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CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

OCTOBER 15, 1987

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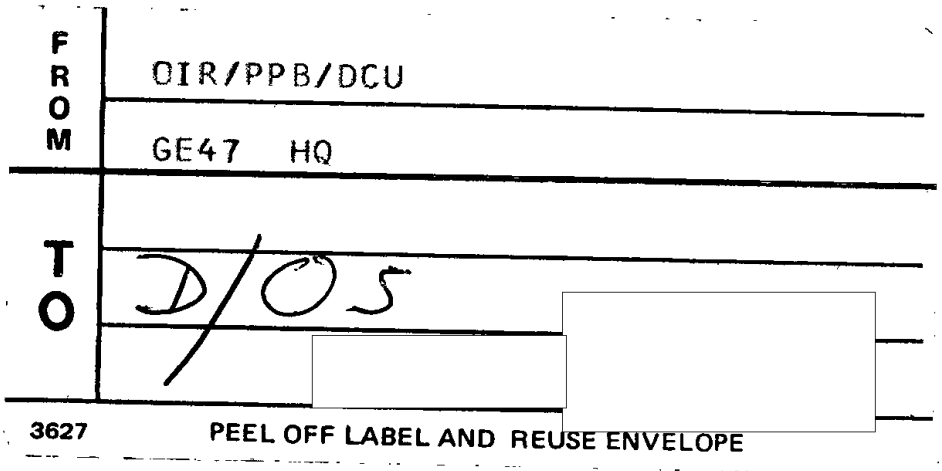

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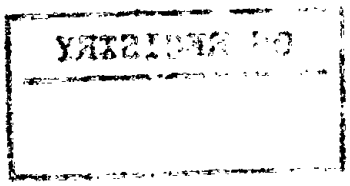

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CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENTS

THURSDAY, OCTOBER 15, 1987

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HUMAN RESOURCES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 311, Cannon House Office Building, Hon. Gerry Sikorski (chairman) presiding.

Mr. SIKORSKI. Good morning. The subcommittee will come to order.

Today the subcommittee will examine the development and content, implementation and purpose of Standard Form 189, the classified information nondisclosure agreement. Further questions will be raised about Form 4193, the nondisclosure form for the so-called SCI.

Concerns about the broad and ambiguous language of SF 189, the coercive and authoritarian tone of implementing regulations, and the heavy-handed tactics used by the Air Force to get employees to sign the form particularly interest the subcommittee.

Our investigation was requested by Congressman John Dingell, Chairman of the House Committee on Energy and Commerce, and Congressman William Ford, Chairman of the Committee on Post Office and Civil Service, and it follows the good work of other members of Congress, including Senator Grassley, Congresswoman Boxer, the Chairman of the House Government Operations Committee, Congressman Brooks, and the Chairman of the House Armed Services Committee, Congressman Aspin.

In response to the congressional outcry led by these members, many who will be testifying today, and to growing employee concern, in August the Information Security Oversight Office, the ISOO, of the General Services Administration issued regulations formally defining and purportedly clarifying some of the terms contained in SF 189. As we will show here today, little clarity actually was achieved.

On the issue of classifiability, for example, over two million federal employees must sign a statement saying that they will not disclose any, and I quote, "information that is either classified or classifiable." Despite the recent regulations issued by the ISOO and the various sometimes inconsistent versions or definitions that Mr. Garfinkel of the ISOO has propounded in letters to this committee

and to others in Congress, the definition of "classifiable" is still threateningly vague and all-encompassing.

Employees must speculate about what information may or may not be classified. Classifiable still can be, as Mr. Garfinkel once honestly declared, just about anything.

Therefore, federal employees place their jobs on the line whenever they release any information, whether or not it was actually marked classified at the time of the release. They risk civil or criminal actions against them.

And the chilling effect is as obvious as a Minnesota January night. What waste, what fraud, what incompetence, what malfeasance and misfeasance, what high crimes or misdemeanors would never have seen the healing light of legislative and public scrutiny if federal employees of years past had been forced to contend with such an all-encompassing restriction.

It is also very curious and unacceptable that the term "classifiable" does not appear in SF 189-A, the nondisclosure agreement for private government contract employees doing the same kind of sensitive work as federal employees, many times on the same project, in the same building, using the same documents, with the same goal or purpose.

The administration's explanation for the missing term in the document to be signed by private contract employees working for the Federal Government is that "contractors do not classify originally." Well, a huge majority of the federal employees affected by the 189 form do not classify originally either.

In fact, contractors create thousands and thousands of classified documents which they are responsible for marking and protecting. Mr. Garfinkel may have come close to the real explanation when he said he was told that "classifiable" could not be included in the industry form because industry would come back screaming.

We will hear today that Air Force employees who were prudent enough to question signing the form were bullied, threatened and harassed. In fact, original Air Force regulations on SF 189 made the "McCarthyesque" statement that the mere "reluctance to sign a nondisclosure agreement will be considered lack of personal commitment to protect classified information." We look forward to hearing an explanation by the Air Force.

This record of inception, adoption, and implementation leads one to the inescapable conclusion that SF 189 is intended to control the vocal cords of federal employees by using sweeping terms whose definitions are as changeable as the weather and by threatening federal employees with the loss of their clearances and jobs. Public scrutiny of politically sensitive, perhaps embarrassing information can be squelched.

This is a disturbing reappearance of that old phenomenon, the misuse of the term "national security interest," which has always been the last refuge of administrations, Democrat or Republican, more concerned with protecting their backsides than with protecting the public interest.

In fact, this administration cannot point to a list of disclosures of classified information by federal employees warranting this action. In fact, the most renowned case I am aware of is that involving the late Director of the CIA, who evidently met over four dozen times

with "Washington Post" reporter Bob Woodward. Mr. Casey apparently disclosed classified material on an ad hoc, unrestricted, and unmonitored basis at the same time he was pushing for tougher controls on this same thing on low-level public servants.

Again we see, as John Kennedy pointed out, that the ship of state leaks from the top, and again, we do not hear a clamor from the administration to change this sorry state of affairs. There is no question of the need to protect classified information detailing our national defense or security interests or our vital secrets. Carefully worded nondisclosure forms can be a useful tool with which to accomplish this goal by reminding employees about their responsibilities.

However, these forms must apply to all who are custodians of the information, without any artificial and repugnant distinctions between public and private employer or between CIA Director and Department of Transportation clerk or between Presidential friend and a GS-5.

National security needs to be balanced with the public's right to know about the workings of their government, the need for a free press, and individual free speech rights. SF 189 clearly tips the scale in favor of secrecy at the expense of press, employee rights, and the public interest.

Our first witness today will be Senator Charles Grassley from Minnesota's neighboring State of Iowa. Senator Grassley has been an outspoken and courageous critic of SF 189. As a member of the Senate Armed Services Committee, Senator Grassley has been a leader in Congress in an attempt to clarify the definition of "classifiable" material and the need for SF 189.

[Mr. Sikorski's statement follows:]

OPENING STATEMENT OF THE HONORABLE
GERRY SIKORSKI
SUBCOMMITTEE ON HUMAN RESOURCES
October 15, 1987

I. INTRODUCTION

A. Subcommittee Jurisdiction

This is an oversight hearing before the Subcommittee on Human Resources of the Committee on Post Office and Civil Service. Under Rule X of the U.S. House of Representatives, the Subcommittee is charged with reviewing and studying, on a continuing basis, the application, administration, execution, and effectivenesss of laws related to Federal civilian personnel requirements

B. Purpose of Hearing

Today the Subcommittee will examine provisions of National Security Decision Directive 84 (NSDD 84), which directed all executive agencies to establish regulations requiring Federal employees with access to classified information or Sensitive Compartmented Information (SCI) to sign two types of nondisclosure agreements. Specifically, we will examine the development, content, implementation and purpose of Standard Form 189 (SF 189), the Classified Information Nondisclosure Agreement. Further, questions will be raised about Form 4193, the nondisclosure form for SCI.

C. Subcommittee's Involvement

Last spring, as the Administration expanded its efforts to get employees to sign SF 189, several Air Force employees very properly raised questions and concerns about the broad and ambiguous language of SF 189. Concerns about the coercive and authoritarian tone of the implementing regulations and the heavy handed tactics being used by the Air Force to get employees to sign the form were expressed.

At the request of Congressman John Dingell, Chairman of the House Committee on Energy and Commerce, and Congressman William Ford, Chairman of the Committee on Post Office and Civil Service, this Subcommittee initiated its examination of SF 189. At the same time, several other Members of Congress, including Senator Grassley, Congresswoman Boxer, the Chairman of the House Government Operations Committee, Congressman Brooks, and the Chairman of the House Armed Services Committee, Congressman Aspin questioned the content, propriety and legality of SF 189.

In response to the Congressional outcry and growing employee concern, in August the Information Security Oversight Office (ISOO) of the General Service Administration issued regulations formally defining and purportedly clarifying some of the terms contained in SF 189. As we shall hear today, little clarity actually was achieved. Likewise, serious problems, questions, and concerns were not assuaged.

II. DISCLOSURE FORMS - PROBLEMS AND QUESTIONS

A. Content

Although there are a number of problems with SF 189's content, the use of the term "classifiable" is the most glaring. According to SF 189 every employee with access to classified material must sign a statement saying that they will not disclose any "information that is either classified or classifiable."

Despite the recent regulations issued by ISOO, the definition is still threateningly vague and all encompassing. The definition still requires employees to speculate about what information may or may not be classified, even though the employees don't have the expertise or the authority to make original classification determinations. Given the broad categories of information that can be classified, "classifiable" still can be, as Mr. Garfinkel once declared, "just about anything."

Therefore, Federal employees place their jobs on the line whenever they release any information -- whether or not it was actually marked classified at the time of the release. They risk civil and criminal actions against them. The chilling effect is obvious as a Minnesota January.

SF 189 flies in the face of the statutory right and obligation of Federal employees to communicate with Congress so we can properly oversee Executive actions. What waste, fraud, incompetence; what malfeasance and misfeasance; what high crimes or misdemeanors would never have seen the healing light of legislative and public scrutiny if Federal employees of years past had been forced to contend with such an all-encompassing restriction?

It is also very curious that the term "classifiable" does not appear in SF 189-A, the nondisclosure agreement for private government contractor employees doing the same kind of sensitive work as Federal employees. The Administration's explanation for the missing term is that "contractors do not classify originally." In fact, contractors create thousands and thousands of classified documents which they are responsible for marking and protecting. And contract employees are indistinguishably involved in some of the most sensitive areas of federal activity.

Mr. Garfinkel may have come closer to the real explanation for this outright discrimination when he said he was told that "classifiable" could not be included in the industry form because "Industry (would) come back screaming." This double standard is inexcusable and unacceptable.

B. SF 189 Implementation

At some agencies, SF 189 has been shoved upon Federal employees without consideration or respect for procedural due process. As we will hear today, Air Force employees who were prudent enough to question signing the form were bullied, threatened and harrassed.

Original Air Force regulations on SF 189 made the "McCarthyesque" statement that mere "reluctance to sign a nondisclosure agreement will be considered lack of personal commitment to protect classified information." The Subcommittee looks forward to hearing an explanation by the Air Force.

In addition, in the frenzy to get employees to sign a nondisclosure form, the Air Force even made employees without security clearances sign. The reason? "Administrative convenience," according to the Air Force.

Even after Mr. Garfinkel's agency -- in response to legal action by two public employee unions -- issued a directive stating that agencies should not withdraw employee security clearances solely on the basis of refusal to sign an SF 189, the use of this intimidation tactic continued. One month after this 1500 directive, the Navy issued instructions to withdraw employee clearances if SF 189 wasn't signed.

III. CONCLUSION

This record of inception, adoption, and implementation leads one to an inescapable conclusion: SF 189, is intended to control the vocal chords of Federal employees. Apparently the hope is that by using sweeping terms whose definitions are as able to change as the weather, and by threatening Federal employees with the loss of their clearances and jobs, public scrutiny of politically sensitive and embarrassing information can be squelched.

This is a disturbing reappearance of an old phenomenon, for the misuse of the term "national security interests" has always been the last refuge of administrations more concerned with hiding their problems than with protecting the public interest.

The concern about these nondisclosure forms is not new and not a partisan matter. Members of both houses and both parties have criticized the forms and fought to modify them.

There are tough criminal and civil laws, regulations and standards of conduct on the books aimed at protecting properly classified information. If the Administration is sincere about preventing just the release of properly classified information and they feel the current laws are inadequate, they have and should work with the Congress to come up with fair and effective laws that recognize the competing needs of security and liberty, oversight and overreach.

In fact, the Administration cannot point to a list of disclosures of classified information warranting this action. In fact, the most renowned case I'm aware of is that involving the late Director of the C.I.A., who evidently met over 4 dozen times with Washington Post reporter Bob Woodward. Mr. Casey apparently disclosed disclosing apparently classified material on an ad hoc, unrestricted and unmonitored basis -- at the same time he was pushing for tougher controls on low level civil servants. Again we see, as John F. Kennedy pointed out, that the ship of state leaks from the top. And again, we do not hear a clamor from the Administration to change this.

There is no question of the need to protect classified information detailing our national defense, security interests, and vital secrets. Carefully worded nondisclosure forms can be a useful tool with which to accomplish this goal by reminding employees about their responsibilities. However, these forms must apply to all who are custodians of the information -- and without an artificial and repugnant distinction between public or private employer, or between CIA Director and DOT clerk, or between presidential friend and a GS-5.

National security needs must be balanced with the public's right to know about the workings of their government, the need for a free press, and individual free speech rights. SF 189 clearly tips the scale in favor of secrecy at the expense of the press, Federal employee rights and the public interest.

STATEMENT OF HON. CHARLES GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you very much, Mr. Chairman, and I want to extend my thanks to you and to the members of your hard working subcommittee for inviting my testimony, and of course, I see you have many other interested parties, but we are all being invited on what I consider to be a matter of profound importance.

It is, as we all know, a natural propensity of the Executive Branch, and this could be under any Republican or Democratic President, to protect information generated by the government and its agents. If done legitimately, our nation's secrets, the disclosure of which would endanger our security, remain protected.

However, if done zealously, it can be threatening, if not violate the rights of free speech for individual employees. It can inhibit the flow of information to Congress, and it can hinder our ability to perform our constitutional responsibility.

So it is the business, Mr. Chairman, of the Congress to protect the individual's rights to free speech, to encourage the free flow of information, and to insure that nonclassified information remains in the public domain.

These are the grounds, as far as I am concerned, for judging the administration's implementation of Standard Form 189. We, in the Congress, must ask ourselves this very basic question: Is 189 a legitimate attempt to prevent disclosure of classified information or is the administration overreaching its authority, seeking to gag public servants in order to prevent embarrassing disclosures of waste and abuse?

This is the question that I would like to address to you, Mr. Chairman, and your subcommittee. On the surface, you might conclude that the intent of the administration is a legitimate attempt to safeguard our nation's secrets.

I think the evidence indicates otherwise. My personal involvement and dealings with the Executive Branch officials on this matter indicate to me an attempt on their part to go way beyond the legitimate protection of classified information.

Their intent, in my view, is to place a blanket of silence over all information generated by the government. It is a broad, I might say very broad, grab for power by any standard and it begs to be addressed immediately by the Congress.

I would like to briefly discuss how I have come to this conclusion. To begin with, we have to review some fundamental facts, and these are very basic: that the Code of Government Ethics requires the legitimate disclosure of waste, abuse and mismanagement.

Second, current law actually encourages and protects such disclosures.

And, third, there are already statutes prohibiting the disclosure of classified information.

In the face of these facts, it is up to the administration to provide a justification for why this broad-reaching measure is necessary.

Furthermore, any action taken should in no way conflict with the current law or rights provided under the Constitution.

The administration so far has provided no justification for why 189 is necessary. Moreover, it conflicts with current law, the code of ethics and the First Amendment.

The administration, then, is pursuing a back-door approach by creating its own rules, its own obligations and its own remedies. The American Law Division of the Library of Congress agrees that 189 violates current law and has provided us with an opinion to that effect. I want to quote from it, in part, and then I would ask that the entire document be placed in the record.

I would quote one short paragraph.

> To the extent that the secrecy agreement because of its apparent breadth and vagueness of terms chills or discourages the disclosure of any information which evidences waste, fraud, corruption or illegality in government, that effect or result would be in contrast to and in derogation of the intended results of the whistleblowing statute.

While the administration has not demonstrated a need for corrective action, there is a rationale for suggesting why 189 is desired by the administration. It is a fact of life that administrations, Republican or Democrat, view whistleblowers as a germ within government.

Given that, the question is whether this administration views 189 as a tool for getting rid of those germs. The means for doing so are obvious.

First, violation of 189 is much easier to enforce. Rather than having to prove the criminal intent required by current law, a simple breach of contract governed by a lower standard would serve the same purpose. Therefore, it would be easier to go after whistleblowers.

Second, 189 is peppered with language that is vague, ambiguous and, in places, very unintelligible. The classic example of this problem is the term "classifiable."

The Director of the Information Security Oversight Office, who will testify before you today, I understand, has taken up several columns in the Federal Register attempting to define that word. Mr. Chairman, I am afraid that language in the Federal Register has been written in vain because reading that definition merely compounds the confusion.

How does one then know when information is classified? The answer is that it is marked "classified."

How does one know when something is classifiable? The answer is that one cannot know. The term is so broad and undefinable that it could supplant the term "lawyer" as a textbook example of vagueness for first year law school classes. In other words, it is impossible for any reasonable person to understand what "classifiable" means such that he or she knows beyond a shadow of a doubt what is prohibited from disclosure.

Mr. Chairman, the term "classifiable" is void for vagueness.

Given the combination of the two points made thus far, first, that 189 creates an easier mechanism for enforcement, and second, that the definition of "classifiable" is void for vagueness, any disclosure of any kind might then constitute a breach of contract and thereby bring about the dismissal of the employee.

It is that wide-ranging grab for power which Congress, I feel, Mr. Chairman, must address very swiftly and decisively.

Now, I have dealt with the administration on this matter directly for several months, including meetings up here on the Hill and meetings with the highest levels of officials at the White House. My intention was to work out a reasonable implementation of this secrecy agreement, and particularly a reasonable definition of the term "classifiable."

These officials assured me that "classifiable" was not intended to be broad. I took these officials at their word and sought to narrow the definition of just what information is classifiable.

I offered to replace the Federal Register language with narrower language taken directly from a fact sheet issued by ISOO. It was the most reasonable definition of the term "classifiable" that I had seen, and it went quite far in eliminating the problem of vagueness which was present in all previous attempts to define "classifiable."

As far as I was concerned, if they would accept this more narrow definition of the term, which was consistent with their rhetoric, then we would have had a basis for a reasonable agreement. But the administration reneged on its initial acceptance of this narrower definition, leaving me to wonder once again, Mr. Chairman, whether the administration actually intends to implement an agreement consistent with what it says or whether it is simply trying to patronize those who disagree until somehow all of us in opposition go back to sleep and forget about it.

Its insistence on a broad definition and its rejection of a reasonable agreement are the best indications of the administration's true intent. In my mind, Mr. Chairman, there is no opportunity for transforming 189 from a gag order to a legitimate secrecy agreement, given the stubbornness and the unreasonableness of administration officials.

SF 189 remains a back-door way of going beyond the laws passed by Congress. It is an attempt by the executive to implement contractual laws of its own.

I would urge all federal employees to refrain from signing SF 189.

And so now, Mr. Chairman, you have invited me here to hear what I had to say. So I urge you, as well, to do whatever possible, legislatively or otherwise, to slam the back door shut and to require the administration to start at ground zero and to demonstrate convincingly why SF 189 is necessary.

I would welcome and appreciate the opportunity to work with you and your subcommittee to achieve that objective.

Once again, Mr. Chairman, I extend my thanks to you for inviting my testimony and for inquiring in this very basic and important matter not only as it deals with our national security, but as it deals with Congress's right to get information and as it deals with the constitutional right of free speech.

Mr. Chairman, if you have any questions, I would be happy to respond. I do want to leave this document that I ask be put in the record from the CRS.

Mr. SIKORSKI. Without objection, the American Law Division article on this matter will be placed in the record at an appropriate point.

I want to thank you on behalf of the subcommittee and the committee and the others who are working on this matter for your per-

severance and continued interest in this topic. I know it affects a lot of people personally, over 2.4 million federal employees directly and intimately.

You probably are the expert on "classifiable," what it is and what it may be. Just in my looking at the testimony of Mr. Garfinkel, whose baby it is, there are at least four definitions that I have seen in explanation of what "classifiable" is. The one that is in the form, and then there is the one that came out in the regulations defining it as material which as a result of negligence, time constraints, error, lack of opportunity, or oversight has not been marked as classified information. That is repeated in a slightly different fashion in the testimony today of Mr. Garfinkel, who say it is classified information that for some reason, whether by accident or design, does not contain the classification markings that are associated with its identification.

Then there is a fourth definition that "classifiable" material is not already classified information but that which is currently undergoing a classification determination and requires interim protection.

It is kind of a moving target here. If I cannot appreciate it and you cannot appreciate it, and you analyzed word for word, comma for comma, how can the federal employee out there appreciate what they are signing their name to?

Senator GRASSLEY. That may be just exactly the environment the administration seeks because whether it is something that is very difficult to understand, like a word like "classifiable," or whether it is just several different approaches, it all has a chilling effect and generally accomplishes through the back door what we know the Executive Branch has been trying to do over long periods of time, and you and I have both said under both parties.

Mr. SIKORSKI. I have the impression that you came to an agreement reaching some definition, some parameters for just the single word "classifiable," but that agreement was not honored. We are using this as an example. There are other problems with SF 189, but in this example, what is the definition that you came to that would narrow it?

Senator GRASSLEY. The document that I refer to, both here as well as in discussions I have had in my office, are from pages 10 and 11 of the accompaniment of the letter to Congresswoman Boxer. The language that is so difficult to understand and that we objected most to is "classifiable information," which, I quote, "refers to information that meets all of the requirements for classification under Executive Order 12356 or under any other Executive Order or statute that prohibits the unauthorized disclosure of information in the interest of national security, but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information."

Now, that includes everything except the words "et cetera, et cetera," and what we wanted and thought we had agreed to was the substitution at the bottom of the page. We feel that this explanation would comport with their rhetoric, if they would go along with it, and we felt that they did. But now we find out that they are not. The language defines "classifiable" as "refers to unmarked

information that already is classified or meets the standards for classification and is in the process of being classified."

It does not refer to unclassified information that might perchance be classified at some time in the future, and on and on. So that is what we thought we agreed to.

Mr. SIKORSKI. Mr. Garfinkel in his testimony seems to give the impression that it is just a question of being marked or unmarked. It is all classified information. It just happens to be unmarked for whatever reason.

That is embraced by the language you just read.

Senator GRASSLEY. Yes.

Mr. SIKORSKI. But they have backed up subsequent to your agreement.

Senator GRASSLEY. Yes, that is right. The language at the bottom of the page should be substituted for the beginning of the page, and that is what we thought we had an agreement on.

Mr. SIKORSKI. How do we slam the door shut, as you suggested, on this? There is a rider in the Senate.

Senator GRASSLEY. Well, in the short term, Congress has to outlaw 189. In the long term, of course, committees with jurisdiction, and that is not just your committee, but several committees in the Congress, all interested parties have to work to bar back-door legislating by the Executive Branch, particularly when its consequences are like they are in 189.

It is also important, in my view, to examine why it is that nondisclosure forms keep reappearing every three years, I guess, like weeds growing out of a garden. Congress has to take a discerning look at the proliferation of National Security Decision Directives, such as those cited as authority for SF 189. Without stricter scrutiny and control of National Security Decision Directives, the Legislative Branch is going to have to legislate quite sweepingly.

What I am saying is we have got to take some short-term action that immediately stops 189. Beyond that, we are going to have to go quite in depth in this. Otherwise, I think we will have a repeat of this same problem year after year, administration after administration, regardless of whether it's Republican or Democrat.

Mr. SIKORSKI. Senator, thank you very much.

Senator GRASSLEY. Thank you, and good luck. Let's continue to communicate and work together on this.

Mr. SIKORSKI. We will be doing that. Thank you.

Our next witness is Congresswoman Barbara Boxer, member of the House Armed Services Committee. Congresswoman Boxer has been a leading critic of this Standard Form 189 and a strong protector of whistleblowers and others who are attempting to save the taxpayers money.

Good morning.

STATEMENT OF HON. BARBARA BOXER, A REPRESENTATIVE FROM THE STATE OF CALIFORNIA

Mrs. BOXER. Good morning, Mr. Chairman, and thank you once again for taking leadership in these very important issues.

Mr. SIKORSKI. I am sorry we will not be betting on a dinner between the Twins and the Giants.

Mrs. BOXER. It was a tough game for us, and I was all set to bet you a bottle of California wine, a sourdough loaf and a rivet from the Golden Gate Bridge.

Mr. SIKORSKI. I was set to bet you a bottle of Minnesota wine.

Mrs. BOXER. Minnesota wine? Isn't that a contradiction in terms, Mr. Chairman?

Mr. SIKORSKI. We have a wonderful wine industry. The growing season is a little short.

Mrs. BOXER. I will tell you what I will do, showing how magnanimous I am. If you win the World Series, I will give you the bottle of wine at least.

Mr. SIKORSKI. Very good. Thank you, and if we win the World Series, I will give you a bottle of Minnesota wine as well.

Mrs. BOXER. That is okay. We will wait until next year for that.

Mr. Chairman, I do want to thank you for holding these important hearings on one of the most controversial policies that flows from National Security Decision Directive 84, the requirement that government employees sign a seriously flawed nondisclosure Standard Form 189.

It was my hope, as it was yours, Senator Grassley's and Les Aspin's, that the administration would suspend its policy until our concerns and questions could be thoroughly and publicly aired. However, our requests were denied, and a growing number of military and civilian employees of the Department of Defense who refuse to sign Form 189 are threatened with the loss of their security clearances.

It disturbs me greatly that our pleas went unheeded. Had it not been for the lawsuits filed by two unions representing federal employees, those individuals, including Ernest Fitzgerald, would have already lost their clearances and possibly their jobs. Mr. Chairman, I might add that Ernie Fitzgerald has contributed so much to this government by pointing out waste, fraud and abuse that to lose someone like Ernie Fitzgerald would be a terrible loss for all of the taxpayers and the citizens of this country.

The administration has said it will not revoke the clearances of those who refuse to sign the form pending the outcome of the court's decision and have tried to better define terms, such as "classifiable."

However, while some progress has been made, I do not believe that all of our concerns have been adequately addressed, and therefore, I object to the fact that federal employees are still being asked to sign the form. I understand in my own office I was asked to sign the form by the DOE, and we are hoping I did not sign it. The fine print was such that it is very possible that it was signed. We are checking now. My husband, who is a lawyer, always says you read every single line in a form that is put before you, but the fact is we in Congress are being asked to sign this form, and it is incumbent upon us to make sure that that stops.

I certainly was unhappy to learn that Senator Grassley does not have the agreement with the administration he thought he had. Mr. Carlucci had sent me a letter in which he had suggested some new language, and Senator Grassley, as I am sure he testified, thought he did have an agreement. As a matter of fact, he told me that when I saw him about a week or two ago on another matter,

and it turned out that, in fact, the changes published in the Federal Register do not go far enough. They leave too many loopholes allowing for retroactive classification after information has been disclosed.

So after months of negotiation, we still have not come to a satisfactory solution.

I firmly believe the whole process should be deferred pending congressional review of the entire policy. My main concern, which I share with my colleagues in Congress who have weighed in on this issue, is that Form 189 will impede the flow of information to Congress.

And, Mr. Chairman, you know as well as I do that is how we make our decisions. We need to have information, and while I have no quarrel with the need to protect classified material, the word "classifiable" is so broad and so vague that it could include anything.

To use Mr. Garfinkel's words when he was asked about the term several months ago, he said, "It could include anything." In other words, the form holds whistleblowers responsible for disclosing unclassified information to Congress, the Inspector General or to any legitimate recipient, information which might, after being disclosed, be retroactively designated as classified.

That whistleblower would then be liable for unauthorized disclosure of classified information. This would, indeed, have a serious, chilling effect on conscientious public servants considering whether to report evidence of waste, fraud and abuse to Congress, the Inspector General or any authorized recipient.

Mr. Chairman, you and I know too well that many government employees are already afraid to stick their necks out, to risk their careers to do what they know is right. They certainly do not need another deterrent.

We do need the information these people provide us. Without it, Congress and the American people are at a terrible disadvantage.

For instance, the House Armed Services Committee depended on candid, up-front assessments by military and civilian field personnel in its investigations of problems of the B–1B and the MX missile. Likewise, information about faulty and overpriced weapons and spare parts has come from both civilian and military employees of the Department of Defense.

It would be a tragedy if individuals such as these, on the front lines, with intimate knowledge of our defense procurement system, were further discouraged from reporting problems.

Mr. Chairman, the Post Office and Civil Service Committee has worked long and hard to improve whistleblower protection for federal employees. I introduced legislation to improve the remedies available for military personnel who disclose waste, fraud and abuse to the Inspector General or to the Congress.

These efforts are necessary because it is very difficult to protect whistleblowers. The current protections simply are not working, and, Mr. Chairman, I urge you to join me in that fight because we have yet to get that bill through the Armed Services Committee, and we are hoping for hearings this month.

I recognize that the administration has given us assurances that SF 189 will not supersede the existing statutes for protection of

whistleblowers. However, anyone contemplating blowing the whistle still has to fear potential prosecution and the personal and financial sacrifice it will entail to clear his or her name.

The administration has not yet made a convincing argument for the need to protect "classifiable" information. That does not seem to have been a problem before. Until this committee, Mr. Chairman, and other committees with jurisdiction over such matters can be convinced that there is a serious problem with the leaking of "classifiable" information, and until the nature and purpose of the nondisclosure form is agreed upon, I prefer that Form 189 be abandoned.

And I want to make one more point to you, Mr. Chairman, that I think is very important. Yesterday I was at a hearing over at the Armed Services Investigation Subcommittee, and we discussed a shocking report by the Defense Investigation Service about the lax security that exists at contractor sites involving work on highly classified or what we call "special access" or "black" programs.

Very briefly, this report concludes that these "black" programs are not receiving adequate oversight and that there are so many of them no one in the Defense Department even knows how many of these programs exist and what they are. There is no central repository for all of these "black" programs, and as a matter of fact, testimony yesterday indicated that only approximately 25 percent of these programs have the proper clearance.

Mr. SIKORSKI. We do not know how many there are. We do not know who is in charge of them. We do not know how much they cost the taxpayers, and we do know that security on some of these is incredibly bad.

Ms. BOXER. Exactly.

Mr. SIKORSKI. And these are the most sensitive programs. That is why they are not known to many people.

Ms. BOXER. That is exactly right, and as a matter of fact, this report, I believe, emanated from legislation authored by your colleague on your other committee, Energy and Commerce, Ron Wyden. This report was made available to us, and it is really shocking to see that here we have programs that are clearly supersecret programs, and they are treated with great laxity and lack of security.

So here we are worrying about "classifiable" information, supposedly, while we are in a mess over on the special access or the "black" program side. It says to me something else, Mr. Chairman. What it says to me is that this whole issue over this form, this entire issue is really a red herring; that we are really just trying to stop people from blowing the whistle on fraud, waste and abuse.

I would suggest that if the administration is really concerned about tightening up on the leaking of classified information, it should focus on implementing reforms to correct the deficiencies documented in that DIS report. That would seem to me a far more productive and fruitful effort than trying to scare government employees with that Form 189, a form that is a serious setback to congressional efforts to better protect whistleblowers.

Mr. Chairman, again, I want to thank you for your leadership on this issue. We have worked long and hard on many of these issues, and I look forward to working with you on this one.

Mr. SIKORSKI. Thank you.

I think we have hit classifiable. The other issue that you have raised is an important one, as we have seen in the Iran-Contra hearings, of congressional oversight without the capacity of federal employees to unfetteredly petition members of Congress to blow the whistle on fraud and waste, incompetence or misfeasance or malfeasance. We are not going to be able to do the oversight that we need to do, and there is going to be in the long term a breakdown in Executive Branch functioning as well.

Many would prefer not to have to come up and testify because it is not fun to take time out, prepare yourself, prepare the testimony, answer questions, attend long hearings a few times a week, sometimes many times a week. And yet that is an important part of the process if the Executive Branch is to do the job they are required to do under the law.

And the only way we can determine Executive Branch effectiveness is if we have information, and we are not going to get it if employees are any more intimidated than they already are.

Ms. BOXER. Exactly.

Mr. SIKORSKI. All right. We will put in the record without objection another article by the experts at the CRS, Library of Congress, on the history of use of Executive Orders and other statements that are not found in statute or in the Constitution to secure ever so tightly government information and the broadening of the terms that have now encompassed virtually any government document into this category of "classified" or "classifiable" information.

Thank you.

Ms. BOXER. Thank you very much, Mr. Chairman.

I think programs are classified or they are not, and any other word is just being used to stop people from telling the truth to Congress, and we have got to put an end to it. Simple.

Mr. SIKORSKI. Thank you.

Congressman Brooks is on his way. We will begin the next panel, and if he comes in, we will then take him.

Our next panel consists of two witnesses, Mr. Ernest Fitzgerald and Mr. Louis Brase. Mr. Fitzgerald is a Management Systems Deputy with the Air Force and a courageous, well-known whistleblower who helped bring this particular issue to light. He drew congressional and media attention when he refused to sign SF 189 because of the ambiguities in its text and their affect on employee rights. The subcommittee is honored to have Mr. Fitzgerald here to share his thoughts, experience, and expertise on employee nondisclosure agreements.

Why don't you come on up, Ernie.

And Mr. Louis Brase is the Cryptological Maintenance Training Manager with the Air Force and has had the frustrating, embarrassing experience of facing the consequences of refusing to sign the SF 189 disclosure form. From the loss of his security clearance to his job transfer and recently to his reinstatement to his position as training manager, Mr. Brase will share with the subcommittee his nightmarish experience and thoughts on failing to sign SF 189.

Come on up, Mr. Brase, and he is being accompanied by his attorney, Mr. Joe Kennedy.

As I understand it, Mr. Fitzgerald, you do not have a statement; is that correct?

Mr. FITZGERALD. Not a prepared statement, Mr. Chairman.

Mr. SIKORSKI. Do you want to make any comments at this point?

Mr. FITZGERALD. Yes, I would like to explain briefly how I got into this mess and give you my observations of how we might get out of it.

