

DATE 5 NOV 1992

TO: C/PPS *W*

ROOM NO. BUILDING

REMARKS:

fyi

C/Policy *JM 7 Nov*

Debbie *AC 10 Nov* (file SF189)

Bohlie -

pls. send a copy to Bob Moroney C/SSC

FVI

Thanks

STAT

FROM:

[Redacted]

EXO

STAT

ROOM NO.

BUILDING

EXTENSION

ROUTING SLIP

TO:

		ACTION	INFO	DATE	INITIAL
1	DCI				
2	DDCI				
3	EXDIR				
4	D/ICS				
5	DDI				
6	DDA		X		
7	DDO				
8	DDS&T				
9	Chm/NIC				
10	GC	X			
11	IG				
12	Compt				
13	D/OCA				
14	D/PAO				
15	D/PERS				
16	D/Ex Staff				
17	D/Security		X		
18					
19					
20					
21					
22					
		SUSPENSE	Date		

Remarks

EO ^{1 NOV 1987} B

Executive Secretary

3 Nov '87

Date

3637 (10-81)

Executive Registry

87-3525X

OS REGISTRY

4 NOV 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, AFL-CIO)
80 F Street, N.W.)
Washington, D.C. 20001)
(202) 639-6426,)
and)

JIM STINCHCOMB)
107 Westerfield Drive)
Goose Creek, S.C. 29445)
(803) 553-5054)
and)

JAMES DOUGLAS)
484 Manchester Way)
Vacaville, Calif. 95688)
(707) 447-8013)
and)

LOUIS C. BRASE)
4112 Loop 306)
St. Angelo, TX 76904)
(915) 942-7559)

Plaintiffs,)

v.)

Civil Action No. 87-2412

STEVEN GARFINKEL, DIRECTOR)
Information Security Oversight Office)
General Services Administration)
18th & F Streets, NW)
Washington, D.C. 20405)
and)

TERRANCE C. GOLDEN, ADMINISTRATOR)
General Services Administration)
18th & F Streets, NW, Rm. 6137)
Washington, D.C. 20405)
and)

FRANK CARLUCCI, DIRECTOR)
National Security Council)
The White House)
Washington, D.C. 20500)
and)

WILLIAM WEBSTER, DIRECTOR)
Central Intelligence Agency)
Washington, D.C. 20505)
and)

CASPAR WEINBERGER,)
 Secretary of Defense)
 The Pentagon)
 Washington, D.C. 20310)
 and)
 HON. EDWARD C. ALDRIDGE)
 Secretary of Air Force)
 Washington, D.C. 20310)
 and)
 HON. JOHN O. MARSH, JR.)
 Secretary of the Army)
 The Pentagon, Rm. 3E 718)
 Washington, D.C. 20310-0100)
 and)
 HON. JAMES H. WEBB, JR.)
 Secretary of the Navy)
 The Pentagon, Rm. 4E 686)
 Washington, D.C. 20350-1000)
 and)
 UNITED STATES OF AMERICA)
 Defendants.)

COMPLAINT
 (Declaratory and Injunctive Relief)

This is an action brought by the American Federation of Government Employees, AFL-CIO and plaintiff civilian federal employees seeking to have enjoined and ~~declared unlawful the federal government's implementation of Standard Form 189 -- the Classified Information Nondisclosure Agreement and Standard Form 4193 -- the Sensitive Compartmented Information Nondisclosure Agreement.~~

JURISDICTION

1. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. 1331, and 28 U.S.C. 1361, and 5 U.S.C. 702. This action is commenced under 28 U.S.C. 2201 et seq. and the First and Fifth Amendments to the United States Constitution, seeking to permanently restrain implementation of Forms 189 and 4193, and a declaration that the Forms are unconstitutional and violative of statutory law.

VENUE

2. Venue property lies in this District Court pursuant to 28 U.S.C. 1391(e).

PARTIES

3. Plaintiff, American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization that represents approximately 700,000 Federal Employees worldwide, including the Department of Defense. AFGE seeks to preserve the economic, civil and constitutional rights of employees in its exclusive bargaining units through collective bargaining, lobbying efforts and litigation. AFGE is suing on its own behalf and on behalf of Federal employees being required to sign these forms as a condition of retention of their security clearances and preservation of their federal employment.

4. Plaintiff Jim Stinchcomb is a WL-8 Motor Vehicle Operator Leader (Ordinance Missile Handler) with the

Polaris Missile Facility, Atlantic in Charleston, South Carolina. Plaintiff Stinchcomb has been instructed to sign Form 189. Plaintiff Stinchcomb has presently refused to sign the Form 189 but has been threatened with security clearance revocation and resultant loss of employment if he does not sign the form.

