The "Right to Write" in the Information Age: A Look at Prepublication Review Boards

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Secrecy agreements that establish legally-enforceable expectations intended to protect classified information have been in use for decades.

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Background

Since the attacks of 11 September 2001, an unprecedented number of retired Intelligence Community (IC) officers have published memoirs and works about their experiences over the past 15 years, in effect building a veritable cottage industry.[a]

Some publications, such as *The Secret Book of CIA Humor* (Pelican, 2004) by a former member of the Central Intelligence Agency's (CIA) Public Affairs office, Ed Mickolus, provide humorous insight. *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives* (Simon & Schuster, 2012) by former National Clandestine Service director Jose A. Rodriguez, Jr., discusses highly controversial subjects. The number of intelligence-based stories written by "insiders" concerns many IC officers who believe writing about their experiences goes against CIA norms—the protection of sources and methods—and is contrary to the secrecy agreement and oath to protect national security that officers must affirm and sign prior to entering on duty.

This concern was especially visible at the National Intelligence University in September 2012, when former ambassador Henry Crumpton visited the university to discuss his book, *The Art of Intelligence* (Penguin Press, 2012) and his intelligence career. His talk, while fascinating, provoked the question, "How is it that he can write about these experiences?"

Secrecy agreements that establish legally enforceable expectations intended to protect classified information have been in use for decades: the US National Archives holds versions of CIA secrecy agreements within the CREST database[b] that date back to the early 1950s. Records from the collection of renowned cryptologist William F. Friedman (1891–1969) provide evidence that secrecy oaths

a. For an early, post-2001 discussion of this topic, see John Hollister Hedley reviews of three CIA memoirs in *Studies in Intelligence* 49, no. 3 (September 2005), 79.

b. CREST is the acronym for the CIA Records Search Tool, a database of declassified intelligence documents. CREST cannot be accessed online but visitors to the National Archives, Archives II Library in College Park, Maryland, can search the database in room 3000 at that location. It is expected to be available on cia.gov in 2017.

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had been in place earlier still; Army Security Agency personnel had to sign them as early as 1947.

The use of secrecy agreements throughout the executive branch began with the signing of Executive Order (EO) 11905, on 19 February 1976. The order, "United States Foreign Intelligence Activities," required all executive branch employees with "access to information containing sources and methods of intelligence to sign an agreement that they will not disclose that information to persons not authorized to receive it."

In addition to that enjoiner, the order directed the development of programs to protect intelligence sources and methods. It was this element of the order that led to the establishment of prepublication review boards within the executive branch.

> *Without a dependable prepublication review procedure, no intelligence agency or responsible government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.*[1]

This sentiment, articulated in the Supreme Court's decision in Snepp v. United States in 1980 stands in contrast to the view of CIA Deputy Director of Plans (now Operations) Frank Wisner (1951–59)—and shared by many IC officers—that

> *. . . persons having the deepest and most legitimate insights into intelligence matters are most scrupulous in their trusteeship of such knowledge and . . . the penchant for sensational revelations is the near monopoly of the charlatans and pretenders who scavenge along the flanks of the intelligence enterprise.*[2]

The number of individuals who actually write memoirs is quite small compared to the number of government and contract employees who have, at some point in their lives, had access to classified material. One early memoirist, a "scavenger," was Herbert O. Yardley with his book, *The American Black Chamber* (1931). Others who chose to write included Roger Hall, a member of the OSS who wrote *You're Stepping on My Cloak and Dagger* (W. W. Norton & Co., 1957) in the 1950s, a humorous account of his experiences, and Allen Dulles, a retired DCI who authored *The Craft of Intelligence* (Harper & Row) in 1963.

The works of Victor Marchetti, Frank Snepp, and Philip Agee in the 1970s shocked the IC, much as Yardley's book in the 1930s had done. Here were "insiders" writing about sensitive subjects. Marchetti's works prompted the creation of a formal prepublication review process. Snepp attempted to work around the review process, resulting in the first imposition of a constructive trust[a] around a book's profits. Agee's works led to an act of Congress that criminalized revelation of the identities of undercover personnel. Between the 1970s and 1990s, the majority of works for the public were written by former senior officials, such as directors of central intelligence Stansfield Turner and William Colby.