STATEMENTS OF A PANEL CONSISTING OF ERNEST FITZGERALD, DEPUTY, MANAGEMENT SYSTEMS, OFFICE OF FINANCIAL MANAGEMENT, U.S. AIR FORCE; AND LOUIS BRASE, CRYPTOLOGICAL MAINTENANCE TRAINING MANAGER, U.S. AIR FORCE

Mr. FITZGERALD. I was minding my own business doing regular bureaucrat stuff in my office in the Pentagon when I was visited on the 13th of July by a military officer who threatened me: either sign this job or lose your security clearance.

That riled my competitive spirit, and I was compelled to start studying Standard Form 189 and its related procedures.

Then on the 2nd of July of 1987, I received a letter from another military officer, my new military boss, General Watts, in which he threatened to take away my security clearance and deny my access to classified information if I did not sign the paper. He gave me 30 days.

So that really galvanized me in my purpose, and I began to study this process in earnest.

I am not a lawyer, but I have read lots of contracts, and this is perhaps the worst contract I have ever seen in my life. I have seen some really bad ones, Mr. Chairman, in the Pentagon with giant corporations, but nothing as bad or one-sided as this.

The lawyers have told me it is called an adhesion contract, a one-way deal, and indeed, it is clear from the changes that have already been made since we began to make a fuss about it, that the employee's signature is intended to bind him forever, and that is a long time.

Now, even the Third Reich was only expected to last 1,000 years, but the government employee is bound forever. But the government claims for itself the right to change the terms of that contract at will. You know, the government can put out a new interpretation in the Federal Register every Monday morning, and the employee is bound by whatever the government comes up with.

I should add right here, I think, that there is a lot wrong with this so-called contract beyond "classifiable." In this instance, the term "classifiable" was turned on its head. In the past it has been used as a limiting term, as in "properly classifiable and, in fact, classified."

Mr. SIKORSKI. In fact, the courts in more recent cases have embraced the term "classifiable" as meaning a limit on "classified." That is, Grandma's recipe that ended up with a classified marking is not classified because it is not classifiable; is that correct?

Mr. FITZGERALD. That is my understanding in the past, but in this instance they have turned a limiting term into an expansionary term, which Mr. Garfinkel said in my presence could mean anything, and I think we owe Mr. Garfinkel a real debt for his

candor. I do not see how anybody can be comforted by what he says, but nevertheless, he has been candid about it.

So to summarize, I have submitted for you and your staff and for the record, if you wish, a long list of unanswered questions, questions, responses and my comments on those, and as a consequence of this long list of unanswered questions and the truly frightening answers to those that I did get, I began to look at why the administration was really doing this. It obviously was not for the stated purposes of alerting us to our duties and getting our commitment to protect classified information, which is exactly what General Watts wrote to me, and which I wrote back recommitting on those same points. If that were the case, it would have been solved on the 14th of July when I wrote back to General Watts.

In asking about the legal basis, I was told that it was the National Security Decision Directive 84. Ms. Buck, in her testimony, talks about the obligation to carry out the statutes and Executive Orders. This is neither.

We have somewhere between two and 300 NSDDs. Some are secret; some are part secret. It is truly Kafkaesque. You do not even know what you are being held accountable for in some cases, and I would endorse Senator Grassley's plea that this be looked at. This is truly scary, the fact that these things are viewed as having the force of law, particularly within the military.

The distribution within the Services at, least in the Air Force is through military channels. If I want to see an NSDD that is classified, I have to go hat in hand to the military, sign a register, and then they may let me read it.

You know, you do not know what we are being held accountable for, and we do not either. So I would emphasize that very strongly.

The basis for arguing that the NSDDs have force of law was said to be the Willard Commission report. Senate investigators furnished me a copy of one, and I wanted to read you something that confirms my conclusion, Mr. Chairman, that the Standard Form 189 and related procedures have nothing to do with true security protection.

In the Willard Commission report itself it says, "Present civil statutes and regulations permitting disciplinary action for unauthorized disclosures by government employees are generally adequate." This was issued March 31, 1982. They obviously do not need this to protect classified information. They go on to say in the same sentence, "Except that they apply only to persons who disclose classified information, not to those who receive it."

Mr. Chairman, this whole document, the Willard Commission report, is aimed at the press and the Congress and recipients of information from the government. They admit that there is no problem in disciplining employees who reveal classified information, but it is necessary, since they are, as they complain, limited in their interrogation techniques. It would appear that they would welcome authority to use torture.

They sought apparently to intimidate the sources for Congress and the press. In my correspondence which you asked that I submit, I had attached originally——

Mr. SIKORSKI. Responses to the Air Force and their response back will be put into the record at the appropriate place.

Mr. FITZGERALD. Thank you, Mr. Chairman.

I had submitted originally as attachments to two pieces of correspondence classified documents which I viewed as improperly classified, which I requested be declassified. I have never heard from either of those requests substantively.

However, in response to a request from the House Armed Services Committee, the National Security Council has already declassified one of these papers, which was a March 12, 1986 memorandum from Admiral Poindexter to Secretary of Defense Weinberger, and I believe your staff has gotten copies of that for you.

I think in examining that memorandum you can see why the administration, and probably as Senator Grassley has said, other administrations, would like to have the power to cover up this kind of stuff.

The document itself is classified "secret," and it is nothing more than a plan to bamboozle Congress. There is not one iota of true national security information in that document.

Mr. SIKORSKI. Mr. Fitzgerald, we are talking of a letter on White House stationery dated March 12, 1986, classified "secret," and stamped over that is a larger "unclassified" stamp at this point; is that correct?

Mr. FITZGERALD. Yes, sir, that is correct, and down at the bottom it has the notation——

Mr. SIKORSKI. "Declassified"?

Mr. FITZGERALD. Yes, sir, on the 8th of September 1987.

Mr. SIKORSKI. And this memo is from John Poindexter for the President to the Honorable Casper Weinberger, Secretary of Defense, and the subject is implementation of the recommendations of the President's Commission on Defense Management.

The second paragraph is interesting. "The NSDD"—that is the National Security Decision Directive——

Mr. FITZGERALD. It eventually became 219.

Mr. SIKORSKI [continuing]. On the Packard Commission reforms, "is intended to strengthen your hand"—this is Poindexter writing Weinberger—"vis-a-vis the legislation now in both Houses and maintain your control of the implementation process. We have tried to be sensitive to the President's desire to implement the Commission's recommendations without infringing on your," Weinberger's, "authority or prerogatives. The events of the past week have demonstrated the Hill has been most favorable towards the Commission's report. The report thus gives the President considerable leverage in dealing with the more radical proposals for reform than now abound in both Houses. Because of our need to sustain momentum on this and your pending trip to Europe, I hope we can have your comments this week before you leave."

The only thing I have not read is the first paragraph that just cites the memo and the tabs that are in draft letters to Houses of Congress.

It does not seem to be top secret to me.

Mr. FITZGERALD. Not properly so, Mr. Chairman, in my opinion, but from the standpoint of wanting to use what in your other committee has come to be known as the "Poindexter-Packard scam" to head off procurement reform, it was absolutely necessary that they keep their intentions secret, and that was done.

This letter is dated March 12, 1986, and it was not declassified until the damage was done, and as you well know, you and Mr. Dingell have written extensively about this, and Chairman Dingell wrote to the President about this matter exactly a year ago today, on October 15, 1986. He wrote a real blast to the President, requesting that administrative and criminal sanctions be invoked as appropriate for misuse of security classification.

Nothing has been heard of that except to intensify the pressure on government employees to keep their mouths shut.

I have another example. I notice that Chairman Brooks came in, but I have another example.

Mr. SIKORSKI. Let's finish on this one. This one has no basis for national security interest classification. There is nothing about defense or cryptology or any projects whose technology or anything else relates to our national security interest. This is pure legislative strategy that could be embarrassing if it became public in one sense because it is very honest, and it shows frame of mind with regard to how the White House was treating the concern for real reform in procurement of defense materiel and weaponry, but also in the sense that it shows that this whole push against waste, fraud and abuse was more a scam than it was sincere.

Mr. FITZGERALD. Yes, sir, and the more you dig into the substance that was back of this, the more convinced you become of just those points.

Now, with respect to the government employees seeing this, before the big, new drive on the gag order, there would have been no reason why any employee should not have brought this to you or any other member of Congress. All of you have clearances.

Mr. SIKORSKI. In fact, under whistleblower protections, an employee would have been required to disclose this.

Mr. FITZGERALD. Certainly under the Code of Ethics, in my view, and to turn it around, an employee seeing this absent the "secret" stamp would have no notion that it could be "classifiable." Yet it was classified by the highest authorities in the land for the President. You cannot get much higher than that.

Mr. SIKORSKI. Thank you.

We are going to return to this panel. At this point, however, we want to introduce Chairman of the House Government Operations Committee, distinguished Congressman Jack Brooks.

His committee has vigorously examined National Security Directive 84 and other troubling aspects of the administration's security policies. The subcommittee is honored to have you testify before us today.

STATEMENT OF HON. JACK BROOKS, A REPRESENTATIVE FROM THE STATE OF TEXAS

Mr. BROOKS. Thank you, Mr. Sikorski. I am delighted to be with you, and I want to commend you for holding these hearings on this very, very critical issue.

As you know, the policy of imposing nondisclosure contracts or secrecy pledges on hundreds of thousands of federal employees was adopted by President Reagan when he issued his infamous National Security Decision Directive 84 back in March of 1983.

NSDD 84 was severely criticized at that time both in Congress and in the national media. The media understood it. As you recall, I introduced legislation to block the most controversial portions of that directive, those dealing with massive polygraph testing and censorship contracts.

In the face of growing support for that legislation, the President announced his intention to abandon those portions of the directive, but despite the President's announcement, those controversial policies authorized under NSDD have continued to be implemented throughout the administration and are in effect today.

Although some people believe the President when he says he is not going to do something, and the perception does persist that these alarming policies were curtailed, the truth is, the fact is that the bureaucracy has just kept right on going with polygraph testing and secrecy pledges. I hope today's hearings will dispel that false impression and illuminate the truth that the NSDD monster, for all practical purposes, is alive and well today.

Specifically with regard to nondisclosure agreements, NSDD 84 had two separate provisions. One (a) required all persons with authorized access to classified information to sign a nondisclosure agreement, and 1(b) required "all persons with authorized access to sensitive, compartmented information," to sign a nondisclosure agreement, which includes a provision for pre-publication review.

It was this latter requirement, the SCI contract with a pre-publication review requirement, that raised the most concern back in 1983. The Government Operations Committee, which I chair, held hearings on this requirement, and on the polygraph provisions.

Professor Thomas Emerson of the Yale Law School, considered by many to be the leading expert on the First Amendment, testified that:

> The essence of Directive 84 is to impose a sweeping prior restraint. It sets up a classic and virulent scheme of censorship. As Chief Justice Berger has said, "prior restraints are the most serious and least tolerable infringements on First Amendment rights."

Professor Bollinger of the Michigan Law School concurred, stating:

> For more than six decades now the courts of this country have struggled with the task of defining a workable set of concepts and principles for the First Amendment. Throughout this time, however, a virtual consensus has formed around one basic idea, and that is that prior restraints are the least favored the most distrusted method of proceeding against harmful speech activity. Licensing or prior restraint, as it has been repeatedly noted in the literature had in cases, is the one matter, perhaps the only matter, we can be confident that the framers intended to prohibit by the free speech clause.

In November of 1983, the Government Operations Committee issued a report entitled "The Administration's Initiatives to Expand Polygraph Use and Impose Life-long Censorship on Thousands of Government Employees." In our report, 98-578, the committee concluded that the pre-publication review agreements required by the President's Directive constituted an unwarranted prior restraint in violation of the First Amendment.

I introduced legislation the following year to prohibit them. Within a month or so Robert McFarland, the then National Securi-

ty Advisor, informed Congress that the President had decided to suspend NSDD 84 1(b), which required pre-publication review.

Nevertheless, the facts are and the truth is that today hundreds of thousands of federal employees have signed and are being required to sign life-long pre-publication review contracts, and that contract is labeled Form 4193.

And, in addition, millions of government and government contractor employees have been required to sign Form 189, another life-long nondisclosure agreement developed to implement NSDD 84 1(a).

I would like without objection to submit the Standard Form 189 if I may, sir. Thank you very much.

Although this contract does not contain an explicit pre-publication review requirement, it contains numerous other provisions which impinge deeply upon First Amendment rights. The contract prohibits the disclosure of classified or classifiable information.

Now, that is kind of a neat, little word they put in there, "classifiable." Think about it. Almost everything in the world could be construed as "classifiable": the temperature, the date.

Mr. SIKORSKI. Your golf score.

Mr. BROOKS. I do not have one.

But can you imagine how much of a chill that word alone can put on free speech, "classifiable"? Almost anything.

And who would determine what is "classifiable"? Anything that somebody said they do not like would be "classifiable."

Now, further, in Form 189 it specifies that government information is government property. As Professor Emerson pointed out, the government is laying the basis for an official secrets act. Will the government use the federal theft statutes to criminally prosecute leaks, as they would somebody who steals a typewriter?

In addition, Form 189 indicates that employees who sign are in positions of special confidence and trust. Does this implicitly require pre-publication review of their writings?

The list of problems with Form 189 goes on and on. The time has come for Congress to fully examine the entire policy of using these life-long contracts with employees to implement the government's rules regarding protection of classified information.

There is no doubt that our national security requires protection of truly sensitive military and diplomatic secrets. The administration, however, is using contracts to lay down and enforce rules that must be made directly by statute through the democratic process.

By using contracts, the administration is attempting to unilaterally legislative sweeping, new constraints that run directly counter to the American approach to free speech and open debate. Perhaps it would be appropriate to require employees to sign a simple statement acknowledging that they are aware of their responsibilities in handling classified information; that they will be subject to statutory and regulatory sanctions for the unauthorized disclosure of such information. But pre-publication censorship, prohibitions against the release of "classifiable information," the use of property statutes to police disclosure and back-hand attempts to chill permissible speech are unwarranted and dangerous in a democracy.

In short, this administration is overreaching. If you want to know just how far they are reaching, you might be interested, Mr.

Chairman, knowing that the Department of Energy has recently sent me—and I was probably the wrong one to send it to—a Form 189, nondisclosure contract, to sign so that I can have access to a report done by the GAO for the United States Congress. I could hardly wait to get it. [Laughter.]

Now, I believe that is overreaching.

I have provided the Department of Energy with an appropriate response.

Mr. SIKORSKI. Without objection, it will be included in the record.

[The above-referenced material follows:]

Declassified in Part - Sanitized Copy Approved for Release 2013/11/06 : CIA-RDP91B00390R000200150028-2

October 14, 1987

The Honorable John Herrington
Secretary of Energy
Washington, D.C. 20585

Dear Mr. Secretary:

I am in receipt of a letter from Troy Wade, II, indicating that the Department of Energy has granted me a "Q" Access Authorization. According to Mr. Wade, the Department of Energy's Office of Congressional Affairs requested that I be processed for such an access "in connection with [my] responsibilities as a Representative of the Ninth Congressional District of Texas and specifically in connection with [my] interest in the General Accounting Office's report on home porting."

Please be advised that I have not requested a "Q" clearance and, as a Member of Congress, do not need Executive Branch clearances to carry out my legislative responsibilities. The concept of an Executive Branch bureaucrat determining whether elected members of the Legislative Branch of our government should be granted clearance to receive access to government-held information deeply offends the basic constitutional framework of separation of powers. It would be impossible for me, as Chairman of the Government Operations Committee, to carry out my oversight responsibilities over the Executive Branch agencies if those very agencies could determine what I can and cannot have access to.

To compound the problem further, Mr. Wade's letter asks me to sign a Classified Information Nondisclosure Agreement (Standard Form 189). DOE wants me to agree, in a contract, to get approval from the Department of Energy before I can discuss matters which are classified or "classifiable" in the eyes of the agency I am obligated to oversee. For obvious reasons, I believe it is inappropriate to suggest that Members of Congress "contract" with the Department of Energy. Furthermore, in my opinion, such a contract is incompatible with the First Amendment to the Constitution regardless of who is asked to sign it.

While I can appreciate the Department's desire to protect sensitive information, I believe you would agree that respect for our country's basic Constitutional institutions is preeminent in this instance. I, therefore, respectfully decline to sign the nondisclosure agreement and I do not acknowledge the granting of a "Q" clearance as a precondition of my access to Department of Energy information.

With best wishes, I am

Sincerely,

JACK BROOKS
Chairman

OFFICIAL USE ONLY

Department of Energy
Washington, DC 20585

September 8, 1987

Honorable Jack Brooks
House of Representatives
Washington, DC 20515-4309

Dear Mr. Brooks:

In connection with your responsibilities as the Representative of the Ninth District of Texas and specifically in connection with your interest in the General Accounting Office's report on home porting, the Department of Energy's (DOE) Office of Congressional Affairs requested that you be processed for a "Q" access authorization.

Since my office is responsible for processing access authorizations, I have been asked to advise you that pursuant to Section 145.b of the Atomic Energy Act of 1954, as amended, a DOE "Q" access authorization was approved. Your DOE file number is WA-70751. Enclosed for your information and retention is a copy of DOE's "SECURITY EDUCATION HANDBOOK."

To assist in meeting our mutual responsibilities of ensuring the protection of classified information, you are urged to request a DOE security briefing, which can be accomplished in your office in approximately 15-20 minutes. Arrangements for this briefing can be made by contacting Gordon Vander Till, Office of Congressional Affairs, 586-4771. I also ask that you complete the enclosed Classified Information Nondisclosure Agreement (Standard Form 189) and return it to DOE in the enclosed preaddressed envelope.

When you no longer require access to Restricted Data, please complete the enclosed Security Termination Statement (DOE Form 5631.29) and forward it to this office.

In the meantime, if I can be of any assistance, please do not hesitate to contact me.

Sincerely,

Troy E. Wade II
Acting Assistant Secretary
for Defense Programs

Enclosures

Mr. Chairman, in its zeal to prevent leaks, the administration has not weighed the value of free speech. There is no balance. The administration is accepting the practices of our adversaries in adopting censorship as a tool of the national government.

I hope today's hearing will fully expose the continuing and growing vitality of NSDD 84 and the serious danger it poses to our republic.

I thank you for being here. If there are any questions I can answer, I will try.

Mr. SIKORSKI. Thank you.

In this administration this is not new. The reaching to silence federal employees has gone beyond anything attempted before, but in this administration apparently this process began when the President announced he was up to his keister in leaks. Some have suggested that the leaks were not the problem. It was concern for protecting the keister that this all evolved from.

Mr. BROOKS. That is one of the basic rules, to protect your own keister.

Mr. SIKORSKI. That is right.

If you listen to the arguments in favor of this nondisclosure form and the pre-publication paragraph in it and the rest and the other polygraph activity that is continuing on, one would believe that we are awash in leaks of classified information by public employees, warranting a nondisclosure agreement form that goes beyond classified to classifiable information and deals with indirect, unauthorized leaks.

Are you aware if we awash of leaks here? You are Chairman of the Government Operations Committee. Are you aware of a huge list of leaks of classified information?

Mr. BROOKS. I am not. Most of the classification, in my judgment, is not to keep our enemies from finding out information. It is to keep the American people and the Congress from finding out what in God's world various agencies are doing and how they are throwing away money, wasting it.

They preach economy, and they throw away money like dirt, and lie and cheat and hide and dissemble to keep Congress from finding out, and for God's sake, they do not want the American people to find out.

Now, that is what their real complaint is, that the people and Congress might find out what they are doing. Reprogramming money, wasting money foolishly, not enforcing the law, not enforcing safety provisions, all sorts of things, and they just do not want anybody in a position to know to say publicly that, yes, this did happen. They want those people to shut up and to go away.

Mr. SIKORSKI. Selling arms to Iran was one thing.

Mr. BROOKS. Oh, they loved that. They did not want the American people to find out that. It was terrible for them to find out. They never believed in trading with the enemy. They would never trade with terrorists. No, sir, they would not, until you caught them.

Mr. SIKORSKI. Mr. North signed a nondisclosure agreement.

Mr. BROOKS. As you recall, the President signed off on the finding himself, which authorized the selling of arms to the Iranian terrorists. And then they had their people down there proud of

doing it. North and Poindexter said, yes, they should have done it and wanted to do it and that they were proud to have lied to Congress, lied to the American people, and lied to individual members of the administration.

They cut out of the loop the Secretary of State, the Secretary of Defense Weinberger, and whoever fought the program. I do not want Mr. Fitzgerald to get upset, but Weinberger even had enough sense and judgment to know that you should not be selling arms to the terrorists in Iran and was not for it. So they just went right around him.

Mr. SIKORSKI. Now, Mr. North had signed a nondisclosure agreement. Mr. North disclosed to the Iranians, as I understand the public testimony, classified information.

Mr. BROOKS. Well, that was part of the deal. He was giving them classified information about Iraq, probably picked up off of the satellite, and he was feeding them the data. That was wonderful, wasn't it?

But they love him. They love him. He is one of Reagan's heroes, but he is not one of mine.

Mr. SIKORSKI. It will be interesting how the administration is treating that disclosure of classified information, contrary to the laws, the statutes, and any nondisclosure agreement.

Mr. BROOKS. They will probably have that great defender of the faith, Mr. Meese, prosecute him. [Laughter.]

Mr. SIKORSKI. Thank you, Mr. Chairman.

Mr. BROOKS. It is a pleasure to be here with you and I am proud of you.

Mr. SIKORSKI. It is a pleasure to have you here. Thank you.

We will return to our panel of Mr. Fitzgerald and Mr. Brase, accompanied by his attorney, Mr. Kennedy.

Mr. Fitzgerald, did we have anything more to talk about in this Poindexter letter?

Mr. FITZGERALD. I think, Mr. Chairman, I had made my major point on the matter.

There was another document that I referred to. In my September 10, 1987 memorandum to General Watts, another classified document that I asked be declassified, and not having heard from that, I resubmitted it yesterday to the Secretary's office and asked that it be forwarded to you.

Now, my impression is that since you are a member of Congress and have a security clearance, that could be forwarded to you with or without clearance. I do not know whether that has been done or not. I was hoping, first, that it would be declassified so that we could discuss it publicly; if not, that they would simply send it to you so that we could discuss it perhaps privately.

But that document was another case of something that in my opinion is improperly classified. It essentially was a chart that depicted what amounts to two sets of books for the Pentagon, for the Air Force part, and the whole Pentagon has the same problem.

In the so-called out-years, the last three years of the five-year defense plan, the sum of the detailed budget estimates greatly exceeds the President's fiscal guidance by tens of billions of dollars. Now, this is a particular problem related again to the Poindexter-Packard matter because under Poindexter-Packard and the laws

that they got Congress to pass, we will not do a five-year defense plan next January.

We failed to do a proper one this past January, which is reflected in the document I wanted to have declassified, and so the consequence of that, Mr. Chairman, is that the first person who will see a properly reconciled five-year defense plan will be the new President, whoever he or she may be. In January 1989, he will have dumped on his desk a requirement for perhaps hundreds of billions of dollars of extra money.

Again, I can understand why bureaucrats and politicians who have been negligent in doing their duty would want to cover this up, but I cannot see why it would be a legitimate national security matter, especially to conceal it from members of Congress.

Mr. SIKORSKI. The memorandum to General Watts from you, dated September 10, 1987, is not classified; is that correct?

Mr. FITZGERALD. The cover memorandum is not, Mr. Chairman; only the attachment.

Mr. SIKORSKI. We are going to place that in the record at the appropriate point and expect that we will place the chart in with it, since we fully expect General Watts will be responsive to the subcommittee. We fully expect that the appropriate non-secret classification will be attached to it because once again, the classification of this material points to classification of political strategy, cooking books and double accounting for purposes of defeating Congress' constitutional responsibility and prerogative dealing with oversight of taxpayer expenditures.

[The above-referenced material follows:]

THE WHITE HOUSE

WASHINGTON

90189

UNCLASSIFIED SECRET

March 12, 1986

Copy

MEMORANDUM FOR THE HONORABLE CASPAR W. WEINBERGER
The Secretary of Defense

SUBJECT: Implementation of the Recommendations of the President's Commission on Defense Management (U)

The implementation memo you sent to the President on March 3 has been revised to follow more closely the format and detail of the Commission report and has been put into NSDD format (Tab A). Attached at Tab B is a proposed public announcement which we plan to release after your review. Appropriate draft letters to both Houses of Congress are at Tab C. (S)

The NSDD is intended to strengthen your hand vis-a-vis the legislation now in both Houses and maintain your control of the implementation process. We have tried to be sensitive to the President's desire to implement the Commission's recommendations without infringing on your authority or prerogatives. (C)

The events of the past week have demonstrated that the Hill has been most favorable toward the Commission's report. The report thus gives the President considerable leverage in dealing with the more radical proposals for reform that now abound in both Houses. Because of our need to sustain momentum on this and your pending trip to Europe, I hope we can have your comments this week before you leave. (C)

FOR THE PRESIDENT:

John M. Poindexter

Attachments

UNCLASSIFIED Classified by: OADR

Declassified/Released on 9-8-87
under provisions of E.O. 12356 (F87-
by N. Menan, National Security Council

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330-1000

OFFICE OF THE SECRETARY

10 September 1987

MEMORANDUM FOR GENERAL WATTS, SAF/AC

SUBJECT: Weapons Systems Costs and Projections

As you will recall from earlier correspondence on the subject, Dr. Amlie and I have continuing concerns about the integrity of our reports to Congress on weapons systems costs and projections. The current confusion over the so-called "outyears" of the Five Year Defense Program (FYDP) has heightened our concerns.

On several occasions in the past couple of months, I have raised the issue of the failure to reconcile the supporting detail of the FYDP "outyears" - FY 90, 91, and 92 - to the President's "top line" figures for those same years. As I understand it, the purpose of the PPBS is to produce a FYDP that reconciles the detailed projections and the "unconstrained" requirements with the "constrained" budget toplines of the President's program. Some people estimate that DOD expends over a million manhours per year to produce a FYDP. I have been told that the essential reconciliation was not done when the FYDP was prepared for this year. I would like to pursue this question, especially as it may affect our reports to Congress.

This brings me to the accompanying SECRET chart. We want to find out whether the figures we are using for "outyear" reporting are reconciled to the "88 PB plus 3% GROWTH" line ("the President's" figures) or the higher 88 PB projection. I presume that the highest projection depicted on the chart reflects the sum of the detailed projections contained in the Comptroller FYDP computer tape. I also presume that the "88 PB plus 3% GROWTH" is the "constrained" projection.

As noted above, the chart in question is "SECRET which greatly inhibits our discussion of this important matter. I would greatly appreciate your declassifying this chart so we can discuss it freely and over the telephone, both with our colleagues in the Pentagon and with interested parties in Congress. Senator Weicker and the DOD Inspector General have already declassified the mismatch figures for all of the Department of Defense. Therefore, I don't see why ours can't be declassified as well. In case you have

not seen the correspondence, Senator Weicker's figures indicated that the excess of the unconstrained projections over "the President's budget" for the three "outyears" was $82.9B. The IG adjusted this figure downward to $77.2B to reflect off-setting receipts. Our mismatch for the three years is roughly proportional to the DOD excess and represents an increase of 7.3% of our total budget for the three years in question. More significantly, perhaps, it represents an excess of 20.5% above the lowest of the three projections on the attached chart, the "87 PB plus 0% GROWTH" line. As noted on the chart, this lowest projection is itself substantially above the House Budget Committee mark for 1988.

Because of the significance of this issue, I would greatly appreciate your personal attention to this matter and your support for getting the accompanying chart and its updates declassified so we can deal with the questions more easily. In this connection, I noted especially President Reagan's call for openness on the part of the Soviet Union in revealing their budget figures. In a speech on August 29, 1987, the President said:

> "The Soviets can also open their defense establishment to world scrutiny. They can publish a valid and comprehensive defense budget and reveal the size and composition of their armed forces. They can let their parliament, The Supreme Soviet, debate major new military programs."

We can set a good example, as well as doing ourselves a favor, by taking our heads out of the sand and dealing forthrightly with the very troubling projections depicted in the attachment. If we don't do it now, I'm afraid the matter might not be dealt with until the new Administration takes office in 1989. As I understand the new procedures, we are not scheduled to do an FYDP next year which will result in the Congress and the taxpayers being kept in the dark. Given this situation, it is all the more important that our current projections hang together at least as well as they have in the past. As the Chief of Staff and the Secretary wrote in their July 29, 1987 memorandum, "Keeping Congress Informed", many in the Congress believe that "the Air Force just isn't being honest in explaining the performance of their programs." They went on to write:

> "Our policy will continue to be to provide candid, timely assessments of problem areas or potential problem areas that could reasonably be of interest to the Congress. We'll just have to do it better."

Declassifying the attached document will be a good start in this direction. If you cannot do this right away, then I must raise the same questions that I raised about the March 12, 1986 memorandum

from John M. Poindexter to the Secretary of Defense which I requested be declassified in my 20 August 1987 memorandum to you, Subject: Questions on SF 189. In this connection, I have not yet received an answer to this declassification request. I would appreciate a follow-up inquiry and an early answer.

Attachment

A. E. FITZGERALD
Management Systems Deputy

Mr. SIKORSKI. At this point I would like to turn to Mr. Louis Brase and ask you to make your statement, and then we will get to questions for both of you.

STATEMENT OF LOUIS BRASE, PRINTING MANAGER

Mr. BRASE. Mr. Chairman, my name is Louis C. Brase. I am a GS-12 printing manager at Goodfellow Air Force Base.

Mr. SIKORSKI. Mr. Brase, can you pull that microphone in? Thank you.

Mr. BRASE. I am a GS-12 printing manager at Goodfellow Air Force Base, San Angelo, Texas. I have been a civilian employee of the Department of Air Force for 33 years.

I very much appreciate the invitation to appear here today to provide the Congress with the information on my experiences with the Standard Form SF 189 and 4193.

As you may know, I am one of the plaintiffs in the case brought by the American Federation of Government Employees that challenges the legality and constitutionality of these secrecy agreements. I am accompanied by my counsel in that matter, Mr. Joseph B. Kennedy, General Counsel for the Government Accountability Project.

At this time I would like to introduce a statement by Mr. Kennedy into the record.

Mr. SIKORSKI. It will be inserted in the record without objection.

[The prepared statements of Joseph B. Kennedy and Louis C. Brase follow:]

COMMENT

I believe the SF 189 and 4193 raise not only important First Amendment issues but equally fundamental issues that stem from the separation of powers doctrine. Thus, as I see it, the core issue in the pending litigation will evolve into a dispute over which branch of government, the legislative or executive, shall make the policy choices on the conduct of employees charged with safeguarding classified information.

The First Amendment says Congress shall make no law abridging the freedom of speech or the press or the right of citizens, including federal employees, to petition Congress or the Executive Branch for a redress of grievances. Indeed, as long ago as 1912, Congress codified these rights when it declared that "The right of employees, individually or collectively, to petition Congress or a Member 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." 5 U.S.C. §7211.

In faithful adherence to the letter and spirit of the First Amendment and the open access law, Congress has never declared that the disclosure of even properly classified information to a to a Member of Congress or the press is a crime or subject to a civil sanction.

Nor despite repeated efforts, has any administration succeeded in persuading Congress to pass an Official Secrets Act. Until this administration devised the SF 189 and 4193 one thing seemed clear. If this country was to have an Official Secrets Act, it should be the result of a deliberate decision by Congress

and not the result of a decision by an unelected bureaucracy.

To circumvent this reality, this administration determined to seize upon a discredited notion of loyalty and security oaths to fashion an end run around the First Amendment and Article I of the Constitution. No amount of pious prating about national security can disguise the fact that these illusory contracts are intended to gag and intimidate employees who feel obligated to report waste, fraud, abuse and mismanagement, to create a de facto Official Secrets Act, and to strip Congress of the power and authority to control its own access and that of the press to information vital to the survival of the republic.

As Chief Judge Wald warned in her Separate Statement in the McGehee case, a system of sanctions for unauthorized disclosures that fails to balance the public's right to know with possible risks to security can result in the permanent loss of information critical to public debate. Allowing the executive to create a system of administrative crimes with draconian sanctions summarily executed denies employees due process and equal protection and the public the right to know critical albeit classified facts relevant to the accountability of the executive branch and its intelligence agencies.

Joseph B. Kennedy
General Counsel
Government Accountability Project
25 E Street N.W. Suite 700
Washington, D.C. 20001

(104a01)

STATEMENT OF LOUIS C. BRASE

Mr. Chairman, Members of the Committee, my name is Louis C. Brase. I am a GS-12, Training Manager at Goodfellow Air Force Base, San Angelo, Texas. I have been a civilian employee of the Department of the Air Force for 35 years. I very much appreciate the invitation to appear here today to provide the Congress with information on my experiences with the SF 189 and 4193. As you may know, I am one of the plaintiffs in the case brought by the American Federation of Government Employees that challanges the legality and constitutionality of these secrecy agreements. I am accompanied by my counsel in that matter, Mr. Joseph B. Kennedy, General Counsel for the Government Accountability Project.

A chronology of my experiences is as follows:

Early June 1987: A copy of SF 189 was dropped on my desk by an Air Force Sergeant with the request to sign. I asked why. His reply was, "If you don't they will pull your ticket [security clearance]." After reading the form I decided to obtain more information about it before signing. I contacted the Civilian Personnel Officer on Goodfellow Air Force Base, Texas (where I work), he promised to get me a package of Air Force correspondance on the subject. I received this package approximately two weeks later. Copies of this correspondance will be provided for the record. I contacted the National Federation of Federal Employees office in Washington, D.C., and talked to staff lawyers who had negotiated on the application of this form

to federal civil service employees. I also obtained a copy of Department of Defense Phamplet DOD 5200. 1-PH-1 which contained an explanation of the form, including a definition of the term classifiable.

July 23, 1987: I sent a letter to my Congressman, Rep. Lamar Smith, 21st District, Texas, explaining my objections to the form and requesting his assistance. A copy of the reply to Congressman Smith's inquiry on my behalf will be provided for the record.

July 25, 1987: I sent copies of all Air Force correspondence which I had received from the Civilian Personnel Office to the American Civil Liberties Union requesting their assistance in legal difficulties I anticipated over the requirement for me to sign SF 189. I also contacted Mr. Ernest Fitzgerald who in turn put me in contact with the Government Accountability Project.

August 3, 1987: I "hand carried" a list of questions about SF 189 through the "chain of command" on Goodfellow AFB. The following is an account of my experiences during this process taken from a Memo For Record which I prepared during that same day:

MEMO FOR RECORD: August 3, 1987

I met with Colonel Pat Clifton, Commander of the 3480 Technical Training Wing, Goodfellow AFB TX on this date to ask for his coordination on a letter which I had written to the Goodfellow AFB Technical Training Center Commander. This letter requested additional

information on SF 189, Classified Information Non-disclosure Agreement.

