A Troubling Equation in Contracts for Government Funded Scientific Research: "Sensitive But Unclassified" = Secret But Unconstitutional

Leslie Gielow Jacobs*

INTRODUCTION

Breakthrough science can lead both to great good and to great evil. The September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon and the anthrax letter attacks that followed highlight the fact that our enemies may use our own advanced science and technology against us.[1]

When the dissemination of scientific information might jeopardize national security, the federal government's primary response has always been to try to control the spread of that information. In a variety of ways, the government has long restricted public access to scientific information in the government's possession. Since September 11, the government has further tightened access to its own information, withholding from public view not just classified data but also so-called "sensitive" information, the release of which it says could pose a danger to national security.

Even with the new security precautions in place, however, the government fears that it cannot keep the nation safe if it is able to control only its own information. That is because some potentially dangerous scientific information is produced by scientists at universities and in industry. Yet the dissemination of privately funded, privately produced scientific information is a form of private speech protected by the Constitution, and the government's ability to restrict such speech, even when it might pose a danger to national security, is limited. The government cannot "classify" or otherwise prevent the sharing of such information without a court order, and

---

* Professor of Law, University of the Pacific, McGeorge School of Law. Thanks to Kristen Cerf and Erich Shiners for their excellent research assistance.

1. *See, e.g.*, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1-46 (2004) (describing use of airplanes as weapons of mass destruction); Rick Weiss & Susan Schmidt, *Capitol Hill Anthrax Matches Army's Stocks; 5 Labs Can Trace Spores to Ft. Detrick*, WASH. POST, Dec. 16, 2001, at A1 (genetic fingerprinting matches anthrax spores mailed to Capitol Hill with those held by the U.S. Army).

orders of this sort are available only in the most extreme circumstances.[2]

Between the extremes of private and government information sits information produced by private scientists with government funding. Contract clauses that restrict the ability of funded scientists to disseminate information related to government-sponsored research occupy an ambiguous middle ground in constitutional doctrine.

Can the government restrict the flow of scientific information produced with government funding in the same way that it can control its own information, or do the constitutional limits that protect private speech apply? This question has become increasingly urgent in the wake of the terrorist attacks on September 11, 2001. Since that time, the government has sought to expand the secrecy it imposes on funded private research beyond "classified" information to include information that is merely "sensitive." Although contract clauses that restrict the release of classified information are an accepted part of the government/scientist research funding relationship, clauses to protect "sensitive but unclassified" (SBU) information are new.[3]

The SBU secrecy clause currently in widest use requires prior written approval from the contracting agency before a scientist "release[s] to anyone" in any form SBU information "pertaining" to the research contract.[4] The

---

2. In the *Pentagon Papers* case the Supreme Court declared, "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). Some privately generated information is required by the Atomic Energy Act to be kept secret. 42 U.S.C. §2274 (2000). Such information is sometimes said to be "born classified." Yet even in a suit to stop the publication of this sort of material the government would have to discharge the "heavy burden of showing justification for the imposition of such a restraint." *New York Times Co.*, 403 U.S. at 714 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)). United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), was just such a case. *See Symposium: Weapons of Mass Destruction, National Security, and a Free Press: Seminal Issues as Viewed Through the Lens of The Progressive Case*, 26 CARDOZO L. REV. (forthcoming 2005).

3. More accurately, the SBU secrecy clauses are new for now. Scientists protested the proposed use of such clauses in the mid-1980s. *See* HAROLD C. RELYEA, SILENCING SCIENCE: NATIONAL SECURITY CONTROLS AND SCIENTIFIC COMMUNICATION 123 (1994) ("The presidents of Stanford, CalTech, and MIT jointly informed the White House in early April 1984 that their universities would refuse to conduct certain kinds of sensitive, but unclassified, scientific research for the Pentagon if DOD reviewers were given the power to restrict the publication of findings.").

4. JULIE T. NORRIS, ASSOCIATION OF AMERICAN UNIVERSITIES/COUNCIL ON GOVERNMENT RELATIONS TASK FORCE, RESTRICTIONS ON RESEARCH AWARDS: TROUBLESOME CLAUSES 5-6 (n.d.) (quoting DFARS 252.204-7000 Disclosure of Information, which the institutions surveyed reported was included in proposed contracts more often than any other single restriction), *available at* http://aau.edu/research/Rpt4.8.04.pdf. Use of the clause is prescribed "[w]hen the Contractor will have access to or generate unclassified information that may be

clause is aimed not only at information contained in a contract's work product that a scientist delivers to the government, however. It applies also to the scientist's other publications and communications, which may include or refer to work done with government funding, but which are separate and distinct from the contract "deliverable." These "releases" may include scholarly papers, conference presentations, email messages, and even telephone or laboratory conversations. What constitutes SBU information is not well understood, nor is it clear when particular information "pertains" to a research contract.[5]

It may be difficult for the government to enforce an SBU secrecy clause across a broad range of communications, especially to prevent unauthorized oral releases. Nevertheless, the mere threat of enforcement may be enough to limit the flow of scientific information generally, as researchers are apt to censor their own communications to avoid the difficulties and delay that attend prepublication review. Moreover, uncertainty about what unclassified information pertains to a contract, as well as the vagueness and breadth of the term "sensitive but unclassified,"[6] could enable contracting agencies to edit proposed releases according to criteria that only roughly and perhaps inconsistently relate to national security. In addition, the fact that scientific information provides the grounding for policy choices in a range of politically controversial areas heightens the possibility that agencies will use their broad editorial discretion to bar releases that question agency competence or

---

sensitive and inappropriate." The clause provides:

> (A) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document) pertaining to any part of this contract or any program related to this contract, unless –
>
> (1) The Contracting Officer has given prior written approval; or
>
> (2) The information is otherwise in the public domain before the date of release.
>
> (B) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose of the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release. . . .

Id. at 5-6. The clause may found in the Defense Department's DEFENSE FEDERAL ACQUISITION REGULATIONS SUPPLEMENT (DFARS), pt. 252, *Solicitation Provisions and Contract Clauses* (rev. Nov. 14, 2003), *at* http://www.acq.osd.mil/dpap/dfars/pdf/r20041110/252204.pdf.

5. Research contract work often spans a number of years, and it may be carried out concurrently with other research projects. The other research projects may deal with subject matter similar to that of the government contract, as scientists tend to work within their specialties. That means that the source of particular information in a communication may be difficult to discern.

6. This term appears not in the commonest secrecy clause, but elsewhere, to guide agency censors. *See infra* notes 29-35 and accompanying text.

undermine official policy positions.[7]

The SBU secrecy clause establishes a prepublication licensing system that would, if applied directly to private scientific speech, face nearly insuperable constitutional obstacles.[8] The question is whether government funding fundamentally changes the constitutional analysis.

Part I provides a brief overview of ways that the government influences the content and flow of scientific knowledge, including secrecy clauses imposed on employees and contractors. Part II furnishes a background and analysis of constitutional doctrine relevant to evaluation of the validity of SBU secrecy clauses. This part examines general free speech doctrine with respect to viewpoint discrimination and prior restraints, speech restrictions on government employees, including classified information secrecy clauses, and cases establishing the boundaries of access conditions on government programs that restrict speech. It concludes that the current SBU secrecy clause imposed on funded researchers impermissibly encroaches on free speech. Part III suggests some minimum features of a constitutional system of SBU information control.

---

7. The use of scientific information by the George W. Bush administration has been a source of controversy. *Compare* SPECIAL INVESTIGATIONS DIV., MINORITY STAFF OF HOUSE COMM. ON GOVERNMENT REFORM, 108TH CONG., POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION (2003) (prepared for Rep. Henry A. Waxman, charging the Bush administration with manipulating scientific committees, distorting scientific information, and interfering with scientific research to benefit the President's supporters, including social conservatives and industry groups), *available at* www.house.gov/reform/min/politicsandscience/ pdfs/pdf_politics_and_science_rep.pdf; UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICY MAKING: FURTHER INVESTIGATION OF THE BUSH ADMINISTRATION'S MISUSE OF SCIENCE 5 (July 2004) (criticizing the Administration's disregard of studies about "the environmental impacts of mountaintop removal mining," "censorship and distortion of scientific analysis" concerning endangered species, "distortion of scientific knowledge" about emergency contraception, and "use of political litmus tests for scientific advisory panel appointees"), *available at* http://www.ucsusa.org/documents/Scientific_Integrity_in_Policy_Making_July_2004.pdf, *with* Christopher Marquis, *Bush Misuses Scientific Data, Report Says*, N.Y. TIMES, Aug. 8, 2003, at A14 (quoting White House spokesperson Scott McClellan responding to the Waxman report as follows: "This administration looks at the facts, and reviews the best available science based on what's right for the American people. The only one who is playing politics about science is Congressman Waxman. His report is riddled with distortion, inaccuracies, and omissions."); Statement of the Hon. John H. Marburger III on Scientific Integrity in the Bush Administration, Apr. 2, 2004 (responding to the UCS allegations, asserting that the Bush administration applies the "highest scientific standards in decision-making"), *available at* http://www.ostp.gov/html/ucs/ResponsetoCongressonUCSDocumentApril2004.pdf.

8. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.").

I. THE CONTEXT OF THE SBU SECRECY CLAUSE

SBU secrecy clauses are only one small part of a larger mosaic of federal government efforts to influence the creation and flow of scientific knowledge. These efforts include the establishment of priorities for funding research, regulation of research, and various forms of information control. They also include an array of contract conditions on funded research.

A. Non-Contractual Efforts to Influence the Creation and Flow of Scientific Knowledge

The government's spending priorities profoundly influence the growth of scientific knowledge. The federal government is the largest funding source for basic research in the United States.[9] Much of the government-funded basic research is conducted by college and university scientists.[10] A substantial part of that research has always been defense-related.[11] The terrorist attacks of September 11, 2001, heightened the focus on national security in federal research funding and diverted money from other research efforts.[12]

Government regulations also influence scientific research. New restrictions address the threat of bioterrorism by limiting work with identified

---

9. NATIONAL SCIENCE BOARD, SCIENCE & ENGINEERING INDICATORS – 2002 (2002), at 4-9, Table 4-1, *available at* http://www.nsf.gov/sbe/srs/seind02/pdf/c04.pdf.

10. *Id.*; AMERICAN ASS'N FOR THE ADVANCEMENT OF SCIENCE, AAAS REPORT XXIX: RESEARCH AND DEVELOPMENT FY 2005 (Mar. 2004), at Table I-8, *available at* http://www.aaas.org/spp/rd/05ptbi8.pdf.

11. NATIONAL SCIENCE BOARD, SCIENCE & ENGINEERING INDICATORS – 2000 (2000), at 2-12, *available at* http://www.nsf.gov/sbe/srs/seind00/pdfstart.htm.

12. *See* Betsy Houston, *Outlook Bleak for Science Budgets*, WASH. NEWS, Apr. 1, 2004 ("While the administration proposes a $6 billion increase in federal R&D spending for 2005 over 2004, virtually all the additional monies would go to weapons development and homeland security R&D."), *available at* http://www.materialsocieties.org/3-04.htm; Paul Elias, *Bioterrorism Labs Sprout, and So Do Safety Concerns*, HOUS. CHRON., Apr. 30, 2004, at 15 ("A growing number of scientists complain that the $6 billion earmarked by Congress for fighting bioterrorism is excessive, is being doled out with little oversight, and is detracting from efforts to combat problems that are much more deadly – for example AIDS and malaria, which are already killing millions of people."); Dana Wilkie, *Biodefense Squeezes US Science Budgets*, THE SCIENTIST, Mar. 15, 2004, at 52 ("The federal budgets for FY2004 and FY2005 reflect a fundamental shift in White House priorities when it comes to scientific research, one that focuses on homeland security to the detriment of basic biomedical research for some of the world's deadliest diseases, critics say."), *available at* http://www.the-scientist.com/yr2004/mar/prof3_040315.html; *id.* (quoting Wendy Selig, Vice President of Legislative Affairs for the American Cancer Society: "We understand there's not an infinite number of dollars here. But if you're a cancer patient, you have to wonder if it was research that might have cured you that ended up on the cutting room floor.").

dangerous or "select" agents. They do this by requiring laboratories to register in order to possess such agents and by tracking and limiting access to them.[13] Other programs tighten the access of foreigners to select agents and, more broadly, to biological research activities in the United States,[14] tracking the activities of foreign students, including their areas of study, and entirely prohibiting certain international students from receiving education and training in sensitive areas.[15]

The federal government also influences the growth of scientific knowledge by restricting the release of government information. Two executive orders currently establish a classification system for information owned by the government or within its control,[16] categorizing information in a hierarchy that defines its potential threat to the national security.[17] Many

---

13. *See* 42 C.F.R. §73.2(a) (2003) (implementing the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 by granting the Department of Health & Human Services (HHS) authority to regulate and prohibit the possession, use, receipt, or transfer of "select agents or toxins" that "pose a severe threat to public health and safety"); 7 U.S.C. §8401 (Supp. II 2002) (authorizing the Department of Agriculture to regulate the possession and use of "agents and toxins" that pose a threat to plant or animal health).

