OCA FILE Log

MEMORANDUM FOR: [redacted] STAT

FROM: [redacted]

SUBJECT: SCI Secrecy Agreements

John:

Most of the arguments we discussed are contained in the attached filing. See especially pp 6-12, 27-28, and 41-48.

[redacted] STAT

Date 1 April 1988

FORM 5-75 101 USE PREVIOUS EDITIONS

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of March, 1988, copies of the foregoing Motion To Dismiss and Defendants' Memorandum Of Points And Authorities In Support Of Motion To Dismiss, In Opposition To Motions For Preliminary Injunction, And In Opposition To Motion For Summary Judgment were served by messenger on:

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WM. ROBERT IRVIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Civil Action No. 87-2284-OG

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,

Plaintiffs,

v.

STEVEN GARFINKEL, Director, Information Security Oversight Office, et al.,

Defendants.

Civil Action No. 87-2412-OG

AMERICAN FOREIGN SERVICE ASSOCIATION, et al.,

Plaintiffs,

v.

STEVEN GARFINKEL, Director, Information Security Oversight Office, et al.,

Defendants.

Civil Action No. 88-0440-OG

MOTION TO DISMISS

Defendants hereby move, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim

upon which relief can be granted. In support of this motion, defendants rely on the accompanying memorandum of points and authorities.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 87-2284-OG
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al., Plaintiffs, v. STEVEN GARFINKEL, Director, Information Security Oversight Office, et al., Defendants.	Civil Action No. 87-2412-OG
AMERICAN FOREIGN SERVICE ASSOCIATION, et al., Plaintiffs, v. STEVEN GARFINKEL, Director, Information Security Oversight Office, et al., Defendants.	Civil Action No. 88-0440-OG

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS, IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION, AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

These consolidated suits seek to restrict the President's exercise of his constitutional authority to protect national security information. The suits challenge the use of secrecy agreements to formally and enforceably obligate certain Executive Branch employees in sensitive positions not to reveal national security secrets. These secrecy agreements, the use of which was generally upheld by the Supreme Court in Snepp v. United States, 444 U.S. 507 (1980), are embodied in Government Standard Form ("SF") 189, Form 4193, and the recently-published successor to Form 4193 known as Form 4355. SF 189, utilized throughout the Government, protects classified information from disclosure. Forms 4193 and 4355, utilized by the Central Intelligence Agency and other Government intelligence agencies, deal with Sensitive Compartmented Information ("SCI"), a particularly critical subcategory of classified information. These types of secrecy agreements have been called "a reasonable means for protecting" the "secrecy of information important to our national security and the appearance of confidentiality essential to the effective operation of our foreign intelligence service." Id. at 509 n.3. By signing these forms, Executive Branch employees and contractors whose jobs require access to classified information promise not to disclose that information to those not authorized to receive it.

These consolidated actions have a complicated procedural history. Briefly, two of the suits, National Federation of

Federal Employees v. United States, et al., Civil Action No. 87-2284-OG ("NFFE"), and American Federation of Government Employees, et al. v. Garfinkel, et al., Civil Action No. 87-2284-OG ("AFGE"), challenged the use, prior to December 22, 1987, of SF 189 and Form 4193; in particular, the two suits challenged the use in SF 189 and Form 4193 of the word "classifiable." While motions to dismiss in NFFE and AFGE were pending, on December 21, 1987, an appropriations measure, Section 630 of the Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. 100-202, purporting to cut off funds for the implementation and enforcement of certain aspects of these secrecy agreements during Fiscal Year 1988, became law.

In response to Congressional concerns concerns expressed in Section 630, the Executive Branch implemented certain interim measures. Use of SF 189 was temporarily suspended, while the effect of the legislation was assessed and possible revisions to the form considered. At this time, revision of SF 189 is still under consideration and its use continues to be suspended. Form 4193 was used for an interim period following the enactment of Section 630, although use of an addendum, which stated that the form would only be implemented and enforced in a manner consistent with Section 630, was required. By taking these steps, the Executive Branch chose to accommodate Congress' concerns, at least temporarily, avoiding any immediate need to address the question of whether Section 630 unconstitutionally intrudes upon the President's constitutional powers.

Subsequently, a third action, American Foreign Service Association, et al. v. Garfinkel, et al., Civil Action No. 88-0440-OG ("AFSA"), seeking to enforce the AFSA plaintiffs' interpretation of Section 630, was filed. Plaintiffs in NFFE and AFGE have amended their complaints to seek the same relief sought by the AFSA plaintiffs. The Court has consolidated all three cases.

On March 18, 1988, Form 4193 was replaced by Form 4355. Form 4355 eliminates the word "classifiable" from its provisions. Form 4355 essentially retains the restrictions of Form 4193.

As a consequence of the evolution of these cases, the Court no longer needs to address certain issues. First, since further implementation of SF 189 has been suspended, and plaintiffs have not offered any evidence that enforcement of the disputed terms in SF 189 is presently in process or contemplated against any particular individual, the Court need not address claims relating to the implementation or enforcement of SF 189 after the date the Executive Branch suspended implementation of that form. Second, since Form 4193 has been replaced by Form 4355 and, again, plaintiffs have not offered any evidence of contemplated enforcement of Form 4193 against any particular individual, the Court need not address claims relating to the implementation or enforcement of Form 4193 after March 18, 1988, the date on which Form 4355 was adopted. Third, since the parties have all filed dispositive motions, the Court need not address the motions for a preliminary injunction.

Nevertheless, the issues remaining before the Court are numerous. First, the Court is faced with all of the issues raised by defendants' original motions to dismiss in AFGE and NFFE. Second, the Court is faced with the issues regarding the scope of Section 630 first raised by the AFSA plaintiffs, and reiterated in the motions for preliminary injunction filed by the NFFE and AFGE plaintiffs, as well as the motion for summary judgment filed by all plaintiffs. Most importantly, the Court is faced with the separation of powers issue first noted by defendants in opposition to the AFSA plaintiffs' motion for a preliminary injunction. To facilitate the Court's resolution of these issues, defendants now move to dismiss all of the outstanding claims in the consolidated cases.

As demonstrated below, these actions should be dismissed for lack of subject matter jurisdiction. All of the plaintiffs lack standing. Claims regarding enforcement of any of the forms are not ripe for review because there is no specific allegation that enforcement actions against any particular individuals are occurring or contemplated. Alternatively, the actions can be dismissed for failure to state a claim upon which relief can be granted. The secrecy agreements at issue do not violate any statute and are not unconstitutional. In any event, even if one or more of the secrecy agreements was found to conflict with the restrictions of Section 630, that provision cannot stand in the way of the President's exercise of his constitutional powers.

BACKGROUND

1. The Presidential Program For Protecting Classified Information

Throughout the nation's history, the President has utilized some degree of secrecy to carry out his responsibility to protect the national security. See "Developments in the Law--The National Security Interest and Civil Liberties," 85 Harv. L. Rev. 1130, 1192 (1972). Indeed, at the very outset of the Republic, President Washington "relied on the need for secrecy in the conduct of foreign affairs" to justify his refusal to turn over to Congress documents regarding negotiation of the Jay Treaty. Id. Subsequent presidents have cited similar reasons for maintaining the confidentiality of national security information in the face of requests for information by Congress. Id. at 1212-13.