After reading my letter Col. Clifton became noticeably upset and told me, among other things, that I was a hard head, that I was not committed to protecting classified information, and that I had to obtain a pre-publication review for any article that I published whether or not I signed SF 189. I told him that I had written letters to the editor of newspapers on many occasions without a prepublication review. Col. Clifton then said that since I was in the habit of writing letters and articles, my clearance should probably be withdrawn - that this was "pretty scary." Col. Clifton then made an appointment for me with the Base Legal Office, Maj. Beckert to get an answer to the questions in my letter and wrote on my letter the following: "... should he (Mr. Brase) still not want to sign SF 189, recommend his clearanace be denied."

I then proceeded to Maj. Beckert's office. Maj. Beckert appeared to be extremely nervous. Maj. Beckert stated that he had very limited knowledge of SF 189 or the regulations governing its administration. However, he reviewed the questions in my letter and attempted to answer each of them. He stated that SF 189 did not provide for anything different from what was already required in various Federal laws and Air Force regulations except for the provisions of para. 5 of the

SF 189.

I then proceeded to the office of the Center Commander, Col. William E. Collins. I met with Col. Collins for approximately one and three quarters hours. At the beginning of the conversation Col. Collins was obviously extremely angry. His first statement to me indicated that he was outraged by my letter and that he was going to "pull" my clearance immediately and separate me from my Air Force employment. He stated that I had no right to question the provisions of SF 189 and that I had only a very limited right to free speech. He also indicated that he had no intention of answering my letter. Throughout the interview Col. Collins continuously accused me of a variety of underhanded motives for refusing to sign the SF 189 until my questions had been answered. These included not wanting to work and intending to reveal classified information. He also accused me of asking frivolous questions in my letter, being uninformed/ignorant of the law and my duty to the Air Force, making an unreasonable request in the last para. of my letter in which I asked for a written response to my questions from an office at the agency level, and using poor judgement in not trusting the AF to administer SF 189 properly.

I answered each of Col. Collins' accusations to the best of my ability. I pointed out that para. 10 of

SF 189 included a statement that my questions on SF 189 had been answered satisfactorily. Therefore for me to sign the form without obtaining answers to my questions would be improper. I also pointed out the provisions of several regulations which provided for a 30 day waiting period before withdrawing the clearance of an employee who refused to sign the form. Col. Collins did not accept any of my statements until I had supported them with facts from the SF 189, from DOD 5200. 1-PH-1 Phamplet (which was issued to explain SF 189), and from various AF regulations.

In the end he conceded that I had a right to a written reply to my questions, asked me to research the best office in the AF to supply that reply, and stated that he would not withdraw my clearance until the 30 day notice period had expired. He did however state that he was going to withdraw my access to classified information immediately. He stated that his reason for doing this was his concern that my preoccupation with the SF 189 issue might cause me to commit a security violation.

That evening I was called at home by my immediate supervisor, Mr. Jack Goudy and told not to report to work the next day and that someone would come by my house to pick up my security access badge.

That same evening a SMSgt. Beach came to my home, picked up security access badge, and told me not to report to work the next day until I was called in.

Aug. 4, 1987: I was called into work, handed a letter which answered the questions in the letter I had submitted the previous day, given an opportunity to discuss those answers with the individual who had prepared them (Maj. Beckert), and was asked to sign SF 189. I replied that I wanted a chance to check the answer with my lawyer and already had several modifications to the form in mind. On this response I was handed a letter which stated (in part): "You have 30 calendar days in which to provide any written statement or other information you may desire to have considered in conjunction with the adjudication of your security clearance eligibility." I was then reassigned to another job, under the supervision of a lower ranking employee and assigned typing duties. Subsequently, after numerous calls from my attorney, Mr. Joseph Kennedy, Government Accountability Project, and a number of stories on my case in the press, I was reassigned to the Base Education Office as an Educational Counselor.

Aug. 10, 1987: I was given a copy of a message from SSO USAF/INS which stated (in part): "Louis C. Brase must be barred from Sensitive Compartmented Information (SCI) access pending his decesion to sign the SF 189....Refusal to sign the SF 189 brings into question an individual's intent to protect classified information and reflects adversely on his trustworthiness."

Aug. 14 1987: I delivered the following letter to Maj. Beckert announcing my decision not to sign SF 189:

William E. Commander
Goodfellow Technical Traning Center
San Angelo TX 76908

August 14,1987

Sir:

This letter is to inform you of my decision on whether to sign Standard Form 189 (SF 189), Classified Information Nondisclosure Agreement. In order to explain my decision I feel that a brief history of the events leading up to this decision is in order. In June of this year everyone in my office was given a copy of SF 189 and told to sign it or "they will pull your ticket" (security clearance). This form provides for a wide range of civil and criminal penalties for divulging "classifiable" information. I was also given copies of numerous letters, messages, and regulations which state that the clearances of employees who refuse to sign SF 189 shall be revoked (with subsequent prospective loss of employment) and a copy of DOD 5200.1-R/AFR 205-1 which states: "reluctance to sign an NdA (SF 189) will be considered a lack of personal commitment to protect classified information." (parenthesis and underline added). On August 3, 1987 I provided you with a letter requesting specific information on SF 189 as provided in paragraph 10 of the form. I "walked" this letter up through the chain of command. The same day I brought this letter to your office and for no other reason, my access to classified information was withdrawn by your direction and my

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access badge to the building in which I work was picked up at my home. Subsequently I was reassigned to work in a typing job under the supervision of a lower-ranking employee.

I feel that there are a number of reason to question the use of SF 189. Among these are:

1. The term "classifiable" as used in the form is defined as "information which meets the criteria for classification under Executive order 12356, but which has not yet been properly classified because of time limitations, oversight or error." The SF 189, by making the employees responsible for not releasing classifiable information, requires the employees to determine if information - information which is in the public domain - is classified even though no official of the government has classifed it. In other words, employees are expected to classify the information themselves. The employees are expected to make classification decisions for which they, in most cases, have neither training, expertise or authority. There are hundreds of classification standards in existence, most of these standards are full of broad, generalized statements, and, in many cases no one can prove, definitively, whether or not a particular piece of information should be classified. The area of doubt for determination whether information which the

employee wishes to communicate should be classified is almost global and in effect - restrains any prudent employee from the legitimate exercise of the right to free speech.

2. The potential for abuse of the form as a means of retaliation for criticism of the government or for "whistle blowing" activities is apparent. This potential must necessarily inhibit my free communication of unclassified information to Congress and the public.

3. Since government officials define what is classified through their interpretation of classification standards, they can arbitrarily deny me the right to speak on almost any subject by denoting the essential information about that subject as classified and enforcing a "gag" on me through the medium of SF 189.

4. SF 189 is not required by either law or executive order.

5. The use of coercion to induce me to sign SF 189 (as exemplified by my experience related above) is demeaning, unreasonable, and far removed from the spirit of the Constitution whose anniversary we are honoring this year.

6. I wish to exphasize that I heartily endorse the protection of classified information. However SF 189 will not inhibit traitors from betraying secrets.

John Walker, the U.S. Navy Petty Officer who sold crypto codes to the Russians for 20 years would have signed SF 189 without hesitation. The current laws provide a much more effective deterrent than SF 189 can provide.

7. There is no overiding national interest which requires the use of SF 189. On the contrary the national interest will most certainly be damaged by the restrictions contained in this form. One reason why Ollie North and his cohorts got by with a wide range of illegal activities for almost a year was the fact that many of the persons in government who were aware of his activities were afraid to reveal his activities by the "security" blanket put over their actions. We can be sure that Ollie will not be the last government official who - for whatever reason - will attempt to subvert the Constitution. Someday we may even have an attempt at a military takeover of the government. If that day ever comes we are going to need "insiders" who are not intimidated from "blowing the whistle" on such activities.

8. I, along with other government employees, military and civilian, have taken an oath to protect and defend to the Constitution. SF 189 is destructive of that right. Therefore the signing of SF 189 would be a violation of my oath.

I have been informed that if I refuse to sign this

form my clearance will be withdrawn and my employment terminated. However, and for all of the reasons listed above, I hereby refuse to sign SF 189.

Louis C. Brase

Sept. 4, 1987: I was notified that my access to SCI classified information had been restored and was directed to report back to my regular job. I was given a briefing on the protection of classified information and was told that my access was temporarily restored pending the outcome of a suit which NFFE had filed challenging the constitutionality of SF 189.

Sept. 7, 1987: I received an annual performance rating from my supervisor of "Fully Successful." In the inflated performance rating system currently used in the Air Force this rating is the "kiss of death" as far as any hope of promotion is concerned.

Sept. 9, 1987: I sent the following letter to my second line supervisor, Col. Holliday through my first line supervisor, Mr. Goudy:

FROM: 3480 TCHTW/TTGXX (Mr. Goudy)
SUBJECT: July 1986 - June 1987 Annual Performance Rating of Mr. Brase
TO: 3480 TCHTW/TTGXX (Goudy)
3480 TCHTW/TTGX (Lt. Col Holliday)
IN TURN

1. I hereby request that subject performance rating be reconsidered. The reasons for this request are listed below:

a. My rating for the period July 1985 - June 1987

was at the "Excellent" level. I also received a Letter of Commendation from the 3380 Technical Tranining Wing Commander for my work during this period. During this period I had been reassigned to Goodfellow AFB into a new job. It seems unreasonable when I had gained additional experience and acquired additional responsibilities.

b. On July 13, 1987 my office received an "Excellent" overall rating as a result of the July 6 - 10 Unit Effictiveness Inspection (UEI). The report of this inspection cited the management of Type 1 Training as "notable." I manage nearly all the Type 1 training in my office and was interviewed by two inspectors during the inspection for a total of three and one-half hours.

c. The present rating is the lowest I have ever received under the current rating system (approximately 10 years). A connection between this rating and my refusal to sign SF 189 will seem obvious to a great many people. Retaliation for activities which are lawful but repugnant to management brings discredit on the agency in which it occurs. For this reason my performance rating should receive scrupulous attention and care.

Sept. 14, 1987: I was informed by my first line supervisor, Mr. Goudy, that my rating had been reconsidered and had been determined to be correct. Mr. Goudy refused to put this answer in writing.

Sept. 25, 1987: Throughout the time period described in this statement I had been writing letters to congressmen/women and newspapers to publicize my opposition of SF 189. Several of my letters were published in my local hometown (San Angelo Texas) newspaper. On this date I was counseled on the possible consequences of this exercise of the right of free speech. A part of the Memo For Record of this meeting appears below:

MEMO FOR RECORD: 25 Sept 1987, 2:35 p.m.

On this date I met with Mr. Jack L. Goudy and Lt. Col. R. C. Holliday from 2:00 to 2:30 p.m. During this meeting Lt. Col. Holliday stated that he was concerned that he was concerned that my letters to newspapers and other actions relating to my refusal to sign SF 189 might cause interference with the efficient performance of my duties. Col. Holliday stated that this might occur if my fellow workers became reluctant to deal with me for fear of what I might put in print or include in a charge against the fellow worker as an outcome of our working relationship. Mr. Goudy stated that he too was concerned on this issuse and that he

now had to "think twice" in all of his dealings with me.

Louis C. Brase

I will furnish for the record all of the letters and articles I have written on the subject of SF 189. They express more fully the reasons for my opposition to the concept of SF 189 as a "contract" extorted from employees by threat and intimidation binding them to a lifetime of apprehension for the expression of any sentiment the government may find repugnant. Since I have already signed the companion to SF 189 (DD Form 1847-1, Sensitive Compartmented Information Nondisclosure Agreement), I too share that apprehension. In an attempt to minimize the dangers associated with that agreement I have forwarded every one of my letters and articles to my attorney, Mr. Kennedy, for approval prior to publication. In spite of this precaution I have little hope of avoiding prosecution over the long run.

There are at least 3,700 classification guides in existence. Having had daily contact with some of these guides, I can testify that many (and I suspect most) of them are written in vague, general terms. Anyone who has signed one of these forms and has written letters or articles or has made public statements which are critical of the government will be vulnerable to a charge of violating the provisions of SF 189. The administration of the enforcement of the form is not clear to me but I suspect that

there will be no independednt grand jury to determine whether the evidence justifies a charge. I believe that I will be hauled into court, forced to hire a lawyer that I can't afford, and tried under all the disadvantages inherent in that kind of situation if I continue to speak out against government policies.

Freedom of speech is a precious right to me and one I hope to pass on to my children. I earnestly solicit your support in the introduction and passage of legislation forbidding the enforcement of Executive Order 12356 which authorizes the requirement for employees to sign SF 189.

Louis C. Brase
P.O. Box 5622
San Angelo TX 76902
Home: (915) 942-7559
Office: (915) 657-3953

Mr. BRASE. Mr. Chairman, I am going to try to be as informal as possible in describing my experiences.

When I first came to Goodfellow Air Force Base in January of 1986, I was asked to sign an SCI form, special compartmented information form, DD–1847–1. It is the equivalent of the 4193 form that has been referenced previously.

I was handed the form without any explanation. I read it over rather hurriedly because I was in the process of in-processing for employment, and I was signing many different forms during that two or three-day time period. I did read the agreement, but the word "classifiable" did not leap out of the page at me. I did not realize the implications of that form when I signed it.

In early June of this year, I was working at my desk one day, and a Master Sergeant in my office came by and dropped a form on my desk, SF 189. I said, "What's this?"

And he said, "It's a secrecy agreement."

I said, "What is it for?"

He said, "Well, what it's for is if you don't sign it, they're going to pull your ticket," meaning pull my clearance.

That aroused my curiosity, and I read the form very carefully, but, frankly, did not understand it. After several days that same Master Sergeant came by again and asked me if I had signed the form. I said, no, I was still studying it. So he handed me a DOD pamphlet, 5200.1–PH–1, which contained in the back a series of questions and answers about the form, including a definition of the term "classifiable," and when I read this definition, I first realized that my suspicions were well founded and that I had a problem with this form.

In order to get further information about the form, I questioned the Master Sergeant, who had very little additional information himself. I went to my civilian personnel officer on Goodfellow, a Mr. Burkette, asked him what he knew about the form. He knew very little. However, he did obtain for me after some period of time a package of documentation that the Air Force had sent to Goodfellow relating to the Standard Form 189. This includes letters, messages and copies of regulations, and the tenor of all of these communications is that every employee with a clearance must sign. If they do not sign, their clearance will be withdrawn.

The factor that concerned me in addition to losing my clearance is the possibility of losing my job because once my clearance is withdrawn, I can no longer work in my authorized position, and if there is no other authorized position for me available on Goodfellow, I would then be terminated.

I did ask my civilian personnel officer if there was alternative employment for me at Goodfellow in case my clearance was withdrawn, and after some investigation, he determined that there was not.

In an attempt to get information about the form, I called a lawyer at the National Federation of Federal Employees's office here in Washington who had actually negotiated on that form and was not able to obtain answers to all my questions.

I was being pressured by my supervisor at work to sign the form. Finally, more or less in desperation and in accordance with Paragraph 10 of the form, which included a statement that my ques-

tions on SF 189 had been answered satisfactorily, I prepared a written list of questions about the form and hand carried it through the chain of command at Goodfellow. I started with my immediate supervisor and his supervisor and the third line supervisor, who is a Colonel Pat Clifton.

Colonel Clifton, when he read my list of questions, became very angry. He told me I was a hard head. He told me I was a security risk. He told me I did not have any right to freedom of speech, that I had to clear any letter or article that I might write with the Air Force before I could publish it, and he finally wrote on my letter a statement to the fact, "I recommend Mr. Brase talk to the base Judge Advocate General's Office, and if he does not sign the form after the discussion, that his clearance be withdrawn."

I left Colonel Clifton's office, went to the Judge Advocate General's Office, talked to a Major there, who was a lawyer and who stated that he was not familiar with the form, but he did attempt to answer the questions I had written out.

I then carried the letter to the center Commander, a Colonel William E. Collins, and Colonel Collins, when I came to his office, had apparently just been talking to Colonel Clifton. He asked me to come into his office, and his first comment to me was, "Mr. Brase, I read this rag," referring to my letter of questions. He said, "I am not going to answer it." He said, "I am going to pull your clearance today." He said, "I am going to have you off this base."

Then we sat down to discuss. After an hour and 45 minutes I convinced Colonel Collins that he could not, indeed, pull my clearance. There was an Air Force regulatory requirement for a 30-day notice period, and also that I had a right to an answer to my questions.

At the conclusion of our discussion, Colonel Collins said, "Well, Mr. Brase, I recognize that you do have a right to a written reply to your written questions." He said, "I am going to provide that." He said, "I also recognize that I cannot pull your clearance. However, I am concerned that your concern with this Standard Form 189 is such that you might become a security risk, that you might accidentally disclose classified information because of your getting upset."

Seeing that he had spent the last hour and 45 minutes accusing me of everything under the sun, I could quite understand why he thought I might be upset.

At any rate, he said, "Because of my concern, I am withdrawing your access to classified information." Without access, of course, I did not have access to the building in which I worked, and I could not do my normal job.

That evening I was contacted by my immediate supervisor at home. He said, "Lou, don't come in to work tomorrow until we call you," and he said, "Somebody is going to be out to your house tonight to pick up your access badge," and later on that evening a Senior Master Sergeant Beach from my office did, indeed, show up at my house. He collected my access badge and, again, told me not to come in to work until I was called.

The next day I was called. I came to work. Without my access badge, I was now given something we call a red badge, which means you have to be accompanied within the SCI facility where I

work, and I was escorted into an office. I met with a Major from the Judge Advocate General's Office whom I had originally talked to. He provided me written answers to my questions. We discussed them at some length.

Then he asked me if I wanted to sign the form, and I said I wanted to check these answers with my lawyer, and I may or will have some modifications to submit to the form.

At that point I was handed a letter indicating that I had a 30-day time period to consider and submit any information I might want to that would be used to determined my eligibility for future access to classified information.

On August 14 of this year, I submitted a letter to Colonel Collins that said after due consideration and after listing my reasons, I decline to sign Standard Form 189.

On September 4 of this year, my access to classified information was restored. I was returned to my work, and on that same day I was handed an annual performance rating which is the lowest rating that I have received in the approximately ten-year period when this current rating system has been in operation.

I do want to comment one more thing about the form, sir, and that is the method of application. I checked with many other employees on Goodfellow and also on Kiesler Air Force Base where I had worked previously for 28 years about whether or not they had signed the form and under what circumstances. Many of them could not recall for sure whether or not they had signed the form. After some investigation, they determined they had signed the form.

The reason they could not remember is because the form was handed them in the same way it was handed to me. There was no explanation. There was no caution as to the provisions of the form. It was simply handed to you and say, "Here. Sign this." And many employees will sign without hesitation if they have no reason to suspect anything wrong.

This pamphlet that accompanies this form, on page 2, has a sample briefing that is entitled "Sample Indoctrination Briefing Required by the Classification Information Nondisclosure Agreement, SF 189." No employee that I talked to had ever received this briefing.

On Goodfellow Air Force Base there is a film that describes the Standard Form 189 and the implications of "classifiable" information. I was shown that film after I was returned to work from my original suspension of access. As far as I know, I am the only person on Goodfellow who has ever seen that film.

I checked with employees both at Goodfellow and at Kiesler. I was trying to find somebody who had signed this form who did not have clearance, a security clearance, and who would join my suit on behalf of having that form returned to him, and of all the people I talked to had ever received this briefing or any briefing whatsoever or had been shown the film.

The experience I had was once I hesitated, I began to be coerced, coerced by being handed regulations that said, for instance, reluctance to sign classified information form SF 189 would be considered a lack of commitment to protect classified information, and repeated assurances that I was in big trouble if I did not sign the

form, and finally my interviews with Colonel Clifton and Colonel Collins, which constituted in my opinion extreme verbal abuse.

I did also ask the individuals on Goodfellow what their intentions were in terms of returning SF 189s to employees who did not have clearances, but who had signed the form, and they told me that they had received no direction on that.

The original Air Force instructions about what to do about employees who did not have clearances and who refused to sign the form say, and I quote, and this is from a Department of the Air Force letter dated 4 December 1986 from the SPI, the Security Police Investigation organization, and it says,

Personnel not currently requiring access to classified information.

These are procedures, how to deal with them.

Number 1. Commander's supervisors inform their personnel that refusal to sign SF 189 will make them ineligible for future access to classified information.

Number 2. Commander's supervisors forward a list of personnel refusing to sign SF 189 through the Servicing Security Police to the SCO.

That is the Security Office.

This list must include each individual's full name, grade and Social Security number.

Number 3. SCO places the clearance eligibility in a restricted status. This is an administrative action to identify individuals ineligible for access to classified information.

Mr. SIKORSKI. Mr. Brase.

Mr. BRASE. Yes.

Mr. SIKORSKI. Let me just interrupt. We are going to put that into the record here, and we are going to have a vote. I want to complete your panel, and get Ms. Buck, who is General Counsel for the Air Force, and Mr. Garfinkel and get down to the nitty-gritty to get some answers to these things. I have some real questions after reading the testimony of those two witnesses.

Before I do that, I think we can clean up some questions and any concluding statements you want to make. Let me ask a few questions and then give you a chance to clean up what you want.

You have had security clearance for how long?

Mr. BRASE. At Kiesler Air Force Base for approximately 20 years, and at Goodfellow now for approximately a year and a half.

Mr. SIKORSKI. So over 20 years.

Mr. BRASE. Yes, sir.

Mr. SIKORSKI. And you have dealt with this classification system as it has evolved over those years?

Mr. BRASE. Yes, sir.

Mr. SIKORSKI. Has it gotten harder or easier to determine what is to be classified?

Mr. BRASE. Sir, the answer to that question is that it has become more difficult, but it is also true that it has always been very, very difficult.

I have here in my hands an index of security classification guides issued by the Deputy Under Secretary for Defense policy. It contains 361 pages. On each page there are approximately nine classification guides listed, which makes a total of approximately 3,249 classification guides.

Mr. SIKORSKI. Oh, but, Mr. Brase, Mr. Garfinkel tells us that "classifiable" embraces a set of requirements. So any information

that meets the requirements of "classifiable" under the Executive Order and the regulations that have been printed in support of that order now becomes at issue, and you are liable for any disclosure if you sign this nondisclosure form. Doesn't that make your life easier?

Mr. BRASE. No, sir. The real problem is this. As I say, there are over——

Mr. SIKORSKI. Well, if it is in the book, then it is classifiable, right?

Mr. BRASE. That is true.

Mr. SIKORSKI. Now, the question is: how do you understand the book?

Mr. BRASE. I happen to be, sir, a cryptologist. One of my duties at Goodfellow is also that I am point of contact for one of these 3,000-plus classification guides.

I would like to offer this for your inspection, sir, if that is possible. The classification guide that I am responsible for is called the "Senior Year Classification Guide."

Mr. SIKORSKI. So you are the original authority for classification?

Mr. BRASE. No, sir. I am the person at Goodfellow who maintains that classification guide, who updates it when changes occur, and who uses that classification guide to brief employees on their responsibilities for access to the Senior Year material, if you will notice about halfway down the page there.

Mr. SIKORSKI. "Senior Year Classification Guide." So it is getting more and more difficult to determine the classification status of material, and it has always been a subjective determination, has it not?

Mr. BRASE. Yes, sir, that is true.

Mr. SIKORSKI. So it is almost impossible for a federal employee who does not have original authority to classify—and a vast, vast volume of 2.4 million federal employees required to sign SF 189 do not have original authority to classify——

Mr. BRASE. Exactly, yes, sir.

Mr. SIKORSKI [continuing]. Would be starting from a point of not knowing much at all about what is classifiable because even the experts have difficulty.

Mr. BRASE. Exactly, yes, sir.

The classification guide that I am responsible for is about 60 pages. It is full of vague, general statements. It is written by a Master Sergeant.

Mr. SIKORSKI. And yours is easier because you are in the area of cryptology, and it is specifically stated in the Executive Order that that stuff is generally classified. So you are in one of the easiest areas.

Mr. BRASE. I suppose so, but even so, it is very, very difficult for me to classify information using that classification guide. The statements are so general and so vague.

As an example at Goodfellow we have recently a document that we had concern about as to whether or not it should be classified. We sent it off to the originating office for determination. It took a year and a half to get back.

Mr. SIKORSKI. It did?

Mr. BRASE. One and a half years, yes, sir, 18 months for the originating office to make a determination as to whether or not that information should be classified.

Mr. SIKORSKI. So when someone is concerned about being liable for classifiable information, and the process in this case took a year and a half for those who deal with it and are responsible for it, their concern about something being classified after they have already released it when it is not classified is a legitimate concern.

Mr. BRASE. Exactly, yes, sir.

Mr. SIKORSKI. In your background, you have gotten all of these excellent reviews and awards for outstanding service and the rest; is that correct?

Mr. BRASE. Yes, sir.

Mr. SIKORSKI. You have not been a trouble-maker?

Mr. BRASE. I have never had a disciplinary action of any kind in my 33-year period.

Mr. SIKORSKI. But you recently wrote a couple of op. ed. pieces or opinion pieces for newspapers and letters to the editor that were not applauded at the base?

Mr. BRASE. Exactly, sir. I was called into an office and met with my immediate supervisor and his supervisor, who informed me that my practice of writing such letters could be considered a disruptive influence, and there was a danger that my fellow employees would be reluctant to talk to me for fear that I might put something about them in a letter to the editor, and I was cautioned on that practice.

Mr. SIKORSKI. In your testimony, you said your latest rating was "successful."

Mr. BRASE. Yes, sir.

Mr. SIKORSKI. But that is pretty low in the inflated rating structure, and it is the lowest you have ever received?

Mr. BRASE. That is correct, yes, sir.

Mr. SIKORSKI. At the same time, you were doing more, with greater authority, than you ever were in the past?

Mr. BRASE. And, in fact, we had an inspection of our office by Air Training Command in July, just prior to the incidence of my refusing to sign SF 189. They rated the office excellent overall. They rated management of Type 1 training as being "notable." I do all of the Type 1 training in my office.

Everybody in my office were congratulating me on that excellent rating, and on September 4th, then, I received the lowest rating I have received.

Mr. SIKORSKI. So would it be fair to say that you are paying the price for objecting to signing SF 189?

Mr. BRASE. That is my belief.

Mr. SIKORSKI. Mr. Fitzgerald, I am going to ask that you stay around and listen to the testimony that will be given by the next panel so that if you have the capacity to engage in that discussion, I would like for you to be around.

Mr. Kennedy, you were motioning earlier. Did you want something to be in the record?

Mr. KENNEDY. No, just the statement that I had prepared.

Mr. SIKORSKI. That will be in the record.

Mr. FITZGERALD. Mr. Chairman, I have received a statement from one of my colleagues in the Air Force Secretariat that I would like to submit for the record, as well as a paper on the contractual aspects of Standard Form 189. I would like to submit that also, with your permission.

Mr. SIKORSKI. Absolutely, without objection.

[The above-referenced material follows:]

AQXR 6 October 87

Nondisclosure Agreement, Standard Form 189

Det 1, 1100th Security Police Squadron (AFDW)/SP

1. I am greatly concerned by the harm to employees, and the Government stemming from Air Force implementation of the nondisclosure agreement. Its presentation is arrogant. Its lack of concern for employee rights or human dignity is evident. The language of the agreement is insulting to the employee and demeaning to the Government. It has no benefit commeasurate with its cost. It has caused a great deal of apprehension, as the perception of the program is one of threat, of the might of the entire United States Government aligned against the individual. While most employees have signed it, they have done so out of fear - justifiable fear - for their jobs.

2. Federal employment, military or civilian, establishes a special relationship between the person and his government. Over the years since World War II, when all citizens were united in their support for America, the value of this special relationship has been steadily eroded. Far too much of this erosion has been the result of self-inflicted wounds. It has been convenient for the government to divert responsibility for poor decisions by passing the blame to federal workers. The popular term "feather merchant" reflects the distain with which we are regarded. The term "military/industrial complex" is a perfectly legitimate denotation of the defense mission for this country, but its connotation is totally derogatory.

3. Apart from the generally overlooked fact that it is not just for the government to permit such a misconception, it carries within itself the seeds of self-destruction. Any organization has some proportion of people who do not serve its best interest. No organization can effectively accomplish its purpose if the proportion of such people passes a critical point. What must it take for the government to realize that (1) the point exists, and (2) how close we are to it?

4. The growing public contempt for both the military and civilian work force is making it much more difficult to attract quality people. We are losing experienced people through retirement and industrial recruiting. The damage to the United States happens gradually. The long time it takes for the ill effects of this trend to become evident makes it easy to ignore it. The government has further exacerbated this problem with the damage done by the nondisclosure agreement. Taking back the profits from a book is a poor trade for one more step in the direction of an ineffectual work force.

5. This agreement, and the push to implement such an unfortunate concept seems a knee-jerk reaction to the crimes of a few. It has been imposed without planning, and there are many legitimate concerns with how it will be used. The attached points are concerns I have; none of which I have seen even marginally addressed. I need tham answered. They should have been long before this program was inflicted.

1 Atch
Nondisclosure Questions

/s/

Barbara Rizzuto
SAF/AQXR
Pentagon

ATTACHMENT
PROBLEMS WITH THE NONDISCLOSURE AGREEMENT

1. In accordance with paragraph 3, your letter, above subject, 27 June 86, I request that you address my concerns with the nondisclosure agreement program. I find (a) internal inconsistencies, (b) an implied and expressed threat, (c) a lack of preparation for administering the program, and (d) thus a considerable potential for its abuse.

2. My interest in pursuing these concerns is to establish a consistent framework to accomplish the goal all federal employees, military and civilian, indeed all citizens desire --the safeguarding of information whose release to a hostile government could cause damage to the United States. I do not believe that the program, as it is presently understood, will accomplish that goal.

3. My basic reaction to the program, one shared by many, is anger. No federal employee can take exception to a required statement of loyalty to the United States. Each has taken an oath upon entering into his position. Workers with security clearances have also signed a statement pledging to protect all classified information to which they may have access. The nondisclosure agreement is not a reaffirmation of that oath or that pledge. It is an agreement based on a presumption of incipient disloyalty for the most venal of purposes - money. It is insulting to the employee and demeaning to the Government.

4. I seriously question the value of the form on a practical basis. It is difficult to assume that it will deter the one employee in a million who, through stupidity or greed, would provide classified information to a hostile government. It is counterproductive because it fosters an atmosphere of distrust between the parties to the agreement.

5. Paragraph 1 of the agreement states that "special confidence and trust shall be placed in" the individual who is granted access to classified information. Paragraphs 4,6,7,8 and 9 of the agreement by implication show how fragile that "confidence and trust" actually are. Paragraph 5, without equivocation, requires the assignment to the US Government of all enrichments that have, will or may result from dislosure of information. The use of the phrase "I hereby assign" in paragraph 5 requires that the signer of the agreement accept the special confidence and trust that has been placed in him/her and at precisely the same time agree to turn over to the Government the rewards he or she could only gain by violating that trust. This dichotomy is morally and ethically unacceptable.

6. A strong inference could be made from the use of the terms "classified" and "classifiable" that the target of this agreement is less the potentially disloyal employee and more the loyal employee who might try to correct waste or fraud by "whistle blowing." The atmosphere of mutual trust which which previously existed between the federal employee and his government and which would have previously permitted dismissal of this inference is no longer possible. The threat in the agreement and the implications raised by the term "and classifiable" make any questioning of authority a most risky act.

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7. The agreement says that any employee may be summarily fired for a security violation, or even on suspicion of one.

"Intending to be legally bound, I hereby accept..... [that] negligent handling of classified information could cause irreparable harm.....and am aware that any breach of this agreement.....may result in termination of my employment."

There is no indication or discussion of employee rights or protection from overzealous or hostile personnel. A refusal to sign the form is construed by top level management as de-facto evidence of disloyalty. Non-signer's clearances are to be revoked and the employee is to be fired.

8. Therefore, more information is required.

a. How does the Government intends to change the use of powers they have always have had, but are now using as a direct threat; that is how will the ordinary conduct of business change as a result of the new emphasis?

b. What steps are being taken to ensure a fair application of the dictates which are set out in the agreement, and elaborated by the Question & Answer section of the DoD Pamphlet? How will the administration of this Agreement will be uniform for everyone?

c. Where is conflict between, or modification of, the language of the agreement by the Q&A section, which will legally rule?

d. What system is or will be set up to adjudicate actions under the terms of this agreement?

e. How will people making use of the DOD Hotline to report fraud, waste and abuse be protected?

f. How will those persons who are frustrated by the system and go public to gain a hearing be protected?

9. As noted in Question 1 of the Q&A attachment to DoD 5200.1-PH-1, the SF 189 does not clearly state its purpose. The answer to that question does nothing to clarify that purpose. The fact that a clearance does not specifically establish an expressed obligation on the part of the employee or the government is a complete non-sequitur.

a. The fact that a request for a clearance is made carries in it the implication that one will use it in a manner consistent with the best interests of the United States. This position is roughly analogous to the implied warranty that a product is capable of being used for the purpose for which is is being sold. Does the answer to Question 1 say that the United States Government has now waived that implied responsibility?

b. Second, upon receiving our clearances, employees signed a paper to the effect that they would not improperly handle classified material. A contractual agreement has been established in form as well as in fact. Is that agreement likewise now null and void?

c. Third, (1) Section 641 of Title 18, USC, already "provides the Government with a clear basis to prevent or punish unauthorized disclosures." (2) Section 798, Section 952, and Section 783 of Title 50 reassert this authority. (3) Section 794 of Title 18 adds the death penalty during wartime to the administrative and prison penalties. (4) Title VI specifically extends protection to covert agents, and raises the administrative penalties substantially. (5) The answer to Question 8 states that the Supreme Court has already ruled on the matter of fiduciary obligation. (6) The answer to Question 9 cites seven penalties, including the ones spelled out in SF 189, which can be invoked. (7) It is a basic tenet of common law that a criminal may not profit from his crime. Therefore, why does the government need an additional basis for punishing unauthorized disclosure of classified material?

10. The answer to Question 15 states that the fact that an employee signed the SF 189 at a particular time may be classifiable in situations which might involve a particular classified project. On the basis that paragraph 1 states "or classifiable" our directorate security officer has stated that no one may retain a copy of the signed form.

a. Inasmuch as the Air Force is demanding that all employees, whether or not they have access to classified material, sign the form how can the above argument be valid?

b. Are there in fact any circumstances in which the fact that people known to be working for Air Force, and therefore known to have been required to sign the Form, could be considered "classifiable?"

c. Is the answer to Question 4, (which establishes that the employee only has liability when he "reasonably should have known that the information met the tests for classification") when most employees have no authority or responsibility for assigning a classification, legally binding upon the United States government? For that matter are any of the answers attached to DoD 5200.1-PH-1 legally binding on the government?