A new outlook on publications emerged in the late 1990s, when Tony Mendez and Gary Schroen were encouraged by CIA senior management to write, respectively, *The Master of Disguise: My Secret Life in the CIA* (William Morrow, 1999) and *First In: An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan* (Presidio Press, 2005).[3] Between these books, in 2002, appeared senior operations officer Dewey Clarridge's memoir, *A Spy for all Seasons: My Life in CIA* (Scribner, 2002). The publication of these books opened a new chapter in the intelligence genre and spawned today's cottage industry in intelligence memoirs.

Early Steps in Protection of Secrets

William Friedman tried hard during his days in the Army Signal Corps and NSA to curtail the publication of any sensitive information. His aversion to publishing sensitive material is evident in his personal papers and the disgust of Herbert Yardley that is revealed in them. Friedman's

a. A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property . . . to assert his own beneficial interest in the property and deny the beneficial interest of another. Source: Scott Atkins, *Equity and Trusts* (Routledge, 2013).

papers also chronicle his involvement in drafting anti-publishing legislation during the 1940s, which appears to have been motivated by his hearing some of his own subordinates at the Army Signal Corps proclaim that their experiences would "make a great book!"[4]

The legislation that ultimately passed Congress during this period would penalize only those who revealed classified information to the public: we know it as 18 US Code Section 798. Much later, in the mid-1960s, a group of lawyers at CIA began to consider alternate ways to prevent the disclosure of sensitive information by current or former employees.[a]

From the 1950s through the mid-1970s, the CIA Office of Security usually reviewed manuscripts intended for nonofficial publication, in association with the Office of General Counsel and other appropriate agency components; however, the Marchetti case revealed the need to establish a more systematic review process at CIA.

United States v. Marchetti was a groundbreaking case that reinforced the strength of the secrecy agreement contract and set precedents that remain in place today.

Victor Marchetti forced the CIA's hand in 1972, when it was discovered—before publication—that he was writing about topics considered quite sensitive. *United States v. Marchetti* was a groundbreaking case that reinforced the strength of the secrecy agreement contract and set precedents that remain in place today. To strengthen the government's position, President Gerald Ford in 1976 allowed for the formal creation of prepublication review boards across the executive branch by issuing Executive Order 11905. EO 11905 also made secrecy agreements mandatory, so that signatories would be duly informed of the new prepublication review requirement.

Growing Burden, Growing Criticism

Since 1976, the CIA's Publications Review Board (PRB) has been reorganized several times in order to accommodate changing trends. One notable change was the decision to review the works of current—as well as past—employees. (Originally, the PRB reviewed only the works of former employees, leaving the review of works written by current employees to their immediate supervisors. However, the PRB assumed responsibility for reviewing the writings of both current and former employees after the appearance of Michael Scheuer's *Imperial Hubris: Why the West Is Losing the War On Terror* (Brassey's, 2004) presumably because of the burden the effort placed on managers to determine what was classified and what was not.[5, 6])

Between 1977 and 1980, the number of PRB reviews grew from 42 to 148 works.[7] From 1980 to 2003, the CIA's PRB reviewed between 200 and 400 manuscripts per year. In 2010, more than 1,800 manuscripts were reviewed. For 2011, the board anticipated the review of more than 2,500 manuscripts.[8] By contrast, the FBI's review board evaluated 69 works in 2000, 167 works in 2008, and 223 works in 2013.[9]

Participation on a prepublication review board is often thankless work, although it should perhaps be seen as a rewarding opportunity to assist in the protection of national security and to assure that peers—past and present—uphold the secrecy agreements they signed.

However, the work is not only thankless, but subject to intense criticism for a range of perceived faults ranging from slowness, inaccuracy, opaqueness to being overly political and playing to favorites or just overreaching the writ of review boards.