5. Plaintiff James H. Douglas is a GS-5 Firefighter (Structure) with the Department of Navy, Naval Weapons Center. Plaintiff Douglas' execution of the SF 189 was achieved only by threat of revocation of his security clearance and the resulting loss of his employment with the federal government.

6. Plaintiff Louis Brase is a Training Manager at Goodfellow Air Force Base. Plaintiff Brase has signed the SF 4193, without advice of counsel, and under coercion and compulsion that failure to execute SF 4193 would result in revocation of his security clearance, retention of which is a condition of his employment. On August 4, 1987, Plaintiff Brase refused to sign SF 189 and at that time the sensitive compartmented information access and clearances granted him in January, 1986, were suspended.

7. Defendant Steven Garfinkel is the Director of the Information and Oversight Office (ISOO), appointed by the Administrator of General Services and approved by the President. As Director, Defendant Garfinkel has been delegated the implementation and monitorship functions of the information security program, including the

responsibility to promulgate directives such as NSDD 84. Defendant Garfinkel is sued solely in his official capacity.

8. Defendant Terence C. Golden is the Administrator of the General Services Administration. Defendant Golden is responsible for implementing and monitoring the information security program established pursuant to Executive Order 12356. Defendant Golden is sued solely in his official capacity.

9. Defendant Frank Carlucci is the Director of the National Security Council. Defendant Carlucci is responsible for approving directives, such as NSDD 84, which are developed by the Director, ISOO. Defendant Carlucci is sued solely in his official capacity.

10. Defendant William Webster is the Director of the Central Intelligence Agency. Defendant Webster has been entrusted by the Executive Order 12356 with the function of creating special access programs to control access of sensitive information classified pursuant to that Order. The Director of Central Intelligence Agency promulgated and administers Form 4193, a nondisclosure agreement, as a condition of access to sensitive compartmented information. Defendant Webster is sued solely in his official capacity.

11. Defendant Caspar Weinberger is the Secretary of Defense, an executive department of the Federal Government. The Department of Defense is administering SF 189 to its federal civilian employees with or without

security clearances and Form 4193 to those with access to sensitive compartmentalized information, and has established a sample indoctrination briefing, DOD 5200.1 PH 1 (July, 1985) to implement this program. Defendant Weinberger is sued solely in his official capacity.

12. Defendant Edward Aldridge is the Secretary of the Air Force. Defendant Aldridge has implemented the usage of SF 189 and 4193, and is responsible for taking the within-described actions against Plaintiff Brase. Plaintiff Aldridge is sued solely in his official capacity.

13. Defendant John Marsh is the Secretary of the Department of the Army. Defendant Marsh has implemented the usage of SF 189 and 4193 and is being sued solely in his official capacity.

14. Defendant James H. Webb, Jr. is the Secretary of the Department of Navy. Defendant webb has implemented the usage of SF 189 and 4193 and is being sued solely in his official capacity.

BACKGROUND

15. By Executive Order No. 12356, dated April 2, 1982, President Reagan prescribed a uniform system for classifying, declassifying and safeguarding national security information. The Executive Order acknowledged the essential right of the public to be informed concerning the activities of the government, but provided that certain information be protected against unauthorized

disclosure. Pursuant to that Order, the National Security Council is entrusted with providing overall policy direction for the information security program. The Administrator of GSA is given the responsibility for implementing and monitoring the classification program and delegating the implementation and monitorship functions to the Director of the Information Security Oversight Office (ISOO). The Director of ISOO is authorized to develop, in consultation with agencies, and promulgate, subject to the approval of the National Security Council, directives for the implementation of the Order, which are binding on the agencies.

16. On March 11, 1983, the Director of ISOO issued National Security Decision Directive (NSDD) 84, which was signed by the President. It provides that its terms are "in addition to the requirements set forth in Executive Order 12356." Paragraph 1a of NSDD 84 requires that all persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access. Paragraph 1b of the Directive required all persons with access to Sensitive Compartmented Information (SCI) to sign a nondisclosure agreement (SF 4193) providing for mandatory life-long prepublication review as a condition of access to SCI and other classified information. In Paragraph 1c of the Directive, the Director of ISOO is assigned the responsibility of developing standardized forms that satisfy the requirements of paragraph 1a and 1b of the

Directive.

17. On or about August 24, 1983, ISOO developed Standard Form 189 entitled "Classified Information Nondisclosure Agreement." Pursuant to 32 C.F.R. 2003.20, this form is required to be executed by all employees of executive branch departments and independent agencies as a condition of access to classified information.