11. Question 6 is concerned with First Amendment rights. The answer to it, and to Question 7, avoids strict legal conflict with the First Amendment by creating the legal fiction that the Form does not require prepublication review. However, taken in context, the inference is clear that anyone would be very foolish not to have such a review if there were the slightest possibility that classified or classifiable material might be involved.

a. Why does the Government feel it is necessary to indulge in such legal convolutions to avoid the possibility of Supreme Court review of constitutional rights?

b. Given (1) the loose definition of classified and classifiable information, (2) the fact that the answer to Question 5 specifically states that these definitions may change in the future, and (3) the answers to Questions 18, 19, 20, 22, 24 and 25, is there any way in which these answers can be regarded as other than legalese specifically intended to provide escape clauses from constitutional challenge?

c. Given all of the above, is there any way to judge with certainty that a given item of information is not classified and will not become classifiable?

d. Does the possession of a prepublication review clearance from a current or last employing agency (Question 7) guarantee that a person might not be held liable if it is subsequently determined that the information cleared contained classified or classifiable material?

e. If not, what does?

Mr. SIKORSKI. We are going to go vote. So we will be in recess for about ten to 12 minutes.

[Whereupon, a short recess was taken.]

Mr. SIKORSKI. The hearing will reconvene.

Mr. Garfinkel and Ms. Buck, have you worked out who is going first?

Mr. GARFINKEL. No, sir. Your pleasure.

Mr. SIKORSKI. Then I will introduce you, Mr. Garfinkel, as the Director of the Information Security Oversight Office, ISOO, the administrative component responsible for overseeing the information security system throughout the Executive Branch. Mr. Garfinkel has been the Director of the office since 1981, and the subcommittee looks forward to his help in examining the development and content, the implementation and purpose of these nondisclosure forms.

STATEMENT OF STEVEN GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE

Mr. GARFINKEL. Thank you, Mr. Chairman.

Ordinarily I would waive reading my testimony, but I think under the circumstances of the number of witnesses testifying in favor of the SF 189, it is not a bad idea that I do read the testimony.

Mr. SIKORSKI. I agree.

Mr. GARFINKEL. Mr. Chairman, I welcome the opportunity to appear before you today to discuss the standard nondisclosure agreement that the Executive Branch developed and issued in 1983 as a means of helping to curb the unauthorized disclosure of classified information.

This is the Standard Form 189, Classified Information Nondisclosure Agreement, which we often refer to as the "SF 189." This nondisclosure agreement plays a critical role in the protection of our nation's vital secrets. It alerts cleared employees of the trust that is placed in them by providing them access to classified information and of their responsibilities to protect that information from unauthorized disclosure.

It also states the nature of that trust and those responsibilities. So if that trust is violated, the United States will be in a better position to enforce the agreement.

This marks the second occasion that a subcommittee of the House Post Office and Civil Service Committee has scrutinized the SF 189. In 1983–84, when the nondisclosure agreement was new, the Subcommittee on Civil Service studied the SF 189 in conjunction with its review of actions taken as a result of National Security Decision Directive 84, entitled "Safeguarding National Security Information."

Since that time, more than 1.75 million civilian and military personnel, including our top officials, have signed the SF 189, and thousands more are signing it each week. Until recently, the implementation of the nondisclosure agreement took place in an atmosphere of minimal controversy and confusion.

Instead of describing at length the background and history of the SF 189, I am submitting as an attachment to my testimony the fact

sheet that the Information Security Oversight Office, or ISOO, has prepared concerning it. The fact sheet covers everything from, "What is ISOO?" to a discussion of the particular issues of the current controversy and the steps that we have taken in an effort to resolve them.

However, I would like to take a few minutes to discuss the term "classifiable information," which has been the source of a great deal of confusion and misunderstanding, and which remains the most troublesome aspect of the SF 189 to most of its critics.

Paragraph 1 of the SF 189 as it currently reads includes the following definition, and I quote: "Classified information is 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."

Recently it has been widely and erroneously reported that "classifiable" as used in the SF 189 refers to information that is not classified at the present time, but which may be classified in the future. Following up on this erroneous interpretation, it has also been alleged that an agency could use the SF 189 to "get" an unwanted employee, for example, a whistle-blower, by classifying the information after that employee had disclosed it.

Mr. Chairman, please be assured that the term "classifiable information," as ISOO has defined it for the Executive Branch, does not refer to information that an agency may or may not classify some time in the future. Nor may an agency punish a whistleblower by classifying a document after the fact of disclosure in order to create a violation of the nondisclosure agreement.

Rather, classifiable information refers to a very narrow and limited species of information. Basically it is classified information that for some reason, whether by accident or by design, does not contain the classification markings that are associated with its identification.

In other words, classifiable information, as used in the SF 189, is not a species of information separate and distinct from classified information, but almost in its entirety a very small subspecies consisting of unmarked classified information. As we define it, the only classifiable information that is not already classified is information that is currently undergoing a classification determination and requires interim protection as required by Executive Order 12356, the framework of our information security system.

Unfortunately, unmarked classified information is not something that we can afford to ignore. Very often it involves some of our nation's most sensitive information. For example, raw intelligence is often gathered under circumstances that do not permit the contemporaneous placement of markings upon it. Nevertheless, until those markings are applied, it is just as critical to our national security that this information not be subjected to unauthorized disclosure.

To be sure, the major function of classification markings is the identification of information that is classified. Therefore, critical to the concept of liability for disclosing classifiable information is the knowledge requirement on the part of the offending party. To be liable, either that party knows that the unmarked information is classified or in the process of a classification determination, in

which case an unauthorized disclosure would ordinarily be wilful, or the party reasonably should know that the information is classified or in the process of a classification determination, in which case the unauthorized disclosure is negligent.

This is fully consistent with the requirement of Executive Order 12356, which states,

> Officers and employees of the United States government and its contractors, licensees and grantees shall be subject to appropriate sanctions if they knowingly, wilfully or negligently disclose to unauthorized persons information properly classified under this Order.

As in any situation that formally assesses liability, the existence or nonexistence of wilful or negligent conduct would be determined by the particular facts of the case. However, in no instance could an employee be found liable for violating the nondisclosure provisions of the SF 189 by disclosing unmarked information where there was no basis to suggest, other than pure speculation, that the information was classified.

Mr. Chairman, this definition of "classifiable information" is not new, neatly designed to defend against the criticisms that have recently emerged. It has been the standard since the term was included in the newly developed form in the summer of 1983.

To our current regret, the lack of controversy over the term at that time and the smooth road on which the SF 189 traveled for almost four years led us to rely on nonregulatory means to cope with the minimal concerns expressed. Over this time only a relatively few persons questioned ISOO about the meaning of "classifiable" or other aspects of the nondisclosure agreement. When they did, almost always a telephone discussion was enough to assuage their concerns.

When someone asked for something in writing, ISOO was happy to comply through correspondence that addressed their specific questions. In turn, agencies relied upon ISOO's explanations to brief their employees about the SF 189.

For example, the Department of Defense published a booklet on the nondisclosure agreement that includes a short, but accurate, explanation of "classifiable information." Only when the current controversy erupted, unexpectedly and belatedly, did we resort to regulatory means to address the concerns expressed. These regulations are also attached to my testimony.

Further, we have commenced the reprinting of the SF 189 so it will include on its face some of the new regulatory language. In the interim, we have advised agencies to permit persons who have signed or are being asked to sign the current edition of the SF 189 to modify it through the attachment of these regulations.

Persons who have already signed the current edition will also be given the opportunity to substitute the revised version upon its publication and distribution.

Also, in the context of litigation that commenced recently, ISOO has placed a temporary moratorium on the withdrawal of clearances based exclusively on a cleared employee's refusal to sign the SF 189.

Mr. Chairman, we are convinced that these actions constructively address the issues that have arisen about the SF 189. As I noted previously, we believe that nondisclosure agreements, such as the

SF 189, are an important and lawful means to help curb the serious problem of unauthorized disclosure of information vital to our nation's security. It is a problem that deserves the closest cooperation between the Executive Branch and Congress.

That concludes my formal statement.

[The fact sheet follows:]

Information Security Oversight Office
Washington, DC 20405

FACT SHEET ON STANDARD FORM 189
CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

STATUS AS OF OCTOBER 15, 1987

I. WHAT IS ISOO?

The Information Security Oversight Office (ISOO) was established by Executive Order 12065 and continued under Executive Order 12356, issued by President Reagan on April 2, 1982. ISOO is responsible for monitoring the information security programs of all of the approximately 68 departments, independent agencies and offices within the executive branch that generate or handle national security information.

ISOO is an administrative component of the General Services Administration but receives its policy direction from the National Security Council. The ISOO Director is appointed by the Administrator of General Services with the approval of the President. The ISOO Director has the authority to appoint its staff, which currently numbers 13 persons.

Among its oversight responsibilities ISOO develops and issues implementing directives; conducts onsite inspections; gathers, analyzes and reports statistical data; develops and disseminates security education materials; receives and takes action on suggestions and complaints on the administration of the Order; conducts special program studies; considers declassification appeals on presidential materials; and reports annually to the President on the status of the Government's information security program. In National Security Decision Directive 84, the President directed ISOO to develop and issue a standardized classified information nondisclosure agreement.

II. WHAT WAS THE BACKGROUND OF NSDD-84?

On March 11, 1983, the President issued National Security Decision Directive 84 (NSDD-84), entitled "Safeguarding National Security Information." NSDD-84 deals with unauthorized disclosures of classified information. It is based on a draft prepared by an interdepartmental group convened by Attorney General William French Smith at the request of William P. Clark, then Assistant to the President for National Security Affairs. It was convened following White House concerns about the continuing problem of unauthorized disclosures of classified information. Richard Willard, now the Assistant Attorney General, Civil Division, served as chairman of this group, which also included representatives of the Departments of State, Treasury, Defense and Energy, and the Central Intelligence Agency. The group met throughout February and March 1982, and issued its Report on March 31, 1982. The President acted upon the group's recommendations when the problem of unauthorized disclosures persisted over the ensuing months.

III. HOW WAS THE SF 189 DEVELOPED?

National Security Decision Directive 84 (NSDD-84) requires that all persons having access to classified information sign a nondisclosure agreement as a condition of receiving access. It directed ISOO to develop a legally enforceable standardized nondisclosure agreement. To fulfill this responsibility, the Director of ISOO chaired an interagency working group that assisted him in developing the draft form. The group included representatives designated by the Secretaries of State, Treasury, Defense and Energy, the Director of Central Intelligence, and the Attorney General. The interagency group met throughout March, April, May, and June 1983. The draft agreement was based on existing forms, approved by the Department of Justice, that performed a similar function for particular agencies. The group also drafted a standardized nondisclosure agreement for Sensitive Compartmented Information that included a mandatory prepublication review provision.

On July 1, 1983, the Director of ISOO transmitted the draft nondisclosure agreement, which reflected the consensus of the interagency group, to the Department of Justice for its determination on enforceability. Upon receiving the concurrence of the Justice Department, ISOO proceeded with the printing and distribution of the SF 189, "Classified Information Nondisclosure Agreement." The SF 189 was printed in August 1983, and its implementation began with the publication in the Federal Register on September 9, 1983, of its implementing regulation.

IV. WHAT IS THE CURRENT STATUS OF IMPLEMENTATION OF THE SF 189?

In September of 1983, ISOO issued SF 189, "Classified Information Nondisclosure Agreement," and directed agencies to proceed with implementation expeditiously.

There are approximately 3.5 million Government and private industry personnel who are cleared for access to classified information. About 1.2 million are contractor personnel, most of whom are expected to sign SF 189-A, the alternate nondisclosure agreement for industry issued in November 1986. As of August 29, 1987, 1,738,319 civilian and military personnel in the federal workforce have signed the SF 189. Only 661,401 personnel have yet to sign the Agreement. These numbers are somewhat inflated by the inclusion of some persons who have signed the form or were being asked to sign the form although they are not cleared for access to classified information. This practice has been halted. ISOO has requested that it be provided as soon as possible with data that do not include uncleared personnel.

As it concerns the SF 189-A, approximately 80,613 industry personnel have signed it, while slightly more than 1 million personnel have not. All contractor personnel covered under the Defense Industrial Security Program are expected to have executed either the SF 189 or 189-A by the end of 1988.

Attached are five graphic displays depicting various aspects of the status of implementation of the SF 189. Again, some of these numbers are slightly inflated by the inclusion of uncleared persons. The graphs include:

Number of Persons Required to Sign the SF 189

Comparison of Signed Agreements vs. Agreements to be Signed

Signatories vs. Signature Refusals

Number of Signed Agreements

Number of Agreements to be Signed

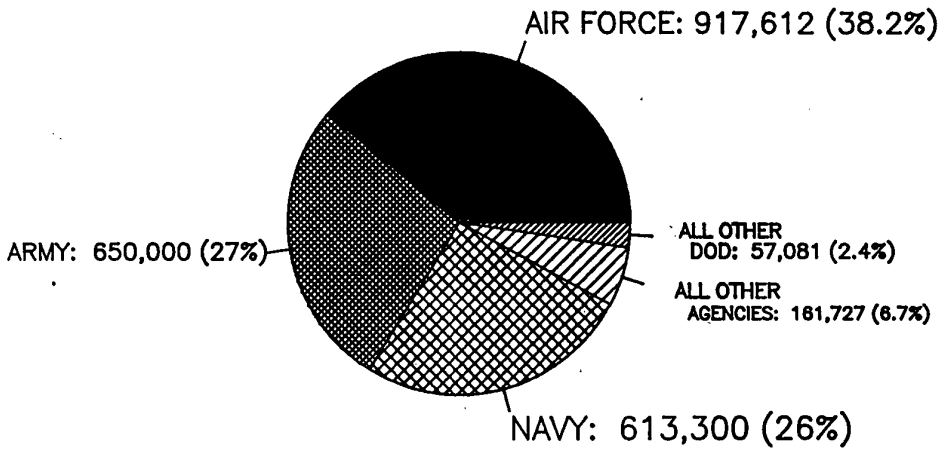
V. WHY HAS THERE BEEN SO MUCH DELAY IN THE EXECUTION OF THE SF 189 WITHIN THE DEPARTMENT OF STATE AND ELEMENTS OF THE DEPARTMENT OF THE DEFENSE?

The drafters of NSDD-84 believed that most DoD and State Department personnel with access to classified information had already signed nondisclosure agreements; therefore, it was initially thought that the burden of implementation, given the numbers and geographical dispersion of their personnel, should only extend to new employees. These agencies delayed immediate implementation based on this assumption. However during implementation it became clear that most Defense and State employees had never signed a nondisclosure agreement at all comparable to the SF 189. As a result, it was agreed that the implementation of the SF 189 must involve current employees also. However, agency programs were not sufficiently developed to obtain full compliance rapidly.

To ease the burden of implementation on the DoD and State, an agreement was reached to allow these agencies three years from the end of 1984 to fully implement the SF 189.

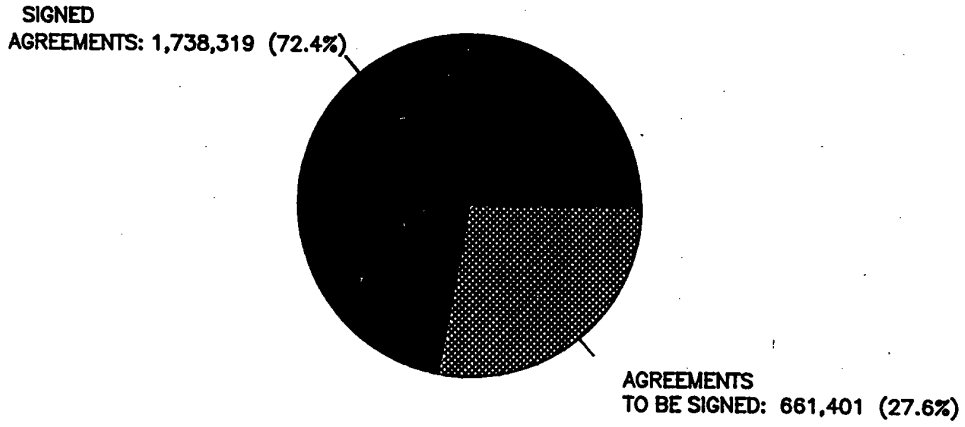
NUMBER OF PERSONS REQUIRED TO SIGN THE SF 189

(TOTAL REQUIRED TO SIGN = 2,399,720 PERSONS)



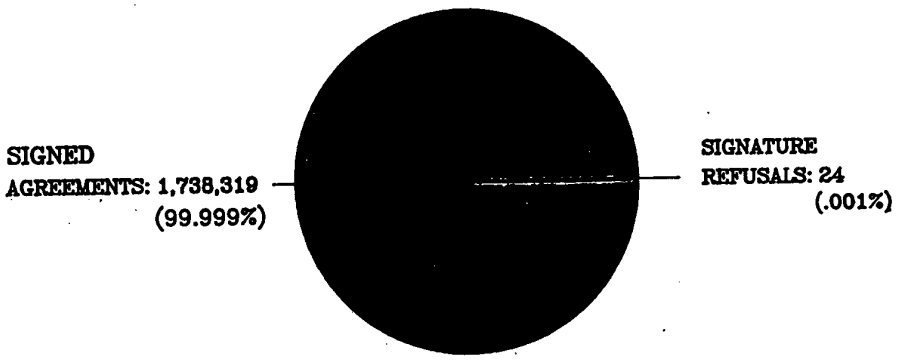
COMPARISON

SIGNED AGREEMENTS VS. AGREEMENTS TO BE SIGNED

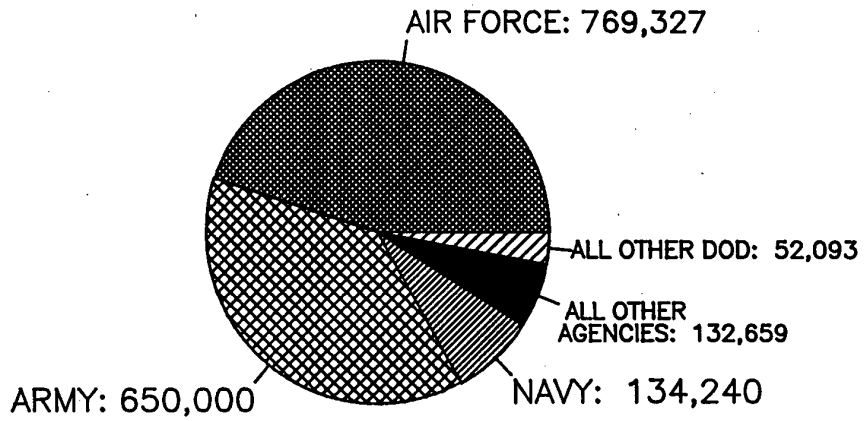


STATUS OF IMPLEMENTATION
SF 189

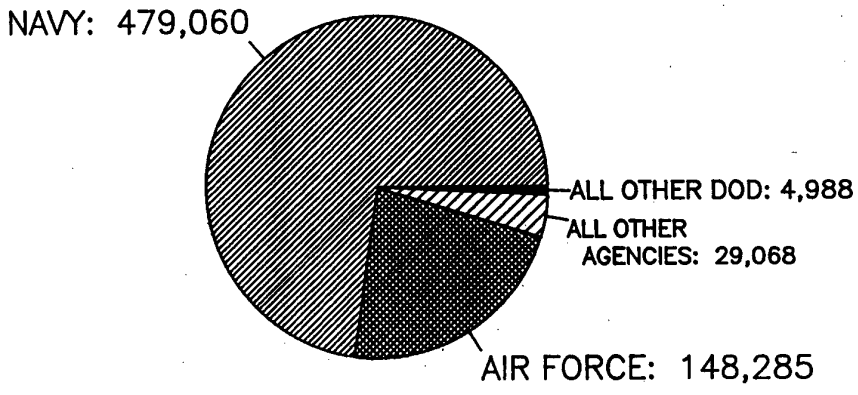
SIGNATORIES VS. SIGNATURE REFUSALS



NUMBER OF SIGNED AGREEMENTS



NUMBER OF AGREEMENTS TO BE SIGNED



VI. WHAT IS THE STATUS OF NSDD-84' OTHER MAJOR PROVISIONS?

NSDD-84 directed that other major steps be taken by all executive branch agencies to curb unauthorized disclosures of classified information. These included the issuance of an alternative Sensitive Compartmented Information (SCI) nondisclosure agreement, developing policies and procedures for the use of the polygraph, and reviewing the Executive order on personnel security. The current status of each of these items is as follows:

- Alternative SCI Nondisclosure Agreement

  The Department of State Authorization Bill of October 20, 1983, banned the implementation of the alternative SCI nondisclosure agreement for six months. On February 15, 1984, the President announced his intention to suspend indefinitely provisions of the directive pertaining to polygraph and prepublication review (the SCI agreement).

- Polygraph Policy and Procedures

  The polygraph provisions of NSDD-84 remain in abeyance. Other polygraph use provisions have been negotiated between executive branch agencies and Congress. The effectiveness and use of polygraph testing is the subject of a current executive branch study based on a subsequent NSDD.

- Federal Personnel Security Program

  An interdepartmental group chaired by the Department of Justice, in consultation with the Director, Office of Personnel Management, developed a proposed draft Executive order revising the federal personnel security program. The draft is currently pending in the Office of the Attorney General.

VII. WHAT IS THE SF 189-A? HOW AND WHY WAS IT DEVELOPED?

The SF 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)" is a nondisclosure agreement between the United States Government and Government contractor, licensee, and grantee employees, or other non-Government personnel requiring access to classified information in the performance of their duties. These employees must sign either the SF 189-A or the SF 189 before being authorized access to classified information.

The DoD recommended development of the SF 189-A as an adaptation of the SF 189, to facilitate industry implementation. The form was developed jointly by the ISOO, and representatives of the DoD. Almost all the SF 189-A is identical to the SF 189. The major differences are:

A. The term "classifiable" in the SF 189-A was deleted. Contractors do not classify originally. By contract, it's the Government's responsibility to identify what information is classified.

B. The second sentence in paragraph 3 of the SF 189-A was changed from "last granting me a security clearance," to "responsible for the classification of the information." The revised language takes into account: (1) the absence of an employer/employee relationship between the Government and the contractor employee; (2) the lack of contractor employee classification authority; and (3) the fact that some contractor employees are cleared for access by more than one Government agency.

C. References to statutory provisions applicable only to Government employees were deleted from the SF 189-A.

D. The debriefing acknowledgment portion of the SF 189-A was added to facilitate maintenance and retrieval.

VIII. WHAT CONTROVERSY SURROUNDED THE SF 189 UNTIL THE SPRING OF 1987?

Until this recent controversy, the SF 189 has engendered very little controversy, especially considering its scope and the fact that it deals with leaks of classified information. SF 189 received little attention during the congressional hearings on NSDD-84 and none of the resulting legislative action pertained to the nondisclosure agreement.

The SF 189 was the subject of extensive discussion between the ISOO and the American Civil Liberties Union (ACLU). The ACLU indicated repeatedly that it had no plans to challenge the facial validity of the SF 189.

Over the course of four years ISOO had approximately two or three dozen people question particular provisions of SF 189. ISOO provided both oral and written responses to their questions. Until the current situation, all persons provided these explanations signed the agreement.

Until the National Federation of Federal Employees brought suit in the United States District Court for the District of Columbia on August 17, 1987, there had been no litigation. No one had been subject to a criminal or civil action for violating the provisions of the SF 189. Further, ISOO is not aware of any person who has lost employment for failure to sign the SF 189, although a small number of persons have lost their clearances after failing to sign the agreement.

IX. HOW DID THE CURRENT CONTROVERSY ARISE?

The current controversy over the Standard Form 189 began when Air Force employee A. Ernest Fitzgerald was first asked to execute the nondisclosure agreement in January 1987. Mr. Fitzgerald refused to sign the form at that time, stating that he needed more information about it. Over the next months he sought this information through successive inquiries to the Air Force, the Department of Defense and the ISOO.

Mr. Fitzgerald was on part-time detail to the staff of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, both chaired by Representative John D. Dingell. Starting in May 1987, following a meeting between Mr. Fitzgerald and other members of the Subcommittee staff and ISOO Director Steven Garfinkel, several members of the House and Senate directed letters to the White House, the Office of Personnel Management and ISOO questioning the legality of a number of aspects of the SF 189, which are addressed in the following section. These letters were also released to the news media, which commenced a series of news articles, stories, op-ed pieces and editorials on the nondisclosure agreement, almost all of which contained serious errors of fact. This media attention, in turn, led to constituent correspondence to other members of Congress, more congressional inquiries, more media attention, etc. Within a couple of months, the situation had snowballed into a major controversy. Fueling the controversy have been a number of misrepresentations and misunderstandings about the SF 189 that have appeared repeatedly in both the media accounts and congressional pronouncements.

On August 17, 1987, the National Federation of Federal Employees (NFFE), a Federal employee labor union, filed suit in the Federal District Court for the District of Columbia challenging the constitutionality and legality of the SF 189. The lawsuit seeks a declaratory judgment that the form violates the First (free speech) and Fifth (due process) Amendments to the Constitution and an injunction which bars the executive branch from using the SF 189 and any other form that prohibits the disclosure of "classifiable" information. On October 7, 1987, NFFE filed an amended complaint seeking the same remedies. The Department of Justice is proceeding as quickly as possible to defend the Government's position and the Administration is confident that it will ultimately prevail on the merits.

Additionally, on September 1, 1987, the American Federation of Government Employees, another Federal employee labor union, filed suit in the Federal District Court for the District of Columbia challenging the constitutionality and legality of the SF 189 and Form 4193. Form 4193 is a nondisclosure agreement for sensitive compartmented information issued by the Director of Central Intelligence.

X. WHAT ARE THE MAJOR POINTS OF CONTENTION?

A. WHAT IS "CLASSIFIABLE INFORMATION?"

As used in paragraph 1 of SF 189, the term "classifiable information" refers to information that meets all the requirements for classification under Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security, but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information. 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 term "classifiable" 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.

For example, a person attending a classified meeting should reasonably know that his or her unmarked notes of that meeting may not be disclosed to a person who doesn't have a clearance and a "need-to-know" that information. In testimony before a Senate subcommittee studying NSDD-84, former CIA Director William Colby alluded to the fact that raw intelligence data are often unmarked as classified when they are first received, yet may very well involve some of the most sensitive information within the Government, such as the names of intelligence sources.

Also, with respect to the term "classifiable," critics have repeatedly leveled the charge that it would subject employees to sanction for disclosing information that was clearly unclassified at the time of disclosure, but was subsequently classified. This argument suggests that it would require employees to speculate about the future classification of information although they themselves may not be original classifiers. This contention completely overlooks the definition of "classifiable" as used in the SF 189. As noted above, "classifiable" refers to unmarked information that already is classified, or meets the standards for classification and is in the process of being classified. It

does not refer to unclassified information that might, perchance, be classified sometime in the future. The only fact patterns in which an employee might be held liable for disclosing unclassified information could occur when the employee knows, or reasonably should know, that the information is in the process of a classification determination and requires interim protection as provided in Section 1.1(c) of Executive Order 12356. For example, if an employee is aware that particular unclassified information has been formally referred to an original classifier for classification action, he or she would very likely violate the SF 189 if he or she were to disclose the information without authorization in the interim.

Critical to the concept of liability for disclosing "classifiable" information is the knowledge requirement on the part of the offending party. To be liable, either that party knows that the unmarked information is classified or in the process of a classification determination, in which case the unauthorized disclosure is either willful or negligent; or the party reasonably should know that the unmarked information is classified or in the process of a classification determination, in which case the unauthorized disclosure is negligent. This is fully consistent with the requirements of Executive Order 12356, which provides at Section 5.4(b)(1): "Officers and employees of the United States Government, and its contractors, licensees, and grantees shall be subject to appropriate sanction if they . . . knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under this Order or predecessor orders . . . ." The existence or non-existence of negligence, as is true in any negligence situation, would be determined by the particular facts of the case. However, in no instance could an employee be found liable for violating the nondisclosure provisions of the SF 189 by disclosing unmarked information when there was no basis to suggest, other than pure speculation, that the information was classified or in the process of being classified.

B. WHAT IS AN "INDIRECT" UNAUTHORIZED DISCLOSURE?

As used in paragraph 3 of SF 189 and SF 189-A, the word "indirect" refers to any 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. A party to SF 189 would violate its nondisclosure provisions only if he or she knew, or reasonably should have known, that his or her action would result, or reasonably could result in the unauthorized disclosure of classified information. ISOO has made regulatory changes defining the meaning of the term "indirect unauthorized disclosure." (See Federal Register, Vol. 52, p. 28802, dated August 3, 1987.)

There are any number of hypotheticals that might constitute an indirect unauthorized disclosure. Here are several examples:

An employee works in an area that is not secured and which is accessible to uncleared personnel. He goes home for the evening, leaving clearly marked classified documents on top of his desk. A reporter walking through the area spots the classified documents, reads them, and files a story on the classified information that is published. The negligent employee has very likely committed an indirect unauthorized disclosure.

An employee reads a news article that speculates about a classified subject. The employee, as a result of his authorized access to classified information, is aware of the accuracy of the information. The employee then advises a party who does not have a clearance and a "need-to-know" that accurate information about a classified subject is revealed in a news article, which the employee cites. The employee has very likely committed an indirect unauthorized disclosure.

An employee tells a co-worker on a classified project that he believes their work is contrary to the goal of world peace. The co-worker agrees, and states that he has a journalist friend who would gladly expose it. The employee provides his co-worker with classified information to leak to the journalist, who then has it published. The co-worker has committed a direct unauthorized disclosure, while the employee, although providing classified information directly only to his cleared co-worker, has committed an indirect unauthorized disclosure.

C. DOES THE SF 189 CONFLICT WITH "WHISTLEBLOWER" STATUTES?

The SF 189 does not conflict with the so-called "whistleblower" statutes (5 U.S.C. § 2302). These statutes specifically do not protect persons who disclose classified information without authorization. The reference in these statutes to information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs" is without question a reference to the contemporary Executive order on national security information, which is now E.O. 12356. In turn, SF 189 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." Future reprints of the SF 189 will explicitly state that the Agreement does not supersede the provisions of the "whistleblower" statutes.

In addition, E.O. 12356, Sec. 1.6(a) specifically prohibits classification "in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security." This provision was included in the Executive order to help prevent the classification of information that would most likely be the concern of whistleblowers.

Finally, there are remedies available to whistleblowers that don't require the unauthorized disclosure of classified information. There are officials within the government who are both authorized access to classified information and who are responsible for investigating instances of reported waste, fraud and abuse. Further, each agency has designated officials to whom challenges to classification may be addressed or to whom a disclosure of classified information is authorized. For example, within the Department of Defense employees are now required to challenge the classification of information that they believe is not properly classified. Special procedures have been established to expedite decisions on these challenges.

D. IS THE SF 189 CONSTITUTIONAL?

Although the constitutionality of SF 189 has yet to be resolved in court, nondisclosure agreements even more stringent in their restrictions have consistently been upheld by the Federal courts, including the Supreme Court, as legally binding and constitutional. At every stage of the development and implementation of the SF 189, experts in the Department of Justice have reviewed its constitutionality and enforceability under existing law.

E. DOES THE SF 189 REQUIRE PREPUBLICATION REVIEW?

The SF 189 contains no requirement for prepublication review. This omission resulted from the specific design of its drafters, since NSDD-84 was silent on the inclusion or non-inclusion of a prepublication review provision for this nondisclosure agreement.

The ability of the Government to seek injunctive relief to prevent the publication of classified information is not, as a few people have suggested, an implied imposition of a blanket prepublication requirement. It is untenable to suggest that the Government, if it is aware that an employee or former employee is about to disclose classified information, should not consider every lawful means to protect the nation's security. However, the possibility of infrequently seeking injunctive relief in no practical or even theoretical sense equates to mandatory prepublication review for every publication of every signer of the SF 189.

F. WHAT OTHER LANGUAGE IN SF 189 IS UNCLEAR?

The first line of paragraph 7 of the SF 189 reads: "I understand that all information to which I may obtain access by signing this form is now and will forever remain the property of the United States Government." The SF 189-A, composed over three years later, includes the word "classified" before the word "information." It has been suggested by a few persons that the SF 189, therefore, imposes a much broader standard.

To the contrary, the first sentences of both agreements mean precisely the same thing. Information to which someone "may obtain access by signing [the SF 189]" is, by definition, "classified information." As further stated in the first sentence of the agreement, ". . . I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information." [Emphasis added.] The drafters of the SF 189 did not include the word "classified" in the first sentence of paragraph 7 because they believed it to be redundant. At the urging of the Department of Defense, it was later included in the SF 189-A, notwithstanding its redundancy, in order to preclude any possibility whatsoever of misunderstanding.

The third sentence of paragraph 7 reads in part: "I agree that I shall return all materials which have, or may have, come into my possession or for which I am responsible because of such access . . .." For the same reasons addressed above, it is clear that "all materials," by definition, refers only to "classified" materials. It is far less clear what is meant by the phrase, "or may have." The current language of this phrase was suggested by the Department of Justice after the interagency drafting group had completed its work on what was to become the SF 189. A detailed review of the records also reveals that the Department suggested slightly different, but far clearer language for the comparable provision of the Sensitive Compartmented Information Nondisclosure Agreement: "I agree that I shall return all materials which have or may come into my possession or for which I am responsible because of such access . . .." It now appears that Justice intended that the phrase "may have come" should actually have read "may come" in what was to become the SF 189 as well. ISOO has modified the rule that implements the use of SF 189 and SF 189-A to clarify these ambiguities. (See Federal Register, Vol. 52, p. 28802, dated August 3, 1987.)

XI. WHAT ACTIONS HAS ISOO TAKEN TO RESOLVE THE CURRENT CONTROVERSY?

To resolve the current controversy surrounding misunderstanding and ambiguities in the language of the SF 189, ISOO has taken a series of actions. Below is a brief summary of the nature of these actions and what they are expected to accomplish.

1. Meaning of "classifiable information"

Prior to the current controversy, ISOO had defined "classifiable information" through correspondence in response to individual inquiries. Now, to regulate formally the meaning of "classifiable information," on August 3, 1987, ISOO has defined the term in the Federal Register as "information that meets all the requirements for classification under Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security, but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information. 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."

On August 11, ISOO issued a further regulatory clarification, noting that "the term 'classifiable' 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." In written notices dated August 4 and 21, ISOO informed executive branch agencies of these regulatory changes. This definition of "classifiable information" is being added to the second sentence of paragraph 1 in the SF 189. Future reprints of the SF 189 will include this addition. Agencies have been advised that employees may add this language to current editions of SF 189.