Executive Branch efforts to protect national security information through classification have been in effect since World War I. Department of Navy v. Egan, __U.S.__, 108 S.Ct. 818, 824 (1988). Since the Truman Administration, Presidents have exercised their Article II responsibility to protect national security information through a series of Executive Orders establishing formal classification systems. See id.; Exec. Order No. 10290, 3 C.F.R. 790 (1949-53 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-53 Comp.); Exec. Order No. 11652, 3 C.F.R. 154 (1972 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1979 Comp.); Exec. Order No. 12356, 3 C.F.R. 166 (1982 Comp.). In each instance, the President has relied primarily on his

constitutional authority as the basis for these actions; the President has not required or relied on any express statutory authorization for establishing a classification system. See 85 Harv. L. Rev. at 1198.

In the most recent of the Executive Orders regarding classification, Executive Order 12356, 47 Fed. Reg. 14874 (April 2, 1982), President Reagan revised the uniform system for classifying, declassifying, and safeguarding national security information. Subsequently, in National Security Decision Directive 84 ("NSDD 84") (Mar. 11, 1983) (attached as Defendants' Exhibit 1 to Defendants' Memorandum Of Points And Authorities In Opposition To Motion For Preliminary Injunction in AFSA ("Defendants' PI Opposition Memorandum")), the President directed a series of measures designed to further safeguard against unlawful disclosure of classified information. Pursuant to NSDD 84, each Executive Branch agency that originates or handles classified information must require the signing of a nondisclosure agreement as a condition of access to such information. Id., ¶ 1a. NSDD 84 also directed that the Director of the Information Security Oversight Office ("ISOO") establish a standard nondisclosure agreement for application throughout the Executive Branch. Id., ¶ 1c.

On September 9, 1983, ISOO, the administrative component of the General Services Administration that has responsibility for prescribing standard forms to implement the information security program authorized by Executive Order 12356, see id.,

§ 5.2(b)(7), issued a regulation adopting SF 189 as the standard nondisclosure agreement that an individual must execute prior to receiving access to classified information. That form contains an agreement not to disclose classified information and defines "classified" information as "information that is either classified or classifiable under the standards of Executive Order 12356 or under any other Executive Order or statute that prohibits the unauthorized disclosure of information in the interest of national security." SF 189, ¶ 1 (attached as Defendants' Exhibit 2 to Defendants' PI Opposition Memorandum).

In response to inquiries from members of Congress[1] and others, ISOO has, on several occasions, clarified the meaning of the term "classifiable" as used in SF 189. Most recently, on December 21, 1987, ISOO defined "classifiable information" as:

> (a) Unmarked classified information, including oral communications; and (b) unclassified information that meets the standards for classification and is in the process of a classification determination. "Classifiable information" does not refer to currently unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination. Therefore, the only circumstances under which a party to SF 189 might violate its terms by

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[1] The use of these classified information nondisclosure agreements, and their particular provisions, has been a source of continuing dispute between the Executive Branch and some members of Congress. See, e.g., Hearing Before Subcommittee on Human Resources of the House Committee on Post Office and Civil Service (October 15, 1987); Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use, Hearing Before a Subcommittee of the House Committee on Government Operations, 98th Cong., 1st Sess. (1983); H.R. Rep. No. 98-578, 98th Cong., 1st Sess. (1983).

> disclosing unclassified information are when a party knows, or reasonably should know, that such information is in the process of a classification determination . . . .

52 Fed. Reg. 48367 (December 21, 1987).

In 1981, the Director of Central Intelligence ("DCI") promulgated Form 4193, concerning access to SCI. In 1983, the President directed in NSDD 84 that all persons with access to SCI sign a non-disclosure agreement containing a pre-publication review requirement covering SCI and other classified information, and instructed the Director of ISOO to develop a standardized form for such a purpose. NSDD 84, ¶ 1b & c. However, on February 17, 1984, the President directed the continuation of a temporary moratorium on the use of the revised and broader SCI non-disclosure form that ISOO had developed, in consultation with the DCI, pursuant to paragraph 1b of NSDD 84. Instead, the President instructed agencies to utilize Form 4193 or other authorized non-disclosure forms for SCI that were in effect on or before March 1, 1983. See Memorandum Re: Implementation Of NSDD 84 (February 17, 1984) (attached as Defendants' Exhibit 3 to Defendants' PI Opposition Memorandum).

Unlike the SF 189, which concerns non-compartmented classified information, Form 4193 applied only to SCI, a specific category of very sensitive classified information relating to intelligence sources and methods. Because of its sensitivity, SCI is "compartmented" and access to it is strictly controlled in specific channels to restrict dissemination to only those individuals with a need for the particular information. This

compartmented information is some of the most sensitive that the Intelligence Community handles, and a compromise of this information would have a serious effect on the national security of the United States. Declaration of William H. Webster, Director of Central Intelligence, ¶ 4 (March 1, 1988) (attached as Defendants' Exhibit 4 to Defendants' PI Opposition Memorandum).

The DCI has the broadest of discretion in ensuring the confidentiality of SCI. Section 102(d)(3) of the National Security Act 1947, 50 U.S.C. § 403(d)(3), provides that the DCI "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." See also Executive Order 12333, § 1.5(h), 3 C.F.R. p. 200 (1981 Compilation); Executive Order 12356, § 4.2(a), 3 C.F.R. p. 166 (1982 Compilation), 47 Fed. Reg. 14874. "The legislative history of § 102(d)(3) . . . makes clear that Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent."[2] CIA v. Sims, 471 U.S. 159, 170 (1985); see also Snepp, 444 U.S. at 509 n.3. Executive Order 12356 continues the specific presidential authorization provided by Executive Order 12065, 3 C.F.R. p. 190 (1978 Compilation) for the DCI to establish a special access

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[2] The President's power to protect sources and methods of information flows from his Article II powers, not simply from legislation enacted by Congress. Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

program for the protection of intelligence sources and methods. In keeping with this responsibility, the DCI has established the SCI security system.

Pursuant to his responsibility for protecting information concerning intelligence sources and methods, the DCI has long required that those with access to such information formally agree not to disclose it without authorization and submit any material relating to such activities for pre-publication clearance. See Snepp, 444 U.S. at 507-08. The DCI promulgated Form 4193 (attached as Defendants' Exhibit 5 to Defendants' PI Opposition Memorandum) in 1981. The form defines SCI to include "classifiable" as well as classified intelligence information, and contains an agreement not to divulge SCI to unauthorized persons. Id., ¶¶ 1, 3. In addition, the form requires the submission for security review of all information intended for disclosure to unauthorized persons that "contain[s] or purport[s] to contain any SCI or description of activities that produce or relate to SCI or that [the signatory has] reason to believe are derived from SCI." Id., ¶ 4.

On March 18, 1988, Form 4193 was replaced by Form 4355. See Declaration of Lt. General Edward J. Heinz, Director of the Intelligence Community Staff for the Director of Central Intelligence ("Heinz Declaration"), ¶ 3 (filed with the Court on March 25, 1988). Form 4355 eliminates use of the word "classifiable" in the definition of SCI. Heinz Declaration,

Exhibit A. Agencies dealing with SCI have been notified of the change. Heinz Declaration, ¶ 3.

