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THE EXTRAORDINARY RESTRICTIONS ON THE CONSTITUTIONAL RIGHTS OF CENTRAL INTELLIGENCE AGENCY EMPLOYEES: HOW NATIONAL SECURITY CONCERNS LEGALLY TRUMP INDIVIDUAL RIGHTS

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Employees of the Central Intelligence Agency (CIA or "the Agency") engage in activities designed to protect the nation's security and, at heart, its Constitution. Ironically, however, CIA employees, by dint of their employment with the Agency, are required to forego many of the very constitutional protections they fight so hard to protect. U.S. law and Agency regulations restrict the ability of CIA employees to engage in political activity, take outside employment, or travel internationally. The CIA significantly invades the privacy of its employees by requiring extensive and intrusive background checks of its employees including blood tests and polygraph examinations. The Agency even goes so far as to limit who its employees can befriend, date, and marry. To top it all off, CIA employees are greatly precluded from contesting these limitations as Congress has prohibited them from forming unions or going on strike, and the Judiciary has greatly limited the ability of Agency employees to bring claims in U.S. courts. Failure to comply with any of the above restrictions can result in disciplinary action and even termination of employment. CIA employees recognize, upon voluntarily joining the Agency, that their constitutional freedoms will be restricted to protect national security; yet few Americans realize the breadth and depth of those restrictions. This article examines the legality of the various restrictions imposed on CIA employees. It concludes that virtually all pass constitutional muster but that one–prohibiting employees from maintaining a substantial and personal relationship with any citizen from certain designated nations–could raise legal concerns.

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INTRODUCTION

The sacrifices that employees of the Central Intelligence Agency make in defense of this country are well known. The 102 stars on the wall of the Agency's entryway represent each of the Agency's employees killed in the line of duty.[1] Seven of these stars were recently added to reflect the CIA officers killed when a suicide bomber detonated his belt of explosives at a CIA base in Afghanistan.[2] Even if not asked to give the ultimate sacrifice to our nation,

1. CENT. INTELLIGENCE AGENCY, *Headquarters Virtual Tour*, https://www.cia.gov/about-cia/headquarters-tour/virtual-tour-flash/index.html (last visited Nov. 13, 2011).

2. Joby Warrick & Pamela Constable, *CIA Base Attacked in Afghanistan Supported*

CIA officers are often asked to live overseas in locations and under circumstances which would often not be described in the most glowing of terms. At best, this requires an Agency officer to uproot himself or herself and his or her family from the familiar to the unfamiliar; at worst, it places the officer and sometimes the officer's family in unpleasant, inhospitable, and sometimes exceedingly dangerous locales. Of course, there are also the long hours and high stress of the job. And let's not forget the pressure to succeed, as failure can lead to catastrophic results.

Less well-known are the sacrifices all Agency employees make with regard to their personal rights and privileges. Basic freedoms and protections so enshrined in the U.S. Constitution that most Americans take them for granted–freedom of speech, right to privacy, freedom of travel, due process, equal protection–are dramatically curtailed for the CIA employee, usually in the name of protecting national security. Indeed, it could be argued that Agency employees are more restricted in their ability to employ their constitutional rights than possibly any other group of citizens of this country, save perhaps prison inmates. It is thus the height of irony that the very CIA officers the nation so relies upon to defend our liberties and freedoms are also the very Americans most deprived of the protections such basic rights afford.

To be fair, CIA employees recognize that they will be sacrificing certain rights upon joining the Agency. Employment with the CIA is voluntary; nobody is drafted against their will. Further, the CIA notifies its employees before hiring them of at least some of the sacrifices and restrictions that come with the job. However, the sheer magnitude of the limitations placed on Agency employees undoubtedly comes as a shock upon commencement of work. Certainly, there is a widespread understanding that classified information may not be disclosed. But restrictions on outside employment? Personal foreign travel? Dating? Newly hired Agency employees likely do not expect such limitations.

The mere fact that CIA employees, and the public at large, may be surprised by these restrictions, however, does not make them illegal by any means. It is well recognized that the United States Government is able to restrict the constitutional rights of its employees in ways that, if imposed on the general public, would be clearly illegal.[3] As the Supreme Court recently stated, in laying out

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Airstrikes Against Al-Qaeda, Taliban, WASH. POST, Jan. 1, 2010, at A01; Press Release, Cent. Intelligence Agency, Statement on CIA Casualties in Afghanistan, (Dec. 31, 2009), *available at* https://www.cia.gov/news-information/press-releases-statements/cia-casualties-in-afghanistan.html.

3. Rutan v. Republican Party of Ill., 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) ("The restrictions that the Constitution places upon the government in its capacity as law-

the general principles with regard to the ability of the government to restrict the rights of its employees:

> First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.[4]

CIA employees have the added burden of limitations imposed by Congress and the courts due to the need to protect national security. The Director of the CIA also possesses extraordinary powers, established by statute, with regard to CIA employees such as firing CIA employees without any specific cause or proof–in order to protect that security.

This article seeks to explore the fascinating interplay between employee rights and government restrictions in the area of national security by evaluating the multitude of restrictions imposed on Agency employees. Part I of this article discusses the incredible statutory power of the CIA's Director to terminate Agency employees to protect national security. Due to this statutory power, the Judiciary typically accords incredible deference to the Director's decisions.

There is, of course, a considerable difference between "deference" and "rubber-stamping," and the Judiciary's radar is particularly attuned when it comes to the protection of constitutional rights. Nonetheless, in the area of restrictions on CIA employees, the courts almost always tilt towards protecting national security over protection of constitutional rights. Thus, the remainder of the article provides a detailed analysis of the limitations on constitutional rights of CIA employees in seven particular contexts. Specifically, Part II explores limitations on the ability of CIA employees to engage in political expression. Part III investigates the Agency's

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maker, *i.e.*, as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees.").

4. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600 (2008). *See also* Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence*: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 87-88 (2006) (describing the doctrine of unconstitutional conditions as the limits imposed by the Supreme Court on the government's ability to condition government benefits, including continued employment, in exchange for the employee's forfeiture of constitutional rights).

ability to preclude friendships, love interests, and even marriage of its employees. Part IV assesses the Agency's ability to enjoin outside employment, require its employees to submit résumés they wish to use to seek future employment, and even restrict post-employment opportunities. Part V reviews the Agency's extensive ability to conduct background investigations of prospective and current employees, as well as engage in work place searches of employee work areas and belongings. Part VI describes limitations on the personal, international travel of CIA employees. Finally, Parts VII and VIII discuss the limitations on the ability of Agency employees to seek to change or challenge these restrictions by discussing how Agency employees are prohibited from unionizing or striking and restricted from access to the courts.

For each category I explain the restriction imposed on the Agency employee and then discuss in detail the basis for the legality of that restriction. Not all of these restrictions are exclusive to the CIA. Employees of other U.S. intelligence agencies are subject to certain of these restrictions; military and diplomatic personnel must contend with others. However, when evaluated as a whole, an argument can certainly be made that no employee in the United States Government is more limited in his or her constitutional rights than the CIA officer.

I. EXTRAORDINARY POWER OF THE DIRECTOR OF THE CIA

The National Security Act of 1947 provides the Director of the Central Intelligence Agency (DCIA or Director) with extraordinary powers to terminate the employment of CIA officers. As that Act provides:

> Notwithstanding the provisions of any other law, the Director of the Central Intelligence Agency may, in the discretion of the Director, terminate the employment of any officer or employee of the Central Intelligence Agency whenever the Director deems the termination of employment of such officer or employee necessary or advisable in the interests of the United States.[5]

This authority of the DCIA to terminate an Agency employee cannot be tempered by statements or promises made by other (even senior) Agency employees nor by language in Agency handbooks or Agency regulations. Any such limitations on the DCIA's power to terminate would be at odds with the legislative intent of

5. National Security Act of 1947 § 104A(e)(1), 50 U.S.C. § 403-4a(e)(1) (2006).

the National Security Act.[6] Thus, even if an Agency supervisor made promises regarding continued employment or an Agency regulation or handbook expressed a limitation to the DCIA's termination authority, such statements could not, in fact, limit the DCIA's authority and would not create a legally reasonable basis for an expectation of continued employment.[7] In addition, it is irrelevant whether or not the employee being terminated or the employee making promises of continued employment actually knew of the DCIA's authority or its extent.[8]

Courts have construed this authority of the DCIA as providing the Agency's Director with an extensive ability to terminate the employment of a CIA officer. As the Supreme Court has noted, this language authorizes the DCIA to terminate employment whenever *the DCIA* deems it necessary to protect U.S. interests, "not simply when the dismissal *is* necessary or advisable to those interests."[9] Thus, in the Court's view, "[t]his standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review."[10]

Such deference emanates from several sources. First, it is recognized that protecting national security interests falls primarily to the Executive Branch, not the courts, as the Constitution gives the Executive Branch primacy in foreign affairs, including national security matters.[11] Second, the courts have repeatedly acknowledged that the Judiciary typically lacks the expertise to assess national security matters, as the experts on that subject matter are usually senior members of the Executive Branch and in particular the DCIA.[12] Most critically, it is recognized that "the Agency's effi-

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6. Doe v. Gates, 981 F.2d 1316, 1320-21 (D.C. Cir. 1993) (noting that provisions in Agency handbooks do not limit the DCIA's authority to terminate employment and "any employee's statements to the contrary have no binding force").

7. *Id.* at 1321.

8. *Id.* ("Federal employees are chargeable with knowledge of governing regulations or statutes . . . .").

9. Webster v. Doe, 486 U.S. 592, 600 (1988).

10. *Id.*

11. Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (describing how courts have consistently "been reluctant to intrude upon the authority of the Executive in military and national security affairs"); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936) (noting the inherent authority of the President to conduct foreign affairs, per the Constitution); United States v. Truong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980) (stating that the Executive Branch is "constitutionally designated as the pre-eminent authority in foreign affairs").

12. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766 (1972) (asserting "the exclusive competence of the Executive Branch in the field of foreign affairs"); *Truong Dinh Hung*, 629 F.2d at 913-14 (stating that while the Executive Branch, including the intelligence agencies, has "unparalleled expertise" in national security matters, the courts are "unschooled" and "largely inexperienced" in such matters); Stillman v. CIA, 517 F. Supp. 2d 32, 39 (D.D.C. 2007) (noting that the deference given to the government with regard to classification decisions stems from "the recognition that the government is in the best position to judge the harm that would result from disclosure").

cacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees."[13]

Judicial hyperbole aside, such deference to the DCIA is nonetheless not absolute. Specifically, the Supreme Court has made it clear that the National Security Act does not trump the U.S. Constitution. For example, the Court has repeatedly "made clear that public employees do not surrender all their First Amendment rights by reason of their employment"[14] and therefore a public employee cannot be fired "for exercising her constitutional right to freedom of expression."[15] As the Court has held, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[16] The Court continued, "[w]e require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[17] Thus, "a constitutional claim based on an individual discharge [of a CIA employee] may be reviewed by the District Court."[18] As discussed in the introduction, that review typically involves balancing the constitutional rights of the employee with the needs of the Agency (and the DCIA) to protect national security. The following sections will explore that balancing act in the context of numerous Agency–and U.S. Government–imposed restrictions on the constitutional rights of CIA employees.

II. RESTRICTIONS ON ENGAGING IN POLITICS AND POLITICAL EXPRESSION

Congress has expressly stated that government "employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation."[19] Despite such a lofty declaration, Congress has nonetheless proceeded to vastly limit the ability of government employees to actually participate in the political process, and the courts have typically upheld such laws.

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13. *Webster*, 486 U.S. at 601. *See also* Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)).

14. Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (citing four Supreme Court precedents).

15. Rankin v. McPherson, 483 U.S. 378, 383-84 (1987). *See also* Connick v. Myers, 461 U.S. 138, 142 (1983) (noting that continued public employment cannot be conditioned "on a basis that infringes the employee's constitutionally protected interest in freedom of expression").

16. *Webster*, 486 U.S. at 603.

17. *Id.*

18. *Id.* at 603-04.

19. 5 U.S.C. § 7321 (2006).

Concern about the politicization of civil servants reaches all the way back to the beginning of our nation's history with Thomas Jefferson issuing an edict that government officers should not seek to influence the votes of others nor engage in politics.[20] However, it was not until 1883 that any actual rules on political activity by government workers were put into effect. In that year, President Chester A. Arthur issued a set of rules which were to govern the U.S. civil service; the first of these rules provided that executive service officers should not use their office to coerce anyone else's vote nor interfere in an election.[21] The rules governing civil servants were amended over the subsequent decades, eventually becoming what is known as the Hatch Act, enacted in 1939 and named after Senator Carl Hatch–who was the Act's chief sponsor.[22] Revised and amended over the years, the current version of the Hatch Act spells out the limitations on the political expression of U.S. government employees today.[23]

The Hatch Act divides federal employees in two categories: "less restricted" and "further restricted."[24] It should come as no surprise that employees of the CIA fall within the latter category.[25] Both categories of employees, with only a few exceptions not relevant here, are prohibited from engaging in political activity while on duty, while in any room or building used for discharging government duties, while wearing any uniform or official insignia indicating the employee's office or position, or while using any government vehicle.[26] These restrictions are pretty strictly interpreted. Thus, for example, the Act prohibits government employees from placing a partisan political bumper sticker on any government-owned vehicle; engaging in any political activities outside

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20. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973). The heads of the executive departments during Jefferson's presidency responded to Jefferson's directive by issuing the following order: " '[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.' " *Id.*

21. *Id.* at 558.

22. *See id.* (discussing the history behind the Hatch Act); Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225 (2005); Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775 (2000).

23. Bloch, *supra* note 22, at 228. The most significant amendment to the Hatch Act came in 1993, when the Act was actually made less restrictive for certain federal employees. *Id.* at 234-35.

24. *Id.* at 238-39.

25. 5 U.S.C. § 7323(b)(2)(B) (2006). CIA employees are not the only "most restricted" employees. Employees of thirteen other agencies, including the Federal Bureau of Investigation, the National Security Agency, and the Defense Intelligence Agency, also fall within this category of employee. *Id.*

26. 5 U.S.C. § 7324(a) (2006).

the office while wearing a patch, pin, or any other insignia of his or her agency; and wearing partisan political buttons or displaying any partisan signage while on duty or in one's office or cubicle at work.[27]

Additional restrictions apply to "further restricted" employees, such as CIA officers. Thus, while "less restricted" employees are permitted to take an active part in political management or in political campaigns with certain exceptions,[28] "further restricted" employees cannot.[29] Thus, CIA employees cannot run for a partisan political office; take an active part in managing a candidate's political campaign for partisan political office; endorse or seek votes for or against a candidate if done in concert with a candidate or a political party; serve as an officer in or delegate to a political party; address a political rally if done in concert with a partisan candidate or party; solicit, accept, or receive political contributions; or actively participate in any form of fundraising for a candidate for a partisan political office or for a political party.[30]

So, what *can* CIA employees do? So long as the political activity does not violate any of the above restrictions, a CIA employee can vote, express his or her political opinions to others, participate in non-partisan activities, be a member of a political party, attend political rallies and events, make a financial contribution to a candidate or political party, and even (oh the excitement) place a sign in his or her yard supporting a candidate for partisan political office.[31] As one commentator described it, federal employees who fall into the further restricted category "are prohibited from engaging in almost all political activities other than voting and expressing their views in private."[32] Any violation of any provision of the Hatch Act, no matter how miniscule, requires a *minimum* penalty of a 30-day suspension from duty without pay and may include termination of federal employment.[33]

The Supreme Court has twice evaluated the most controversial facet of the Hatch Act, that is, the prohibition on the ability of "further restricted" government employees to take an active part in political management or political campaigns. In both cases, the Court found the prohibition to be constitutional.[34] The more rele-

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27. 5 C.F.R. §§ 734.306 (examples 6, 10, and 16) and 734.406 (examples 4 and 6) (2011). *See also* Bloch, *supra* note 22, at 240-46 (listing activities prohibited by the Hatch Act).

28. 5 U.S.C. § 7323 (2006).

29. 5 U.S.C. § 7323(b)(2)(A) (2006).

30. 5 C.F.R. §§ 734.408-734.412 (2011).