2. Meaning of "indirect" unauthorized disclosure

To regulate formally the meaning of an "indirect" unauthorized disclosure, ISOO defined the term in the Federal Register on August 3, 1987, as "any 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. A party to SF 189 would violate its nondisclosure provisions only if he or she knew, or reasonably should have known, that his or her action would result, or reasonably could result in the unauthorized disclosure of classified information."

ISOO informed executive branch agencies of this clarification in a letter to agency senior officials dated August 4, 1987. The definition is being added to the first sentence of paragraph 3 of SF 189 and SF 189-A. Future reprints of the SF 189 and the SF 189-A will include this addition. Agencies have been advised that employees may add this language to current editions of SF 189.

3. Conflict of SF 189 with "Whistleblower" statutes

The SF 189 does not conflict with the so-called "whistleblower" statutes (5 U.S.C. §2302). To end any confusion on this issue, the following statement is being added to the end of paragraph 4 of SF 189: "I understand that this Agreement does not supersede the provisions of Section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees." Future reprints of SF 189 will include this statement. ISOO notified agencies of this addition on August 4, 1987. Agencies have been advised that employees may add this language to current editions of SF 189.

4. Conflict of SF 189 with constitutional provisions

The Administration is confident that the SF 189 fully complies with all constitutional and legal standards. On August 17, 1987, the National Federation of Federal Employees brought suit in the United States District Court for the District of Columbia challenging the constitutionality and legality of the Agreement. Pending some resolution of the issues in this litigation, on August 21, 1987, ISOO provided agencies with instructions concerning the execution and implementation of SF 189. The instructions require agencies to place a moratorium on withdrawal of clearances or denial of access solely on basis of refusing to sign SF 189 and to provide individualized briefings for those who refuse to sign the SF 189 but retain clearances. The letter also instructs agencies that these instructions are temporary and that they should continue with implementation of the SF 189.

Also, on September 1, 1987, the American Federation of Government Employees filed suit against the Government challenging the constitutionality of the SF 189 and of Form 4193. Form 4193 is a nondisclosure agreement for sensitive compartmented information issued by the Central Intelligence Agency.

5. Prepublication review

The SF 189 contains no requirement for prepublication review. Therefore, no action was necessary.

6. Other unclear language

The first line of paragraph 7 of SF 189 reads: "I understand that all information to which I may obtain access by signing this form is now and will forever remain the property of the United States Government." The SF 189-A, composed over three years later, includes the word "classified" before the word "information." To correct the inconsistency in the language of the two forms, ISOO has added the word "classified" before the word "information" in the first sentence of paragraph 7 of SF 189. ISOO published this change in the Federal Register on August 3, 1987, and notified executive branch agencies of the change in a written notice dated August 4, 1987. Future reprints of SF 189 will reflect this change. Agencies have been advised that current editions of the SF 189 may be amended to reflect this change.

The third sentence of paragraph 7 of SF 189 and SF 189-A reads in part: "I agree that I shall return all materials which have, or may have, come into my possession or for which I am responsible because of such access . . .." By definition "all materials" refers only to "classified" materials. As it concerns the meaning of the phrase "or may have," it appears that the phrase should have read "may come." To clarify the meaning and intent of this language ISOO published these changes in the Federal Register on August 3, 1987, and notified executive branch agencies of these changes in a written notice dated August 4, 1987. Additionally, the word "classified" has been added before the word "materials" in the third sentence of paragraph 7 of SF 189 and SF 189-A. In the same sentence and paragraph of both forms, the second "have" from the phrase "which have, or may have come into my possession" has been deleted. Future reprints of SF 189 and SF 189-A will reflect these changes. Agencies have been advised that current editions of the SF 189 may be amended to reflect this change.

7. Other changes

Future reprints of SF 189 will include the Witness and Acceptance block and Security Debriefing Acknowledgement block which currently appear in SF 189-A. The addition of the Witness and Acceptance block is intended to clarify the role of the witness and the role of the acceptor for the Government. By adding the optional Security Debriefing Acknowledgement block, SF 189 will provide for the acknowledgement of both a security debriefing and a security briefing.

Mr. SIKORSKI. Thank you, Mr. Garfinkel.

Ms. Kathleen Buck is General Counsel for the Air Force. The subcommittee thanks you for your time and testimony, especially in light of the fact that your confirmation as Department of Defense General Counsel is fast approaching.

We look forward to discussion on the use of nondisclosure agreements at the Department of the Air Force and working with you to resolve the problems that have arisen.

STATEMENT OF KATHLEEN BUCK, GENERAL COUNSEL, U.S. AIR FORCE

Ms. BUCK. Thank you, Mr. Chairman.

My testimony is actually very short.

Mr. SIKORSKI. Yes, why don't you go ahead?

Ms. BUCK. So with your permission, I would like to go ahead and read that testimony.

Thank you for inviting me to appear today to discuss the classified information nondisclosure agreement and its implementation in the United States Air Force.

I am sure that we can all agree that in order to effectively provide for the nation's security, we must maintain the secrecy of appropriate defense information and protect against intentional and negligent disclosures of that information to unauthorized recipients.

The Air Force does not formulate the nation's policies regarding the protection of classified information. The legal and policy framework for the protection of classified information is established by statute and Executive Order.

In March 1983, the President issued National Security Decision Directive 84 and made the execution of a nondisclosure agreement a condition of access to classified information. The President assigned GSA's Director of the Information Security Oversight Office the responsibility to develop a standardized form for use by the agencies.

In February 1985, the Department of Defense issued instructions that all military and DOD civilian personnel with current access to classified information would be required to sign Standard Form 189 as soon as practicable. Those instructions also required that we maintain a file system from which executed agreements could be expeditiously retrieved.

In July 1985, the Department of Defense issued a 37-page pamphlet, and that is DOD 5200.1-PH-1, entitled "Classified Information Nondisclosure Agreement SF 189." It included a sample briefing regarding the agreement, copies of the legislative and executive authorities cited in Paragraph 10 in SF 189, and informational questions and answers regarding implementation of the agreement.

In September 1985, the principal Director of Counterintelligence and Security Policy for the Department of Defense directed the military services to accomplish the execution of the SF 189 by all personnel as soon as possible. That letter emphasized the goal of 100 percent coverage of all cleared personnel and noted that ISOO would ask for an agency-by-agency status report for its annual report to the President.

It was in response to these directions that the Air Force first implemented procedures for the use of Standard Form 189.

In June 1986, the Department of Defense promulgated its information security program regulation, which is DOD 5200.1-R. Paragraph 10.102 of that regulation confirmed that DOD personnel could not be given access to classified information until they had received an initial security briefing and signed Standard Form 189.

It also confirmed that personnel who already possessed a security clearance when the regulation became effective were required to sign the agreement as soon as practicable.

The obvious intent of those directives was that no one have access to classified information without first signing the agreement. At the time the Air Force developed its procedures, a very high percentage of Air Force members and employees possessed security clearances and were, thus, eligible for immediate access to classified information.

Those procedures reflected our desire to efficiently and reliably implement the government-wide policy that no one gain access to classified information without first signing a nondisclosure agreement.

In August 1987, the Information Security Oversight Office instructed that until further notice, no one should be denied access to classified information or have their clearance revoked solely because he or she has refused to sign the agreement, and the Air Force is, of course, complying with those instructions.

Only those Air Force members and civilians who require access to classified information are being asked to sign the nondisclosure agreement. Moreover, we are undertaking a thorough review of our procedures regarding the classified information nondisclosure agreement at the request of Senator Grassley.

I appreciate the opportunity to appear here today, Mr. Chairman, to review the program, and I would be happy to entertain any questions that you might have.

Mr. SIKORSKI. Thank you, Ms. Buck.

Let's see if we can get to the nitty-gritty here.

Mr. Garfinkel, you talk about the failure of prior and existing efforts to protect classified information. Can you describe to us the parade of horribles that has created this Standard Form 189 and that the form is addressing?

Mr. GARFINKEL. Mr. Chairman, there have been and continue to be unauthorized disclosures of classified information in every year of this administration and in every year of preceding administrations.

Mr. SIKORSKI. Okay. How many?

Mr. GARFINKEL. ISOO has had reported to it over the course of or since SF 189 was issued approximately 100 to 110 serious unauthorized disclosures per year.

Mr. SIKORSKI. One hundred ten since 1983?

Mr. GARFINKEL. Per year. So we are talking about a total of over 400 since that time.

Mr. SIKORSKI. Since 1983, and these are disclosures of classified information by federal employees?

Mr. GARFINKEL. These are disclosures of classified information, presumably by federal employees, either of the Executive Branch or perhaps in the Legislative Branch.

Mr. SIKORSKI. Okay. Okay. These are disclosures. They might come from the Executive Branch, the people who are required to sign SF 189.

Mr. GARFINKEL. That is correct.

Mr. SIKORSKI. They might come from contract employees who sign SF 189-A, but do not have to sign on "classifiable" material; is that correct?

Mr. GARFINKEL. Most of the disclosures to which we are privy deal with disclosures of intelligence information, and I would suspect that most of that information would not be made available to contractors.

I am not suggesting that—

Mr. SIKORSKI. Wait a minute. Wait a minute. We know the numbers, and these are serious, and I have a question as to what triggers the label "serious."

Mr. GARFINKEL. Serious enough that the agencies concerned believed an investigation was necessary to see if they could determine the source of the unauthorized disclosure.

Mr. SIKORSKI. In how many of these was the source determined?

Mr. GARFINKEL. Very, very few. I do not have the figures in front of me.

Mr. SIKORSKI. How many out of the 110 last year, approximately?

Mr. GARFINKEL. I don't have the figure. ISOO's concerns over unauthorized disclosures in terms of its jurisdiction goes to where the system, where the classification system may have been responsible for the disclosure.

Mr. SIKORSKI. I understand, but you are proposing if not a drastic, certainly a controversial nondisclosure agreement.

Mr. GARFINKEL. No, sir, I have not——

Mr. SIKORSKI. You are administering it, and the administration has proposed and is making employees sign this. We are talking about a total of almost four million people signing these agreements to respond to a failure in the security of the classified information system.

I asked you the dimension of the failure that would cause all of this bureaucratic paper-pushing. You said you hear about approximately 110 per year. I said are the sources the same people who are signing the SF 189 and 189-A, these four million people, and you say you do not know.

My next question is: aren't there statutes—not a little contract, not a piece of paper—aren't there criminal and civil statutes on the book today to get these people or entities that are releasing this classified information?

Mr. GARFINKEL. Mr. Chairman, it is my opinion that there is no statute that in and of itself satisfactorily provides criminal sanctions for unauthorized disclosures of classified information.

Mr. SIKORSKI. Let me remind you of your testimony this morning. You are in a difficult situation. I have read this stuff, and you look like you are dancing as fast as anyone has ever danced. So I do not want to make your difficulties greater.

But you said in your testimony today and in prior correspondence with this subcommittee and other members of Congress that this all came out of the Willard Commission. At least a good part of the genesis is there.

As you have heard, the Willard Commission said the present civil statutes and regulations permitting disciplinary action for unauthorized disclosures by government employees are generally adequate.

Mr. GARFINKEL. Mr. Chairman, I do not know that the Willard Commission report speaks for the policy of this administration on that question. I believe personally, as someone very much involved with classified information, and I know any number of other individuals who are so involved, that the current criminal statutes are not satisfactory, and I suspect that if you asked Richard Willard that question, who was the chairman of that group, I think he would answer the same way.

Mr. SIKORSKI. Good. What suggestions do you have to change the criminal statutes?

Mr. GARFINKEL. I do not have anything with me today, Mr. Chairman, but we would be happy to cooperate with the Congress.

Mr. SIKORSKI. Well, if there is a deficiency, let's get it off our chest.

Mr. GARFINKEL. We have expressed that deficiency to committees of Congress repeatedly, and no legislation has been introduced or seriously undertaken.

Mr. SIKORSKI. Mr. Garfinkel, I have seen this administration, the national security people, say that the statutes are fine. Now, can you provide the subcommittee with your proposed changes to the criminal statutes, the legislation that you have asked be introduced and when you asked it to be introduced, so that the subcommittee can try to assist you?

But I do not think it is quite that way, is it?

Mr. GARFINKEL. It is exactly the way I have been saying, Mr. Chairman. I would be happy——

Mr. SIKORSKI. Wait a minute. Let me ask you the question. The administration has proposed legislation to adjust the criminal statutes?

Mr. GARFINKEL. The administration has discussed prospective legislation on the issue of unauthorized disclosures of information with a number of committees of Congress, most specifically the intelligence committees of Congress, who have, in turn, reported that such legislation would be appropriate.

Mr. SIKORSKI. This is so important as to engender four million signatures and all of the time entailed in that, of which you are better aware than I, but it does not trigger criminal sanctions at all.

Mr. GARFINKEL. That is correct, and I would suggest, Mr. Chairman, that there are occasions when criminal sanctions are unreachable, where civil sanctions are not.

Mr. SIKORSKI. Well, we are not quite there yet. But this thing does not get to it. We have criminal statutes to punish people who release this. It is not considered important enough to protect, and for people after seven years to propose legislation, not have chats about maybe, maybe doing some legislation, but all of a sudden it

is important enough to engender this huge paper flow. Someone, a cynic, might suggest that the reason is not really protecting the release of information which needs to be kept secret. The releases appear to be very nominal. If you talk about classified pieces of information, how many billions or trillions of pieces of information are classified?

Mr. GARFINKEL. We estimate approximately ten million classifications, new classification decisions, both original and derivative decisions, were made last year, and I think that is probably a fair ball park figure of an annual total.

Mr. SIKORSKI. Would it be wrong to assume that each one of those was at least one page?

Mr. GARFINKEL. It would be impossible to——

Mr. SIKORSKI. Well, they are not smaller than one page?

Mr. GARFINKEL. No, some of them could be one sentence or even one word, and some of them are large reports.

Mr. SIKORSKI. Encyclopedias and huge tomes, but it is not unreasonable to expect that at least it is on one page of paper. What I am trying to figure out is if ten million classification decisions are made a year, then we are probably talking trillions of pieces of paper that have been classified in the main classifications.

Mr. GARFINKEL. I do not know whether I can say trillions. I can say that it is a phenomenally large body of information.

Mr. SIKORSKI. Mega-billions?

Mr. GARFINKEL. Mr. Chairman, I could not suggest that. I have never undertaken a count.

Mr. SIKORSKI. Well, maybe you should, since you are in charge of securing this. That is your job, right?

Mr. GARFINKEL. It is my job to be in charge of the information security system; that is correct.

Mr. SIKORSKI. Okay. I am trying to get a handle on how much information is sitting there.

Mr. GARFINKEL. And we provide that information each year in terms of our annual report.

Mr. SIKORSKI. No, in terms of classifications. I am trying to talk in terms of volume, gross volume.

Mr. GARFINKEL. Mr. Chairman, we have never had anywhere near the resources to be able to begin a page-by-page count of every document that is classified. That question has arisen before, and it has been our considered judgment that the expenditure of funds that would be necessary to determine whether it was trillions or mega-billions or hundreds of millions is not worth that dollar figure.

Mr. SIKORSKI. Good. We know it is huge.

Mr. GARFINKEL. We know that it is very large, but we also know that——

Mr. SIKORSKI. But we also know that 110, approximately, releases of classified information surfaced, and we do not know the sources of those leaks.

Mr. GARFINKEL. I suggested approximately 110.

Mr. SIKORSKI. Per year, for the last six or seven years.

Mr. GARFINKEL. Mr. Chairman, it may be 110, but I do not want to discount that number as having a minimal effect on the national security of the United States.

Mr. SIKORSKI. Nor would I. Nor would I. I was just trying to put it into perspective because you are proposing that we complete at least four million sheets of paper, and actually more than that, in response to it. It seems the money associated with engendering that paper work is not well spent.

Ms. BUCK. Mr. Chairman, may I also comment?

Mr. SIKORSKI. Surely.

Ms. BUCK. I think it is important here not to just merely focus on numbers or numbers of pages, but you can have one case that has a very substantial impact on the government.

Mr. SIKORSKI. Ms. Buck, I know that, and everyone knows it. I am trying to put this thing into perspective. You are making people sign these agreements, you are telling people that they cannot release any classified information, and I would like for people to understand the dimensions of their liability. I am only asking for the underlying support for the statements made that there has been a failure that this form responds to. Beyond that, you have made a distinction between those who work for the federal government as federal employees and those who work for the federal government as employees of entities that contract with the federal government. Now, it has been my experience on the Energy and Commerce Committee, which has been involved for the last five years in a longer investigation of the Department of Energy's security at our nuclear weapons production facilities, which are under the administration and operation of the Department of Energy and are extensively operated by contract employees, that in the most sensitive areas that include one sentence or just a little paragraph or one paper or a little manual of classified information, that we have got contract employees working side by side with federal employees, and the same thing at the Air Force experimentation research stations and the rest of it. We have got contract employees working side by side with federal employees on the same projects, doing similar or the same things, maybe with higher salaries, but they are there, and they are dealing with the same type of classified or top secret documents.

And yet they are distinguished in which form they must sign. Okay so far?

Mr. GARFINKEL. Could I make one additional comment about the question of the scope of the problem?

Mr. SIKORSKI. I will let you summarize at the end, and you will have the last word. You can clean up that and anything else.

Are we okay so far with regard to contract employees or do you dispute the fact that they are in some of the most sensitive areas of this government's national security?

Mr. GARFINKEL. I don't dispute that.

Mr. SIKORSKI. And we are talking numbers, right? We are talking according to you, about 1.2 million people. We are talking about 2.4 million, according to your testimony, federal employees, another 1.2 million in contract employees. Right so far?

Mr. GARFINKEL. That is correct.

Mr. SIKORSKI. You have given the subcommittee some nice charts describing how many people have signed these forms and how many have not signed these forms, percentages and the rest of it,

and I understand from Ms. Buck's testimony that there has been a big push to get these forms signed.

You have not provided the same kind of charts and graphs with regards to these 1.2 million contract employees, have you?

Mr. GARFINKEL. We have provided you with the numbers of people.

Mr. SIKORSKI. Would you like to refresh my memory on the numbers with these 1.2 million contract employees?

Mr. GARFINKEL. It is our understanding that somewhere between 80,000 and 100,000 contractor employees have signed either the SF 189 or the SF 189(a).

Mr. SIKORSKI. So approximately eight to ten percent of the contract employees have signed these forms?

Mr. GARFINKEL. One or the other of the forms.

Mr. SIKORSKI. What are the numbers for the other areas, the non-contract employees, the public employees? The federal employees who have to sign this 189, who do not have the option of 189-A without the "classifiable" definition in it.

Mr. GARFINKEL. Well, the number that we have is as was in my testimony, approximately one and three-quarter million government employees have signed the form. The total number of government employees who will ultimately have to sign the form will be somewhere around 2.1 to 2.4 million.

Mr. SIKORSKI. So approximately 80 percent of the federal employees have been signed up.

Mr. GARFINKEL. That is correct.

Mr. SIKORSKI. But only approximately eight percent of the contract employees have been signed up.

Mr. GARFINKEL. I can explain the reason if you are interested in the discrepancy.

Mr. SIKORSKI. Well, if we have a failure in protecting this classification system and these people are in there, I do not see the difference between the apples here.

Mr. GARFINKEL. Well, it is not a difference in the sensitivity situation. It is merely a distinction in the logistics of getting started in getting these forms implemented. Most contractor employees are subject to something called the Defense Industrial Security Program. The Defense Investigative Service, which undertakes that program, is implementing these forms in the context of the re-issuance of its industrial security manual. That has been delayed until this time, not because we wanted it to be so delayed, but because it has been, and they are beginning to undertake this project at full steam right now.

Mr. SIKORSKI. Yes. Focusing more on the distinction that has arisen between how contract employees and federal employees, all involved in security incidents, projects, and dealing with classified information are treated, the contract employees, this 1.2 million, do not have to sign a form promising to protect "classifiable" information.

You said at one point that was because industry would come back screaming. Is that sufficient reason?

Mr. GARFINKEL. That is not the reason the change was made. The change was made——

Mr. SIKORSKI. Wait a minute. Do you dispute having said industry would come back screaming?

Mr. GARFINKEL. I do not recall whether I said those exact words. I would certainly love to see the context in which I said those words and any other words that Mr. Fitzgerald wants to quote for me. I always prefer to be quoted by speaking for myself rather than having members of the media or even members of the Congress have Mr. Fitzgerald quote for me.

Mr. SIKORSKI. Don't we all? We all want that.

Your statement tells us today that it is important to use "classifiable" because, for example, there is raw intelligence being gathered, and before it is marked classified, it is treated as classified, and that is what you are attempting to protect, correct?

Mr. GARFINKEL. That is correct.

Mr. SIKORSKI. As one example.

Mr. GARFINKEL. That is correct.

Mr. SIKORSKI. Now, contract employees can be put into the same situation.

Mr. GARFINKEL. Contract employees would almost never be subject to receiving raw intelligence.

Mr. SIKORSKI. Are you telling us that there are no contract employees at the Central Intelligence Agency?

Mr. GARFINKEL. Yes, but those contract employees would have signed a nondisclosure agreement other than the SF 189, for example, the Form 4193, that would make specific reference to classifiable information. So those same employees would have signed a form that includes that term.

Mr. SIKORSKI. So we have contract employees signing 189, "unclassifiable"?

Mr. GARFINKEL. We have contract employees who are signing nondisclosure agreements that include reference to "classifiable" information. We have some who have signed the SF 189.

Mr. SIKORSKI. I think I know what the answer is. We have everyone who is dealing with this raw intelligence signing "unclassifiable"?

Mr. GARFINKEL. I think that is fair to say.

Mr. SIKORSKI. Then we have a whole bunch of people, millions, who do not deal with raw intelligence who are signing "unclassifiable" because they are a federal employee, and probably a million contract employees who are not signing "unclassifiable" and not dealing with raw intelligence.

So your example does not help support the distinction between public and contract employee. You suggest elsewhere that the contractor or contract employee does not have original authority for classification. Therefore, they cannot be reasonably assigned the responsibility or liability for "classifiable" information.

Mr. GARFINKEL. There is a very real difference between the United States government, the Executive Branch, and its contractors with respect to classified information.

Mr. SIKORSKI. Well, let me talk about not the difference between the government and the contractors, but between the contract employees and the government employees with regard to classified information, just so we are talking apples and apples.

Mr. GARFINKEL. I do not think that you can distinguish those points of difference here because it is with respect to the fact that contractor employees may not generate new classified information that the term "classifiable"——

Mr. SIKORSKI. Wait. I do not want to interrupt you, but contract employees do not generate classified information?

Mr. GARFINKEL. I said they do not generate new classified information. In other words, original classified information.

Mr. SIKORSKI. Only technically, because they are not the original classifier, but you are surely not going to tell me that General Dynamics does not produce new diagrams of the most sophisticated Stealth submarine that become classified in the highest form, do you? Are you telling me they do not produce them?

Mr. GARFINKEL. Yes, they do produce them. They produce them under instructions that they receive from the agency that is contracted with them.

Mr. SIKORSKI. But they produce those new classified pieces of information.

Mr. GARFINKEL. Pursuant to instructions that they have received concerning the classification.

Mr. SIKORSKI. What difference does that make in terms of protecting that information?

Mr. GARFINKEL. It does not make any difference in terms of protecting that information, but it——

Mr. SIKORSKI. What difference does it mean in terms of signing SF 189?

Mr. GARFINKEL. The difference is that in the SF 189 we were intending to impart the concept that there is a great deal of information that is classified, but is unmarked, and that information, especially within the context of intelligence data and related data, is extraordinarily sensitive information and needs to be protected just like marked classified information.

Mr. SIKORSKI. What is the difference between General Dynamics's diagrams of their new super secret submarine and that raw intelligence data coming in from——

Mr. GARFINKEL. Because those diagrams are marked, Mr. Chairman. Those diagrams are marked pursuant to the instruction they received concerning the——

Mr. SIKORSKI. Who is marking them?

Mr. GARFINKEL. The contractor is marking them.

Mr. SIKORSKI. So the contractor is classifying data and producing new classified data.

Mr. GARFINKEL. The contractor is producing classified data, as instructed by the user agency.

Mr. SIKORSKI. And for some reason, because there is an instruction up here, the people below that are touching this stuff and are responsible for securing it and protecting it do not have to be worried about——

Mr. GARFINKEL. They have to be just as worried.

Mr. SIKORSKI. But they do not have to sign off on SF 189. You took "classifiable" away from them.

Mr. GARFINKEL. We have not taken away the concept of unmarked classified information.

Mr. SIKORSKI. You just have not stuck them with it.

Mr. GARFINKEL. They would still be liable, Mr. Chairman, if they were to disclose——

Mr. SIKORSKI. How would they be liable?

Mr. GARFINKEL. If they knew that information they possessed was classified information.

Mr. SIKORSKI. Classifiable.

Mr. GARFINKEL. Mr. Chairman, the definition that we have given "classifiable" is, as I have said in my testimony, a subset of classified information.

Mr. SIKORSKI. Wait a minute. Assuming that we accept that definition for the time being, they know it. They are liable. How are they liable?

Mr. GARFINKEL. For an unauthorized disclosure of classified information.

Mr. SIKORSKI. And how are they going to get "gotten"?

Mr. GARFINKEL. Presumably they would lose their security clearance.

Mr. SIKORSKI. And there may be criminal penalties?

Mr. GARFINKEL. There may be.

Mr. SIKORSKI. The system that you just told me was faulty a few minutes ago is now the system that is going to protect some of our most sensitive diagrams.

Mr. GARFINKEL. Mr. Chairman, a few minutes ago I said I believe that the criminal sanctions are faulty in that there is a no criminal sanction that specifically addresses the unauthorized disclosure of all classified information as a criminal violation.

Mr. SIKORSKI. Okay. But they are going to take away the criminal sanctions; civil and disciplinary sanctions are going to entail here. The same thing against the federal employee.

Now, tell me, please, the distinction between that employee for General Dynamics on a contract to the U.S. Navy and the federal employee who is working with them on the same diagrams. Tell me the distinction from a security, classified information position that requires the federal employee to sign off on classifiable, but not the contract employee.

Mr. GARFINKEL. There is no difference as far as potential liability is concerned.

Mr. SIKORSKI. Oh, yes, there is. They sign off on "classifiable," the federal employee.

Mr. GARFINKEL. "Classifiable" does not mean something that is outside the realm of "classified."

Mr. SIKORSKI. Then why is it in there and not in the contract employee form?

Mr. GARFINKEL. Because, Mr. Chairman——

Mr. SIKORSKI. Because industry would scream, and they would not accept it.

Mr. GARFINKEL. Because, Mr. Chairman, when we drafted the SF 189, there was a very strong belief that the concept of protecting unmarked classified information needed to be expressed.

That term was derived from a pre-existing form used within the intelligence community that also used the term "classifiable information" to express the requirements that unmarked classified information be protected.

Mr. SIKORSKI. Mr. Garfinkel, I am not going to make this statement as applied to you personally because I do not know if it is the case, and I would suspect it is not the case, but we have seen in this subcommittee different treatment for contract employees all the way down the line. They do not take drug tests to the extent that federal employees are now expected to take drug tests. They are treated dissimilarly now here under this classification system.

Even the form gathering shows the difference between the two groups even though the contract employee must sign a less objectionable form than the federal employee, a much higher percentage of federal employees have signed.

So let me just suggest that there is a pattern here that is not very seemly. I have spent a lot of time on this issue. Your logic behind making this distinction does not hold up, and I think you had better make changes, and if you do not the Congress is going to step in and make the changes for you, because federal and contract employees are doing the same thing. What is good for one set of people is good for another. What is good for the goose is good for the gander. If you are responsible for protecting this information, you have got to be responsible all the way down the line.

If this form is so important, then it had better be the same for both hands that are on that piece of paper. We can't have some artificial distinction made because private industry might not go along with SF 189, and if they do not go along, maybe they have a reason that you should consider.

Let me focus because of your response to the last question on the distinctions between different definitions. In the Federal Register, after the brouhaha, you defined classifiable material as information which meets the requirements for classification "but which as a result of negligence, time constraints, error, lack of opportunity, or oversight has not been marked as classified information."

In the fact sheet you included with a copy of your testimony, you claim that classifiable material is "unmarked information that already is classified or meets the standards for classification and is in the process of being classified."

Today you told us that classifiable information is classified information "that for some reason, whether by accident or design, does not contain the classification markings that are associated with its identification," and you go on, "and information that is not already classified, but is currently undergoing a classification determination," and there are, I think, two definitions in there.

And then you point in your testimony, as well, to the Department of Defense's handy little pamphlet, which is not so handy a pamphlet as it turns out. You said that is an easy reader guide to what is classifiable, but that definition is again dissimilar in part from the definitions you have already given us.

Now, I am a federal employee. I am asked to sign this form. What is the definition of "classifiable" that I sign to?

Mr. GARFINKEL. Mr. Chairman, I think all of those definitions are the same.

Mr. SIKORSKI. Oh, no.

Mr. GARFINKEL. One may be a little more elaborate than the other. The definition as it currently appears in the Federal Register, as published in the Federal Register, is the formal definition of

"classifiable information," but I would suggest that my statements elaborating on that definition are just as conclusive about what that information entails.

Mr. SIKORSKI. Let me just suggest that there are major conflicts. Now, I do not purport to be the best lawyer around. I do have some credentials in law. They are available to anyone who would like to look at them, but one of the first things I learned the first month in law school was in cannons of construction. The first cannon is that you take the meaning that is on the paper.

Let me just suggest that you have several different meanings on paper. The definition in the Federal Register does not suggest that material in the process of being classified is classifiable. That suggestion was first made in ISOO's fact sheet attached to a September 21 letter to Congresswoman Boxer.

That fact sheet states that material which fulfills all of the requirements for classification, but which is in the process of being so stamped, is covered by SF 189.

In today's testimony you now suggest that even material which has not yet been determined to fulfill the requirements for classification, but which is "undergoing a classification determination," is classifiable.

Mr. GARFINKEL. Mr. Chairman, there is no difference. If you look at the definition, it says that the term——

Mr. SIKORSKI. Which definition?

Mr. GARFINKEL. The definition that appears in the August 11 edition of the Federal Register.

It refers to information that meets all of the requirements for classification under Executive Order 12356. Executive Order 12356 is the current framework for our security classification system, and under that Executive Order there is a reference to the fact that when information is being considered for classification, when it is in the midst of a classification determination, it should be protected as if it were classified.

Mr. SIKORSKI. Thank you.

Mr. Garfinkel, Executive Order 12356 states, and you quoted in your testimony,

> officers and employees of the United States government and its contractors, licensees and grantees shall be subject to appropriate sanction if they knowingly, willfully or negligently disclose to unauthorized persons information properly classified under this order.

Mr. GARFINKEL. Mr. Chairman, the Executive Order also says,

> If 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 who shall make that determination within 30 days.

Mr. SIKORSKI. Okay. You have cited negligence, oversight, delay et cetera that have not hindered the determination process. Now, how does that fit in to your definition and this Executive Order?

Mr. GARFINKEL. Remember there are——

Mr. SIKORSKI. Wait a minute. Please answer the question.

Mr. GARFINKEL. Yes, I am trying to answer the question.

I have elaborated on the definition by suggesting that you have two categories of information that may fall within it. The smaller category is that which is undergoing a classification determination.

Mr. SIKORSKI. Wait a minute. I don't want to interrupt, but I want to keep track of you.

That is the part that is engaged by the second provision that you went on to quote, that you did not put in your testimony, from Executive Order 12356.

Mr. GARFINKEL. That is correct.

Mr. SIKORSKI. Okay. Now, the other?

Mr. GARFINKEL. Now, the other part is information that is classified information. For example, Mr. Chairman, if I were to reveal to you the source of some intelligence information, my oral presentation to you could hardly be marked. My words cannot be marked.

Mr. SIKORSKI. Now, wait. That was not my example, and that is specifically covered in the Executive Order, sources of intelligence information. My example is your example: negligence. Someone just did not mark it. Where is that in this Executive Order under properly classified or in the determination process?

Mr. GARFINKEL. The recitation——

Mr. SIKORSKI. You cannot answer it because it is not there, but the point of all of this is if it is not there, how am I to know what my liability is when I sign this form rather than lose my job?

Mr. GARFINKEL. Mr. Chairman, unmarked classified information could be unmarked for a variety of reasons. For example, it may be impossible to mark it.

Mr. SIKORSKI. I understand that.

Mr. GARFINKEL. It may be unmarked because I——

Mr. SIKORSKI. How about the negligence point?

Mr. GARFINKEL. Yes, I may take classified information and negligently fail to mark that information. I may keep it around my desk and not safeguard it properly and act negligently both with respect to its storage and with respect to its markings, and if I disclose that information, and I know that it is classified information, then I have acted improperly. I have disclosed without authority classified information, and I am subject to sanction under this agreement.

Mr. SIKORSKI. And are you telling me that the employee who has not been negligent is also liable?

Mr. GARFINKEL. We have said repeatedly in the definition and in my explanation that there is a knowledge requirement that must exist with respect to the unauthorized disclosure of classified information for this form to take effect toward liability.

Mr. SIKORSKI. You have also said that the reason that contract employees do not have to sign off on classifiable is that they do not know how to classify information.

Mr. GARFINKEL. I have not said that.

Mr. SIKORSKI. They do not have the authority to classify. They have not read this handy-dandy guide to just the index of security classifications.

Mr. GARFINKEL. Mr. Chairman, it is absurd to suggest that any one employee is subjected to one-one millionth of the information that is covered in the guides that are listed in that index. We all must have a "need-to-know" classified information before we can have access to it.

Just because I am a cleared employee does not mean that I can have access to all of the information covered by all of those classification guides.

Mr. SIKORSKI. You have too many definitions of one word. You know the Dewey problem solving process says you identify a problem and its nature, and then you list the alternatives to solve it, and you do a cost-benefit analysis and the rest of it.

You have identified some kind of failure here. It has not been pinned on federal employees. But they have been told to sign a form saying they will not disclose classifiable information, and yet we are not going to define that term.

Mr. GARFINKEL. Mr. Chairman, we have consistently defined the term "classifiable."

Mr. SIKORSKI. You have consistently defined the term differently each time you defined it.

Mr. GARFINKEL. We have not, sir.

Mr. SIKORSKI. You have, too. It is right here in the record, right here in the record.

Mr. GARFINKEL. We have consistently defined the term to refer to unmarked material that meets the criteria for classification, unmarked classified information.

Mr. SIKORSKI. Oh, wait a minute. Wait a minute.

Mr. GARFINKEL. And upon request——

Mr. SIKORSKI. Wait a minute. I think I feel a new definition coming on. Now we are just talking about unmarked classified information?

Mr. GARFINKEL. Mr. Chairman, for purposes of this I want to explain that major category of the information. There is a very minor, and we have discussed this information that is in the process of being classified, and I hope that we can agree that that information needs to be protected. I would hope that we can agree to that.