2. Previous Litigation

On August 17, 1987, the National Federation of Federal Employees, a federal employee labor union, filed an action before this Court seeking a declaratory judgment that SF 189 violates the First and Fifth Amendments to the Constitution and an order enjoining the Executive Branch from using SF 189 and any other form that prohibits the disclosure of "classifiable" information. The Government has filed and the plaintiff has opposed a motion to dismiss the plaintiffs' action; that motion is pending before this Court. On December 2, 1987, the Court in the NFFE action granted the motion by Senators Grassley, Pryor, and Proxmire and Representatives Brooks, Boxer, Schroeder, and Sikorski (all plaintiffs in AFSA) to file a brief amici curiae in support of the union.

On September 1, 1987, the American Federation of Government Employees, another federal employee labor union, filed suit challenging the use of SF 189 and Form 4193. Defendants moved to dismiss that action as well, which plaintiffs have opposed.

3. The Continuing Resolution And Executive Branch Reaction

In late December, 1987, just before Congress adjourned, an appropriations rider was attached to the Omnibus Continuing Resolution For Fiscal Year 1988, Pub. L. 100-202, purporting to cut off funds to implement and enforce certain provisions of SF 189 and Form 4193. Section 630 of Pub. L. 100-202 provides:

> No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the rights of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;
>
> (5) imposes any obligations or invokes any remedies inconsistent with statutory law.
>
> Provided, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

Section 630, Pub. L. 100-202. This provision was attached to the Continuing Resolution without any hearings and was one paragraph of the 1000-plus page Continuing Resolution signed by the President.

Following the enactment of Section 630, the Executive Branch took certain measures to accommodate the concerns expressed by Congress while continuing to carry out the President's constitutional duty to protect national security information.

Shortly after the enactment of Section 630, Steven Garfinkel, Director of ISOO, temporarily suspended further implementation of SF 189, pending receipt of an opinion from the Attorney General on the legal impact of Section 630 on SF 189. Affidavit of Steven Garfinkel ("Garfinkel Affidavit"), ¶ 2 (February 8, 1988), attached as Plaintiffs' Exhibit 7 to the Motion For Preliminary Injunction in AFSA. Garfinkel also notified agencies using SF 189 to notify affected employees that an SF 189 executed after December 22, 1987 will be treated as voidable at the employee's request. Garfinkel Affidavit, ¶ 3.

Also in response to Section 630, Lt. General Heinz directed that, during Fiscal Year 1988, Form 4193 and any other nondisclosure forms for the protection of SCI were only to be used when accompanied by a special addendum which stated:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

Declaration of Lt. General Edward J. Heinz, ¶ 4 (February 9, 1988), attached as Plaintiffs' Exhibit 6 to Plaintiffs' Motion For Preliminary Injunction in AFSA. As discussed above, Form 4193 has now been replaced by Form 4355.

4. The AFSA Suit

On February 19, 1988, the AFSA suit, seeking declaratory and injunctive relief, was filed. In addition, the AFSA plaintiffs moved for a preliminary injunction against continued use of Form

4193, declaring forms executed after December 22, 1987 void, and requiring defendants to notify signers of the provisions of Section 630. On March 16 and 17, 1988, plaintiffs in AFGE and NFFE amended their complaint to allege the same violations of Section 630 asserted in AFSA. On March 18, both union plaintiffs moved for preliminary injunctive relief similar to that sought by the AFSA plaintiffs. Also on March 18, 1988, plaintiffs in all three suits moved for summary judgment on their claims alleging violations of Section 630.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE PLAINTIFFS LACK STANDING

The AFSA, AFGE, and NFFE actions must all be dismissed because none of the plaintiffs has alleged sufficient injury to state a justiciable claim, as required by Article III of the Constitution. Article III confines the federal courts to adjudicating actual "cases" and "controversies." A plaintiff must allege at "an irreducible minimum" a personal "injury-in-fact" that is fairly traceable to the defendant's allegedly unlawful conduct and that is likely to be redressed by the requested relief. Valley Forge Christian College v. Americans United For Church and State, Inc., 454 U.S. 464, 472 (1962). The injury alleged must be "immediate," "distinct and palpable," Warth v. Seldin, 422 U.S. 490, 501 (1975); Rizzo v. Goode, 423 U.S. 362 (1972), not "abstract," "conjectural," "hypothetical," or "speculative," City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

AFSA cannot satisfy even the first prong of the Washington Apple standing test. AFSA's members would not have standing to pursue this action in their own right because they have suffered no injury in fact. The only injury alleged on behalf of AFSA's members is that defendants' actions "chill employees' constitutional and statutory rights to free speech and to petition Congress . . . ." Plaintiffs have cited no cases to support their putative standing on such speculative grounds. In United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984), however, the court, following Laird v. Tatum, 408 U.S. 1 (1972), held that allegations of a "chilling effect" on plaintiffs' exercise of constitutional rights are insufficient to satisfy the requirement for standing of a concrete injury in fact. United Presbyterian Church, 738 F.2d at 1378-80. Since use of SF 189 has been temporarily suspended, Form 4193 was accompanied by an addendum which limited its implementation and enforcement in a manner consistent with Section 630 and other applicable law, and Form 4355 does not cover "classifiable" information, there is no factual basis for AFSA's claim of a chill. Accordingly, AFSA's members would not have standing in their own right and, therefore, AFSA does not have standing.

Indeed, there is no basis for AFSA or anyone else to challenge the Executive's interpretation of Section 630. That provision is an appropriations measure, not new or general

legislation.[3] It creates no substantive rights and confers no right of action or standing on anyone. By its terms, the provision simply purports to limit the funds the Executive can spend for a particular purpose. Allegations that a spending limitation has been exceeded are for resolution between Congress and the President. In this context, AFSA's allegations of injury are no different from those rejected as a basis for standing in Public Citizen, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976) and Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).

In Public Citizen, Inc. v. Simon, plaintiffs sought to recover to the Treasury the salaries of White House staff members who were involved in the 1972 presidential reelection effort. Plaintiffs alleged that the payment of those salaries "was in derogation of constitutional and statutory strictures." Id., 212. The court rejected plaintiffs' claim of taxpayer standing:

> [T]he fair implication of appellants' position is to recognize taxpayer standing to attack any executive action that draws on an outstanding appropriation on the ground that the purchases or services are not in accord with the congressional intent in passing the appropriation. This would place the judiciary in the role of government overseer of the Executive Branch. Such oversight is a function of Congress. Taxpayer standing here would bring into play the separation of powers concerns pervading Frothingham[v. Mellon, 262 U.S. 447 (1923)], [United States v.]Richardson[,418 U.S. 166 (1974)] and

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[3] Congressional rules prohibit proposing new or general legislation in amendments to appropriations bills. See Senate Rule XVI; House Rule XXI; see also, Kaiser, Congressional Action To Overturn Agency Rules: Alternatives To The Legislative Veto, 32 Admin. L. Rev. 667, 688 (1980).

Schlesinger[v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)]."

Public Citizen, Inc. v. Simon, 539 F.2d at 217.

Similarly, in Harrington v. Schlesinger, plaintiffs alleged that the Executive Branch was violating a law prohibiting expenditures to support combat activities by American forces in Indochina. The court rejected plaintiffs' claim of taxpayer standing, holding that the case presented no constitutional challenge to an appropriation, but merely a challenge to the Executive's interpretation of the statutory spending limitation. Id., 528 F.2d at 457-58. The court concluded that the proper remedy for such a controversy was in Congress, not the courts. Id., 459.