14. The Visas Condor program checks a visa applicant's name against a number of government databases and denies visas to aliens suspected of having terrorist connections. *See* Pederson & Freedman LLP, *Security Clearances*, Mar. 12, 2004 (describing details of program), *at* http://www.usvisainfo.com/printer.php?docID=97#condor. The State Department has also created a Technology Alert List that identifies categories of specialized research activities designated on a visa application that will provoke further intelligence review. Dep't of State, *Technology Alert List (9 FAM 40.31, Exhibit 1)* (2000), *available at* http://www.foia.state.gov/masterdocs/09fam/0940031X1.pdf.

15. *See* Homeland Security Presidential Directive-2, *Combating Terrorism Through Immigration Policies*, Oct. 29, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/10/20011030-2.html. In May 2002, the White House Office of Science and Technology Policy unveiled a proposal to create an Interagency Panel for Advanced Science and Security (IPASS). IPASS would screen foreign graduate students, post-doctoral fellows, and scientists who apply for visas to study "sensitive areas of science and technology that are 'uniquely available'" on U.S. campuses. NAFSA: Ass'n of Int'l Educators, *Administration Unveils Plan for Reviewing Foreign Students Pursuing Sensitive Areas of Study* (n.d.), *at* http://www.nafsa.org/content/ publicpolicy/NAFSAontheissues/OSTP_briefing.htm. The final IPASS policy, which will be implemented by the Department of Homeland Security, is pending as this is written. *See* Dep't of Homeland Security Press Release, *Remarks by Secretary Ridge to the Association of American Universities*, Apr. 14, 2003 (describing intended composition and results of panel), *at* http://www.dhs.gov/dhspublic/display?content=558.

16. Exec. Order No. 12,958, *Classified National Security Information*, 60 Fed. Reg. 19,825 (Apr. 20, 1995); Exec. Order No. 13,292, *Further Amendment To Executive Order 12,958, as Amended, Classified National Security Information*, 68 Fed. Reg. 15,315 (Mar. 25, 2003); *see* Nathan Brooks, *The Protection of Classified Information: The Legal Framework* (Cong. Res. Serv. No. RS21900) (2004), *available at* http://www.fas.org/sgp/crs/RS21900.pdf.

17. *See* Exec. Order No. 12,958, §1.3 (detailing the different labels to be applied to classified information).

officials within various government agencies have authority to classify information.[18] The decision to classify is subject to periodic review, in order to ensure that the criteria for classification continue to be satisfied.[19] The Information Security Oversight Office (ISOO), located within the National Archives, oversees the compliance of all government agencies with the classification standards.[20] An Interagency Security Classification Appeals Panel decides appeals of classification challenges,[21] which may be brought by, *inter alia*, authorized holders of information who believe that its classification is improper.[22] Nevertheless, the current system produces a substantial amount of over- and underclassification.[23]

The government's ability to control the release of its own information is limited by the Freedom of Information Act (FOIA),[24] which gives almost anyone the right to request and receive government information without providing a reason or demonstrating a particularized need for that information. Classified information and eight other specific types of data, however, are exempt from disclosure under FOIA.[25] Agency claims that requested information is exempt because it is classified are subject to judicial review.[26] Although an agency has the burden of justifying its withholding of information, and while the judicial review is de novo and may involve in camera inspection of disputed documents,[27] this review is typically quite

---

18. *See* Exec. Order No. 13,292, §1.3(a). Currently almost 4,000 government officials may classify documents as top secret, secret, or confidential. *See* OMB Watch, *Coalition Reports Massive Classification Abuse, Secrecy Rose 60%*, Sept. 7, 2004, *at* www.ombwatch.org/article/articleview/2379/1/1/?TopicID=1().

19. *See* Exec. Order No. 13,292, §§1.5, 3.3, 3.4.

20. *Id.* §5.3(a), (b).

21. *Id.* §5.3(b)(1) - (3).

22. *Id.* §1.8(a).

23. *See* REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at xxi (1997) ("The classification system . . . is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters."); *ISOO Reports a 25% Rise in Classification Activity*, SECRECY NEWS, Apr. 27, 2004 (citing an Information Security Oversight Office report that "[m]any senior officials will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own"); JASON PROGRAM OFFICE, MITRE CORP., HORIZONTAL INTEGRATION: BROADER ACCESS MODELS FOR REALIZING INFORMATION DOMINANCE (2004) [hereinafter HORIZONTAL INTEGRATION] (criticizing current classification system and noting, *inter alia*, that "[u]nderclassification of documents . . . is a well known practice."), *available at* http://www.fas.org/irp/agency/dod/jason/classpol.pdf.

24. 5 U.S.C. §552 (2000 & Supp. II 2002).

25. *Id.* §552(b).

26. *Id.* §552(a)(4)(B).

27. *Id.*

deferential.[28]

The policy of the executive branch in responding to FOIA requests has changed over time. While the Clinton administration announced that it favored disclosure,[29] the Bush administration has directed federal agencies to evaluate FOIA requests carefully and to use existing exemptions liberally to protect "sensitive" information.[30] The President's Chief of Staff has more explicitly emphasized that agencies should "safeguard sensitive but unclassified information related to America's homeland security" and give "full and careful consideration to all applicable FOIA exemptions."[31] The term "sensitive but unclassified," however, has no single, clear definition.[32]

---

28. Center for National Security Studies v. United States Dep't of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004) ("the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security" (citing CIA v. Sims, 471 U.S. 159 (1985), and other cases)). *But cf.* Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 67-68 (1992) (arguing that while the "apparently prevailing view among scholars of the FOIA is that courts must 'defer' to agency declarations regarding national security information, . . . [j]udicial deference is not an accurate description of the role assigned to the courts in reviewing FOIA national security cases.").

29. *See* Presidential Memorandum for Heads of Departments and Agencies Regarding the FOIA, 29 WEEKLY COMP. PRES. DOC. 1999 (Oct. 4, 1993), *available at* http://www.usdoj.gov/foia/93_clntmem.htm (declaring that the Justice Department would defend a refusal to release information pursuant to a FOIA request only if release would cause "foreseeable harm").

30. *See* Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies (Oct. 12, 2001) ("Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional [national security and law enforcement], commercial, and personal privacy interests that could be implicated by disclosure of the information."), *available at* http://www.usdoj.gov/04foia/011012.htm. The memorandum also states that the Justice Department will defend a refusal to release information if the agency's decision has a "sound legal basis." *Id*.

31. Memorandum from Andrew H. Card, Assistant to the President and Chief of Staff, to Heads of Executive Departments and Agencies (Mar. 19, 2002), *available at* http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm.

32. *See* Library of Congress, *Laws and Regulations Governing the Protection of Sensitive But Unclassified Information* (Sept. 2004), at i ("Although there is growing concern in the post 9/11 world that guidelines for the protection of SBU . . . are needed, a uniform legal definition or set of procedures applicable to all Federal government agencies does not now exist."), *available at* http://www.fas.org/sgp/library/sbu.pdf; HORIZONTAL INTEGRATION, *supra* note 23, at 9 ("The status of sensitive information outside of the present classification system is murkier than ever. . . . 'Sensitive but unclassified' data is increasingly defined by the eye of the beholder."); Genevieve J. Knezo, *"Sensitive But Unclassified" and Other Federal Security Controls on Scientific and Technical Information: History and Current Controversy* (Cong. Res. Serv. No. RL31845) (2003), at 16-22 (cataloging federal agencies' various definitions of "sensitive but unclassified"), *available at* http://www.fas.org/irp/crs/RL31845.pdf .

Departments and agencies have attempted to implement the recent executive directives in various ways. Thousands of documents that were publicly available previously have now been removed from government Web sites.[33] A number of agencies have also developed new policies to prevent the release of particular types of SBU information.[34] Additionally, the Homeland Security Act directs the President to "identify and safeguard" within various federal government agencies "homeland security information that is sensitive but unclassified."[35]

Even without classifying data or invoking one of the FOIA exemptions, as a practical matter the government enjoys broad discretion to keep

---

33. *See, e.g.*, William Matthews, *Walking a Fine Line on Web Access*, FED. COMPUTER WEEK, Feb. 4, 2002 (noting that the Nuclear Regulatory Commission completely shut down its Web site in early October 2001 and is back online with information excised, while the Federal Energy Regulatory Commission "removed 'tens of thousands' of documents from the Internet and from public reading rooms"), *available at* http://www.fcw.com/fcw/articles/2002/0204/pol-access-02-04-02.asp; Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL'Y 671, 673 (2003) (observing that the Department of Energy removed approximately 9,000 documents from its Information Bridge Web service, and that the manager of the Defense Technical Information Center was instructed by national security officials to remove "thousands of documents from online public access"); *see also* OMB Watch, *Results of OMB Watch FOIA Request on Information Withheld*, May 15, 2002 (listing information removed from federal agency Web sites after 9/11), *at* http://www.ombwatch. org/article/articleview/735.

34. The Federal Energy Regulatory Commission, for example, announced a policy change under which it will evaluate FOIA requests for "critical energy infrastructure information" that "could be useful to a person planning an attack," and it will release such information only to those who demonstrate a need to know. *Critical Energy Infrastructure Information*, 68 Fed. Reg. 9857 (Mar. 3, 2003) (codified at 18 C.F.R. §§375.313, 388.112, 388.113 (2004)). Regulations of the Transportation Security Agency prohibit public disclosure of "sensitive security information" that might be detrimental to transportation safety, including research and development information. *See* 49 C.F.R. §1520.5 (2003) (listing persons who must protect Sensitive Security Information (SSI) from disclosure); 49 C.F.R. §1520.7 (2003) (defining SSI). The Department of Homeland Security recently issued regulations to implement a statutory exemption from release under FOIA for "critical infrastructure information" voluntarily submitted by industries or other non-federal entities. *Procedures for Handling Critical Infrastructure Information*, 69 Fed. Reg. 8074 (Feb. 28, 2004) (to be codified at 6 C.F.R. pt. 29). The U.S. Department of Agriculture restricts release of what it terms "Sensitive Security Information," which is different from the SSI restricted by the Transportation Security Agency. *See* USDA Departmental Reg. No. 3440-02, *Control and Protection of "Sensitive Security Information"* (Jan. 30, 2003), *available at* http://www.fas.org/sgp/othergov/usda3440-02.html.

35. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §892(a)(1)(B), 116 Stat. 2135, 2253; *Justice Dept. on Critical Infrastructure Info, SHSI*, SECRECY NEWS, Mar. 2, 2004 (reporting that DHS procedures governing the handling of "sensitive homeland security information" are not yet complete, but, according to a Justice Department notice, "hold the potential of significantly altering the landscape for the safeguarding of federal information"), *at* http://www.fas.org/sgp/news/secrecy/2004/03/030204.html.

information secret that is within its control. Government agencies can gather facts, conduct research, or produce reports without releasing them to the public, unless compelled to do so under FOIA.[36] Agencies can subject information to review and other bureaucratic requirements that delay release, perhaps indefinitely.[37] They may edit scientific and other facts and conclusions in reports in a fashion that serves the incumbent administration's political agenda.[38] They also can choose to include or delete scientific information, which in turn influences the content of the conclusions presented.[39] Even when a statute requires an agency to convene a scientific advisory panel before it makes important policy decisions, the agency can influence the result through its selection or discharge of panel members.[40] In

---

36. *See, e.g.*, Elizabeth Shogren, *FDA Sat on Report Linking Suicide, Drugs*, L.A. TIMES, Apr. 6, 2004, at A13 (reporting that Food and Drug Administration decided not to release a report concluding that children taking antidepressant drugs were twice as likely as those not taking the drugs to exhibit suicide-related behavior); *see also Senators Reintroduce CRS Bill*, AM. LIBRARIES, Apr. 1, 2003, at 15 (noting that the Congressional Research Service "is prohibited from disseminating its work directly to the public.").

37. *See, e.g.*, Seymour M. Hersh, *The Other War*, NEW YORKER, Apr. 12, 2004, at 40 (claiming that a "Pentagon-commissioned report [was] left in bureaucratic limbo when its conclusions [about the conduct of the Afghanistan war] proved negative"); John J. Fialka, *Mercury Threat to Children Rising, Says an Unreleased EPA Report*, WALL ST. J., Feb. 20, 2003, at A1 (reporting that EPA withheld a report on adverse health effects of mercury emissions for nine months while the Bush administration tried to persuade Congress to pass the Clear Skies Act, which would allow "emissions trading" between power plants).

38. *See, e.g.*, Jennifer 8. Lee, *White House Minimized the Risks of Mercury in Proposed Rules, Scientists Say*, N.Y. TIMES, Apr. 7, 2004, at 16 ("While working with Environmental Protection Agency officials to write regulations for coal-fired power plants over several recent months, White House staff members played down the toxic effects of mercury, hundreds of pages of documents and e-mail messages show."); Katharine Q. Seelye & Jennifer 8. Lee, *EPA Calls U.S. Cleaner and Greener Than 30 Years Ago*, N.Y. TIMES, June 24, 2003, at 28 (asserting that EPA report "was heavily edited by the White House . . . [and] eliminates references to many studies that conclude that global warming is at least partly caused by human activity . . . and that global warming could threaten health and ecosystems."); H. Jack Geiger, *Why Is HHS Obscuring a Health Care Gap?*, WASH. POST, January 27, 2004, at A17 (reporting that the Department of Health and Human Services edited out references to race and ethnicity in the Agency for Healthcare Research and Quality's national report card on disparities in healthcare).

