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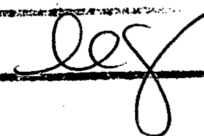
OCA FILE



18 August 1988
OCA 2811-88

MEMORANDUM FOR: Deputy Director for Administration
General Counsel
Director of Security
DGC/AS/OGC
C/ICAD/OGC
C/ALD/OGC
LD/OGC (Attn: STAT
PAO/DCI (Attn:

FROM: STAT Legislation Division
Office of Congressional Affairs

SUBJECT: Grassley Amendment - Conference Report

1. Attached for your information is a copy of the report of the conferees on H.R. 4775, the Fiscal Year 1989 Treasury, Postal Service and General Government Appropriations bill (Tab A - Congressional Record, 11 August 1988, pp. H6975-84; House Report 100-881). The report (p. H6982, amendment No 137) reflects the conferees agreement to reenact for Fiscal Year 1989 the so-called "Grassley amendment" restricting the use of secrecy agreements containing the term "classifiable".

2. As noted, the conferees agreed to restore the provision which was contained in the original House bill, H.R. 4775, but subsequently deleted by the Senate Appropriations Committee and thereafter passed in that form by the Senate (Tab B - copies of relevant pages of Senate-passed bill attached).

3. On 10 August, the Legislation and National Security Subcommittee on the House Government Operations Committee (chaired by Representative Brooks) held a hearing on the provision. Copies of the witness list and various witness' statements are attached for your information (Tab C). The hearing appears to have been held to build the support for

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overcoming the Senate opposition to the amendment. In this regard, we understand that Senators Grassley and Proxmire, both members of the Senate Appropriations Committee, strongly supported reinclusion of the provision in the bill.

4. Swift action on the report is expected when the Congress returns in September and the President is expected to sign the legislation thereafter. This office and the Office of General Counsel are working to include favorable language on the matter in the President's signing statement.

5. The immediate effect of reenactment appears to be to preserve against a claim of mootness the appeal of the district court's decision holding the FY '88 version of the legislation unconstitutional.

6. Please contact us if you ~~have~~ any questions.

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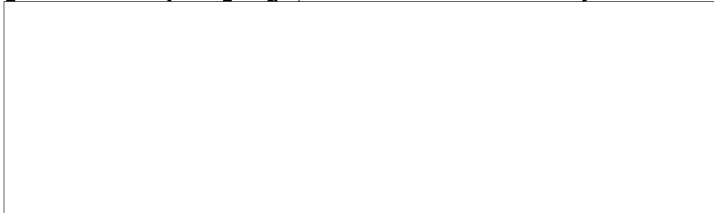

Attachments
as stated

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OCA/PS/bsb: 19 Aug 88

Distribution:
Orig - addressee(s)
1 - D/OCA (w/o att.)
1 - DD/LEG (w/o att.)
1 - OCA Records (w/att.)
1 - PS Chrono (w/o att.)
1 - OCA/LEG Subj. File (Secrecy Agreements)(w/att.)

FOR THE RECORD - A complete package of the attachments were given to DDA, DGC/AS/OGC and LD/OGC Only Tab C, (Testimony) was given to Others were sent a note asking them to call me for copies if they needed a complete package.

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nominated, and the other one who will be nominated shortly.

Is it not great to live in a land where we can all speak up and speak out? We can have a difference of opinion without having a difference of principle.

I have had a number of other jobs, but I have never had any position where I have had more voluminous mail than I have had as a Member of Congress, because as a Member of Congress, we are faced with all kinds of issues from every different point of view, whereby whether I was a public service commission, TVA Director, or president of a college, it was a specific issue, but now it is a broad range of issue.

Mr. Speaker, we have the message now, and I thank the Chair for giving me the opportunity to say a few words.

[Pursuant to the order of the House on Aug. 11, 1988, the following Conference Report was filed on Aug. 12, 1988]

CONFERENCE REPORT ON H.R. 4775

Mr. ROYBAL submitted the following conference report and statement on the bill (H.R. 4775) making appropriations for the Treasury Department, the U.S. Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1989, and for other purposes:

CONFERENCE REPORT (H. REPT. 100-881)

The Committee of Conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 4775) making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1989, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 6, 8, 13, 14, 29, 32, 48, 51, 52, 54, 57, 59, 70, 79, 82, 83, 84, 86, 87, 94, 95, 96, 108, 109, 110, 111, 112, 115, 118, 119, 120, 126, 130 136, 139, 140, 147, 148, 150, 151, and 155.

That the House recede from its disagreement to the amendments of the Senate numbered 5, 9, 17, 18, 20, 21, 22, 23, 36, 37, 38, 40, 55, 58, 64, 65, 66, 67, 69, 73, 78, 99, 101, 103, 104, 105, 107, 114, 123, 124, 125, 127, 128, 129, 131, 132, 133, 134, and 135.

Amendment numbered 1:

That the House recede from its disagreement to the amendment of the Senate numbered 1, and agree to the same with an amendment, as follows:

In lieu of the matter stricken and inserted by said amendment, insert the following:

OFFICE OF THE SECRETARY

SALARIES AND EXPENSES

For necessary expenses of the Office of the Secretary, including operation and maintenance of the Treasury Building and Annex; hire of passenger motor vehicles; not to exceed $22,000 for official reception and representation expenses; not to exceed $200,000 for unforeseen emergencies of a confidential nature, to be allocated and expended under the direction of the Secretary of the Treasury and to be accounted for solely on his certificate; not to exceed $573,000, to remain available until expended, for repairs and improvements to the Main Treasury Building and Annex; $59,618,000.

INTERNATIONAL AFFAIRS

For necessary expenses of the international affairs function of the office of the Secretary; hire of passenger motor vehicles; maintenance, repairs, and improvements of, and purchase of commercial insurance policies for, real properties leased or owned overseas, when necessary for the performance of official business; not to exceed $2,000,000 for official travel expenses; and not to exceed $73,000 for official reception and representation expenses; $22,000,000.

And the Senate agree to the same.

Amendment numbered 3:

That the House recede from its disagreement to the amendment of the Senate numbered 3, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$277,230,000*; and the Senate agree to the same.

Amendment numbered 4:

That the House recede from its disagreement to the amendment of the Senate numbered 4, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$13,237,000*; and the Senate agree to the same.

Amendment numbered 7:

That the House recede from its disagreement to the amendment of the Senate numbered 7, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$234,000,000*; and the Senate agree to the same.

Amendment numbered 12:

That the House recede from its disagreement to the amendment of the Senate numbered 12, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$1,025,411,000*; and the Senate agree to the same.

Amendment numbered 15:

That the House recede from its disagreement to the amendment of the Senate numbered 15, and agree to the same with an amendment, as follows:

In lieu of the number proposed by said amendment insert *$16,739*; and the Senate agree to the same.

Amendment numbered 19:

That the House recede from its disagreement to the amendment of the Senate numbered 19, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$47,000,000*; and the Senate agree to the same.

Amendment numbered 24:

That the House recede from its disagreement to the amendment of the Senate numbered 24, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$1,740,353,000*; and the Senate agree to the same.

Amendment numbered 26:

That the House recede from its disagreement to the amendment of the Senate numbered 26, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$2,800,000*; and the Senate agree to the same.

Amendment numbered 27:

That the House recede from its disagreement to the amendment of the Senate numbered 27, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$2,800,000*; and the Senate agree to the same.

Amendment numbered 28:

That the House recede from its disagreement to the amendment of the Senate numbered 28, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$1,434,921,000*; and the Senate agree to the same.

Amendment numbered 30:

That the House recede from its disagreement to the amendment of the Senate numbered 30, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$357,500,000*; and the Senate agree to the same.

Amendment numbered 33:

That the House recede from its disagreement to the amendment of the Senate numbered 33, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$16,850,000*; and the Senate agree to the same.

Amendment numbered 34:

That the House recede from its disagreement to the amendment of the Senate numbered 34, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$225,000*; and the Senate agree to the same.

Amendment numbered 43:

That the House recede from its disagreement to the amendment of the Senate numbered 43, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$119,820,000*; and the Senate agree to the same.

Amendment numbered 50:

That the House recede from its disagreement to the amendment of the Senate numbered 50, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$532,865,000*; and the Senate agree to the same.

Amendment numbered 56:

That the House recede from its disagreement to the amendment of the Senate numbered 56, and agree to the same with an amendment, as follows:

Restore the matter stricken by said amendment, amended as follows:

In lieu of the sum named by said amendment, insert *$11,000,000*; and the Senate agree to the same.

Amendment numbered 61:

That the House recede from its disagreement to the amendment of the Senate numbered 61, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$200,000,000;* and the Senate agree to the same.

Amendment numbered 97:

That the House recede from its disagreement to the amendment of the Senate numbered 97, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$108,000,000;* and the Senate agree to the same.

Amendment numbered 106:

That the House recede from its disagreement to the amendment of the Senate numbered 106, and agree to the same with an amendment, as follows:

Restore the matter stricken by said amendment, amended as follows:

In lieu of the section number named, insert *509A;* and the Senate agree to the same.

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Amendment numbered 137:

That the House recede from its disagreement to the amendment of the Senate numbered 137, and agree to the same with an amendment, as follows:

Restore the matter stricken by said amendment, amended as follows:

In lieu of the section number named, insert *619;* and the Senate agree to the same.

Amendment numbered 144:

That the House recede from its disagreement to the amendment of the Senate numbered 144, and agree to the same with an amendment, as follows:

Restore the matter stricken by said amendment, amended as follows:

In lieu of the section number named, insert *624;* and the Senate agree to the same.

The committee of conference report in disagreement amendments numbered 2, 10, 11, 16, 25, 31, 35, 39, 41, 42, 44, 45, 46, 47, 49, 53, 60, 62, 63, 68, 71, 72, 74, 75, 76, 77, 80, 81, 85, 88, 89, 90, 91, 92, 93, 98, 100, 102, 113, 116, 117, 121, 122, 138, 141, 142, 143, 145, 146, 149, 152, 153, and 154.

EDWARD R. ROYBAL,
DANIEL K. AKAKA,
STENY H. HOYER,
RONALD D. COLEMAN,
EDWARD P. BOLAND,
SIDNEY R. YATES.
(except 92),
JAMIE L. WHITTEN,
JOE SKEEN,
BILL LOWERY,
FRANK R. WOLF,
SILVIO O. CONTE,
Managers on the Part of the House.

DENNIS DECONCINI,
WILLIAM PROXMIRE,
B.A. MIKULSKI,
JOHN C. STENNIS,
PETE DOMENICI,
ALFONSE M. D'AMATO,
MARK O. HATFIELD,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 4775) making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain independent agencies for the fiscal year ending September 30, 1989, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

TITLE I—TREASURY DEPARTMENT

OFFICE OF THE SECRETARY

Amendment No. 1: Establishes separate appropriation accounts for the Office of the Secretary and International Affairs as proposed by the House instead of consolidating those accounts into one account as proposed by the Senate. Appropriates $59,618,000 for salaries and expenses of the Office of the Secretary as proposed by the House and appropriates $22,000,000 for international affairs. The Senate proposed total funding of $83,000,000 for both accounts combined.

FEDERAL LAW ENFORCEMENT TRAINING CENTER

Amendment No. 2: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken and instead by said amendment, insert the following:

For necessary expenses of the Federal Law Enforcement Training Center, as a bureau of the Department of the Treasury, including purchase (not to exceed fifteen for police-type use) and hire of passenger motor vehicles; for expenses for student athletic and related activities; uniforms without regard to the general purchase price limitation for the current fiscal year; the conducting of and participating in firearms matches and presentation of awards; for public awareness and enhancing community support of law enforcement training; not to exceed $5,000 for official reception and representation expenses; room and board for student interns; and services as authorized by 5 U.S.C. 3109: Provided, That the Center is authorized the acceptance of gifts: Provided further, That funds appropriated in this account shall be available for State and local government law enforcement training on a space-available basis; training of foreign law enforcement officials on a space-available basis with reimbursement of actual costs to this appropriation; training of private sector security officials on a space-available basis with reimbursement of actual costs to this appropriation; travel expenses of non-Federal personnel to attend State and local course development meetings at the Center: Provided further, That the Federal Law Enforcement Training Center shall hire up to and maintain an average of not less than 425 direct full-time equivalent positions for fiscal year 1989; $34,664,000: Provided further, That none of the funds appropriated under this heading shall be used to reduce the level of advanced training or other training activities of the Federal Law Enforcement Training Center at Marana, Arizona.

ACQUISITION, CONSTRUCTION, IMPROVEMENTS, AND RELATED EXPENSES

For acquisition, construction, improvements, and related expenses (to include design, equipment, furnishing, and other such costs) for the Federal Law Enforcement Training Center, $20,000,000 to remain available until expended: Provided, That of this amount, $7,000,000 shall reamin available for the acquisition, renovation, and adaptation of the former Artesia Christian College campus in Artesia, New Mexico, as a facility of the Federal Law Enforcement Training Center: Provided further, That $13,000,000 shall be available for the first phase of implementation of the Master Plan for the expansion of the Federal Law Enforcement Training Center at Glynco, Georgia, and for on-going maintenance, facility improvements, and related equipment: Provided further, That the Master Plan for the Federal Law Enforcement Training Center shall make provision for construction of an advanced firearms training range for participating agencies with specialized firearms training requirements.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates funds for salaries and expenses and for construction at the Federal Law Enforcement Training Center at Glynco, Georgia. It also appropriates $7,000,000 for acquisition, renovation and adaptation of the former Artesia Christian College campus in Artesia, New Mexico.

FINANCIAL MANAGEMENT SERVICE

Amendment No. 3: Appropriates $277,230,000 for salaries and expenses instead of $280,461,000 as proposed by the House and $276,000,000 as proposed by the Senate.

Amendment No. 4: Makes available $13,237,000 for systems moderization initiatives instead of $11,737,000 as proposed by the House and $14,737,000 as proposed by the Senate.

PAYMENT OF GOVERNMENT LOSSES IN SHIPMENT

Amendment No. 5: Deletes appropriation language proposed by the House. This exact language is included in Amendment No. 22.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

Amendment No. 6: Deletes language proposed by the Senate which would have exempted the bureau from the general purchase price limitation on police-type vehicles.

Amendment No. 7: Appropriates $234,000,000 for salaries and expenses instead of $231,003,000 as proposed by the House and $240,000,000 as proposed by the Senate.

Amendment No. 8: Makes available $15,000,000 for the Federal Alcohol Administration Act as proposed by the House instead of $20,000,000 as proposed by the Senate.

Amendment No. 9: Establishes a base level of 3,701 full-time equivalent positions as proposed by the Senate instead of 3,451 as proposed by the House.

Amendment No. 10: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which allocates 543 full-time equivalent positions to the Armed Career Criminal Apprehension Program.

Amendment No. 11: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate making funds available for the purchase of certain equipment.

U.S. CUSTOMS SERVICE

Amendment No. 12: Appropriates $1,025,411,000 for salaries and expenses instead of $1,004,821,000 as proposed by the House and $1,046,000,000 as proposed by the Senate.

CUSTOMS COOPERATION COUNCIL

The Conferees agree that the Commissioner of Customs is authorized to fund the 1989 Customs Cooperation Council annual meeting in 1989. Such funding is to come from monies appropriated in this Act for the Customs Service for Fiscal Year 1989.

The Customs Cooperation Council is a worldwide Customs group of 103 member nations, responsible for multi-national efforts to coordinate and make consistent the various Customs practices of member countries. The forum includes development of the Harmonized System of classification and numerous initiatives directed at facilitating world trade.

The Conferees note that U.S. participation in the Convention is an important component in overall world trading arrangements. It is in recognition of this factor that the Conferees authorize the Commissioner to fund the 1989 Customs Cooperation Council Convention.

OAKLAND AND SAN FRANCISCO SELECTION PROCESSING SITE

The Conferees direct the Customs Service not to take any action which would result in the consolidation of the Oakland and San Francisco Selection Processing Site functions at San Francisco airport. Nor may any steps be taken to reduce the staff or mission of the two facilities until such time as the Department holds public hearings to determine the impact of such actions and reports to the Committee on the results of those meetings and the need to consolidate these functions.

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U.S. CUSTOMS SERVICE: EXPORT CLEARANCE

The Conferees note that the Kenai Peninsula in Alaska has experienced an increase in exports from Alaska going to overseas destinations. Vessels coming from overseas to pick up such exports must be cleared by the United States Customs Service when they arrive to pick up cargo destined for foreign markets.

Given that such trade authority is on the increase, the Conferees direct the United States Customs Service to study the feasibility of providing reimbursable services to the ports along the Kenai Peninsula with specific emphasis on in-place presence. The United States Customs Service shall submit a report of its analysis to the Senate and House Committees on Appropriations no later than February 1, 1989.

DELAYS AT U.S.-MEXICO PORTS OF ENTRY

The Conferees are encouraged by recent action taken by the U.S. Customs Service to reduce delays at U.S.-Mexico Ports of Entry. Nevertheless, traffic at the border continues to grow and the problem of delays will exist for the foreseeable future.

The Customs Service has testified that it is increasing personnel at the Southwest border and it now has the capability to staff all allotted inspection positions. The Conferees direct Customs to report on the effectiveness of the personnel increases and other steps being taken to reduce delays at commercial and passenger crossings.

As part of this report, the Conferees would like the Customs Service to evaluate the cooperation between Federal agencies with border responsibilities. Specifically, Customs should address the success of the Customs agreement with the Immigration and Naturalization Service to divide lane staffing duties on a fifty-fifty basis. Customs should evaluate its relationship with INS on the entire Southwest border and discuss particular successes and problems at these locations. The Customs Service should state its views on what steps need to be taken regarding current and potential problems that contribute to delays at the U.S.-Mexico Ports of Entry. This report should be provided to the House and Senate Committees on Appropriations no later than March 1, 1989.

Amendment No. 13: Restores a provision regarding the Customs User Fee account as proposed by the House.

Amendment No. 14: Restores a provision proposed by the House and deleted by the Senate which prohibits the redirection of the Equal Employment Opportunity Program.

Amendment No. 15: Establishes a base of 16,739 full-time equivalent positions instead of 16,599 as proposed by the House and 16,799 as proposed by the Senate.

Amendment No. 16: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which provides that all additional Customs positions will be allocated only for commercial operations.

OPERATIONS AND THE MAINTENANCE, AIR INTERDICTION PROGRAM

Amendment No. 17: Appropriates $142,262,000 for operations and maintenance as proposed by the Senate instead of $132,262,000 as proposed by the House.

Amendment No. 18: Deletes language as proposed by the Senate which prohibits the transfer of certain equipment on a permanent basis.

U.S. MINT

Amendment No. 19: Appropriates $47,000,000 for salaries and expenses instead of $47,869,000 as proposed by the House and $46,000,000 as proposed by the Senate.