Precisely the same type of challenge is at issue in this case. Like the plaintiffs in Public Citizen, Inc. v. Simon and Harrington v. Schlesinger, who were challenging the Executive Branch's interpretation of appropriations measures, plaintiffs in the present case are challenging the Executive Branch's interpretation of the spending limitation set forth in Section 630. While plaintiffs have avoided labeling their action as a taxpayer suit, which would place their suit on all fours with Public Citizen and Schlesinger, nonetheless, their claims present the same separation of powers concerns which led those courts to conclude that they were without jurisdiction. This court should reach the same conclusion.

Like AFSA, NFFE has not even met the first prong of the

Washington Apple test because NFFE's members would have no standing to pursue this action in their own right. Id. NFFE alleges that unspecified members were required to sign SF 189 over their objections, and that those who have refused to sign the form have "subjected themselves to the potential loss of security clearance and/or employment." See Second Amended Complaint for Declaratory and Injunctive Relief, ¶16. This unsupported statement, which does not identify a single such employee or incident, does not satisfy NFFE's burden of pleading and proving the elements of standing.[4] See Steele v. National Firearms Act Branch, 755 F.2d 1410, 1414 (11th Cir. 1985). Nor does NFFE identify any employee who wishes to disclose information that might be covered by the form. Compare McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983) (plaintiff intended to publish manuscript). Finally, for the same reasons AFGE has failed to meet the standing requirement because it has not alleged any injury that would allow its members to sue in their own right.[5] Id.

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[4] Even if NFFE had identified specific employees who are threatened with loss of their security clearances, such allegations would be insufficient to confer standing. As the Supreme Court recently stated in Department of Navy v. Egan, supra, "It should be obvious that no one has a 'right' to a security clearance." 108 S.Ct. at 824. Certainly, then, the mere threat of losing a security clearance does not amount to a cognizable injury-in-fact. Cf. Harrington v. Bush, 553 F.2d at 204 (threat of future injury lessens concreteness of injury).

[5] In addition to plaintiffs' lack of standing, the claims of the plaintiffs in all three cases directed at continued use of SF 189 and Form 4193 are moot. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally

(continued...)

B. The Individual Employee Plaintiffs Do Not Have Standing

None of the three individual plaintiffs in the AFGE action have alleged a concrete injury-in-fact. Plaintiff Louis Brase is the only plaintiff who has signed or been asked to sign the Form 4193 or any agency version of that form.[6] In fact, plaintiff Brase signed Form DD 1847-1, a Department of Defense version of the Form 4193. Brase, however, does not allege any definite, concrete injury as a result of his having signed the agreement. In particular, he does not allege any intent to make a disclosure in contravention to the commitments that he made in signing the

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[5](...continued)
cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481 (1982); Powell v. McCormack, 395 U.S. 486, 496 (1969). "Corrective action by an agency is one type of subsequent development that can moot a previously justiciable issue." Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission, 680 F.2d 810, 814 (D.C. Cir. 1982). In these cases, the plaintiffs' complaints about SF 189 and Form 4193 have become moot because the Government has imposed a moratorium on the use of SF 189 for FY 1988 and has replaced Form 4193 with Form 4355, which does not use the term "classifiable."

Moreover, plaintiffs' claims regarding enforcement of these secrecy agreements are not ripe for adjudication. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 81-92 (1978); Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). The plaintiffs have not cited a single instance where the Government is enforcing or planning to enforce any of the security forms, even to the extent of revoking any employee's security clearance, and the Government is not requiring anyone to sign SF 189 or SF 4193. Thus, the challenged administrative action is not "sufficiently direct and immediate" as to render such action "appropriate for judicial review at this stage." Abbott Laboratories, 387 U.S. at 152.

[6] The union plaintiff does not even allege that any of its members are subject to the form, much less have any objections to it. Furthermore, since implementation of SF 189 has been suspended, neither Brase nor anyone else is being required to sign SF 189.

form. Compare McGehee v. Casey, 718 F.2d 1137. Thus, Brase has no standing to challenge the Form 4193 because signing it has caused him no injury.[7]

The other individual plaintiffs, Messrs. Stinchcomb and Douglas, have also failed to allege a concrete injury. Mr. Stinchcomb complains that he has refused to sign SF 189 and has been threatened with "security clearance revocation and resulting loss of employment if he does not sign the form." Second Amended Complaint, ¶4. Mr. Douglas alleges that he signed SF 189 only as a result of "threat of revocation of his security clearance and resulting loss of his employment with the federal government." Id., ¶5. Neither Douglas nor Stitchcomb allege any impending action to either revoke their security clearances or to terminate their employment. In short, like Brase, and like the unnamed members of NFFE, Douglas and Stinchcomb allege nothing more than fear of the loss of their security clearances--to which they have absolutely no legal right. Egan, 108 S.Ct. at 824.

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[7] That is true regardless of the fact that the Air Force temporarily suspended Brase's access to SCI and to the SCI facility where he worked. See Second Amended Complaint, ¶ 6. Brase, like all other individuals, has no right to a security clearance or access to SCI, so that suspension of his access to SCI caused him no injury. Egan, 108 S.Ct. at 824. Moreover, there is no present or impending future controversy between Brase and the defendants in regard to the security forms. The Air Force suspended Brase's access because his refusal to sign the SF 189 initially created uncertainty as to his willingness to abide by the terms of the SCI non-disclosure agreement, which he had signed. After careful consideration of the facts, the Air Force decided to restore Brase's access to SCI. See Memorandum In Support Of Defendants' Motion For A Stay in NFFE and AFGE, Exhibit A.

C. The Congressional Plaintiffs Do Not Have Standing

It is well-settled that:

> [t]here are no special standards for determining Congressional standing questions. Although the interests and injuries which legislators assert are surely different from those put forth by other litigants, the technique for analyzing the interests is the same.

Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977) (emphasis deleted). Thus, as with any other plaintiff, to have standing, the seven members of Congress bringing this action must demonstrate a concrete injury in fact. They have failed to do so.

The injury asserted by the congressional plaintiffs, that defendants' actions "impede the congressional plaintiffs' ability to obtain important information from federal employees, which they need to carry out their duties," does not amount to a concrete injury in fact. As the court explained in Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (en banc), judgment vacated on other grounds, 444 U.S. 996 (1979):

> In our decisions on congressional standing this court has carefully drawn a distinction between (1) a diminution in congressional influence resulting from an Executive action that nullifies a specific congressional vote or opportunity to vote, in an objectively verifiable manner -- which we have found constitutes injury in fact; and (2) a diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute enacted through the legislator's vote, where the plaintiff-legislator still has power to act through the legislative process to remedy the alleged abuses -- in

which situations we do not find injury in fact.

Id., 617 F.2d at 702 (emphasis added, footnotes omitted). In the present case, the Complaint alleges that the Executive's failure to obey Section 630 has diminished the congressional plaintiffs' effectiveness as legislators by impairing their ability to obtain information from federal employees. Thus, the congressional plaintiffs' claimed injury in the present case falls squarely within the second category enunciated in Goldwater and, consequently, does not constitute an injury in fact.[8] See also Harrington v. Bush, 553 F.2d at 212-13 (claim that lack of information diminished congressional plaintiff's effectiveness as legislator insufficient to confer standing).

The congressional plaintiffs have asserted nothing more than a mere generalized grievance of a type that has been rejected repeatedly by the courts as a basis for standing. See, e.g., United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1381-82 (Congressman's challenge to Executive Order on grounds it violated congressionally-imposed limitations thus diminishing his powers as legislator constituted a generalized grievance about the conduct of government); American Federation of Government Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir.