39. *See, e.g.*, Dana Milbank, *White House Web Scrubbing: Offending Comments on Iraq Disappear from Site*, WASH. POST, Dec. 18, 2003, at A5 ("The federal Centers for Disease Control and Prevention and USAID have removed or revised fact sheets on condoms, excising information about their effectiveness in disease prevention, and promoting abstinence instead. The National Cancer Institute, meanwhile, scrapped claims on its Web site that there was no association between abortion and breast cancer. And the Justice Department recently redacted criticism of the department in a consultant's report that had been posted on its Web site.").

40. *See, e.g.*, Mark Henderson, *Science Panel "Pushes Bush Ethics*," THE TIMES (LONDON), Mar. 6, 2004, at 20:

An influential scientific panel that advises President Bush on bioethics has

addition, government agencies exercise great discretion over scientific information produced by others but presented by the government in compilations such as brochures, booklets, and Web sites.

By contrast, the government's power to restrict the dissemination of information not within its control is quite limited. Only a few statutes limit the release of privately generated information on national security grounds. These are the Invention Secrecy Act,[41] which restricts the release of information contained in patent applications; the Atomic Energy Act,[42] which forbids the release of nuclear weapons information; and export statutes that require individuals to obtain a license to transfer weapons-related products or information to a foreign person.[43] Otherwise, the government must obtain a court order to prevent the release of dangerous information held by private individuals, and to do that it must present a compelling demonstration of danger to the national security.[44] Even without statutory authority, however, the government can sometimes induce changes in the flow of private scientific information merely by threatening to impose restrictions. For example, the editors of leading scientific journals recently agreed to implement an internal review system after government officials expressed concern that certain cutting-edge biological information could assist terrorists in mounting an attack.[45]

B. Secrecy Clauses Restricting Private Speech

In addition to obtaining security clearances, government employees must sign a nondisclosure agreement as a condition of access to classified

---

> systematically distorted evidence to advance a conservative ideological agenda, two of its members said. . . . There is concern among scientists that Mr. Bush is stacking advisory committees with religious and political allies. [Several panel members who supported embryonic research] were dismissed from the panel last week and replaced by a doctor who has called for a more prominent place for religion in public life, a scientist who is an opponent of embryonic stem cell research, and an academic who campaigns against abortion.

41. 35 U.S.C. §§181-188 (2000).

42. 42 U.S.C. §§2011-2259 (2000).

43. *See* Arms Export Control Act, 22 U.S.C. §§ 2751-2799aa-2 (2000 & Supp. II 2002) (weapons and military technology). The regulation of items with dual commercial and weapons uses, formerly authorized by the Export Administration Act, 50 U.S.C. App. §§2401-2420 (2000) (expired), is now conducted pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§1701-1707 (2000 & Supp. II 2002), as implemented by executive order. *See* Exec. Order No. 13,222, *Continuation of Export Control Regulations*, 66 Fed. Reg. 44,025 (Aug. 17, 2001).

44. New York Times Co. v. United States, 403 U.S. 713 (1971).

45. Journal Editors and Authors Group, *Statement on Scientific Publication and Security*, SCIENCE, Feb. 21, 2003, at 1149.

information.[46] The agreement is a contract under which a cleared employee agrees never to disclose classified information to an unauthorized person.[47] The contract binds the employee both during and after government employment, so long as the information remains classified.[48] The government asserts that it may enforce the agreement by means of civil actions for a court order enjoining disclosure of classified information, for damages, or for disgorgement of any gains realized by the employee by an unauthorized disclosure, and by means of administrative actions, including reprimand, suspension, demotion, or removal, as well as loss of security clearance.[49] It also warns that it will criminally prosecute those who violate statutes prohibiting unauthorized disclosures of classified information.[50]

Some government agencies require some employees to sign classified information nondisclosure agreements that include provisions calling for prepublication review.[51] A broad range of writings is subject to the prepublication review requirement, as are prepared oral statements.[52]

Until recently, the government's nondisclosure and prepublication review forms for federal personnel restricted disclosure of classified information only. In August 2004, however, the Department of Homeland Security (DHS) began requiring employees and others to execute nondisclosure agreements to gain access to a range of unclassified information as well.[53] The DHS form

---

46. *See* Exec. Order No. 12,958, *Classified National Security Information*, §4.2(a), 60 Fed. Reg. 19,825 (Apr. 17, 1995).

47. *See Classified Information Nondisclosure Agreement* (SF 312) (rev. Jan. 2000), *available at* http://www.fas.org/sgp/isoo/new_sf312.pdf.

48. *Id.* ¶8.

49. *See* Information Security Oversight Office, *Classified Information Nondisclosure Agreement (Standard Form 312) Briefing Booklet* (n.d.) [hereinafter *CINA Briefing Book*], at 23, *available at* http://266fincom1.hqusareur.army.mil/Security_S2/Personnel%20Security/Non_Dis_Info_312.pdf.

50. *Id.* at 24.

51. *See, e.g., Sensitive Compartmented Information Nondisclosure Agreement* (SF 4414) (Feb. 1997), *available at* http://www.usgs.gov/usgs-manual/handbook/hb/440-7-h/440-7-h-figure 5-2.pdf.

52. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 994 (3d ed. 2002) (citing 28 C.F.R. §17.18(f), (g) (2001) (Dep't of Justice guidelines); 57 Fed. Reg. 54,564 ¶(e)(1) (1992) (proposed update of CIA Headquarters Reg. 6-2)).

53. *See A Non-Disclosure Agreement for Unclassified Information*, SECRECY NEWS, Nov. 8, 2004 (describing categories of information subject to the agreements as including: "For Official Use Only (FOUO); Official Use Only (OUO); Sensitive Homeland Security Information (SHSI); Limited Official Use (LOU); Law Enforcement Sensitive (LES); Safeguarding Information (SGI); Unclassified Controlled Nuclear Information (UCNI); and any other identifier used by other government agencies to categorize information as sensitive but unclassified.").

provided for a variety of penalties but did not require prepublication review.[54] The National Treasury Employees Union and the American Federation of Government Employees asked DHS to rescind the non-disclosure agreement policy, arguing that use of the agreement was unconstitutional.[55] The DHS did so in January 2005, stating that nondisclosure agreements previously signed by DHS employees "will no longer be valid."[56]

Beyond its own employees, it is the government's established practice to require each employee of a government contractor needing access to classified information to obtain a security clearance and to execute a nondisclosure agreement.[57] The agreement in question imposes the same legal obligations undertaken by government employees, and the government asserts the right to enforce these obligations by similar means, to the extent possible, against both the individual employee and the employer.[58] A primary purpose of the agreement is to protect classified information released by the government to private contractors during the course of funded research.[59] By designating the research itself as classified, the government may protect the products of that research as well by making them subject to the nondisclosure agreement. Although the government keeps Classified Information Nondisclosure Agreements on file for fifty years,[60] the forms executed by government contractors do not explicitly or implicitly require that contractors submit future publications to the contracting agency for prepublication review.[61]

The SBU secrecy clauses currently being imposed on scientists undertaking funded research stem from the executive branch's post-September 11 efforts to limit the release of SBU information it holds, as well as from a continuing concern that such research may produce information that

---

54. *See* Dep't of Homeland Security, *Non-Disclosure Agreement* (DHS Form 11000-6) (Aug. 2004), *available at* http://www.fas.org/sgp/othergov/dhs-nda.pdf.

55. *See* Letter from Gregory O'Duden, Gen. Counsel, NTEU & Mark Roth, Gen. Counsel, AFGE to Joe D. Whitley, Gen. Counsel, Dep't of Homeland Security (Nov. 23, 2004) (asserting that the agreement violated both the First and Fourteenth Amendments), *available at* http://www.fas.org/sgp/news/2004/11/nteu112304-gc.pdf.

56. Memorandum from Janet Hale, Under Sec. for Management, Dept. of Homeland Security to Undersecretaries et al. (Jan. 12, 2005), *available at* http://www.fas.org/sgp/other gov/dhs20050111.pdf.

57. *See CINA Briefing Book*, *supra* note 49, at 12; *see also* 32 C.F.R. §2003.20 (2004) (describing Classified Information Nondisclosure Agreements SF 312, SF 189, and SF 189-A).

58. *See CINA Briefing Book*, *supra* note 49, at 23.

59. *See* 32 C.F.R. §2003.20(c) (requiring all "Government contractor, licensee, and grantee employees" to sign SF 312 "before being granted access to classified information.").

60. *CINA Briefing Book*, *supra* note 49, at 24.

61. *Id.* at 22 (noting that individuals uncertain about the status of information in a proposed publication may seek voluntary review).

could pose a national security danger in enemy hands.[62] The Department of Defense first proposed that SBU secrecy clauses apply broadly as conditions to its research contracts,[63] but it has since withdrawn that proposal.[64] The Bush administration has stated that it continues to adhere to the prior policy of restricting the flow of information produced by government-funded scientific research only when the project is designated classified at the outset.[65] In practice, however, agency officials increasingly are inserting SBU

---

62. *See* NATIONAL RESEARCH COUNCIL, BIOTECHNOLOGY RESEARCH IN AN AGE OF TERRORISM: CONFRONTING THE DUAL USE DILEMMA 17-23 (2004) (explaining the new threat posed by advances in biotechnologies and genetic engineering technologies and recent examples of "contentious research" in the life sciences); Nicholas Wade, *A DNA Success Raises Bioterror Concern*, N.Y. TIMES, Jan. 12, 2005, at A17 (unexpected sudden advance in synthesis of long DNA molecules could allow bioterrorists to create smallpox virus genome).

63. *See* Dept. of Defense Reg. No. 5200.39-R, *Mandatory Procedures for Research and Technology Protection Within the DOD* (draft Mar. 2002), at ¶AP1.A1.4, *available at* www.fas.org/sgp/news/2002/04/dod5200_39r_dr.html; *Conducting Research During the War on Terrorism: Balancing Openness and Security, Hearing Charter for the House Comm. on Science*, 107th Cong. (2002) (noting that the proposed prepublication review "could have been extended to unclassified studies involving basic research" and that "criminal sanctions could have been imposed against scientists violating the policy"), *available at* http://www.fas.org/sgp/ congress/2002/101002charter.html.

64. *See* American Association of University Professors Special Committee, *Academic Freedom and National Security in a Time of Crisis*, 89 ACADEME 34, 42 (Nov.-Dec. 2003) [hereinafter AAUP Special Committee Report] (describing how scientists "balked at the notion of prior restraints on research that had not been classified as secret"), *available at* http://www.aaup.org/statements/REPORTS/Post9-11.pdf.

65. *See generally* National Security Decision Directive 189, *National Policy on the Transfer of Scientific, Technical and Engineering Information* (Sept. 21, 1985) ("It is the policy of this [Reagan] Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research in science, technology, and engineering at colleges, universities, and laboratories is classification. Each federal government agency is responsible for: a) determining whether classification is appropriate prior to the award of a research grant, contract, or cooperative agreement and, if so, controlling the research results through standard classification procedures; b) periodically reviewing all research grants, contracts, or cooperative agreements for potential classification. No restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes"), *available at* http://www.fas. org/irp/offdocs/nsdd/nsdd-189.htm; DANA A. SHEA, *Balancing Scientific Publication and National Security Concerns: Issues for Congress* (Cong. Res. Serv. RL31695) (2004), at 7-9 (indicating that as of late 2004 the 1985 directive "has not been superceded and continues to be the government policy regarding controls on federally-funded research results"), *available at* http://www.fas.org/sgp/crs/RL31695.pdf. With classified research identified from the outset as secret, universities were able to choose whether to do classified research, and they were able to segregate classified research from other work if they chose to do it. *See* AAUP Special Committee Report, *supra* note 64, at 43 (making a "rough guess" that

secrecy clauses into contracts for unclassified scientific research on an ad hoc basis, while debates continue within the government about how to protect SBU more systematically.[66]

In its commonest form, the SBU secrecy clause applies when a researcher "will have access to or generate unclassified information that may be sensitive and inappropriate," and it prohibits a "release to anyone" in any form without the funding agency's "prior written approval."[67] There is no standard time frame for agency decisionmaking or explicit provision for judicial review.[68] The remedies that the government could seek for violation of an SBU secrecy clause are presumably similar to those for violation of Classified Information Nondisclosure Agreements executed by contractors, and they include a court order barring publication, money judgments, and disqualification from future government projects, which may be imposed on the individual violator, the employing institution, or both.[69]

While the SBU secrecy clauses resemble information controls that the government has long imposed on employees and contractors engaged in classified research, some provisions of these clauses and the context in which they are used make them constitutionally suspect. Three concerns in particular bear careful examination.

First, the definition of SBU is broad, vague, and inconsistent across government agencies. Whereas information may be classified only under the definitions and procedures set out in the relevant executive order, no similar structure cabins the discretion of agency officials to designate information as SBU. This broad discretion raises the possibility of government censorship of private speech according to viewpoint, and such censorship is the primary danger addressed by the Free Speech Clause.