BUREAU OF THE PUBLIC DEBT

Amendment No. 20: Appropriates $219,430,000 for salaries and expenses as proposed by the Senate instead of $242,840,000 as proposed by the House.

Amendment No. 21: Inserts the phrase "shall be available" as proposed by the Senate.

PAYMENT OF GOVERNMENT LOSSES IN SHIPMENT

Amendment No. 22: Inserts a provision appropriating $960,000 as proposed by the Senate.

INTERNAL REVENUE SERVICE

Amendment No. 23: Appropriations $87,165,000 for salaries and expenses as proposed by the Senate instead of $94,547,000 as proposed by the House.

IRS PAYROLL

The Conferees are aware of the efforts that IRS has made to correct the problems associated with the IRS payroll system.

The Conferees understand that the Department of the Treasury is considering abolishing the Office of Fiscal Operations and the Resources Systems Development Division of the Detroit Data Center and transferring its payroll/personnel functions to the Department of Agriculture.

The Conferees are convinced that the IRS, at the Senate Committee's request, has made significant progress in rectifying the deficiencies cited in the Committee's FY 1988 report.

Accordingly, the Conferees direct the Secretary of the Treasury to continue the current payroll system throughout FY 1989.

Amendment No. 24: Appropriates $1,740,353,000 for processing tax returns instead of $1,850,134,000 as proposed by the House and $1,691,076,000 as proposed by the Senate.

Amendment No. 25: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum striken and inserted by said amendment, insert the following: *$1,932,441,000.*

The managers on the part of the Senate will offer a motion to recede and concur in the amendment of the House to the amendment of the Senate.

This amendment makes available $1,932,441,000 for examinations and appeals.

Amendment No. 26: Makes available $2,800,000 for the Tax Counseling for the Elderly program instead of $2,850,000 as proposed by the Senate and $2,650,000 as proposed by the House.

Amendment No. 27: Makes available $2,800,000 for the Tax Counseling for the Elderly program instead of $2,850,000 as proposed by the Senate and $2,650,000 as proposed by the House.

Amendment No. 28: Appropriates $1,434,921,000 for investigation, collection and taxpayer service instead of $1,490,225,000 as proposed by the House and $1,431,058,000 as proposed by the Senate.

U.S. SECRET SERVICE

Amendment No. 29: Deletes a provision proposed by the Senate which would have exempted the Service from the general purchase price limitation for police-type vehicles.

Amendment No. 30: Appropriates $357,500,000 for salaries and expenses instead of $362,000,000 as proposed by the House and $354,500,000 as proposed by the Senate.

TITLE II—U.S. POSTAL SERVICE

SENSE OF SENATE PROVISION

Amendment No. 31: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which provides that it is the Sense of the Senate that a certain contract entered into between the Postal Service and Perot Systems not be implemented until certain conditions are met.

U.S. POSTAL SERVICE: SUN CITY, ARIZONA

The Conferees are concerned about the unfortunate situation of mail theft from curbside mail boxes in Sun City, Arizona, primarily a retirement community. Under Postal Service regulations, residential developments constructed after 1978 will not receive door mail delivery, but will only be able to receive either curbside mail delivery or delivery to local area "cluster" boxes. The purpose of these regulations is to contain costs involved in delivering the mail.

In light of the mail security problems recently experienced by the elderly residents of Sun City, Arizona, the Conferees direct the United States Postal Service to study the economic feasibility of amending Postal Service regulations to provide door mail delivery to retirement communities constructed after 1978 nationwide if a majority of the residents favor such a change in their mail delivery. The Conferees further direct the USPS to report the conclusions of their study to the House and Senate Appropriations Committees by no later than June 1, 1989.

POSTAL FACILITY FOR THE TIERRASANTA AREA OF SAN DIEGO, CALIFORNIA

The Conferees continued to be concerned over the lack of a Postal Service facility for the Tierrasanta area of San Diego. This project is on the Postal Service's five year construction plan and was originally scheduled to be completed by 1989. The Conferees believed that this facility should continue to be a priority for the Postal Service.

The Postal Service has stated that it has been unable to obtain a suitable site for a permanent facility for Tierrasanta. To address the problem in the short-term, the Postal Service plans to establish a Temporary Carrier Annex to serve the Tierrasanta, Sierra Mesa and Grantville areas of San Diego. The Committee supports this plan, but believes the Postal Service should address the lack of planned walk-up window service for Tierrasanta.

The Conferees urge the Postal Service to continue seeking a site for a permanent full service postal facility for Tierrasanta and requests that the Postal Service keep it informed of its effort to address the mail service problem for these areas of San Diego.

PALATINE, ILLINOIS POSTAL FACILITY

The Conferees are concerned about a situation occurring between the Village of Palatine, Illinois and the United States Postal Service. The Conferees understand that the Village of Palatine has been attempting in good faith to find an alternative site for a Postal Service distribution facility. The Conferees understand that failure to find an alternative to the site being proposed by the Postal Service could have a devastating effect on the tax base of Palatine and on the schools and parks districts. Therefore, the Conferees direct the Postal Service to work with the Village of Palatine to find an alternative site that would meet postal needs, before expending any funds for design and/or constuction work on the Postal Service's preferred site

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ADMINISTRATIVE PROVISION

Amendment No. 32: Restores a provision inserted by the House and stricken by the Senate which mandates certain services to the people of Holly Springs, Mississippi.

TITLE III—EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF ADMINISTRATION

Amendment No. 33: Appropriates $16,850,000 for salaries and expenses instead of $16,900,000 as proposed by the House and $16,800,000 as proposed by the Senate

NATIONAL CRITICAL MATERIALS COUNCIL

Amendment No. 34: Appropriates $225,000 for salaries and expenses instead of $178,000 as proposed by the House and $300,000 as proposed by the Senate.

OFFICE OF MANAGEMENT AND BUDGET

Amendment No. 35: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment insert the following: *$39,640,000, of which not to exceed $1,000,000 may be available for a consolidated Federal budget and financial information system to improve the management of Executive agencies.*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $39,640,000 for salaries and expenses and authorizes not to exceed $1,000,000 for a Federal budget and financial information system.

Amendment No. 36: Inserts the word "altering" as proposed by the Senate and deletes the word "review" proposed by the House. This provision prohibits OMB from altering the transcripts of certain testimony under certain conditions as proposed by the Senate instead of prohibiting OMB from reviewing the testimony as proposed by the House.

Amendment No. 37: Deletes a provision proposed by the House. The Conferees emphasize their position on this issue by inserting the following statement on determination and compliance with Congressional intent:

DETERMINATION AND COMPLIANCE WITH CONGRESSIONAL INTENT

The Conferees take strong exception to action by the Director of the Office of Management and Budget in his Memorandum for Cabinet Officers and Agency Heads dated March 15, 1988. That memorandum reminded them, and all employees of their agencies, that Congressional reports have no force of law and claiming the right of the Executive Branch to substitute its judgment as to which projects to fund.

APPROPRIATIONS CAN BE USED ONLY FOR THE PURPOSES FOR WHICH MADE

Title 31 of the United States Code makes clear that appropriations can be used only for the purposes for which they were appropriated, as follows:

Section 1301. Application:

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

STATEMENT OF INTENT INCLUDED IN CONTINUING RESOLUTION

Section 107 of Public Law 100-202, the Continuing Resolution for fiscal year 1988, says:

Amounts and authorities provided by this resolution shall be in accordance with the reports accompanying the bills as passed by or reported to the House and the Senate and in the Joint Resolution.

Executive Branch wishes cannot substitute for Congress' own statements as to the best evidence of Congressional intentions—that is, the official reports of the Congress.

UNANTICIPATED NEEDS

Amendment No. 38: Inserts center head proposed by the Senate and deletes a center head proposed by the House.

EXPENSES OF MANAGEMENT IMPROVEMENT

Amendment No. 39: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment amended to read as follows:

In lieu of the matter proposed by said amendment, insert the following:

EXPENSES OF MANAGEMENT IMPROVEMENT

For expenses necessary to provide a comprehensive office automation system, including equipment and software, for the Office of Management and Budget, $1,000,000, to remain available until expended.

The managers on the part of the Senate will move to recede and concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $1,000,000 to provide a comprehensive office automation system for the Office of Management and Budget.

TITLE IV—INDEPENDENT AGENCIES

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Amendment No. 40: Appropriates $1,040,000 for salaries and expenses as proposed by the Senate instead of $1,275,000 as proposed by the House.

ADVISORY COMMITTEE ON FEDERAL PAY

Amendment No. 41: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken by said amendment, insert the following:

ADVISORY COMMITTEE ON FEDERAL PAY

SALARIES AND EXPENSES

For necessary expenses of the Advisory Committee on Federal Pay, established by 5 U.S.C. 5306; $205,000: Provided, That the annual report of the Advisory Committee on Federal Pay shall be submitted to the Appropriations Committees of the House and Senate and other appropriate Committees of the Congress at the same time the report is submitted to the President.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $205,000 for the Advisory Committee on Federal Pay. The Conferees are concerned that the report of the Advisory Committee on Federal Pay is not available in a timely fashion for review by the Congress and have included language to require that the report be submitted to the Congress at the same time the report is submitted to the President.

GENERAL SERVICES ADMINISTRATION

FEDERAL BUILDINGS FUND LIMITATIONS ON AVAILABILITY OF REVENUE

Amendment No. 42: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$3,024,217,000.*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment establishes a total limitation on the availability of funds in the Federal Buildings Fund.

Amendment No. 43: Establishes a limitation of $119,820,000 on construction instead of $92,139,000 as proposed by the House and $137,147,000 as proposed by the Senate.

Amendment No. 44: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum named in said amendment, insert the following: *$14,000,000.*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment makes available $14,000,000 for construction of the Lakeland, Florida Federal Building.

Amendment No. 45: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which makes available $16,758,000 for construction of a Federal Building, Courthouse in Baton Rouge, Louisiana.

Amendment No. 46: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which makes available $250,000 for site and design of a parking facility in Newark, New Jersey.

Amendment No. 47: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which makes available $5,000,000 for a grant to the University of New Mexico.

Amendment No. 48: Deletes a provision proposed by the Senate which would have made $7,000,000 available for the Martha Graham Center of Contemporary Dance.

Amendment No. 49: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum named in said amendment, insert the following: *$500,000.*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

The amendment makes available $500,000 for other selected purchases.

Amendment No. 50: Establishes a limitation of $532,865,000 for repairs and alterations instead of $550,673,000 as proposed by the House and $517,424,000 as proposed by the Senate.

FEDERAL USE OF POST OFFICE BUILDING IN JAMESTOWN, NORTH DAKOTA

The Conferees direct the Administrator of General Services, by no later than September 15, 1988, to submit a written report to the House and Senate Committees on Appropriations outlining in detail the potential uses of the former United States Postal Service building located on First Avenue and Third Street S.W. in Jamestown, North Dakota for Federal Offfice space. The report shall include, but not be limited to the following information regarding the potential Fedeal utilization of this Postal Service faiclity:

utilization of no less than 60 percent of the total square feet in such building;

utilization of such building for storage or as a depository for Government records, documents, or other materials;

which Federal agenceis are potential tenants of such building;

the cost of renovation of the building to accommodate any and all Federal uses;

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the timetable for relocating Federal agency personnel and equipment to the building; and

possible financing options to cover the cost of renovating, purchasing, or otherwise preparing the postal service building for occupancy by Federal agencies.

The Conferees believe that the Administrator of General Services should make every possible effort to explore all potential Federal uses for this facility in Jamestown.

JOHNSTOWN, PENNSYLVANIA FEDERAL COURT

The Conferees understand that pursuant to 28 U.S.C. 118, Johnstown, Pennsylvania is designated as a seat for a Federal court for the Western District of Pennsylvania. The Conferees are concerned about the need for the establishment of a satellite court facility in Johnstown to accommodate residents of the surrounding counties. Therefore, the Conferees direct the General Services Administration to establish and maintain a satellite court facility for the Western District of Pennsylvania in Johnstown.

Amendment No. 51: Restores a provision proposed by the House and deleted by the Senate which makes available $1,000,000 for a grant to the County of Los Angeles.

Amendment No. 52: Restores a provision proposed by the House and deleted by the Senate which makes available $800,000 for a grant to California State University.

Amendment No. 53. Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum named in said amendment, insert the following: *$5,000,000.*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment makes available $5,000,000 for the repair and alteration of a Federal Building, Courthouse in San Francisco, California.

Amendment No. 54: Restores a provision proposed by the House and deleted by the Senate which makes available $29,000,000 for the Ariel Rios Federal Building, New Post Office in Washington, D.C.

ATF HEADQUARTERS

The Conferees are determined that the proposed renovation of the Ariel Rios Federal Building will be effected in such a manner so as not to unduly disrupt the vital law enforcement and excise tax collection functions of the Bureau of Alcohol, Tobacco and Firearms, which is the principal occupant of the Rios Building. It should be noted that it was by action of this Committee that the building was named in memory of Ariel Rios, an ATF agent murdered in an undercover narcotics operation in South Florida.

To avoid undue disruption, the Conferees direct that ATF will not be required to temporarily relocate its Headquarters activity during the renovation in any space deemed unacceptable by the Director of ATF. Further, appropriation of funds for renovation of the Rios building is made with the clear understanding that ATF will re-occupy the Rios building immediately upon completion of the renovation.

Amendment No. 55: Deletes a provision proposed by the House and deleted by the Senate which would have made available $12,000,000 for General Accounting Office in Washington, D.C.

Amendment No. 56: Restores a provision proposed by the House and deleted by the Senate and makes available $11,000,000 for the GSA Headquarters in Washington, D.C. instead of $23,000,000 as proposed by the House.

Amendment No. 57: Restores a provision proposed by the House and deleted by the Senate which makes available $19,970,000 for the James V. Forrestal Building in Washington, D.C.

Amendment No. 58: Makes available $6,500,000 for the Interior Department at Avondale, Maryland as proposed by the Senate instead of $6,000,000 as proposed by the House.

Amendment No. 59: Deletes a provision proposed by the Senate which would have made available $2,900,000 for the Grove Arcade Federal Building in Asheville, North Carolina.

Amendment No. 60: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken and inserted by said amendment, insert the following:

Capital Improvements of United States-Mexico Border Facilities, $42,150,000 as follows:

Arizona:

Douglas, AZ: New facility/R&A/Safety, $820,700

Lukeville, AZ: R&A/Safety, $229,100

Naco, AZ:

New facility/R&A/Safety, $320,900

Nogales, AZ:

Grande Ave./Morley Gate, New Station/R&A/Safety, $2,420,900

Mariposa, R&A, $746,800

Sasabe, AZ: New facility/R&A/Safety, $355,300

San Luis, AZ: R&A/Safety, $499,300

California:

Andrade, CA: New station/R&A/Safety, $454,300

Calexico, CA: New station/R&A/Safety, $4,830,900

San Ysidro/Otay Mesa, CA:

New facility/Otay Mesa $721,700

Safety/San Ysidro/Otay Mesa, $2,673,900

R&A/Signs/Security/Commercial lot improvements, $4,956,200

Tecate, CA: New station/R&A, $861,800

New Mexico:

Antelope Wells, NM: Security/Housing, $158,500

Columbus, NM: Security, $236,300

Santa Teresa, NM: New station, $1,668,000

Texas:

Amastad Dam, TX: R&A, $83,400

Brownsville, TX:

Gateway Bridge, Security/R&A/Lane expansion/New Bridge, $5,783,600

B&M Bridge, Replace station, $1,794,300

Los Indios, Replace station, $105,700

Del Rio, TX: Security/Lane expansion, $597,700

Eagle Pass, TX: Security/R&A, $2,251,800

El Paso, TX:

Bridge of the Americas, Design/R&A/Import Lot Paving, $1,700,300

Paso del Norte, Extension/R&A, $639,400

Ysleta, Design/Construction, $1,501,200

Fabens, TX: Site acquisition/Security, $444,800

Falcon Dam, TX: R&A, $172,400

Hidalgo, TX: Safety/Design/R&A, $617,200

Laredo, TX:

Juarez-Lincoln Bridge, Site/Design/R&A, $1,668,000

New bridge, $278,000

Convent Street, Design upgrade, $1,473,400

Presidio, TX: Security/Housing, $556,000

Progresso, TX: Security/R&A, $222,400

Roma, TX: Safety, $305,800

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment makes available $42,150,000 for capital improvements of United States-Mexico Border Facilities.

Amendment No. 61: Establishes a limitation of $200,000,000 for minor repairs and alterations instead of $212,780,000 as proposed by the House and $194,780,000 as proposed by the Senate.

Amendment No. 62: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which makes available $2,000,000 to fund a pilot project establishing safe areas of refuge from fire for the disabled in six existing Federal buildings as proposed by the Senate.

Amendment No. 63: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which makes available $10,000,000 as proposed by the Senate to provide additional funding for United States-Mexico Border Facility projects under certain circumstances.

Amendment No. 64: Establishes a limitation of $133,000,000 for payment on purchases contracts as proposed by the Senate instead of $142,450,000 as proposed by the House.

Amendment No. 65: Establishes a limitation of $1,177,532,000 for rental of space as proposed by the Senate instead of $1,200,000,000 as proposed by the House.

Amendment No. 66: Establishes a limitation of $882,000,000 for real property operations as proposed by the Senate instead of $881,703,000 as proposed by the House.

Amendment No. 67: Establishes a limitation of $49,000,000 for program direction and centralized services as proposed by the Senate instead of $49,740,000 as proposed by the House.

Amendment No. 68: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$130,000,000 of which $2,200,000 shall be made available for a grant to the Marine Biological Laboratory at Woods Hole, Massachusetts and of which $127,800,000 shall be available*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment establishes a limitation of $130,000,000 for design and construction services and provides a grant to a Marine Biological Laboratory.

Amendment No. 69: Deletes a citation proposed by the House and inserts a citation proposed by the Senate.

Amendment No. 70: Restores a provision proposed by the House and deleted by the Senate which excepts the Memphis, Tennessee Internal Revenue Service Center from certain requirements.

Amendment No. 71: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which exempts the Baton Rouge Louisiana Federal Building, Courthouse and the Lakeland, Florida building from certain requirements

Amendment No. 72: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$3,024,217,000*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

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This amendment establishes a total limitation on the availability of funds in the Federal Buildings Fund.

FEDERAL SUPPLY SERVICE

Amendment No. 73. Appropriates $47,000,000 for operating expenses as proposed by the Senate instead of $47,829,000 as proposed by the House.

FEDERAL PROPERTY RESOURCES SERVICE

Amendment No. 74: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$10,800,000*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $10,800,000 for the Federal Property Resources Service.