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[8] Indeed, the asserted injury to the congressional plaintiffs rests wholly on the "chilling effect" alleged by AFSA on behalf of its members. Certainly, if an allegation of a chilling effect is insufficient to confer standing on the federal employee plaintiffs, see United Presbyterian Church, 738 F.2d at 1378-80, it is insufficient to confer standing on the congressional plaintiffs.

1982) (Congressman's interest in proper execution of laws insufficient to confer standing); Harrington v. Bush, 553 F.2d 190, 213-14 (Congressman's complaint about the execution of a law was generalized grievance insufficient to confer standing); Harrington v. Schlesinger, 528 F.2d 455, 459 (members of Congress lacked standing for suit alleging that Executive was violating spending prohibitions enacted by Congress). To the extent that the congressional plaintiffs have a complaint regarding the Executive's interpretation of Section 630, any possible remedy lies with their fellow legislators, not this Court. Id.; see also Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985).

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Even if the Court had subject matter jurisdiction, these suits should be dismissed for failure to state a claim upon which relief can be granted. As demonstrated below, plaintiffs' claims regarding events before and after December 22, 1987 are without merit.[9]

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[9] Plaintiffs' motion for summary judgment should also be denied because, as shown above, plaintiffs lack standing and, as shown below, plaintiffs have failed to state a claim upon which relief can be granted. Accordingly, plaintiffs are not entitled to judgment as a matter of law.

In addition, since the parties have all filed dispositive motions, the Court need not address the motions for a preliminary injunction.

Plaintiffs in NFFE and AFGE have alleged that SF 189 and Form 4193, as used prior to December 22, 1987, violated various statutory and constitutional restrictions. Although use of SF 189 was suspended by the Director of ISOO, and Form 4193 was ultimately modified by the special addendum, the defendants contend that SF 189 and Form 4193 without the addendum remain effective as to those employees who have already signed them. The use of those forms, however, represented an appropriate and constitutionally permissible exercise by the President of his constitutional authority to control access to national security information.

All of the plaintiffs have alleged that actions by the Executive Branch in the wake of the enactment of Section 630 violate that appropriations measure. As demonstrated below, however, the Executive Branch has accommodated Congress' concerns while continuing to carry out the President's constitutional responsibility to protect national security information. If, however, the Court concludes that these actions conflict with Section 630, the Executive Branch's actions must nevertheless be upheld, because Section 630 cannot displace the President's constitutional power over national security information.

A. The Challenged Secrecy Agreements Are An Appropriate And Constitutionally Permissible Means Of Safeguarding National Security Information

1. Non-Disclosure Agreements Are An Appropriate And Constitutionally Permissible Means Of Safeguarding National Security Information

The courts have recognized that non-disclosure or "secrecy" agreements between the government and its employees are an appropriate and constitutionally permissible means of protecting national security information. In the seminal case of Snepp v. United States, 444 U.S. 507 (1980) (per curiam), the Supreme court upheld an agreement by Frank Snepp, a former employee of the Central Intelligence Agency ("CIA"), not to divulge classified information without authorization and not to publish any information relating to the agency without prepublication clearance.[10]

The Supreme Court disposed of Snepp's objections to enforcement of the agreement in a footnote, rejecting his claim that the agreement was "unenforceable as a prior restraint on protected speech." Id. at 507 n.3. Instead, the Supreme Court agreed with the court of appeals that the agreement was an "'entirely appropriate' exercise of the DCI's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'" Id. (quoting United States v. Snepp, 595 F. 2d 926, 932 (4th Cir. 1979)). In fact, the Court added that its "cases make clear that -- even the absence of an express

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10 SF 189 does not contain a prepublication clearance requirement.

agreement -- the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." Id. The Supreme Court concluded that "[t]he Government has a compelling interest in protecting . . . the secrecy of information important to our national security . . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest." Id.[11]

Following Snepp, the court of appeals for this circuit upheld the CIA's "classification and censorship scheme" for prepublication review of a manuscript written by a former CIA employee. McGehee v. Casey, 718 F.2d 1137. McGehee had signed an agreement when he joined the CIA barring him from revealing classified information without prior CIA approval. When the CIA refused to approve disclosure of portions of a manuscript that he wrote, McGehee challenged the agency's prepublication review scheme on First Amendment grounds. The court of appeals rejected that challenge, finding that the CIA's scheme "protect[ed] critical national interests" and that the classification criteria used "specif[ied] the nature of the information subject to censorship with sufficient particularity to satisfy the

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[11] Even prior to Snepp, the Fourth Circuit had upheld an injunction enforcing a CIA secrecy agreement prohibiting unauthorized disclosure of classified information. United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

applicable constitutional tests for First Amendment restraints on former CIA employees." Id. at 1139.[12]

2. The Use Of The Term "Classifiable" In SF 189 And Form 4193 Is Reasonable And Consistent With Executive Order 12356

Plaintiffs' objections to the use of the term "classifiable" in SF 189 and Form 4193 are unfounded and based on a misunderstanding of the meaning and import of that term.[13] The term by definition "does not include any information that is not otherwise required by statute or Executive order to be protected from unauthorized disclosure in the interest of national security." 52 Fed. Reg. 29793 (August 11, 1987).[14] In fact, the term is limited to two very narrow categories of information: (1) unmarked classified information; and (2) information that meets the standards for classification and is actually in the process of a classification determination. 52 Fed. Reg. 48367.

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[12] Federal employees have no First Amendment right of access to such national security information. In fact, "[a]s a general rule, citizens have no First Amendment right of access to traditionally nonpublic government information." McGehee, 718 F.2d at 1147.

[13] Although use of SF 189 has been temporarily suspended and Form 4193 has been replaced by Form 4355, which does not use the term "classifiable," the Court is still faced with plaintiffs' challenges to forms using that term. In the case of SF 189, plaintiffs continue to challenge the implementation and enforcement of those forms before December 22, 1987. In the case of Form 4193, plaintiffs may continue to challenge the use of those forms before March 18, 1988, the date on which Form 4355 was approved.

[14] Thus, the use of the term "classifiable" does not prevent the disclosure of information not already protected from unauthorized disclosure. It, therefore, has no effect whatsoever on protections afforded "whistleblowers" or on disclosure of information to Congress. See 5 U.S.C. §§ 2302 (b) (8), 7211.

Moreover, an employee is subject to liability under SF 189 only for negligent or willful violations. Id.

Thus, the first category of "classifiable" information is merely classified information that lacks markings identifying it as such. An example would be an employee's notes that contain classified information discussed in a briefing. Although the notes lack classification markings, the employee knows the information is classified. Surely, plaintiffs have no objection to an agreement restraining the disclosure of classified information.

The second category of "classifiable" information consists of information that meets all the requirements for classification and that is in the process of a classification determination. For example, a scientist employed by an intelligence agency may develop a new intelligence application of technology and refer it to a classification authority for a classification determination. During the classification process, the scientist knows to safeguard the information although it is not yet classified.

This minimal restriction on the unauthorized disclosure of unclassified information in no way exceeds the obligations already imposed on employees by Executive Order 12356. Under that Order, "[i]f there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority . . . ." Exec. Order 12356 § 1.1(c). In addition, when an employee "of an agency that does not have original

classification authority originates information believed by that person to require classification," that information must be protected as if it were classified pending a classification determination. Id. § 1.29e0.