---

about "two dozen universities . . . undertake classified work," either regularly or on a case-by-case basis, noting that several universities have stand-alone facilities for classified research, such as the Massachusetts Institute of Technology's Lincoln Laboratory, the University of California's Los Alamos National Scientific Laboratory, and Carnegie Mellon University's Software Engineering Institute, and reporting that while "the reasons for separation vary by institution, . . . a common premise is that a stand-alone facility is easier to protect than an on-campus laboratory or building.").

66. *See* Peg Brickley, *Contract Conflicts: U.S. Universities Resisting Government Attempts to Control Fundamental Research*, THE SCIENTIST, Jan. 7, 2003 (observing that the "rash of restrictive clauses appear[s] to be the scattershot product of security-conscious administrators"), *available at* http://www.biomedcentral.com/news/20030107/02; *OMB Tackles Sensitive But Unclassified Information*, SECRECY NEWS, Sept. 3, 2002 (OMB is to develop standards and procedures for protecting SBU information), *available at* http://www.fas.org/sgp/news/secrecy/2002/09/090302.html.

67. NORRIS, *supra* note 4, at 5-6 (quoting DFARS 252.204-7000).

68. Library of Congress, *supra* note 32, at i (no uniform set of procedures applicable to SBU information).

69. *CINA Briefing Book*, *supra* note 49, at 32.

Second, the SBU secrecy clause's prepublication review provision imposes a prior restraint on private speech, which is the most disfavored method of enforcing the government's secrecy interest. Although such a review requirement may properly be imposed to prevent the release of classified information by current or former government employees, there is no precedent for extending it to restrict the release of unclassified information obtained or produced by private parties in the course of working on government contracts.

Finally, aside from uncertainty about the definition of SBU and the requirement of prepublication review, the very idea of controlling SBU information raises constitutional questions. Some threshold level of national security danger must exist for the government's interest in secrecy to outweigh the individual's interest in speaking freely and the public's interest in receiving the information. Classification signifies an official decision, according to established criteria, that certain information poses a definite and substantial threat to national security. Without such an official decision or criteria for making it, the government may not be able to demonstrate the requisite danger to national security that would overcome an individual's free speech right.

II. CONSTITUTIONAL BACKGROUND AND ANALYSIS

Because a research contract applicant can always walk away from a proffered government contract, one might imagine that the government could attach any condition at all to such a contract. But that is not the law.[70] The Constitution limits the conditions that the government may impose on receipt of its many benefits, even though recipients are free to reject the benefits or may, often, be quite willing to accept them with conditions.[71] The Constitution protects not only individual recipients but also the public more generally from the cumulative effect of government bargains that require the exchange of individual rights.[72] The public has a particular interest in the free

---

70. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) ("[Our] precedents have long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has not the constitutional right to be a policeman.'" (quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892))).

71. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 210 (2003) (the "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit" (quoting *Umbehr*, 518 U.S. at 674)).

72. *See* Thomas W. Merrill, *The Unconstitutional Conditions Doctrine: In the Context of Property*, 72 DENV. U. L. REV. 859, 862 (1995) (positing that "when constitutional rights are perceived by courts as having a large public goods dimension, courts will be reluctant to enforce contracts in which individuals waive the exercise of the right in exchange for some

speech right, which exists not just for speakers, but for listeners as well.[73]

Sometimes the government may properly impose conditions on benefits that limit the recipient's freedom of speech. Courts have found it difficult, however, to draw the line between constitutional and so-called "unconstitutional" conditions.[74] On one side of the balance is the government's broad discretion to structure its own programs. On the other side is the risk of government censorship of private speech that such broad discretion invites. SBU secrecy clauses implicate both sides of this balance: the government seeks to structure scientific research projects that it funds so as to prevent the release of dangerous information, while researchers and the public want to preserve the free flow of scientific information not owned by the government.

Several strains of constitutional doctrine are relevant to a determination of the constitutionality of SBU secrecy clauses. First Amendment doctrine relating to speech restrictions generally, and the law regarding prior restraints in particular, demonstrate that the definitions and prepublication review requirements of the SBU secrecy clause would violate the Constitution if imposed without the lever of government funding. Another strain addresses the constitutionality of speech conditions imposed on government employees and contractors, including classified information nondisclosure and prepublication review agreements. Yet another involves the constitutionality of various speech-restricting conditions imposed by the government on private parties seeking benefits other than government employment.

---

discretionary benefit.").

73. *See* United States v. Nat. Treasury Employees Union, 513 U.S. 454, 468 (1995) (interests of "potential audiences" factor into the balance when the government restricts its employees' speech); First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 783 (1978) ("A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'"); Johnson v. Fed. Express Corp., 147 F. Supp. 2d 1268, 1276 (M.D. Ala. 2001) ("Free speech furthers intrinsic and instrumental values for speakers and listeners."); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 680 (1992) ("When the government funds speech . . . first amendment concerns are not limited to potential coercion of the subsidized speaker, but extend also, and perhaps more importantly, to the listener. From the perspective of the audience, the danger lies not in the coercive effect of the benefit on speakers, but in the indoctrinating effect of a monopolized marketplace of ideas.").

74. As to unconstitutional conditions more generally, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) ("Regrettably, more than a century of judicial and scholarly attention to the problem [of unconstitutional conditions] has produced few settled understandings."); Merrill, *supra* note 72, at 859 ("The Supreme Court has never offered a satisfactory rationale for [the unconstitutional conditions] doctrine."); Frederick Shauer, *A Unifying Theory?*, 72 DENV. U. L. REV. 989, 990 (1995) (doctrine of unconstitutional conditions is "irredeemably intractable").

A. National Security Speech Restrictions and Prior Restraints Generally

A critical distinction exists in Free Speech Clause doctrine between speech restrictions that are content-neutral and those that are content-based. Content-based speech restrictions are "presumptively invalid,"[75] because when government targets the message of private speech it may skew the marketplace of ideas,[76] either to the advantage of majority over minority points of view or to the incumbent government's political advantage.[77] To be valid, content-based speech restrictions must survive strict judicial scrutiny, pursuant to which the government must demonstrate a compelling purpose and a means narrowly tailored to achieve that purpose.[78]

Although viewpoint discrimination is the most egregious Free Speech Clause violation,[79] strict scrutiny is required for both content- and viewpoint-based speech restrictions.[80] This is because content-based restrictions are more likely than content-neutral restrictions to be viewpoint-based in

---

75. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

76. *See id.* at 430 (Stevens, J., concurring) ("[Viewpoint discrimination] requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue."); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 894 (1995) (Souter, J., dissenting) ("[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing pubic debate.").

77. *See* Turner Broadcasting System, Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message . . . pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions 'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" (quoting Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

78. *See* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000).

79. *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular viewpoints taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

80. *See* Hill v. Colorado, 530 U.S. 703, 735 (2000) (Souter, J., concurring) ("content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others"); *id.* at 723 ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulations, is also an objectionable form of content-based regulation."); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

purpose[81] or effect;[82] they do not bear the political legitimacy of content-neutral speech restrictions, which spread their burdens broadly and without respect to message.[83] Any speech restriction, on the other hand, must be articulated precisely and narrowly to be valid.[84]

Strict scrutiny is required for content-based speech restrictions even when the content of that speech could endanger national security. In fact, the Supreme Court developed the strict rules that now apply to such restrictions in spite of government claims that it needed broad discretion to limit private speech in order to protect national security and public order.[85] The Free Speech Clause, like other individual rights guarantees, prevents the government from using the most efficient means to pursue its security

---

81. *See, e.g.*, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 56 (1987) ("When a restriction is content-based, the risk of improper motivation [based on disagreement with the ideas expressed] is especially high, for government officials considering the adoption of such a restriction will often, consciously or unconsciously, be influenced by their own opinions about the merits of the restricted speech.").

82. R.A.V. v. City of St. Paul, 505 U.S. 377, 431 (1992) (Stevens, J., concurring) ("a regulation that on its face regulates speech by subject matter may in some instances effectively suppress particular viewpoints").

83. Turner Broadcasting System, Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring in part and dissenting in part) ("Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome.").

84. *See* City of Chicago v. Morales, 527 U.S. 41, 52 (1999) ("[I]mprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.") (citations omitted).

85. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (a state may forbid advocacy of illegal action, including violent overthrow of government, only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (immediate danger is required even though the government claims that membership in a radical organization promoting violent overthrow will lead to that result); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (immediate danger is required even though the government claimed that a radical manifesto would lead to its violent overthrow); Abrams v. United States, 250 U.S. 616, 627-628 (1919) (Holmes, J., dissenting) (arguing that the clear and present danger test was not met despite the government's claim that pamphlets would hinder the war effort); Schenck v. United States, 249 U.S. 47, 52 (1919) (articulating a clear and present danger test where the government claimed that pamphlets would encourage soldiers to evade the draft and so undermine the war effort).

interest.[86]

A prior restraint on speech exists when a court imposes an injunction prohibiting speech[87] or when the government establishes a licensing system under which individuals must obtain permission to speak.[88] A prior restraint, in contrast to subsequent punishment, restricts speech before the public can hear and evaluate it. Prior restraints were the initial target of the Free Speech Clause, and they remain a particularly obnoxious form of speech restriction, because they present dangers beyond those inherent in content-based restrictions.[89] The government must demonstrate a direct and immediate danger to national security that cannot be addressed by other means in order to suppress speech by a prior restraint.[90]

A prior restraint imposed by means of an administrative licensing system poses dangers distinct from judicially-imposed injunctions. One danger of a speech licensing system is that its administrators may suppress speech that a court would determine to be constitutionally protected. Another danger is that, even if administrators ultimately decide not to suppress expression, the anticipated expense and difficulties, and potential denial of permission from the licensor, may chill protected speech, as speakers forgo the creation of information subject to the system in the first place.[91]

The Constitution requires a series of procedural safeguards to render a licensing system valid. One requirement is clear standards, tied to the government's legitimate purpose, to counter the danger of viewpoint

---

86. *See* ALAN DERSHOWITZ, WHY TERRORISM WORKS 106-125 (2002) (listing possible actions of a hypothetical "antiterrorism czar" charged with devising the most effective means to protect national security without respect to constitutional limitations, including controlling the media, monitoring all communications, and criminalizing advocacy).

87. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

88. *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) ("[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."); Kunz v. New York, 340 U.S. 290 (1951) (holding that standardless discretion of a police chief to issue a license to use a radio or loudspeaker on city property was unconstitutional as a prior restraint on protected speech); Lovell v. City of Griffin, 303 U.S. 444 (1938) (striking down a permit requirement for distribution of literature).

89. *See Near*, 283 U.S. at 713-714 (referring to freedom of the press).

90. In the *Pentagon Papers Case*, the Justices found that the government's attempted restraint on publication of a classified study of Vietnam War policy failed to meet this high standard. New York Times Co. v. United States, 403 U.S. 713 (1971). One court granted an injunction to suppress publication of scientific information explaining the operation of a hydrogen bomb, finding that the high standard was met, United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), but the case became moot when the information was published elsewhere pending appellate review.

91. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker . . . .").

censorship that broad, vague standards present.[92] These standards both limit the licensor's initial discretion and allow for meaningful judicial review.[93] Another requirement is a specified, brief period for agency decisionmaking, as well as expeditious judicial review that must be initiated by the government and in which the government bears the burden of proof.[94]

These general First Amendment principles demonstrate that the terms of the SBU secrecy clause could not constitutionally be imposed directly on private speech. Because the government's purpose in restraining the publication of SBU information is to abate a national security danger, such clauses are clearly content-based. SBU secrecy clauses are not, however, crafted with the precision that would be necessary to demonstrate that the information to be suppressed directly raises a strong and immediate national security concern.

Another constitutional problem is that the prepublication review requirement of the SBU secrecy clause imposes a prior restraint on private speech without the necessary justification and procedural safeguards. The definition of SBU information is not tied to a direct and immediate security danger sufficient to justify a prior restraint. Neither is the definition precise enough to limit an administrator's discretion. There is no standard time limit for an agency prepublication review. And, although a contractor might choose to challenge terms of the clause or agency decisions, there is no provision for prompt judicial involvement at any stage of review.

Does the fact that the SBU secrecy clause is attached to government funding fundamentally change the constitutional analysis? The cases addressing speech conditions imposed on government employees and contractors are relevant to this analysis.

---

92. *See City of Lakewood*, 486 U.S. at 760.

93. *See id*. at 771 (holding that an ordinance's "minimal requirement" that the mayor state his reasons for denying a permit "cannot provide the standards necessary to ensure constitutional decisionmaking, nor will it, of necessity, provide a solid foundation for eventual judicial review. . . . Even if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decision-maker's discretion.").

94. *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 321 (2002) ("In response to the[] grave 'dangers of a censorship system,' we [have] held that a film licensing process must contain certain procedural safeguards in order to avoid constituting an invalid prior restraint: '(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.'") (citations omitted).