31. 5 C.F.R. §§ 734.402-734.405 (2011); 5 U.S.C. § 7323(c) (2006).

32. Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 846 (1996).

33. 5 U.S.C. § 7326 (2006).

34. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973);

vant case, and indeed the most recent Court decision on the Hatch Act–*U.S. Civil Service Commission v. National Ass'n of Letter Carriers* ("*Letter Carriers*")–analyzed the Act under the balancing test articulated by the seminal Supreme Court case of *Pickering v. Board of Education*.[35] In *Pickering*, the Court held that, in determining whether the government can restrict the free speech of its employees, the courts are to seek "a balance between the interests of the [public 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."[36]

Applying this balancing test to the Hatch Act, the Court in *Letter Carriers* focused almost exclusively on the government's interest " 'as an employer, in promoting the efficiency of the public services it performs through its employees.' "[37] The Court found that there was a deepening sense that government administration could be undermined if government personnel are actively partisan; that government service would be damaged if government promotions or favor were based upon political connections, rather than meritorious effort; and that "the political influence of federal employees on others and on the electoral process should be limited."[38]

The Court then held that the Hatch Act directly addressed these concerns. First, the Hatch Act promoted one of the great ends of government, that is, the impartial execution of the law. As the Court noted, it was "fundamental" that government employees "should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party."[39] Prohibiting involvement in political campaigns helped achieve fair and impartial governance. Second, the Hatch Act not only prevented political partiality, but also the appearance to the public of any such impropriety. Third, the Hatch Act helped

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United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). It should be noted that Congress amended the Hatch Act in 1993, well after the Court decided *Letter Carriers*. Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993) (codified as amended at 5 U.S.C. §§ 7321-7326 (2006)). However, the major parts of the Act considered by the *Letter Carriers* Court were not affected by the 1993 amendments, and, in fact, the Act continues to preclude "further restricted" government employees from "tak[ing] an active part in political management or political campaigns." 5 U.S.C. § 7323(b)(2)(A) (2006).

35. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 480 ("The time-tested *Pickering* balance . . . provides the governing framework for analysis of all manner of restrictions on speech by the government as employer.") (O'Connor, J., concurring).

36. *Pickering*, 391 U.S. at 568 (1968).

37. *Letter Carriers*, 413 U.S. at 564 (quoting *Pickering*, 391 U.S. at 568).

38. *Id.* at 557.

39. *Id.* at 564-65.

prevent the creation of political machines. Fourth, it served the goal of helping ensure that gaining employment and promotion in the government would be based on merit, not political affiliation. Fifth, the Hatch Act helped ensure that government employees would not feel compelled to vote a certain way, or assist in a certain political campaign, in order to garner favors.[40] Due to these significant bases, as well as a general judicial deference to Congress to decide how to protect against politicization of government agencies, the Court found the balance to weigh significantly in favor of the government and found the Hatch Act did not violate the First Amendment.[41]

It is worth noting that, subsequent to the decision in *Letter Carriers*, the Supreme Court issued *United States v. National Treasury Employees Union (NTEU)*,[42] which established an alternative balancing test to the one articulated in *Pickering*. The Court in *NTEU* provided that, while the *Pickering* balancing test was to be used to evaluate employment decisions related to individual government employees after they had spoken, a different balancing test applies in situations involving "wholesale deterrent to a broad category of expression by a massive number of potential speakers,"[43] that is, situations in which the government, through rule, regulation or statute, seeks to preclude the speech of employees before such speech has taken place. The Hatch Act clearly falls within the *NTEU* balancing test, rather than the *Pickering* test, as the Act seeks to preclude broad-based speech before it occurs. The Court in *Letter Carriers* obviously did not evaluate the Act under the *NTEU* balancing test, as the *NTEU* decision was not issued until almost twenty years after *Letter Carriers*. Had the Court utilized the *NTEU* test, however, it would have almost certainly come to the same conclusion. Under the *NTEU* test, the government

40. *Id.* at 564-66. One commentator has described the Hatch Act, in pursuing these goals, as a "good government" statute in that it assumes that public employees, if not restricted in their political activities, would allow partisan pressures to overcome their obligations to the public. Congress thus passed the Hatch Act to save public employees from succumbing to such pressures. As the commentator notes, however, the problem with "good government" legislation such as the Hatch Act, is that its creator–Congress–may have itself enacted or amended the Hatch Act due to partisan political pressures. Gely & Chandler, *supra* note 22, at 804-17.

41. *Letter Carriers*, 413 U.S. at 548. *See also* Bloch, *supra* note 22, at 260 ("[T]he *Letter Carriers* Court viewed the Hatch Act as presenting a conflict between obviously important interests of the government and the First Amendment rights of employees, with the government interests sufficient to vindicate the Act."). The Court also found the prohibition on government employees taking an active part in political management or political campaigns was not unconstitutionally vague or overbroad. *Letter Carriers*, 413 U.S. at 568-81.

42. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995).

43. *Id.* at 467. *See also* Harman v. City of New York, 140 F.3d 111, 118 (2d Cir. 1998) (stating that the *NTEU* test is to be used to consider "a blanket policy designed to restrict expression by a large number of potential speakers," rather than to address "an isolated disciplinary action taken in response to one employee's speech").

must demonstrate "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."[44] The five bases enumerated by the *Letter Carriers* Court in support of the Hatch Act[45] would seem to fulfill that requirement, though undoubtedly the government would have to provide additional evidence demonstrating the "necessary impact" that the Hatch Act has had on government operations.

At least one commentator–Anthony Kovalchick–has questioned the Court's conclusion in *Letter Carriers*.[46] Kovalchick asserts that the Court did not seriously analyze, much less question, the bases for the Hatch Act provided by Congress, but merely "acted as a rubber stamp."[47] Further, Kovalchick notes that the concerns expressed in *Letter Carriers* came before the 1993 Amendments to the Hatch Act that liberalized some of the Act's more oppressive provisions; yet many of the potentially harrowing consequences described in *Letter Carriers* did not come true once the Hatch Act's provisions were lessened.[48] Kovalchick's greatest criticism, however, focuses on the Hatch Act's preclusion of government employees running for political office. Kovalchick views this as an attempt by Congressional "incumbents to insulate themselves from electoral challenges from government employees."[49] He believes it to be particularly hypocritical given that under the Hatch Act civil service employees who seek to run for political office must resign from their civil service job, while members of Congress are not required to do so when they run for another elected office.[50] Finally, he notes that interests of Congress in ensuring that public governance is based on merit, not political affiliation, can be achieved by less extreme measures than those established by the Hatch Act.[51]

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44. *Nat'l Treasury Emps. Union,* 513 U.S. at 468 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)). *See also* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (" 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' ") (citations omitted).

45. *See supra* text accompanying notes 39-41.

46. Anthony T. Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW ENG. L. REV. 419, 431 (2008).

47. *Id.* at 432.

48. *Id.* at 441-42.

49. *Id.* at 421.

50. *Id.* at 454.

51. *Id.* at 471-72. Another commentator has questioned how the Hatch Act has been interpreted with regard to the expression of political opinion by a public employee at work. Carolyn M. Abbate, *It's Time to "Hatch" a New Act: How the OSC's Interpretation of the Hatch Act Chills Protected Speech*, 18 FED. CIR. B.J. 139 (2009).

Kovalchick's criticisms have considerable emotional merit. As he correctly notes, the *Letter Carriers* Court did not spend any time focusing on the other side of the balancing test–namely the negative impact on government employees' freedom of expression and right to engage in political affairs created by the Hatch Act.[52] Further, the Act does appear to have instituted a more extreme framework than necessary to prevent the evils of concern to Congress. Nonetheless, his assertions do not carry substantial legal heft. The courts have acknowledged that legislation restricting expression need not be the best nor least restrictive, it must merely suffice under the *Pickering* (or *NTEU*) balancing test.[53] Further, the Court's failure in *Letter Carriers* to evaluate the detriment to the government employee was a brazen oversight, but not an unjust one. The impediments to government employees were fairly obvious from the restrictions imposed by the Hatch Act. The interest of the government to protect the nation from a politicized civil service were legitimate, there was a valid nexus between the Hatch Act's provisions and the government's interests, and the Court appropriately gave deference to the political branches of the government on a matter involving "politics."[54] It was therefore valid for the Court to uphold the Act's provisions. Thus, while the Hatch Act may not be the clearest, best written, nor most narrowly tailored provision on the books, it certainly seems clear that it passes constitutional muster.

III. LIMITATIONS ON FRIENDSHIPS, DATING, AND MARRIAGE – THE AGENCY'S ANTI-FRATERNIZATION POLICY

While many companies, organizations, and government agencies seek to dissuade employees from dating or marrying each other, especially when such romances involve an employee-supervisor relationship,[55] the CIA's "anti-fraternization" policy goes well beyond the norm. Specifically, the CIA requires its employees to in-

52. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

53. *See, e.g.*, Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1443 (D.C. Cir. 1996) (noting that the government's scheme, though possibly overbroad, "restricts no more speech than is 'reasonably necessary' "); Sanjour v. Envtl. Prot. Agency, 56 F.3d 85, 98 (D.C. Cir. 1995) (acknowledging that the *Pickering* test does not contain a " 'least restrictive means' component").

54. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 99 (1947) ("Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.").

55. *See, e.g.*, 5 C.F.R. § 2635.502(a) (2011) (precluding government employees from engaging in a personal relationship which "would cause a reasonable person with knowledge of the relevant facts to question [the employee's] impartiality in the matter."). This is often the basis for precluding government supervisors from dating their employees.

form the Agency of any "close, personal relationship"–romantic or otherwise–that the employee has with any foreign national. This can range from casual dating, to a long-term friendship, to marriage. The Agency then conducts an "investigation" of the foreign national–which is usually fairly limited and non-invasive–and decides, based upon the need to protect national security, whether the relationship can continue. In some cases, this has required employees to sever long-term friendships, end potential romantic endeavors, and even terminate engagements. Failure to end a "tainted" relationship can lead to termination of employment. Thus, in extreme cases, a CIA employee is forced to choose between her job and her fiancé.

In addition, for citizens of a very small number of countries, the Agency does not even bother conducting a case-by-case analysis of the foreign national in question, but rather places a blanket restriction on close, personal contact by CIA employees with all citizens of those nations. Though the reasons for such blanket prohibitions are not specifically articulated, I suspect the regulation reflects two concerns. First, the nations at issue are antagonistic towards the United States and engage in extensive monitoring of their citizens to ensure that they are not interacting with the enemy. As such, it can be presumed that in situations in which a citizen of those countries does interact in a personal manner with an American, such interaction is likely known to, and possibly even at the behest of, the foreign country. Second, due to the antagonism of these countries towards the United States, it would be extremely difficult for the Agency to acquire enough information about the foreign citizen to be able to conclusively determine whether or not a specific individual poses a national security threat.

The Agency's anti-fraternization policies–certainly the "case-by-case" evaluation and to a much more limited degree the "blanket" preclusions–impact virtually every Agency employee. For example, I have a long-time platonic friendship with a female college classmate who is Swedish. Before each visit, I am required to fill out an expansive form indicating the details of our connection as well as information about our intended meeting. This has been going on for the more than ten years I have been with the Agency and has encompassed almost a dozen visits. At this point, the requirement is more inconvenient than anything else; had I been required to terminate my friendship, however, it would fall well beyond inconvenience. Virtually every Agency employee has similar stories.

Courts have reviewed government restrictions on marriage, dating, friendships and similar associations under two broad constitutional theories: the Due Process Clause and the Equal Protection Clause.[56] Title VII of the Civil Rights Act of 1964 provides additional guidance.[57] I will consider in turn both the Agency's case-by-case evaluations and its blanket regulations under each theory.

A. Case-by-case Evaluations

1. Due Process

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[58] Courts have assessed that relationships fall within this Due Process Clause either as a protected "liberty" interest[59] or as an implied right to privacy.[60] In either case, the Supreme Court has held that certain liberty/privacy rights are "fundamental," such as the right to marry, procreate, direct the education and upbringing of one's children, resolve marital issues, use contraception, protect bodily integrity, choose to have an abortion, and decide to refuse unwanted medical treatment.[61] Recently, the Court appears to have added the right to sexual orientation–or at least the right to engage in homosexual acts–to this list,[62]

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56. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (evaluating intimate relationships between homosexuals under both theories).

57. 42 U.S.C. § 2000e-16 (2006) (applying Title VII to federal government employees). As will be discussed later, some courts have asserted that Title VII is the sole remedy for federal government employees alleging national origin discrimination claims, including any claims raised under the Constitution. *See infra* text accompanying notes 114-15. However, as that argument appears questionable, I will address the Constitutional claims as well.

58. U.S. CONST. amend. V. Though the Fifth Amendment applies only to federal government activity, the Fourteenth Amendment guarantees protection against similar action by the states. Cook v. Gates, 528 F.3d 42, 49 (1st Cir. 2008).

59. *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). Some courts have described the "liberty" interest as a type of freedom of association. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618-22 (1983) (describing a "freedom of intimate association"). The legal effect appears to the same regardless of how the courts choose to delineate the "liberty" interest. *Id.* (appearing to use the same criteria as the "liberty" interest based upon the Due Process Clause, discussed in the text accompanying this footnote).

60. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 263-64 (2004) (noting that the U.S. Constitution "does not explicitly mention a right to privacy" but that cases such as *Griswold* and *Roe v. Wade* grounded "the right to privacy . . . in the Due Process Clause of the Fourteenth Amendment").

61. *Glucksberg*, 521 U.S. at 720.

62. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overturning a sodomy law, the Court noted the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in [homosexual] conduct without intervention of the government").

though the matter is not entirely settled.[63] However, the Court has made it clear that it is highly reluctant to add any additional fundamental rights to this list.[64]

If governmental action threatens one of these fundamental rights, the courts apply "heightened protection," allowing the government to infringe on such interests only if " 'the infringement is narrowly tailored to serve a compelling state interest.' "[65] If the government action does not threaten a fundamental right, the courts utilize a rational basis standard.[66] Under this latter standard, the law or regulation at issue "is accorded a strong presumption of validity."[67] The government need not provide any evidence to sustain the rationality of the regulation; rather, " '[t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record."[68] The strength of the individual's interest and the extent of the intrusion on that interest are irrelevant in this analysis.[69] Thus, courts merely evaluate whether the regulations at issue seek to achieve a legitimate governmental purpose, and then whether those regulations rationally

63. *See Cook*, 528 F.3d at 51-52 (listing the numerous diverging viewpoints of courts and commentators with regard to the *Lawrence* case); Witt v. Dep't of the Air Force, 527 F.3d 806, 814 (9th Cir. 2008) ("*Lawrence* is, perhaps intentionally so, silent as to the level of scrutiny that it applied . . . .").

64. *Glucksberg*, 521 U.S. at 720 ("But we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' ") (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)). States sometimes add additional protections. *See* Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 646 (2004) (describing certain state laws that limit employers). It is unclear, however, whether these state laws could be employed against a federal employer located in the state. In any case, neither Virginia–where CIA's headquarters are located–nor Washington D.C.–where many of the cases against the Agency are litigated–appears to have any such laws. *Id.* at 646-70; Matthew W. Finkin, *Life Away from Work*, 66 LA. L. REV. 945, 946 (2006).

65. *Glucksberg*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

66. Kelley v. Johnson, 425 U.S. 238, 248 (1976) (stating that, in instances where there is no fundamental liberty right, the individual must show that the government action "is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest"); *Cook*, 528 F.3d at 48-49 n.3 ("Where no protected liberty interest is implicated, substantive due process challenges are reviewed under the rational basis standard."); *Witt*, 527 F.3d at 817 ("Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases."); Steffan v. Perry, 41 F.3d 677, 684-85 (D.C. Cir. 1994) (noting that the rational basis test, when applicable, applies to both laws and regulations); Major John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 28 (2005) ("[C]ourts will invalidate the regulation of non-fundamental rights or non-fundamental liberty interests only if the regulation fails to relate rationally to a legitimate government purpose.").

67. Heller v. Doe, 509 U.S. 312, 319 (1993); *Cook*, 528 F.3d at 49 n.3 (under the rational basis test, "a statute passes constitutional muster so long as the law is rationally related to a legitimate governmental interest").