Mr. SIKORSKI. We can agree that national security, defense, intelligence sources and all of the information that I have seen, cryptology and other things, listed in the Executive Order need to be protected. But getting from that point to Point B ain't easy, and it is filled with all kinds of different definitions, which are appropriate, and I am not ridiculing those, but my point is you are asking me as a GS-blank to sign on the dotted line for liability for classifiable information, and you have not been able to come up with a definition of that that is finite and absolute and says these are the parameters of my liability.

I think that is wrong, and I think it is unfair, and I think it is even more unfair then to pull that requirement for contract employees doing the same thing.

On these definitions, you have danced very well, the best polkaing I have seen since Minnesota, but there are some problems here because they affect people's security clearances, their jobs, their livelihood, their capacity to do the things we dream about doing as Americans: buying a house, sending kids to college, going on a vacation, very personal things.

And I am suggesting to you, as others have, and as Senator Grassley has in much more forceful language, that you have got to

tell people what they are liable for, and if you do not it is wrong, and it is not going to be enforceable.

I promised you a chance to clean up.

Mr. GARFINKEL. There is only one thread that I did want to touch up, and that is when you were talking about the scope of the problem, the number of unauthorized disclosures. I would suggest that another subcommittee of this committee, Ms. Schroeder's subcommittee, was provided four years ago with an elaborate classified briefing about the scope of that problem and follow-up. Although her committee initially expressed the same concerns you did, that the problem was perhaps overblown; following that classified briefing, I did not see that committee come out with any language critical of the need to protect against unauthorized disclosures of classified information.

Mr. SIKORSKI. No one is disagreeing with that, Mr. Garfinkel, and I think that is quite a fine tactic, to retreat behind the national security. It has worked often, and I know it is sincere.

Mr. GARFINKEL. And it is not just a tactic, sir. It is something more than just a tactic if it is sincere.

Mr. SIKORSKI. But it is a tactic not to respond to the real issues that are here before us. To get from Point A to Point B requires more than waving the flag and saying, "We have got to protect things."

Mr. GARFINKEL. Mr. Chairman, we are currently having this very form that you feel is so defective litigated.

Mr. SIKORSKI. Let me ask you a question. Why didn't you embrace Senator Grassley's definition which you apparently agreed to with him before it was blown out of the water back up on Pennsylvania Avenue?

Mr. GARFINKEL. I would suggest that we are very close with Senator Grassley to agreeing on a definition. There was a misunderstanding.

Mr. SIKORSKI. He is hot as Hades on that.

Mr. GARFINKEL. Well, I would suggest that those of us in the Executive Branch feel very similarly to the way he feels, and apparently there has been a misunderstanding over our negotiations over this form, and I suspect that we are not that far apart from coming into some kind of an agreement with him.

Mr. SIKORSKI. Ms. Buck, you have been patient, and I appreciate your willingness to come here. I have not understood why the Air Force uses the McCarthyesque statement that any reluctance to sign this form will be considered a reluctance to protect classified information, something to that effect.

Ms. BUCK. Yes, sir. I do not agree with that phrase either, and we deleted that from the regulations.

Mr. SIKORSKI. Good, and what happens to people that have signed or people are not signing these forms now in the Air Force?

Ms. BUCK. People may sign them. If they do not sign them, then no action is taken with respect to their security clearance, in accordance with the instructions that we received from ISOO.

Mr. SIKORSKI. How about the people who signed, and this is a Navy problem, too, who are not required to sign? What happens to those disclosure agreements?

I understand that everyone in some areas was asked to sign including people who do not have security clearances and were not dealing with classified information.

Ms. BUCK. If they ask for the forms back, they can have them back.

Mr. SIKORSKI. I am going to have to go vote. Mr. Garfinkel, I am bothered by a statement you have made repeatedly that SF 189 does not conflict with the whistle-blower protection laws and the code of ethics. Is that a fair description of your view?

Mr. GARFINKEL. That is a fair summary.

Mr. SIKORSKI. Yet you are quoted in a newspaper article as saying that I will quote: "Garfinkel himself said recently the use of a contract involves 'no conflict in law, no statute. You just show the form to a judge and say the agreement has been violated. You don't have to argue principles.' "

Mr. GARFINKEL. That is not my quote. That may be Mr. Fitzgerald's quote of Mr. Garfinkel.

Mr. SIKORSKI. No, no. It is a quote by Mr. Ross Gilbspan of you in a September 13, 1987, Boston Sunday Globe.

Mr. GARFINKEL. Well, I have never spoken to that gentleman that I recall.

Mr. SIKORSKI. The reason I raise it is that in your testimony you seem to want to make us feel good by suggesting that there is going to be some clear understanding of what classifiability and classified and negligence mean and that only disclosure of information a person knew or should have known was classified would trigger any kind of action pursuant to this form. This kind of statement, which you say is not yours, indicates——

Mr. GARFINKEL. Could you read that statement?

Mr. SIKORSKI. It is just the contract business, that the reason we have got this form is we want to eliminate the necessity to prove all the statutory elements. It states: "Mr. Garfinkel himself said recently the use of a contract involves 'no common law, no statute. You just show the form to a judge and say the agreement has been violated. You do not have to argue principles.' "

Mr. GARFINKEL. Well, I never said that. I know I never said that.

I think it is fair to suggest that the reason there is a standard form is in order that we are in a better position to understand the context of it with respect to potential action taken in a civil or administrative context.

Mr. SIKORSKI. Let me give you an opportunity. I have about five pages of excellent questions that I never got to, for good reason, but I would like to give them to you and ask you to respond for the record with an appropriate amount of time so that you can do it. These are good questions that I think will help you see the light. I do not mean that in a derogatory sense. I think that you have a tough job, and I want to help you work on it so that we can all go on to other issues. I thank both of you for assisting the subcommittee and look forward to working with you on it.

Thank you.

Mr. GARFINKEL. Thank you.

Ms. BUCK. Thank you.

[Whereupon, a short recess was taken.]

Mr. SIKORSKI. I apologize for the disruption. I am sorry also that Mr. Garfinkel and Ms. Buck did not get the impression that I wanted them to stay around and answer questions. But I wanted to finish with them so that they could leave, and I guess that was taken care of.

The next panel consists of the President of the National Federation of Federal Employees and the Deputy General Counsel of the American Federation of Government Employees.

Mr. James Peirce is President of the National Federation of Federal Employees. He has been a forceful and highly effective leader and advocate of the more than 150,000 employees that NFFE represents. This was the first union to file suit against the use of this form, and the subcommittee thanks you for being here this morning to discuss this important issue.

Mr. PEIRCE. Thank you.

Mr. SIKORSKI. Your whole statement, including attachments, will be placed in the record, and you can do what you want with your time.

STATEMENTS OF A PANEL CONSISTING OF JAMES PEIRCE, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES; AND CHARLES HOBBIE, DEPUTY GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. PEIRCE. Thank you, Mr. Chairman. I was going to request that, and I will just give you a very brief summary.

I want to thank you for the opportunity to appear before the committee and discuss our concerns relative to the Federal Government's continued enforcement of SF 189.

NFFE has actively pursued relief from what we view as the extremely punitive nature of the form and its effect on federal workers. NFFE represents approximately 75,000 civilian employees throughout DOD. Many of our bargaining unit members hold security clearances and have been required to sign the SF 189.

While executive agencies were first informed of the necessity of seeking signatures on SF 189 as early as 1983, many have not complied with this requirement until six months ago. Since the increased enforcement of SF 189, we have received numerous letters and telephone calls from employees expressing grave doubts about the validity and effects of the form.

By far, the most critical issue is the requirement that employees agree not to disclose classifiable information. As you know, there is nothing contained in SF 189 to define "classifiable."

NFFE members' questions regarding the scope and meaning of the agreement have not been satisfactorily answered by their employing agencies. However, many have signed the agreement because of explicit threats of having their security clearances revoked, thus leading to a possible job loss.

In response to the widespread concerns of our membership, NFFE filed a lawsuit August 17, 1987 in the U.S. District Court for the District of Columbia regarding the validity of SF 189. We are seeking a declaratory judgment on the merits of the case and a permanent injunction to stop the use of SF 189.

We have not yet received a response from the defendants to the complaint.

Our lawsuit contains two main contentions. First, we have alleged that SF 189, as currently written, is arbitrary, capricious and contrary to law. For example, NFFE believes that the prohibition against disclosure of classifiable information runs counter to protections afforded to federal employees in the areas of whistle-blowing and freedom of communication with members of Congress.

Secondly, we believe that the restrictions on disclosure of information violates certain constitutional protections.

The imprecise nature of the term "classifiable" effectively presents an individual from disclosing any information, thus having a chilling effect on the exercise of an individual's First Amendment right of free speech.

The Internal Security Oversight Office has issued instructions to executive agencies directing that pending the outcome of NFFE's litigation, security clearances should not be revoked as a result of an employee's failure to sign the form. However, SF 189 is still in use, and the issue remains far from settled.

Some have proposed defining "classifiable" in SF 189 in order to eliminate some uncertainty, but we believe that the term "classifiable" can never be defined with enough precision or specificity to cure its constitutional failings.

Mr. Chairman, here I am going to depart from what I was going to say after listening to some of what I heard this morning.

Mr. SIKORSKI. Before you do, the specifics of Dr. Muench's case are detailed in your prepared statement, and we will put this in the record right now as part of your statement. It is enlightening and a good example of what can happen under this process, but I do not think we need to recite the facts.

Mr. PEIRCE. I was not going to.

Mr. SIKORSKI. Good.

Mr. PEIRCE. Thank you.

Let me preface what I am going to say with the fact that my civil service, federal service was with the Department of Defense, specifically Air Force, and during that service, I carried a top secret clearance. I worked with weapons systems which in effect were classified.

In my experience, there was never really a question as to what was classified. It even went to the extent, and I performed a lot of evaluations which were not on classified materials but when the General told me, "This is classified until I clear it," it is still classified, and quite frankly, most of the time I found out it was classified because he wanted to change what I had in there. But in any sense of the word, when he said it was classified, I understood it was classified.

Now, to go a little bit further, I have found in the years that there is a general trend in government to include a term or terms more or less because they do not seem to be able to define everything specifically they want to include, and there is always a Catch-22 attached to it. Later on if I decide, well, that should have been there, now I can slide it in there. It is a catch-all, so to speak, and I think this term "classifiable" is just, in fact, that.

It is a catch-all. It is something they do not know really, and they cannot define it. I suspect that the term "classifiable" was intentionally put in so that they could have those varying interpretations applied, and if the specificity had prevailed and the definition was put in there, then I figure probably the term "classifiable" would not need to be there because I think it could have been included under what is already there.

I just look at this thing, number one, and what I have heard so far and what we have seen, as another catch-all term that they can interpret time and time again, and I think any attempt, in fact, to define "classifiable" is not really going to get to the core of the problem.

I would like to end merely by saying that Dr. Muench's statement is in here. I think it is very revealing, and I will conclude my statement there and will be happy to answer any questions.

[The prepared statement of James Peirce follows:]

STATEMENT BY

THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. Chairman and Subcommittee Members,

On behalf of the National Federation of Federal Employees, I appreciate the opportunity to appear before the Subcommittee to discuss our concerns about the Federal Government's continued enforcement of the Standard Form 189, the Classified Information Nondisclosure Agreement. NFFE has actively pursued relief from what we view as the extremely punitive nature of the form and its effect on Federal workers.

NFFE represents approximately 75,000 civilian employees throughout the Department of Defense. Many of our bargaining unit members hold security clearances and have been required to sign the SF-189. While executive agencies were first informed of the necessity of seeking signatures on SF-189 in 1983 and 1984, many had not complied with this requirement until six months ago. This delay was due to an administrative decision by the Information Security Oversight Office (ISOO) to allow them until the end of 1987 to obtain signatures.

As more and more of our bargaining unit members were required to sign SF-189, NFFE received numerous letters and telephone calls from employees expressing grave doubts about the validity and effects of the form. By far, the most critical issue was the requirement that employees agree not to disclose "classifiable" information. As you know, there is nothing contained in SF-189 to define "classifiable." Members informed us that their questions regarding the scope and meaning of the agreement were not satisfactorily answered by their employing agencies. However, many signed the agreement because of the explicit threat of having their security clearances revoked, thus leading to job loss.

In response to the widespread concerns of our membership, NFFE filed a lawsuit August 17, 1987 in the US District Court for the District of Columbia regarding the validity of SF-189. In our initial pleading, we named the ISOO and the General Services Administration as defendants, because of their delegated responsibility for the development and use of SF-189. We later amended the complaint to name specifically the Departments of Defense, Army, Navy, and Air Force. This change was found to be necessary as a result of information we received indicating that these departments had unique methods of implementation which needed to be addressed.

We are seeking a declaratory judgment on the merits of the case and a permanent injunction to stop the use of SF-189. We have not yet received a response from the defendants to the complaint.

Our lawsuit contains two main contentions. First, we have alleged that the SF-189 as currently written is arbitrary, capricious, and contrary to law. For example, NFFE believes that the prohibition against disclosure of classifiable information runs counter to protections afforded to Federal employees in the areas of whistleblowing (5 U.S.C. sec. 2302 (b) (8)) and freedom to communicate with Members of Congress (5 U.S.C. sec. 7211).

Secondly, we believe that the restrictions on disclosure of information violate certain constitutional protections. The imprecise nature of the term "classifiable" effectively prevents an individual from disclosing any information, thus having a chilling effect on the exercise of an individual's First Amendment right to free speech. In addition, the form is so vague and overbroad that employees are not given notice of what information they must safeguard as if it were classified. Thus, Fifth Amendment rights to due process have also been violated.

NFFE was pleased to find that ISOO issued instructions to executive agencies to direct that security clearances should not be revoked as a result of an employee's failure to sign the SF-189, pending the outcome of our litigation. However, SF-189 is still in use and the issue remains far from settled. While it has been proposed by some that defining "classifiable" in the SF-189 might eliminate some uncertainty, it is NFFE's position that the term "classifiable" can never be defined with enough precision to cure its constitutional frailties.

Executive Order 12356 requires that classified information be marked as such. By using the term "classifiable," an individual would be unfairly burdened with determining what information should be safeguarded, without protecting him or her from the serious consequences arising from a change in a particular document's status at a later date. Defining "classifiable" as unmarked information that is already classified does not comply with the terms of the Executive Order, nor resolve the practical difficulties for the employee.

For example, Stuart Muench, an employee represented by NFFE Local 1384 at Hanscom Air Force Base, outside Boston, Massachusetts, has undergone a significant amount of difficulty recently because of the Administration's enforcement of SF-189.

Dr. Muench is a GS-14 atmospheric scientist with over 30 years of experience. A conscientious worker, Dr. Muench has received numerous performance awards. In addition, his work usually does not involve using classified materials.

Dr. Muench first received the SF-189 September 8, 1986, and was given four days in which to sign the form. The accompanying letter from management indicated that employees did have the right to refuse to sign the form, but that they could suffer the loss of their security clearances if they did so, in turn jeopardizing their careers.

No other materials nor instructions were made available to employees when the form was distributed. Employees with questions about related documents were forced to search files in other buildings at Hanscom Air Force Base and even local public libraries. No assistance was offered by any supervisor or Air Force official.

Upon receiving the SF-189, Dr. Muench researched Executive Order 12356 in order to find a definition of the term "classifiable," which was the chief obstacle to signing the form. When he found no definition, he decided that SF-189 was too broad a commitment to make - as he put it, "It was akin to signing a blank check for people I did not know." Having no instructions to the contrary, Dr. Muench scratched out the term "classifiable" from his copy of the form SF-189, then signed the agreement and turned it in with a letter attached explaining his reasons for doing so.

Two weeks later, the form was returned with a verbal explanation that it was unacceptable. (Since then, Dr. Muench has learned that the SF-189 version for contractors does not contain "classifiable" and is similar to that form he modified and signed. The irony is that Dr. Muench could have resigned from Hanscom Air Force Base, joined a local research group with a government contract, signed the contractor's SF-189, and performed the same work he has since been doing.)

On October 3, 1986, Dr. Muench was advised that his failure to sign the SF-189 would result in the revocation of his security clearance. Two months later, on December 8, 1986, Dr. Muench's supervisor presented him with a letter stating that action had indeed been taken to revoke his security clearance, and that from that time on, he was not cleared to receive classified information. Dr. Muench later learned, however, that this letter was only a scare tactic intended to force him to sign the form. No action was ever taken, even temporarily, to deny his access to classified information.

Dr. Muench spent the next several months attempting to obtain answers to the many questions he had regarding the form and the ultimate effect on his career, including work he might perform following his retirement from government service. On April 3, 1987, Dr. Muench met with his supervisor, as well as several Hanscom AFB officials. At this meeting, he was apprised of the procedure for revoking

his security clearance, which included that neither he nor counsel could be present, that no appeals would be permitted, nor could he receive any such status again for at least three years.

In addition, Dr. Muench and the Air Force officials discussed that a decision would have to be made whether employees without clearances could work in some buildings and groups as those with clearances. Dr. Muench understood that he could possibly be forced to retire. At the end of the meeting, the Air Force officials agreed that no recommendation for action to revoke Dr. Muench's security clearance would be taken while he sought answers both inside and outside the Air Force. The officials did not believe that they could obtain answers through the normal chain of command. It is important to note that no official memorandum was made of this meeting. The only notes taken were those by Dr. Muench.

Dr. Muench then continued his inquiry of various offices, including the Air Force Judge Advocate General's office, the Information Security Oversight Office, as well as offices of his United States Senators. On June 4, 1987, Dr. Muench received a letter from the Commander at Air Force Geophysics Laboratory that he would take action after thirty days to request that Dr. Muench's security clearance be revoked.

The thirty days was ostensibly provided as an opportunity for Dr. Muench to provide materials for the deciding official to review. Dr. Muench decided he could not sign the form without contradicting its terms: item 10 of the form specifically states that the individual's questions have been satisfactorily answered. At this time, Dr. Muench had not yet received answers from any of the offices to which he had written.

On June 5, 1987, Dr. Muench began receiving some responses from his inquiries, none of which answered his questions. The Air Force Judge Advocate General's office explained that he had the option of obtaining legal counsel, at his own expense, of course, and could certainly elect not to sign the form. However, he would still face the loss of his security clearance, and removal or reassignment, if warranted.

As a final resort, Dr. Muench employed private legal counsel, who advised him to sign the form with an explanation of his concerns. His attorney's interpretation was that by explaining his inability to obtain answers, he would not be subject to prosecution for perjury. In addition, he was advised that the terms of the agreement not specifically referenced in the United States Code would be difficult to enforce since Dr. Muench had signed the form under duress.

Dr. Muench signed SF-189 on June 26, 1987, and attached an explanation of his concerns. When he arrived home that evening, he received a letter from ISOO answering his questions. The response was mixed: some of their interpretations were reassuring, some were not. ISOO informed Dr. Muench that the form only pertained to information learned in the course of his employment or other contractual relationship with an agency granting him a clearance. However, in ISOO's opinion, the attempted definition of "classifiable" as set forth in DOD document 5200.1-PH-1 would not be legally binding. It was clear to Dr. Muench that an individual could be subjected to arbitrary definitions of the term at any time in the individual's future.

Dr. Muench's relationship with his supervisors deteriorated when he was interviewed by the Boston Globe. One of Dr. Muench's comments to the newspaper was his concern that he would be removed if his security clearance were revoked for failure to sign the form. The branch chief felt that the installation would always be able to employ Dr. Muench even if his clearance were revoked, despite the documents he received from management that without a security clearance, no guarantees of employment could exist.

It was for Dr. Muench and the thousands of Federal workers like him that NFFE initiated its lawsuit to limit the use of SF-189, as it is now written. While NFFE has every expectation that we will be successful in our litigation, we would welcome the assistance of Congress in protecting the rights of Federal workers. I thank the subcommittee for its prompt attention to this critical issue, and I look forward to working with you as progress on the issue continues.

That concludes my statement. I will be happy to answer any questions.

Mr. SIKORSKI. Thank you.

We will hear Mr. Hobbie, and then we will deal with questions.

Charles Hobbie is Deputy General Counsel at the American Federation of Government Employees, and is also an advocate for federal employees. Like NFFE, AFGE has filed suit against the use of SF 189.

The subcommittee thanks you for being here this morning to discuss this important issue. I have the statement of Ken Blaylock, the President of AFGE. You can summarize however you want.

STATEMENT OF CHARLES HOBBIE, DEPUTY GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. HOBBIE. Thank you, Mr. Chairman.

Ken Blaylock has asked me initially to express his regrets that he could not be here today. He has asked me to stand in his place as Deputy General Counsel of AFGE.

AFGE is the exclusive representative of approximately 700,000 federal and District of Columbia government employees. Approximately half of these are employed in the Department of Defense or its component activities.

I appreciate the opportunity to appear before this subcommittee this morning to express our opposition to the administration's nondisclosure agreements.

While there may be other nondisclosure agreements, our greatest concern and the focus of this statement is on Forms 189 and 4193. The genesis of these forms is National Security Decision Directive 84, issued by the Director of ISOO and signed by the President. It requires all persons with authorized access to classified information to sign a nondisclosure agreement, Standard Form 189, as a condition of access to such information.

It also requires all person with access to sensitive compartmented information, SCI, to sign a nondisclosure agreement providing for mandatory, life-long, pre-publication review as a condition of access to such information and other classified information. That form, again, is Standard Form 4193.

Our country clearly needs to protect and safeguard vital and properly classified national security information, but at the same time, these national security needs must be balanced against the need for information in a properly functioning democracy.

All too often, as we know, in the past protecting national security has been used to cover up governmental actions which were not related to national security, but were, instead, embarrassing or politically harmful. We have already touched on a number of those situations in testimony today.

Congress, in recognition of this history, has specifically enacted legislation, such as the Freedom of Information Act, and included whistle- blower protections in the Civil Service Reform Act of 1978. The clear intent of such legislation is to insure that the public has full knowledge of governmental actions within the legitimate constraints of national security, with emphasis on "legitimate constraints of national security."

The nondisclosure forms go beyond national security interests to chill and suppress federal employee disclosure of mismanagement,

waste, fraud, abuse of authority, and danger to public health and safety. Indeed, the nondisclosure agreements are unnecessary since the existing legal framework already prohibits improper disclosure.

The debate today and before this time over these forms has focused on the term "classifiable." The requirement to sign a form pledging not to release classifiable information is vague, overly broad, and wholly ambiguous and, therefore, violates constitutional protections of free speech, due process, and the right to petition Congress.

The prohibition against disclosure of information not presently classified by authorized officials, but which may subsequently be construed as classified, unreasonably inhibits legitimate public debate.

The standard form makes an employee liable for releasing information from public sources which later becomes classified. This is a totally unreasonable standard for employees to meet.

Moreover, compelling the signing of these forms with their vague terms, such as "classifiable" and "indirect disclosure," which is used in the Standard Form 4193, violates the employee's Fifth Amendment protections against deprivation of liberty and property interests without due process.

The "indirect disclosure" language, for example, subjects an employee to civil or criminal liability for a proper disclosure, for example to a Congress person, which long afterwards and through no action by the employee is made public.

Subjecting employees to the loss of their security clearance and termination without prior notice or a hearing also violates the due process clause. I might interject here we had testimony this morning from Mr. Brase where he, in fact, signed one of these forms. I have seen in various papers in the course of preparing for our court case that even the fact that an employee has been required to sign the form may be classified information. So Mr. Brase by testifying this morning that he has signed that form could be found to be guilty of an unauthorized disclosure.

Since the initiation of lawsuits challenging these forms, there has been considerable effort by the administration to acceptably redefine the term "classifiable," as we have heard. However, this new definition is still lacking.

Employees who disclose information are liable if they know or should have known such information was already classified, meets the standards for classification or is in the process of being classified. This slight amendment of the regulations, as characterized by the Director of ISOO in an August 21, 1987 letter, still demands judgment and speculation by the employee on the standards for classification, which, of course, is a matter generally entrusted to an expert classifier.

Moreover, in that same letter, the Director of ISOO begrudgingly offers that any modification to the form and to the 189 program is just a "temporary accommodation" to recent lawsuits challenging this entire scheme.

Both standard forms also suffer from other serious constitutional and statutory flaws. The imposition of Standard Form 189 and Standard Form 4193 inhibits the lawful disclosure of violations of law, waste of funds, and abuse of authority by contradicting the

whistle-blower protections provided for in the Civil Service Reform Act.

The prohibited personnel practices component of that Act expressly protects the right of employees to make such disclosures to the public if such disclosures are 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 security or the conduct of foreign affairs.

Standard Forms 189 and 4193 are not laws or Executive Orders which may constrain the availability of these whistle-blower protections with respect to general disclosures to the public, nor is National Security Decision Directive 84, the so-called authority for these nondisclosure agreements, a law or Executive Order.

As that directive clearly provides, its terms are in addition to Executive Order 12356. Nothing in Executive Order 12356 requires nondisclosure agreements of this nature.

Ironically, as you know, Mr. Chairman, the Special Counsel has refused to take any initiative whatsoever in seeking stays against these forms, nor has the Special Counsel of the Merit Systems Protection Board taken any actions to stop the threatened or actual revocation of clearances and consequential job displacements when an employee refuses to sign the forms. The coercively obtained renunciation of lawful rights to disclose gross abuses in government, coupled with the Special Counsel's continued reluctance to support these rights, makes re-evaluation of these forms particularly compelling.

Similarly, title 5, section 7211 of the U.S. Code, provides that the right of federal employees to petition or furnish information to Congress may not be interfered with or denied. The blanket prohibition in Standard Form 189 and Standard Form 4193 against disclosing classified or classifiable information will inevitably have the effect of restricting information to Congress.

Yet Public Law 96-303, codified at 5 USC 301, the Code of Ethics for Government Service to which all federal employees are bound, requires any federal employee to "expose corruption whenever discovered." Without further qualification, this could potentially conflict, obviously, with the requirements of the nondisclosure forms.

Moreover, the Freedom of Information Act permits the withholding of national security information only if it is required by Executive Order to be kept secret and if it is, in fact, properly classified pursuant to such an order. The prohibition in the standard forms of disclosure of classifiable information is not consistent with the Act, which requires an actual classification prior to any withholding of information. The standard forms do not take into account the propriety or accuracy of the classification and thus compel withholding of information even if such information has not been properly classified pursuant to Executive Order.

The forms also do not acknowledge the proper authority for determining the property rights of the writings and works of federal employees. The copyright clause of the Constitution, Article I, Section 8, Clause 8 confers upon Congress alone the authority to secure exclusive rights to particular writings and discoveries. The compelled relinquishment of this right by the two forms we have

mentioned is an unlawful assumption of the duties of Congress by the Executive.

I would also like to comment very briefly on the life-time, pre-publication review requirement for employees with special compartmented information access as contained in Form 4193. While this pre-publication review provision does not appear on the face of the Standard Form 189, the Department of Defense has indicated in its Pamphlet 5200.1-PH that some agency regulations in effect as of 1983 required employees with any clearance to submit any and all materials for pre-publication review.

Indeed, the required authorization in the Standard Form 189 that the government may seek injunctive relief against any possible or perceived disclosure of classified or classifiable information is, in essence, an imposition of a blanket pre-publication requirement.

The requirement of pre-publication review constitutes an unlawful prior restraint on the exercise of First Amendment rights. The administration had exceeded its authority by continuing to use Standard Form 4193.

In the latter part of 1984, the President specifically withdrew a paragraph from the National Security Decision Directive that formulated the authority for pre-publication review agreements. Moreover, the President declared his intent not to reinstate that paragraph and to place a moratorium on nondisclosure agreements with pre-publication review. However, the administration in an apparent end run has now resurrected a 1981 version of the form with the same pre-publication provision. The continued use of this form is without statutory or executive authority and contrary to the President's declaration to Congress.

Finally, there is ample authority in the government's current arsenal of legal remedies to adequately redress breaches of national security. There are specific laws and regulations that prohibit the unauthorized disclosure of classified information, including the Intelligence Identities Protection Act of 1982 and Titles 18 and 50 of the U.S. Code.

Section 7532 of Title 5 permits the head of an agency to immediately suspend without pay and remove an employee of his agency when he considers that action necessary in the interest of national security.

Criminal statutes cover a wide array of such activities. If the administration seeks changes in the law, the proper vehicle is through Congress, not through a unilateral usurping of congressional law-making powers.

AFGE believes that the use of the nondisclosure agreements is a veiled effort to undue the whistle-blowing protections of the Reform Act and will chill the exercise of free speech. If a disclosure is truly illegal and not simply embarrassing to political interests, there already exists an adequate administrative and criminal framework to redress the problem.

I thank you, Mr. Chairman, for holding this hearing and bringing this matter to the attention of Congress and the public. We look forward to working with you and your committee on future actions to safeguard the rights of current and future federal employees.

And I would be glad also to respond to any questions that you may have.

Mr. SIKORSKI. Thank you.

You raised a curious point at the end that should not go unnoticed about the actual legal authority to implement these forms. I have mentioned I have five pages, actually ten pages of single-spaced questions dealing with conflicts of laws, property issues, contract issues, employee rights, effect on employees, indirect disclosure, the use of "classifiable," flow of information to Congress, the whistle-blower issue, implementation of SF 189 and the need for the 189 form in the first place.

It is interesting. I saved you all from that discussion about the real lack of statutory authority to proceed with SF 189 and how, if it is currently employed or if it is permanently employed at all, it raises major logical and legal problems concerning its interplay with other laws and regulations, such as the Code of Ethics.

What is the current status of your lawsuit?

Ms. BODLEY. The National Federation of Federal Employees is expecting a response from the government any day now. They had until the end of this week or early next week to reply to our complaint.

Mr. SIKORSKI. They have not complied at all?

Ms. BODLEY. No, not yet.

Mr. SIKORSKI. When does the time toll?

Ms. BODLEY. It would be 60 days from August 17th.

Mr. SIKORSKI. And that is here?

Ms. BODLEY. It is in the United States District Court for the District of Columbia, before Judge Gasch.

Mr. SIKORSKI. When can you begin discovery?

Ms. BODLEY. NFFE has already filed requests for discovery. So those are outstanding at this point, though they are just recently outstanding.

Mr. SIKORSKI. See if you get answers sooner than I do.

What is Dr. Muench's current situation?

Ms. BODLEY. Dr. Muench, as I understand, has not suffered from any adverse action due his refusal to sign the form. He was informed that his security clearance would be revoked, but, as far as I know, it has not, in fact, been revoked, and so he is in a holding pattern right now.

Mr. SIKORSKI. The policy, as I understand it, is that any attempts to revoke clearances for refusal to sign SF 189 have been suspended so that federal employees who question the form will not have their clearances revoked. But as with Mr. Brase, more subtle penalties that can apply.

Are you aware of any of the members of your two unions who have faced this for failure to sign SF 189?

Mr. PEIRCE. No further than what we have already indicated.

Let me add one thing, though, to Dr. Muench. We have been apprised by him that there has been a serious impact on his relationship with his supervisor, and this is something that normally happens when somebody is exercising their rights. Of course, we feel it should not.

Mr. SIKORSKI. But it is a natural reaction of supervisory personnel to take it personally.

Mr. PEIRCE. It seems to be, and it seems it is something they never forget then.

Mr. SIKORSKI. I asked the Air Force about what happens to someone who signed one of these forms who did not have a clearance and should not have been signing in the first place, and was told that they can receive the forms back.

I am also told, although this was not part of the testimony, that whether they signed or refused to sign, it is still marked on their record even though they should not have been asked to sign it in the first place.

Mr. HOBBIE. I could address your question also, Mr. Chairman.

Mr. SIKORSKI. Yes.

Mr. HOBBIE. Judging by the number of inquiries we have had from our local representatives in the field, I would say that although I am aware of no direct personnel actions that have been taken, certainly the potential is there, and our indications are that everybody in the field is expecting to have these kinds of adverse effects on their careers if they, in fact, refuse to sign these forms.

So we have advised people as we normally do to comply with the existing requirement and then grieve afterwards.

Mr. SIKORSKI. Let me just point out that we focused in this hearing on the numbers and the supposed need for doing this in the first place. I was surprised that the numbers are pretty small, and the data pretty unimpressive. It is not that classified materials' disclosure is a minor problem because the numbers are small, but that there is no linkage of the huge amount of classified information to a very large amount of leakage, and that leakage to the people who are being faced with this form. There is no linkage at all proven between federal employees that have to sign this form and the disclosures that have occurred.

We also focused on the discrimination between contract employees and direct federal employees, and we saw that what they do is similar work and just as classified and just as capable of classifying or not. Most employees of both categories do not have anything to do with classifying and consequently cannot be burdened with knowing what should or should not be classified other than what is marked or what they are told should be classified.

But even the difference in numbers who have signed is a sorry example of the discrimination affecting who is going to bear the burden of this new-found concern for security.

We looked at the floating definition of what is classifiable, and we saw several, at least four, and I think five, different, conflicting definitions.

We did not focus as much on the pre-publication review issue you discussed in your testimony. SF 4193 explicitly requires life-long, pre-publication review of writings for employees with access to sensitive, compartmented information, so-called SCI.

SF 189 requires such review if the definition of "classifiable" is so broad that no employee will feel comfortable revealing any information at all without previous clearance. That is mentioned in your lawsuits and needs to be re-explained because back a few years ago, the editorialists around the country went absolutely crazy on the pre-publication review requirements contained in NSDD-84.

As Chairman Brooks pointed out, both polygraphing and pre-publication review forms are now a much greater problem than before, but the perception, as opposed to the reality, is that the administration has changed its position. It is important that commentators understand that pre-publication review still exists and may be even a greater problem under SF 189.

The other issue that was focused on and needs to be raised again is whistle-blowing, one that I think we might have to take a look at just specifically as it relates to these forms. Your lawsuits discuss the conflicts between whistle-blower's statutes and these standard forms. Your people are caught in a bind.

The code of ethics and federal law protecting whistle-blowers mandate that disclosure occur. There is a legal obligation and liability. Then some form comes about that is not based in statute, that is not based in anything but a vague linkage to some Executive Order, and it seems to conflict with the language of that Executive Order, and then there is some definition later on in the Federal Register. The basis for the definition is not in the statute. The basis for the form is not in the statute or the Executive Order.

SF 189 requires employees to get authorization to reveal classified or classifiable information to anyone, presumably including Congress. Clearly, if an employee has to receive clearance from a supervisor before blowing the whistle, disclosures are much less likely to occur. In fact, the few that we get now, I would guess, would permanently cease.

I wanted to thank you for pointing out those two particular issues that need to be addressed. There is one more that will be addressed at the end, and that is this issue of indirect, unauthorized disclosure. You can disclose from A to B, but if B discloses to C, D, E or F, somehow under this form A is responsible. We will get to that at the end of the hearing.