B. Speech Conditions on Government Employees and Contractors

Courts address the constitutionality of employee secrecy requirements against the more general background of speech limitations imposed as a condition of government employment. The government cannot restrict its employees' unofficial speech on matters of public concern simply because it disagrees with the message. At the same time, the government can sometimes restrict employee speech that is otherwise entitled to full First Amendment protection when it is necessary to serve some legitimate and important government interest.[95] The validity of an adverse employment action imposed because of an employee's speech depends upon a balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[96]

In *United States v. National Treasury Employees Union*,[97] the Supreme Court declared that the government bears a heavier burden in justifying a speech-limiting rule when it imposes it on a broad class of employees by prohibiting speech before it occurs.[98] In such an instance, the "Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[99] Moreover, the government must "'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'"[100]

In cases involving government employees, courts have found that the balance allows the government to impose secrecy clauses as a condition of employment in some circumstances. In *United States v. Marchetti*,[101] the United States Court of Appeals for the Fourth Circuit addressed the constitutionality of a secrecy agreement signed by a Central Intelligence Agency (CIA) employee as a condition of employment. The court agreed with Marchetti that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements

---

95. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996).

96. *Id*. at 676 (citation omitted).

97. 513 U.S. 454 (1995).

98. *Id.* at 468 ("unlike an adverse action taken in response to actual speech, this ban [on employees' acceptance of honoraria] chills potential speech before it happens.").

99. *Id.* (citation omitted).

100. *Id.* at 475 (quoting Turner Broadcasting System, Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 664 (1994)).

101. 466 F.2d 1309 (4th Cir. 1972).

upon its employees and enforce them with a system of prior censorship."[102] The court held the secrecy agreement valid, however, as applied to suppress classified information. Nevertheless, it noted that "[w]e would decline [its] enforcement . . . to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights."[103] The court also declared that "[b]ecause we are dealing with a prior restraint on speech," the CIA must respond promptly to a request for review, in a timeframe that "should not exceed thirty days."[104] Additionally, Marchetti was entitled to judicial review of any disapproval, although "[b]ecause of the sensitivity of the area and confidentiality of the relationship in which the information was obtained," the court placed the burden of seeking such review on Marchetti.[105]

In *Snepp v. United States*,[106] the government sought to go farther than in *Marchetti* and to enforce the prepublication review requirement with respect to a manuscript that did not contain information that was alleged to be classified.[107] The Supreme Court accepted the government's claims, upholding the constitutionality of a secrecy clause that obligated a CIA employee to obtain agency prepublication review of any information "relating to the Agency, its activities or intelligence activities generally" for the rest of his life.[108]

The Court first explained that the prepublication review promise was "an integral part of Snepp's concurrent undertaking 'not to disclose any classified information relating to the Agency without proper authorization.'"[109] It went on to note that the clause was an "'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'"[110] It held that Snepp had entered into a voluntary agreement to submit any proposed publication for prior review,[111] and that even absent an express agreement the "Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[112]

---

102. *Id*. at 1313.
103. *Id*. at 1317.
104. *Id*.
105. *Id*.
106. 444 U.S. 507 (1980).
107. *Id.* at 510 n.4.
108. *Id.* at 508.
109. *Id.* at 508 (citation omitted).
110. *Id.* at 510 n.3 (citation omitted).
111. *Id.*; *id*. at 511 n.6 (suggesting that "the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship").
112. *Id.* at 510 n.3.

The government's strong secrecy interest meant that Snepp violated his trust by failing to submit his manuscript for prepublication review, regardless of whether it disclosed classified information.[113] The Court held that a CIA employee's fiduciary duty included a requirement to follow the procedure of prepublication review, because "publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified [since it] may reveal information that the CIA – with its broader understanding of what may expose classified information and confidential sources – could have identified as harmful."[114] In support, it quoted the CIA Director, who testified that the threat that ex-employees like Snepp would reveal classified information through their publications had damaged the CIA's ability to obtain and retain confidential sources.[115] Recognizing the government's need to establish a "reliable deterrent against similar breaches of security," the Court imposed a constructive trust in favor of the government on all the proceeds from Snepp's book.[116]

After *Snepp*, President Reagan issued National Security Decision Directive 84, which directed agencies that have access to classified information to require employees to sign some sort of secrecy agreement.[117] The forms for employee signature originally purported to cover information

---

113. *Id.* at 511 ("Whether Snepp violated his trust does not depend upon whether his book actually contained classified information.").

114. *Id.* at 511-512.

115. *Id.* at 512-513.

116. *Id.* at 514, 515-516. Justice Stevens, joined by Justices Brennan and Marshall, dissented. He argued that the Court seemed to acknowledge that "a CIA employee has a First Amendment right to publish unclassified information," *id.* at 521 n.11 (noting that this was "the Fourth Circuit's view in *Marchetti*"), and that since Snepp's book contained no classified information, it did not cause the harm that the government alleged. *Id.* at 522-523. He labeled the constructive trust a "drastic new remedy . . . fashioned to enforce a species of prior restraint on a citizen's right to criticize his government" that is "bound to have an inhibiting effect on [the] writing [of a critical book]." *Id.* at 526 & n.17. He concluded by noting that "[i]nherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy. The character of the covenant as a prior restraint on free speech surely imposes an especially heavy burden on the censor to justify the remedy it seeks. It would take more than the Court has written to persuade me that that burden has been met." *Id.* at 526.

117. National Security Decision Directive (NSDD) 84, *Safeguarding National Security Information* (n.d.) (stating that persons with access to classified information must sign nondisclosure agreements and that those with access to Sensitive Compartmented Information must also sign prepublication review agreements), *available at* http://www.fas.org/irp/offdocs/nsdd/nsdd-084.htm.

that was either "classified or classifiable."[118] Congress objected to the breadth and vagueness of the coverage, and it placed a rider in appropriations legislation that forbade the executive branch to use funds to enforce the secrecy agreements beyond the scope of classified information.[119] A district court invalidated the rider on separation of powers grounds,[120] but the Supreme Court declined to rule on this constitutional question.[121] In another opinion in the same case, the district court held that the secrecy clause provision to protect "classifiable information," unless narrowed by a precise definition, violated the free speech guarantee.[122] The government's current nondisclosure and prepublication review forms refer to "classified" information only.[123]

Lower courts have reviewed other challenges to secrecy agreements. In *McGehee v. Casey*,[124] the United States Court of Appeals for the District of Columbia Circuit drew from Supreme Court precedent in determining that secrecy clauses must "'protect a substantial government interest unrelated to the suppression of free speech' . . . [and] be narrowly drawn to 'restrict speech no more than is necessary to protect the substantial government interest.'"[125] The court applied this test to uphold CIA censorship of information classified "secret" which was contained in former agents' writings and was obtained by them in the course of their employment. The court noted that the government's legitimate secrecy interest could extend only to classified information,[126] that standards more precise than a general interest in protecting national security must define the government's legitimate security interest,[127] and that judicial review must confirm the

---

118. Information Security Oversight Office, *Classified Information Nondisclosure Agreement* (SF 189) (n.d.), *reprinted in part in* DYCUS, *supra* note 52, at 991.

119. Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, §630, 101 Stat. 1329, 1329-432 (1987).

120. Nat'l Fed'n of Fed. Employees v. United States, 688 F. Supp. 671, 685 (D.D.C. 1988), *vacated sub nom.* Am. Foreign Svc. Ass'n v. Garfinkel, 490 U.S. 153 (1989).

121. *Garfinkel*, 490 U.S. at 158.

122. Nat'l Fed'n of Fed. Employees v. United States, 695 F. Supp. 1196, 1202-1203 (D.D.C. 1988).

123. *Classified Information Nondisclosure Agreement* (SF 312) (Jan. 2000), *available at* http://www.fas.org/sgp/isoo/new_sf312.pdf; *Sensitive Compartmented Information Nondisclosure Agreement* (SF 4414) (Feb. 1997), *available at* http://www.usgs.gov/usgs-manual/handbook/hb/440-7-h/440-7-h-figure5-2.pdf.

124. 718 F.2d 1137 (D.C. Cir. 1983).

125. *Id.* at 1142-1143 (quoting Brown v. Giles, 444 U.S. 348, 354-355 (1980)).

126. *McGehee*, 718 F.2d at 1141 ("The government has no legitimate interest in censoring unclassified materials.").

127. *Id.* at 1143-1145 ("The term 'national security' . . . defined for classification purposes as 'the national defense and foreign relations of the United States' . . . is inherently vague," but more specific guidelines in the governing executive order and CIA handbook

connection between the information suppressed and the government's interest.[128]

Since the Supreme Court's 1995 decision in *United States v. National Treasury Employees Union*,[129] invalidating a ban on honoraria for government employees, lower courts have applied the test used in that case to balance the free speech interests of employees and audiences against the government's actual and demonstrated interests as an employer to a range of prospective speech restrictions.[130] In *Weaver v. United States Information Agency*, another panel of the United States Court of Appeals for the District of Columbia Circuit upheld a prepublication review requirement that extended beyond classified information.[131] The court construed the requirement narrowly, however, finding that the regulation at issue called for employees to submit publications for agency "clearance," a process that did not include the authority to punish employees who subsequently published unapproved material.[132] The court held that the particular free speech burden of prior restraint should be considered as a factor in the interest balancing test

---

brought the "secret" classification applied to censor material in McGehee's manuscript within constitutional bounds).

128. *Id.* at 1149. The court noted that, in contrast to a citizen seeking information under FOIA, an ex-employee has a constitutional right to disseminate information that he possesses, which raises the standard of judicial review. In such an instance, the CIA must "justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification." *Id.* at 1148. The court anticipated that "in camera review of affidavits, followed if necessary by further judicial inquiry, will be the norm." *Id.* at 1149.

129. 513 U.S. 454.

130. *See, e.g.*, Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) (invalidating a university's requirement that employees obtain approval before contacting prospective athletes); Swartzwelder v. McNeilly, 297 F.3d 228 (3d Cir. 2002) (finding that a police department requirement that employees receive permission from the police chief to testify as an expert witness was probably invalid); Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998) (invalidating a city policy requiring approval for employees to speak to the press); Weaver v. United States Info. Agency, 87 F.3d 1429 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) (upholding regulations requiring nonbinding prepublication review of government employee expression); Sanjour v. EPA, 56 F.3d 85, 90-91 (D.C. Cir. 1995) (en banc) (invalidating an EPA rule prohibiting employees from receiving travel expense reimbursement from private sources for unofficial speaking or writing).

131. 87 F.3d 1429 (D.C. Cir. 1996) (upholding a regulation requiring employees of the State Department, the United States Information Agency, and the Agency for International Development to submit all speaking, writing, and teaching material on matters of "official concern," including material relating to agency or foreign policy or United States foreign relations, for nonbinding prepublication review).

132. *Id.* at 1436 ("If, contrary to the government's proposed interpretation, the regulation were read to authorize punishment for publication of material disapproved [for] inaccuracy, inconsistency with current foreign policy, or significant potential to affect U.S. foreign relations in an adverse manner [] then the regulation would raise serious constitutional issues.").

established by the government employment and secrecy clause cases.[133] While a majority of the panel found the balance to favor the government, Judge Wald dissented, finding that "[t]he affirmation of such a prepublication clearance procedure based on viewpoint and content goes far beyond any employee restriction previously upheld by this court or the Supreme Court."[134]

In *Harman v. City of New York*,[135] a Second Circuit panel cited and distinguished *Weaver* when it invalidated a New York City requirement that agency employees obtain approval to speak with media about their agencies' policies or activities. In the balance between government and free speech interests, the court found that the government's interest in protecting confidential information relating to children and families was "undeniably significant," but that it was less weighty than the need to protect national security, which underpinned the prepublication review processes upheld by other courts.[136] On the free speech side of the balance, the court noted that the prepublication review and secrecy requirements adversely affected both the employees' right to speak and the public's right to receive information of public concern. The court agreed with Judge Wald's assessment of the burdens on the employees' speech, noting the dangers of self-censorship, delay, and viewpoint discrimination apparent in the process.[137]

Other cases reviewing the implementation of secrecy clauses with prepublication review requirements for government employees have confirmed the possibility of delays, chilling effects, and viewpoint discrimination. Despite rules that seem to require prompt agency action, the back-and-forth process between an ex-employee and an agency enforcing the terms of a secrecy clause may take many months.[138] Even without threats or concrete legal action, reviewing agencies can chill speech.[139] Judicial review, although it presents the possibility of overturning agency redaction decisions,

---

133. *Id.* at 1440 (finding such an approach consistent with Supreme Court precedent).

134. *Id.* at 1456.

135. 140 F.3d 111 (2d Cir. 1998).

136. *Id.* at 122 & n.6.

137. *Id*. at 140 F.3d at 120-121.

138. *See, e.g.*, Penguin Books USA, Inc. v. Walsh, 756 F. Supp. 770, 774-778 (S.D.N.Y. 1991), *vacated and appeal dismissed*, 929 F.2d 69 (2d Cir. 1991) (interchange between Jeffrey Toobin, who was a prosecuting attorney in the Oliver North case, and the Office of the Independent Counsel took more than a year); Stillman v. Dep't of Defense 209 F. Supp. 2d 185, 188 (D.D.C. 2002), *rev'd and remanded*, 319 F.3d 546 (D.C. Cir. 2003) (negotiation between ex-employee of Los Alamos National Laboratory and federal agencies took eight months).