68. *Heller*, 509 U.S. at 320-21 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

69. *Cook*, 528 F.3d at 55.

further that purpose.[70] As courts have noted, "[i]t is hard to imagine a more deferential standard than rational basis."[71]

As noted above, the right to marry is clearly a fundamental liberty interest protected by the Due Process Clause and thus entitled to heightened protection.[72] As such, for the CIA to preclude an employee from marrying (or, more specifically, terminate an employee's employment for failing to comply with an Agency preclusion of marriage), the Agency must show that its action is "narrowly tailored to serve a compelling state interest."[73] The courts have found national security interests to constitute a type of compelling state interest that meets this standard.[74] Thus, if the Agency can demonstrate a legitimate national security concern about the current or potential spouse of an Agency employee, then requiring the Agency employee to preclude or discontinue marrying that individual would likely pass due process muster.[75]

Whether relationships that fall short of marriage also constitute a fundamental liberty interest, however, remains unclear. Most lower courts have refused to find a fundamentally protected right to have such relationships.[76] As one district court stated:

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70. *Heller*, 509 U.S. at 320 (noting that, under the rational basis test, there need merely be "a rational relationship between the disparity of treatment and some legitimate governmental purpose"); *Kelley*, 425 U.S. at 247 (noting that, since the police department has an unquestionable need to promote the safety of persons and property, a county regulation limiting the length of a police officer's hair will violate the constitution only if "respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property"); *Steffan*, 41 F.3d at 685.

71. *Steffan*, 41 F.3d at 685. Courts have been even more deferential in applying the test when the matter involves the military. *Id.* ("[W]hen judging the rationality of a regulation in the military context, we owe even more special deference to the 'considered professional judgment' of 'appropriate military officials.' ").

72. *See supra* text accompanying note 61.

73. Washington v. Glucksberg, 521 U.S. 702, 721 (1997); *see supra* text accompanying note 65.

74. *See* U.S. Info. Agency v. Krc, 989 F.2d 1211, 1214-15 (D.C. Cir. 1993) (noting that protection of national security interests is a basis for termination of employment); Doe v. Gates, 981 F.2d 1316, 1324 (D.C. Cir. 1993) (upholding termination of a CIA employee where his " 'homosexual conduct was a threat to national security' "); Bennett v. Chertoff, 425 F.3d 999, 1000 (D.C. Cir. 2005) (noting that courts cannot consider denial or revocation of a security clearance under Title VII because such determinations are sensitive and inherently discretionary judgment matters involving national security); Witt v. Dep't of Air Force, 527 F.3d 806, 821 (9th Cir. 2008) (stating that military affairs can be sufficient to justify discrimination under a heightened scrutiny test).

75. It should also be noted that the issue rarely gets this far. As employees need to notify the Agency about close and personal relationships with foreign nationals, the employee should have made the Agency aware of the romantic involvement well before the relationship moves to the point of marriage.

76. *See, e.g.*, Cameron v. Seitz, 38 F.3d 264, 275 (6th Cir. 1994) ("[T]he constitutional protection of the right of marital association did not clearly extend to a dating relationship or to engagement . . . ."); Shawgo v. Spradlin, 701 F.2d 470, 483 (5th Cir. 1983) (finding "a rational connection between the exigencies of [police] Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit"). *But see* Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984) (holding da-

> The reason is self-evident. It is impossible to draw a principled line demarcating the point on the spectrum of dating relationships at which a romantic attraction is transformed from a dalliance into a prospective union worthy of constitutional protection. As a result, society has defined that line at marriage (or in some states at the declaration of a civil union).[77]

The recent Supreme Court case of *Lawrence v. Texas*, however, may question that conclusion.[78] In *Lawrence*, the Court struck down a Texas statute that made it a crime for two individuals of the same sex to engage in sodomy. As the Court stated, "[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[79]

The *Lawrence* opinion, however, left almost as many questions as answers.[80] It failed to articulate the standard of review it employed for assessing the constitutionality of the Texas statute.[81] Further, it is unclear whether the constitutional protections it asserts apply only to the sexual acts at issue (that is, protection of the bedroom), or to the relationship (that is, homosexual relationships).[82]

The answer to this latter question may indicate the reach of the opinion, and its import, to our current discussion. Prior to *Lawrence*, the Court had upheld anti-sodomy statutes, especially as enforced against homosexuals, finding that there was no constitutional right of homosexuals to engage in sodomy.[83] Based upon

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ting to be protected by the first amendment's freedom of association). *Wilson*, however, has been roundly criticized. *See Cameron*, 38 F.3d at 275 (noting that, contrary to the holding in *Wilson*, "other circuit court cases strongly suggest that such an association is not a clearly established constitutional right"); Plummer v. Town of Somerset, 601 F. Supp. 2d 358, 368 (D. Mass. 2009) ("*Wilson* . . . was no longer good law in 2001, and certainly was not good law in 2005.").

77. *Plummer*, 601 F. Supp. 2d at 366 (upholding the termination of employment of a police officer for having a relationship with a known drug user and alleged prostitute).

78. Lawrence v. Texas, 539 U.S. 558 (2003).

79. *Id.* at 578.

80. *See* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1060 (2004) (discussing the "opacity" of the *Lawrence* opinion).

81. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916-17 (2004) (noting the criticism and confusion that *Lawrence* may generate by not providing a standard of review).

82. *Id.* at 1904 (noting that the dissent in the opinion focuses on the act, but asserting that the key to the opinion is " '[i]t's not the *sodomy*. It's the *relationship*!' ").

83. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

that ruling, numerous circuit courts held that homosexuality and homosexual conduct were not fundamental interests protected by the Constitution; thus, only a rational basis was needed for the government to preclude homosexual behavior or fire employees for acknowledging that they were homosexual.[84] If, however, *Lawrence* is interpreted to protect relationships (and not acts), then an argument could be made that its protection should reach all romantic relationships–homosexual or heterosexual–to include dating. After all, the gay relationship in *Lawrence* was not a marriage in any sense of the term; rather, all indications are that it was a one-night stand.[85] If such a "relationship" is protected by the Constitution, then so too should all heterosexual or homosexual romantic relationships, whether deeply committed or lasting only a few hours.[86]

These issues are being debated in the courts and in academia,[87] and probably will not be fully resolved in the near term. Regardless, the answer (or perceived answer) probably will not impact the legality of the Agency's policies. *Lawrence* was concerned with either an invasion of privacy in the bedroom or discrimination based on sexual preference. The Agency's policy implicates neither concern. The Agency's decision to preclude an employee from a friendship or a romantic relationship is not based on what sexual acts are or are not committed, nor on the sexual preference of the employee. Rather, it is based solely on the act-neutral, sexual preference-neutral question of whether the close, personal relationship has national security implications. As such, the concerns raised in *Lawrence*–whether interpreted as applying to sexual acts or to sexual preferences–are not at issue with the Agency's requirements, thereby suggesting that however *Lawrence* is eventually interpreted, it will not impact the CIA's policies.

Given that *Lawrence* does not appear relevant to the Agency's restrictions on the dating life and friendships of its employees, there is no basis for believing that such relationships are "fundamental rights." Therefore, Agency policies restricting such rela-

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84. *See, e.g.*, Richenberg v. Perry, 97 F.3d 256, 260-62 (8th Cir. 1996) (applying the rational basis test in agreeing with six other circuits that the military can exclude homosexuals from its ranks pursuant to its "Don't Ask, Don't Tell" policy).

85. *See* Tribe, *supra* note 81, at 1904 (describing the relationship in *Lawrence* as "quite fleeting, lasting only one night and lacking any semblance of permanence or exclusivity"); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408 (2004) (suggesting the individuals in *Lawrence* "might have just been tricking with each other" and indeed might not have even known each other's name at the point they were arrested by the police).

86. Indeed, Laurence Tribe asserts that the Court concluded all "nonprocreative intimate relationships between opposite-sex adult couples–whether marital or nonmarital, lifelong or ephemeral–[deserve to be] protected." Tribe, *supra* note 81, at 1904.

87. *See* Tribe, *supra* note 81; Sunstein, *supra* note 80; Franke, *supra* note 85.

tionships should be evaluated under the rational basis test. As noted above, under this highly deferential standard, the Agency need merely show that its actions achieve a legitimate governmental purpose, and then whether those actions rationally further that purpose.[88] Assuming the Agency can show that there is even a remote, legitimate national security threat posed by the friend or significant other of an Agency employee, terminating the employee's employment for refusing to end that relationship should easily pass the rational basis test.

Even if *Lawrence* is found to be applicable to the CIA's policies in this area, and even if the protections offered by *Lawrence* are deemed "fundamental," the Agency's reliance on national security interests as the basis for its determinations should be sufficient to prevail even against that heightened standard. In *Briggs v. North Muskegon Police Department*, a district court case affirmed by the Sixth Circuit before the *Lawrence* opinion, the court determined that a police officer could not be fired from his job for cohabitating with a married woman who was not his wife.[89] Noting that courts appear divided on whether the Constitution protects sexual conduct outside marriage, the court there found the better view to be that sexual privacy–even amongst unmarried couples–was a fundamental right protected by the Constitution.[90] It therefore overturned the termination of employment, holding that the stated reasons for the termination (loss of the officer's credibility with the citizenry) did not impact the ability of the officer to do his job.[91] The opposite, however, is true for the CIA. As an individual with a top secret clearance whose job is to protect this nation's security, an Agency employee's relationship with an individual who is a national security risk clearly impedes the ability of a CIA employee to do his or her job and places our nation at risk. As noted above, courts have found national security to be a compelling interest that fulfills the constitutional requirements.[92] As such, should dating and friendships be considered "fundamental" constitutional rights, courts would likely find the Agency's precluding specific relationships, on a case-by-case basis, due to national security reasons to fulfill the higher standard and pass constitutional muster.

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88. *See supra* text accompanying note 70.

89. Briggs v. N. Muskegon Police Dep't, 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).

90. *Id.* at 590.

91. *Id.* at 590-91.

92. *See supra* text accompanying note 74.

2. Equal Protection

Equal protection analysis employs a test similar to that for due process. Indeed, as the Supreme Court stated in *Lawrence*, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[93] Yet, as the Supreme Court has noted elsewhere, "[a]lthough both Amendments require the same type of analysis . . . the two protections are not always coextensive."[94]

The Equal Protection Clause, contained in the Fourteenth Amendment to the Constitution, provides that states may not "deny to any person within its jurisdiction the equal protection of the laws."[95] It is well settled that the Equal Protection Clause applies not only to states, but also to the federal government.[96]

The general rule is that government actions are presumed to comply with the Equal Protection Clause, and thus will be upheld, so long as they fulfill the rational basis test, *i.e.*, that they are "rationally related to a legitimate state interest."[97] However, as in the due process analysis discussed above, heightened judicial scrutiny for equal protection is employed with regard to actions against a "suspect class."[98] These protected suspect classes include race, gender, national origin, legitimacy, and ethnicity.[99] Sexual orientation may also be a protected suspect class.[100] The level of heightened scrutiny depends on the equal protection interest at issue.[101] For most of those interests, including national origin, government laws or actions which apply only to a protected class "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."[102]

Spouses, significant others, and friends are not protected classes in and of themselves. However, Agency regulations that impact

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93. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

94. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

95. U.S. CONST. amend. XIV, § 1.

96. Doe v. Gates, 981 F.2d 1316, 1322 n.2 (D.C. Cir. 1993) (" 'The equal protection component of the [F]ourteenth [A]mendment is binding upon the federal government as part of the [F]ifth [A]mendment's [D]ue [P]rocess [C]lause.' ") (citation omitted).

97. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 440 (1985). *See also* Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) (quoting *Cleburne*).

98. *Cleburne*, 473 U.S. at 437; *Cook*, 528 F.3d at 61 ("Under equal protection jurisprudence, a governmental classification aimed at a 'suspect class' is subject to heightened judicial scrutiny.").

99. *Cleburne*, 473 U.S. at 440-41; Stein, *supra* note 60, at 267 n.27.

100. Stein, *supra* note 60, at 267-71.

101. *Cleburne*, 473 U.S. at 440-41; Stein, *supra* note 60, at 269.

102. *Cleburne*, 473 U.S. at 440.

such close, personal relationships could trigger equal protection concerns, particularly if such decisions are connected to national origin–as could appear to be the case for the Agency's anti-fraternization policy. However, as noted above, the Agency's case-by-case policy involves investigations of each reported relationship on an individual basis to determine if the specific individual poses a national security concern. Presuming that the Agency then makes determinations regarding the relationship based on the foreign national's particular situation, and not on his or her national origin, such a determination would not impact any protected class and therefore need merely pass the rational basis test.[103]

The Agency should be able to easily clear that hurdle. For example, in *U.S. Information Agency v. Krc*, the D.C. Circuit upheld the U.S. government's termination of employment of a foreign service officer for homosexual escapades with government officials of foreign countries.[104] The court made it clear, however, that its willingness to uphold the termination was based on the fact that the employee was terminated due to his poor conduct, not the fact that he or his conduct was homosexual. As the court noted:

> It is beyond genuine dispute that the USIA would have terminated the Foreign Service appointment of an officer who had heterosexual escapades with the military attache of a neutral country and with nationals of a Communist country. Such behavior reflects appallingly poor judgment and virtually invites an approach from a hostile intelligence service.[105]

Similarly, a few years earlier, the same court upheld the CIA's termination of a homosexual Agency employee, finding that termination also was not due to the employee's sexual orientation, but rather due to the fact that the employee lied to the Agency about being a homosexual.[106] Determining there was no evidence that the Agency had a blanket policy against homosexuality, the court found "that the CIA had a legitimate concern about [the employee's] trustworthiness, in light of the fact that he hid information about his involvement in homosexual activity despite suspecting or knowing that the Agency considered such involvement to be a matter of security significance."[107] Thus, the discharge of the employee was rationally related to the Agency's " 'legitimate government se-

103. *See supra* text accompanying note 97.
104. U.S. Info. Agency v. Krc, 989 F.2d 1211 (D.C. Cir. 1993).
105. *Id.* at 1214.
106. Doe v. Gates, 981 F.2d 1316 (D.C. Cir. 1993).
107. *Id.* at 1324.

curity interest in collecting foreign intelligence and protecting the nation's secrets.' "[108] As such, the Agency's current restrictions, based upon national security interests, would appear to clearly prevail under a rational basis test.

3. Title VII

Title VII of the Civil Rights Act of 1964 protects discrimination of employees by their employers on the basis of race, color, religion, sex, or national origin.[109] However, until the early 1970s, Title VII did not protect federal employees.[110] Indeed, to that point, though it was recognized that discrimination of federal employees clearly violated both the Constitution and statutory law, it was unclear what remedy for such discrimination was available.[111] In 1972, however, Congress amended Title VII to ensure that federal employees would be "made free from any discrimination based on race, color, religion, sex, or national origin."[112] The amended language gave the Equal Employment Opportunity Commission (EEOC) the authority to issue rules and regulations to prohibit discrimination against federal employees and the power to effectuate remedies in instances of such discrimination.[113]

The Supreme Court has stated that Title VII is the exclusive statutory basis for discriminatory claims by federal employees.[114] Some courts have gone so far as to assert that Title VII preempts even constitutional claims.[115] However, such an argument appears incorrect. As noted at the beginning of this article,[116] the Supreme Court has firmly stated that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[117] Yet nothing in Title VII, and in particular the provisions related to federal employees, indicates that the statute preempts constitutional claims. Indeed, the courts, including the Supreme Court, have heard numerous constitutional claims of discrimina-

108. *Id.* (quoting the lower court's opinion in the case, Doe v. Webster, 769 F. Supp. 1, 3 (D.D.C. 1991)).

109. 42 U.S.C. § 2000e-2(a) (2006).

110. Brown v. Gen. Servs. Admin., 425 U.S. 820, 825 (1976).

111. *Id.*

112. 42 U.S.C. § 2000e-16(a) (2006).

113. 42 U.S.C. § 2000e-16(b) (2006).

114. *Brown*, 425 U.S. at 835 (concluding, after review of the language and legislative history of Title VII, that it "provides the exclusive judicial remedy for claims of discrimination in federal employment").

