**Association of American Publishers, Inc. (AAP)** is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

**American Booksellers Foundation for Free Expression (ABFFE)** was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom of choice in reading materials.

**American Society of Newspaper Editors (ASNE)** is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

**Association of Alternative Newsweeklies (AAN)** is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice, Boston Phoenix and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7.5 million and a reach of over 25 million readers.

**Association of American University Presses (AAUP).** The AAUP's 128 members are nonprofit scholarly publishers affiliated with universities, research institutions, and scholarly societies. Members are located in 43 states and the District of Columbia, and publish over 12,000 books and 700 journals annually. Many of these publications are in U.S. history, political science, diplomatic history, military history, and other fields.

**Freedom to Read Foundation (FTRF)** is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen; to support the rights of libraries to include in their collections and make

available to the public any work they may legally acquire; and to establish legal precedent for the freedom to read on behalf of all citizens.

**Magazine Publishers of America** is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

**Public Citizen, Inc.**, is a nonprofit membership advocacy group with members throughout the United States. On behalf of its members, Public Citizen advocates openness in government and wide access to the information an informed citizenry needs to participate in public affairs. Public Citizen has been involved in various capacities in many cases involving governmental efforts to suppress access to information, including allegedly classified information.

**Publishers Marketing Association (PMA)**, the Independent Book Publishers Association is a nonprofit trade association representing more than 4,100 publishers across the United States and Canada. PMA members publish and distribute mainstream books on a variety of topics including current affairs, history, politics, including many biographies and memoirs.

**Radio-Television News Directors Association (RTNDA)**, based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news directors and executives, news associates, educators, and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

**Reporters Committee for Freedom of the Press (RCFP)** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. RCFP has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

**Society of Professional Journalists (SPJ)** is dedicated to improving and protecting journalism. It is the nation's largest and most

broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior.

Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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