The difficulties faced by these boards became apparent early on. The first manuscript from Victor Marchetti (578 pages in length) was reviewed by an ad hoc board of high-ranking CIA officers. The book had more than 300 redactions made during its first review; Marchetti contested many of them in court. By the end of legal negotiations, the number of redactions was reduced to 168.

a. In reality, it is practically impossible to prevent the disclosure of sensitive information if someone is intent on doing it. The threat or reality of imprisonment or fines, as discussed in the nondisclosure or secrecy agreements, will not deter all individuals. Chelsea Manning and Edward Snowden in this century, Ana Montez or Robert Hanssen in the 1980s and 1990s, and Philip Agee in the 1970s all demonstrate that it is not hard to get information out of government control. The more difficult task is for an individual who has the trust of the US government to write about an intelligence related topic and follow the rules to publish an unclassified work for a nonofficial audience. Of course, this is not impossible by any means, evidenced by the intelligence genre cottage industry that has grown exponentially since 2000. This is where review boards come in.

Directors Tenet, Hayden, and Panetta favored far looser retrictions [on what could be published], which facilitated the publication of a significantly larger number of manuscripts.

The removed sections ranged from a couple of words to entire paragraphs.

However, perceptions of favoritism in the treatment of some authors have challenged the credibility of the process. When a former CIA director incurs no apparent repercussions from going to print prior to full PRB review, the reputation of the PRB suffers. "If he doesn't follow the specific protocols, then why should there be any expectation for anybody underneath him to do so?" said Mark Zaid, a Washington lawyer who has handled more than a dozen cases involving authors and the CIA's review board.[10]

Indeed, in the CIA memorandum "Inspection Report of the Office of Public Affairs, Chapter V," about the Publications Review Board from then-inspector general Charles Briggs to CIA's deputy director in 1981, employees were already expressing concerns over whether the PRB acted fairly toward critical texts and whether the board was acting impartially toward former senior officers.[11]

In his 2016 book *Company Confessions,* Christopher Moran wrote that

> *being someone who speaks out against the Agency is a brutal experience. The official backlash against the individuals . . . was such a ferocious orgy of overkill that they were left devastated. . . . Marchetti was thrust into a psychological and financial tailspin that left him a shadow of his former self; Agee was, quite literally, cast into the wilderness. The sad moral of their story was: publish at your peril.*[12]

A former member of CIA's PRB wrote in the September 2011 *Studies of Intelligence* article "Myths and Realities: CIA Prepublication Review in the Information Age":

> *As a longtime DI manager, the frenetic activity of dealing with middle-of-the-night breaking events now seems quaintly bucolic compared with my daily navigation of the often confusing rules and guidelines dealing with the CIA's prepublication review process.*[13]

For example, under CIA director Porter Goss, the board tended to err on the side of allowing very little to be published by CIA authors. By contrast, directors Tenet, Hayden, and Panetta favored far looser restrictions, which facilitated the publication of a significantly larger number of manuscripts.[14]

The Absence of Digital Archive of Decisions

Authors who have worked with the PRB have the perception that there is no complete digital, searchable archive of previously reviewed and cleared publications, a situation which is described as a source of frustration.[a] Authors who have submitted works in the past, for example, published authors Hank Crumpton, Robert Wallace, and Bill Harlow, have gone back to the board some time later with the same material and found the previously-cleared writing redacted.[15] Even after seeing the previous text in the context of the previous publication, the PRB has been firm in redacting some previously-cleared verbiage. Unsurprising, then, that some individuals find the PRB daunting, frustrating, cumbersome, and capricious.

CIA inspector general reports about the PRB process mirror some of these concerns. In addition to concerns about lack of transparency, unfairness, heavy handedness, the difficulty of disputing decisions, an overarching concern has been the absence of a comprehensive database containing previously-cleared manuscripts, a shortcoming that has prevented the PRB from comparing newer writings against older writings. The CIA inspector general (IG) report from May 2009 identified a number of problems caused by the absence of such a searchable database.

The 2009 report was not the first time that inadequacies have been identified in the PRB's ability to conduct its duties efficiently. In the 1981 inspector general report cited earlier, the author noted that PRB members expressed concern over the difficulty of keeping track of intelligence-related information in the public domain.[19]

a. The PRB maintains detailed files of all cases they review. But conversion of these files to digital forms for easy searching has been a challenge.