115. *See, e.g.*, Mlynczak v. Bodman, 442 F.3d 1050, 1056-57 (7th Cir. 2006) (stating, without much discussion, that Title VII precludes even claims of discrimination raised under the Fifth Amendment's Equal Protection Clause).

116. *See supra* text accompanying note 16.

117. Webster v. Doe, 486 U.S. 592, 603 (1988).

tion of federal employees, yet did not dismiss such cases under the argument that Title VII is the exclusive remedy for such assertions.[118] As those courts permitted the constitutional claim to proceed, it must be presumed that Title VII exclusivity does not preclude such constitutional claims.

In any case, Title VII cases are analyzed under a long-standing, burden-shifting framework established by the Supreme Court almost 40 years ago.[119] Under that framework, the plaintiff must first establish a prima facie case of discrimination, for example, that the plaintiff is a minority who was denied a promotion or a job provided to a non-minority. The burden then shifts to the employer to articulate a legitimate and non-discriminatory basis for its action. Finally, the burden shifts back to the plaintiff to show that the employer's stated reason for its action is a pretext for a discriminatory decision.[120] At all times, the plaintiff bears the burden of proof that he or she was subjected to intentional discrimination.[121]

Applying this to the Agency's case-by-case analysis, a Title VII claim would likely commence with the plaintiff CIA employee asserting that whatever action the Agency took against the plaintiff was based on the national origin of the plaintiff's spouse, fiancé, or friend. The Agency would then counter that its basis for action was not pursuant to national origin, but rather related to a valid national security basis. The plaintiff would then seek to demonstrate that the Agency's national security basis was merely a pretext.

In this context, the plaintiff faces an uphill battle as, in most cases, it will be extremely difficult to demonstrate that national origin, and not national security, was the basis for the Agency's action. In any event, the ability of the employee to win his or her claim will depend on a court's evaluation of the particular facts involved.

B. The Agency's Blanket Policy on Employee Relationships with Citizens of Certain Countries

As noted above, Agency regulations also preclude Agency employees from having any significant interaction with individuals from certain countries. From a legal perspective, this differs signif-

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118. *See, e.g., id.* at 603-05 (remanding constitutional claims of discrimination to the district court); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) (allowing that a Constitutional claim of discrimination could proceed even if a Title VII claim is precluded).

119. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

120. *Id.* at 802-05. *See also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (reiterating the standard set by *McDonnell Douglas*); Prince v. Rice, 453 F. Supp. 2d 14, 21-23 (D.D.C. 2006) (also discussing the *McDonnell Douglas* test).

121. *Burdine*, 450 U.S. at 252-53.

icantly from the above case-by-case evaluation. In the case-by-case scenario, the analysis is based on the specifics of the given foreign national. In the blanket situation, however, the Agency is making a determination based *exclusively* on a person's nationality or national origin. As discussed above, national origin is a protected class under equal protection law.[122]

In some ways, this Agency regulation appears analogous to a line of cases in the immigration arena in which the U.S. Government places restrictions on non-Americans from certain countries due to policy reasons. In such cases, the courts have held that "classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis."[123] Based on this, the courts have upheld regulations such as those made in response to the political uprising in Iran in 1979. Such regulations required immigrant alien, postsecondary school students who were natives or citizens of Iran to provide special information to the Immigration and Naturalization Service (INS).[124] More recently, the courts have upheld similar special registration requirements for immigrants from certain specified countries in order to prevent terrorism.[125] The basic philosophy of the courts in these areas is that immigration restrictions are a matter of public policy specifically within the expertise of the President.[126] While the Judiciary "lack[s] the information necessary for the formation of an opinion," the President "has the opportunity of knowing the conditions which prevail in foreign countries" and "has his confidential sources of information and his agents in the form of diplomatic, consular and other officials."[127] Thus, the courts have employed the rational basis test in such circumstances, finding such provisions to have a rational basis so long as the President is not "clearly in excess of his authority."[128]

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122. *See supra* text accompanying note 99.

123. Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979) (citing Mathews v. Diaz, 426 U.S. 67 (1976)).

124. *See, e.g.*, Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980) (dismissing a due process claim to the regulation); *Narenji*, 617 F.2d 745 (dismissing both due process and equal protection claims to the regulation).

125. *See, e.g.*, Kandamar v. Gonzales, 464 F.3d 65 (1st Cir. 2006).

126. *See Mathews*, 426 U.S. at 79-80 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

127. *Narenji*, 617 F.2d at 748. *See also Mathews*, 426 U.S. at 81 (noting that the responsibility for regulating the relationship between the United States and foreign nationals "has been committed to the political branches of the Federal Government" and therefore is more appropriately determined by the Legislative and the Executive branches); *Kandamar*, 464 F.3d at 72 (noting that the Supreme Court's judicial review in the immigration arena is "deferential").

128. *Narenji*, 617 F.2d at 748. *See also Kandamar*, 464 F.3d at 73 (upholding the Attorney General's requirement that young males from certain countries be subject to special registration as such registration is rationally related to the "government objectives of moni-

An argument could be made that the Agency's blanket policy should fall within the same category as immigration–given that it is based on national security grounds which, as the courts have repeatedly acknowledged, falls within the expertise of the President[129]–and therefore should also be subject to the rational basis standard. The problem with such an argument is that the courts have found that *all* immigration decisions, by their very nature, implicate foreign policy concerns within the President's expertise and therefore should be considered under the rational basis test.[130] The courts have not, however, come to the same conclusion with regard to all decisions or regulations implemented by the CIA. Rather, as shown throughout this article, the courts view those decisions and regulations on a case-by-case basis. If the regulation or decision implicates a protected class, it should be considered under the strict scrutiny standard or otherwise under the rational basis test.

With regard to the Agency's blanket policy, it would seem more likely that courts would not interpret such a policy as analogous to immigration policies, but rather akin to an Agency policy forbidding its employees from associating with African-Americans or with homosexuals (putting aside, of course, the large numbers of both groups who are already critical members of the Agency). As such, it would appear the courts would apply strict scrutiny analysis which, as noted above, applies to discrimination based upon national origin.[131]

While no court appears to have addressed this issue directly, some guidance can be gleaned from a D.C. district court case, *Huynh v. Carlucci*.[132] That case concerned a challenge to a Department of Defense (DoD) regulation that denied security clearances to naturalized citizens from any of 29 designated countries, unless the individual had been a U.S. citizen for more than five years or had resided in the United States for more than ten years. DoD asserted that it instituted the policy because information about citizens born in those 29 countries was typically difficult to obtain or verify and that accurate background information was critical to determine whether a security clearance could be granted. The court found the regulations constituted discrimination based upon national origin and thus should be examined under a strict scrutiny standard. The court then held that the DoD regulation did not pass strict scrutiny analysis, as DoD could not show

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toring nationals from certain countries to prevent terrorism").

129. *See supra* text accompanying note 11.

130. *See supra* text accompanying notes 123-28.

131. *See supra* text accompanying note 99.

132. Huynh v. Carlucci, 679 F. Supp. 61 (D.D.C. 1988).

that its "policy is supported by any convincing empirical evidence or is a necessary or precisely-tailored procedure for preserving national security."[133] Indeed, the court noted that it was "hard put to find even a rational basis for the [DoD] Regulation."[134]

The Agency's blanket regulation, however, has a twist that may distinguish it from *Huyhn*. Although the Agency is clearly making decisions based upon national origin–as noted above, a protected category for equal protection claims[135]–it is not the national origin of the restricted individual (the CIA employee) that is at issue, but rather it is the national origin of the employee's contact (a non-U.S. person) that is in question. No court case appears to have evaluated such "association" claims in either the due process or equal employment context.

Title VII cases, however, have addressed this issue, holding that employers violate that Act when they discriminate on the basis of association with a member of those protected classes–although most of the cases have involved questions of race rather than national origin.[136] The earliest cases held that discrimination based on such association was not covered by Title VII, asserting that the individual bringing suit (usually a white male claiming discrimination at work for his marriage to a black female) was not a member of the minority class that Congress intended to protect by Title VII.[137] Subsequent cases, however, have pretty uniformly rejected such analysis and have held that Title VII covers an employee's association with a protected class where the employee's race or national origin is a factor.[138] This most frequently comes into play in the context of a claim that a white employee was fired for being in an inter-racial or inter-ethnic marriage, but it has also been applied to friendships. In such cases, the courts have found

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133. *Id.* at 66-67.

134. *Id.* at 67.

135. *See supra* text accompanying note 99.

136. Interestingly, while Title VII does not indicate whether it covers associational discrimination, the Americans with Disabilities Act (ADA) explicitly prohibits "denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4) (2006).

137. *See, e.g.*, Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 208-10 (N.D. Ala. 1973) (holding that Title VII does not protect a white employee who alleged he was discharged for his association with fellow black employees as the plaintiff did not claim that he was fired due to his race); Adams v. Governor's Comm. on Postsecondary Educ., No. C80-624A, 1981 WL 27101, at *3-4 (N.D. Ga. Sept. 3, 1981) (holding that a white employee, allegedly discriminated based upon his wife's race, lacked standing under Title VII).

138. *See* Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (rejecting the "restrictive reading" of *Ripp* and *Adams*); Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298, 299 (S.D.N.Y. 1996) ("Several courts have rejected the highly restrictive holdings of *Ripp* and *Adams* . . . ."); Chacon v. Ochs, 780 F. Supp. 680, 682 (C.D. Cal. 1991) (rejecting "the reasoning in *Ripp* and *Adams* as inconsistent with both the language and intent of Title VII").

that the employee's race or national origin was indeed a factor as it could be argued that the employee would not have been fired had he or she been of the same race as his or her spouse or friend.[139] As one court described it, "Title VII prohibits race-conscious discriminatory practices. Applying Title VII protections to discrimination based on an interracial relationship is consistent with the very purpose of Title VII: by necessity, the race of the plaintiff is a factor affecting the conduct of the defendant."[140]

Several cases, however, have gone a step further, finding that Title VII protects association with individuals of other races and national origins, even if the plaintiff's own race is not a factor in the matter. For example, in *Reiter v. Center Consolidated School District*, the district court upheld a white female employee's Title VII claim that her school district employer discriminated against her based upon her "close association with the Spanish citizens of the district."[141] Similarly, in *Barrett v. Whirlpool Corp.*, the Sixth Circuit upheld a Title VII claim by white females that they had been discriminated against based on their association with and advocacy on behalf of their African-American co-workers.[142] Accepting this type of associational discrimination appears to be the

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139. *See, e.g.*, *Holcomb*, 521 F.3d at 139 (holding that Title VII applies to claims by a white male that he was fired for having a black wife since "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race"); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . ."); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998), *rev'd on other grounds*, 188 F.3d 278 (5th Cir. 1999) ("[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998) (holding that not only marriage, but also friendship, can create an associational race discrimination claim so long as the discrimination was based on the employee's race); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."); *Rosenblatt*, 946 F. Supp. at 300 ("Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race. As a result, plaintiff has standing to pursue his civil rights claims under Title VII."); Gresham v. Waffle House, Inc., 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (holding that a white female "has stated a claim under Title VII by alleging that she was discharged by her employer because of her interracial marriage to a black man"); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (holding that a white woman can maintain a Title VII claim based upon an allegation of being discharged for having a friendship with a black male).

140. *Chacon*, 780 F. Supp. at 682 (upholding the ability of a Caucasian woman to bring a claim under Title VII that she was subjected to a hostile work environment due to her marriage to a Hispanic man).

141. Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1459-60 (D. Colo. 1985).

142. Barrett v. Whirlpool Corp., 556 F.3d 502, 512-14 (6th Cir. 2009).

trend as several other courts have come to similar conclusions,[143] and no published case seems to have rejected this concept.

In coming to this conclusion, the courts have relied on guidance provided by the United States Equal Employment Opportunity Commission (EEOC),[144] which is charged with enforcement responsibility for Title VII claims.[145] The Code of Federal Regulations (CFR) for Title VII, promulgated by the EEOC, defines national origin discrimination "as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[146] The CFR further states that the United States "will examine with particular concern" employment decisions based on factors including "*association* with persons of a national origin group."[147] The EEOC webpage states that "[n]ational origin discrimination . . . can involve treating people unfavorably because they are married to (or associated with) a person of a certain national origin or because of their connection with an ethnic organization or group."[148] EEOC's Compliance Manual similarly notes that "Title VII prohibits discrimination against a person because he or she is associated with an individual of a particular national origin."[149] Finally, several EEOC commission cases have recognized that Title VII protects association with individuals of other national origins.[150] Importantly, as the Supreme Court has noted,

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143. *See* Blanks v. Lockheed Martin Corp., 568 F. Supp. 2d 740, 746 (S.D. Miss. 2007) (voicing its approval for racial association discrimination claims based on "mere friendly and/or social relationships," but noting that several unpublished cases have not supported that view); Baker v. Wilmington Trust Co., 320 F. Supp. 2d 196, 202-03 (D. Del. 2004) (recognizing that an associational discrimination claim can exist based on national origin); LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 772-73 (D. Neb. 1999) (recognizing that white male can assert Title VII claim of discrimination based upon his association with a black co-worker, but determining that plaintiff did not prove his case); Chandler v. Fast Lane, Inc., 868 F. Supp. 1138, 1143-44 (E.D. Ark. 1994) (recognizing ability of white females to bring cause of action under Title VII based on right to association with African-Americans).

144. *Tetro*, 173 F.3d at 994 (noting that EEOC opinions in support of race association claims bolsters the court's decision to uphold such claims); *see Parr*, 791 F.2d at 892; *Chacon*, 780 F. Supp. at 682; *Reiter*, 618 F. Supp. at 1460 (same for national origin association).

145. 42 U.S.C. § 2000e-16(b) (2006). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971) (noting that the EEOC has enforcement responsibility for Title VII).

146. 29 C.F.R. § 1606.1 (2011).

147. *Id.* (emphasis added).

148. U.S. Equal Emp't Opportunity Comm'n, *National Origin Discrimination*, http://www1.eeoc.gov/laws/types/nationalorigin.cfm (last visited Nov. 11, 2011). *See also* U.S. Equal Emp't Opportunity Comm'n, *Facts About National Origin Discrimination*, http://www1.eeoc.gov//eeoc/publications/fs-nator.cfm (last visited Nov. 11, 2011) ("Equal employment opportunity cannot be denied because of marriage or association with persons of a national origin group . . . .").

149. U.S. EQUAL EMP'T OPPORTUNITY COMM'N COMPLIANCE MANUAL § 13-II (Dec. 2, 2002), *available at* http://eeoc.gov/policy/docs/national-origin.html.

150. *See* Morgan v. Schafer, EEOC Appeal No. 0120072653 (Aug. 29, 2008) (accepting

these types of EEOC interpretations of Title VII " 'are entitled to great deference.' "[151]

The courts, however, are not uniform as to the degree of association necessary to trigger the protection in Title VII cases. In *Baker v. Wilmington Trust Co.*, a district court in Delaware, with little discussion, held that a relationship between bank tellers and their Indian clients did not establish a sufficiently close relationship to trigger Title VII protection.[152] In contrast, the Sixth Circuit in *Barrett*, discussed above, found that "the degree of the association is irrelevant."[153] The Sixth Circuit noted that Title VII protects discrimination in its entirety; if a person is discriminated against due to his or her association with a member of another race or national origin, the closeness of the relationship is immaterial. Rather, the degree of association should be used solely as a factor in proving the alleged discrimination; for example, it will be easier for an employee to show that there was discrimination based on the national origin of an individual's spouse as opposed to an individual's distant friend.[154] The Sixth Circuit would appear to have the more convincing argument.

On its face then, the Agency's actions in precluding its employees' association with persons of certain national origin groups (namely citizens of certain countries) would appear to constitute a Title VII violation. It is worth noting, however, that Title VII explicitly contains a national security exemption, which allows discrimination "if (1) the occupancy of such position . . . is subject to any requirement imposed in the interest of the national security of the United States . . . and (2) such individual has not fulfilled or has ceased to fulfill that requirement."[155] However, EEOC guidance indicates that to invoke this exception the government employer must "prove that the challenged employment decision was made because of national security requirements imposed by statute or Executive Order."[156] The EEOC cases that have considered

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concept of national origin discrimination based upon association with Native Americans), *available at* http://www.eeoc.gov/decisions/0120072653.txt; Carney v. Reno, EEOC Appeal No. 01971033 (Apr. 7, 1999) (accepting same concept for people of Korean ancestry), *available at* http://www.eeoc.gov/decisions/01971033_r.txt.

151. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (citing Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)).

152. Baker v. Wilmington Trust Co., 320 F. Supp. 2d 196, 203 (D. Del. 2004).

153. Barrett v. Whirlpool Corp., 556 F.3d 502, 513 (6th Cir. 2009). *See also* Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998) (holding that the degree of association is not relevant in a race association claim, but asserting that the discrimination must be due to the employee's race).

154. *Barrett*, 556 F.3d at 513.

155. 42 U.S.C. § 2000e-2(g) (2006). *See also* 29 C.F.R. § 1606.3 (2011) (noting that it is not unlawful to deny employment based upon this national security exception).

156. U.S. Equal Emp't Opportunity Comm'n, *Notice N-915-041: Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the*

the exception do not provide any illumination on the issue before us. Further, no court case has directly addressed this exception, and few have even examined this area at all.[157]

The only relevant case that has considered the exception is the 1984 case of *Molerio v. FBI*, in which an individual claimed that the FBI refused to hire him as a special agent due to his Cuban background and his father's alleged connection to a pro-Castro association.[158] The D.C. Circuit upheld the FBI's decision for a variety of reasons. However, with regard to the plaintiff's claims of national origin discrimination, the court–noting that the FBI attached "special weight" to the fact that the plaintiff had relatives residing in a country hostile to the United States–held that "[n]either the general policy nor its particular application to Cuba is any evidence of discrimination on the basis of race or national origin, since it would apply to any person, of any race or nationality, with relatives in the pertinent country."[159] Based on the national security exemption to Title VII, the court noted that "the mere fact that such requirements impose special disabilities on the basis of connection with particular foreign countries is not alone evidence of discrimination."[160]

Molerio, however, would not seem to comport with policy guidance issued by the EEOC with regard to the National Security exception. That guidance provides an example in which a company that does primarily government contract work refuses to hire an individual because the individual has family residing in Mexico. In such a situation, the policy guidance indicates that the national security exception is not available because the reasons for not hiring the individual were "not made because of national security requirements imposed by statute or Executive Order."[161] With the national security exception unavailable, there would need to be an assessment of whether the basis for denying to hire the individual related to a protected discriminatory reason; "[f]or example, such a policy would discriminate against Hispanics if it were applied only to applicants who had family residing in Mexico."[162]

In the end, then, the law in this area is muddled at best. First, it is unclear whether the courts would accept the concept of "association" discrimination to apply in the constitutional context. Se-

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Civil Rights Act of 1964, as Amended (May 1, 1989), www.eeoc.gov/policy/docs/national_security_exemption.html.

157. 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 59.05 (2d ed. 2007).

158. Molerio v. FBI, 749 F.2d 815 (D.C. Cir. 1984).

159. *Id.* at 823.

160. *Id.*

161. U.S. Equal Emp't Opportunity Comm'n, *supra* note 156.

162. *Id.* Why the example focuses on race (Hispanic) and not national origin (Mexico) is unclear.

cond, in the Title VII context, it is unclear whether the national security exception would apply and to what extent.

Given the trends in this area, my best guess is that courts would accept the concept of "association" discrimination for constitutional cases. Not only is it a clear form of discrimination based on a protected classification, but there is no reason for the courts to distinguish the reach of the Constitution from Title VII. Put another way, it is difficult to believe a court would assert that the Constitution permits a type of national origin discrimination that a statute such as Title VII does not. If this analysis is correct, then from a constitutional perspective the Agency's policy of prohibiting relationships with citizens of certain countries would constitute national origin discrimination and thus require strict scrutiny analysis. Alternatively, if the courts do not accept "association" discrimination, then the Agency's policies do not discriminate against a protected class and will be evaluated under the rational basis test.

In the Title VII context, courts would employ the burden-shifting process discussed above.[163] Thus, the plaintiff employee would first need to prove a prima facie case of national origin discrimination, which should be fairly easy given that the Agency's policy covers all individuals of certain countries. The Agency would then need to provide evidence that it has a valid non-discriminatory basis for its action, which presumably would be national security concerns. The Agency would point to the national security exemption to Title VII as the basis for arguing that national security trumps alleged discrimination. The plaintiff would then need to argue that national security interests are merely a pretext and that the preclusion in interaction with individuals of the given country is based on other (namely, political) grounds.

In the end, however, whether the case is brought as a constitutional or a Title VII claim, and regardless of the government's burden, the base question will come down to how well the Agency can defend its policy on national security grounds–a question that cannot be addressed here without revealing the classified information of exactly which nation's citizens are off limits to Agency employees, and how and why the Agency made that determination. However, it seems clear that if the Agency's policy is vaguely focused on citizens of countries that could only theoretically pose a threat to the United States–and is based primarily on the inability of the Agency to acquire information about individuals in those countries–then, like the *Huynh* case, the Agency will have difficulty defending its regulation as constitutional. If, on the other hand, the

163. *See supra* text accompanying notes 119-21.

Agency can provide substantial evidence that national security interests require the restriction–for example, showing that citizens of the prohibited countries are so limited in their interaction with Americans that any such attempted association should be presumed to be an attempt to recruit or provoke–then the Agency's blanket policy might well be able to pass Title VII evaluation, as well as both strict scrutiny and rational basis analysis.

IV. RESTRICTIONS ON OUTSIDE EMPLOYMENT

The Agency, like other U.S. government agencies, exerts extraordinary control on the outside employment opportunities of its employees, in regard to both seeking a second job while still employed with the Agency and attempting to secure post-Agency employment. If CIA employees wish to engage in any outside employment while still employed at the Agency, they are required to fill out an Outside Activity Approval Request (known as an "879 form," which corresponds to the Request's form number).[164] The Agency may then preclude the employee from engaging in the outside employment if such employment would have a negative impact on the Agency or the ability of the employee to perform his or her Agency job.[165] Further, the Agency will bar outside employment if such employment would be with another foreign government (known as an emolument). In addition, any résumé an employee wishes to send out to prospective employers must be vetted by the Agency to ensure that classified information is not disgorged nor national security risked. Finally, Agency employees, like all government employees, must conform to government-wide ethics rules that restrict future employment. Overall then, the Agency can dictate its employees' outside employment; curtail future employment; and not only review an employee's résumé before it is sent, but actually edit it. While all of this may appear to be highly intrusive, not to mention an apparent conflict of interest for the Agency to restrict the employment alternatives of its employees, it is nonetheless perfectly legal.

The Supreme Court has long held that "the right of the individual to contract [and] to engage in any of the common occupations of life" is a liberty interest protected by the Fourth (and

164. Other government employees have similar requirements. *See* 5 C.F.R. § 2635.803 (2011) (requiring government employees to "obtain prior approval before engaging in outside employment or activities").

165. This too is based upon a government-wide restriction. *See* 5 C.F.R. § 2635.802 (2011) (stating that a government "employee shall not engage in outside employment or any other outside activity that conflicts with his official duties").

Fourteenth) Amendments.[166] This right includes "the right of the individual to contract [and] to engage in any of the common occupations of life."[167] However, the right is not absolute. Thus, the government may restrict employment so long as such action is not "arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[168]

In determining whether a government action that deprives employment is arbitrary or unreasonable, courts tend to evaluate "(1) the nature and seriousness of the alleged governmental interference; and (2) the strength of the justification given."[169] For example, in *Wilkerson v. Johnson*, the defendant used his position as a member of the Tennessee Board of Barber Examiners to pass regulations that effectively precluded the plaintiffs from opening a barber shop next door to the board member's own barber shop.[170] The Sixth Circuit held that the board member's infringement in allowing plaintiffs to pursue their occupation "is sufficiently serious, and the reasons given in justification for the delay so lacking in substance as to constitute a due process violation of plaintiffs' 'liberty' interests."[171]

While any Agency decision regarding the outside employment of its employees would need to be considered on a case-by-case basis (as discussed below) the CIA's restrictions on employment are vastly less drastic than those in *Wilkerson* and have a much more legitimate justification (usually related to protection of national security).

A. Secondary Employment

Restricting an employee from taking a second job does not infringe on an employee's right to pursue his or her main occupation or earn a living. And, if that second job would jeopardize national security–for example, seeking employment with an entity affiliated with terrorism or drug trafficking–there would be more than substantial justification for the Agency to preclude such employment.

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166. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Parate v. Isibor, 868 F.2d 821, 831 (6th Cir. 1989) (noting that *Meyer* represents a "long held" assertion that the freedom to pursue a career is a liberty interest); Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) (quoting *Meyer*).

167. *Meyer*, 262 U.S. at 399.

168. *Id.* at 400. *See also Parate*, 868 F.2d at 831 (noting that unreasonable or arbitrary interference with the freedom to pursue an occupation would be a substantive due process violation).

169. *Parate*, 868 F.2d at 831. *See also Wilkerson*, 699 F.2d at 328 (noting these two bases for evaluation).

170. *Wilkerson*, 699 F.2d at 325.

171. *Id.* at 328.

However, there does not appear to be any federal case law that has considered the due process interests in seeking secondary employment. Some guidance nonetheless can be gleaned from state law governing an employee's duty of loyalty to his or her employer. Under Virginia law–which would likely govern CIA cases in this area given the location of CIA's headquarters in Langley, Virginia–it is "long recognized that under the common law an employee, including an employee-at-will, owes a fiduciary duty of loyalty to his employer during his employment."[172] As part of this duty, the employee may not take any action that is adverse to the interests of his or her employer.[173] Thus, the Virginia courts have held that it is a breach of this duty if the employee takes a second job that is adverse to the benefit of his or her first employer.[174] By analogy, I would expect courts to support the Agency in precluding an Agency employee from taking a second job that endangers national security, as such secondary employment clearly would be adverse to the interests of a national security agency such as the CIA.

B. Emoluments

One of the reasons CIA employees must inform the Agency of outside employment is to ensure that they do not violate the Emoluments Clause of the Constitution. The Emoluments Clause provides that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[175] The purpose of the clause was to prevent federal employees from undue influence or corruption from foreign governments.[176] "Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty. That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government . . . ."[177]

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172. Williams v. Dominion Tech. Partners, 576 S.E.2d 752, 757 (Va. 2003).

173. E.L. Hamm & Assocs. v. Sparrow (*In re* Sparrow), 306 B.R. 812, 839-41 (Bankr. E.D. Va. 2003).

174. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 516 (4th Cir. 1999) (holding undercover reporters to have breached a duty of loyalty to a food chain when the reporters took jobs with the food chain solely to document alleged abuses).

175. U.S. CONST. art. I, § 9, cl. 8.

176. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand, ed., rev. ed. 1937, reprint 1966); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand, ed., rev. ed. 1937, reprint 1966); Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114 (1993).

177. Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 18 (1994).

Though few court cases have evaluated the Emoluments Clause,[178] the Department of Justice's Office of Legal Counsel (OLC) has provided extensive guidance to federal agencies regarding the Clause's restrictions.[179] Per OLC, "[t]he language of the Emoluments Clause is both sweeping and unqualified."[180] OLC therefore has interpreted the clause as applying to all federal government employees, not just senior officials.[181] It applies broadly to all types of employment and compensation, including partnership earnings where some part of the earnings derive from the partnership representing a foreign government.[182] Indeed, a U.S. employee is not only prohibited from employment by a foreign government itself, but also from receiving compensation from corporations and other entities controlled by foreign governments (such as public universities).[183] Thus, the clause effectively precludes CIA employees from engaging in outside employment with any entity controlled by a foreign government, even if the foreign government is an ally of the United States.[184] Given the overseas presence of Agency employees, as well as their experience and expertise in foreign affairs, this can considerably impact CIA workers. And while it certainly makes sense to preclude CIA employees from working for an enemy intelligence agency, the Emoluments Clause also has the perhaps unintended effect of forbidding an Agency employee,

178. The only published case I could find was United States *ex rel.* New v. Rumsfeld, 448 F.3d 403, 410 (D.C. Cir. 2006) (rejecting, with little analysis, the "weak" claim that the government violated the Emoluments Clause by requiring members of the U.S. army to wear a United Nations patch when serving as part of a U.N. peacekeeping force). The district court in *New* noted that there did not appear to be a Supreme Court precedent related to the Emoluments Clause. United States *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 102 (D.D.C. 2004), *aff'd*, 448 F.3d 403 (D.C. Cir. 2006).

179. For detailed discussion of the role and relevance of OLC opinions, see Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93 (2008).

180. Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 177, at 17. *See also* 49 Comp. Gen. 819, 821 (1970) (noting that the drafters of the Clause "intended the prohibition to have the broadest possible scope and applicability").

181. *Emoluments Clause and World Bank, Memorandum Opinion for the General Counsel Smithsonian Institution*, 2001 WL 34610590 (O.L.C.) (May 24, 2001), *available at* http://www.justice.gov/olc/smithsonianwb.htm; Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 158 (1982).

182. Applicability of the Emoluments Clause to Non-Government Members of ACUS, *supra* note 176.

183. *Emoluments Clause and World Bank*, *supra* note 181; Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 177.

184. It is worth noting that the reach of the Emoluments Clause is not unlimited. Per the express terms of the clause itself, Congress has the ability to limit the expanse of the Emoluments Clause and has invoked this authority on several instances. For example, Congress exempts from the clause gifts of minimal value, as well as gifts of educational scholarship or medical treatment, that a federal employee may receive from a foreign government. 5 U.S.C. § 7342(c)(1) (2006).

in his or her free time, from supplementing his or her government income by teaching an English literature course at a foreign public university or working with preschoolers at a foreign government-owned child day care center. As the Emoluments Clause is part of the U.S. Constitution, its provisions are clearly constitutional.

C. Pre-Review of Résumés

The courts have continuously made it clear that the CIA has the right to engage in pre-publication review of its employees' writings related to intelligence activities[185] and to preclude those writings from including classified information.[186] The courts have come to this conclusion based on the extraordinary need of the government to protect national security, as the release of classified information could:

> reveal intelligence sources, methods and activities, foreign government information, or information impacting the foreign relations of the United States, and that disclosure could cause serious damage to national security, endanger the safety and lives of individual [sic] who work for and with the CIA, and undermine the ability of the CIA to collect intelligence information.[187]

No court appears to have considered whether the CIA can subject the résumés of its employees to the same "pre-publication" scrutiny. However, résumés are a form of publication provided to outside and "uncleared" sources that include intelligence information (such as the mere fact that the employee works at the Agency, as well as details of the employee's position). Such documents could easily disclose classified material if not monitored. As

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185. Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (upholding the CIA's right to require its former employees to submit their writings on intelligence activities to the CIA prior to publication, so that the Agency can assess whether the writings contain classified information).

186. McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983) (upholding CIA's decision to refuse to allow a former employee to publish classified information); Berntsen v. CIA, 618 F. Supp. 2d 27 (D.D.C. 2009) (finding the CIA properly classified eighteen items in the manuscript of a former CIA employee); Boening v. CIA, 579 F. Supp. 2d 166, 170-72 (D.D.C. 2008) (acknowledging that the CIA may preclude a former employee's publication of classified information which has not been disclosed to the public, though assessing that the court does not have enough information to determine if that is the situation here); Stillman v. CIA, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) ("Courts have uniformly held that current and former government employees have no First Amendment right to publish properly classified information to which they gain access by virtue of their employment."); Wilson v. McConnell, 501 F. Supp. 2d 545, 552 (S.D.N.Y. 2007) (upholding CIA determination that certain information that a former CIA employee sought to publish in her book was classified).

187. *Berntsen*, 618 F. Supp. 2d at 30-31.

such, it is difficult to envision a court precluding this type of Agency requirement, given that the same law and logic for prepublication review of proposed books and articles would also apply to résumés. Thus, as long as the Agency's résumé review is confined solely to searching for classified information and is conducted to protect national security (and not to preclude employees from leaving the Agency), the Agency's requirement to review its employees' résumés would appear to pass constitutional muster–even if it could be seen as raising a potential conflict of interest.