139. *Penguin Books*, 756 F. Supp. at 778-779 (concluding that the Office of the Independent Counsel had subtly threatened Toobin by refusing to discuss what action it would take if he published his book, and that "[n]o one enjoys living under a cloud of threatened, or intimated, legal action.").

adds further delay to the review process.[140]

The general balancing test for weighing the government's interests against employees' free speech rights applies also to adverse employment actions taken by the government against independent contractors.[141] The Supreme Court has noted, however, that "differences between employees and independent contractors" must inform the balance.[142] Specifically, "[i]ndependent contractors . . . lie somewhere between the case of government employees, who have the closest relationship with the government, and our other unconstitutional conditions precedents, which involve persons with less close relationships with the government," and they are "more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.[143] This observation would likely inform the application of the balance to prospective speech restrictions on contractors as well.

This series of government employee and contractor cases strongly suggests that the current SBU secrecy clause, applied to private scientists, intrudes too far into the free speech guarantee. Because the clause applies prospectively, the relevant balance of interests requires the government to show that the information to be suppressed has a "'necessary impact on the [government's] actual operation'" and that the secrecy interest outweighs the interests of both the affected researchers and potential audiences in receiving their communications.[144] Moreover, the government must "'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'"[145] Weighing against the government in the balance are the imprecise definitions in the SBU secrecy clause, which create the possibility of unauthorized censorship,[146] the particular free speech burdens of prepublication review,[147] the government's presumably lesser interest in protecting SBU information

---

140. *Penguin Books*, 929 F.2d at 72-74 (noting publication of the book before oral argument on appeal, labeling the controversy moot, dismissing, and vacating the district court's judgment).

141. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996).

142. *Id*. at 678.

143. *Id*. at 680.

144. United States v. National Treasury Employees Union, 513 U.S. 454, 468 (1995) (citation omitted).

145. *Id.* at 475 (citation omitted).

146. Harman v. City of New York, 140 F.3d 111, 120 (2d Cir. 1998) ("courts have found that the potential for censorship in a regulation 'justifies an additional thumb on the employees' side of [the] scales'") (citation omitted).

147. Weaver v. United States Info. Agency, 87 F.3d 1429, 1440 (D.C. 1996).

as compared with classified information,[148] and its presumably lesser interest in controlling the speech of private contractors as compared with that of government employees.[149]

The cases just described could be sufficient to confirm the unconstitutionality of the current SBU secrecy clause. The balancing test they establish might also be used to describe the boundaries and general outline of a system to protect SBU information that comports with the free speech guarantee. A different line of cases, however, complicates the constitutional analysis. These cases address the constitutionality of speech limitations imposed on private parties as conditions for participation in a government program.

C. Speech Conditions on Access to Government Programs

SBU secrecy clauses impose conditions on access to government programs that fund scientific research. Any SBU secrecy clause will limit speech according to its content. The imprecise definitions and prepublication review requirement of the current SBU secrecy clause not only result in content discrimination, they also present the possibility of viewpoint discrimination. While the employment and contractor cases require definitions and procedures to limit the possibility of viewpoint discrimination, the cases testing program conditions indicate that, in some circumstances, such safeguards are not required. It is therefore necessary to examine the general rules of the program condition cases and apply them specifically to the funding of scientific research.

1. Programs That Require Precise, Viewpoint-Neutral Access Conditions

The Supreme Court's "forum" rules recognize that government efforts to limit or skew private speech by means of a "subsidy," as well as by direct restriction, may be unconstitutional.[150] The Court has made it clear that traditional public forums, such as streets and parks, are held by the government in trust for the people for the purpose of facilitating communication.[151] The government must hold these forums open on a

148. McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983) (government's legitimate secrecy interest extends only to classified information).

149. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996).

150. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995) (declaring that failure to fund a religious student publication when other publications are funded "cast[s] disapproval on particular viewpoints of [the University's] students [and] risks the suppression of free speech and creative inquiry").

151. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

nondiscriminatory basis for private speakers,[152] even though those speakers may well say things that undercut the government's own messages and policy objectives. Additionally, the Court has recognized that "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression,"[153] and it has accordingly treated forum access decisions like other speech-licensing decisions, requiring that the definitions be "narrowly drawn, reasonable, and definite," in order to "guide the [administrator's] discretion and render it subject to effective judicial review."[154]

Beyond traditional government forums, other forums exist because the government chooses to furnish access to property[155] or to provide funding for their creation.[156] These created forums are government largesse that can be withdrawn at will.[157] For this reason, as well as the fact that the government administers some created forums for purposes having nothing to do with the promotion of private speech,[158] the government has great discretion to determine the boundaries of such forums and to exclude private speakers.[159]

---

152. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) ("[T]raditional public fora are open for expressive activity regardless of the government's intent.").

153. Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002).

154. *Id.* at 323-324 (citations omitted).

155. *Forbes*, 523 U.S. at 677, 679 (explaining that the government creates a designated public forum when it "intentionally open[s] a nontraditional public forum for public discourse," and it creates a nonpublic forum when it "allows selective access for individual speakers.").

156. *Rosenberger*, 515 U.S. at 830 (stating that government funding may create a "metaphysical forum").

157. *Forbes*, 523 U.S. at 681-682 (observing that onerous equal access requirements may in fact undercut free speech clause values by diminishing speech opportunities if the operator of the forum chooses not to provide access to anyone).

158. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (speech rights at airport terminals); United States v. Kokinda, 497 U.S. 720 (1990) (distribution of literature on sidewalk outside post office).

159. These boundaries need not be described by a precise set of rules, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39, 47-48 (1983) (access to school mail system controlled in part by individual school building principals); they may be articulated post hoc, *Forbes*, 523 U.S. at 680 (finding that rules may be articulated after an access decision is made where a broadcaster "reserved eligibility for participation in the debate to candidates for the Third Congressional District seat" and later "made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate"); and they may, when articulated, correlate very closely to viewpoint, *Perry Educ. Ass'n*, 460 U.S. at 65 (Brennan, J., dissenting) (arguing that a policy allowing only the incumbent union to use the school mail system was viewpoint discriminatory because it "amplif[ied] the speech of the [incumbent union], while repressing the speech of the [rival union] based on [its] point of view."). *See also Forbes*, 523 U.S. at 682 (upholding the exclusion of a congressional candidate from a debate because the sponsoring organization's director believed neither voters nor news organizations considered him a "serious candidate").

Still, the core prohibition of viewpoint discrimination by the government applies.[160] That is, even though the government is distributing a discretionary benefit, that discretion does not extend to the use either of explicitly viewpoint-discriminatory criteria[161] or of broad, vague standards that create a significant risk of viewpoint discrimination.[162]

The government sometimes provides assistance to private speakers without creating a forum in order to promote government policies other than the encouragement of private speech.[163] The Supreme Court has emphasized the government's discretion in structuring non-forum subsidy programs, but it has also noted that "even in the provision of subsidies, the government may not 'ai[m] at the suppression of dangerous ideas.'"[164] This means that in most instances the government cannot condition access to a subsidy on the viewpoint of a recipient's speech either in explicit terms or by the application of imprecise criteria that could allow program administrators to engage in

---

160. *Forbes*, 523 U.S. at 682 ("[T]he exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property."); *Rosenberger*, 515 U.S. at 829 (holding that the state is forbidden "to exercise viewpoint discrimination, even when the limited public forum is one of its own creation").

161. The Court has repeatedly held that exclusion of religious speakers from a created forum is unconstitutional viewpoint discrimination. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); *Rosenberger*; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). *But see* Locke v. Davey, 540 U.S. 712 (2004) (holding that exclusion of a theology student from a state scholarship program is not exclusion of a speaker from a created forum, but is a funding decision that does not violate the Free Exercise Clause).

162. *See, e.g.*, Thomas v. Chicago Park Dist., 534 U.S. 316, 324 (2002) (finding that while a Chicago Park District ordinance required participants to obtain a permit to hold rallies in parks, the ordinance was enforceable because it "provide[d] 'narrowly drawn, reasonable and definite standards' to guide the licensor's determination" (citation omitted)); AIDS Action Comm. of Massachusetts, Inc. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 12 (1st Cir. 1994) ("The [access] Policy itself is almost impossible to understand. The purported exclusion of all messages or representations 'pertaining to sexual conduct' is so vague and broad that it could cover much of the clothing and movie advertising commonly seen on billboards and in magazines. . . . We think that the opportunities for discrimination created by this Policy have been borne out in practice, and that this case presents an unrebutted claim of discrimination in the application of supposedly neutral standards.").

163. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 237 n.7 (2003) (finding that the purpose of providing Internet terminals in public libraries is not "to encourage a diversity of views from private speakers"); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998) ("In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers.'" (quoting *Rosenberger*, 515 U.S. at 835)).

164. *See Finley*, 524 U.S. at 587 (quoting Regan v. Taxation With Representation of Washington, 461 U.S. 540, 550 (1983)).

viewpoint censorship.[165] Exceptions exist, however.

2. Programs That May Justify Explicitly Viewpoint-Discriminatory Funding Conditions

One exception to the rule against viewpoint discrimination in government funding exists when a purpose of the program is to produce speech, and private individuals effectively become government speakers through participation in the program. In *Rust v. Sullivan*,[166] health care providers claimed that their free speech rights were violated by government regulations prohibiting them, as a condition of receiving family planning funds, from engaging in abortion counseling, referral, or advocacy. The Supreme Court held that "[t]his is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope."[167] The Court later described *Rust* as involving the government's use of "private speakers to transmit specific information pertaining to its own program."[168] In such an instance, when the government "disburses funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[169]

Access conditions that explicitly discriminate on the basis of viewpoint are valid only when private program participants become government speakers, however. In *Legal Services Corp. v. Velasquez*,[170] the Supreme Court invalidated a condition placed on Legal Services Corporation (LSC) attorneys that prohibited them from challenging existing welfare laws. According to the Court, "Congress cannot recast a condition on funding as a

---

165. *Regan*, 461 U.S. at 548 (upholding a tax benefit for lobbying by veterans' organizations but not other types of nonprofit organizations, noting that eligibility for the benefit did not depend on the content of speech and that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to "'aim[] at the suppression of dangerous ideas.'") (citation omitted); Speiser v. Randall, 357 U.S. 513 (1958) (state cannot condition access to a property tax exemption on agreement of the recipient to sign a declaration stating that he did not advocate forcible overthrow of the United States government).

166. 500 U.S. 173 (1991).

167. *Id.* at 194.

168. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995). More recently, the Court has emphasized that *Rust* is not limited to "situations where the government seeks to communicate a specific message," but extends to other instances where the government's purpose is something other than to facilitate private speech. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 237 n.7 (2003) (stating that *Rust* applies when the government's purpose is to provide library patrons with material "of requisite and appropriate quality," which excludes pornography).

169. *Rosenberger*, 515 U.S. at 833.

170. 531 U.S. 533 (2001).

mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[171] The Court found the LSC funding condition to be "aimed at the suppression of ideas thought inimical to the Government's own interest."[172] The Court distinguished *Rust* on the ground that "the LSC program was designed to facilitate private speech, not to promote a governmental message."[173] It noted that "certain restrictions may be necessary" when "the government establishes a subsidy for specified ends,"[174] but it found that this condition was an unconstitutional "attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider."[175]

Although the Court has indicated that the discretion it described in *Rust v. Sullivan* applies to a broad range of government funding decisions, there is no indication that this discretion includes employment of the potentially viewpoint-discriminatory access criteria of the SBU secrecy clause in funding scientific research. A viewpoint-specific program like the one in *Rust*, which restricts counseling about abortion, has as part of its purpose communication outside the government. Such a program may impose a funding condition that limits the speech of recipients in order to control the communication, which is part of the "product" of the program.

Most of the government's scientific research funding, by comparison, does not have communication by the private contractor to members of the public on behalf of the government as part of its purpose. Contracts for scientific research typically anticipate tangible products that will be delivered to the government. These products may be things, or reports, or a combination of nonspeech things and information. An exchange of information is part of the bargain, but the bargain's purpose is only the exchange between contractor and government. The government can control the content of the information for which it contracts, within the bounds of ethics and authorship, by prescribing the type of information sought and the

---

171. *Id.* at 547.

172. *Id*. at 549.

173. *Id*. at 542. The Court has since emphasized that the government's discretion to condition access to a subsidy such as that upheld in *Rust* extends beyond circumstances where private participants become government speakers. *Am. Library Ass'n*, 539 U.S. at 213 n.7. It did so, however, when upholding an access condition that limited participant speech according to content, not viewpoint. *Id.* at 204 ("[T]he government has broad discretion to make content-based judgments in deciding what private speech to make available to the public."). There is no indication in *American Library Association* that the Court would uphold explicitly viewpoint discriminatory access criteria outside the context of the private program participants delivering a government message.

174. *Velasquez*, 531 U.S. at 543 (citing *Rust*).