Failure to develop a comprehensive readily-searchable institutional memory of material officially released to the public hastens the day when the CIA will be embarrassed (and probably sued) because it denies an author the right to publish material that has officially been made publicly available.[20]

The Problem of Leaks

Further confounding the process is the problem of leaks, which many IC writers may believe can be cited in their own work. Leaked information is not automatically unclassified by the originating organization. As a result, because information that was leaked is not always identified as such, writers will be confronted with a problem if they draw, intentionally or unintentionally, on leaked information. The lack of a current database of officially released material makes it difficult for both writers and reviewers to recognize leaked material in a document.

In 2005, Congressman Peter Hoekstra said in a speech to the Heritage Foundation, "It has become all too common—almost second nature—for people in Washington to leak information.

Making it worse is that leaks themselves happen for a variety of reasons. There are official leaks, as noted by Gary Ross in his 2011 book, *Who Watches the Watchman*:

> *In 1987, the Tower Commission that investigated the Iran-Contra Affair made the same point more succinctly: "Selective leaking has evolved to the point that it is a principal means of waging bureaucratic warfare and a primary tool in the process of policy formulation and development in Washington."*[21]

In 2005, Congressman Peter Hoekstra said in a speech to the Heritage Foundation, "It has become all too common—almost second nature—for people in Washington to leak information. Policymakers may leak for any number of reasons, such as to bring attention to a good news story or discredit policies with which they disagree. They may also leak information to gauge public interest in a new policy or issue. But some seemingly leak just because they can.[22]

The ratio of material that might possibly be leaked to the number of proven and punished leakers makes the likelihood of being jailed for leaking, as author David Pozen notes, "statistically very low."[23] Another issue is a "longstanding organizational culture that treats leaking classified information to the media as nearly risk-free, which suggests

Unauthorized Disclosure and the Arm of the Law

Over the past 10 years, the US government has become more inclined to follow through in pursuing indictments against contract or staff employees for unauthorized disclosure of classified information.

The mechanism for the criminal punishment of unauthorized disclosure is that the agency that believes its information has been mishandled makes an official complaint to the Department of Justice, which then decides, first, whether to investigate and, second, whether the results of the investigation warrant indictment.

It should be noted that Lawrence Franklin, a former Department of Defense official, was indicted in May 2009 and subsequently convicted for leaking information to the American Israel Public Affairs Committee. Before Franklin's indictment, the only two modern-era indictments had been Daniel Ellsberg in June 1971 (case dismissed) and Samuel Morison in October 1984 (convicted, then pardoned by presidential decree.)

In 2009, Director of National Intelligence Dennis Blair asked the Department of Justice for a report on the number of leak cases brought between 2005 and 2009.[16] The report found that 153 referrals from agencies resulted in 24 investigations by the FBI—and no indictments.[17,] Subsequently, DOJ is reported to have issued eight indictments (the last against Edward Snowden).[18]

Newspaper accounts have differed on the number of indictments made during the Obama administration, perhaps because some tally only indicted government officials while others count total indictments (several of those indicted were contractors, not government employees). The most accurate information available suggests there have been eight indictments since 2010: Thomas Drake, April 2010 (guilty of lesser charges, not espionage); Shamai Leibowitz, May 2010 (convicted); Chelsey Manning, May 2010 (convicted); Stephen Jin Woo Kim, August 2010 (convicted); Jeffrey Sterling, December 2010 (convicted); John Kiriakou, January 2012 (convicted, but not of espionage); James Hitelsberger, January 2012 (case pending); and Edward Snowden, June 2013 (case pending). Some accounts suggest further indictments are also being prepared.