18. SF 189 provides that in consideration for being granted access to classified information, specified as information that is either classified or classifiable under the standards of Executive Order 12356, execution of and acceptance of the obligations of the Form are required. Employees are advised by this Form that breach of the agreement may result in termination of security clearances, removal from positions of trust and termination of their employment, as well as criminal prosecution. The Form requires acknowledgment that all information to which an employee may obtain access by signing the Agreement is now and will forever remain the property of the U.S. Government, and an assignment of all royalties and remunerations that have resulted or may result from any disclosure, publication or revelation not consistent with the terms of the Agreement. Employees are assured that all questions have been answered to their satisfaction prior to signing the form.

19. Classifiable information has been defined by ISOO as information which would have been marked as classified

"but which as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information." Moreover, ISOO maintains that a party to SF 189 would "violate its nondisclosure provisions only if he or she disclosed without authorization classified information or information that he or she knew or reasonably should have known was classified, although it did not yet include required classification markings." The government reserves the right to retroactively reclassify information for a period of up to fifty years.

20. Individually named Plaintiffs and employees represented by Plaintiff AFGE have been compelled to sign SF 189 as a condition of retention of their security clearances and maintenance of their federal employment. Plaintiff Stinchcomb and other employees who refuse to sign the SF 189 are subject to the revocation of their security clearance and the termination of their employment.

21. On or about August 24, 1983, the federal government also issued SF 4193, entitled "Sensitive Compartmented Information Nondisclosure Agreement." By its terms, this Agreement required employees who have been granted access to information known as Sensitive Compartmented Information (SCI) to submit for prepublication review all materials, including works of fiction that he or she contemplates disclosing to any person not authorized to have such information or that is

prepared for public disclosure, which contains any SCI; classified information from intelligence reports or estimates; or any information concerning intelligence activities, sources or methods.

22. In the early part of 1984, President Reagan withdrew and deleted paragraph 1(b) of the NSDD 84. Consequently, the 1983 version of the SF 4193 form was no longer operative. However, a virtually identical version of the SF 4193 in existence since December 1981 remains operational, and its execution remains as a required condition to access to SCI and retention of positions requiring that access. That 1981 version of Form 4193, also contains a lifelong prepublication review component. It provides that SCI involves or derives from intelligence sources or methods and is classified or classifiable. It provides further that any information to which an employee may obtain access is now and will forever remain the property of the U.S. Government, and that the employee assigns to the U.S. Government all rights, title, interests and remunerations that have resulted or may result from any disclosure, publication or revelation not consistent with the terms of this Agreement.

VIOLATIONS OF LAW

COUNT I

23. Execution of SF 189 and 4193 are compelled due to the real threat of revocation of security clearance and

consequential loss of employment. In many instances the forms have already been signed, coerced under the circumstances. The required execution of the forms with the vague, overlybroad and wholly ambiguous proscription for the release of "classifiable" information is violative of the First Amendment to the United States Constitution's protection against abridgement of freedom of speech and the right to petition Congress.

24. The prohibition against disclosure of information not presently classified by authorized officials, but which may subsequently be construed as classified, presents an unreasonably inhibiting and chilling effect upon the free exchange of legitimate matters of public discussion.

25. The SF 189, in violation of the First Amendment, exposes an employee to liability for releasing information from public sources which become classified after sources were published, or even declassified information that has entered the public domain.

26. The lifetime prepublication review requirement for employees with SCI access contained in Form 4193 constitutes an unlawful prior restraint on the exercise of First Amendment rights and a virulent scheme of licensing and censorship.

27. Department of Defense in DOD 5200: 1-PH 1 has indicated that some agency regulations in effect before March 1983 require employees with any clearance to submit any and all materials for prepublication review. This

constitutes an impermissible prior restraint on the exercise of First Amendment rights.

28. The suspension on August 4, 1987 of Plaintiff Brase's SCI clearance and the removal from his position as Training Manager at Goodfellow Air Force Base because of his refusal to sign the SF 189 is an unlawful interference with his First Amendment right of free speech.

COUNT II

29. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 28.

30. Requiring execution of SF 189 and 4193 is violative of the employees Fifth Amendment protections against deprivation of liberty and property, without due process of law.

31. The terms in SF 189 and 4193 "classifiable," and "indirect unauthorized disclosure," are unconstitutionally vague. The spectre of termination from employment and civil and criminal liability for disclosure under these circumstances renders the forms constitutionally defective under the Fifth Amendment. The absence of prior notice or hearing to determine what is "classifiable" information subjects employees to revocation of security clearances and termination of employment in violation of the due process clause.