D. Ethics Rules

Finally, government-wide ethics rules restrict all government employees, including CIA officers, from working on certain matters after they leave the Agency. Thus, a former government employee is forever banned from acting on behalf of another entity (such as an industrial contractor) in connection with and with the intent to influence any USG agency if the issue pertains to a particular matter–such as a contract–in which the employee "participated personally and substantially" as a government employee.[188] There is also a two-year restriction on acting on behalf of another entity before a USG agency with regard to any matter that fell under the employee's responsibilities when he or she worked for the government.[189] Certain senior personnel also cannot professionally interact with *any* employee of their former agency on behalf of another entity for one year after leaving government employment.[190] For example, applying these rules, a DCIA can go to work for an industrial contractor after retiring or resigning from the Agency. However, the former DCIA cannot meet or have a telephone call with any CIA employee on behalf of that contractor on any issue for one year after leaving the Agency, for two years with regard to any Agency contract that existed while he was DCIA, and forever on any contract in which he was personally and substantially involved while at the Agency if he is seeking to influence that CIA employee. Courts have consistently found that such restrictions pass constitutional muster.[191]

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188. 18 U.S.C. § 207(a)(1) (2006).

189. 18 U.S.C. § 207(a)(2) (2006).

190. 18 U.S.C. § 207(c) (2006).

191. *See* United States v. Nevers, 7 F.3d 59 (5th Cir. 1993) (finding 18 U.S.C. § 208 (1988) is not unconstitutionally vague); United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) (holding the same for 18 U.S.C. § 207 (1964)).

V. RESTRICTIONS ON EMPLOYEE PRIVACY: BACKGROUND INVESTIGATIONS AND MONITORING AGENCY EMPLOYEES AT WORK

Employment at the CIA comes with an understandable and expected reduction in personal privacy. The Agency engages in extensive background investigations of prospective employees. Current employees also undergo such background checks every few years as part of standard Agency practice. These investigations require prospective and current employees to disclose significant amounts of personal information to the Agency, undergo drug tests, and take the infamous polygraph examination. In addition, the Agency also conducts routine searches of current employees' work computer files and, when appropriate, searches of their work areas.

A. Providing Personal Information

When the Agency offers a job to an applicant, it provides that individual with a Conditional Offer of Employment (COE). The "condition" is that the employee must pass the Agency's detailed background investigation. As part of that investigation, the individual is required to provide extensive amounts of personal information covering the last fifteen years or more of the individual's life.[192] The purpose of requesting this information is to allow the Agency to determine whether the individual poses a national security risk, such that he or she should not be permitted access to the Agency's classified information (and thus would not be suitable for employment at the CIA).

Even after an individual passes the background investigation and starts work at the Agency, the CIA continues to require personal data throughout the individual's career.[193] Every few years, employees are required to provide additional personal information as part of the Agency's routine reinvestigation of its employees to determine if any national security concerns have arisen since the employee commenced work. In addition, every two years, Agency employees must fill out a Financial Disclosure Form, which as the name implies, seeks substantial information about an employee's finances. Such financial information is sought by the Agency to uncover unexplained income that could suggest the employee is involved in espionage. On the flip side, revelation of a serious finan-

192. *See Application Process*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/careers/application-process/index.html (last visited Nov. 12, 2011) (describing the application requirements for applying to the Agency, including background checks).

193. *Id.*

cial problem could suggest that the employee might be vulnerable to recruitment by a foreign service–or at least susceptible to sell classified information–in order to acquire money.

Requiring prospective and current employees to provide such information triggers two possible constitutional concerns: the Fifth Amendment privilege against self-incrimination and the right to privacy. With regard to the former concern, most Agency documents requesting information from current and prospective Agency employees provide that, though the Agency will inform the Department of Justice (DoJ) of any violations of U.S. criminal law, the information provided by the employee will not be used against him or her in any criminal proceeding. Further, when CIA transmits any such information to DoJ, it is caveated with the statement that such information is for lead purposes only and cannot be used in a criminal prosecution. Thus, there would not appear to be any self-incrimination concerns. As the D.C. Circuit has stated, in evaluating a case requiring the revelation by government employees of illegal drug use, "the protection of the [Fifth Amendment] privilege extends only to criminal prosecutions. A government employee would not be incriminating himself within the meaning of the Fifth Amendment if his answers could not be used against him in a criminal case."[194]

As for the right to privacy, courts have expressed doubt as to whether there even exists a constitutional right to privacy in personal information.[195] Nonetheless, even if such a right exists, the courts have upheld the government's right to seek the information from prospective and current employees in certain employment contexts. The D.C. Circuit, for example, evaluated a DoD form–seemingly similar to the Agency's form–requiring individuals in positions with access to classified information or in a "critical sensitive" position to provide a significant amount of personal information.[196] The forms requested detailed information relating to the employee's financial history, arrest record, use of illegal narcotics, and mental health. Balancing the invasion of privacy with the government need, the court found DoD had "sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into [its] employees' privacy."[197] It first noted that the individual interest in privacy was "significantly less important" when the government collected the information for its

194. Nat'l Fed'n of Fed. Emps. v. Greenberg, 983 F.2d 286, 292 (D.C. Cir. 1993).

195. *See generally* Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev., 118 F.3d 786, 791-93 (D.C. Cir. 1997) (discussing numerous court decisions that conclude such a right does not exist, as well as many court opinions that provide for such a right).

196. *Id.* at 789.

197. *Id.* at 793.

own purposes as an employer, rather than for public dissemination.[198] The Court then held that the government's need to protect "the interests of national security" outweighed these limited privacy interests.[199] Thus, it permitted the government to ask the detailed personal questions of individuals involved in protecting classified information noting the courts' "traditional reluctance to intrude on Executive decisionmaking in the area of national defense."[200] The same should hold true with regard to the CIA questionnaires.

B. Drug Testing

Prospective Agency employees are all required to undergo drug testing.[201] Such drug testing involves examination of blood and urine specimens. The Supreme Court has consistently found such testing to intrude upon the expectations of privacy that society has long recognized as reasonable and therefore constitutes a search under the Fourth Amendment.[202] As the Fourth Amendment precludes only "unreasonable" searches, the Supreme Court has then gone on to evaluate whether blood and urine testing for alcohol or drug abuse is "reasonable." The Court has noted that, normally, a government search is reasonable only if the government possesses a reasonable suspicion that a specific individual has engaged in wrongdoing and a warrant from a court. The Agency's requirement that all prospective employees engage in blood and urine testing, without a warrant, clearly does not meet this criteria.

However, the Court has found that there are times when "special needs" exist to preclude the individualized suspicion and warrant requirements. In such instances, the courts weigh the private and public interests of the given situation. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered

198. *Id.* Other courts evaluating similar disclosures of personal information by government employees have noted that government employees may have a diminished expectation of privacy based on their position. Thus, "any employee who occupies a position of public trust is aware of his employer's elevated expectations in his integrity and performance" and thus has "diminished rights to withhold personal information that compromises the right of the public to repose trust and confidence in them." Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury, 25 F.3d 237, 244 (5th Cir. 1994) (upholding right of IRS to require its "public trust" employees to submit answers to a questionnaire concerning personal use of drugs and alcohol).

199. *Am. Fed'n of Gov't Emps.*, 118 F.3d at 793-94.

200. *Id.* at 794.

201. *See Application Process*, *supra* note 192.

202. Skinner v. Ry. Labor Execs'. Ass'n, 489 U.S. 602, 616-17 (1989). *See also* Chandler v. Miller, 520 U.S. 305, 313 (1997) (citing *Skinner* for the "uncontested point" that "Georgia's drug-testing requirement, imposed by law and enforced by state officials, effects a search within the meaning of the Fourth and Fourteenth Amendments").

by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[203] Based upon this analysis, the Supreme Court has upheld drug tests via blood or urine examinations in situations where "the proffered special need for drug testing [is] substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[204] Thus, the Court has allowed drug tests for railway employees involved in train accidents,[205] U.S. Customs Service employees seeking to be promoted to certain sensitive positions,[206] and high school students who wished to participate in school sports.[207] It has, however, refused to allow such testing for candidates to certain state offices,[208] as well as for unwitting maternity patients where the tests would be used to prosecute mothers whose children tested positive for drugs at birth.[209]

Though the Supreme Court has not specifically addressed the issue of such testing for CIA employees, the Court has noted that

> employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test [for drug testing], especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test.[210]

Based upon this, lower courts have upheld drug testing of individuals with or seeking security clearances.[211] As these courts have

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203. *Skinner*, 489 U.S. at 624. *See also Chandler*, 520 U.S. at 313-14 (describing the process for court evaluation laid out by *Skinner* and its progeny); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665-66 (1989).

204. *Chandler*, 520 U.S. at 318.

205. *Skinner*, 489 U.S. 602.

206. *Von Raab*, 489 U.S. 656.

207. Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

208. *Chandler*, 520 U.S. 305.

209. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

210. *Von Raab*, 489 U.S. at 677. The Court in this case remanded the matter to decide whether a Customs Service requirement met this criteria due to the insufficient record before the Court. *Id.* at 658.

211. *See* AFGE Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991) (allowing random drug testing of Navy employees holding top secret security clearances); Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990) (upholding drug testing by a number of executive agencies of employees holding secret clearances); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) (allowing the Department of Justice to drug test employees with top secret clearances); Nat'l Treasury Emps. Union v. Hallett, 756 F. Supp. 947 (E.D. La. 1991) (allowing the U.S. Customs Service to conduct drug testing of employees holding top secret, secret or confidential security clearances).

noted, "[i]ndividuals who accept jobs that subject them to such close review of their personal lives cannot legitimately claim to have a high expectation of job-related privacy."[212] Further, the government need for such testing is high in such situations as "[t]he ways in which users of illegal drugs might put into jeopardy classified information in their possession are too obvious to require much elaboration."[213] A drug-abusing employee could be blackmailed, might sell classified information to pay for drugs, or could mishandle classified information due to a drug-induced, diminished capacity.[214] As all CIA employees are required to have and maintain a security clearance, it seems quite clear that the courts would uphold the Agency's blood and urine testing of its current and prospective employees for drug use.

C. Polygraph Examination

One of the most feared facets of the Agency's background investigation involves the polygraph exam,[215] more commonly known as a lie detector test. Such exams consist of strapping the prospective or current employee to a special chair, placing electrodes on the arm and chest, asking a series of questions related to national security concerns, and evaluating the body's responses to those questions for deception. The Agency is the only U.S. government entity that routinely requires its employees to undergo a polygraph exam as part of the process of obtaining and retaining employment. And though the efficacy of and need for the polygraph has been questioned, the exam appears likely to remain a critical part of the Agency's background investigation. It is also clear that requiring such an exam is perfectly legal.

The Employee Polygraph Protection Act (EPPA)[216] makes it unlawful for any employer "directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test."[217] Employers who violate this provision are susceptible to civil penalties and lawsuits.[218]

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212. *AFGE Local 1533*, 944 F.2d at 507.

213. *Id.* at 506 n.6.

214. *Id. See also Hartness*, 919 F.2d at 172-73 (noting the potential for blackmailing drug-using government employees); *Hallett*, 756 F. Supp. at 953 (noting that drug-induced government employees "with access to sensitive information may disclose such information through off duty intoxication, blackmail, or bribery").

215. *See Application Process*, *supra* note 192.

216. 29 U.S.C. §§ 2001-2009 (2006).

217. 29 U.S.C. § 2002(1) (2006).

218. 29 U.S.C. § 2005 (2006).

However, the federal government is expressly exempt from the prohibition on the use of polygraph exams.[219] Indeed, the EEPA explicitly provides that "[n]othing in this chapter shall be construed to prohibit the administration, by the Federal Government, in the performance of any intelligence or counterintelligence function, of any lie detector test to any individual employed by, assigned to, or detailed to . . . the Central Intelligence Agency."[220] The courts have made it clear that any state law that seeks to limit the application of polygraph exams to CIA employees–or any federal government worker, for that matter–would be considered preempted by the EEPA and thus null and void.[221] Thus, as fearsome as the polygraph process may be, it is clearly a legal activity and by all accounts likely to remain in use by the Agency.

D. Workplace Searches

The CIA has long conducted searches of employees' work areas and computers whenever there is a reasonable belief that the employee has engaged in activity detrimental to the Agency. Agency regulations indeed make it clear that the Agency can and will search work spaces and monitor any and all of its information systems. For example, the CIA regularly engages in standardized searches of all employees' e-mails and other electronic correspondence through use of certain search terms. This is undertaken to detect whether any Agency employee is engaging in inappropriate behavior, such as using government computers for reviewing or advancing child pornography or downloading information for purposes of espionage. Agency regulations provide that an employee has no reasonable expectation of privacy in any Agency information system and that any misuse can lead to administrative sanction and/or referral to the Department of Justice for criminal prosecution. CIA employees are presumed knowledgeable about such regulations on searches as a matter of law.[222]

The Supreme Court has held that the Fourth Amendment does apply to government officials in their work environment: "[i]ndividuals do not lose Fourth Amendment rights merely because

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219. 29 U.S.C. § 2006(a) (2006).

220. 29 U.S.C. § 2006(b)(2)(A)(i) (2006). The EEPA also authorizes the National Security Agency, the Defense Intelligence Agency, and the National Geospatial-Intelligence Agency to conduct polygraph exams of its employees. *Id.*

221. *See* Stehney v. Perry, 101 F.3d 925, 938 (3d Cir. 1996) ("[T]he New Jersey anti-polygraph statute was preempted by a federal statute, the Employee Polygraph Protection Act (EPPA).").

222. Doe v. Gates, 981 F.2d 1316, 1321 (D.C. Cir. 1993) (in discussing CIA regulations, the court noted that "[f]ederal employees are chargeable with knowledge of governing regulations or statutes").

they work for the government instead of a private employer."[223] Based upon this, "[s]earches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment."[224]

The issue then turns on the reasonable expectation of privacy a government employee has in a given item searched. An employee who brings a piece of luggage or a handbag into work has a significant expectation of privacy with regard to the contents of that item.[225] On the other hand, an employee has a vastly reduced expectation of privacy with regard to items that are regularly accessed by other government employees such that "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable."[226]

Due to the wide variety of differing work environments, "the question whether an employee has a reasonable expectation of privacy [in a given search] must be addressed on a case-by-case basis."[227] If an employee has no expectation of privacy in a particular item in the workplace, then the government may search it without triggering the Fourth Amendment. If, however, the public employee has an expectation of privacy in the workplace item, then the courts must "balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."[228] Normally, the government needs a search warrant in order to tip this balance into its favor. However, the warrant requirement may be unsuitable in situations in which obtaining the warrant would

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223. O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (O'Connor, J., plurality); *id.* at 731 (Scalia, J., concurring) (noting that constitutional protection against unreasonable searches by the government continue when the government acts as an employer). Together, the plurality opinion and the portions of Justice Scalia's concurring opinion which agree with the plurality opinion constitute a majority of the Court.

224. *Id.* at 715 (O'Connor, J., plurality). *See also id.* at 731 (Scalia, J., concurring) ("The offices of government employees . . . are covered by Fourth Amendment protections as a general matter.").

225. *Id.* at 716 (O'Connor, J., plurality).

226. *Id.* at 718. *See also id.* at 731 (Scalia, J., concurring) (noting that an office which is "subject to unrestricted public access" would not be protected by the Fourth Amendment).

227. *Id.* at 718 (O'Connor, J., plurality). Justice Scalia disagreed with the "case by case" requirement, and with the "reasonableness" standard. He sought a bright line rule that, due to the special needs of the government as employer, "government searches to retrieve work-related materials or to investigate violations of workplace rules . . . do not violate the Fourth Amendment." *Id.* at 732 (Scalia, J., concurring). However, lower courts consider the plurality opinion as governing the law in this area. United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000); Shields v. Burge, 874 F.2d 1201, 1203-04 (7th Cir. 1989); Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1335 (9th Cir. 1987). As the Seventh Circuit stated, even if Justice Scalia appears to have adopted a less stringent standard than "reasonableness," that standard "is the Court's least-common-denominator holding"–if a work-related workplace search was deemed "reasonable" both he and the plurality would agree it would not violate the Fourth Amendment. *Shields*, 874 F.2d at 1204.