Thank you.

Mr. PEIRCE. Mr. Chairman, one comment going back to something that you said previously relative to contractor employees. To me I have more of a fear in that direction than I do with federal employees because especially in the defense industrial establishment, they not only, I think, ofttimes breach it. I think they buy intelligence, buy secrets, what have you, by merely hiring certain employees and paying them more money.

I am not sure at least in my experience in the past that this is always with a company that necessarily has the clearance itself or has signed anything to effect on the thing. I see no difference between the two.

Mr. SIKORSKI. Maybe we are going to have to pursue this distinction between the contract and the direct federal employee. We are going to have to bring in some of these employees in sensitive areas and see if the public buys into this distinction.

I share your concern, and I have been looking at the confidential investigation of the Department of Energy, and there is nothing to make me feel good about any contractor security in very sensitive areas.

Thank you.

Our last witness is Tom Devine, who is the Director of the Government Accountability Project, GAP. Mr. Devine and GAP have

been helping hands to whistle-blowers and countless others who have stood up for their rights, even in the face of adverse action, as well as helpful assistants to congressional watchdog committees. For that the subcommittee thanks you, and we thank you for your testimony, for the hard work you have performed on the issue, and for your assistance to the subcommittee as we prepared for this hearing and carry forward on the issue.

STATEMENT OF TOM DEVINE, DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Thank you, Congressman.

My name is Thomas Devine, and I am the Legal Director of the Government Accountability Project.

I will submit my prepared statement for the record and will limit my oral testimony to a few rebuttal points that were not covered in your outstanding cross examination earlier.

Mr. SIKORSKI. Well, thank you for the comment, but more importantly for your summarizing your testimony.

Mr. DEVINE. Yes. I am hungry, too.

Mr. SIKORSKI. I know I am no person to talk about brevity.

Mr. DEVINE. The first point we should address is whether there is a need for SF 189. Of course, when you intrude on the Constitution, there must be a compelling need, and it cannot be based on adjectives.

Mr. Garfinkel attempted to give us a few figures this morning of 100 to 110 leaks per year, but even then he did not pinpoint it to leaks of unmarked, classifiable information, and that is the only new area that is covered by SF 189. We still have a vacuum of objective data on this issue.

Mr. SIKORSKI. In fact, they do not know. They do not know who leaked it in most of the instances and whether they were federal employees, and they do not know whether it was unmarked. I suspect that in most if not all instances it was classified information, not this "classifiable" information.

Mr. DEVINE. You are right. The administration has not come up with a single example of unmarked, sensitive information whose release requires this gag order.

Mr. SIKORSKI. The only releases that we are aware of, that are in the public domain, are those that come from people who have signed all of the orders and who have willingly signed the orders, people who for corrupt reasons that have sold secrets and are commercially engaged in the trading of secrets. Those people are not stopped by a piece of paper, a signature, or criminal or civil statutes already in existence.

Mr. DEVINE. If I were an individual who wanted to compromise national security, I would much prefer to defend myself under SF 189 than more reasonable statutes and laws in this area.

Second, if SF 189 only covers classified information, as Mr. Garfinkel asserted, we already have a pledge by all employees who have security clearances to respect the restrictions on disclosure of classified information. This new form is duplicative, if it is not ominous.

And, third, if there is a problem with unmarked information, the status quo has solved that one as well. The only context where SF 189 makes any sense is when an originator does not have the authority to mark information as classified. As Mr. Garfinkel told us, that is the context that always occurs with military contractors.

We solved that problem. On page 49 the industrial security manual for contractors gives instructions for that situation. The contractor should simply mark "classification determination pending. Protect as though classified." It is simple. We do not need to throw out the Constitution to deal with this problem, if it exists.

Turning to the spark for this dispute, Mr. Garfinkel stated that we have not had any controversy until recently. Well, that is because back in 1983, General Stillwell pledged that nondisclosure agreements would be limited to those with SCI clearance and then only new- hires.

Until Mr. Fitzgerald said, "No," we made the mistake of thinking the administration was telling the truth. I do not think that we should be criticized for that, except perhaps by those who are criticizing SF 189.

Mr. SIKORSKI. You are correct. The impression given by that testimony is that there is not a problem, that the Civil Service Subcommittee and others have looked at the situation and said that everything was great.

The fact is that that subcommittee did consider this situation and appropriate provisions of their report will be made part of the record. It found a lot wrong with NSDD–84 initially, but it was not made an issue earlier not because it was not a problem but because the pressure was not on. It was a decision to go full speed ahead for an annual report to the President that created the paper flurry that came to the attention of members of Congress.

Mr. DEVINE. The lack of pressure was based on a false premise from the administration, in my opinion.

The third area that I think we need to discuss is to come in from the twilight zone on this term "classifiable." Mr. Garfinkel defines it as unmarked, classified information. There is no such animal, in terms of liability. There is no basis in law for Mr. Garfinkel's definition.

In fact, he quoted from Executive Order 12356 on liability, and the key phrase there was that the information was properly classified. Well, the Executive Order tell us what it has to be to be properly classified. Section 1.5 requires identification and marking.

The definition section, 6.1(g), states, "Original classification means an initial determination that information requires protection against unauthorized disclosure, together with a classification designation signifying the level of protection required."

The White House is making up words here.

Mr. SIKORSKI. Well, he made the argument, and I would like to hear your response, that a verbal statement from an operative to one of our government people is classified, even though the verbal statement cannot be marked. What response would you make?

Mr. DEVINE. I would say that the Executive Order does not cover every situation. But, its principles certainly can be applied, and a verbal statement should have a P.S.: "This is classified, by the way," or "I'm not sure, but this might be classified. So why don't

you protect it that way until we find out?" There are not any real loopholes here.

In fact, the industrial security manual for contractors who always face this situation defines classified information in three elements. The third element is "so designated." We do not make these categories up.

The fourth area that I would like to discuss is the one that is the dearest to our hearts at the Government Accountability Project. That is whistle-blower protection.

Mr. Garfinkel reassured us that there will not be any conflict with the whistle-blower statutes. Unfortunately, under the whistle-blower statutes, that is just flat wrong legally. The Executive Orders are the boundary for permissible restrictions on whistle-blowing.

As we have just seen, there is nothing in the Executive Orders that allow reprisal for disclosure of unmarked information. To comply with the Civil Service Reform Act, the administration has to start over and shrink its definition of "classifiable" to conform to the boundaries of E.O. 12356.

And to check the acid test for this rhetoric, it is empty if the government can begin the process of marking information as classified after the whistle-blower exposes misconduct. If that is permissible under this system, we have created ex post facto criminal liability for the whistle-blower, because he or she did not correct the government's mistakes. That is simply not fair.

And finally on the issue of whistle-blower protection, as the AFGE has testified——

Mr. SIKORSKI. Before you leave that issue, let me mention that there have been examples I recall of things as goofy as Grandma's recipe for corn muffins, golf scores, and weather reports being classified, and that what is being classified today has over the last fifty years grown immediately.

There was one attempt in the early 1950s to reign it in but that did not succeed for very long. Now information classified for national security interest purposes can, if you look at what has been classified, embrace virtually anything, and "classifiable" certainly can embrace even more.

So someone sitting down to make a decision on whether to release information must consider what could be classified later on, and would have to guess that virtually everything is classifiable because virtually everything or every topic has been classified in the past, even some things that obviously should not have been, but for one reason or other were, classified.

Mr. DEVINE. Without markings or warnings or some sort of tangible notice, any whistle-blower with a healthy sense of self-preservation, professional self-preservation, will keep quiet rather than take a chance.

What is particular Orwellian about this whole debate is that Mr. Garfinkel's office was established to help solve that problem and declassify information, and what it has turned into is the office to implement a linguistic octopus that can strangle freedom of speech. Life is strange in Washington, D.C.

The final point on whistle-blower protection is to second the AFGE's testimony. There has been an empty chair in these final

panels that should have been filled by the Office of Special Counsel.

Mr. SIKORSKI. Yes.

Mr. DEVINE. They receive $4 million a year to protect the merit system in general and freedom of speech in particular, and Ms. Wieseman, the Special Counsel, has consistently responded to congressional requests with a "Pontius Pilate" letter. It is inexcusable for the Special Counsel to wash its hands of this issue.

The fifth area that I would like to mention briefly is the temporary moratorium. Our organization receives a number of complaints and intakes from folks who are having problems with SF 189. There are counter examples to a temporary reprieve.

One gentleman had to fight off a proposed termination after the reprieve was announced. When he fought that off, his security clearance was proposed for revocation on alternate grounds to SF 189.

As Mr. Brase pointed out, you can get low performance appraisals and just not bring up the concept of SF 189, and even by its terms, the reprieve permits continued passive reprisals.

Employees can be placed on an ineligible list for promotions and doomed to career paralysis if they do not sign this form. The reprieve is very incomplete, even if it were permanent.

Finally, Mr. Garfinkel told us that this will not decrease the flow of information to Congress. That is balderdash. Under this authorized recipient requirement, Mr. Garfinkel has explained that a member of Congress has to have a need to know even if he is cleared for receipt of classified information.

This institutes a routine system of prior restraint by agency screening and clearing offices. You could call them censorship offices, to determine if Congress has a need to know. Since when is that the Executive Branch's shot to call?

In our view, Mr. Garfinkel's reassurances today, even if they were really reassuring, would not be relevant. As he has pointed out numerous times, SF 189 is enforceable on its own terms, not on his congressional testimony and not on his letters to various members of Congress.

In conclusion, Mr. Chairman, Mr. Lou Brase's Kafkaesque ordeal was not atypical. It was typical of the calls we have received at GAP, and although the administration has boasted that only 24 have refused to sign this form, that is no reason to boast.

Those 24 people are the real freedom fighters in the civil service system, but without your continued support, there will be 24 new chapters of "Profiles in Courage." We hope you keep up the good work, sir.

[The prepared statement of Tom Devine follows:]

TESTIMONY OF THOMAS DEVINE,

GOVERNMENT ACCOUNTABILITY PROJECT

Mr. Chairman:

Thank you for inviting my testimony today. My name is Thomas Devine. I'm the Legal Director of the Government Accountability Project, a nonpartisan, nonprofit, legal support organization for government and corporate whistleblowers. The hearings on Standard Form (SF) 189 are as timely as President Reagan's wrap-up speech on the Iran-contragate scandal. The President spoke of "the lessons we have learned" and reassured, "I've tried to take steps so that what we've been through can't happen again, either in this administration or future ones." But actions speak louder than words. The administration's deeds tell a different story than the President's rhetoric: The lesson learned at the White House is to slash the free speech rights of government employees, and increase the odds that next time, the public will stay ignorant.

This spring the administration has issued regulations making it mandatory for federal employees to sign away their constitutional and statutory due process and free speech rights, or lose their security clearances -- along with their jobs in many cases. Three million employees have been ordered to sign a nondisclosure agreement entitled Standard Form 189. Any employee who signs agrees, among other provisions, not to disclose "classifiable" information directly or indirectly to any "unauthorized" individual. Alleged violations could cause loss of security clearance, FBI investigation, and criminal prosecution.

Perhaps the primary lesson to be learned from Iran-

contragate is the danger of secret government. As testimony by Colonel North, Admiral Poindexter, and Secretary Schultz revealed, our nation faces a serious threat from secret government -- an elite group of bureaucrats who decide when Congress and the public are entitled to know the truth, and who don't always share with the President the difference between fact and fiction. There are even proposals for a "secret" CIA that could be government without any underlying accountability.

A little-noticed but highly significant factor in the Irangate crisis is that it took a disgruntled Middle Eastern arms trader and a Lebanese journalist to expose this sordid affair. Why didn't any of the federal employees who had to know about this illegal foreign policy blow the whistle? The answer is they've been gagged. The administration has engaged in an assault on freedom of speech in the Executive branch, unprecedented in its intensity since the Malek-May Manual of the Nixon administration. Most disappointing, the administration largely has succeeded in silencing the civil service system. Iran-contragate reveals that --

1. the administration has dried up the flow of information to Congress about even grossly illegal activities and brazenly dishonest disinformation campaigns; and

2. under secret government, the interests of ordinary Americans are sacrificed for lawless goals that our elected leaders dare not share with the voters.

Ironically, the leaks of this gag order are from the National Security Council, and a Presidential directive that grew

out of work by the staff of Messrs. McFarlane and Thompson -- two cogs in the secret government that disclosed sensitive information to our enemies but refused it to Congress. To illustrate how far the repression has advanced, the Information, Security Oversight Office (ISOO), which monitors implementation of SF 189, estimates that 1.7 million out of the three million eligible federal employees had signed this form. Only 24 employees have refused. Although SF 189 first appeared in 1983, signing it has only been mandatory throughout the Executive branch recently, such as since April 28, 1987 at the Air Force.

More specifically, SF 189 can teach us four lessons. The form represents an illegal -- (1) seizure of power by the Executive from Congress; (2) assault on constitutional rights; (3) weapon with the definitional power to cancel out the whistleblower protection statutes; and (4) illustration of the breakdown in Executive branch agencies responsible to protect freedom of speech. Let's review each of these lessons in turn.

I. SEIZURE OF POWER BY THE EXECUTIVE BRANCH FROM CONGRESS

At the conclusion of the Iran-contragate hearings, several Senators offered their conclusion that a bureaucratic junta had usurped the legal authority of our elected officials. If those assessments were correct, SF 189 is the junta's weapon for an informational coup that will strip Congress of its right to know. SF 189 helps achieve this goal through two techniques. First, there is no definition for which individuals are "unauthorized" to receive information. In news interviews, the administration

has stated that no one is authorized, even a Member of Congress with a security clearance, unless the relevant agency first decides that the legislator has a "need to know." Since when is it up to the executive branch to decide if the legislature needs to be informed? This system inherently introduces a system of prior restraint by agency screening and censorship offices.

Second, SF 189 creates liability for "indirect" disclosures. This means that the first employee is liable for the behavior of even an authorized recipient, such as a Member of Congress, depending on the outcome of a criminal trial to decide if a civil servant should have known that the authorized legislator would make a disclosure to an unauthorized person, such as a member of the press. This section of the law on indirect disclosures also applies to authorized individuals within the bureaucracy.

In effect, this provision means that anyone who signs SF 189 is his or her brother's legal keeper, to the point of assuming criminal liability. It could support tactics to further isolate whistleblowers. The end result is a Catch-33 dilemma, meaning that we either will have (a) criminal prosecution of good faith whistleblowers; (b) the cut-off of the flow of significant information to Congress; or (c) a cut-off of the flow of significant information from Congress. The flow of truth is the life blood of government accountability.

This result also would cancel out 5 U.S.C. 7211 and 18 U.S.C. 1505, which establish the right to communicate freely with Congress. These laws should not be discarded lightly. For example, 5 U.S.C. 7211 was passed in 1912 to reverse President

Taft's "gag rule" forbidding civil servants from communicating information to Congress without the consent of department chiefs. The law was passed to codify first amendment rights and to reestablish the free flow of information to Congress. As one supporter declared:

> How can a conscientious Member of Congress vote intelligently and for the best interests of the American people if the most reliable sources of information are closed to him? I am glad that this rule is to be abrogated, not only because of my sympathy for these men, who have been unreasonably restrained in their rights as citizens, but I am glad because hereafter I shall be free to seek and secure information that will enable me the better to discharge my duties as a Representative.

Appendix to 48 CONG. REC. 140 (1912) (remarks of Representative Stone).

The bill's sponsor characterized the "gag rule" as "un-American, unjust. It may fit into the scheme of things in a country like Russia, but it is entirely antagonistic to the spirit of our institutions. It is a slap at the Constitution and an affront to our citizens." 48 CONG. REC. 10671 (1912) (remarks of Representative Lloyd).

As Representative Lloyd further explained:

> If no Government employee is permitted to speak, excepting through his department chiefs, and the department chief through the Cabinet officer, then this is an aristocratic Government, dominated completely by the official family of the President. If the principle enunciated in these Executive orders is to be carried to the extreme, then there is no possible way of obtaining information excepting through the Cabinet officers, and if these officials desire to withhold information and suppress the truth or to conceal their official acts it is within their power to do so. This government will be more popular when its official proceedings are an open book and the conduct of its officials continuously subject to scrutiny and

> investigation by the people at any time and in any manner the people elect.

48 CONG. REC. 10671 (1912).

Some thirty-five years ago, even then-Senator Nixon declared,

> Mr. President, I have introduced in the Senate today a bill to make it a violation of law for any officer of the Federal Government to dismiss or otherwise discipline a Government employee for testifying before a committee of Congress.
>
> . . . It is essential to the security of the Nation and the very lives of the people, as we look into these vitally important issues, that every witness have complete freedom from reprisal when he is given an opportunity to tell what he knows.
>
> There is too much at stake to permit foreign policy and military strategy to be established on the basis of half truths and the suppression of testimony.
>
> Unless protection is given to witnesses who are members of the armed services or employees of the Government, the scheduled hearings will amount to no more than a parade of yes men for administration policies as they exist.

97 CONG. REC. (1951).

II. ATTACK ON THE CONSTITUTION

As seen above, SF 189 violates the First Amendment by creating a system of routine prior restraint on communications within and from the Executive Branch. This is one of only numerous constitutional rights which this gag order threatens. In addition, the nondisclosure agreement would -- (1) create criminal liability in the absence of a congressional statute; (2) establish ex post facto criminal liability; (3) create liability in an unacceptably vague, ambiguous and overbroad manner by

failing to define the key terms; (4) take away liberty and property rights without due process; and (5) violate equal protection by creating total liability for those who negligently or willfully disclose unmarked information that qualifies for classified status, while totally absolving those who negligently or willfully failed to apply required markings. Ironically, it was the latter's responsibility in the first place.

The administration is attacking all of these constitutional rights without first establishing a compelling need beyond the level of adjectives. For example, the administration has provided no information on the number of leaks of classifiable -- as opposed to classified -- information by civil servants with security clearance, and the impact of these leaks, in the abstract or by comparison to other federal employees who don't have security clearances; or with contractors who aren't bound by the classifiable standard. Similarly, the administration has failed to identify relevant weaknesses in current statutes to protect sensitive information, or to propose necessary legislative amendments. The administration has failed to identify what is wrong with the current pledge by all employees who have security clearances to protect classified information. Instead, the White House took the easy way out, with an end run around the Constitution through a coerced nondisclosure contract.

The White House has only attempted analytically to demonstrate a need for this nondisclosure agreement from time lags when a federal employee generates classified data, but does not have the authority to mark it with that status. Even then,

there is no need to throw out the Constitution. Common sense is still available. As the Pentagon instructs military contractors in its Industrial Security Manual for Safeguarding Classified Information (DoD 5220.22 M (Nov. 1, 1986) at 49).

> In any such case, the following protective marking, or a similar marking which clearly conveys the same meaning, will be used: Classification determination pending. Protect as though classified (CONFIDENTIAL, SECRET, or TOP SECRET).

There is nothing that prevents a civil servant from doing the same thing.

III. ATTACK ON THE WHISTLEBLOWER STATUTE

5 U.S.C. §2302(b)(8), the whistleblower provision of the Civil Service Reform Act, makes it illegal to retaliate against an employee or applicant as reprisal for the disclosure of information by the employee which he or she reasonably believes evidences illegality, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety, unless the disclosure is specifically prohibited by relevant statute or executive order. SF 189 flatly defeats the whistleblower statute, by requiring retaliation against employees who make disclosures beyond the scope of Executive Order 12356.

The administration has argued that SF 189 is legal because it is based on EO 12356, which the civil service law permits as a restriction on public disclosures. The rationalization cannot withstand scrutiny. The whistleblower law permits restrictions

specifically identified in a statute or executive order. In 1978, our organization helped defeat an administration push to commit broader restrictions flowing from rules and regulations that implement congressional statutes. Congress rejected the administration's language, and speech can only be specifically restricted by the text of an executive order or statute -- not from a derivative that interprets or implements the former. Sen. Rpt. 95-969, at 21-22. SF 189 is at best a derivative of a derivative. It implements National Security Decision Directive 84, which states in the opening paragraph that its terms are "in addition to" the requirements of EO 12356. In short, this contract cannot co-exist with civil service law -- definitionally, it represents precisely the type of gag Congress rejected.

Second, the administration has argued that a clause in EO 12356 protects whistleblowers, because the Executive Order forbids information from being classified to conceal misconduct. Unfortunately, SF 189 establishes liability based on the contents of information, not the government's motive in any particular classification decision. Information that couldn't be classified to cover up a scandal arguably could be classified under various hypotheses for legitimate purposes. If that possibility exists, the would-be whistleblower could still face prosecution for disclosing national security breakdowns to Congress.

If there were any doubt about the gag order's illegality, it should be dispelled by a July 28, 1987 legal opinion from the Congressional Research Services' American Law Division. The

opinion, which was prepared at Senator Grassley's request, concluded:

> To be consistent with [civil service] whistleblowing protections, it would appear that the secrecy agreement would have to permit without punishment or negative personnel action, the public disclosure of information which the employee believes evidences a violation of law, or waste, fraud or abuse, and which is not specifically classified information or specifically required to be kept secret under EO 12356 or other executive order, and must allow the disclosure of information evidencing such illegality, waste, fraud or abuse to the Special Counsel, and Inspector General, or to the Congress, even if the information is classified or required to be kept secret.

(emphasis supplied).

More recently, the administration has declared that SF 189 does not violate the whistleblower statutes and cannot contradict them. That assertion would be reassuring, if it had substance. Unfortunately, the substance of the gag order and its implementing regulations don't match the rhetoric.

The gist of the White House reasoning is that SF 189 only covers classified information, albeit unmarked due to time constraints, negligence, error, or oversight. How is the whistleblower to know whether the government was negligent or made a mistake and failed to classify the classified information? There is no notice or warning required. The dissenting employee will not know definitely until he or she is charged with a criminal violation of the nondisclosure agreement. At that point, the government can assert that it erred by not marking the records classified originally. But the whistleblower could face loss of job or criminal prosecution for not correcting the agency's error. Under the new rationalization, we have merely

shifted from a gag order that says anything could be classified, to one that says anything already was classified. It just wasn't designated. That is no progress at all.

Fundamentally, the latest excuse is simply wrong as a matter of law. The heart of the current White House position is that classifiable information already is classified, and in fact is merely a subset of the entire pool of classified data. Unless the records are so designated, however, under current law they simply do not qualify for that status. Initially, turn to Executive Order 12356 and its section 1.5 on Identification and Markings. That provision requires classified records to be clearly marked "at the time of original classification." Further, Section 5.4(b)(1), Sanctions, only imposes liability for disclosure of "information properly classified under this Order or predecessor orders...." (emphasis supplied). Section 6.1(g), Definitions, provides the requirements for proper classification: "'original classification' means an initial determination which information requires, in the interest of national security, protection against unauthorized disclosure, together with a classification designation signifying the level of protection required." (emphasis supplied). Quite clearly the liabilities imposed by SF 189 violate the standards of EO 12356, both with respect to definitions and to liability.

Similarly, the Industrial Security Manual provides a definition of classified information in section I.3(k): "This is information or material that is: (i) owned by, produced by or for, or under the control of the U.S. government; (ii) determined

under EO 12356 or prior orders to require protection against unauthorized disclosure; and (iii) so designated." (emphasis supplied).

The courts have not viewed "classifiable" as an expansive term for data that is classified without markings, either. Rather, the term has been a restrictive device to assure that information marked as classified properly deserved that status. For example, in Alfred A. Knopf, Inc., v. Colby, 509 F.2d 1362 (4th Cir), cert. denied 421 U.S. 992 (1975), the court used the term "classifiable" to test whether classified information "in fact" qualified for classification. To avoid release under the Freedom of Information Act the court required that data be both "classified and classifiable." (emphasis supplied). The administration doublespeak changes the standard for criminal liability to classified or classifiable. In short, there is no basis in law for the administration's assertion that classified information does not have to be so marked. In the courts or ever under its own regulations, the administration's core premise for defending SF 189 against charges of violating the whistleblower law is a legal fantasy.

The final criteria to examine the legality of this nondisclosure agreement under the whistleblower protection statute is its impact. In terms of effect, the American Law Division explained,

> In a practical sense, to the extent that the secrecy agreement because of its apparent breadth and vagueness of terms shows or discourages the disclosure of any information which evidences waste, fraud, corruption or illegality in government, that effect or result will be

> in contrast to and in derogation of the intended results of the whistleblower statute.

(citations omitted). Until the term "classifiable" has a concrete definition with objective, tangible boundaries, it is an uncontrollable octopus that can strangle freedom of speech. The text of even the recent clarified gag order will at least chill, and probably deep-freeze, dissent in the civil service system. It has no place in a free society, or in the merit system.

IV. BREAKDOWN IN EXECUTIVE BRANCH STRUCTURE TO PROTECT FREEDOM OF SPEECH

Specifically, the agency that has avoided its duties is the Office of the Special Counsel (OSC) of the Merit Systems Protection Board (MSPB or Board). Over the last few months six Senate and House Office (Senators Grassley and Pryor, and Representatives Sikorski, Boxer, Schroeder, and Wolf) have requested that the Office of the Special Counsel petition the MSPB for stays of any personnel actions taken in response to a civil servant's failure to sign an SF 189. Recently the OSC has responded, informing Congress that no action "is warranted at this time."

In her Pontius Pilate letters, Special Counsel Mary Wieseman offered three reasons in abbreviated fashion, which appear to correspond to the following legal grounds not to act: (1) The OSC does not have jurisdiction, because no employees have called the Special Counsel to complain or seek assistance. (2) There is no OSC jurisdiction, because the administration's Information Security Oversight Office has told agencies to stop revoking

security clearances pending a district court test. (3) It would be improper for the OSC to preempt the district court, and more appropriate "to look forward to a resolution of the issues in dispute by the Court."

Each of the rationalizations above is factually mistaken or legally inadequate for the OSC to wash its hands of SF 189, currently the most wide-ranging, significant threat to free speech/dissent rights in the civil service system. The OSC response also is a weathervane for the Special Counsel's recent testimony about the "new OSC" that vigorously supports freedom of speech and wants to actively participate in rewriting the whistleblower protection laws.

The five congressional offices requesting the OSC stay efforts are leaders in the drive for a Whistleblower Protection Act. Besides this Subcommittee Chairman, they include the Senate and House Subcommittee Chairs (Senator Pryor and Representative Schroeder, respectively) responsible for ongoing oversight of the Special Counsel. As a result, this issue may be an excellent test for the OSC's rhetoric in determining what is ultimately its proper role, in any, in the final version of the reform legislation.

(1) Lack of jurisdiction due to lack of complainants. This is a legal red herring. As stated in 5 U.S.C. 1206(a)(3), "[T]he Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, existed or is to be taken." The Special

Counsel's regulations recognize and incorporate this portion of the statute. 5 C.F.R. 1251.1(c).

Similarly, there are no restrictions on the OSC's ability to take corrective action after a self-initiated investigation. The Special Counsel can act to correct prohibited personnel practices "in connection with any investigation" under 5 U.S.C. 1206. 5 U.S.C. 1206(c)(1).

The legislative history for the Civil Service Reform Act explains the congressional intent here. As the Senate Report states, at 32:

> The Special Counsel should not passively await employee complaints, but rather, vigorously pursue merit system abuses on a systematic basis. He should seek action by the Merit Board to eliminate both individual instances of merit abuse and patterns of prohibited personnel practices.

Even if the OSC excuse were not legally baseless, it is easily corrected. ISOO records received by GAP reveal numerous leads to identify uncorrected prohibited personnel practices, if the Special Counsel wants to look.

(2) Lack of jurisdiction due to ISOO reprieve of security clearance revocations. This reasoning also is legally incorrect and factually incomplete. Legally, the OSC has authority to act when there are "reasonable grounds to believe" an agency "will take" a prohibited personnel practice. The Special Counsel always has interpreted that provision to mean jurisdiction is established when an agency proposes an improper personnel action.

On this issue the facts are that numerous revocations of security clearances have been proposed, and none have been

withdrawn. ISOO merely has halted processing of the adverse actions pending court decisions. Under civil service law, each act of proposing security clearance revocations for failure to sign SF 189 was, and remains, a prohibited personnel practice.

Second, there is a major loophole in the ISOO reprieve. It only halts actions to take away employees' current jobs. Agencies are still free to engage in passive reprisals by imposing career paralysis, barring government job applicants from new positions until they sign the SF 189 or placing them on ineligible lists for promotion. These are listed personnel actions under 5 USC 2302(a) and therefore can represent ongoing prohibited personnel practices. The Special Counsel should plug the loophole.

(3). Impropriety of OSC initiatives while litigation is pending. There is nothing in the Civil Service Reform Act that requires administrative agencies like the OSC to step aside in favor of letting the courts get the first crack at disputes on civil service law. To the contrary, since Bush v. Lucas, 462 U.S. 367 (1983) the restrictions have been in the opposite direction: the courts don't get involved when there is an administrative remedy.

Successful OSC stay requests at the administrative level could have a significant, constructive impact on the courts. Indeed, if the Special Counsel succeeded in staying or defeating the SF 189 adverse actions at the administrative level, the courts may temporarily defer to the administrative process and

ultimately decide that the issues are moot. The OSC should do its share, like all other good faith defenders of free speech.

Finally, the OSC could play a vital role short of litigation by using the same technique that it claims has made litigation unnecessary since 1981 -- effective negotiation. That is Ms. Wieseman's defense against criticisms that the Office has been receiving $4 million per year to defend whistleblowers but has spent at least the last $25 million without conducting a corrective action hearing to restore a whistleblower's job. Certainly SF 189 would be the ideal issue to test whether the OSC's negotiating clout makes hearings unnecessary on the most significant merit system threats.

SOLUTIONS

Recently there have been a series of inherently flawed attempts to solve the problems created by SF 189. For example, the administration has issued a series of clarifying rules in the Federal Register that civilize and otherwise modify the terms of the gag order. Unfortunately, the changes have been too incremental to be significant. This testimony attacks the revised versions of SF 189. Further, Federal Register notices come and go with the political tides. They can be revised again in the future to restore repressive features that have been modified. But the text of SF 189 is permanent and an employee's signature lasts a lifetime. The solution must be just as permanent.

Additionally, the administration recently attempted to assuage Congress through unenforceable rhetoric. For example, in the fact sheet attached to Mr. Garfinkel's testimony today, as well as to a September 21 letter from the National Security Counsel to Representative Boxer, the administration explained, "The only fact patterns in which an employee might be held liable for disclosing unclassified information could occur when the employee knows, or reasonably should know, that the information is in the process of a classification determination, and requires interim protection as provided in Section 1.1(c) of Executive Order 12356."

At first, free speech advocates were excited by this rhetoric. It meant that whistleblowers no longer would be liable for making the same mistake about the merits of classification that the agency made when it failed by negligence, error, or oversight to mark the document. This would have meant that the criteria for liability had shrunk from both substantive and process criteria, to merely the latter. Unfortunately, the administration has refused so far to issue a clarifying rule incorporating this language. This bad faith reassurance raises questions whether the rhetoric is worth the paper on which it is written. The lesson to learn from this incident is that we won't reach a solution by taking the administration's word for it.

A third approach to solving the problem is o file lawsuits. The American Law Division of the Library of Congress, however, has warned of the risks from accepting a flawed secrecy agreement, and expecting the courts to "repair" it in practice:

"However, cases and experience have shown that whistleblowing protections may be difficult to enforce in court on behalf of an employee." (citations omitted). Indeed, even if one court throws out the gag orders as unconstitutional or otherwise illegal, other courts may uphold its legality and create a war of the circuits. Or the administration may appeal a district court favorable decision and seek a stay pending the outcome, to maintain the chilling effect of SF 189 for years. We cannot count on the courts to solve this problem.

Congress must attack the gag order directly. This can be done through several means. One suggestion, for example, would be to cut off all funds used to implement or enforce SF 189. A second suggestion would be to cut off funds for the White House's Information Security Oversight Office, which oversees implementation of SF 189. This office was created to help declassify information, but in practice it has turned into just the opposite -- the administration's office to expand free speech restrictions through its legal mutant, the "classifiable" concept. Congress is under no obligation to finance this type of abuse.

More directly, Congress could simply abolish the gag order by statute. Congress should declare null and void any nondisclosure contracts, agreements, rules, regulations or other Executive Branch actions prohibiting the disclosure of information other than specifically marked as classified; that violate or have the effect of violating 5 U.S.C. §2302, 7211, or any other statutory free speech protections; or that exceed

nondisclosure requirements specifically required by law. Similarly, this body could neutralize SF 189 by making it a prohibited personnel practice to discriminate against an employee for communicating with Congress, or for retaliating against an employee for disobeying an illegal nondisclosure agreement. The law should be clear that this right is absolute. This initiative would provide enforceability for 5 U.S.C. 7211, which established the right but provides no remedy. Finally, Congress should take the offensive to pass a strengthened Whistleblower Protection Act. SF 189 is by no means the administration's only attack on freedom of dissent. Last year the House passed the Whistleblower Protection Act, but the administration stalled its consideration in the Senate and even threatened to veto the free speech legislation. This year, during the last few months the administration has been pressuring Representatives Schroeder and Horton of the Civil Service Subcommittee to gut the Whistleblower Protection Act, under threat that otherwise the bill will be stalled to death again in the Senate. Congress should go on the offensive to pass the legislation without further compromises. If anything, the bill should be strengthened to develop further protections that neutralize SF 189.

The administration has gloated that only 24 employees have refused to sign SF 189. That is no grounds to boast. It means that 1.7 million employees are so intimidated by the repression of the last seven years they that perceive no other choice but to sacrifice their rights to freedom of speech and due process. The 24 who have said no are the real freedom fighters of this government. Without your assistance and support, however, these 24 freedom fighters could each be their own chapter of Profiles in Courage. Mr. Chairman, your continued leadership will be necessary to restore freedom of dissent in the civil service system.

Mr. SIKORSKI. Yes. People talk admiringly about the people described in "Profiles in Courage," but all of them were left for an obscure writer later on to dig out and dust off. Ernie, do you want to discuss the issue of indirect responsibility?

Mr. FITZGERALD. Yes, Mr. Chairman. I wanted to reinforce something Mr. Hobbie said.

Mr. Colin Parfitt, my associate who has also not signed his form, and I were both threatened by the Assistant General Counsel of the Air Force about including in prepared congressional testimony "proprietary" information on contractors, and in the process of that, we discovered the principle of indirect responsibility.

We were told that we were responsible for the security of that information after it had been given to the congressional committee. If it had been leaked, it was our responsibility.

The same thing applies here as far as I can tell, and this alone would chill relations with Congress and Congress's ability to get information.