Thus, plaintiffs' concerns about the use of the term "classifiable" are unfounded. There is no need for employees to speculate as to what should have been or might be classified in the future, nor must they make classification determinations, as plaintiffs allege. Certainly, the term "classifiable" does not include any information not already protected by Executive Order from unauthorized disclosure for national security reasons. In fact, the term pertains only to a limited portion of such information. Moreover, plaintiff's fear that agencies might retroactively classify information in order to punish employees who have disclosed it is without basis.[15]

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15 Nor does a restriction on disclosure of "classifiable" information conflict with the statutory protection for "whistleblowers" contained in 5 U.S.C. § 2302(b)(8). That statute prohibits adverse actions by federal agencies against employees who publicly disclose certain information, but only "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." Id. § 2302(b)(8)(A). As discussed above, Executive Order 12356 restricts the disclosure of classified and "classifiable" information. Thus, SF 189 and Form 4193 only prohibit public disclosure of information "specifically required by Executive order to be kept secret." Such a restriction, of course, does not preclude public disclosures permitted by the "whistleblower" statute.

Similarly, the use of the term "classifiable" does not interfere with the right of federal employees under 5 U.S.C. § 7211 to petition or furnish information to Congress. In fact, it has no effect whatsoever on that right. SF 189 and Form 4193

(continued...)

3. The Use Of The Term "Classifiable" Does Not Violate The First Amendment

The use of the term "classifiable" in SF 189 and Form 4193 does not abridge the Constitution. "Secrecy agreements," of course, may preclude the disclosure of classified information without violating the First Amendment. E.g., Snepp, 444 U.S. at 507; McGehee, 718 F.2d 1137. Indeed, in Snepp the Supreme Court upheld an agreement prohibiting disclosure of any unclassified information concerning the CIA or intelligence activities generally without prepublication review.

As far as the limitation concerning information in the process of a classification determination is concerned, courts have long recognized much broader limitations on the disclosure of national security information. The concept that those entrusted with national secrets should safeguard such information -- even if it is not formally classified -- is not only reasonable, it is essential to any responsible program of protecting critical national security information. Well before the advent of Executive Orders on the subject of classification, the Supreme Court acknowledged the compelling nature of this proposition. See Totten v. United States, 92 U.S. 105, 106 (1876); Bliss Co. v. United States, 248 U.S. 37, 45 (1918); see also United States v. Reynolds, 345 U.S. 1, 7-8 (1953).

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[15](...continued)
only restrict the unauthorized disclosure of "classified" or "classifiable" information. To the extent that Executive Order 12356 or other laws or executive orders permit the disclosure of such information to Congress, SF 189 and Form 4193 would also permit it.

Certainly, the government's compelling interest in safeguarding national security information outweighs the concern that an employee might be deterred from disclosing information not requiring national security protection for fear that it might be "classifiable." Of course, an employee in such a situation has an obvious recourse -- simply ascertaining whether the information at issue is classified or in the process of a classification determination.[16] Moreover, an employee is only liable under SF 189 for willful or negligent violations. Furthermore, the employees subject to the forms routinely deal with classified information and, thus, can be expected to be familiar with what type of information must be protected.

Therefore, the limitations imposed by SF 189 and Form 4193 on the disclosure of information are minimal and do not infringe the First Amendment. Moreover, because SF 189 and Form 4193 pertain to information that is otherwise protected by law from unauthorized disclosure, any "chill" on the right of signatories to release information not implicating national security interests would exist even in the absence of the agreement. Therefore, the limitations imposed by SF 189 and Form 4193 on the disclosure of information are minimal and do not infringe the First Amendment.

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[16] As the court of appeals noted in McGehee, the opportunity to ascertain beforehand "whether intended publications contain classified material engenders less of a chilling effect on free speech" and "reduces any disfavored chilling effect." 718 F.2d at 1145, 1147.

5. Plaintiffs' Remaining Claims Regarding Use Of SF 189 And Form 4193 Prior To The Enactment Of Section 630 Are Without Merit

In addition to the principal constitutional and statutory challenges, the AFGE plaintiffs have asserted numerous other challenges to the use of SF 189 and Form 4193. These claims have no merit.

The term "classifiable" is not unconstitutionally vague. As discussed previously, "classifiable" information is narrowly defined as unmarked classified information or information meeting the standards for classification and in the process of a classification determination. There is little room for misunderstanding this definition. And, the fact that SF 189 provides sanctions only for willful or negligent violations and imposes only civil or administrative penalties lessens the degree of precision required of the term at issue, as does the employee's opportunity to easily ascertain beforehand whether his or her conduct would violate the agreement. Furthermore, on numerous occasions, the courts have upheld against claims of vagueness the far more general definitions of information protected from disclosure for national security reasons under criminal statutes. See, e.g., Gorin v. United States, 312 U.S. 19, 26-28 (1941) (information "connected with the national defense"); United States v. Boyce, 594 F.2d at 1252 n.2 ("information relating to the national defense"); United States v. Dedeyan, 584 F.2d 36, 39 (4th Cir. 1978) (same); United States v. Morison, 604 F. Supp. at 658-60 (same).

Plaintiffs also object to the restriction in both SF 189 and Form 4193 against "indirect" disclosure of classified information. "Indirect" disclosure of classified information merely refers to a situation "in which the knowing, willful or negligent action of a party to the agreement results in the unauthorized disclosure of classified information even though the party to the agreement does not directly communicate, deliver or transmit classified information to a person who is not authorized to receive it." 52 Fed. Reg. 28802 (Aug. 3, 1987). For example, an employee who furnishes classified information to a co-worker authorized to receive it, but knows that the co-worker intends to furnish it to unauthorized persons, has indirectly disclosed such information without authorization. Thus, the restriction on "indirect" unauthorized disclosures is merely a means to forestall obvious attempts to evade non-disclosure obligations. The term is precise, easily understandable, and certainly meets the constitutional standards necessary for such a requirement to avoid being void for vagueness.

Plaintiffs also object, on equal protection grounds, to the fact that employees of federal contractors requiring access to classified information must sign the SF 189-A, which does not contain the term "classifiable," rather than the SF 189. AFGE Second Amended Complaint, ¶ 34. This claim verges on the frivolous. Treating different categories of people differently does not per se violate equal protection. The government violates equal protection only if it invidiously discriminates or

treats those similarly situated differently without a rational basis. Hagens v. Lavine, 415 U.S. 528, 539 (1974). In fact, "[n]ormally a classification will not be set aside if any set of facts rationally justifying it is demonstrated to or perceived by the courts." United States v. Maryland Savings-Share Insurance Corp., 400 U.S. 4, 6 (1970) (per curiam). Furthermore, the government may address a problem "one step at a time" and apply a remedy selectively. Jefferson v. Hackney, 406 U.S. 535, 546 (1972).[17]

In this case, it is not unreasonable for the government to require more of its own employees than it does of those working for contractors. And, the government is entitled to address the problem of unauthorized disclosure of protected information "one step at a time." Moreover, contractors do not have original classification authority and generally will have possession of national security information only after the government has already classified it. See Exec. Order 12356, § 1.2. Accordingly, plaintiffs' equal protection claim must fail.