175. *Id.* at 546.

form of presentation. It can also decide whether to endorse and publicize the information products of its contracts. Because the government does not generally use research contracts to advance a viewpoint-specific policy, however, viewpoint-discriminatory limitations on the speech of contractors are not necessary to fulfill the research program's purpose.[176] Consequently, *Rust* does not validate the viewpoint- discriminatory features of the current SBU secrecy clause.

3. Selective Speech Funding Programs

The government generally cannot condition access to federal programs on vague, broad standards that create a significant risk that administrators will engage in viewpoint discrimination. An exception exists, however, when in order "[t]o fulfill their traditional missions . . . [public entities] must have broad discretion to decide what [privately produced] material to provide to their patrons."[177] In such programs, the requirement of clear, definite standards to channel an administrator's decisionmaking fundamentally conflicts with the discretion the administrator must have to make the selective, quality-based access decisions that fulfill the program's purpose, which is to present to a designated audience private speech that reflects government views. Fulfilling the program's legitimate purpose requires the toleration of a risk that broad access standards may be misused.

When the government acts as an editor, combining private speech into a unique whole, it may properly use broad, vague standards for access to government benefits that are not subject to effective judicial review. The combination of private speech is, itself, a message.[178] The government is also entitled to use considerable discretion in allocating space among private

---

176. In addition to contracts and cooperative agreements for specific "deliverables," the government may make grants for scientific research that indeed have communication outside the government as a goal. By contrast to contracts for specific products, which fulfill a particular government objective, such grants support the interests and agendas of individual scientists or institutions, with the broad purpose of creating and disseminating information that will spur scientific discovery and progress. But while communication beyond the government is a purpose of such programs, it is not a purpose that justifies a speech-limiting condition. When the dissemination of information is a primary purpose of a research-funding program, SBU secrecy clauses actually subvert, rather than enhance, the communication objective. In other words, the government lacks a viewpoint-based policy in such programs that would support SBU secrecy clause restrictions.

177. *Am. Library Ass'n*, 539 U.S. at 204.

178. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998) ("Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.").

entries, including choosing among different points of view.[179] In addition, government entities may act as editors when they put together reports, newsletters,[180] Web sites, conferences, ceremonies, and numerous other types of private speech compilations.[181] Although there is a risk of abuse, the values served by allowing the discretion outweigh that risk.[182]

The government may also exercise a large degree of subjective judgment when it creates or administers programs designed to identify private speech that meets a particular standard of "quality" or "appropriateness." Government entities such as schools, prisons, and the military have instructional and safety responsibilities with respect to their populations, and they may select and present private speech that they deem appropriate to their missions.[183] Libraries make quality and appropriateness decisions when making their selections, and Congress, too, can impose content-based conditions on the acquisitions that it funds.[184]

Congress can require the National Endowment for the Arts (NEA) to consider "general standards of decency and respect for the diverse beliefs and values of the American public" when distributing arts funding,[185] even though

---

179. *Id*. at 673 ("[Editors] must exercise [discretion] to fulfill their journalistic purpose and statutory obligations.").

180. Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (PG&E's newsletter "receives the full protection of the First Amendment").

181. *Forbes*, 523 U.S. at 674 (comparing broadcasters' activities to a university's commencement speaker selection and a public institution's lecture series choices).

182. *Id*. (noting that in the context of broadcaster discretion, "'[c]alculated risks of abuse are taken in order to preserve higher values'" (quoting Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973)).

183. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed . . . ."); Thornburgh v. Abbott, 490 U.S. 401, 415 (1989) (stating that regulations restricting inmates' receipt of certain types of publications by mail are permitted only when the particular type of publication is "detrimental to [prison] security"); Brown v. Glines, 444 U.S. 348, 356 (1980) ("Since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force.").

184. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 211-212 (2003) ("[The funding programs] were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes. . . . Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs.").

185. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

such criteria create a risk of abuse.[186] NEA grants are "selective" or "competitive" subsidies,[187] which depend upon an "excellence" threshold that is "inherently content-based."[188] Such quality-based government programs abound, and they are valuable.[189] But in designing them "it is not always feasible for Congress to legislate with clarity."[190] Instead, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[191] Meeting the purpose of the program – selecting, rewarding, and presenting "quality" private speech to the public – justifies conditioning the government benefit on broad, vague standards.

By contrast to the many programs that require subjective evaluations of the speech of private participants, the program of funding private research is not "selective" in a way that justifies the potentially viewpoint-discriminatory features of the SBU secrecy clause. It is important in this analysis to distinguish the selectivity the government may appropriately exercise over the activity of scientific research which it funds from the operation of the SBU secrecy clause itself, which addresses the speech of the people who do the research.

The program of supporting private research involves selective funding, which means that the government has broad discretion to consider a range of factors in deciding how to allocate funds among research priorities and among applicants. In exercising this discretion, Congress and the agencies with statutory responsibility for awarding funding can set and apply standards that reflect their policy preferences. These policy preferences will be value-laden and may well be viewpoint-based. Decisions about what type of research to fund and who should receive funding to do it will involve a range of subjective factors not susceptible of rigorous judicial review. Such subjective funding decisions will nevertheless determine what scientific work gets done and what information is available for public consumption. What renders the exercise of this discretion constitutional is the government's responsibility for determining funding priorities and its public accountability for its exercise of that subjective judgment.

Yet while the government's discretion to award research funding is very broad, it does not include the right to impose SBU secrecy clause conditions

---

186. *Id.* at 583-584 (noting respondent's claim that the criteria "are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination," but recognizing that risk is present with determination of "artistic excellence" as well).

187. *Id.* at 587, 589.

188. *Id.* at 586.

189. *Id.* at 589 (listing programs).

190. *Id.*

191. *Id.* at 587-588.

that regulate not the product of the research but the speech of the researcher. The selective decisions about what type of research to fund, although they will undoubtedly affect the content of the information in the speech market, do not provoke a Free Speech Clause analysis, because the access criteria do not refer to speech directly. By contrast, SBU secrecy clauses implicate the free speech guarantee because their terms limit speech directly. The cases indicate that only a government purpose to select and present information of a particular appropriateness or quality can justify imprecise criteria to evaluate the private speech selected. The scientific research funding to which the government attaches SBU secrecy clauses does not have as its purpose the presentation of private speech to the public in a compilation or otherwise with the imprimatur of a government judgment about quality.[192] The use of such a clause thus cannot be justified as an explicit selective speech restriction.[193]

---

192. By contrast to contracts to fulfill instrumental government purposes, some grant funding has information dissemination as a goal. NORRIS, *supra* note 4, at 3 n.4 ("Although the specific charge to the Task Force was to identify restrictive language in both contracts and grants, a review of the submissions indicates that, with only a few exceptions, all the restrictions were with respect to contracts."). Government agencies have thus far not sought to impose SBU secrecy clauses in this realm. When dissemination of the product of funded research is a purpose of the program, the government could perhaps impose a requirement that it receive and evaluate information produced by the research before the researcher presents it to the public as the product of government funding. The program's purpose would be to inject into the public realm scientific research that the government deems "appropriate," meaning that it does not present a national security danger. The reach of the government review would be only into the product of the program, and the review would effectuate the program's purpose of mixing the government's quality judgment with private speech to present a particular selection of material to the public. This type of program would not, however, justify the current SBU secrecy clause, which extends to publications that are not the product of the program.

193. Although the selectivity of scientific funding does not justify access conditions that directly limit private speech, the government can, as with any decision, constitutionally consider impacts beyond the explicit scope of the project in allocating funding. While the government cannot know exactly what information will result from a research project, it can consider the national security danger that information from a project might pose when it awards funding, and even without explicit congressional direction agencies could, depending on the scope of their statutory authority, do the same. Political accountability serves as a check on the government's decision to use a particular factor in its decisionmaking. Congress's decisions to condition funding of the arts and of library Internet connections according to "decency" generated broad public debate. *See* Alicia M. Choi, *National Endowment for the Arts v. Finley: A Dispute Over the "Decency and Respect" Provision*, 32 AKRON L. REV. 327, 327 (1999) ("Since Congress incorporated the 'decency and respect' provision into the [NEA] guidelines, the NEA has suffered intense scrutiny and criticism from the public.").

D. Other Considerations

The foregoing analysis demonstrates that the cases involving program conditions do not give the government unlimited discretion to restrict the speech of researchers who receive funding. Rather, the constitutional rule that prohibits viewpoint discrimination among program participants applies to the program of funding scientific research. This conclusion confirms what the employee and contractor cases strongly suggest: a system of SBU information controls must contain precise definitions linked to identified levels of national security danger that limit the discretion of program administrators to engage in viewpoint discrimination. Beyond this requirement, the program conditions cases indicate that SBU information controls that limit the content of private participant speech, as opposed to its viewpoint, may be constitutional when the government's interest in protecting national security supports them. The employee and contractor cases indicate that even when the government asserts a legitimate interest in controlling private speech to protect national security, a balance between the government and the free speech interests will determine the constitutionality of particular controls. Those cases provide some details to factor into this balance. The program conditions cases offer additional considerations that are particularly relevant in determining the constitutionality of SBU secrecy clauses.

1. Accountability

Most evident in the cases involving government assistance to speech is a constitutional requirement that the government stand politically accountable for the extent to which it influences the content or viewpoint of private speech. Ensuring accountability is important because of the particular danger to democracy that government subsidized private speech presents. The danger is that the government's influence will be invisible.[194] The government can engage in viewpoint discrimination in its own speech, because when government officials or agencies speak, the government source is obvious and the public can evaluate the content of the speech with the identity of the speaker in mind. The Supreme Court has said that the government can "promote its own policies or . . . advance a particular idea, [because] it is, in the end, accountable to the electorate and the political

194. Planned Parenthood of South Carolina, Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) (opinion of Michaels, J.) (obscuring the government's role in promoting a message on specialty license plates "thwarts 'the rationale behind the government's authority to draw otherwise impermissible viewpoint distinctions in the government speech context,' namely, 'the accountability inherent in the political process.'") (citation omitted).

process for its advocacy."[195]

When the government speaks through private agents, on the other hand, even if those agents are carrying out a government program, the government source is less obvious. Listeners may be confused about the source of the speech, and this confusion may work to the government's persuasive advantage. The government can hide its responsibility for the message, or it can deliver the message in other ways, creating the impression that independent private speakers have adopted the message as their own.[196] These effects skew the balance of viewpoints in the marketplace of ideas,[197] undermining citizens' ability to evaluate and criticize the messages and policies of the government they have elected.

Accountability is the principle that grounds the government's ability to discriminate according to viewpoint or to employ imprecise criteria when it presents private speech to the public. The same type of accountability should ground a government decision to keep private information secret. The definitions and procedures of the classification system render the government accountable for its administration of that system. When it imposes nondisclosure or prepublication review requirements to protect classified information, the redacted information in private speech must be traceable to information held by the government that has been determined by a government official to meet standards that demonstrate a threshold level of national security danger. The accountability principle suggests that these same sorts of safeguards must exist if the government seeks to suppress SBU information.

2. Scope of Program Condition

Another consideration in evaluating a funding condition is its reach into the participant's private speech. In *FCC v. League of Women Voters of California*,[198] the Supreme Court invalidated a condition of public broadcast funding that prohibited recipient stations from "editorializing." The Court

---

195. Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 235 (2000).

196. *See, e.g.*, John Files, *Bush's Drug Videos Broke Law, Accountability Office Decides*, N.Y. TIMES, Jan. 7, 2005, at A16 (reporting the Government Accountability Office's finding that the Bush administration's videos detailing the effects of drug use among young people were illegal "covert propaganda" because they did not identify the government as the source of the materials); Robert Pear, *White House's Medicare Videos Are Ruled Illegal*, N.Y. TIMES, May 20, 2004 (same with respect to Bush's administration's Medicare promotional videos).

197. David Cole, *supra* note 73, at 705 ("The problem with both [government speech suppression and selective support of private speech] is their skewing effect on public debate.").

198. 468 U.S. 364 (1984).

later distinguished this case in *Rust v. Sullivan*, noting that it "placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[199] It was crucial to the Court in *Rust* that the grantees in *League of Women Voters* could not "segregate . . . activities according to the source of . . . funding."[200] By contrast, recipients of family planning funds in *Rust* remained "free . . . to pursue abortion-related activities when they are not acting under the auspices of the [federal] project."[201]

The *Rust* decision was itself distinguished in another case that turned on the scope of a program condition. That case, *Board of Trustees of Leland Stanford Jr. University v. Sullivan*,[202] involved the withdrawal by the National Heart, Lung, and Blood Institute of the National Institutes of Health of a proffered five-year contract with Stanford Medical School to perform artificial heart research after the school refused to agree that it would submit any proposed release of preliminary results for prepublication review.[203] The court noted, and the government conceded, that the prepublication review procedure constituted a prior restraint that the government could not impose by means of regulation on private researchers not funded by a government grant or contract.[204] The question then became "whether the grant of public funds takes the present situation out of the category of impermissible suppression of speech."[205] The court rejected the government's claim that the university researchers' free speech rights should be determined as if they were government employees on the theory that the government could have hired scientists as employees to do the research.[206] Instead, the court looked to

---

199. Rust v. Sullivan, 500 U.S. 173, 197 (1991) (emphasis in original).

200. *Id.* The Court continued, "We expressly recognized, however, that were Congress to permit the recipient stations to 'establish "affiliate" organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid.'" *Id.* (quoting *League of Women Voters*, 468 U.S. at 400); *see also* Regan v. Taxation With Representation of Washington, 461 U.S. 540, 552-553 (1983) (Blackmun, J., concurring) (approving the prohibition of substantial lobbying by tax-exempt charities on the ground that they could establish lobbying affiliates).