You may recall that in your subcommittee under Chairman Dingell the GAO refused to give to Chairman Dingell some information that they had collected on those very grounds.

The final thing that I would want to say, Mr. Garfinkel denied some statements attributed to him. I want to say that he made them. I was present. I was not alone. He attributed them to my quote.

Mr. Stockton and Mr. Chafin were with me. All three of us were talking to Mr. Garfinkel. Mr. Chairman, he said it.

Mr. SIKORSKI. I do not think that he denied saying it. He said he did not recall.

Mr. FITZGERALD. Okay. I can refresh his recollection. He said it.

Mr. SIKORSKI. There is a "Poindexterity" here.

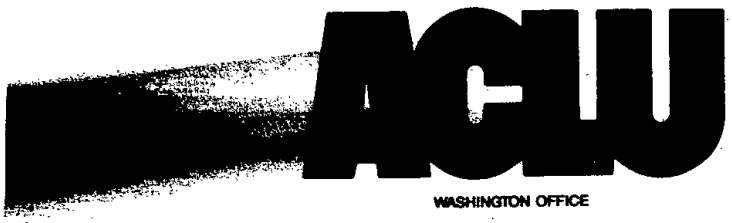
We thank you once again for your assistance and for your willingness to do the work on this issue. This morning we had Jose Napolean Duarte addressing us, and we had Mary Beth Whitehead over in another subcommittee that I am on. SF 189 does not grab the headlines like peace in Central America or surrogate motherhood, but it is a problem that affects millions of people intimately as well as Congress ability to fulfill its constitutional oversight responsibilities. Thank you for your willingness to continue to work on it.

Mr. DEVINE. Mr. Chairman, I am also concerned that indirect disclosure liability can chill the flow of information to whistle-blowers. Other members of the Pentagon could be prosecuted for giving information to Ernie Fitzgerald because they, quote, should have known he would go public and tell people about the scandal.

Mr. SIKORSKI. Thank you.

[Whereupon, at 1:55 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

[The following material was received for the record:]



December 7, 1987

Rep. Gerry Sikorski
Chairman, Subcommittee on Human Resources
House Committee on Post Office & Civil Service
406 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Chairman,

At the kind invitation of your staff, I write on behalf of the American Civil Liberties Union to request that this letter and the attached correspondence be made a part of the record of the Subcommittee's October 15, 1987 hearing on the Executive Branch's Standard Form 189, Classified Information Nondisclosure Agreement, and the Reagan Administration's policy for its implementation and enforcement.

The attached correspondence between myself and the office of the President's National Security Advisor, Frank Carlucci, addresses the ACLU's concerns regarding references to the ACLU by Administration officials in statements to Members of Congress extolling the reasonableness and legality of SF 189 as written and implemented.

These references, including one in the written testimony submitted to the Subcommittee by the Director of the Information Security Oversight Office, imply that the ACLU did not object to SF 189 when it was issued and does not object to it now. Since the implications do not square with the facts, the ACLU objected to Mr. Carlucci and sought to eliminate such misleading references to the ACLU from future Administration statements. By placing our letter and the official response into the hearing record, we hope to clarify our views on SF 189 and to dispel any mistaken impressions that may exist.

Background

No organization has played a more active role in attempting to safeguard the First Amendment rights of government employees in the context of secrecy agreement requirements than the ACLU.

The ACLU argued the First Amendment rights of former CIA employees in each of the major court cases upholding the

constitutionality of such agreements and the consequent enforcement of prepublication review requirements. See, Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); McGehee v. Casey, 718 F.2d 1137 (D.C.Cir. 1983).

Moreover, the ACLU Washington Office has been the leading critic of prepublication review agreements before the Congress, usually in hearings held at the urging of the ACLU. For example, following the Supreme Court ruling in the Snepp case, the ACLU argued for a legislative response before the House Permanent Select Committee on Intelligence. Prepublication Review and Secrecy Agreements: Hearings Before the Subcomm. on Oversight of the House Perm. Select Comm. on Intelligence, 96th Cong., 2d Sess. 115 (1980).

Similarly, when President Reagan issued National Security Decision Directive 84 in March 1983, establishing requirements for secrecy agreements with prepublication review requirements outside the intelligence community, the work of the ACLU Washington Office helped arouse House and Senate interest in hearings which generated broad-based condemnation of the Directive and legislative proposals to block its implementation. See National Security Decision Directive 84: Hearing Before the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. (1983); Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use: Hearing Before A Subcomm. of the House Comm. on Government Operations, 98th Cong., 1st Sess. (1983); Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong., 1st and 2d Sess. (1983 and 1984); Federal Polygraph Limitation and Anti-Censorship Act of 1984: Hearings on H.R. 4681 Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 98th Cong., 2d Sess. (1984).

The ACLU Washington Office worked with House subcommittee staff on both proposed legislation (H.R.4681) and a subsequent committee report (H.Rpt. 98-961, Part 1), and helped obtain adoption of the Mathias-Eagleton Amendment to the Department of State Authorization Act, Fiscal Years 1984 and 1985, P.L. 98-164, Section 1010, 97 STAT. 1061, which placed a five-month moratorium on implementation of the prepublication review requirements of NSDD-84 and ultimately forced the White House to "hold in abeyance" plans for future implementation of such requirements with a commitment to give prior notice to Congress.

In 1985 and 1986, staff of the ACLU Washington Office used the earlier White House commitment to successfully urge the Director of the Information Security Oversight Office to intercede on behalf of an employee of the Defense Logistics Agency and block that agency's efforts to implement a new prepublication review

requirement. [Correspondence regarding this matter is available in the files of ACLU Washington Office staff.]

Focus on Prepublication Review

For the ACLU, as for the Congress and most government employees as well, the chief controversy regarding secrecy agreements has never really centered on the general proposition of whether a government employee can, as a condition for obtaining access to properly classified information, be required to enter into a written agreement in which the individual promises not to engage in unauthorized disclosure of such information.

In the Marchetti, Knopf, Snepp, and McGehee cases, as well as in Congressional hearings on NSDD-84, the primary First Amendment objections were voiced by the ACLU and others not against nondisclosure agreements per se, but against the enforcement of prepublication review requirements related to such agreements.

The ACLU Washington Office has consistently opposed prepublication review requirements -- whether express, implied, or judicially-imposed -- as censorship through prior restraint in violation of the First Amendment. Although the Snepp decision has made it impossible for us to prevent the continuing imposition of prepublication review obligations on present and former employees of the intelligence agencies, our active opposition to such requirements undoubtedly contributed to the Administration's decision to exclude prepublication review requirements from SF 189, the standardized Classified Information Nondisclosure Agreement issued under NSDD-84, and to later explicitly disavow the invitation of the Supreme Court in Snepp to imply such obligations based on the existence of a fiduciary relationship. See, e.g., Pamphlet on SF 189, DOD 5200.1-PH-1 (July 1985) p.30 and Department of Justice Internal Security Order, DOJ 2620.8; 48 Fed. Reg. 3913 (daily ed. August 30, 1983).

While this is not to suggest that the prepublication review issue is the only troubling aspect of secrecy agreements, it is important to understand that, until recently, it was the only issue that elicited any substantial consideration from the courts and concern from the Congress in response to arguments about the First Amendment and the rights of government employees.

Recent Developments

The current controversy over SF 189, the standardized Classified Information Nondisclosure Agreement, illustrates a number of other considerations about nondisclosure agreements which also raise significant concerns for the ACLU and the First Amendment rights of government employees.

Even without prepublication review provisions, SF 189 has a singularly oppressive quality which appears to have been deliberately cultivated by the Administration through artful use of intimidating language and ambiguous terms in order to threaten

individuals with a sweeping potential for liability with regard to obligations that are not clearly defined.

With an excess of legal jargon and irrelevant but menacing references to potential liability under criminal provisions of the U.S. Code, SF 189 purports to establish a judicially-enforceable contractual obligation on the part of the signee to refrain from unauthorized disclosure of any classified information obtained by the access which it authorizes.

In signing SF 189, the individual purports to "accept," "acknowledge," "understand," and "assign" in accordance with its terms and to "make this Agreement without mental reservations..." However, as explained in the attached ACLU memorandum of July 16, 1987, the vagueness and overbreadth of key terms in SF 189 undercut any notion of informed and voluntary consent, while raising serious First Amendment questions about the need and enforceability of such agreements beyond the safeguarding of properly classified information.

Nondisclosure agreements are readily subject to constitutional and other legal objections when they consist of ambiguous terms, impose unreasonable obligations, extend beyond properly classified national security information obtained in the course of employment, provide for enforcement without due process, and subject covered employees to sanctions which are disproportionate to the nature of their actions. Beyond this, however, it is not clear that the Government cannot reasonably and constitutionally require them.

We hope the Subcommittee will continue to challenge the validity of SF 189 and similarly questionable measures in pursuit of information security policies which do not trample upon either common sense or the Constitution The ACLU is willing to assist the Subcommittee in this endeavor in any way it can.

Sincerely,

Allan Adler

Allan Adler
Legislative Counsel

Enclosures

WASHINGTON OFFICE

October 15, 1987

The Honorable Frank Carlucci
National Security Advisor
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear Mr. Carlucci,

On behalf of the American Civil Liberties Union, I write to protest the distortive manner in which you and Steven Garfinkel, Director of the Information Security Oversight Office, have made reference to the ACLU in your correspondence with several Congressional offices regarding the controversy over Standard Form 189, "Classified Information Nondisclosure Agreement."

Specifically, I want to draw your attention to the following statements regarding SF 189 which appear both in Mr. Garfinkel's July 10, 1987 letter to Kris Kolesnik of Sen. Charles Grassley's staff, and in your July 23, 1987 letter to Rep. Gerald Sikorski:

> "Before [SF 189] was issued, several committees of Congress and representatives of the American Civil Liberties Union and other public interest organizations scrutinized the form. No legal action against the nondisclosure agreement resulted."

In addition, please note the following statements which appear in the "Fact Sheet on SF 189" that was an attachment to your September 21, 1987 letter to Rep. Barbara Boxer as well as to written testimony submitted by Mr. Garfinkel to the House Subcommittee on Human Resources on October 15, 1987:

> "The SF 189 was the subject of extensive discussion between the ISOO and the American Civil Liberties Union (ACLU). The ACLU indicated repeatedly that it had no plans to challenge the facial validity of the SF 189."

These statements appear to have been deliberately crafted to imply that the ACLU communicated its approval of SF 189 to certain Administration officials. And, regardless of whether that implication was intentional in the wording, it seems clear that

the purpose of repeating these references in your correspondence with Congressional offices was to promote an inference that the ACLU did not and does not disapprove of SF 189.

It is true that ACLU staff, myself among them, were given an opportunity to review SF 189 before it was issued; however, we voiced objections to many of its provisions then as we do now. While it is also true that ACLU "had no plans to challenge the facial validity of the SF 189" and that "no legal action... resulted," this reflects only our tactical judgment regarding the likely results of such a court challenge and in no way signifies that the ACLU was favorably disposed toward SF 189.

We are particularly troubled by these artful intimations in light of the fact that, with the exception of Mr. Garfinkel's letter to Senator Grassley's staff, all of the correspondence noted above occurred after Mr. Garfinkel had been apprised of certain ACLU objections to SF 189 through a July 16 ACLU memorandum which was circulated to those Congressional offices and other interested parties.

Shortly thereafter, in a July 28 letter commenting on ISOO's proposed clarification of the term "classifiable," we quoted our July 16 memorandum regarding certain terms in SF 189 "that are vague and subject to overreaching ex post facto interpretations which would illegally and, we believe, unconstitutionally broaden the government's authority under this agreement to reach disclosures of unclassified information and other communications that are not prohibited by law." (emphasis in original)

We feel certain that you would understand the ACLU's dismay regarding the deliberate misrepresentation of our views on matters of consequence. We are no less dismayed when our actions are misinterpreted through inferences drawn from suggestive and manipulative characterizations of them. Accordingly, we request that any future references to the ACLU by Administration officials in the context of discussions on SF 189 accurately reflect the facts as stated in this letter.

Sincerely,

Allan Adler
Legislative Counsel

AA/cm

THE WHITE HOUSE

WASHINGTON

November 6, 1987

Dear Mr. Adler:

Thank you for your letter of October 21, 1987 to Mr. Carlucci. He has asked me to reply on his behalf.

Your letter objects to a reference that Mr. Carlucci made to the American Civil Liberties Union (ACLU) in recent congressional correspondence concerning SF 189, the "Classified Information Nondisclosure Agreement." It similarly objects to such references in correspondence by Mr. Steven Garfinkel, Director of the Information Security Oversight Office (ISOO), and in an ISOO "Fact Sheet" on the same subject.

Mr. Carlucci's letter noted that ACLU was one of a number of organizations that commented on SF 189 before it was issued. Like Mr. Garfinkel's letter and the ISOO Fact Sheet, it also noted that no legal challenges to SF 189 had been made by ACLU or anyone else during the four-year period following its introduction in August 1983. We regret to learn that you believe these statements, which are accurate, somehow present a distorted picture of ACLU's position with respect to the Form. It certainly was not our intention to depict ACLU's position, nor would we presume to do so in this or any other context. It was our intention merely to underscore the substantial efforts that the Administration generally, and ISOO in particular, have made to consult with and address the concerns of interested organizations (including ACLU) in the course of developing and implementing the Classified Information Nondisclosure Agreement. Accordingly, while we reject your assertion that these statements were "deliberately crafted to imply that the ACLU communicated its approval of SF 189" or to "promote an inference that the ACLU did not and does not disapprove of SF 189," we nonetheless shall refrain from referring in the future to ACLU's discussions with ISOO in this regard. We have asked Mr. Garfinkel to do likewise.

Sincerely,

Grant S. Green, Jr.
Executive Secretary

Mr. Allan Adler
Legislative Counsel
American Civil Liberties Union
122 Maryland Avenue, N.E.
Washington, D.C. 20002

cc: Mr. Steven Garfinkel
Director
Information Security Oversight Office

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

M E M O R A N D U M July 16, 1987

TO: Interested Parties

FROM: Allan Adler, Legislative Counsel

RE: SF 189, "Classified Information Nondisclosure Agreement"

The ACLU finds no inherent constitutional barrier to an Executive Order requirement that government employees and other individuals, as a condition of being granted access to classified information, must sign an agreement which (a) imposes an obligation not to disclose such information without authorization and (b) is legally-enforceable in a civil action for breach of contract.

This position, however, is premised upon the understanding that the nondisclosure obligation accepted by the individual who signs such an agreement does not require prepublication review, and will be breached only where that individual has obtained properly classified information by virtue of a clearance requiring the agreement and has knowingly, willfully or negligently disclosed such information to a person or persons not authorized to receive it.

SF 189, the "Classified Information Nondisclosure Agreement" required pursuant to National Security Decision Directive 84 in implementation of the safeguarding requirements of Executive Order 12356, is purported to be such a narrowly-crafted contractual instrument. However, some of the key provisions prescribing the nature and scope of the obligations and potential liability of an individual who signs it rely on terms that are vague and subject to overreaching ex post facto interpretations which would illegally and, we believe, unconstitutionally broaden the government's authority under this agreement to reach disclosures of unclassified information and other communications that are not prohibited by law.

The ACLU believes that these problems can be resolved administratively by rescission of SF 189 in its present form, and issuance of a new version of SF 189 including remedial changes in the contractual language.

Declassified in Part - Sanitized Copy Approved for Release 2013/11/06 : CIA-RDP91B00390R000200150028-2

Alternatively, if rescission and reissuance are not feasible, appropriate clarifications of the obligations and liability imposed by the agreement (perhaps incorporating the Q & A format developed by the Information Security Oversight Office, as included in the Defense Department's briefing pamphlet, DOD 5200.1-PH-1) should be made a formal addendum to SF 189 or issued by ISOO or the National Security Council as part of a revised directive or regulation implementing the agreement.

The ACLU, however, urges that legislative action to properly limit the scope of SF 189 should be undertaken if administrative solutions are not forthcoming.

* * * *

"Classifiable" Information

Aside from its unnecessarily menacing and legalistic tone, the principal problem with the present language of SF 189 is the use of the term "classifiable" in a manner implying that the nondisclosure obligations of the contract extend to information which qualifies for classification under the standards and criteria of Executive Order 12356 but has not in fact been classified pursuant to the procedures of that Order.

Literal reliance on this term, in effect, prohibits the individual from disclosing concededly unclassified information and makes a mockery of the legal framework of statutes and Executive Orders that distinguishes between "classified" and "unclassified" information in order to assure proper safeguards for the former which would be inappropriate as access and dissemination restrictions on the latter.

Federal caselaw upholding the constitutionality of nondisclosure agreements of this kind clearly establishes that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees..." McGehee v. Casey, 718 F.2d 1137, 1141 (D.C.Cir. 1983), citing United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir.), cert.denied, 409 U.S. 1063 (1972). Specifically, the court in Marchetti noted that it would "decline enforcement" of the secrecy agreement signed by a CIA employee when he left the agency "to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights." 466 F.2d at 1317. See also Snepp v. United States, 444 U.S. 507, 521 n.11 (1980) (Stevens, J. dissenting) ("It is noteworthy that the Court does not disagree with the Fourth Circuit's view in Marchetti, reiterated in Snepp, that a CIA employee has a First Amendment right to publish unclassified information.")

Executive Order 12356, like its predecessors, provides specific standards and procedures for purposefully distinguishing between "classified" and "unclassified" information. For example, the Executive Order, at Sec. 1.3(b), makes it clear that information

must be classified if "it is determined to concern one or more of the categories" listed in the Order and "an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." Moreover, the Executive Order, at Sec. 1.5, requires specific "Identification and Markings" to be "shown on the face of all classified documents, or clearly associated with other forms of classified information in a manner appropriate to the medium involved..."

Congress, through the statutory mechanism of the Freedom of Information Act, 5 U.S.C. 552 (b)(1), permits withholding of national security information as a matter of law only when the information concerns matters that "are (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

In Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975), a "sequel" to the Marchetti case, the FOIA requirement for protectible national security information to be "in fact properly classified" led the court to conclude that, in reviewing deletions made from published materials pursuant to a secrecy agreement, "the deletion items should be suppressed only if they are found both to be classified and classifiable under the Executive Order." Clearly, the court used the term "classifiable" to mean that the classified information in question "in fact" qualified for classification, on the basis of the two-step determination made by an original classification authority pursuant to the Executive Order.

SF 189 does not use the term "classifiable" as a qualification on "classified," the way it was used by the court in Colby; instead, it uses it to identify a separate category of nondisclosable information. An individual who agrees not to disclose "classifiable" information is thus expected, quite unreasonably, to perform the task of the original classification authorities under the Executive Order; that is, to determine whether the information is within one of the "Classification Categories" and whether its unauthorized disclosure "reasonably could be expected to cause damage to the national security" so as to qualify for classification.

The overwhelming majority of individuals who are cleared for access to classified information are not authorized to make original or even derivative classification determinations, as such authority is enumerated or delegated under Executive Order 12356. Moreover, it should be clear that basic fairness prohibits holding an individual responsible for disclosure of classified information that the individual could not reasonably have known to be classified. This is obviously the underlying purpose of the "Identification and Marking" requirements of Executive Order 12356, as well as the statutory qualification protecting national

security information only when it is "in fact properly classified pursuant to such Executive Order."

If an individual is to be held responsible for recognizing and protecting "classifiable" information, the Government must bear a substantial burden of proof to demonstrate that the individual knew or reasonably should have known that the information would have been "in fact properly classified" but for the lack of an opportunity for proper marking according to the standards and procedures of the Executive Order. It cannot be enough that the information appears to fall within one or more of the "Classification Categories" listed in the Executive Order, since those categories clearly embrace a great deal of information which is not only "unclassified" but "unclassifiable" because it would not meet the standard of "damage to national security."

The Executive Order itself does not impose safeguarding obligations for "classifiable" information, aside from the "Exceptional Cases" at Sec. 1.2(e) where an employee, contractor, licensee, or grantee of an agency that does not have original classification authority "originates information believed by that person to require classification..." [emphasis added]. It is noteworthy that these "Exceptional Cases" do not include instances where information is obtained by the individual in the course of employment, and they impose an obligation only where the individual believes the information requires classification.

The Question & Answer materials developed by the Information Security Oversight Office to explain SF 189 acknowledge these problems (#4) in explaining that "classifiable" information "refers to information that meets the criteria for classification under Executive Order 12356, but which has not yet been properly marked because of time limitations, oversight or error." Consequently, the Q & A materials provide that "[a]n employee with authorized access to classified information would only be liable for disclosing 'classifiable' information when he or she reasonably should have known that the information met the tests for classification and should have been marked as such."

The Q & A explanation acknowledges that, with respect to an alleged disclosure of "classifiable" information, the Government bears the substantial burden of having to prove that the individual -- in the absence of appropriate markings --should have known from other facts and circumstances that (1) the information qualified for classification, and (2) the information would have been "in fact properly classified" but for time limitations, oversight or error. Such "time limitations, oversight or error" are an additional part of the Government's burden of proof and could not be presumed from the nature of the information and the absence of proper markings.

The example accompanying the Q & A explanation, concerning the status of notes taken by an employee at a classified briefing prior to an opportunity to review and mark them, illustrates the very narrow nature of the "time limitations" exception in which

an individual could be held liable under an agreement not to disclose "classifiable" information. Since the employee knew that the entire briefing was classified, it can fairly be said that the employee reasonably should have known that the notes qualified for classification and were not "in fact properly classified" only because there had not yet been an opportunity for marking.

The Q & A does not provide illustrative examples of "oversight or error" resulting in information being "classifiable" rather than "classified," and it is not at all clear why an individual should be expected to determine or have knowledge of the sensitivity of the information in such circumstances, unless the "oversight or error" was that of the individual (i.e., having original classification authority) himself.

Unlike the "lack of opportunity" situation, which will require a factual showing of the individual's personal knowledge of a time-constrained sequence of events precluding an opportunity for proper marking, "oversight or error" may simply involve the non-occurrence of events; that is, it doesn't require a showing that "something happened" to prevent classification, it merely requires the assertion that, for any or no particular reason, "nothing happened" to achieve classification.

Again, it would be wholly unfair to expect that the individual should presume to make his or her own classification determination based exclusively on the nature of the information. Unless the Government can show the individual's personal knowledge of specific facts which should reasonably have informed the individual about the "oversight or error" but for which the information would have been "in fact properly classified," the individual should not be liable for disclosure of "classifiable" information in such circumstances.

Unfortunately, however, no explanation of any kind is provided in the express language of the agreement to define the term "classifiable" and the Government has refused to permit the Q & A and other explanatory briefing materials to be formally considered as a part of the agreement. Without such qualification, the Government could baldly assert the "classifiable" nature of almost any information and, consequently, the individual who signs such an agreement risks potential liability wholly unrelated to legitimate obligations to safeguard classified information.

The ACLU believes that the cited federal caselaw would require a judicial construction limiting the enforceability of SF 189 to information that is "in fact properly classified" or "classifiable" in the sense discussed above. There is no reason, however, to leave such limitations to chance in light of the various ways in which this problem could be more directly addressed.

"Indirect" Disclosure

Similarly, the express imposition of liability for "direct or indirect unauthorized disclosure" in SF 189 raises definitional problems that could and should be clarified. What is meant by an "indirect" unauthorized disclosure?

The ISOO Q & A (#17) provides "one example" in terms of telling an unauthorized individual "where he might obtain the information, for instance, that he should read the story on pages 30-33 of a particular magazine because it was entirely accurate."

However, this is clearly inadequate to give an individual fair notice of the kinds of conduct that could be considered a violation of his or her obligations. Moreover, it is not at all clear why this example should be considered valid, since the story in the magazine is in the public domain and the individual cannot, based on these facts, be said to have disclosed anything but the whereabouts of unclassified information in response to an unspecified factual question.

It is noteworthy that the "Sanctions" for unauthorized disclosure of classified information by officers and employees of the U.S. Government, and its contractors, licensees, and grantees under Executive Order 12356, at Sec. 5.4(b)(1), apply only if they "knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under this Order or predecessor orders." Without such a limiting definition of culpable behavior, the term "indirect" disclosure in SF 189 could subject an individual who signs the agreement to liability for disclosures that occur without the individual's knowledge, intent or negligence and which therefore cannot fairly be viewed as a breach of the individual's obligations to safeguard classified information.

Disclosures of Classified Information to Congress

Finally, it is not clear whether the Government believes that an individual's disclosure of classified information to Congress is an "unauthorized disclosure" in violation of the agreement.

Again, as shown in the language of Sec. 5.4(b)(1) of Executive Order 12356, an "unauthorized disclosure" in the context of classified information refers to a disclosure made to a person or persons who have not been cleared to receive information at that level of classification. A disclosure is not "unauthorized" simply because the specific transaction has not been approved; otherwise, each and every disclosure of classified information -- including those between two persons holding appropriate security clearances -- would be considered "unauthorized" unless specifically approved.

While it may be argued that a different rule applies to SCI and other special access programs, a disclosure of classified information to a recipient "authorized" (i.e., cleared) to receive information at that level of classification is not an "unauthorized disclosure."

Members of Congress are, of course, cleared for access to all classified information by virtue of their positions. So long as the information is given directly to a Member of Congress, or is communicated to a Member of Congress or a Congressional committee or subcommittee through the custody of a Congressional staffperson who has an appropriate clearance for such classified information, the disclosure cannot be considered "unauthorized." See also Intelligence Oversight Act, 50 U.S.C. Sec.413(e); Civil Service Reform Act, 5 U.S.C. Sec. 2302(b)(8) and 7211; and other statutory authorities protecting communications of classified information to Congress by government employees and other persons.

The language of SF 189 can and should, in the ACLU's view, be substantially improved through rescission and redrafting; in any event, its terms require further clarification which should become binding interpretations for the application and enforcement of the obligations and liability it imposes.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

July 28, 1987

TO : Honorable Charles Grassley
Attn: Kris Kolesnik

FROM : American Law Division

SUBJECT : Effect of Secrecy Agreements on Whistleblowing Protections

The following memorandum is submitted in response to your request, as discussed with Kris Kolesnik, for information on the possible effect of the required secrecy agreements, or "non-disclosure agreements" required of persons in the executive branch receiving security clearances, on the "whistleblowing" protections of federal law.

Many, but not all, civilian employees in the executive branch of the federal government are covered by the "whistleblowing" protections enacted in the 95th Congress as part of the Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1114. The statutory provisions work to protect an employee from "personnel actions" which are taken as "reprisals" for the employee's whistleblowing activities, that is, the disclosure by the employee of certain illegal, improper or wasteful governmental activities. See 5 U.S.C. §2302(b)(8).

The general intent of Congress in enacting the whistleblowing protection provisions of the Civil Service Reform Act was to encourage the disclosure of illegality, waste, and corruption in government by protecting those employees who "blow the whistle" on such activity, and in so protecting and encouraging such disclosures, ultimately to increase the efficiency and effectiveness of

the federal service. As stated in the Senate Report on the whistleblowing and civil service reform legislation:

> Often the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.
>
> S. Rpt. No. 969, 95th Cong., 2d Sess. 8 (1978).

There are, as a general matter, two types of protected whistleblowing disclosures that may be made by covered employees: (1) public disclosure of non-secret information or information not prohibited by law or certain executive orders from disclosure, and (2) disclosures of any information to specified and particular officers or employees of the government. Whistleblowing disclosures that are made public must not contain information the disclosure of which is prohibited by law, or which is specifically required by an executive order to be kept secret in the interest of national defense or the conduct of foreign affairs, such as classified information. 5 U.S.C.

§2308(b)(8)(A). However, disclosures which are otherwise "protected" disclosures, may be made, regardless of statutory and executive order secrecy requirements, to the Special Counsel of the Merit System Protection Board, or to an Inspector General of an agency or "another employee designated by the head of an agency to receive such disclosures." 5 U.S.C. §2308(b)(8)(B). The statute further expressly provides that the whistleblowing provisions are "not to be construed to authorize . . . the taking of any personnel action against an employee who discloses information to the Congress." 5 U.S.C. §1202(b). The Congress sought to protect its right to receive even "confidential" information from federal employees, without the employee's fear of reprisals:

> The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.
>
> H.R. Rpt. No. 1717 (Conference Report), 95th Cong., 2d Sess. 132 (1978).

Public disclosures that are prohibited by law, and so not protected by the whistleblowing statutes, are intended by Congress to be those that are prohibited by <u>statutory</u> law, or by executive order for national security

reasons, and not those that are merely prohibited by regulation. An agency could not properly retaliate against an employee for the disclosure of protected whistleblowing information merely because the disclosure violated agency regulations. As noted in the Conference Report on the whistleblowing legislation: "The reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations." H.R. Rpt. No. 1717, supra at 130.

The non-disclosure or secrecy agreement in question, SF 189, requires as a condition to the access to classified information that the employee agree, among other things, never to divulge "classified information," which is defined to mean "information that is either classified or classifiable under the standards of Executive Order 12356, or under any other Executive Order or statute . . . ." The restrictions in the secrecy agreement on the disclosure of information which is not specifically classified under the Executive Order, but merely "classifiable," raise questions as to the consistency of the agreement with the whistleblowing protections of federal law and the purposes of the whistleblowing statute.

To be consistent with the whistleblowing protections it would appear that the secrecy agreement would have to permit without punishment or negative personnel action, the public disclosure of information which the employee believes evidences a violation of law, or waste, fraud or abuse, and which is not specifically classified information or specifically required to be kept secret under E.O. 12356 or other Executive Order, and must allow the disclosure of information evidencing such illegality, waste, fraud or abuse to the Special Counsel, an Inspector General, or to the Congress even if the information is

classified or required to be kept secret. It is not clear whether or not the secrecy agreement on its face would subject an employee to loss of security clearance for any such disclosures.

The secrecy agreement would allow revocation of one's security clearance for the disclosure of not only "classified" information, but also for "classifiable" information. The non-disclosure or secrecy agreement does not precisely state what information would come within the term "classifiable," a term whose scope is apparently a matter of some conjecture at this time. It should be noted that the Executive Order referenced in the agreement, E.O. 12356, provides, at Section 1.3, that:

> (a) Information shall be considered for classification if it concerns:
>
> (1) military plans, weapons, or operations;
> (2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;
> (3) foreign government information;
> (4) intelligence activities (including special activities), or intelligence sources or methods;
> (5) foreign relations or foreign activities of the United States;
> (6) scientific, technological, or economic matters relating to the national security;
> (7) United States Government programs for safeguarding nuclear materials or facilities;
> (8) cryptology;
> (9) a confidential source; or
> (10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President. Any determination made

> under this subsection shall be reported promptly to the Director of the Information Security Oversight Office.
>
> (b) Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

Thus a broad range of information relating to weapons, weapon systems, the problems or vulnerabilities of such systems, foreign relations, etc., might conceivably be that type of information which could arguably be considered "classifiable" or "considered for classification" under the Executive Order, even if not classified at the time. Under the "classifiable" standard, it is arguably possible that the secrecy agreement may go beyond the Executive Order and actually punish the disclosure of information which is not at that time classified or required to be kept secret under the Executive Order, but could be in the future, and thus punish someone for an after-the-fact classification. Even information which has been de-classified is subject to possible re-classification at a later date, E.O. 12356, Section 1.6(c) and (d), and could thus presumably be called "classifiable," and subject one to penalties for disclosure under the secrecy agreement. To the extent that the secrecy agreement subjects to discipline the disclosure of information that is not in fact required to be kept secret under the Executive Order, it is arguably in conflict with the language and intent of the whistleblowing law, which would seem to provide that such disclosures are "protected." 5 U.S.C. §2308(b)(8)(A).

It should be noted that the Executive Order states that when there is a reasonable doubt about the need to classify information, one should protect that information as if it were classified "pending a determination" by an authority within 30 days. Section 1.1(c). The Executive Order may thus in this specific instance require information to be kept secret, pending a determination, even when the information is not yet classified, and thus the public disclosure of that information would not appear to be "protected" under the specific language of the whistleblowing statute.

In a practical sense and as a general matter, to the extent that the secrecy agreement because of its apparent breadth and vagueness of terms chills or discourages the disclosure of any information which evidences waste, fraud, corruption or illegality in government, that effect or result would be in contrast to and in derogation of the intended results of the whistleblowing statute. See S. Rpt. No. 969, supra at 7-8.

In a legal context it may be argued that the whistleblowing law should protect an employee from a negative personnel action such as loss of one's security clearance for the public disclosure of information that is not classified or required to be kept secret at the time of disclosure by the Executive Order. 5 U.S.C. §2308(b)(8)(A). If such information is required to be kept secret only by the non-disclosure agreement, and not specifically by the Executive Order or a statute, it should, arguably, still be a "protected" disclosure. See H.R. Rpt. No. 1717, Conference Report, supra at 130.

However, cases and experience have shown that whistleblowing protections may be difficult to enforce in court on behalf of an employee. See, for example, Hearings, H. Comm. on Post Office and Civil Service, "Whistleblower

Protection Act of 1986," Serial No. 99-54, 99th Cong., 2d Session (1986). The burden of proof of determining a "retaliation" for a protected disclosure is on the employee, In re Frazier, 1 MSPB 159 (1979), aff'd Frazier v. MSPB, 672 F.2d 150, 164-65 (D.C. Cir. 1983); Hagmeyer v. Department of Treasury, 757 F.2d 1281, 1284 (Fed. Cir. 1985), and where no direct evidence or statements exist may be difficult of proof. In "disciplinary action" cases against officers who allegedly retaliated against employees for protected whistleblowing disclosures, which are intended to provide significant deterrence to such retaliatory actions, the courts have required a showing of a wrongful "retaliatory intent" on the part of the acting official, and have required a determination of the official's "state of mind" to "insure that the motive for the adverse action was an improper one," that is, primarily to punish the employee or deter him from making protected disclosures. Starrett v. Special Counsel, 792 F.2d 1246, 1253-1255 (4th Cir. 1986); see also Harvey v. M.S.P.B., 802 F.2d 537 (D.C. Cir. 1986). In these cases where there is an independent, and arguably, legitimate management objective, other than primarily punishment or deterrence for whistleblowing, in taking or not taking an action regarding an employee, then the court might not uphold a disciplinary action against such official taking those personnel actions even when based in part on the disclosures made. Starrett, supra at 1254; Harvey, supra at 547-548. It is possible that a court may find that a breach of a non-disclosure or secrecy agreement by an employee provides such an independent and valid or "legitimate" management reason for taking a personnel action under such an analysis. But see Warren v. Department of Army, 804 F.2d 654, 658 (Fed. Cir. 1986), concerning an employee appeal of an adverse action - "Chapter 77 appeal" - where it was found that the "independent" grounds "considered in the proceeding [must] not include the 'protected disclosures' themselves."

Jack H. Maskell
Legislative Attorney