REAL PROPERTY RELOCATION

Amendment No. 75: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$4,000,000*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $4,000,000 for real property relocation.

Amendment No. 76: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which makes available $1,500,000 for certain relocation costs associated with the facility at Loran Station, Island of Kauai, Hawaii.

INFORMATION RESOURCES MANAGEMENT SERVICE

Amendment No. 77: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$31,875,000*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $31,875,000 for the Information Resources Management Service.

OFFICE OF INSPECTOR GENERAL

Amendment No. 78: Appropriates $25,000,000 for the Office of Inspector General as proposed by the Senate instead of $25,400,000 as proposed by the House.

ALLOWANCES AND OFFICE STAFF FOR FORMER PRESIDENTS

Amendment No. 79: Appropriates $1,431,000 as proposed by the House instead of $1,400,000 as proposed by the Senate.

NATIONAL DEFENSE STOCKPILE TRANSACTION FUND

Amendment No. 80: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$30,000,000*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $30,000,000 for the National Defense Stockpile Transaction Fund.

Amendment No. 81: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken and inserted by said amendment, insert the following:

University of Texas at El Paso pursuant to 50 U.S.C. 98a and 98g for a grant to study and facilitate the development, transfer, and installation of strategic materials technologies among American industries; $3,000,000;

University of Hawaii at Manoa pursuant to 50 U.S.C 98a and 98g(a), for a grant to construct and equip a strategic materials research facility, $14,000,000;

Loyola College in Maryland pursuant to 50 U.S.C. 98a and 98g(a), for a grant to pay the Federal share of the cost of construction and equipment, including approaches and appurtenances and costs already incurred, of a Center for Advanced Information and Resource Management Studies, $3,000,000;

University of Idaho pursuant to 50 U.S.C. 98a and 98g(a) for a grant to construct and equip a Strategic Research and Environmental Laboratory, $3,000,000; and

University of Utah pursuant to 50 U.S.C. 98a and 98g(a)(2)(C) for a grant to pay the Federal share of the cost of construction and equipment for a Center for Biomedical Polymers, $7,000,000.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $30,000,000 for projects under the National Defense Stockpile Transaction Fund.

The Conference agreement provides $14,000,000 for a grant to construct a strategic materials research facility at the University of Hawaii. Although this is less than the amount recommended by the House, the managers intend to complete this project by providing the balance of the funds for this facility at a later date.

Amendment No. 82: Restores a provision proposed by the House and deleted by the Senate which authorizes funds to be made available for the payment of rent under certain circumstances.

Amendment No. 83: Restores a section number as proposed by the House.

Amendment No. 84: Restores a section number as proposed by the House.

Amendment No. 85: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which authorizes and directs the General Services Administration to charge the Department of the Interior for the design of the Avondale, Maryland property as proposed by the Senate.

Amendment No. 86: Restores a provision proposed by the House and deleted by the Senate which authorizes the acquisition of a building in Memphis, Tennessee for the Internal Revenue Service.

Amendment No. 87: Restores a provision proposed by the House and deleted by the Senate which authorizes construction at the Center for Disease Control campus in Chamble, Georgia.

Amendment No. 88: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number proposed by said amendment, insert the following: *1e*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment authorizes the Administrator of General Services to hire and maintain an annual average of not less than 1,000 full-time equivalent positions not later than fiscal year 1992 for the Federal Protective Service.

The Committee directs GSA to conduct a study on salary comparability of members of the Federal Protective Service with other law enforcement agencies and submit a report to the Committees on Appropriations by January 31, 1989.

Amendment No. 89: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter proposed by said amendment, insert the following:

SEC. 11. Notwithstanding any other provision of law, the Administrator of General Services is hereafter authorized to transfer from the available resources of the Federal Buildings Fund, in accordance with such rules and procedures as may be established by the Office of Management and Budget and the Department of the Treasury, such amounts as are necessary to repay the principal amount of General Services Administration borrowings from the Federal Financing Bank when such borrowings are legal obligations of the Fund.

The Managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment authorizes the Administrator of General Services to transfer from the available resources in the Federal Buildings Fund to repay certain borrowings.

Amendment No. 90: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *12*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment authorizes the General Services Administration to sell, at competitive bid, a Federal building in Lakeland, Florida.

Amendment No. 91: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *13*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment prohibits the sale and certain other methods of disposal of certain lands in the vicinity of Bull Shoals Lake, Arkansas without the specific approval of Congress.

Amendment No. 92: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter proposed by said amendment, insert the following:

SEC. 14. None of the funds appropriated by this Act may be obligated or expended in any way for the purpose of the sale, excessing, surplusing, or disposal of lands in the vicinity of Norfork Lake, Arkansas, administered by the Corps of Engineers, Department of the Army, without the specific approval of the Congress.

SEC. 15. Notwithstanding any other provision of this Act the amount appropriated for General Management and Administration, Salaries and Expenses of the General Services Administration is $120,774,000 for fiscal year 1989.

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SEC. 16. The Administrator of General Services shall transfer, without consideration, to the Secretary of the Army the approximately 24 acres located in Laurel, Maryland, and classified as surplus property under the title "FDA—Beltsville Research Facility". Such property shall be used in connection with the Maryland National Guard.

SEC. 17. The Secretary of the Interior, within 30 days of enactment of this Act shall designate a consolidated agency of no less than 400 people within the Department of the Interior for relocation to Avondale, Maryland. The Administrator of General Services shall relocate the designee to the Avondale facility no later than 90 days after the Administrator determines design and alteration of the facility is completed.

SEC. 18. Notwithstanding any other provision of this Act, no funds made available from the Federal Buildings Fund for new construction for fiscal year 1989 may be used to fund the St. Croix Federal Building, Courthouse located in the Virgin Islands.

SEC. 19. None of the funds appropriated by this or any other Act in any fiscal year may be obligated or expended in any way for the purpose of the sale, lease, rental, excessing, surplusing, or disposal of any portion of land identified as a portion of the Middle River Federal Depot located in Baltimore County, Maryland before October 1, 1989: Provided, That such land may be sold before that time if the General Services Administration enters into a mutually agreed upon sale agreement with the State of Maryland and/or Baltimore County, Maryland.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

Section 14 of this amendment prohibits the sale and certain other methods of disposal of lands in the vicinity of Norfork Lake, Arkansas without the specific approval of Congress.

Section 15 of this amendment provides that the total amount appropriated to the General Management and Administration account is $120,774,000.

Section 16 of this amendment concerns property located in Laurel, Maryland. The Conferees have included this provision to provide for a transfer of surplus property in Laurel, Maryland to the Secretary of the Army without consideration for use by the Maryland National Guard.

Section 17 of this amendment concerns a facility at Avondale, Maryland. The Conferees have included this provision to insure that within 30 days after enactment the Secretary of the Interior shall designate to the Administrator of General Services a consolidated agency of no less than 400 people which will be relocated to the Avondale property. The Administrator is expected to move quickly to renovate the Avondale property for the designated agency and relocate the designated agency no later than 90 days after the renovation is completed.

Section 18 of this amendment deletes all funding in this Act for the new construction of the St. Croix Federal Building, Courthouse located in the Virgin Islands.

Section 19 of the amendment concerns the Middle River Federal Depot. The Conferees have included this provision which prevents GSA from selling, or in any way disposing of, the Middle River Federal Depot located in Baltimore County, Maryland before October 1, 1989. The provision further provides that GSA may sell this property before that time if it enters into a mutually agreed upon sale agreement with the State of Maryland and/or Baltimore County, Maryland.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

OPERATING EXPENSES

Amendment No. 93: Reported in technical disagreement. The mangers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the sum stricken and inserted by said amendment, insert the following: *$121,900,000, of which $125,000 shall be made available directly to the Forbes Library, Northampton, Massachusetts for such expenses as are necessary for the proper preservation, restoration, and display of the Presidential papers of Calvin Coolidge, and*

The managers of the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment appropriates $121,900,000 for the National Archives and makes available $125,000 for the Presidential papers of Calvin Coolidge.

Amendment No. 94: Deletes a phrase proposed by the Senate which would make a technical change in the sentence structure.

Amendment No. 95: Deletes a word proposed by the Senate which would make a technical change in the sentence structure.

Amendment No. 96: Restores a provision proposed by the House and stricken by the Senate which makes available $4,100,000 for construction at the John F. Kennedy Library in Boston, Massachusetts.

OFFICE OF PERSONNEL MANAGEMENT

Amendment No. 97: Appropriates $108,000,000 for salaries and expenses instead of $107,477,000 as proposed by the House and $108,977,000 as proposed by the Senate.

Amendment No. 98: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter proposed by said amendment, insert the following: *not to exceed $1,000,000 may be made available for establishment of Federal health promotion and disease prevention programs for Federal employees;*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment provides that OPM may use up to $1,000,000 for certain programs.

Amendment No. 99: Inserts the word "and" proposed by the Senate.

Amendment No. 100: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as folllows:

In lieu of the matter proposed by said amendment, insert the following: *not to exceed $500,000 may be made available for implementation of the Combined Federal Campaign in fiscal year 1989;*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment provides that OPM may use up to $500,000 for the CFC.

OFFICE OF SPECIAL COUNSEL

Amendment No. 101: Appropriates $5,000,000 for salaries and expenses as proposed by the Senate instead of $4,761,000 as proposed by the House.

TITLE V

GENERAL PROVISIONS—THIS ACT

Amendment No. 102: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which prohibits the procurement of hand and measuring tools not produced in the United States unless certain conditions are met.

Amendment No. 103: Inserts new section number proposed by the Senate.

Amendment No. 104: Inserts new section number proposed by the Senate.

Amendment No. 105: Inserts new section number proposed by the Senate.

Amendment No. 106: Restores a provision proposed by the House and deleted by the Senate which prohibits the closing of a Federal Information Center of the General Services Administration located in Sacramento, California, and changes the section number.

Amendment No. 107: Inserts a phrase proposed by the Senate which prohibits the transfer of the Federal Law Enforcement Training Center located at Marana, Arizona out of the Treasury Department.

Amendment No. 108: Restores a provision proposed by the House and deleted by the Senate.

Amendment No. 109: Restores section number proposed by the House.

Amendment No. 110: Restores section number proposed by the House.

Amendment No. 111: Restores section number proposed by the House.

Amendment No. 112: Restores a provision proposed by the House and stricken by the Senate which provides that funds shall be used to evaluate, test, relocate, upgrade or purchase stockpile materials to meet certain National Defense Stockpile goals and specifications.

Amendment No. 113: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *519*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment prohibits the procurement of stainless steel flatware not produced in the United States except under certain circumstances.

Amendment No. 114: Deletes a provision proposed by the House and deleted by the Senate regarding the "port of arrival immediate release and enforcement determination" program.

Amendment No. 115: Restores a section number proposed by the House.

Amendment No. 116: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

Restore the matter stricken by said amendment, amended to read as follows:

SEC. 521. Not later than October 1, 1989, of the amounts obtained from the sale, transfer, or disposition of silver from the National Defense Stockpile, not less than $1,000,000 shall be obligated for a pilot project to upgrade cobalt deposited in the National Defense Stockpile to the highest purity levels required for critical military applications. The funds used in this section for upgrading shall not exceed $2,000,000.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment makes funds available in the National Defense Stockpile for upgrading cobalt deposited in said Stockpile. Conferees note the serious deficit of high purity cobalt in the Stockpile and consequently direct that these funds be obligated by October 1, 1989 to commence a pilot project to upgrade cobalt deposited in the National Defense Stockpile to the highest purity

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levels required for critical military applications.

Amendment No. 117: Reported in techical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

Restore the matter stricken by said amendment, amended to read as follows:

SEC. 522. The Administrator of General Services, under section 210(h) of the Federal Property and Administrative Services Act of 1949, as amended, may acquire, by means of a lease of up to 30 years duration, space for the United States Courts in Tacoma, Washington, at the site of Union Station, Tacoma, Washington.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment provides authority to the Administrator of General Services to acquire space for the United States Courts in Tacoma, Washington.

Amendment No. 118: Restores a section number proposed by the House.

Amendment No. 119: Restores a section number proposed by the House.

Amendment No. 120: Restores a section number proposed by the House.

Amendment No. 121: Restores in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *526*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment provides that sums for the 1989 pay raises authorized by this Act shall be absorbed within the levels appropriated.

Amendment No. 122: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter proposed by said amendment, insert the following:

SEC. 527. (a)(1) Notwithstanding any other provision of this Act, no department, agency, or instrumentality of the United States Government receiving appropriated funds under this Act for fiscal year 1989, shall during fiscal year 1989, obligate and expend funds for consulting services involving management and professional services; special studies and analyses; technical assistance; and management review of program funded organizations; in excess of an amount equal to 85 percent of the amount obligated and expended by such department, agency, or instrumentality for such services during fiscal year 1987.

(2) The term "consulting services" shall be defined consistent with the provision of OMB Circular A-120 dated January 4, 1988.

(b) The Director of the Office of Management and Budget shall take such action as may be necessary, through budget instructions or otherwise, to direct each department, agency, and instrumentality of the United States to comply with the provisions of section 1114 of title 31, United States Code.

(c) All savings to any department, agency, or instrumentality which result from the application of subsection (a), shall be used for the 4.1 percent increase in rates of pay in such department, agency, or instrumentality made under this Act.

SEC. 528. Section 509 of this Act shall have no force or effect.

SEC. 529. The Office of Personnel Management may, during the fiscal year ending September 30, 1989, accept donations of supplies and equipment for the Federal Executive Institute for the enhancement of the morale and educational experience of attendees at the Institute.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

Section 527 of this amendment limits expenditures for certain consulting services.

Section 528 of this amendment nullifies Section 509 of the general provisions in this Act. The Conferees have included a provision which nullifies and thereby gives no meaning, force or effect to section 509 of the bill. This approach is necessary because technical factors which relate solely to the rules and procedures of Congress prevent the Conferees from simply deleting the text of section 509. It is the intent of Congress that section 528 operate to nullify section 509 and have the same result as if section 509 did not appear as part of the text of the Treasury, Postal Service and General Government Appropriations Act, 1989. Section 509 has been rendered unnecessary by the enactment of a provision of law (Section 8093 of the Department of Defense Appropriations Act, 1988, P.L. 100-202) which the General Accounting Office has correctly determined to be permanent and governmentwide. (See the April 11, 1988 letter opinion of the Comptroller General.)

Section 529 of this amendment authorizes the Office of Personnel Management to accept certain donations.

TITLE VI—GENERAL PROVISIONS

DEPARTMENTS, AGENCIES AND CORPORATIONS

Amendment No. 123: Deletes a provision proposed by the House and stricken by the Senate which would have prohibited certain purchase contract projects.

Amendment No. 124: Inserts a section number proposed by the Senate.

Amendment No. 125: Inserts a section number proposed by the Senate.

Amendment No. 126: Deletes a provision proposed by the Senate which would adjust space and service levels based on amounts appropriated. The Conferees are aware that some Standard Level User Charge (SLUC) requests are reduced with the expectation that the level of service provided by the GSA not be reduced. The Conferees are also aware that those reductions are made because SLUC estimates are not reviewed but simply included in an agency request. Since such reductions have the effect of reducing revenues in the Federal Buildings Fund, the Conferees recommend that the problems that could be caused by such reductions be reviewed.

Amendment No. 127: Inserts a section number proposed by the Senate.

Amendment No. 128: Inserts a section number proposed by the Senate.

Amendment No. 129: Inserts a section number proposed by the Senate.

Amendment No. 130: Restores language proposed by the House and deletes a phrase proposed by the Senate which prohibits renovating, remodeling, or making other changes in offices under certain conditions unless notice is given to the Committees on Appropriations. The Conferees agree that approval by (not notice to) the Committees on Appropriations is required.

Amendment No. 131: Deletes a provision proposed by the House related to child care services. The Conferees agree that this provision is not necessary because it is permanent law.

Amendment No. 132: Inserts a section number proposed by the Senate.

Amendment No. 133: Inserts a section number proposed by the Senate.

Amendment No. 134: Inserts a section number proposed by the Senate.

Amendment No. 135: Inserts a section number proposed by the Senate.

Amendment No. 136: Restores a center heading proposed by the House and deleted by the Senate.

Amendment No. 137: Restores a provision proposed by the House and deleted by the Senate which prohibits the government from interfering with Federal employees disclosure of information under certain circumstances.

Amendment No. 138: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken by said amendment, insert the following:

SEC. 620. (a)(1) Notwithstanding any other provision of law, in the case of fiscal year 1989, the overall percentage of the adjustment under section 5305 of title 5, United States Code, in the rates of pay under the General Schedule, and in the rates of pay under the other statutory pay systems (as defined by section 5301(c) of such title), shall be an increase of 4.1 percent.

(2) Each increase in a pay rate or schedule which takes effect pursuant to paragraph (1) shall, to the maximum extent practicable, be of the same percentage, and shall take effect as of the first day of the first applicable pay period commencing on or after January 1, 1989.

(b)(1) Notwithstanding any other provision of this Act or any other law, no adjustment in rates of pay under section 5305 of title 5, United States Code, which becomes effective on or after October 1, 1988, and before October 1, 1989, shall have the effect of increasing the rate of salary or basic pay for any

The managers on the part of the Senate will move to recede and concur in the amendment of the House to the amendment of the Seante.

This amendment provides a pay increase for Federal employees. The Conferees strongly support parity for civilian and military employees in adjustments of compensation. The Conferees have provided for a 4.1% adjustment for civilian workers as was provided in the Defense Authorization Bill approved by both Houses of Congress. The Conferees have remained silent on the military adjustment, however, military employees are protected under section 1009 of Title 37 of the United States Code which provides that military employees shall receive no less of an adjustment than civilian employees. The Conferees have excluded Members of Congress from the pay adjustment along with any employee whose basic rate of salary is equal to or greater than level III of the Executive Schedule ($82,500).

Amendment No. 139: Deletes a provison proposed by the Senate which would provide for a 4% pay increase for all Federal employees except Members of Congress.

Amendment No. 140: Deletes a provision proposed by the Senate which would require that no pay increase for Members of Congress can be enacted unless certain procedures are followed.

Amendment No. 141: Reported in technical disagreement. The mangers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken by said amendment, insert the following:

SEC. 621. Effective October 1, 1988, the Secretary shall sell, within fiscal year 1989, 2.5 million fine troy ounces of silvr held by the Treasury subject to Sec. 624 of this Act.

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The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment mandates the sale of silver subject to certain conditions.

Amendment No. 142: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken by said amendment insert the following:

SEC. 622. Effective October 1, 1989, the Secretary shall sell, within fiscal year 1990, 2.5 million fine troy ounces of silver held by the Treasury subject to Sec. 624 of this Act.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment mandates the sale of silver under certain conditions.