201. *Rust*, 500 U.S. at 198.

202. 773 F. Supp. 472 (D.D.C. 1991).

203. *Id.* at 474. The specific terms of the clause required researchers to give 45 days' advance notice that they intended to publish preliminary findings, and, if the contracting officer objected, to give the officer an additional sixty days to respond to the researcher's written claim.

204. *Id.* at 475.

205. *Id*.

206. *Id.* at 475 n.8 (noting that such "an argument could be made with respect to almost any activity, and its acceptance would in practice erode First Amendment freedoms on the widest scale.").

cases addressing speech conditions on government benefits.

Noting the "confusion among [the cases,]"[207] the court applied and distinguished the Supreme Court's holding in *Rust* to find the proposed secrecy clause overbroad, in that it restricted researchers' speech outside the scope of the project.[208] Although the clause referred to research results that were a part of the project, the court found that it effectively restricted any speech relating to artificial heart research that the scientists undertook during the five-year life of the contract, and perhaps after, even when they were not doing project work.[209] The court also found the terms of the clause vague, permitting contracting officers unfettered discretion to intrude on the specially protected sphere of free expression within the university.[210] The court questioned the government's asserted public health grounds for requiring prepublication review, as well.[211] While the court acknowledged its obligation to follow *Rust*, it noted that a broad reading of the Supreme Court's decision in that case "would be an invitation to government censorship wherever public funds flow, and . . . present an enormous threat to the First Amendment rights of American citizens and to a free society."[212] According to the court, "*Rust* is consistent with a decision to allow Stanford to use its own judgment on when and what to publish, notwithstanding that its research is supported with federal funds.[213] The appellate court dismissed the government's appeal as moot.

Although SBU secrecy clauses explicitly prohibit disclosure of information provided or produced as part of the project, they also have an impact on private speech outside the project. While researchers theoretically should be able to segregate their speech in order to omit SBU information that relates to the project, as a practical matter project information may provide

---

207. *Id.* at 475.

208. *Id.* at 476.

209. *Id.* at 476 n.13 ("Defendants' ban on preliminary reporting could not validly be defended on the basis that it is tied to the heart research program rather than the researchers, for the latter . . . would be precluded from speaking or publishing about artificial heart research even on their own time. Any attempt to examine such speech or publication with a view to determining whether or not the information came to these scientists as a consequence of their work on the federally-financed project or from their general familiarity with the subject would require such intrusive examination into thought processes that it could not conceivably be undertaken. It should be noted in this connection that Dr. Oyer has worked for almost twenty years on the development of a self-contained artificial heart device.").

210. *Id.* at 477.

211. *Id.* at 477 n.16 (rejecting the claim that restricting the speech of Stanford scientists is necessary to protect the public from false commercial claims, and rejecting the legitimacy of the government's expression of concern about "protecting prospective patients from unwarranted hope.").

212. *Id.* at 478.

213. *Id.* at 479.

necessary building blocks for future research. In the publication of that research SBU information may be densely intermingled with information gleaned without government sponsorship. This intertwining of project and non-project speech in the context of scientific research must weigh in the balance between the government's interest and free speech concerns.

3. Government Power

Other relevant considerations affecting the constitutional analysis of the SBU clause include the nature of the government benefit and the likely impact of the access condition on speakers and the public audience. That impact may be measured in part by the government's power over the means of communication at issue.[214] The requirement that government hold open property that has traditionally been used for public discourse stems in part from this consideration. The same concern prompted the Supreme Court to recognize that, despite the government's broad discretion to structure its own programs, "censorship" of the mail according to either content or viewpoint would raise "grave constitutional questions."[215]

Not many speech opportunities are as government-dominated as traditional gathering places or the mail.[216] Still, when the government exercises substantial control over a discrete type of speech opportunity, the importance of content-based access conditions will be magnified by the extent of its control. Justice Souter, dissenting in a recent Supreme Court case, quoted a district court decision that invalidated an NEA funding condition,[217] arguing that the "decency and respect" condition would have a particularly dangerous "chilling effect" on artists because of "practical realities of funding in the artistic community."[218] Not only does NEA "occup[y] a dominant and influential role in the financial affairs of the art world," he said, but because NEA grants require private matching funds and create prestige that may allow artists to gain private support for future projects, "NEA's funding

---

214. *See* Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 56 (1988) (asserting that the unconstitutional conditions doctrine acts as a check on government monopoly of public resources, including speech forums).

215. Hannigan v. Esquire, Inc., 327 U.S. 146, 155-156 (1946) (invalidating on statutory grounds a content-based condition on access to the mail system).

216. In fact, the mail is becoming less government-dominated, as alternatives, such as other carriers and e-mail, consume parts of the market.

217. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991) (holding that a requirement that NEA grantees certify in writing that no funds would be used on "obscene" projects was unconstitutionally vague).

218. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 621 (1998) (Souter, J., dissenting).

involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors."[219]

This consideration forms part of the background for evaluating the constitutionality of SBU information secrecy controls. Although the government is not the only funder of scientific research, its market power, especially with respect to university scientists who conduct basic research, is substantial. This means that information suppressed by the government is unlikely to be supplied by other sources, and to the extent that government administrators have the discretion to suppress information on unauthorized grounds, those decisions may significantly skew the marketplace of scientific ideas. While industry, the entity that funds much other scientific research, may also be prone to secrecy,[220] the government has a special constitutional responsibility to keep channels of public communication open. This responsibility, combined with the impact of government action that suppresses speech, weighs against broad government discretion to edit private scientific speech as a condition of government funding.

4. The Special Free Speech Role of the University

The university plays a special role in preserving and promoting speech free of government influence. The Supreme Court has emphasized the role of the university as a "vital center[] for the Nation's intellectual life" that should be free from "the chilling of individual thought and expression."[221] The Court has noted this special role of the university in the context of both created forums[222] and other funding conditions.[223] In *Rust v. Sullivan*, the Court explicitly cautioned that its decision upholding an abortion counseling restriction on family planning funds was "not to suggest that funding by the

---

219. *Id.* at 621-622.

220. *See* Barry Meier, *Contracts Keep Drug Research Out of Reach*, N.Y. TIMES, Nov. 29, 2004, at A1 (describing secrecy clauses imposed by drug companies on academic researchers).

221. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 835-836 (1995); *see also* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 237 (2000) (Souter J., concurring) ("Our understanding of academic freedom has included . . . liberty from restraints on thought, expression, and association in the academy . . . .").

222. *See Rosenberger*, 515 U.S. at 835 ("[The danger to liberty] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.").

223. Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."

Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."[224]

The government's imposition of SBU secrecy clauses raises additional constitutional concerns in the university setting. The government has broad power to keep its own information secret and to require its employees to keep that information secret. It can conduct scientific research intramurally, and it can exercise great control over dissemination of the resulting information. But the structure of such internal controls makes a difference under the Constitution, because it leaves the government politically accountable for its actions, at least to some degree.

This consideration suggests that SBU secrecy controls that reach into university discourse pose a particular danger because of the special role of the university in promoting innovation and expression outside of government control, and because, with respect to scientific information in particular, the university has a special role in conducting research for the purpose of expansion and dissemination of knowledge. Although the government shapes expression on university campuses in many ways, the expectation is that expression not identified as the government's will be unconstrained. The special role of the university thus must weigh in the constitutional balance.

III. RESTRUCTURING GOVERNMENT CONTROLS OVER SBU INFORMATION IN SCIENTIFIC RESEARCH CONTRACTS

General Free Speech Clause doctrine and the rules specific to secrecy clauses in government employment contracts suggest that the government can only restrict private speech if the information it contains is classified. As a bright line rule, this conclusion has some appeal. Nevertheless, the current security environment, including the possibility that potentially dangerous information will unexpectedly result from funded research, makes it difficult and perhaps counterproductive to try to classify all the information that the government may have a legitimate national security interest in keeping secret. This is true of the government's own information and also of information contained in the speech of private parties who receive government funding. Consequently, the government may be able to assert a strong enough national security interest in some types of SBU information and some types of scientific research to impose some level of secrecy on it.

The details of a constitutional system for protecting SBU information will depend in part on the government's careful assessment of its own interests. Bearing in mind the analysis of constitutional doctrine outlined above and the

224. *Id.* at 199.

apparent defects in the current SBU secrecy clause, such an assessment might suggest a new system of SBU information controls with the following characteristics:

A. A Uniform System with Precise Definitions of Types of SBU Information Linked to Identified Levels of National Security Danger

Courts have sometimes upheld the government's right to suppress classified information contained in private speech because the classification system establishes reasonably clear definitions that apply across government agencies. These definitions require administrators to determine that particular information poses a real and substantial danger to national security. Clear definitions limit an administrator's ability to suppress private speech for reasons not linked to national security, both by channeling the initial decision and by allowing for effective judicial review. Uniform definitions across government agencies add legitimacy to particular decisions as administrators must justify them with reference to the entire structure.

To satisfy the Constitution, a system for protecting SBU information must at a minimum have each of these features. One possibility would be to revise the current classification system definitions to include certain types of SBU information.[225] Another would be to devise a parallel system of SBU protection, with a structure that resembles the current classification system. Definitions that are uniform, precise, and explicitly linked to national security danger would not guarantee that a system of SBU information protection would comport with the Constitution. They would, however, be a necessary first step.

B. Procedures to Ensure That Particular Information Is Properly Categorized as Sensitive But Unclassified

The system for protecting classified information includes procedures calling for internal and judicial review of the initial classification decision, and ongoing review to ensure that classification is still appropriate. A government agency physically possesses information designated as classified, as well, which enables concerned employees to question improper classification decisions. These same procedures should be part of a system for protecting SBU information.

---

225. *See* HORIZONTAL INTEGRATION, *supra* note 23 (containing recommendation of the Defense Department's JASON scientific advisory panel that the present system for information security ought to be "radically changed," and proposing an alternate model that seeks to maximize information flow up to a determined level of acceptable risk).

Although an SBU system might not have the same security clearance and handling requirements as the classification system, it should have parallel procedures to protect the free speech rights of individuals. These procedures should ensure that SBU information is properly categorized and periodically reviewed. They should also provide government accountability for keeping such information secret. In applying such a system to the funding of scientific research, the responsibility must be on the government agency to identify SBU information that it discloses in support of a project, as well as information created by the project that it considers to be SBU. As to newly created information, the government must take possession of it, label it, and hold it according to the established SBU information control structure. Only in this way can the continuing checks that protect the free speech right become a part of the structure.

C. SBU Information Controls That Acknowledge and Include the Value of the Free Flow of Scientific Information and That Evidence a Commitment to Use the Least Speech-Restrictive Means to Protect the National Security Interest

The government's ability to suppress information depends upon a balance between its particular government interest and the public interest in free speech. Both of these interests should be apparent in an SBU information control system. Definitions should be not only precise, but narrow, imposing secrecy only on the class of SBU information that poses a significant national security danger. The means of enforcing the secrecy interest should also be the least restrictive necessary to fulfill the government's legitimate interests. In particular, an SBU information control system incorporates the public interest in the free flow of information when it employs the mechanism of prepublication review selectively and sparingly in circumstances where less onerous means of control, such as nondisclosure pledges or requirements of prepublication review and comment, as opposed to approval, cannot protect the government's national security interest.

CONCLUSION

The government's purpose in imposing the current SBU secrecy clauses on private scientists undertaking funded research is legitimate and perhaps even compelling. It seeks to protect the national security by ensuring that our enemies do not have access to information that might help them to harm us. But purpose alone does not demonstrate the constitutionality of a government action. The mechanism by which the government achieves its secrecy purpose must be crafted to serve the government interest without unnecessarily undermining free speech. General free speech principles, as

well as those addressed specifically to secrecy clauses and speech-limiting conditions on government programs, indicate that the current SBU secrecy clause intrudes too far on the free speech right. Its problematic features are its imprecise definitions, its authorization of enforcement by prepublication review, and the fact that it is not part of a system that links protected information to a clear national security danger.

The government's constitutional authority to prevent the release of SBU information in private expression is, therefore, uncertain. Yet recent changes in the security environment may permit the government to impose secrecy requirements on some amount of "sensitive" information, even though it is not contained within the formal classification system. A balance of the government's national security interest with the free speech right must determine the extent of this protection. At a minimum, a constitutional system to protect SBU information must include features that resemble those of the classification system that are designed to protect the free speech right. These include precise definitions of types of SBU information tied to a definite national security interest, procedures to ensure that particular information is properly categorized and kept secret, and selective and limited use of prepublication review. These features provide the beginning of what must be an ongoing adjustment in the balance between secrecy and openness with respect to government funded scientific research.

* * *