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that the behavior is acceptable.[24] Enforcement of anti-leaking laws, as haphazard as it has been, has focused almost entirely on the leakers, while the recipients of the leaks—typically journalists—are left untouched.[25] Courts have also taken a dim view of attempts to block publication of leaked material.[26]

On the other hand, courts have consistently upheld CIA efforts to block publication by individuals who are "in privity" with the agency by virtue of having signed a secrecy agreement that obliges them to seek prepublication permission for manuscripts. This has enabled the CIA to temporarily stop publication of books by former employees in order for the PRB to gain access to the manuscript. However, the secrecy agreement has applied only to attempts by CIA-affiliated authors to publish their own works; it has not been ruled to constitute grounds for enjoining publication by third parties.[27]

Enthusiastic authors hoping to use information obtained from official or unofficial leaks in their books are walking into a minefield. One of the problems with publicly available information is the possibility that the information is still considered classified by the originating agency or department. Up until about 2014, CIA neither affirmed nor denied involvement in the Predator program, while Hank Crumpton's 2012 book discussed the Predator program in detail. Ambassador Crumpton's book clearly states the book was reviewed by the CIA's PRB, but once published, many in the IC thought the inclusion of the Predator account in the book was at least curious, given the agency's continued refusal to confirm its existence. This situation is not limited to CIA. In an atmosphere like this, an Intelligence Community person using classified terms but quoting them from reports in the media would presumably strongly challenge the probable redactions.

A Broken Process?

In a *Washington Post* op-ed dated 27 December 2015, Jack Goldsmith and Oona A. Hathaway lamented, "The government's prepublication review process is broken."[28] They state in their opening paragraph:

> *We both learned the hard way that public service in jobs related to national security carries the risk that, for the rest of our lives, the government will insist that we allow it to review virtually everything we write related to our time in government before it can be published. We are not alone. Hundreds of thousands of former government employees who have had access to classified information cannot publish without permission. This system results in pervasive and unjustifiable harms to freedom of speech.*[29]

The secrecy or non-disclosure agreement signed by both of these individuals prior to their being allowed to access classified information clearly specifies a prepublication review requirement. Furthermore, any other nondisclosure agreement they may have signed subsequently—indeed, at any point in their careers— carries the same verbiage. Secrecy agreements are legal contracts upheld by the US Supreme Court and enforceable by the executive branch. These agreements clearly state that information must be reviewed by a prepublication review board prior to publishing.

Goldsmith and Hathaway continue:

> *In the 35 years since Snepp, however, the review system has grown unreasonable . . . the number of classified documents, and of people with access to them, has grown exponentially. The result today is a mess of overbroad and inconsistent regulations that apply to all living people with pre-clearance contracts going back decades . . . the system is racked with pathologies . . . The review process sometimes takes longer than the specified review periods, leaving authors in limbo. And vague criteria give reviewers enormous discretion over what the public can see . . .*
>
> *It is time for change. The executive branch should develop clear, uniform criteria for publication review. Only writings that might reasonably contain or be derived from classified information should be subject to the process, and inspection for classified information should be the only basis for review. When an agency blocks publication, it should give clear reasons and permit swift appeals. And it should establish binding*

deadlines for completion— ideally no longer than 30 days. If the executive branch needs more resources to implement these reforms, Congress should provide them.

The government must be able to keep its secrets, but First Amendment values also matter. The president and Congress should find a better way to balance the two.[30]

Goldsmith and Hathaway do touch on some very important aspects of prepublication review, however. The resources devoted to review efforts appear to be minimal for the formal teams. Staff members may not even be full time, and review boards may have a hard time maintaining the staff that is allocated for the function whether "enough" for the task or not. Depending on the status of the writer, and the institution, the primary reviewer may still end up being a current supervisor. That supervisor may have any number of other mission-critical tasks to do in addition to reviewing this work, which probably should not be carried home in case some sensitive item is discovered in the work—thus creating a security violation. Additionally, no formal training exists to instruct supervisors on how to evaluate documents under review (other than resumes) according to board standards.

The process can be even more burdensome if a manuscript requires review by other IC entities. This always happens when a manuscript contains information that reviewers believe involves information and source and methods managed in other community components. For example, in 2013, the FBI received

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for prepublication review 16 works from other agencies or departments. The requirement to coordinate review with other IC elements can easily lead to failure to meet the 30-day review deadline established in the Marchetti case. At the very least, the Supreme Court decision in Marchetti and its 30-day "rule" did not address timing in cases where the manuscript needs to be reviewed by a second or third IC partner.