Amendment No. 143: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken by said amendment, insert the following:

SEC. 623. Effective October 1, 1990, the Secretary shall sell, within fiscal year 1991, 2.5 million fine troy ounces of silver held by the Treasury subject to Sec. 624 of this Act.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment mandates the sale of silver under certain conditions.

Amendment No. 144: Restores a provision proposed by the House and stricken by the Senate and changes the section number. This amendment allows the Secretary of the Treasury to reduce the amount of silver sold if he submits a written determination to Congress that such a sale severely disrupts the domestic market for silver. The Committee understands that silver sales in a declining market shall be considered severely disruptive to the domestic market for silver.

Amendment No. 145: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *625*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment prohibits the purchase, construction, or lease of space under certain conditions for law enforcement training.

Amendment No. 146: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *626*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment provides certain benefits to certain employees of the Federal Property Resources Service of the General Services Administration.

Amendment No. 147: Deletes a provision proposed by the Senate which would allow funds to be used for one year contracts which are to be performed in two fiscal years under certain circumtances.

Amendment No. 148: Restores a section number proposed by the House.

Amendment No. 149: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter stricken by said amendment, insert the following:

SEC. 628. (a) No department, agency, or instrumentality of the United States receiving appropriated funds under this Act for fiscal year 1989, or under any other Act appropriating funds for fiscal year 1989, shall obligate or expend any such funds, unless such department, agency, or instrumentality has in place, and will continue to administer in good faith, a written policy designed to ensure that all of its work places are free from the illegal use, possession, or distribution of controlled substances (as defined in the Controlled Substances Act) by the officers and employees of such department, agency, or instrumentality.

(b) No funds so appropriated to any such department, agency, or instrumentality shall be available for payment in connection with any grant, contract, or other agreement, unless the recipient of such grant, contractor, or party to such agreement, as the case may be, has in place and will continue to administer in good faith a written policy, adopted by such recipient, contractor, or party's board of directors or other governing authority, satisfactory to the head of the department, agency, or instrumentality making such payment, designed to ensure that all of the workplace of such recipient, contractor, or party are free from the illegal use, possession, or distribution of controlled substances (as defined in the Controlled Substances Act) by the officers and employees of such recipient, contractor, or party.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment provides authority which will help to achieve a drug free workplace.

Amendment No. 150: Deletes a provision proposed by the Senate regarding interagency funding.

Amendment No. 151: Deletes a provision proposed by the Senate which would have eliminated a requirement for an analysis to be done by the Office of Management and Budget.

Amendment No. 152. Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the matter proposed by said amendment, insert the following:

SEC. 629. (a) Section 5724(a) of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (1);

(2) by striking out the period at the end of paragraph (2) and inserting in lieu thereof "; and"; and

(3) by adding at the end the following:

(3) upon the separation of a career appointee (as defined in section 3132(a)(4) of this title), the travel expenses of that individual, the transportation expenses of the immediate family of such individual, and the expenses of moving (including transporting, packing, crating, temporarily storing, draying, and unpacking) the household goods of such individual and personal effects not in excess of 18,000 pounds net weight, to the place where the individual will reside within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements, as described in section 3(a) of the Panama Canal Act of 1979 (or, if the individual dies before the travel, transportation, and moving is completed, to the place where the family will reside) if such individual—

"(A) during the five years preceding eligibility to receive an annuity under subchapter III of chapter 83, or of chapter 84 of this title, and thereafter, has been transferred in the interest of the Government from one official station to another for permanent duty as a career appointee in the Senior Executive Service; and

"(B) is eligible to receive an annuity upon such separation under the provisions of subchapter III of chapter 83 or chapter 84 of this title.".

(b) The amendments made by subsection (a) shall be carried out by agencies by the use of funds appropriated or otherwise available for the administrative expenses of each of such respective agencies. The amendments made by such subsection do not authorize the appropriation of funds in amounts exceeding the sums otherwise authorized to be appropriated for such agencies.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment authorizes certain payments related to certain relocation expenses for Senior Executive Service personnel.

Amendment No. 153: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *630*

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment makes technical and conforming changes to existing law related to the transfer of the William Langer Jewel Bearing Plant from General Services Administration to the National Defense Stockpile.

Amendment No. 154: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate amended to read as follows:

In lieu of the section number named in said amendment, insert the following: *631*

The managers on the part of the Senate will move to concur in the amendment on the House to the amendment of the Senate.

This amendment provides that a certain hospital is deemed to be located in Franklin County, Missouri retroactively effective for discharges beginning on or after December 22, 1987.

Amendment No. 155: Deletes a provision proposed by the Senate which would provide that none of the funds appropriated by this Act may be obligated or expended to enter into any contract for the construction, alteration, or repair of any public building or public work in the United States or any territory or possession of the United States with any contractor or subcontractor of a foreign country, or any supplier of products of a foreign country, during any period in which that foreign country denies certain market opportunities for products and services of the United States.

DEFINITION OF PROGRAM, PROJECT, AND ACTIVITY

During fiscal year 1989, for purposes of the Balanced Budget and Emergency Deficit Control Act of 1985 (Public Law 99-177), as amended, the following information provides the definition of the term "program, project, and activity" for departments and agencies under the jurisdiction of the Treasury, Postal Service, and General Government Subcommittee. The term "program,

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project, and activity" shall include the most specific level of budget items identified as a dollar amount in the Treasury, Postal Service, and General Government Appropriations Act, 1989 (H.R. 4775), the House and Senate committee reports (H. Rept. 100-679) and S. Rept. 100-387), and the conference report and accompanying joint explanatory statement of the managers of the committee of conference (Under the above definition, the Federal Buildings Fund, the Bureau of Engraving and Printing Fund, and other intragovernmental funds are among the accounts exempt from sequestration altogether.).

In implementing a Presidential Order, departments and agencies shall apply the percentage reduction required for fiscal year 1989 pursuant to the provisions of Public Law 99-177, as amended, to each budget item that is listed under said accounts in the budget justifications submitted to the House and Senate Committees on Appropriations as modified by subsequent appropriations acts (including joint resolutions providing continuing appropriations), and accompanying House and Senate Committee reports, conference reports, or joint explanatory statements of the committee of conference.

CONFERENCE TOTAL—WITH COMPARISONS

The total new budget (obligational) authority for the fiscal year 1989 recommended by the Committee of Conference, with comparisons to the fiscal year 1988 amount, the 1989 budget estimates, and the House and Senate bills for 1989 follow:

New budget (obligational) authority, fiscal year 1988	$15,115,699,000
Budget estimates of new (obligational) authority, fiscal year 1989	16,163,725,000
House bill, fiscal year 1989	16,113,771,000
Senate bill, fiscal year 1989	15,917,514,000
Conference agreement, fiscal year 1989	16,019,910,000
Conference agreement compared with:	
New budget (obligational) authority, fiscal year 1988	+904,211,000
Budget estimates of new (obligational) authority, fiscal year 1989	−143,815,000
House bill, fiscal year 1989	−93,861,000
Senate bill, fiscal year 1989	+102,396,000

EDWARD R. ROYBAL,
DANIEL K. AKAKA,
STENY H. HOYER,
RONALD D. COLEMAN,
EDWARD P. BOLAND,
SIDNEY R. YATES (except 92),
JAMIE L. WHITTEN,
JOE SKEEN,
BILL LOWERY,
FRANK R. WOLF,
SILVIO O. CONTE,

Managers on the Part of the House.

DENNIS DECONCINI,
WILLIAM PROXMIRE,
B.A. MIKULSKI,
JOHN C. STENNIS,
PETE DOMENICI,
ALFONSE M. D'AMATO,
MARK O. HATFIELD,

Managers on the Part of the Senate.

CONFERENCE REPORT ON H.R. 4387

Mr. STOKES submitted the following conference report and statement on the bill (H.R. 4387) to authorize appropriations for fiscal year 1989 for intelligence and intelligence-related activities of the United States Government, for the Intelligence Community Staff, for the Central Intelligence Agency Retirement and Disability System, and for other purposes:

CONFERENCE REPORT (H. REPT. 100-879)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4387) to authorize appropriations for fiscal year 1989 for intelligence and intelligence-related activities of the United States Government, for the Intelligence Community Staff, for the Central Intelligence Agency Retirement and Disability System, and for other purposes, having met, after full and free conference, having agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Intelligence Authorization Act, Fiscal Year 1989."

TITLE I—INTELLIGENCE ACTIVITIES

AUTHORIZATION OF APPROPRIATIONS

SEC. 101. (a) Funds are hereby authorized to be appropriated for fiscal year 1989 for the conduct of the intelligence and intelligence-related activities of the following elements of the United States Government:

(1) The Central Intelligence Agency.

(2) The Department of Defense.

(3) The Defense Intelligence Agency.

(4) The National Security Agency.

(5) The Department of the Army, the Department of the Navy, and the Department of the Air Force.

(6) The Department of State.

(7) The Department of the Treasury.

(8) The Department of Energy.

(9) The Federal Bureau of Investigation.

(10) The Drug Enforcement Administration.

(b) None of the funds authorized to be appropriated by this Act may be used to procure more than three GUARDRAIL RC-12K aircraft and sensor suites until the Department of the Army has submitted to the Permanent Select Committee on Intelligence and the Committee on Armed Services of the House of Representatives and to the Committee on Armed Services of the Senate a report detailing the long-range plans and budgetary commitments to meet the future requirements for tactical airborne reconnaissance in support of the United States Army. The report should include, but not be limited to, the contribution of remotely piloted vehicles and other reconnaissance assets.

(c) Of the funds authorized to be appropriated in this Act for the Defense Intelligence Agency, the Secretary of Defense may transfer not to exceed $15,100,000 to appropriations for the foreign counterintelligence activities for the Federal Bureau of Investigation.

(d) The expiration date provided for in section 803(b) of the Intelligence Authorization Act for Fiscal Year 1986 (Public Law 99-169) shall be exended until December 31, 1989.

CLASSIFIED SCHEDULE OF AUTHORIZATIONS

SEC. 102. (2) The amounts authorized to be appropriated under section 101, and the authorized personnel ceilings as of September 30, 1989, for the conduct of the intelligence and intelligence-related activities of the elements listed in such section, are those specified in the classified Schedule of Authorizations prepared by the committee of conference to accompany H.R. 4387 of the One Hundredth Congress.

(b) The Schedule of Authorizations described in subsection (a) shall be made available to the Committee on Appropriations of the Senate and of the House of Representatives and to the President. The President shall provide for suitable distibution of the Schedule, or of appropriate portions of the Schedule, within the executive branch.

PERSONNEL CEILING ADJUSTMENTS

SEC. 103. The Director of Central Intelligence may authorize employment of civilian personnel in excess of the numbers authorized for fiscal year 1989 under sections 102 and 202 of this Act when he determines that such action is necesssary to the performance of important intelligence functions, except that such number may not, for any element of the Intelligence Community, exceed 2 per centum of the number of civilian personnel authorized under such sections for such element. The Director of Central Intelligence shall promptly notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate whenever he exercises the authority granted by this section.

RESTRICTION ON SUPPORT FOR MILITARY OR PARAMILITARY OPERATIONS IN NICARAGUA

SEC. 104. Funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States may be obligated and expended during fiscal year 1989 to provide funds, materiel, or other assistance to the Nicaraguan democratic resistance to support military or paramilitary operations in Nicaragua only as authorized in section 101 and as specified in the classified Schedule of Authorizations referred to in section 102, or pursuant to section 502 of the National Security Act of 1947, or pursuant to any provision of law specifically providing such funds, materiel, or assistance.

TITLE II—INTELLIGENCE COMMUNITY STAFF

AUTHORIZATION OF APPROPRIATIONS

SEC. 201. There is authorized to be appropriated for the Intelligence Community Staff for fiscal year 1989 the sum of $23,745,000.

AUTHORIZATION OF PERSONNEL END STRENGTH

SEC. 202. (a) The Intelligence Community Staff is authorized 244 full-time personnel as of September 30, 1989. Such personnel of the Intelligence Community Staff may be permanent employees of the Intelligence Community Staff or personnel detailed from other elements of the United States Government.

(b) During Fiscal Year 1987, personnel of the Intelligence Community Staff shall be selected so as to provide appropriate representation from elements of the United States Government engaged in intelligence and intelligence-related activities.

(c) During Fiscal Year 1989, any officer or employee of the United States or a member of the Armed Forces who is detailed to the Intelligence Community Staff from another element of the United States Government shall be detailed on a reimbursable basis, except that any such officer, employee or member may be detailed on a nonreimbursable basis for a period of less than one year for the performance of temporary functions as required by the Director of Central Intelligence.

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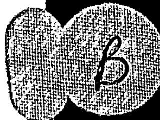
100TH CONGRESS
2D SESSION

H. R. 4775



IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 1988

Ordered to be printed with the amendments of the Senate numbered

AN ACT

Making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1989, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That the following sums are appropriated, out of any money
4 in the Treasury not otherwise appropriated, for the Treasury
5 Department, the United States Postal Service, the Executive
6 Office of the President, and certain Independent Agencies,
7 for the fiscal year ending September 30, 1989, and for other
8 purposes, namely:

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1 Laws 99–500, 99–591, and 100–202 may continue and may
2 cover additional employees in fiscal year 1989, the Office of
3 Personnel Management may continue to operate by regula-
4 tion, notwithstanding chapter 63 of title 5, United States
5 Code, a program under which the unused accrued annual
6 leave of officers or employees of the Federal Government
7 may be transferred for use by other officers or employees who
8 need such leave due to a personal emergency as defined in
9 the regulations. The Office may provide by regulation for
10 such exceptions from the provisions of section 7351 of title 5
11 as the Office may determine appropriate for the transfer of
12 leave under this section. The Veterans' Administration may
13 operate a similar program for employees subject to section
14 4108 of title 38, United States Code. The programs operated
15 under this section shall expire at the end of fiscal year 1989,
16 but any leave that has been transferred to an officer or em-
17 ployee under the programs shall remain available for use
18 until the personal emergency has ended, and any remaining
19 unused transferred leave shall, to the extent administratively
20 feasible, be restored to the leave accounts of the officers or
21 employees from whose accounts it was originally transferred.

22 (136) ~~EMPLOYEE DISCLOSURE AGREEMENTS~~

23 (137) ~~SEC. 621. No funds appropriated in this or any~~
24 ~~other Act for fiscal year 1989 may be used to implement or~~
25 ~~enforce the agreements in Standard Forms 189 and 4193 of~~

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1 the Government or any other nondisclosure policy, form or
2 agreement if such policy, form or agreement:
3 (1) concerns information other than that specifical-
4 ly marked as classified; or, unmarked but known by the
5 employee to be classified; or, unclassified but known by
6 the employee to be in the process of a classification
7 determination;
8 (2) contains the term classifiable;
9 (3) directly or indirectly obstructs, by requirement
10 of prior written authorization, limitation of authorized
11 disclosure, or otherwise, the right of any individual to
12 petition or communicate with Members of Congress in
13 a secure manner as provided by the rules and proce-
14 dures of the Congress;
15 (4) interferes with the right of the Congress to
16 obtain executive branch information in a secure manner
17 as provided by the rules and procedures of the Con-
18 gress;
19 (5) imposes any obligations or invokes any reme-
20 dies inconsistent with statutory law:
21 *Provided,* That nothing in this section shall affect the en-
22 forcement of those aspects of such nondisclosure policy, form
23 or agreement that do not fall within subsection (1)-(5) of this
24 section.

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1 *repair of a public building or public work, of vehicles*
2 *or construction equipment of a foreign country.*
3 *(5) The terms "contractor" and "subcontractor"*
4 *includes any person performing any architectural, en-*
5 *gineering, or other services directly related to the prep-*
6 *aration for or performance of the construction, alter-*
7 *ation, or repair.*
8 *(e) Paragraph (a)(1) of this section shall not apply to*
9 *contracts entered into prior to the date of enactment of this*
10 *Act.*
11 *(f) The provisions of this section are in addition to, and*
12 *do not limit or supersede, any other restrictions contained in*
13 *any other Federal law.*

14 This Act may be cited as the "Treasury, Postal Service
15 and General Government Appropriations Act, 1989".

Passed the House of Representatives June 14, 1988.

Attest: DONNALD K. ANDERSON,
Clerk.

Passed the Senate with amendments June 27, 1988.

Attest: WALTER J. STEWART,
Secretary.

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ONE HUNDREDTH CONGRESS

Congress of the United States

House of Representatives

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-373
WASHINGTON, DC 20515

HEARING ON CONGRESS AND THE
ADMINISTRATION'S SECRECY PLEDGES
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
Wednesday, August 10, 1988, 10:00 a.m.
Room 2154 Rayburn House Office Building

WITNESSES

Panel:

Honorable William Proxmire
United States Senate (Wisconsin)

Honorable Charles E. Grassley
United States Senate (Iowa)

Honorable Barbara Boxer
House of Representatives
(6th District, California)

Honorable Charles McC. Mathias
Former Senator (Maryland)
Jones, Davis, Reavis and Pogue

Honorable James C. Miller, III
Director
Office of Management and Budget

Honorable Stansfield Turner
Former Director
Central Intelligence Agency

Panel:

Professor Harold H. Bruff
Redditt Professor of Law
University of Texas at Austin

Professor Michael Glennon
Law School
University of California at Davis

Mr. Louis J. Rodrigues
Associate Director
National Security and International Affairs Division
General Accounting Office

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STATEMENT OF THE HONORABLE FRANK HURTON

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

AUGUST 10, 1988

MR. CHAIRMAN, IT IS A PLESURE TO JOIN YOU HERE TODAY FOR THIS MOST IMPORTANT HEARING. WE ARE GOING TO EXAMINE AN AREA THAT SHOULD INTEREST EVERY MEMBER OF CONGRESS AND EVERY AMERICAN AS WELL. WE WILL EXAMINE THE USE OF NON-DISCLOSURE AGREEMENTS AND PRE-PUBLICATION REVIEW CONTRACTS, THE CONDITIONS UNDER WHICH THESE ARE AND SHOULD BE WARRANTED, AND THE ROLE OF CONGRESS IN SETTING PARAMETERS FOR THEIR USE.

THE ISSUES ARE COMPLEX AND RAISE QUESTIONS ABOUT THE BALANCE BETWEEN LEGITIMATE NATIONAL SECURITY CONCERNS ON ONE HAND AND CONSTITUTIONAL RIGHTS ON THE OTHER.