228. *Ortega*, 480 U.S. at 719-20 (O'Connor, J., plurality).

frustrate the government's reason for the search, or if "special needs" exist that make acquiring a warrant impractical.[229]

The Supreme Court has found that such "special needs" exist when the government conducts searches of its employees' items "for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct."[230] In such situations, the courts will evaluate whether the search was "reasonable[ ] under all the circumstances."[231]

The Fourth Circuit has specifically applied this analysis with regard to the CIA workplace in the case of *United States v. Simons*.[232] In *Simons*, a division of the CIA had an announced policy that employees were to use the Internet at work for government-related purposes only, that access of unlawful material was prohibited, and that the government would engage in routine electronic auditing of its networks. Pursuant to a random search based on this policy, it was discovered that Simons, an Agency employee, had viewed sites containing sexual content. Simons' computer was then examined from a remote computer system and found to contain a large amount of pornographic material, including pictures of minors. Based upon this discovery, the Agency entered Simons' private work office when he was away, removed the hard drive on his computer, and replaced it with a copy. Search warrants were then obtained, and used to effectuate a more thorough search of Simons' work area.[233]

When Simons was eventually indicted on child pornography charges, he moved to suppress the evidence seized from his office. Applying the above-mentioned guidance provided by the Supreme Court, the Fourth Circuit held that Simons did not have a legitimate expectation of privacy in the files he had downloaded from the Internet, due to the Internet policy in place.[234] Thus, the court found, as a preliminary matter, that viewing and copying his computer files from a remote workstation did not violate the Fourth Amendment.[235]

As for the warrantless entry into his office to retrieve the hard drive, the court found that because Simons did not share the office he had a legitimate expectation of privacy in its contents. However, the court found the searches to be in line with an investigation of work-related misconduct, despite the fact that the dominant

229. *Id.* at 720.
230. *Id.* at 725.
231. *Id.* at 725-26.
232. Simons, 206 F.3d 392.
233. *Id.* at 395-97.
234. *Id.* at 398.
235. *Id.* at 399.

purpose of the search appears to have been to acquire evidence that Simons had engaged in criminal activity. As the Fourth Circuit stated, the Agency's special need to ensure the workplace operates efficiently and properly does not evaporate merely because the evidence being acquired was of a crime. Simons' violation of the Internet policy "happened also to be a violation of criminal law; this does not mean that [the CIA division] lost the capacity and interests of an employer."[236] As there were reasonable grounds for the search, the scope of the search was reasonably related to the objective, and the search was not overly intrusive, the court upheld the search as not violating Simons' Fourth Amendment rights.[237]

Thus, the Agency would appear to have considerable leeway in searching an employee's work-related area and/or computer. This is particularly true given the Agency notifications to the workforce that it routinely conducts such searches.[238] While any such analysis would be based on the specifics of a given case, as required by the Supreme Court,[239] as a general matter such searches could extend not only to Agency files, offices, and computer downloads, but also to e-mail and instant messaging exchanges.[240]

VI. LIMITATIONS ON PERSONAL INTERNATIONAL TRAVEL

The CIA imposes significant restrictions on the ability of its employees to travel overseas for non-work related reasons. Employees seeking to engage in personal foreign travel must provide details of that travel to the Agency beforehand. The Agency then conducts a review of the proposed trip, on a case-by-case basis, and can deny the travel for national security reasons. Despite the obvious impact that prohibiting personal travel can have on an employee, such restrictions appear quite legal.

The courts draw a major distinction between restricting the right to travel within the United States and restricting the right to travel internationally. As the Supreme Court has consistently stated:

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236. *Id.* at 400.

237. *Id.* at 401. The court did note that it might have reached a different conclusion had the employee's alleged criminal acts not also been a violation of the Agency's policy. *Id.*

238. *See* discussion *supra* p. 148-51.

239. *See supra* text accompanying note 227.

240. *See Legality of Intrusion-Detection System to Protect Unclassified Computer Networks in the Executive Branch*, 2009 WL 3029764 O.L.C. (Aug. 14, 2009), *available at* http://www.justice.gov/olc/2009/legality-of-e2.pdf (asserting the government does not violate the Fourth Amendment rights of its employees when it uses an intrusion-detection system to search Internet communications of its employees made on government computers when the employees are informed that such searches may occur via log-on banners and/or computer-user agreements).

> The constitutional right of interstate travel is virtually unqualified. By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,' the Court has held, can be regulated within the bounds of due process.[241]

Courts employ the rational basis test to evaluate government regulation of international travel.[242] Using this test, the Supreme Court has upheld various government restrictions on international travel, mostly on grounds of national security. In 1964, for example, the Court found the Secretary of State's refusal to validate passports for travel by U.S. citizens to Cuba to be constitutional.[243] The Court noted the State Department had expressed concerns–about Cuba's stated intention to export its Communist revolution, as well as the fear of imprisonment of Americans in Cuba without charges. The Court held that these concerns were legitimate bases for the Secretary of State to have "justifiably concluded" that travel to Cuba could lead to "dangerous international incidents."[244]

The Supreme Court reaffirmed travel bans to Cuba 20 years later, stating "we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by re-

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241. Califano v. Aznavorian, 439 U.S. 170, 176 (1978) (citations omitted) (quoting Califano v. Torres, 435 U.S. 1, 4 n.6) (finding a statutory provision precluding certain social security benefits for any month an individual spends abroad to have a rational basis and thus constitutional). *See also* Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting *Califano*); Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) (noting that international travel "is an important aspect of the citizen's 'liberty' guaranteed in the Due Process Clause of the Fifth Amendment") (quoting Kent v. Dulles, 357 U.S. 116, 127 (1958)).

242. *Califano*, 439 U.S. at 177 (stating that a government-imposed limitation on international travel is constitutional unless it is deemed "wholly irrational"). *See also id.* at 178 (noting that the constitutionality of measures restricting international travel "does not depend on compelling justifications. It is enough if the provision is rationally based"); Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 604 (7th Cir. 2009) ("The Supreme Court affords great deference to restrictions on international travel so long as they are justified by a rational foreign policy consideration."); Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 662 (N.D. Cal. 1994) ("Because international travel is not a fundamental right, limitations on it are evaluated under a rational basis test."); Moses v. Allard, 779 F. Supp. 857, 867 (E.D. Mich. 1991) ("The [*Califano*]Court held that a mere rational justification would suffice for Congress to limit international travel.").

243. Zemel v. Rusk, 381 U.S. 1 (1965).

244. *Id.* at 14-15. The Court dismissed the claim that the restriction deprived travelers of First Amendment rights to view the basis and impact of the nation's policies first hand, finding that the restriction was really "an inhibition of action," not speech. *Id.* at 16-17. *See also Clancy*, 559 F.3d at 605 (disposing of a First Amendment claim based upon regulations precluding travel to Iraq by noting that "[t]he Supreme Court has held that governmental restrictions on international travel inhibit action rather than speech").

stricting travel."[245] In so concluding, the Court made clear its "classical deference to the political branches in matters of foreign policy."[246] As it noted, issues involving foreign affairs are to be left almost entirely to Congress and the Executive Branch to manage.[247]

The most relevant case in this area is *Haig v. Agee*.[248] In that case, Philip Agee, a former CIA employee, undertook a deliberate campaign to undermine the Agency by traveling to foreign countries and exposing covert CIA officers. Beyond divulging classified information, violating his non-disclosure agreement with the Agency, and harming the ability of the United States to gain foreign intelligence, Agee's actions also led to numerous acts of violence against purported CIA employees he identified. Based on this perceived harm and Agee's announced intention to continue to travel abroad to expose CIA employees, the Secretary of State revoked Agee's passport. Agee promptly sued on a variety of grounds, including deprivation of his right to travel overseas.[249]

The Court upheld the Secretary's actions. With regard to Agee's constitutional claims, the Court stated that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation" and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests."[250] The Court quickly, and easily, found that Agee had jeopardized those interests, as well as endangered the nation's foreign relationship with other countries; thus, the Court upheld the revocation of Agee's passport.[251]

However, the Court has not blindly permitted all restrictions on international travel. Twice, in decisions pre-dating the Cuba cases above, the Court found prohibitions based on political affiliation to be illegal. In the first of these cases, the Secretary of State denied passports to certain individuals based upon their alleged affiliation with the Communist Party and their refusal to sign an affidavit denying such affiliation.[252] The Court found the Secretary's actions to be illegal because Congress had not delegated that authority to the Secretary. In so holding, the Court explicitly stated that it was not deciding whether such an act would

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245. Regan v. Wald, 468 U.S. 222, 243 (1984).

246. *Id.* at 242.

247. *Id.* ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' ") (citation omitted).

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

249. *Id.* at 283-87.

250. *Id.* at 307.

251. *Id.* at 308-09.

252. Kent v. Dulles, 357 U.S. 116 (1958).

have been constitutional had Congress passed a law authorizing such actions.[253]

The Court, however, did address that situation in the second case–*Aptheker v. Secretary of State*.[254] In *Aptheker*, the Court evaluated a statute that barred members of any communist organization from applying for, renewing, or using a U.S. passport. It ultimately held the statute to be an unconstitutional violation of the Due Process Clause of the Fifth Amendment because it "too broadly and indiscriminately restrict[ed] the right to travel.[255] The Court noted that the statute applied both to members who knew and to members who did not know that their organization sought to further the aims of the world communist movement. The statute also did not take into account the level of activity the individual had in the organization, the commitment of the individual to the organization's purpose, the reasons for the individual's travel, or the place where the individual was traveling. Finally, the Court noted that Congress could have taken less drastic measures to fulfill its objective of safeguarding national security.[256] Given that the statute restricted a constitutionally-protected activity, but was not " 'narrowly drawn to prevent the supposed evil,' " the Court refused to uphold the statute.[257]

The CIA's restrictions on international travel do not have the same problems. The Agency does not ban all personal international travel of its employees. Rather, it merely requires that all employees inform the Agency of such travel. The Agency then reviews the specific travel on a case-by-case basis and can deny the travel for national security reasons.[258] Thus, unlike *Aptheker*, the Agency's restriction is narrowly drawn to prevent the proposed evil of risking national security. Further, as the Supreme Court noted in *Haig v. Agee*, protection of national security easily passes the rational basis test.[259] Finally, as noted at the beginning of this article, the federal government has more leeway to restrict the rights of its employees than it does public citizens.[260] As the Supreme Court has upheld the government's right to preclude international

253. *Id.* at 129.

254. Aptheker v. Sec'y of State, 378 U.S. 500 (1964).

255. *Id.* at 505.

256. *Id.* at 509-513.

257. *Id.* at 514 (quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)). *See also* Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 604-05 (7th Cir. 2009) (noting that the Court has distinguished between general policy bans on international travel established for foreign policy reasons and those created to "discriminate among people based on their political affiliation").

258. Personal trips to North Korea or Iran, for example, would probably not be approved.

259. *See supra* text accompanying note 248.

260. *See supra* text accompanying notes 3-4.

travel by public citizens on the basis of national security concerns,[261] clearly the government (in the form of the CIA) can preclude its employees from such travel for the same reason. Thus, the Agency's restrictions on international travel, assuming a valid nexus in a given case to protection of national security, should pass constitutional muster.

VII. PROHIBITION ON UNIONS AND STRIKES

One mechanism by which Agency employees could theoretically challenge the above restrictions on their constitutional rights would be through unionization, collective bargaining, and the threat or actuality of a strike. However, these options are entirely foreclosed to CIA employees.

Congress has noted that "in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection."[262] The Supreme Court has gone so far as to proclaim that the right to unionize "is a fundamental right."[263] However, it is well accepted that the U.S. Constitution itself does not recognize a right to unionize; rather, any right for such unionization stems from legislative fiat.[264]

The Federal Service Labor-Management Relations Act is the congressional statute governing unionization by federal employees.[265] It mandates that every federal government "employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of

261. *See supra* text accompanying notes 250-51.

262. 29 U.S.C. § 401(a) (2006).

263. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

264. *See* David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135, 138 (1988) ("The Constitution of the United States does not expressly recognize a right to unionize . . . ."); WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 174 (3d ed. 1993) ("[T]he right of public employees to bargain collectively . . . is not protected by the Constitution."); Am. Fed'n of Gov't Emps. v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) (upholding ability of President to exclude certain subdivisions of the Marshals Service from unionizing, in compliance with the Federal Service Labor-Management Relations Act).

265. Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 303 (2004); *Reagan*, 870 F.2d at 724.

such right."[266] However, this statute explicitly excludes employees of certain agencies, including the CIA, from forming unions.[267]

Whether the inability of the CIA to unionize is a curse or a blessing is certainly up to debate. However, it is undoubtedly true that one key advantage of unions is their ability to help protect and assist government employees.[268] This is done in a number of ways. One mechanism is seeking to influence Congress to pass legislation that benefits workers. This can be done by administering pressure on Congress or by seeking to acquire legislative influence. For example, federal unions engage in significant efforts each year to induce Congress to increase federal pay.[269] It is no coincidence that, over the past 20 years, half of the top ten donors to members of Congress were unions.[270] Another way federal unions can assist federal employees is by bringing lawsuits on their behalf. A perusal of the footnotes of this article can attest to this fact, given the plethora of significant constitutional cases cited in which the plaintiff is a federal government union.[271] Regardless of the benefits that could accrue with unionization, the courts have upheld the statutory ability of the government to preclude certain of its employees–such as CIA officers–from forming unions.[272]

Associated with the right to unionize is another useful tool for employees: the right to strike. In essence, the power of collective bargaining stems from the ability of employees to utilize certain economic weapons. Without those economic weapons, the employee loses considerable leverage. As one commentator has stated, "[c]ollective bargaining evidently functions as a method of fixing terms and conditions of employment only because the risk of loss

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266. 5 U.S.C. § 7102 (2006). While § 7102 refers only to an "employee," the definition of "employee" in the subsequent section of the statute makes clear that its terms apply solely to federal government employees. *See infra* note 267.

267. 5 U.S.C. § 7103 (2006) (defining an "employee" covered by the statute as an individual "employed in an agency" with the term "agency" defined as an "Executive agency" but explicitly providing that the definition does not include "the Central Intelligence Agency" as well as the FBI, NSA, and others).

268. *See generally NLRB*, 301 U.S. at 33 (noting that unions are "essential to give laborers opportunity to deal on an equality with their employer").

269. *See* Mike Causey, *2009 The Year of the Fed*, FEDERALNEWSRADIO.COM (Oct. 9, 2009), http://www.federalnewsradio.com/?nid=&sid=1781276 (noting the crucial role that federal unions play in the determination of the annual pay raise for federal employees).

270. David von Drehle, *Spotlight: Campaign Finance and the Court*, TIME, Feb. 8, 2010, at 14 (evaluating the top ten donor organizations to Congress between 1989 and 2010, and noting that five of them were unions).

271. *See, e.g.*, cases cited *supra* notes 35, 194, and 195 (comprising plaintiffs such as the American Federation of Government Employees, National Federation of Federal Employees, and National Treasury Employees Union (NTEU)).

272. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) (holding that, per the provisions of the Federal Service Labor-Management Relations Act, the President can exclude certain subdivisions of the Marshals Service from unionizing).

to both parties from a strike can become 'so great that compromise is cheaper than economic battle.' "[273]

However, as with the right to unionize, the right to strike has never been considered a right protected by the Constitution.[274] Indeed, until fairly recently, such collective action on the part of employees was often prosecuted as a conspiracy.[275] Thus, like the right to unionize, the right to strike stems from statute,[276] in particular Section 7 of the National Labor Relations Act.[277]

That Act, however, explicitly states that it does not apply to federal employees, and no other statute provides government employees with the right to strike.[278] To the contrary, federal statutory law expressly precludes all federal government employees, including CIA employees, from "participat[ing] in a strike, or assert[ing] the right to strike, against the Government of the United States."[279] This also includes "work stoppages or any similar activity interfering with a federal agency's operations."[280]

Courts have upheld this preclusion, deciding that–because the right to strike is not a constitutional right–government restrictions or prohibitions on strikes need merely fulfill the rational basis test. As discussed previously,[281] under this relaxed test, the government action is permissible so long as its basis "is not 'arbitrary' or 'irrational,' i.e., 'if any state of facts reasonably may be conceived to justify it.' "[282] Courts have accepted numerous bases for the government to preclude strikes by its employees: the public servant's higher duty to the public good, the need to ensure the continued functioning of the government, as well as the desire to protect the public's health and safety.[283] Based on these, courts have had no

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273. 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1572-73 (John E. Higgins, Jr. et al. eds. 5th ed. 2006) (quoting COX, BOK, GORMAN & FINKIN, LABOR LAW CASES AND MATERIALS 469 (12th ed. 1996)).