32. The suspension on August 4, 1987 of Plaintiff Brase's SCI clearance and the removal from his position as Training Manager at Goodfellow Air Force Base because of his refusal to sign the SF 189 constitutes an unauthorized interference with liberty, property and dignitary interests guaranteed him by the Fifth Amendment.

COUNT III

33. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

34. Requiring execution by Plaintiff Federal Employees of Forms 189 and 4193 deprives them of equal protection of the law as guaranteed by the Fifth Amendment of the United States Constitution.

35. Private entrepreneurs who are awarded federal government contracts are required to sign SF 189A. Unlike federal employees, private contractors may only be subject to loss of security clearance for disclosure of classified information, not classifiable information. This disparate treatment of Plaintiff federal employees caused by imposition of this vague "classifiable" standard which makes it impossible for an employee to govern his or her conduct, is not rationally related to any legitimate government purpose and is unconstitutional.

COUNT IV

36. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 35.

37. Section 2302(b)(8)(A) of Title 5 U.S.C., Civil Service Reform Act, protects the rights of federal employees to disclose to the public information which the employee reasonably believes evidences a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

38. Section 2302(b)(8)(B) provides similar protection for like disclosures to the Special Counsel of the Merit System Protection or the Inspector General of an agency or agency head designee, without limitation by other laws or Executive Orders compelling secrecy in the interest of national defense.

39. SF 189 and 4193 are not laws or Executive Orders which may constrain the availability of these whistleblower protection, with respect to general disclosures to the public. Nor is NSDD 84 a law or executive order within the contemplation of 5 U.S.C. 2302(b)(8)(A), as NSDD 84 clearly delineates that its terms are in addition to Executive Order 12356. Nothing in Executive Order 12356 requires nondisclosure agreements of this sort for implementation, contractual or otherwise.

40. The imposition of SF 189 and 4193 has the effect of inhibiting the disclosure of violations of law, waste of funds, abuse of authority and specific dangers to public health or safety, by eliminating the whistleblower protections provided by statute. These compelled authorizations to revoke security clearances, terminate employment and take other disciplinary action for lawful disclosures of non classified, but potentially classifiable information, of this important nature, are violative of the anti-reprisal protections of the Civil Service Reform Act.

COUNT V

41. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-40.

42. Section 7211 of Title 5 provides that the right of Federal employees to petition members of Congress or to furnish information to either House of Congress or to a Committee or member thereof, may not be interfered with or denied.

43. The blanket prohibitions in SF 189 and 4193 against disclosing potentially "classifiable" information, albeit presently unclassified, is in direct contravention of 5 U.S.C. 7211.

COUNT VI

44. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-43.

45. Public Law 96-303, entitled the Code of Ethics for Government Service, requires any person in government service to "expose corruption whenever discovered."

46. Imposition of the terms of SF 189 and 4193, requiring that a federal employee not disclose information that is "classifiable," is inconsistent with the terms of Public Law 96-303 and is violative of that statute.

COUNT VII

47. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-46.

48. The Administrative Procedure Act prohibits agency action which is arbitrary, capricious or an abuse of discretion. 5 U.S.C., Sec. 706(2)(A).

49. The requirement that Plaintiffs execute SF 189 and 4193 with its speculative "classifiable" determination is arbitrary, capricious, and an abuse of discretion. Requiring Plaintiffs to exercise the authority reserved by Executive Order to prescribed individuals specifically trained and fully conversant with classification standards and designations, unduly exposes them to risk of loss of employment and criminal liability.

50. ISOO exceeded its authority and abused its discretion by mandating that individual Plaintiffs agree not to disclose "classifiable" information as a condition

of retention of security clearance and employment.

COUNT VIII

51. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-50.

52. Defendants have exceeded their authority by their continued usage of SF 4193, in violation of 5 U.S.C. 706(2)(C).

53. In the latter part of 1984, President Reagan specifically withdrew paragraph 1(b) from NSDD 84 and declared an intent not to reinstate that paragraph and place a moratorium on nondisclosure agreements with prepublication review. Paragraph 1(b) of NSDD 84 was the purported authority for the CIA's establishment and utilization of the nondisclosure agreement as a condition of access to sensitive compartmentalized information. The Defendants continued use of the prior 1981 version of this agreement (Form 4193) is without statutory or executive authority and operates in clear excess of any delegated authority.

COUNT IX

54. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-53.

55. The Copyright Clause of the United States Constitution, Article I, Section 8, Clause 8, confers upon Congress alone the authority to secure exclusive rights to particular writings and discoveries.