A RECENT FEDERAL DISTRICT COURT RULED AS UNCONSTITUTIONAL CONGRESS' ROLE IN THE USE OF NON-DISCLOSURE AND PRE-PUBLICATION REVIEW AGREEMENTS. THE SAME COURT, HOWEVER, ONLY A FEW WEEKS LATER, RULED AS UNCONSTITUTIONAL SOME OF THE VERY ELEMENTS OF THESE AGREEMENTS WHICH CONGRESS SOUGHT TO ELIMINATE. I UNDERSTAND THAT THE FIRST DECISION -- THE ONE REGARDING THE ROLE OF CONGRESS IN THIS AREA -- IS CURRENTLY ON APPEAL TO THE SUPREMEN COURT. I HOPE THIS CASE IS HEARD.

I HOPE IT IS HEARD FOR A NUMBER OF REASONS, NOT THE LEAST OF WHICH IS MY SUSPICION THAT THIS CASE MAY HAVE IMPLICATIONS FOR OTHER LAWS GOVERNING ACCESS TO INFORMATION -- PRESIDENTIAL

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DOCUMENTS IN PARTICULAR. LAWS THAT COME TO MIND ARE THE INSPECTOR GENERALS ACT, THE FREEDOM OF INFORMATION ACT, THE CLASSIFIED INFORMATION PROCEDURES ACT, CERTAIN WHISTLEBLOWER PROTECTION STATUTES AND OTHERS.

MR. CHAIRMAN, I UNDERSTAND AS WELL AS ANYONE THE IMPORTANCE OF CONTROLLING SENSITIVE, CLASSIFIED INFORMATION. THOSE WHO WANTONLY AND KNOWINGLY DISCLOSE SUCH INFORMATION SHOULD BE PUNISHED WITH THE FULL FORCE OF LAW, WHETHER OR NOT THEY HAVE SIGNED THESE NON-DISCLOSURE AGREEMENTS. THAT SAID, I BELIEVE STRONGLY THAT AGREEMENTS BINDING GOVERNMENT EMPLOYEES TO NON-DISCLOSURE OF INFORMATION, AND GOVERNMENT CONTROL OF THEIR WRITING, SHOULD BE RESTRICTED TO CLASSIFIED INFORMATION ONLY. I BELIEVE ALSO THAT ACCESS BY INDIVIDUALS WISHING TO DISCLOSE INFORMATION TO MEMBERS OF CONGRESS SHOULD NOT BE RESTRICTED, SO LONG AS CONTACT CONFORMS TO ESTABLISHED RULES OF THE HOUSE AND SENATE.

MR. CHAIRMAN, MORE THAN 500,000 PRE-PUBLICATION REVIEW CONTRACTS ARE IN FORCE. THIS NUMBER INDICATES TO ME THAT CONTROLS ARE NEEDED OVER THEIR USE, AND THAT PERHAPS CONDITIONS UNDER WHICH THESE ARE PRESCRIBED OUGHT TO BE MORE NARROWLY DEFINED. I LOOK FORWARD TO EXPLORING THIS ISSUE TODAY.

FINALLY, MR. CHAIRMAN, I WANT TO MAKE THIS POINT. I AM DISTURBED BY WHAT I SEE AS A TREND IN CONGRESS ABDICATING ITS

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AUTHORITY IN CRITICAL AREAS. IN THE PAST EIGHT WEEKS ALONE WE HAVE CONSIDERED LEGISLATION TO GRANT SWEEPING AUTHORITY TO THE SECRETARY OF DEFENSE TO CLOSE MILITARY BASES NATIONWIDE -- WITH NO CONGRESSIONAL OVERSIGHT. WHY? THE CONCLUSION I HEARD MOST OFTEN WAS THAT CONGRESS CAN NO LONGER AND THEREFORE SHOULD NOT BE TRUSTED WITH THIS, ITS LEGITIMATE TASK.

WE HAVE EXAMINED THE USE OF NATIONAL SECURITY DECISION DIRECTIVES, WHEREBY EVERY PRESIDENT SINCE HARRY TRUMAN HAS IMPLEMENTED POLICIES WITH NO ACCOUNTABILITY WHATSOEVER. AND AGAIN WE HEARD SUGGESTIONS THAT CONGRESS COULD NOT BE TRUSTED TO KNOW.

NOW WE ARE QUESTIONING THE ROLE OF CONGRESS IN SETTING PARAMETERS FOR THE USE OF NON-DISCLOSURE AGREEMENTS. AS I HAVE STATED, THERE ARE CIRCUMSTANCES THAT WARRANT THEIR USE, MOST NOTABLY IN THE AREAS OF NATIONAL SECURITY AND INTELLIGENCE. HOWEVER, THESE SHOULD NOT BE USED IRRESPONSIBLY AND ON A WIDESPREAD BASIS. CONGRESS SHOULD SHAPE POLICIES THAT GOVERN THEIR USE AND STRIKE THE NEEDED BALANCE BETWEEN CRITICAL NATIONAL SECURITY NEEDS AND CONSTITUTIONAL GUARANTEES.

MR. CHAIRMAN, AGAIN, I AM VERY PLEASED TO JOIN YOU IN THIS HEARING THAT WILL EXAMINE CONTROL OF CRITICAL INFORMATION, CONSTITUTIONAL ISSUES AND ISSUES OF CHECKS-AND-BALANCES BETWEEN OUR THREE BRANCHES OF GOVERNMENT.

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Opening Statement of Chairman Jack Brooks
Hearing on Congress and the Administration's Secrecy Pledges
Legislation and National Security Subcommittee
Wednesday, August 10, 1988

THIS MAY, A FEDERAL DISTRICT JUDGE OVERTURNED A STATUTE -- PASSED BY CONGRESS AND SIGNED INTO LAW BY THE PRESIDENT -- WHICH PLACED A ONE-YEAR MORATORIUM ON THE ADMINISTRATION'S USE OF SECRECY PLEDGES. STATING THAT "THE STATUTE IMPERMISSIBLY RESTRICTS THE PRESIDENT'S POWER TO FULFILL OBLIGATIONS IMPOSED UPON HIM BY HIS EXPRESS CONSTITUTIONAL POWERS AND THE ROLE OF THE EXECUTIVE IN FOREIGN RELATIONS," THE JUDGE RULED THAT THE STATUTE WAS "UNCONSTITUTIONAL". THAT CASE IS PRESENTLY ON APPEAL TO THE SUPREME COURT.

THE GOVERNMENT OPERATIONS COMMITTEE HAS LONG HAD AN INTEREST IN THE USE OF SECRECY PLEDGES. IN 1983, THE COMMITTEE ADOPTED A REPORT ENTITLED "THE ADMINISTRATION'S INITIATIVES TO EXPAND POLYGRAPH USE AND IMPOSE LIFELONG CENSORSHIP ON THOUSANDS OF GOVERNMENT EMPLOYEES" (HOUSE REPORT NO. 98-578), IN WHICH THE COMMITTEE FOUND THAT THE "PREPUBLICATION REVIEW AGREEMENTS" IN THESE SECRECY CONTRACTS "CONSTITUTE AN UNWARRANTED PRIOR RESTRAINT IN VIOLATION OF THE FIRST AMENDMENT" AND THAT THEY POSE "A SERIOUS THREAT TO FREEDOM OF SPEECH AND NATIONAL PUBLIC DEBATE." THE COMMITTEE RECOMMENDED THAT THE PRESIDENT'S REQUIREMENTS FOR PREPUBLICATION REVIEW, CONTAINED IN NATIONAL SECURITY DECISION DIRECTIVE 84, BE RESCINDED AND, IF NOT, THAT THE CONGRESS ENACT LEGISLATION PROHIBITING THEM. A MORATORIUM ON THE USE OF THE CENSORSHIP REQUIREMENTS, SPONSORED BY SENATOR MATHIAS, WAS QUICKLY ENACTED (SECTION 1010 OF PUBLIC LAW 98-164).

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THE NEXT YEAR, I INTRODUCED LEGISLATION THAT WOULD HAVE PROHIBITED SUCH CENSORSHIP CONTRACTS PERMANENTLY. AS MY BILL WAS PROCEEDING THROUGH CONGRESS, THE PRESIDENT ANNOUNCED HIS INTENTION TO SUSPEND THE CENSORSHIP REQUIREMENTS IN HIS DIRECTIVE. AS I WAS TO LEARN LATER, THAT SUSPENSION WAS ILLUSORY; THE ADMINISTRATION ONLY SUSPENDED ONE VERSION OF THE CENSORSHIP CONTRACT. IN FACT, THE REQUIREMENT CONTAINED IN THE PRESIDENT'S DIRECTIVE THAT INDIVIDUALS WITH ACCESS TO CERTAIN FORMS OF CLASSIFIED INFORMATION BE REQUIRED TO SIGN LIFELONG PREPUBLICATION CONTRACTS REMAINED IN PLACE AND SUCH CONTRACTS ARE STILL BEING USED TODAY.

CONGRESS'S CONCERNS WITH SECRECY PLEDGES CONTINUED AND VARIOUS MEMBERS OF BOTH THE HOUSE AND THE SENATE HAVE RAISED QUESTIONS REGARDING OTHER ASPECTS OF THESE CONTRACTS. THEY PROHIBIT THE DISCLOSURE NOT ONLY OF CLASSIFIED INFORMATION, BUT "CLASSIFIABLE" INFORMATION AS WELL. RECENTLY, A FEDERAL JUDGE HAS DETERMINED THAT "CLASSIFIABLE" IS UNCONSTITUTIONALLY VAGUE AND MUST BE DEFINED NARROWLY TO AVOID A VIOLATION OF FIRST AMENDMENT RIGHTS. FURTHER, THESE CONTRACTS SEEK TO RESTRICT DISCLOSURES BY WHISTLEBLOWERS TO CONGRESS IN DIRECT CONTRAVENTION OF VARIOUS WHISTLEBLOWER STATUTES AND THE LLOYD-LaFOLLETTE ACT WHICH PROVIDES THAT "THE RIGHT OF PERSONS EMPLOYED IN THE CIVIL SERVICE OF THE UNITED STATES ... TO FURNISH INFORMATION TO EITHER HOUSE OF CONGRESS, OR TO ANY COMMITTEE OR MEMBER THEREOF, SHALL NOT BE DENIED OR INTERFERED WITH." (5 U.S.C. 7211) THAT ACT WAS PASSED IN 1912 IN RESPONSE TO SIMILAR EFFORTS BY PRESIDENT TAFT TO LIMIT EMPLOYEES' DISCLOSURES TO CONGRESS.

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BECAUSE THE CONTROVERSY HAS CONTINUED, CONGRESS ENACTED ANOTHER MORATORIUM OF THESE SECRECY PLEDGES LAST YEAR. AS I HAVE INDICATED, HOWEVER, THAT STATUTE HAS NOW BEEN OVERTURNED. TODAY'S HEARINGS WILL FOCUS ON CONGRESS' AUTHORITY TO LEGISLATE LIMITATIONS ON THE ADMINISTRATION'S USE OF SECRECY CONTRACTS.

I FIND IT INCREDIBLE THAT A COURT HAS CONCLUDED THAT A LAW -- VOTED ON BY THE CONGRESS AND SIGNED BY THE PRESIDENT -- IS AN INAPPROPRIATE METHOD TO SET THE BALANCE BETWEEN NATIONAL SECURITY AND FIRST AMENDMENT CONCERNS THAT THESE CONTRACTS RAISE. UNDER THE HOLDING OF THE CASE, THE DECISIONS OF EXECUTIVE AGENCY BUREAUCRATS ARE TO BE PREFERRED TO THOSE OF THE ELECTED OFFICIALS IN OUR GOVERNMENT. THE CONSTITUTION DOES NOT ASSIGN EXCLUSIVE AUTHORITY FOR NATIONAL SECURITY OR FOREIGN POLICY TO ANY BRANCH OF GOVERNMENT; RATHER, POWER IS SHARED UNDER THE CONSTITUTIONAL FRAMEWORK. THIS OPINION CASTS A BIG SHADOW OVER CONGRESS'S AUTHORITY UNDER OUR CONSTITUTIONAL SYSTEM OF GOVERNMENT.

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Statement by Senator William Proxmire

On Congress and Secrecy Pledges

Before the Subcommittee on Legislation and National Security

Of the House Committee on Government Operations

August 10, 1988

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Chairman Brooks, members of the subcommittee, I am pleased and honored to have been invited to testify in these hearings.

I first want to commend the chairman for initiating this review of the Administration's efforts to restrict the flow of information between the executive branch and congress. I especially want to praise Chairman Brooks for the fight he has waged over many years to inject common sense into Congress' relations with executive agencies and to prevent the White House from overstepping its bounds under the banner of national security. I am hopeful that this hearing will lead to legislation resolving the policy issues raised by the nondisclosure agreements, or secrecy pledges, required by the Administration.

In the broad scheme of things the contents of the nondisclosure agreements in question, SF 189 and SF 4193, may seem relatively inconsequential. But that is not so.

For one thing, the agreements are of fundamental importance because they abridge the rights and the freedom of millions of federal employes to speak out and to communicate with their elected representatives.

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It is one of the ironies of our time that an Administration which prides itself on defending freedom and human rights around the world has gone to such lengths to limit the freedom and rights of its own government employees. The twisted logic of this policy is something that future historians will have to unravel.

I would only observe that the Administration has followed a policy of restricting the right of government employees to speak out against waste, mismangement and corruption in government programs. Many employees and officials have left government service frustrated by their inability to prevent wasteful uses of taxpayers money and abuses of trust. Countless others have been cowed into silence or coerced into collaboration.

One has only to think about the current Pentagon fraud scandal to realize how widespread the problem of corruption is and how long it has been going on. It takes no leap of the imagination to wonder whether fewer restrictions on government employees would have encouraged honest career civil servants in the Pentagon to demand that dishonest practices stop and to turn in the crooks and connivers long before the present situation came to light.

The fact that this and other Pentagon scandals involve illegal trafficking in classified documents and wholesale

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leaks of classified information by Pentagon officials to defense contractors underlines the ineffectiveness and misguided nature of the [redacted] STAT STAT [redacted]

The White House likes to picture Congress as a major source of security leaks. The nondisclosure agreements are, in large part, intended to prevent executive employees from giving classified information to members of congress who might leak it to others. But experience shows it is the executive branch, especially the Pentagon, which is the major source of security leaks.

Most of the leaking done in recent years has been done for one simple reason: private profit. Greed, the excessive desire to get more than one deserves, has been the motivating force behind the leaks of information from the Pentagon to Soviet agents and from the Pentagon to defense contractors.

There is another side to this issue, strongly linked to the rights of employees to communicate with congress. That is, the right of congress to get information from government employees.

The struggle over this right is old and neverending and

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bipartisan. Administrations are always nervous about what government employees might tell congress about the conduct of government programs. They are always concerned about what congress and the public might find out about the way taxpayers' money is spent. Some have gone further than others in trying to gag employees but all, inevitably, take steps in that direction.

Efforts to gag employees date at least to the turn of the century when, in 1902, President Theodore Roosevelt issued an executive order forbidding employees from attempting to influence legislation except through the heads of their departments. President Taft broadened the restriction in a new executive order, issued in 1909, which prohibited federal employees from responding to any request for information from congress except through the heads of their departments.

Congress finally passed legislation to overrule these gag rules in 1912 with what has come to be known as the Lloyd-LaFollette Act. The central provision of that act is as follows:

> The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress or any Member thereof, or to furnish information to any House of Congress or to any committee or Member thereof,

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shall not be denied or interfered with.

There have been numerous efforts to abrogate or whittle down the Lloyd-LaFollette Act, direct and indirect, blunt and subtle. The nondisclosure agreements required by the present Administration originate in the same impulse that led to the gag rules earlier in the century.

Congress has enacted legislation to protect "whistleblowers" in recent years because it recognizes the importance of preserving access to information in the possession of federal employees. It is worth recounting the story of one of our most honored whistleblowers, A.Ernest Fitzgerald.

Just about 20 years ago, in the Fall of 1968, I conducted an inquiry into certain Air Force weapons programs, including the C-5A cargo aircraft. Mr.Fitzgerald was on a panel testifying before the Joint Economic Committee when I asked him about the cost status of the C-5A. He replied, truthfully, that the program had incurred a cost overrun of About $2 billion.

The disclosure was significant because Air Force officials had previously testified to other committee that the program was on schedule and within budget, and it was rare if not unique for a Defense Department official to ever

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admit that a program was in trouble before the Defense Department or one of the Services was ready to make an official admission.

To shorten a long story, Mr.Fitzgerald was fired under the Johnson Administration, persecuted by the Nixon Administration, ignored by the Carter Administration, and barely tolerated by the Reagan Administration. Despite the ill treatment of his superiors, he has remained faithful to his principles and has persisted in telling congress the truth.

Characteristically, he has refused to sign a nondiclosure agreement. It is obvious to me that these agreements, as presently structured, serve both as an employee's gag and a congressional blindfold. We can be thankful for the Fitzgeralds in the civil service who risk their careers and their livelihoods to defy efforts to gag them. We in congress are direct beneficiaries of these acts of defiance as they help us maintain our access to information in the Executive Branch. But we have to do our part, too.

The point is we have to protect the rights of federal employees in order to protect congress' rights in order to protect the taxpayers' rights.

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That, Mr.Chairman, concludes my statement. I applaud this subcommittee's work and look forward to early legislative action.

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STATEMENT OF CONGRESSWOMAN BARBARA BOXER BEFORE THE
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
HOUSE GOVERNMENT OPERATIONS COMMITTEE
GOVERNMENT SECRECY AGREEMENTS
August 10, 1988

Mr. Chairman, I commend you for holding these hearings today. The issues you will consider are serious and important. They deal with the respective rights of the executive and legislative branches to control national security information. They also have to do with the responsibility of this Congress to exercise its proper oversight role over government activities. As you know, that responsibility rests to a great extent on the information we receive from whistleblowers, those who direct our attention to problems and wrongdoing of which we would otherwise have no knowledge.

Specifically, this hearing is about the implications of Judge Oliver Gasch's decisions with respect to Section 630 of the FY 1988 Continuing Resolution, and of the future of certain non-disclosure forms, including Standard Form 189.

As you remember, Mr. Chairman, you and Senator Grassley and I testified last year before Congressman Sikorski's Human Resources Subcommittee, about our concerns over the requirement that many federal employees and members of the armed services sign flawed non-dislosure forms. My particular concern was Standard Form 189. The vagueness of the word "classifiable" would have a chilling

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effect on would-be whistleblowers, fearful that embarrassing or damaging disclosures might be retroactively classified. I called for SF 189 to be suspended, pending a Congressional review of the policy. Prior to the hearing federal employees' unions filed suit to stop the implementation of SF 189 and 4193, which calls for pre-publication review.

Senator Grassley tried particularly hard to reach an agreement on this issue with the Administration that would strike the proper balance between the need to keep secret legitimate national security information and the need to guarantee the rights of federal employees to communicate with Congress. Unfortunately, that effort failed and Section 630 was added to the Continuing Resolution.