Plaintiffs' contention that the restriction in SF 189 and Form 4193 on the disclosure of "classifiable" information is inconsistent with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(1), is also meritless. That provision authorizes the withholding of information properly classified

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[17] Plaintiffs, of course, cannot claim that federal employees are a suspect class deserving special protection under the Constitution. If anything, the contrary is true. See e.g., Snepp, 444 U.S. at 510.

pursuant to Executive order. Executive Order 12356 specifically provides that "information may be classified or reclassified after an agency receives a request for it under" FOIA. Id. § 1.6(d) (emphasis added). See, e.g., Miller v. Department of State, 779 F.2d 1378 (8th Cir. 1985). An agency receiving a FOIA request for "classifiable" information, therefore, could complete its classification process prior to determining whether to release the information. Thus, there is no conflict between the requirement to protect "classifiable" information and the FOIA.

Plaintiffs also complain that the provision in SF 189 and Form 4193 assigning to the government all financial interests that might result from disclosures in violation of the agreements contravenes the Copyright Clause of the Constitution, Art. I, § 8, cl. 8. Congress has precluded government employees from asserting a copyright claim based on government information. 28 U.S.C. § 1498. A disclosure in violation of SF 189 or Form 4193 would involve the disclosure of government information. And, of course, the Supreme Court in Snepp approved the imposition of a constructive trust in favor of the government on the profits resulting from a publication in violation of a non-disclosure agreement. Id., 444 U.S. at 514-16.

B. The Executive Branch's Actions Have Been Consistent With Section 630

As outlined above, the Executive Branch adopted certain interim measures in response to the enactment of Section 630 to accommodate Congress' concerns while continuing to carry out the President's constitutional duty to protect national security

information. All of those actions have been consistent with the requirements of Section 630. Accordingly, plaintiffs' claims alleging violations of Section 630 should be dismissed.

1. Suspension Of SF 189

In response to Section 630, Steven Garfinkel, Director of the ISOO suspended further implementation of SF 189, and notified agencies using SF 189 to notify affected employees that an SF 189 executed after December 22, 1987 will be treated as voidable at the employee's request. Garfinkel Affidavit, ¶ 3. Nevertheless, plaintiffs seek to force defendants to declare any SF 189 executed after December 22, 1987 void and to notify employees that such agreements are void. Section 630 does not require either action, however. Accordingly, plaintiffs' claims should be dismissed.

2. Use Of Form 4193 With An Addendum

Also in response to Section 630, Lt. General Heinz directed that, during Fiscal Year 1988, Form 4193 and any other nondisclosure forms for the protection of SCI were only to be used when accompanied by a special addendum which stated that the form would only "be implemented and enforced in a manner consistent with" Section 630. Declaration of Lt. General Edward J. Heinz, ¶ 4 (February 9, 1988), attached as Plaintiffs' Exhibit 6 to Plaintiffs' Motion For Preliminary Injunction in AFSA. Thus, under the plain language of the addendum, any provisions of Form 4193 that are inconsistent with the restrictions of Section 630 (e.g., the phrase "classifiable") are a nullity.

Accordingly, with this addendum, Form 4193 was transformed into a nondisclosure form which satisfies Congress' concerns expressed in Section 630.

Plaintiffs have relied heavily on a floor statement of Congressman Brooks, one of the plaintiffs in this suit, to support their contention that implementation of Form 4193, even with the addendum, was prohibited. Before a court looks to the legislative history, of course, it should first examine the plain language of the statute. United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615, 621 (D.C. Cir. 1982). The plain language of Section 630 only addresses the implementation of nondisclosure forms that fall within the five categories enunciated in subsections one through five. With the addendum, however, Form 4193 no longer fell within those categories.

Moreover, even if it were necessary for the Court to examine the legislative history, the floor statement of a lone member of Congress is not entitled to decisive weight. Id., 622-23. As the Supreme Court held in Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984):

> [i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43; see also NLRB v. United Food & Com'l Workers Union, __U.S.__, 108 S.Ct. 413, 421, 426 (1987); Cablevision Sys. Dev. v. Motion Picture Ass'n, 836 F.2d 599, 607 n.12 (D.C. Cir.

1988). Thus, if the statute at issue is ambiguous, the administrative agency's interpretration of the statute is entitled to substantial deference from a reviewing Court. Udall v. Tallman, 380 U.S. 1, 16 (1965). So long as the agency's interpretation is reasonable, it should be upheld, even though the agency's construction might not be the only one possible or even the construction the reviewing court would have made. Id.; see also Bayside Enterprises. Inc. v. NLRB, 429 U.S. 298, 304 (1977). In this case, the Executive Branch has responded Section 630 in a way that accommodates congressional concerns while continuing to carry out the President's constitutional duty to protect national security information. This balancing of interests is reasonable and should be upheld.

Finally, Congressman Brooks spoke of "standard forms 189 and 4193 and any other similar contracts or policies" and suggested that, "No one will be required to sign these contracts in the coming fiscal year." 133 Cong. Rec. H11999 (daily ed. Dec. 21, 1987) (emphasis added). As has already been demonstrated, no one is being required to sign Form 4193 as objected to by Congress; rather, the requirement was that Form 4193 be signed as amended by the addendum responsive to the legislation. Furthermore, with the adoption of Form 4355, no one will be required to sign Form 4193 in the future in any form. Accordingly, plaintiffs' claims that use of Form 4193 with the addendum violates Section 630 should be dismissed.

3. Form 4355

On March 18, 1988, Form 4193 was replaced by Form 4355. Heinz Declaration, ¶ 3. Since Form 4355 eliminates the word "classifiable," it is not inconsistent with subsections one and two of Section 630. In addition, as with the other forms at issue in this case, Form 4355 is not inconsistent with the statutory protection for "whistleblowers" contained in 5 U.S.C. § 2302(b)(8) or the right of federal employees under 5 U.S.C. § 7211 to petition or furnish information to Congress. See note 15, supra. Accordingly, Form 4355 also comports with subsections three through five of Section 630.

C. Should This Court Conclude The Executive's Actions Are Inconsistent With Section 630, Serious Questions Of The Constitutional Separation Of Powers Would Be Implemented

Courts generally should be reluctant to reach a constitutional question where there are alternative grounds for decision as there are in this case. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 504-07 (1979); Crowell v. Benson, 285 U.S. 22, 66 (1932). Moreover, where national security is involved, as it is in this case, a statute should not be interpreted so as to defeat the Executive's responsibilities. Curran v. Laird, 420 F.2d 122, 133 (D.C. Cir. 1969) (en banc). By finding the Executive Branch's actions to be consistent with Section 630, the Court need not reach the lurking issue of the legislation's constitutionality. If, however, the Court concludes that the Executive Branch's actions do not comport with Section 630, those actions are nevertheless valid because that

legislation represents an unconstitutional intrusion by Congress on the President's constitutional authority over national security information.

The protection of national security information falls within the powers committed to the President by the Constitution:

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

Department of Navy v. Egan, 108 S.Ct. at 824.

The Supreme Court explained the basis for the President's constitutional authority over national security information in United States v. Curtiss-Wright Export Corp., 299 U.S. 304:

> [The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Id., 299 U.S. at 320. As Justice Stewart recognized in New York Times Co. v. United States, 403 U.S. 713:

> The responsibility [for protecting classified information] must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of

> foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order.

Id., 403 U.S. at 728-29.