Certainly, reviews of some works can be especially taxing. When former DCI George Tenet submitted his manuscript of *At the Center of the Storm*, the CIA PRB convened a special committee just for his work. That group required about a year to evaluate his manuscript. Soon after the evaluation was completed in 2006, the PRB underwent the most recent of its reorganizations in reaction to the changing volume of material and the identified need to have a relatively stable permanent staff.[31]

With the increasing volume of book manuscripts, the reality of similarly long delays (or longer) for other authors increases the likelihood authors will attempt to buck the system, publishing without review and leaving themselves to the mercy of the courts. Alternatively, they may become more inclined to ditch their projects altogether. An author taking this last route most likely would characterize the decision as a de facto form of government prohibition (through the PRB) of the publication of their work.

A similar opinion is that of Robert Wallace, former director of the Office of Technical Service at CIA. He believes that individuals who have successfully worked with a PRB multiple times should be allowed some sort of an expedited process through the PRB. He believes that these "frequent fliers" should be trusted not to put classified information into new works presented to the PRB.[32]

All individuals within the IC assume a great deal of responsibility when they sign a secrecy agreement. They are entrusted to keep thousands of "secrets" and only occasionally have to face anyone to "prove" their worthiness for the opportunity to protect these items so important for the national security.[a] The burden for writing an unclassified work is always on the writer. It is the PRB's job to verify that the work does not contain classified information.[33]

The Question of "Appropriateness"

While the discussion about "classified" versus "unclassified" can be intense, a potential bigger hornet's nest is the issue of an additional normative standard to which current CIA employees and contractors must adhere—that of "appropriateness." While this standard has been applicable for years, the subject was treated at length, in two pages, in the aforementioned 2011 *Studies in Intelligence* article.[b] The officer reminded

a. Issues around overclassification *do* exist.

b. Former PRB chairman John Hedley addressed this topic, although in less detail, in his article on the review process in 1997. See "Reviewing the Work of CIA Authors:

readers of the provision by including the following excerpt from the CIA prepublication regulation:

> *For current employees and contractors, in addition to the prohibition on revealing classified information, the Agency is also legally authorized to deny permission to publish any official or nonofficial materials on matters set forth (earlier in the regulation) that could:*
>
> *(a) reasonably be expected to impair the author's performance of his or her job duties,*
>
> *(b) interfere with the authorized functions of the CIA, or*
>
> *(c) have an adverse effect on the foreign relations or security of the United States.*[34]

One would presume that a conversation with a current employee about how an item he or she authored could affect foreign relations or security, or interfere with the agency's functions, would lead to an agreed-upon conclusion that such disclosures are not acceptable. For example, national policy is for policymakers to discuss and determine; analysts provide information to help policymakers come to conclusions, but they themselves should never appear to advocate any particular policy direction. Another example is the case of someone who might be identified on social media as a current CIA employee, who could be viewed as expressing "CIA policy." Items (b) and (c) seem reasonable enough on their face.[a]

What makes the appropriateness provision difficult is that it more often requires subjective judgment and a longer view of the potential implications of what is published in the literature of intelligence. Accordingly, it is often subject to negotiation.

In Sum

Prepublication review boards are a necessary function within the executive branch, a fact the majority of Intelligence Community writers almost certainly recognize and accept. Prepublication review boards, in effect, legitimize the needs of writers by providing them the means for complying with regulations and agreements and protecting sources, methods, and US interests as they exercise their rights as American citizens.

But, given the state of current information technology, writers would be reasonable to wonder why these advances have not been mobilized to improve and speed up review processes. In this respect, the Goldsmith and Hathaway call for change is not unreasonable. Among the possibilities are applying more up-to-date archival tools and data analytics, adopting Bob Wallace's trusted "frequent flier" notion, and improving staffing.

Investment in the means to improve and speed up the review process would yield valuable returns by reducing tension in the process (and the likelihood someone will circumvent the system), which would result in published works with the potential to foster a greater understanding of the functions of intelligence in the United States and the challenges it faces in serving US national security.

And unless Congress creates laws to restrict the unclassified writings of Intelligence Community officers, the future will likely see many more works from current and former IC officers sent to PRBs for review. The need for change can only become more urgent.

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a. Of course, resignation—admittedly drastic—is one option for circumventing the appropriateness provision.

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