I believe Section 630 does strike the proper balance. It prohibits non-disclosure agreements containing the word "classifiable", but recognizes restrictions on properly classifed information or information in the process of a classification determination. It stresses the continuation of disclosures to Congress that are consistent with law. In short, it prohibits the use of SF 189 in its current form.

However, the Administration has not fully complied with the law. They made little effort to void the offending non-disclosure agreements made before December 22 of last year. This was unacceptable and we were forced to file suit to force compliance.

We now face the distressing implications of Judge Gasch's two rulings in this case, one in May and one in July. Reluctantly, we have now elevated our case to the Supreme Court.

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First, as you know, in his May decision, Judge Gasch, found Section 630 to be unconstitutional because it infringes on the Executive's right to protect the national security. He objects to Section 630 because he says it only demands secrecy of national security information that is mandated by law. He feels the President has the right to determine what should remain secret. But what Section 630 says is that a non-disclosure agreement should not impose remedies inconsistent with statutory law. The language reflects Congress'concern that these nondisclosure forms trample on the legal rights of whistleblowers.

The implications of Judge Gasch's decision are appalling and its effects are already striking close to home.

On June 22, Acting Assistant Attorney General Thomas M. Boyd wrote to the chairman of the Armed Services Committees commenting on certain provisions of the committee's FY 1989 Defense Authorization Bill. He objected to my provision which provides better protections for military whistleblowers. Mr. Boyd charges, and I will submit his letter for the record, Mr. Chairman, that military whistleblower protection is unconstitutional because "it threatens the President's control over national security matters" and "undermines his ability as Commander-in-Chief to control members of the armed forces."

Mr. Chairman, the provision, which is now part of the FY 1989 Defense Authorization Act, simply says that "No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General." The whistleblower provision does not apply to a communication that is unlawful. Yet Justice has

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seized on Judge Gasch's decision to inhibit military whistleblowing.

Both the House and the Senate have approved that language. It is reasonable and responsible. Congress must have access to all information to do its job, unless the disclosure of that information is prohibited by law. If information is too sensitive to be disclosed to all members of Congress, both the executive and legislative branches should determine by statute what conditions and limits should apply.

Again, I am concerned about the chilling effect such reasoning will have on military personnel concerned about wrongdoing. I think particularly, of the kind of information that military whistleblowers have been responsible for bringing to the attention of Congress.

Let me give you some examples.

Colonel Jim Burton testified before Congress about the adequecy of testing of the Bradley Fighting Vehicle. As a result of his courage, we will have an upgraded model of the Bradley which is less vulnerable to enemy weapons.

One of the reasons I introduced my Military Whistleblower Protection Act in the 99th Congress was concern for Air Force airman Thom Jonsson, who brought me the example of the $7600 coffee brewer on the C-5 cargo plane, the $300 "No Smoking" sign and the $600 armrest. His testimony contributed to Congressional action to curb overpriced spare parts.

Two military whistleblowers recently testified before the House Armed Services Committee in support of my bill. One, Peter Cole,

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investigated major problems in the inventory supply system in Europe in the mid 1970's. Chief Petty Office Michael Tufariello protested payments to Naval Reserve Officers for training missions they never flew.

It would have been a great loss if these brave men had been deterred from speaking out. Yet, they all paid a price. That is why Congress passed my legislation - to encourage whistleblowers to disclose waste, fraud and abuse and to deter those who would harass them.

The opinion of the Justice Department, based on Judge Gasch's flawed decision, is dangerous and irresponsible because it sends the opposite message. If military whistleblower protections are struck down, and SF 189 with its prohibition against the disclosure of "classifiable" information is allowed to stand, future Col. Burtons and Michael Tufariellos might never speak out.

I am alarmed that Judge Gasch's May decision may be the beginning of a new campaign to challenge all whistleblower protections. In fact, Judge Gasch's decision threatens whistleblower protections for federal employees. Inhibiting federal employees from making disclosures of information to Congress is contrary to the intent of the 1978 Civil Service Reform Act and the pending Whistleblower Protection Act of 1988.

For these reasons I believe it essential to reenact the language of Section 630 for the next fiscal year.

A brief comment on Judge Gasch's most recent decision on SF 189. I am gratified that Judge Gasch found the use of the term

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"classifiable" overly broad. But his decision to allow the administration to define the world "classifiable" is wrong. I disagree that the Administration should be allowed to rely on the last clarification of the word "classifiable" printed in the federal register. That definition said that holding individuals liable because they should have known information was in the process of a classification determination is flawed. I am concerned this will force would-be whistleblowers to have to ask their superiors about classification determinations. This would act to stop the whistleblower. In contrast, Section 630 only covers information an employee knows is in the process of classification determination.

I support Judge Gasch's second suggestion, to eliminate the use of the word "classifiable" from the non-disclosure form. I understand that such an offer was made to you by the Administration and I hope they follow through.

Again, Mr. Chairman, I applaud your efforts today. I believe that the provisions of Section 630 must be re-enacted and should stand until we have solid legislation that addresses the respective rights of the executive and legislative branches in these very sensitive matters.

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STATEMENT BY SENATOR CHARLES GRASSLEY

TESTIMONY BEFORE

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

APRIL 10, 1988

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Mr. Chairman, I would like to thank you for the opportunity to testify on what I consider potentially the most important First Amendment issue to face Congress since I have been in the United States Senate.

I would like to commend your efforts to ensure the free flow of information between the executive branch and the Congress. Without congressional access to such information, the checks and balances that are the foundation of any democracy are severely weakened.

At issue, here, Mr. Chairman, is the use of secrecy agreements by the executive branch to protect not only classified information, the protection of which is essential to the national security, but also information that may encompass anything at all, including unclassified information that is simply embarrassing to the executive branch. Such information may be embarrassing at times, but the effective functioning of a democracy often depends on knowledge of such information, if not by the public, then certainly by another branch of government.

It is my belief that secrecy agreements serve a useful purpose in safeguarding national security information, if used judiciously. However, if used zealously, they can create a

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chilling effect within the government and a barrier to the free flow of vital information to the Congress. SF-189, SF-4193, and other secrecy agreements used by the Executive may have started out with judicious intentions. But the record speaks to the contrary. There is a clear sense of unreasonableness associated with the Administration's policy, statements and negotiations of these forms. Unless Congress acts to alter the Adminstration's course, we're simply paving the road to a Secret Government.

That is why I commend your efforts, Mr. Chairman, to bring this issue into the public domain and to urge that Congress take decisive legislative action.

Toward that end, I would like to discuss what I feel are areas in need of permanent legislation.

To begin with, Mr. Chairman, the recent decision handed down by the US District Court for the District of Columbia will have a detrimental impact on the free flow of information to the legislative branch.

Congress requires information to meet its constitutional responsibilities for oversight, for its role in policymaking

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and for passing legislation.

Many members of Congress have voiced their concerns about these secrecy forms being used by the executive branch as unjustifiable restrictions on the flow of information from federal employees to Congress, in violation of both Congress' right to have such information and the employee's right to petition Congress.

After unsuccessfully trying to negotiate with the Administration for a reasonable resolution to this attempt to go way beyond the legitimate protection of classified information, the Congress passed a provision late last year placing a moritorium on the continued use of these forms. This is known as Section 630 of the FY 1988 Continuing Resolution.

I am concerned with the recent decision by the district court that declared this statute unconstitutional on the grounds that it intrudes upon exclusive Presidential authority over foreign policy and national security.

This sets an ominous precedent, that the President can restrict information that would otherwise be available to Congress.

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The executive branch's concern for protecting national security should not include the ability to decide what should or should not be given to Congress.

The need for Congressional access to classified information has increased dramatically in recent times.

Monitoring covert operations, Pentagon "black budgets", executive branch activities, arms control treaties, conduct by executive officials, the multitude of legislation that affects national security and defense matters, all require that Congress have access to classified material.

The presupposition guiding this requirement is that Congress itself has a vested interest in maintaining secrecy to protect its reputation as a responsible partner in these matters.

The record of Congress' ability to protect against unauthorized disclosures, plus the commendations by a number of well-respected former top executive branch officials as to Congress' discretion, are documented in a study prepared for this hearing by Frederick M. Kaiser of the Congressional Research Service.

With your permission, Mr. Chairman, I would like to enter that

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study into the record.

It is also important to note that Congress is taking further steps to protect classified information. For instance, the new Office of Senate Security and the Senate Security Manual were established by law in 1987 to provide greater safeguards for protecting the nations secrets here in the halls of Congress. A much more comprehensive analysis of congressional efforts in this regard is also contained in the CRS report.

But beyond Congress' well-established need for classified information, Mr. Chairman, is the fact that Congress also relies heavily on a wide range of unclassified information from the executive branch simply to conduct its day-to-day business affairs.

The Senate Budget Committee, as one case in point, relied significantly on the testimony of whistleblowers Franklin Spinney, Earnest Fitzgerald and Ompal Chauhan in freezing the FY 1986 Defense Budget in April of 1985. And I personally carried their testimony and data to the Senate floor in May of 1985 and won an historic victory for the taxpayers of this country, saving $17 billion.

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The benefits to Congress and the nation of an uninhibited flow of information is untold. Conversely, policies which create a chilling effect for whistleblowers will diminish those benefits. By ruling that Section 630 is unconstitutional, the court gave legitimacy to the chilling effect created by these standard forms.

As you know, Mr. Chairman, that decision is on appeal before the Supreme Court. If the ban is dropped from the Appropriations bill, it is likely that the appeal would become moot. For that reason, it is in the interest of Congress to protect its prerogatives by maintaining the ban until the Supreme Court has decided the issue.

In addition, Mr. Chairman, the lower court accepted the Administration's definition of the word "classifiable". That definition would hold an employee liable for disclosing information which he or she "should have known" was in the process of a classification determination. In other words, if the employee is not certain if information might some day be classified, he or she must ask a supervisor. As a result, the potential whistleblower would be identified, and the supervisor could block disclosure of the information, even if it was not classified and had never intended to be classified, but was

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simply embarrassing to the Administration.

Besides this weakness in the court's decision, the forms themselves still contain a provision requiring prior authorization for disclosure. This is a direct violation of a federal employee's right to petition Congress. And some of these forms require employees to submit their writings for prepublication review. This amounts to a lifetime censorship, even after the employee leaves the government.

I believe these are all areas, Mr. Chairman, in which the court's ruling did not go far enough, and in which Congress, and indeed this subcommittee, should pass permanent, corrective legislation. But most critical at this time, Congress must pass for another year the moratorium known as Section 630 as part of this year's Appropriations process. This matter is currently pending in conference, and I have every confidence that the Senate will support the House position and extend the ban for an additional year.

Finally, Mr. Chairman, I'd like to analogize the context of this problem by drawing upon a book that most of us are familiar with.

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The book is by Arthur C. Clarke, and is titled 2001: A Space Odyssey. In that book, a super computer named HAL, on board the space craft, decided that the human astronauts on board were of little value, that they couldn't handle the information they were collecting as part of their voyage. HAL thought they were superfluous, and a detriment to the successful completion of the mission.

You may recall that HAL carried this to an extreme, and tried to eliminate the astronauts. This, of course, put the crew, the ship and the mission itself at much risk.

It seems to me, Mr. Chairman, that in this case, HAL is to the astronauts what the Administration is to Congress. The Administration often views Congress as superfluous, and a detriment to its mission. And if that's the case, we should deal with this Administration on this issue the way the astronauts dealt with HAL. They began to disconnect HAL. In response, HAL cried out that he was reformed, that he would be good, that he now recognized the value of the astronauts.

Let me suggest, Mr. Chairman, that passage of the moratorium, as well as other legislative remedies -- just like the disconnecting of HAL -- may get the Administration to finally

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recognize that Congress is a partner in maintaining a safe and strong democracy.

I will be pleased to continue working with you and the members of this subcommittee to find a balance between safeguarding the nation's secrets and maintaining the flow of information. Once again, I thank you for inviting my testimony, and I would be pleased to answer any questions.

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Statement by
Senator Charles McC. Mathias, Jr.
Legislation and National Security Subcommittee
Committee on Government Operations
House of Representatives
Washington, D.C.
August 10, 1988

Prior restraint on the printing, circulation or publication of works in writing is inimical to that free exchange in ideas that is vital to the American constitutional system. The whole theory of the American political process is founded on the ability to reach rational decisions after a comprehensive discussion of the facts. The first amendment is not only a guarantee of the personal satisfaction of free expression, it is also a bulwark of national existence that encourages the mature judgment of the citizens. To the extent that any form of censorship or restraint is applied, it diminishes the ability of the citizen to do his duty.

Thus there are real constitutional problems with prior restraint and it is hard to overcome them. It may be sanctioned in some narrow, specific cases, such as those entering into a contract of employment with the National

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Security Agency or the Central Intelligence Agency. It is extremely difficult, however, to justify this form of censorship for those who work for the government in less sensitive agencies. The experience of public service is a part of national life and should be shared both to increase confidence in its positive aspects and to promote correction of its faults. To single out civil servants to be censored is not only offensive to the Constitution in general, but strikes at a specific activity contemplated by the Constitution, the widespread discussion of public affairs.

It will be said that prior restraint is "flexible," that it does not prohibit publication, it merely filters out the chaff. The fact is that censorship results in a silent operation as well as its overt side. Knowing that a manuscript will be read by an official censor can chill the author in a way that will congeal the thoughts and freeze the ink. The best ideas and the worst may not be exposed to public praise or public ridicule and the public will have a less accurate standard of comparison.

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There are policy reasons in addition to constitutional grounds for resisting the policy of prior restraint on the works of thousands of civil servants. At a time when we seek to make the government less intrusive and less expensive, it is unusual to propose a system of censorship that will require a new and dangerous bureaucracy. Censorship is the job of censors, who will doubtless take their job seriously. When they think prohibited words are eluding them, they will begin to search them out. The impact of such authority can be estimated when it is recalled that by 1986 over 200,000 federal employees in addition to NSA and CIA personnel were covered by contract restrictions. To oversee the possible literary production of this army is a major undertaking, notwithstanding the efforts to minimize it. It will require manpower and it will cost money.

For what purpose are these expenditures proposed? It is said that prior restraint is necessary to control the unauthorized disclosure of official secrets. As a practical matter, it is the least likely method of controlling leaks. The source of leaks is not usually identified. Few authors

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sit down with pen in hand and deliberately set down classified information in a text that they plan to sign and authenticate. Leakers, on the contrary, are clandestine. They whisper to reporters whom they arrange to meet in empty garages. They make anonymous telephone tips. They drop careful hints. They do not often write books. It is true, I suppose, that occasionally some slip of the pen in a personal memoire might reveal a secret inadvertently. But the risk is not very high that such errors would occur so often and deal with such sensitive information that we have to create a new arm of government to deal with it.

To suggest that members of Congress or Cabinet members might logically come under the ban some day exposes the weakness of the proposal. Such officials are privy to classified information in order to do their jobs. They are not expected to sit on the information like hens hatching eggs. They are supposed to use it in executing their duties. If every speech or statement had to be vetted before it was delivered, the response to events would be stale and useless.

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Equally compelling is the congressional need for information before making important decisions. The concept that testimony before congressional committees be subjected to even more scrutiny than is presently the case is hardly supportable.

The Constitution will not permit widespread, indiscriminate prior restraint on thousands of citizens merely because they work for their government and know its business. Common sense will not support the creation of a censorship for civil servants out of all proportion to the risks that they represent. Prior restraint is another example of the desire for automatic answers to solve the difficult human problems that demand leadership and understanding. Running a government is hard work and it is natural to seek labor saving devices, but this is an idea that is not only wrong, but will cause more trouble than it avoids.

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August 4, 1988

Testimony on Pre-Publication Review

for

House Legislation and National Security Subcommittee

by

Stansfield Turner

August 10, 1988

Mr. Chairman: I HAVE ONLY TWO BRIEF POINTS TO MAKE ON THE SUBJECT OF PRE-PUBLICATION REVIEWS. FIRST, THAT THE REVIEWS AS CONDUCTED BY THE CIA AND NSA ARE SUBJECT TO ABUSE AND SHOULD BE PLACED UNDER SOME OUTSIDE REGULATION. SECOND, THAT THERE IS GREATER DANGER THAN BENEFIT IN EXTENDING THE PRE-PUBLICATION REVIEW REQUIREMENT TO OTHER AGENCIES OF OUR GOVERNMENT.

ON THE FIRST POINT, MY EXPERIENCE IN OBTAINING CLEARANCE FROM THE CIA FOR MY BOOK "SECRECY AND DEMOCRACY" WAS A PAINFUL AND COSTLY PROCESS FOR ME. I WOULD NOTE THAT THIS WAS DURING THE TENURE OF WILLIAM CASEY AT THE CIA, A PERIOD IN WHICH THERE WAS EXTENSIVE OVER-CLASSIFICATION OF MATERIALS. I HAVE FOUND A MUCH MORE REASONABLE ATTITUDE SINCE JUDGE WEBSTER BECAME THE DIRECTOR. MY POINT, THOUGH, IS THAT THE POTENTIAL FOR ABUSE EXISTS AS PROVEN BY MY EXPERIENCE DURING MR. CASEY'S TIME.

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FOR INSTANCE, I WAS NOT PERMITTED IN MY BOOK TO REFER TO THE USE
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OF PHOTOGRAPHIC SATELLITES FOR ANY PURPOSE OTHER THAN VERIFICATION OF ARMS CONTROL AGREEMENTS. IT IS, OF COURSE, ABSURD TO ATTEMPT TO TELL THE AMERICAN PEOPLE THAT WE HAVE PHOTOGRAPHIC SATELLITES AND DO NOT EMPLOY THEM FOR ANY OTHER PURPOSE THAN ARMS CONTROL. THE AMERICAN PEOPLE DESERVE TO KNOW THAT OUR GOVERNMENT HAS THE CAPABILITY TO PROTECT OUR INTERESTS THROUGH THE USE OF SATELLITE PHOTOGRAPHY.

FIVE MONTHS AFTER MY BOOK WAS PUBLISHED, THE CIA SENT REPRESENTATIVES TO COURT TO TESTIFY IN THE CASE OF A MAN NAMED MORISON. MORISON HAD PURPORTEDLY GIVEN U.S. SATELLITE PHOTOGRAPHY TO A JOURNAL PUBLISHED IN ENGLAND. THE PHOTOS IN QUESTION WERE OF SOVIET AIRCRAFT CARRIERS. AIRCRAFT CARRIERS ARE NOT A PART OF ANY ARMS CONTROL AGREEMENT. THUS, THE CIA WAS DISCLOSING PRECISELY WHAT I HAD BEEN FORBIDDEN TO DISCLOSE.