Since the Truman Administration, Presidents have exercised this constitutional authority through the issuance of Executive Orders controlling access to national security information. See Exec. Order No. 10290, 3 C.F.R. 790 (1949-53 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-53 Comp.); Exec. Order No. 11652, 3 C.F.R. 154 (1972 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1979 Comp.); Exec. Order No. 12356, 3 C.F.R. 166 (1982 Comp.). In so doing, the Presidents have relied primarily on their constitutional authority. See, e.g., Exec. Order 10290 ("by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States"); Exec. Order 12356 ("by the authority vested in me as President by the Constitution and laws of the United States"). There has never been a specific act of Congress relied upon as a basis for the Executive Orders governing national security information. See 85 Harv. L. Rev. 1130, 1198; cf. United States v. Curtiss-Wright Export Corp., 299 U.S. at 319-20 (President's authority over foreign affairs does not require as a basis an act of Congress). Nor are we aware of any specific budgetary appropriation from Congress for this ongoing presidential security program. It is also worth noting that these Executive Orders essentially

regulate information generated in the Executive Branch and apply primarily to Executive Branch employees who assist the President in carrying out his foreign relations and national security functions under the Constitution.

None of this suggests that Congress is totally without power to legislate in the area of national security. Nevertheless, drawing lines between the political branches on this subject is difficult at best, see United States v. A.T. & T., 551 F.2d 384 (D.C. Cir. 1976), and the courts have gone out of their way to avoid making hard and fast pronouncements. Cf. Goldwater, 617 F.2d at 704. The present controversy does not call for a judicial exegesis on the extent to which Congress may, as an original matter, legislate the regulation and control of disclosure of national security information. The key to this case is the fact that the underlying security program has been authorized by a series of Presidents pursuant to their Article II powers, not specific legislation. Congress, in enacting Section 630, did not purport to exercise any of its independent foreign affairs powers.[18] To

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[18] Section 630 purports to be a budgetary provision, but Congress cannot accomplish by an appropriations measure what would be unconstitutional if enacted as substantive laws. See United States v. Lovett, 328 U.S. 303 (1946); Henkin, Foreign Affairs and the Constitution, at 113 (1972) ("Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly."). Moreover, implementation of NSDD 84 was never the subject of a specific appropriation by Congress, presumably because expenditures for that specific purpose were de minimus. See Henkin at 115 ("Congress cannot impose conditions which invade

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the contrary, the congressional action was unambiguously styled as a direct challenge to the President's exercise of his constitutional authority. Whatever Congress' more general powers may be to deal with the disclosure of classified information, generated within the Executive Branch by the President's Article II subordinates -- and those powers may well be quite limited -- surely legislation which directly undermines another branch's legitimate exercise of its constitutional authority crosses the line.[19]

The Executive Order and Directives are based on presidential findings of what specific controls on disclosure were thought necessary to protect national security, and are the product of a process of ventilation and review within the expert military, foreign policy, and intelligence agencies of the Executive Branch. Congress in Section 630 did not disagree with these longstanding presidential judgments; it did not even purport to examine the issues in traditional legislative fashion. In fact,

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[18](...continued)
Presidential prerogatives to which the spending is at most incidental . . . ." That Section 630 merely masquerades as a spending limitation seems clear from the self-evident fact that changing all the forms to comply with it would be manifestly more expensive than maintaining the status quo ante.

[19] Even assuming some overlapping constitutional authority on this question, as a practical matter Congress would typically set a policy and leave it to the President to execute the minute details, especially when the President undeniably has his own national security powers. Choosing the appropriate words necessary to convey meaning to a distinct group of employees, with specialized knowledge and expertise, who are subordinate to the President, is obviously a task for the President. It is hard to imagine a context in which congressional micromanagement is less appropriate than the present one.

while certainly not dispositive standing alone, the circumstances under which Section 630 was passed speaks volumes about the respective interests of the branches here. Neither House held hearings on this provision. It was, at the 11th hour, literally slipped into a continuing resolution of over 1000 pages, which had to be signed by the President on the eve of the 1987 Christmas recess to keep the government operating. What little legislative history there is to Section 630, and its lack of relationship to the rest of the Continuing Resolution, strongly suggest that very few members of Congress, other than the plaintiffs in AFSA who sponsored it, were even aware of the provision, let alone understood what it was designed to do. A holding that Congress, in so facile and offhanded a manner, can effectively undercut an evolution of 40 years of Presidential Executive Orders and national security directives promulgated pursuant to Article II is clearly not called for here.

To the extent the congressional plaintiffs claim a right to unimpeded access to classified or even "classifiable" information from Executive Branch "whistleblowers," a related constitutional doctrine comes into play. Since the time of Washington, Congress has recognized the President's authority to control access to national security information. Curtiss-Wright, 299 U.S. at 320 (President Washington's refusal to comply with a congressional request for documents relating to foreign affairs was "a refusal the wisdom of which was recognized by the House itself and has never since been doubted."). This doctrine of executive

privilege for national security information is well recognized in modern cases, see United States v. Nixon, 418 U.S. 683, 710 (1974); United States v. Reynolds, 345 U.S. 1 (1953), and applies vis-a-vis the Congress. United States v. AT&T, 567 F.2d 121, 129 (D.C. Cir. 1977).[20]

The Executive Orders and NSDD 84 are, in part, delegations by the President to certain high level subordinates to control access to and disclosure of classified information. The secrecy agreements embodied in the forms at issue are mechanisms by which the President's power to assert executive privilege can be carried out. Questions regarding disclosure of national security information to Congress can be pushed up to the appropriate level

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20 In AT&T, supra, the defendant was in possession of certain national security documents that had been subpoenaed by a House committee. The United States sued to prevent AT&T from complying, citing potential damage to the government's intelligence interests. The court allowed the suit to proceed, noting that the Executive Branch should be no worse off than if it controlled the documents itself:

> If the request letters were only in the hands of the Justice Department, it could have refused to comply with the legislative demand, citing Senate Select Committee. The fact that the request letters are available from AT&T as well as from the Justice Department does not make the legislative authority unreviewable in court, for AT&T could have refused to comply and insisted on an ultimate court decision to avoid prosecution. The fact that the Executive is not in a position to assert its claim of constitutional right by refusing to comply with a subpoena does not bar the challenge so long as members of the Subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena.

Id. at 129 (footnote and citations omitted).

within the Executive Branch, even to the President himself. The notion, however, that any employee in the national security establishment is equipped to decide what can safely be disclosed has been rejected by the courts, See Snepp, 444 U.S. at 507-10, and bespeaks a lack of discipline that is inimical to any responsible program of protection of classified information. Id.; see also Sims, 471 U.S. at 170. With its subpoena authority and political powers, the Congress is hardly helpless in dealing with the President. But it cannot undermine the President's ability to prevent disclosures of classified information by his own Executive Branch employees by legislatively immunizing them from unauthorized end runs. Congress has legitimate tools to obtain the information it needs. Section 630 is not one of them.

Because Section 630 is directly targeted at an exercise of Presidential authority under Article II, embodying an Executive judgment that specific controls on classified information are needed in the interest of national security, and because Congress has not even purported to establish its own competing scheme governing such information, compelling the Executive to comply with that statute, beyond the actions the Executive has already taken to meet congressional concerns, would violate the constitutional separation of powers.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss, deny plaintiffs' motion for

summary judgment, and deny plaintiffs' motions for preliminary injunctive relief.

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