56. The Copyright Act specifically bars any copyright claim by any government official using government information.

57. The declaration and required acknowledgment of a property right inuring to the Government by execution of SF 189 and 4193 for the writings and works of federal employees is an unlawful accession of the function of Congress and is contrary to the Constitution and copyright laws.

58. The taking of property without just compensation and without an independent grant of Congressional authority is violative of the Fifth Amendment and Article I of the United States Constitution.

COUNT X

59. Plaintiffs allege and incorporate by reference the allegations contained in paragraphs 1-58.

60. The Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) permits the withholding of national security information if it is so required by Executive Order to be kept secret and is "in fact properly classified pursuant to such Executive Order."

61. The prohibition in SF 189 and 4193 of disclosure of "classifiable information" is in contravention of the terms of FOIA which require an actual classification prior to any withholding of information.

62. The SF 189 and 4193 do not take into account the propriety or accuracy of the classification, and thus

compel withholding of information that has not "in fact" been properly classified pursuant to Executive Order.

COUNT XI

63. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-62.

64. Defendants have required federal employees in Defense departments, without any security clearances, to execute SF 189.

65. Requiring execution of SF 189 compels the misrepresentation of certain facts, such as having received a security indoctrination, having been granted a security clearance, and having been authorized access to classified information.

66. There is no consideration for the nondisclosure agreement with respect to employees without security clearances and it is thus unenforceable.

67. The requirement to sign SF 189 imposed upon Federal employees without security clearances constitutes a prior restraint on freedom of speech and right of expression guaranteed by the First Amendment and a violation of the Fifth Amendment.

COUNT XII

68. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-67.

69. As contracts the SF 189 and 4193 are void or voidable because they impose unconstitutional conditions on the continued employment of federal employees; are unsupported by legal consideration; are not authorized by Congress or any lawful exercise or authority delegated by Congress to the Executive Branch; and are not executed by duly appointed and authorized contracting officers (or appointment authorities) of the United States.

70. SF 189 and 4193 are masked and unlawful attempts to formulate national legislation by means of a contract, and to skirt the regulatory process.

71. SF 189 and 4193 are illusory contracts of adhesion induced by the exercise of undue influence, economic duress, and unconscionable coercion.

72. As SF 4193 applies beyond one's employment and in perpetuity, it exceeds any purported Executive dominion over an employment relationship and suffers from fatal overreaching.

73. SF 189 and 4193 are enforced by a process that deprives federal employees of the safeguards to the liberty, property and dignitary interest that attach to their tenured positions and that are guaranteed by the Constitution, the Civil Service Reform Act and the traditions and laws of the United States Civil Service.

Wherefore, Plaintiffs pray that this Honorable Court enter an order:

- A. Declaring that Plaintiffs rights, including First and Fifth Amendment guarantees have been violated by Defendants usage of SF 189 and 4193.
- B. Declaring that Defendants promulgation and reliance on SF 189 and 4193 is arbitrary, capricious, and in excess of statutory and executive authority.
- C. Declare unlawful Defendants actions in compelling the execution of SF 189 and 4193, as applied in contravention of the Freedom of Information Act, the whistleblower protections and right to Petition Congress guarantees of the Civil Service Reform Act, the Code of Ethics for Government Service, the copyright laws and the State Department Authorization Act.
- D. Permanently restrain, and enjoin Defendants and all their officers, agents, employees and successors from implementing SF 189 and 4193 as presently constructed.
- E. Compelling Defendants to publish a notice in the Federal Register and a notice to all affected employees that SF 189 and 4193 have been canceled, and that all executed forms will be withdrawn and rescinded.
- F. Compelling the Secretary of Air Force to reinstate Plaintiff Brase's SCI clearance.
- G. Compelling the Secretary of Air Force to reinstate Plaintiff Brase to his position as Training Manager, from which he was removed on August 4, 1987, or to place him in a functionally equivalent position.
- H. Granting Plaintiffs attorney fees and costs

I. Granting such other and further relief as the Court finds proper.

Respectfully submitted,

Stuart A. Kirsch

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing First Amended Complaint (Declaratory and Injunctive Relief) has been served by regular mail this 27th day of October, 1987, upon the following:

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555 4th Street, N.W.
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Attention: Secretary to Chief of Civil Division

Steven Garfinkel, Director
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William Webster, Director
Central Intelligence Agency
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Caspar Weinberger
Secretary of Defense
The Pentagon
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Edward C. Aldridge
Secretary of Air Force
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SERVICE SHEET CONT'D

Hon. John O. Marsh, Jr.
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