NOW, I RECOGNIZE THAT FROM TIME TO TIME THE GOVERNMENT DECIDES THAT SOME OVERRIDING INTEREST MAKES IT WORTHWHILE TO DECLASSIFY SOMETHING CLASSIFIED. I AM SUGGESTING, THOUGH, THAT THE AGENCY'S WILLINGNESS TO BREAK THEIR RULE ON SATELLITE PHOTOGRAPHY SO READILY INDICATES THAT THERE WAS LITTLE SUBSTANCE BEHIND IT.

TO RUB SALT IN THE WOUNDS, IT TOOK THE AGENCY 21 MONTHS - LET ME REPEAT THAT, 21 MONTHS - TO MY REQUEST TO BE PERMITTED TO SAY JUST WHAT THE CIA REPRESENTATIVE HAD SAID IN COURT. THAT IS A GROSS ABUSE OF THE CONSTITUTIONAL RIGHT OF A CITIZEN TO FREE SPEECH, IN MY OPINION.

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INTELLIGENCE, I GAVE A NUMBER OF UNCLASSIFIED SPEECHES TO AUDIENCES WITH NO SECURITY CLEARANCES. IN ONE OF THOSE I GAVE A HYPOTHETICAL EXAMPLE OF HOW WE INTEGRATE VARIOUS TYPES OF INTELLIGENCE COLLECTION. WHEN I ATTEMPTED TO QUOTE MY OWN UNCLASSIFIED SPEECH IN MY BOOK, I WAS DENIED PERMISSION. YET, I OBTAINED QUITE FREELY A COPY OF MY SPEECH FROM THE CIA AND ASSUME, SINCE IT IS NOT CLASSIFIED, THAT YOU OR ANY CITIZEN COULD DO SO TODAY. RE-CLASSIFICATION OF WHAT IS IN THE PUBLIC DOMAIN IS AN ACT THAT RECALLS THE KING WHO ATTEMPTED TO PUSH BY THE TIDE. MOREOVER, THERE WAS NOTHING CLASSIFIED IN MY HYPOTHETICAL EXAMPLE, THOUGH I CANNOT GIVE IT TO YOU TODAY AS I AM STILL BOUND BY THIS RIDICULOUS RULING.

I WOULD ALSO LIKE TO COMMENT THAT THE CIA IS SERIOUSLY SHORT OF STAFF TO CONDUCT THE PRE-PUBLICATION REVIEWS. THEY HAVE NO CONCEPT THAT TIME IS WORTH MONEY TO AN AUTHOR. WHEN THEY TOOK WEEKS TO REVIEW A CHAPTER I WOULD SEND THEM, IT WOULD INTERRUPT THE PROGRESS OF MY WORK. AND, THEN, I WOULD APPEAL SOME RULING AND MORE WEEKS WOULD ELAPSE. IT BECAME DIFFICULT TO KEEP TRACK OF WHERE WE STOOD AND WHICH ARGUMENT WAS WHICH. I ESTIMATE THAT THE PRE-PUBLICATION REVIEW PROCESS CONSUMED 20% OF MY EFFORT IN PRODUCING MY BOOK. THAT IS UNACCEPTABLE AND I SUSPECT THAT I RECEIVED FAR BETTER TREATMENT THAN THE AVERAGE AUTHOR.

BECAUSE THE PRE-PUBLICATION REVIEW PROCEDURES CAN BE ABUSED, I BELIEVE SOME PRECAUTIONS ARE IN ORDER. I SUGGEST THE FOLLOWING:

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1. THAT THE INTELLIGENCE COMMITTEES OF THE CONGRESS CONDUCT ANNUAL OVERSIGHT OF THE REVIEW PROCESS WITH SPOT CHECKS ON THE TYPES OF DELETIONS MADE AND THE LENGTH OF TIME AUTHORS WERE REQUIRED TO WAIT FOR DECISIONS.

2. THAT THE OBLIGATION OF ANY INDIVIDUAL TO SUBMIT HIS WRITINGS FOR REVIEW BE LIMITED TO 10 YEARS. CERTAINLY THE CIA COULD SAY THAT SOME SECRETS EXTEND PAST 10 YEARS, BUT IN MATTERS LIKE THESE WE MUST MAKE A BALANCE BETWEEN THE INDIVIDUAL'S RIGHT TO SPEAK AND THE PUBLIC'S RIGHT TO HEAR ON THE ONE HAND, AND THE CIA'S NEED FOR SECRECY ON THE OTHER. IN MAKING THAT BALANCE WE SHOULD KEEP IN MIND THAT THE VAST MAJORITY OF THOSE DOING THE WRITING ARE CONSCIENTIOUS AND WOULD HARDLY REVEAL SOMETHING SO SECRET THAT IT NEEDED TO BE SECRET AFTER 10 YEARS. THOSE WHO ARE NOT CONSCIENTIOUS WILL LET THE CAT OUT ONE WAY OR ANOTHER.

MY SECOND POINT IS CLOSELY RELATED TO THESE LAST COMMENTS. IT CONCERNS WHETHER LITERALLY HUNDREDS OF THOUSANDS OF ADDITIONAL PUBLIC SERVANTS SHOULD BE REQUIRED TO SUBMIT TO PRE-PUBLICATION REVIEW. I EMPHATICALLY SAY "NO" FOR THREE REASONS:

1. THE ABUSES I HAVE EXPERIENCED NOT ONLY COULD, BUT VERY LIKELY WOULD, BE EXPERIENCED FREQUENTLY.

2. THE BUREAUCRACY TO HANDLE HUNDREDS OF THOUSANDS OF

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HAND WITH THE CIA AS THE NUMBER OF RETIREES DOING WRITING HAS INCREASED. I BELIEVE IT WOULD BECOME UNMANAGEABLE WITH HUNDREDS OF THOUSANDS AND WOULD END UP BEING IGNORED.

3. WHILE THERE ARE LOTS OF IMPORTANT SECRETS IN OUR GOVERNMENT, THERE ARE NOT AS MANY CRITICAL ONES IN MOST AREAS OF GOVERNMENT AS IN THE CIA AND NSA. OUR FORM OF GOVERNMENT IS BUILT ON THE ASSUMPTION OF A WELL INFORMED ELECTORATE. AS WE STIFLE EXPRESSION FROM PEOPLE WITH FIRST-HAND EXPERIENCE IN GOVERNMENT, WE REDUCE THE LIKELIHOOD THAT THE ELECTORATE WILL BE WELL INFORMED.

IT IS STRICTLY A JUDGMENT CALL, BUT I BELIEVE THAT UNLESS THERE IS A COMPELLING CASE FOR SECRECY, WE SHOULD ALWAYS COME DOWN ON THE SIDE OF OPENNESS. THERE ARE EXCEPTIONS, BUT SO MANY OF THE "SECRETS" IN THE AVERAGE AGENCY OF OUR GOVERNMENT ARE NOT SECRET AT ALL, THAT I COME DOWN ON THE SIDE OF NO PRE-PUBLICATION REVIEW OUTSIDE THE CIA AND NSA.

THANK YOU, MR. CHAIRMAN.

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Legislation and National Security Subcommittee

Committee on Government Operations

U.S. House of Representatives

Statement of Harold H. Bruff

John S. Redditt Professor of Law

The University of Texas at Austin

August 10, 1988

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I am pleased to give the Subcommittee my views on the recent district court decision in American Foreign Service Ass'n v. Garfinkel,[1] which held unconstitutional § 630 of the Continuing Resolution for Fiscal Year 1988.[2] The case is especially important because the statute limits the executive's use of nondisclosure agreements with its employees, and because the court's opinion finds exclusive presidential authority over broad areas of national security.

Section 630 provides that no appropriations for fiscal year 1988 may be used to implement nondisclosure forms if they concern information not known by the employee to be classified, if they contain the term "classifiable," if they obstruct communications between employees and Congress, or if they contravene existing statutory law. Thus the statute's purposes sound equally in individual rights and the separation of powers. Congress is attempting to protect the rights of employees and former employees of the executive to write and speak about their experiences, and the rights of Congress, and ultimately the people, to monitor executive branch activity. Yet the executive, and the nation, have obvious needs to protect sensitive information, as many unhappy events in recent years have shown. Has this statute gone too far?

This controversy stems from President Reagan's order that

1. Civ. Action No. 88-0440-OG (D.D.C. Sept. 1, 1987), appeal to the Supreme Court filed, June 3, 1988.

2. Pub. L. No. 100-202, 101 Stat. 1329 (Dec. 22, 1987).

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employees in sensitive positions sign nondisclosure agreements as a condition of their access to classified information.[3] To implement the order, the executive developed Standard Form 189 (and similar SF 4193, for access to Sensitive Compartmented Information). These forms bind employees never to divulge classified or "classifiable" information to anyone, including Congress, without prior authorization from their employing agency. By late 1987, more than 1.7 million of the 2.5 million federal employees who have access to classified information had been compelled to sign SF 189.[4] Violations of the agreements are punishable by a range of sanctions including loss of security clearance and employment.

The AFSA litigation is a suit by an association of foreign service employees and seven Members of Congress to compel compliance with § 630 and to void previously signed agreements. The executive defendants challenged the constitutionality of § 630 under the doctrine of separation of powers. The district court found it likely that the executive was not in compliance with § 630. Then, in vague but broad language, the court ruled that the statute is unconstitutional.

Judge Gasch's opinion began by recognizing that the

3. National Security Decision Directive 84, Safeguarding National Security Information, reprinted in National Security Decision Directive 84, Hearing Before the Sen. Comm. on Governmental Affairs, 98th Cong., 1st Sess. 85-86 (1983).

4. Also, another 200,000 outside the CIA and NSA had signed SF 4193. Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. 62, 67 (1987).

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Constitution does not explicitly say which branch of government may regulate national security information. He noted, however, that Presidents have traditionally controlled the classification process by executive order, without relying on express statutory authority. He seemed to think that the congressional role has historically been limited to bolstering but not regulating this executive activity, for example by furnishing the criminal sanctions in the Espionage Act.[5] He concluded that the President's role in foreign affairs "requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of purely domestic concern." Section 630 was not "consistent with this principle."

Apparently, § 630 failed in two respects to conform to the principle that Judge Gasch announced. First, he thought that Congress overreached by forbidding interference with its attempts to obtain information about executive activity. Second, he read the provision that forbids agreements that are "inconsistent with statutory law" to allow the executive to protect secrecy "only by those means authorized by Congress."

The court's approach was oversimplified throughout. Its outcome, the invalidation of § 630, is incorrect and should be reversed by the Supreme Court. My explanation will follow the general outlines of the court's analysis, correcting it where necessary.

5. 18 U.S.C. § 793.

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The Constitution distributes national powers over defense and foreign relations to both President and Congress. The President's powers in these fields, although certainly broad, are not always-- or even usually-- exclusive of those of Congress.[6] The text of the Constitution makes this clear. The President is Commander in Chief, but Congress declares war, raises and regulates the armed forces, and funds all military operations. The President has various powers related to foreign affairs, for example to negotiate treaties and to receive ambassadors, but Congress regulates foreign commerce and the Senate ratifies treaties.

There are two principal sources for modern arguments that notwithstanding the Constitution's apparent purpose to empower both branches in this realm, the President must be regarded as having plenary powers exclusive of Congress. First, some overbroad statements in Supreme Court opinions have been torn from context and offered as a gloss on the constitutional text. Second, and probably accounting for the first, the conditions of modern life require executive power to deal successfully with a dangerous world in which instant and unilateral action is sometimes necessary. I think, though, that § 630 can be reconciled with both judicial precedent and executive necessity.

The broadest claims of exclusive executive power usually rely on Justice Sutherland's expansive opinion in United States v. Curtiss-Wright Corp.,[7] for example his reference to the

6. See generally L. Henkin, Foreign Affairs and the Constitution (1972).

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"plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-- a power which does not require as a basis for its exercise an act of Congress." It is one thing, however, to claim that the President may act without express statutory authority, and quite another to say that he may ignore statutory constraints. Curtiss-Wright itself simply upheld a statute delegating power to the President to stop foreign arms sales. The case stands for the sound proposition that Congress may constitutionally delegate more power to the President in foregn affairs than in domestic contexts. The Court's broader statements are dicta, and have never been well received by neutral observers.[8]

The modern judicial approach to delineating the respective powers of President and Congress stems from Youngstown Sheet & Tube Co. v. Sawyer,[9] in which the Court invalidated President Truman's seizure of the steel mills in wartime, because a statute forbade the seizure. Justice Jackson, a former Attorney General, wrote a famous concurring opinion in which he noted that the President is often able to act in the absence of clear statutory authority, but that when he acts contrary to statute,[10]

7. 299 U.S. 304 (1936).

8. Lofgren, United States v. Curtiss-Wright Export Corporation: An Historical Reassessment, 83 Yale L.J. 1 (1973); Levitan, The Foreign Relations Power: An Analysis of Mr. Sutherland's Theory, 55 Yale L.J. 467 (1946).

9. 343 U.S. 579 (1952).

10. 343 U.S. at 637.

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> his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

In later cases, the Court has consistently followed this approach. For example, in Dames & Moore v. Regan,[11] the Court upheld the executive agreements ending the Iranian hostage crisis only after determining their consistency with statutory authority.

The court's opinion in AFSA comes close to reversing this approach, by announcing the "principle" that Congressional intrusion on the executive is more "severely limited" in foreign than domestic affairs, and by invalidating a statute without requiring any weighty showing of executive need. Contrast Youngstown, where the Supreme Court would not allow presidential claims of necessity that were based on national security to override a contrary statute. What the AFSA court should have done was to uphold § 630 if it could be interpreted to meet

11. 453 U.S. 654 (1981).

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identifiable constitutional claims of the executive for control of national security information. I turn to that inquiry, concluding that § 630 can easily be read to remain within constitutional limits.

Congress has left overall policy concerning which documents should be classified to executive discretion.[12] As each administration sets its own policy by executive order, substantial variations occur. The Reagan administration's order,[13] more stringent than its predecessor, allows classification of information posing no danger in itself if "in the context of other information," it might damage national security.[14] Once a document has been classified, the Freedom of Information Act[15] protects it from the mandatory disclosure to which most agency records are subject, if it has been properly classified. Courts review agency decisions to withhold; the burden of proof is on the agency to justify withholding on both procedural and substantive grounds.[16] Another statute, the Central Intelligence Agency Information Act,[17] protects CIA

12. See generally P. Shane & H. Bruff, The Law of Presidential Power 154-56 (1988).

13. Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

14. See generally House Comm. on Government Operations, Security Classification Policy and Executive Order 12,356, H.R. Rept. No. 731, 97th Cong., 2d Sess. (1982).

15. 5 U.S.C. § 552(b)(1).

16. Courts are authorized to order the release of information contained in classified documents if it is both nonclassifiable and segregable from protected portions of the documents. Goldberg v. U.S. Dept. of State, 818 F.2d 71 (D.C. Cir. 1987).

17. 50 U.S.C. §§ 431-32; see Winchester & Zirkle, Freedom of

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"operational files," with some exceptions.

Thus, it would be quite inaccurate to characterize the control of classified information as wholly in the discretion of the executive. Moreover, FOIA requires the release of nonexempt records to any member of the public, without any showing of need. In contrast, Congress may be able to make a strong showing of need for information in executive hands. Thus, if FOIA is constitutional, as no one denies, it is hard to see how Congress can lack power to control "classifiable" but as yet unclassified information in at least some circumstances.

It is true that to date Congress has left large areas of national security information policy to the executive. In these areas, the courts have usually upheld executive discretion.[18] For example, in Snepp v. United States,[19] the Court enforced the CIA's contract agreement with one of its employees to obtain prepublication clearance of all information relating to the agency. Yet where Congress has regulated executive papers, the Court has upheld the statutes. In Nixon v. Administrator of

Information and the CIA Information Act, 21 U. Rich. L. Rev. 231 (1987).

18. See generally Edgar & Schmidt, Curtiss-Wright Comes Home: Executive Power and National Security Secrecy, 21 Harv. Civ. Rts.-Civ. Lib. L. Rev. 349 (1986); see, e.g., Department of the Navy v. Egan, 108 S.Ct. 818, 825: "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." The Court has, however, recently extended some constitutional protection to security-based discharges of CIA personnel, in Webster v. Doe, 56 U.S.L.W. 4568 (June 15, 1988).

19. 444 U.S. 507 (1980).

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General Services,[20] the Court upheld the statutory regulation of the President's own papers against separation of powers challenge. The Court's test was whether the statute "prevents the Executive Branch from accomplishing its constitutionally assigned functions." If the potential for disruption was present, the Court said, it would determine "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Surely this is the correct test for the validity of § 630. Let us apply it.

There are two ways in which this statute could invade executive prerogative. The first is by trying to require explicit congressional authority for all executive control of national security information. The AFSA court so read § 630, and such a statute would risk invading the President's independent constitutional powers. But the usual judicial practice is to read statutes in ways that preserve rather than destroy their constitutionality. The portion of § 630 the forbids executive agreements that are "inconsistent with statutory law" appears to refer only to the constraints of existing statutes. The court's broad reading of it as a requirement for affirmative statutory authority is strained. Moreover, it ignores the consistent congressional practice of broad acquiescence in executive control of information in the absence of statutory restriction. So a straightforward reading of this provision, to require obeying laws on the books, should remove constitutional doubt.

20. 433 U.S. 425 (1977).

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The second way that § 630 could be unconstitutional is by infringing executive privilege. The Court recognized a qualified constitutional executive privilege in United States v. Nixon.[21] The extent of that privilege with regard to congressional demands for information, however, has never been made clear.[22] Again, it is possible to interpret § 630 to preserve its constitutionality. It is only necessary to read the statute to allow the executive branch to claim its privilege against Congress where it would otherwise do so, subject to the (uncertain) limits of existing law.

Thus, § 630 does not appear to disrupt the President's ability to discharge his constitutional duties. Moreover, it serves two important interests of Congress. First, it protects the civil liberties of government employees. The First Amendment obligates the executive to restrict its employees' speech no more than necessary.[23] Because the Reagan administration's executive order on classification provides that documents not themselves threatening to national security may be classified if they could pose a threat in the context of "other information," the sweep of a term like "classifiable" becomes extremely broad and vague. The same district court that decided AFSA admitted as much when, in related litigation, it ordered the executive to define that term or cease its use.[24] Surely it is within the power of

21. 418 U.S. 684 (1974).

22. See United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977).

23. See, e.g., Brown v. Glines, 444 U.S. 348 (1980); McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).

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Congress to seek the same end of protecting First Amendment rights by enacting a statute.