274. *See* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971) ("At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers."); THE DEVELOPING LABOR LAW, *supra* note 273, at 1573 ("The right to strike has never been accorded unqualified constitutional protection."); GOULD, *supra* note 264, at 174 (noting that the right of public employees to strike is not protected by the Constitution).

275. *Blount*, 325 F. Supp. at 882.

276. *Id.*; THE DEVELOPING LABOR LAW, *supra* note 273, at 1585.

277. THE DEVELOPING LABOR LAW, *supra* note 273, at 1585.

278. *Blount*, 325 F. Supp. at 882. (noting that the NLRB does not include "any governmental or political subdivisions" and that no other federal statute provides government employees the right to strike).

279. 5 U.S.C. § 7311(3) (2006). *See also* THE DEVELOPING LABOR LAW, *supra* note 273, at 1589 n.86 (citing § 7311 for the proposition that "[e]mployees of the federal government are absolutely prohibited from participating in strikes").

280. *In re* Prof'l Air Traffic Controllers Org., 724 F.2d 205, 206 n.6 (D.C. Cir. 1984).

281. *See supra* text accompanying notes 66-71.

282. *Blount*, 325 F. Supp. at 883 (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

283. *Id.*

problem finding that the government's preclusion of the ability of its employees to strike fulfills the rational basis test and passes constitutional muster.[284]

It is worth noting that the consequences of violating the prohibition to strike are fairly severe. Government employees who participate in a strike–or even merely assert the right to strike–against the federal government face a fine and imprisonment of up to one year.[285] More imposing, however, such individuals may not only be legally terminated from their federal government position, but also become statutorily precluded from employment by the federal government in any capacity, with no temporal limitation.[286]

VIII. RESTRICTIONS ON ACCESS TO COURTS

Not only are CIA employees deprived of many of their constitutional rights, but they are also greatly restricted in their ability to challenge such deprivations in court. As a general matter, the right to "petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights" and is "intimately connected both in origin and purpose, with the other First Amendment rights of free speech and free press."[287] Nonetheless, it is beyond doubt that access to the courts is not unfettered. Congress and the courts can and do impose numerous limitations on court access, such as statute of limitations provisions and protected privileges. Included in these limitations are several statutes and judicial doctrines that specifically place significant limitations on an Agency employee's ability to bring suit against the CIA.

Thus, by statute, a CIA employee may only bring a tort claim against the Agency pursuant to the Federal Tort Claims Act (FTCA).[288] The only exceptions are for alleged violations of the Constitution or a federal statute.[289] Yet the FTCA still creates several roadblocks for a CIA employee seeking to sue the Agency in tort. In addition to requiring the filing of an administrative claim with the

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284. *Id.*

285. 18 U.S.C. § 1918 (2006).

286. Clarry v. United States, 85 F.3d 1041, 1046 (2d Cir. 1996) (finding that federal air traffic controllers who participated in a strike against the United States lose any right to future federal employment as "[5 U.S.C.] § 7311 provides that any person who participates in a strike against the federal government may be barred indefinitely from employment with the federal government").

287. United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967).

288. 28 U.S.C. §§ 1346(b)(1), 2679 (2006) (stating the FTCA is the exclusive mechanism for all claims against the United States and its agencies for injury to person or property from the negligent or wrongful act or omission by a federal government employee acting within the scope of his or her duty).

289. 28 U.S.C. § 2679(b)(2) (2006).

Agency before bringing suit,[290] the FTCA also prevents certain claims from ever being filed against the federal government. Thus, a CIA employee is precluded from filing a tort claim against the Agency for negligent execution of a statute or regulation, engagement in a discretionary government function, assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, interference with contract rights, and for "[a]ny claim arising in a foreign country."[291] The last exemption is particularly critical given the focus of the Agency on overseas operations.[292] Thus, the FTCA imposes significant restraints on possible lawsuits by Agency employees.

The Political Question Doctrine, created by the courts, imposes further limitations. This doctrine finds its roots in the landmark decision of *Marbury v. Madison*, wherein Chief Justice Marshall stated that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[293] Though the contours of the doctrine are notoriously " 'murky and unsettled,' "[294] the Supreme Court has outlined a series of factors that would constitute political questions and thus require dismissal of a case. These factors include that the matter is constitutionally committed to another political branch of government, that the court would need to make a policy determination not meant for judicial consideration, or that the court's opinion would show a lack of respect for another branch of government.[295] Courts have found that national security matters can fall under this doctrine,[296] which may prove an impediment to CIA employee lawsuits.

A more critical judicially-created doctrine is the State Secrets Privilege. The State Secrets Privilege permits the United States to prohibit the disclosure of information in a court of law which would harm the national security.[297] Its basis stems from the supremacy

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290. 28 U.S.C. § 2675(a) (2006).

291. 28 U.S.C. § 2680 (2006).

292. It is worth noting that this last exemption also applies to decisions made in the United States related to overseas activities. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

293. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803). *See also* Alperin v. Vatican Bank, 410 F.3d 532, 544 (9th Cir. 2005) (recognizing *Marbury* as the launching point of the Political Question Doctrine).

294. Bancoult v. McNamara, 445 F.3d 427, 435 (D.C. Cir. 2006) (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring)).

295. Baker v. Carr, 369 U.S. 186, 217 (1962).

296. *See, e.g.*, Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005) (dismissing a claim, pursuant to the Political Question Doctrine, that the United States and the former National Security Advisor were involved in the failed kidnapping attempt of Chile's President, as such a claim implicated matters best left to the political branches of government).

297. United States v. Reynolds, 345 U.S. 1 (1953); Halkin v. Helms, 598 F.2d 1, 7 (D.C.

of the Executive Branch in matters concerning military and foreign affairs, and the courts' reluctance to interfere in those areas.[298] The privilege is quite absolute, as it concerns areas in which "the courts have traditionally shown the utmost deference to Presidential responsibilities."[299] Indeed, the government can intervene and assert the privilege even if it is not a party to the litigation.[300] Judicial scrutiny of a properly asserted state secrets claim is extremely limited.[301] When properly invoked, no party may use the protected information at trial.[302] The court must then dismiss any claims based upon the protected information and, further, if the protected information goes to the very subject matter of the case, dismiss the entire lawsuit.[303] Based upon the CIA's invocation of the State Secrets Privilege, courts have dismissed numerous claims filed by Agency employees against the CIA alleging various wrong-doings,[304]–even though the courts have recognized the inherent unfairness such dismissal can place on the Agency litigant.[305] In upholding such cases, the courts not only restrict access to the courts by the particular federal litigants, but undoubtedly dissuade other Agency employees from even considering filing suit against their employer.

Finally, as noted in Part I, an employee may be entirely precluded from bringing suit against the CIA depending on the type of action undertaken by the Agency. Specifically, the courts have consistently held that statutory claims involving revocations of a security clearance cannot be reviewed by the courts.[306] Thus, the Supreme Court has dismissed as non-judiciable a claim by a CIA employee under the Administrative Procedures Act (APA) that his

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Cir. 1978).

298. *Reynolds*, 345 U.S. at 6-7.

299. United States v. Nixon, 418 U.S. 683, 710 (1974).

300. Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991); Fitzgerald v. Penthouse Int'l Ltd., 776 F.2d 1236, 1241-42 (4th Cir. 1985).

301. Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) ("When properly invoked, the [S]tate [S]ecrets [P]rivilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege.").

302. *Reynolds*, 345 U.S. at 11.

303. CIA v. Sims, 471 U.S. 159, 179-81 (1985) (dismissing claim that would have required disclosure of individual names and their institutional affiliations after the Director of Central Intelligence invoked the State Secrets Privilege); *Reynolds*, 345 U.S. at 10-11 (protecting a military report from disclosure after Secretary of the Air Force invoked State Secrets Privilege); *Zuckerbraun*, 935 F.2d 544 (dismissing entire case when key purported evidence is impermissible under the State Secrets Privilege).

304. *See, e.g.*, Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005) (dismissing a race discrimination claim filed by a CIA employee pursuant to the State Secrets Privilege invoked by the Agency).

305. *See id.* at 348 ("We recognize that our decision [to dismiss the claim pursuant to the State Secrets Privilege] places, on behalf of the entire country, a burden on Sterling that he alone must bear.").

306. Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988) (holding that the courts will not consider a statutory claim based on revocation of a security clearance).

national security clearance was illegally revoked.[307] Other courts have similarly dismissed Title VII claims brought by government employees asserting that revocation of their security clearances was due to discrimination.[308] As the Supreme Court has noted, the reason for such dismissals is that "it is not reasonably possible" for an outside, non-expert body–such as a court–to review the decision of whether to grant or revoke a security clearance, to evaluate whether the Agency correctly decided who can and cannot be trusted with classified information, and to "determine what constitutes an acceptable margin of error in assessing the potential risk."[309] Still, it is important to note that courts have only precluded claims related to revocation of security clearances that are based on statute. Where such a claim is based on the Constitution, the courts have permitted the suit to continue.[310]

CONCLUSION

Central Intelligence Agency employees face a wave of limitations on their constitutional rights. They are greatly restricted in their ability to engage in political expression, date, marry, befriend, acquire an outside job, protect their privacy, conduct personal foreign travel, and even challenge these restrictions through unions, strikes, or the courts. These limitations appear perfectly legal, though the limitation on association with nationals of certain foreign nations is certainly susceptible to constitutional challenge.

Regardless of legality, however, the overall extent of restrictions on basic human rights and liberties placed on CIA employees is fairly staggering. Yet, the ability of the government to restrict these constitutional and personal rights stems from four perfectly logical and acceptable sources. First and foremost is what can be best described as a knowing and voluntary waiver. Certain

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307. Webster v. Doe, 486 U.S. 592, 601 (1988).

308. *See, e.g.*, Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) ("[E]mployment actions based on denial of security clearance are not subject to judicial review, including under Title VII."); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[A]n adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.").

309. *Egan*, 484 U.S. at 529.

310. *Webster*, 486 U.S. at 603-04 (allowing constitutional claims by a CIA employee that he was improperly terminated for being a homosexual, as "we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court"); *Ryan*, 168 F.3d at 524 (dismissing a Title VII claim based upon revocation of a security clearance, but stating that "our holding is limited to Title VII discrimination actions and does not apply to actions alleging deprivation of constitutional rights" as there is no indication that Congress clearly stated an intent to preclude such constitutional claims); Stillman v. Dep't of Defense, 209 F. Supp. 2d 185, 208-13 (D.D.C. 2002), *rev'd on other grounds*, 319 F.3d 546 (D.C. Cir. 2003) (emphatically holding that constitutional claims can be brought with regard to revocation of a security clearance).

commentators have suggested that individuals cannot waive their constitutional rights.[311] Such an assertion is pure hogwash. As one commentator has noted:

> Constitutional rights are waived every day. People incriminate themselves, surrender their rights to counsel, waive a bundle of rights as part of plea bargains, and sign contracts surrendering a right to trial through arbitration or confession of judgment clauses. A criminal defendant even has a constitutional right to waive certain constitutional rights.[312]

This is certainly true of CIA employees. Such individuals, by dint of understanding the purpose of the CIA and their employment within it, concede to waiving a host of rights. The most obvious is the freedom of speech to disclose classified information, though that is hardly the only right freely waived to protect national security. By becoming a CIA employee, and receiving the benefits of such employment–monetary, patriotic, prestigious, or otherwise–CIA employees knowingly, willing, and lawfully give up numerous, substantial rights.

Such a waiver is connected to a second basis for limiting the rights of CIA employees; namely, contractual. Every CIA employee signs a Secrecy Agreement, in which the employee agrees not to disclose classified information. Throughout his or her career, an Agency employee may sign additional Secrecy Agreements, pledging not to reveal information related to more specific national security matters. Such Secrecy Agreements not only put CIA employees on notice about the broad-based restrictions imposed upon them, but also create a valid contractual obligation which has been upheld by the courts.[313]

Third, as indicated several times previously, the government plays a much different role as an employer than it does in its interaction with and obligation to the general public. As Justice Scalia has stated:

> The restrictions that the Constitution places upon the government in its capacity as lawmaker, *i.e.*, as the regulator of private conduct, are not the same as the restrictions that it

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311. *See* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 346 (1981) (discussing the position of Ronald Dworkin).

312. *Id.* at 346 (citations omitted).

313. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (finding in favor of the CIA, when a former CIA employee breached his Secrecy Agreement with the Agency by failing to submit a publication to the Agency for pre-publication review).

> places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees. Private citizens perhaps cannot be prevented from wearing long hair, but policemen can. Private citizens cannot have their property searched without probable cause, but in many circumstances government employees can. Private citizens cannot be punished for refusing to provide the government information that may incriminate them, but government employees can be dismissed when the incriminating information that they refuse to provide relates to the performance of their jobs. With regard to freedom of speech in particular: Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason. Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that reason.[314]

Fourth, and most critical, is the power of the DCIA and deference of courts to national security. As noted in Part I, by statute, the DCIA maintains awesome powers, not to mention incredible deference by the courts. Such power and deference is not limitless, but it is nonetheless part of the reason that courts have generally permitted DCIAs to place restrictions on CIA employees in the name of national security.[315]

So, what are we to make of this quandary? On the one hand, there are these four compelling bases for restricting the rights of CIA employees. On the other hand, the actual list of limited rights is mind-boggling and cuts across virtually every major right provided to Americans–speech, travel, employment, friendships, etc. And, as stated in the introduction, such limitations are particularly ironic given that Agency employees defend our national security precisely to protect rights that are specifically restricted to them.

The answer lies in attempting to make sure that there is a proper balance between protection of national security and protection of the individual rights of CIA employees. The courts have assessed that, for the most part, the Agency has legally implemented the correct balance. Most Agency decisions are made on a case-by-case basis and weigh the national security concerns of a given interest with the individual rights of a particular Agency employee. Where the Agency places itself most at risk in upsetting the bal-

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314. Rutan v. Republican Party of Ill., 497 U.S. 62, 94-95 (1990) (Scalia, J., dissenting) (citations omitted).

315. *See supra* text accompanying notes 9-10.

ance is where assessments are not made on a case-by-case basis, but rather are dependent on over-arching general concepts. The blanket restriction on CIA employees having significant personal relationships with citizens of certain countries is a perfect example of this imbalance. While no court has specifically analyzed such scenarios, judicial decisions in analogous circumstances suggest that the Agency will have difficulty justifying its position.

Whether all of the Agency restrictions will continue to be upheld, however, comes down to how well the Agency can prove the national security risk at issue. As noted above, sometimes the courts employ a rational basis test to assess government action; sometimes they utilize a more exacting strict scrutiny mechanism. In the area of national security law, however, the test used is almost irrelevant. The real question considered by the court is whether the government's assertion of national security is or is not legitimate. If legitimate, the courts seem willing to restrict even the most hallowed of constitutional rights of an Agency officer. If the national security claim, however, is more theoretical or ethereal, the courts seem more likely to rule in favor of the CIA employee.

The result of these decisions by the Agency and the courts is not theoretical, but rather has a significant impact on the lives of the thousands of CIA employees. Admittedly, the restrictions do not seem to be impacting the Agency's ability to recruit and retain quality employees. More and more Americans continue to apply for employment with the CIA. And more and more CIA employees continue to spend years upon years, decades upon decades, engaging in actions to protect this country from harm. However, such interest in the Agency, and the dedication of its employees, does not authorize the Agency to overlook its obligation to ensure that the rights of its workers are not swept under the overarching rug of national security. As indicated in this article, the Agency traditionally does a pretty good job of fulfilling that obligation. Yet continued vigilance is required to ensure that the ever-mounting threats to our nation do not improperly supersede the individual rights of the government employees whose job it is to protect our national security.