Second, § 630 serves the need of Congress and the people to monitor executive performance. It is firmly in the tradition of the Civil Service Reform Act's prohibition of retaliation against whistleblowers for their communications to Congress.[25] Both statutes attempt to assure those providing necessary information to Congress that they will not be penalized for doing so. Both are in aid of Congress' fundamental power to investigate executive activity in aid of its legislative powers.[26] Section 630 is clearly constitutional.

24. National Federation of Federal Employees v. United States, Civ. Action No. 87-2284-OG (D.D.C. July 29, 1988).

25. 5 U.S.C. § 2302 (b).

26. <u>See, e.g.,</u> McGrain v. Daugherty, 273 U.S. 135 (1926).

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TESTIMONY OF

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before the

COMMITTEE ON GOVERNMENT OPERATIONS

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

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Mr. Chairman and Members of the Committee:

Let me begin by thanking the Subcommittee for inviting me to be here today, and by commending the Subcommittee for its interest in the case of American Foreign Service Association [AFSA], v. Garfinkel, and, more generally, for its continuing concern about governmental censorship. In AFSA, the United States District Court for the District of Columbia, on May 27, 1988, struck down section 630 of the Omnibus Continuing Resolution for Fiscal Year 1988,[1] which placed limits upon the use of appropriated funds for the implementation or enforcement of certain so-called "pre-publication review agreements." The court did so on the theory that the statute trenched upon the President's general foreign affairs powers under the Constitution.

Mr. Chairman, the May 27 decision of the district court is not simply without precedent: the decision is an ill-considered and radical exercise of judicial activism.

The decision is ill-considered in that it is inconsistent with the court's own later reasoning. Two months after its May 27, 1988 memorandum opinion and order, the court handed down another opinion

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in a companion case that is irreconcilable. On May 27, as I mentioned, the court had struck down section 630 of the Continuing Resolution as an unconstitutional intrusion by the Congress upon the power of the Executive to conduct the nation's foreign affairs.[2] Yet in its July 29, 1988 memorandum opinion, the court held that certain of those same agreements proscribed by section 630 -- those using the term "classifiable" -- are constitutionally _un_enforceable. Can Congress not constitutionally deny funds for the enforcement of agreements that are constitutionally unenforceable? Does the Executive have constitutional power to enforce constitutionally _un_enforceable agreements? If this matter is within the exclusive constitutional prerogative of the President, how is it that a federal district judge can substitute his judgment for that of the President? One would have supposed that the deference traditionally accorded an act of Congress -- long regarded as presumptively constitutional -- would have counseled the need for more judicious and deliberate consideration of this delicate issue.

The decision is radical in that it disregards fundamental and time-honored doctrines of Anglo-American jurisprudence. It is unsupported by judicial precedent. So far as I can find, it is the only decision in American case law in which a court has invalidated an act of Congress on the basis of a general presidential foreign affairs power. Moreover, so far as I can find, it is the only decision in American case law in which a court has invalidated an exercise of Congress's power over the purse as an unconstitutional

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encroachment on executive power. I shall elaborate those two points, and conclude with some comments on pre-publication review agreements generally.

PRESIDENTIAL POWER AND THE CONGRESSIONAL WILL

Although it has often been asserted that the President is possessed of plenary foreign affairs powers -- powers that do not admit of the possibility of congressional limitation -- the truth is that no court has ever held that. It may surprise some to hear this, but _every time the courts have reached the merits in a foreign affairs dispute pitting Congress against the Executive, Congress has won_.

The seminal precedent, overlooked completely by the _AFSA_ court, is _Little v. Barreme_,[3] decided in 1804 by Chief Justice John Marshall and joined by a unanimous United States Supreme Court.[4]

The events leading up to _Little_ occurred during the administration of President John Adams, when the United States was engaged in an undeclared naval war with France.[5] Although the war was not formally declared, Congress did prohibit American vessels from sailing to French ports.[6] Congress also enacted the means to carry out this restriction. Specifically, it authorized the President to order United States naval officers to (a) stop any American ship if they had reason to suspect the ship to be bound for a French port,[7] and (b) to seize the ship if, upon searching it, it appeared to be so bound.[8] Congress further provided that the captured ship be condemned -- auctioned or sold -- and, rather

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generously, that half the proceeds go to the United States and the other half to the person who initiated the capture and sale, presumably the ship's captain.[9]

When the Secretary of the Navy issued orders a month after the law was enacted, he included a copy of the law. One recipient of those orders was Captain George Little, commander of the United States Frigate Boston. Unknown to Little, however, the orders departed from the law in two key respects. First, they directed the seizure not only of ships that were clearly American, but also of ships that appeared to be foreign but might really be American or even merely carrying American cargo.[10] Second, they directed the seizure not only of ships bound to French ports, but also of ships sailing from French ports.[11] The order therefore seemingly expanded Little's authority, and the United States' risk of involvement in hostilities, significantly beyond what Congress had contemplated.

Sure enough, the Navy seized the wrong ship -- a vessel with Danish papers sailing from a French port. Captain Little captured this ship, the Flying Fish, and sought to have her condemned.[12] The central issue in the condemnation proceedings was not whether the Flying Fish should be condemned; Chief Justice Marshall agreed with the courts below that the seizure of a neutral vessel was unlawful.[13] Rather, the case turned on whether the Danish owners of the Flying Fish should be awarded damages for the injuries they suffered.[14] Little's defense was that he had merely followed orders, and that those orders excused him from liability.[15] Because the Flying Fish fell squarely within the class of ships that the

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President had ordered seized, the Supreme Court had to consider whether the President's instructions immunized his officer personally from an action for damages arising under the statute.[16]

The Supreme Court affirmed the circuit court's judgment awarding damages to the owners.[17] Marshall's first reaction, he confesses in the opinion, was that, given Little's orders, a judgment against him for damages would be improper. It is "indispensably necessary to every military system," he writes, that "military men usually pay implicit obedience . . . to the orders of their superiors."[18] Yet Marshall changed his mind when he considered the character of Captain Little's act: it directly contravened the will of Congress. "[T]he legislature seems to have prescribed the manner in which this law shall be carried into execution," and in so doing, "exclude[d] a seizure of any vessel not bound to a French port."[19] Under the law enacted by Congress, therefore, Captain Little "would not have been authorized to detain" The Flying Fish.[20] "[T]he instructions [from the Secretary of the Navy]," Marshall concludes, "cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."[21]

Little v. Barreme is, in all, an extraordinary case -- extraordinary not only for what the opinion says, but also for what it does not say. Nowhere in Little, for example, does Marshall even consider the possibility that the President's order might have fallen within independent powers the Executive might enjoy as "sole organ" of the United States in its foreign relations. Yet it was

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none other than John Marshall, speaking only two years earlier on the floor of the House of Representatives, who apparently coined the term. In the context of a debate on President Adams' power to extradite to Britain an individual charged with murder, Marshall declared: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[22] Although we might imagine that such rhetoric, if taken seriously, would lead Marshall to declare the statute in Little to be an unconstitutional infringement of presidential power, such an interpretation could not have been further from Marshall's meaning. Far from arguing in his speech that President Adams had an "inherent" or "independent" power to extradite to Britain an individual charged with murder, Marshall in fact contended that it was Adams' duty faithfully to execute the Jay Treaty,[23] and that it was that Treaty, not the President's exclusive constitutional power, that authorized and indeed required the extradition in question.[24] The truth is, therefore, that it probably never occurred to John Marshall or to any of his colleagues in 1804 that the President, acting within the Constitution that many of them had helped write, could disregard this congressional restriction. That, most likely, is why Little is silent on the issue. The argument for a royal prerogative was not new to these Founding Fathers; while they had not encountered Oliver North, they had encountered his ideological if not genealogical ancestor, Lord North.[25]

During the Korean War, Marshall's analysis again became timely

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in another case also completely overlooked by the district court in AFSA. In 1952, Youngstown Sheet & Tube Co. v. Sawyer --the famed Steel Seizure Case -- presented the Supreme Court with a stark choice. A nation-wide strike had broken out in the steel industry. According to the Youngstown court:

> The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.[26]

President Harry S Truman consequently issued an executive order directing the Secretary of Commerce to take possession of most of the mills and keep them running, arguing that the President had "inherent power" to do so. The companies objected, complaining in court that the seizure was not authorized by the Constitution or by any statute.

Congress had not statutorily authorized the seizure, either before or after it occurred. Congress had, however, enacted three statutes providing for governmental seizure of the mills in certain specifically prescribed situations, but the Administration never claimed that any of those conditions had existed prior to its action. More important, Congress had in fact considered, and rejected, authorization for the sort of seizure Truman actually ordered.

Justice Hugo Black delivered the opinion of the Court. The President, Justice Black wrote, had engaged in law-making, a task assigned by the Constitution to Congress.[27] The seizure was

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therefore unlawful, since the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[28] Yet Youngstown is remembered mostly for the concurring opinion of Justice Robert Jackson. In reasoning strikingly reminiscent of Marshall's in Little, Jackson wrote that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[29] Because of the importance of Jackson's opinion, key portions are set forth without paraphrase:

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables

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> rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[30]

The opinion is thus notable for its unwillingness to decide the case by reference to "inherent" presidential power, and in the weight it accords congressional will. It remained for a former Jackson clerk, Justice William Rehnquist, to give Jackson's opinion the force of law. The Supreme Court formally adopted this mode of analysis in Dames & Moore v. Regan,[31] in which Justice William Rehnquist applied Jackson's approach to uphold President Jimmy Carter's Iranian hostage settlement agreement as having been authorized by Congress.[32] In so doing, Rehnquist wrote that Jackson's opinion "brings together as much combination of analysis and common sense as there is in this area."[33] Rehnquist then quoted from Jackson a passage that, today, is as significant as it is timely. He said: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."[34]

This, then, is the mode of analysis pursued by the United States Supreme Court in the assessing the reach of presidential

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foreign affairs power. It bears repeating: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[35] "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."[36]

Section 630 of the 1988 Continuing Resolution, Mr. Chairman, placed presidential use of specified pre-publication review agreements in this third category of Justice Jackson's analysis, where his power to use those agreements is at its lowest ebb. Any other case used for comparison must therefore fall within this third category. Cases dealing with presidential acts that fall within Justice Jackson's first or second categories -- where Congress has approved, and where Congress is silent -- are not on point.

The four cases relied upon by the district court in AFSA are for this reason altogether irrelevant to the constitutionality of section 630. The first case, Department of the Navy v. Eagan,[37] raised the issue whether the statutory structure permitted administrative review of the merits of a security-clearance denial underlying an employee's removal. The "statute's 'express language' along with 'the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved'" all militated against such review.[38] Congress thus agreed, rather than disagreed, with the Executive's position. Indeed, in an important passage unnoted by the AFSA court, the Supreme Court in this case pointed out that

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deference to the Executive in military and national security affairs is only appropriate "unless Congress specifically has provided otherwise."[39] In section 630, Congress specifically provided otherwise.

The second case is represented by part of the concurring opinion of Justice Potter Stewart in The Pentagon Papers Case.[40] Unfortunately, the AFSA court neglected to include the most pertinent portion of Justice Stewart's opinion -- his observation that, in that case, the Court was "asked neither to construe specific regulations nor to apply specific laws." In other words, the controversy fell within Jackson's second category -- the "zone of twilight." The case, unlike AFSA v. Garfinkel, presented no disagreement between Congress and the Executive. (The AFSA court also neglects to note the outcome of The Pentagon Papers Case: the Executive lost.)

The third case, United States v. American Telephone and Telegraph Co.,[41] seems to be cited by the AFSA district court as authority that the role of Congress in this realm is limited to protecting its own access to classified information, rather than "intruding upon the President's oversight of national security information . . . ." In fact, the case said nothing of the sort. While it did present "nerve-center constitutional questions,"[42] the court expressly declined to resolve those issues,[43] urging the parties to pursue an out-of-court settlement. No statute was struck down; no executive act flouting the will of Congress was upheld.

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The fourth case, which deserves special attention in this regard, is that old war-horse, United States v. Curtiss-Wright.[44] Those words -- Curtiss-Wright -- often are ritualistically incanted in executive efforts aimed at exorcising the demons of legislative limitation.[45] But the holding of Curtiss-Wright hardly lends itself to such labors, for the circumstances in which the case arose -- the facts to which a holding is perforce confined -- constituted anything but a legislative-executive confrontation. The posture of Congress in that case, unlike AFSA, was support for the President, not opposition. Congress had enacted a very ordinary law making certain arms sales illegal upon a finding by the President that a ban on those sales would serve the cause of peace. President Roosevelt made the finding, defendant Curtiss-Wright violated the law, was indicted and convicted, and on appeal challenged the constitutionality of the law on the ground that it violated the six-month-old delegation doctrine. Court held that delegation doctrine need be of concern only, or almost only, in the case of prodigal domestic authorizations: the law in question was not "vulnerable to attack under the rule that forbids a delegation of the lawmaking power."[46]

The case is known for its extravagant dicta concerning "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[47] But it is important to bear in mind that the Court's comments represent precisely that: dicta. This is demonstrably not a plenary powers case. A "plenary presidential power" is a one

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that is not susceptible of congressional limitation. Plenary power refers to the power of the President to act <u>even if Congress prohibits that act</u>. I gather that this is what the author of the opinion, Justice George Sutherland, means by the term.[48] Now, what plenary power did President Roosevelt exercise under the facts of <u>Curtiss-Wright</u>? Under no accepted principle of American constitutional jurisprudence could the President promulgate by executive fiat a criminal prohibition and, without congressional concurrence, proceed to impose criminal penalties. It is emphatically the task of Congress to legislate[49] -- most surely to enact statutes imposing criminal penalties. One wonders what Sutherland has in mind, therefore, when he announces that "we are dealing here" not with statutory power alone, but with statutory power "plus the very delicate, plenary and exclusive power of the President" -- "a power which does not require as a basis for its exercise an act of Congress. . . ."[50] Does Sutherland seriously mean to suggest that the President could have imposed criminal penalties on Curtiss-Wright without any statutory "basis"? Can he truly mean that, in the absence of any trace of congressional authorization, the Executive could somehow have fined or jailed Curtiss-Wright? Suppose under the facts of this case that Congress had taken a contrary position; suppose that, instead of <u>prohibiting</u> the arms sales in question, it had affirmatively <u>permitted</u> those sales. If "we are dealing here" with a plenary power, then the conclusion must be that the President could criminalize the arms sales even over Congress's statutory opposition -- an absurd

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proposition that even George Sutherland presumably would reject. Perhaps he meant for this impressionistic essay to be read less rigorously. Perhaps by "here" he does not mean "here in this case," but rather "here" in these generalized flights of fancy about the manifold delicacies of plenary power. Perhaps; a little precision would have gone a long way. In any event, one is compelled to conclude that the discussion of plenary power has no place in Curtiss-Wright case since, again, the posture of Congress in that case is approval of the President's initiative, not disapproval. The case falls in Jackson's first category, not his third.

The AFSA court thus relies upon precedential props that collapse under examination. No case that the court cites supports the notion that the President can use appropriated funds to enforce pre-publication review agreements when Congress has expressly declined to appropriate funds for that purpose. In an effort to shore up its shaky conclusion, the AFSA court thus turns to a student law review note for the proposition that "[n]ever has the President's authority in this area been dependent upon express legislative authorization."[51] Unfortunately, the note observes on the very page cited by the court that "authority for the practice is said to be implicit in a number of statutes."[52] To the extent that such authority is conferred statutorily, of course, it can be limited or repealed statutorily. The court elsewhere seems not to have appreciated the note's full import. The court, for example, cites the note as authority for the proposition that Presidents

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"have been protecting national security information since World War I." Yet woven throughout the note's discussion are repeated references to relevant authorizing legislation, and the note nowhere suggests that Congress would lack power to prohibit the use of funds to limit the means by which national security information is protected.[53] Indeed, at no point in the this note does any reference appear to pre-publication review agreements, for the apparent reason that, whatever Presidents may have been doing "since World War I," none other than the incumbent has widely and routinely employed such agreements.

So much for the court's discussion of presidential power. Let me turn now to another vital subject that the court again fails to discuss: congressional power -- the power over the purse.

THE CONGRESSIONAL POWER OVER THE PURSE

Section 630 represents a classic, textbook exercise of Congress's power over the purse. It prohibits the expenditure of certain appropriated funds for a specified purpose.

The Constitution prohibits statutorily unauthorized expenditures by the President. Article I, section 9, clause 7 confers on Congress exclusive power over the purse. It provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." The only prohibitions in the Constitution against the use of the appropriations power to curtail the activities of another branch are the requirements that the Justices of the Supreme Court and the President receive a

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compensation that may not be diminished.[54] Had the Framers intended further limitations on the appropriations power they seemingly would have included them. Indeed, in the case of "national security" matters they went to the other extreme. In addition to the power to appropriate funds -- and to refuse to do so -- they gave Congress the power to "raise and support Armies"[55] and to "provide and maintain a Navy"[56] -- and to refuse to do so.

Its historical background reveals why the appropriations clause conferred such broad power upon Congress.[57] The provision was framed against the backdrop of 150 years of struggle between the King and Parliament for control over the purse, often centering on military matters. In 1624 the House of Commons for the first time conditioned a grant of funds to the king. The Subsidy Act of that year prohibited the use of any military monies except for financing the navy, aiding the Dutch, and defending England and Ireland.[58] Two years later Charles I attempted to wage war without popular support, but Parliament promptly denied him funds to conduct it.[59]

By the 1670's parliamentary control over the purse was firmly established. Charles II insisted that the stationing of troops in Flanders was a prerogative of the Crown. Parliament, however, saw it differently: it enacted the Supply Act of 1678,[60] requiring that funds granted be used to disband the Flanders forces.[61]

Meeting in Philadelphia in 1787, the Framers were well aware of the tradition of parliamentary power over the purse and its use to check unwanted "national security" activities. "The purse and

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the sword must not be in the same hands," George Mason said.[62] Madison considered it "particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands."[63] He regarded the power over the purse as "the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people...."[64] Accordingly, the Framers chose, in the words of Jefferson, to transfer the war power "from the executive to the legislative body, from those who are to spend to those who are to pay."[65]

Early practice comported with a broad reading of the appropriations clause in matters touching on national security. Presidents Jefferson and Jackson, for example, when requesting congressional instructions as to the proper course to pursue in the fact of threatened aggression by Spain and marauding by South American pirates, respectively, recognized that control of the "means" necessary to carry out any military effort lies exclusively with Congress. The Nixon Administration recognized the supremacy of Congress's power over the purse even as it asserted broad power under the commander-in-chief clause to prosecute the war in Vietnam. Indeed, it conceded that Congress could use the power over the purse to control troop <u>deployment</u> decisions.[66]

The Supreme Court, accordingly, has never held unconstitutional any use of the appropriations power to limit the exercise of power by the executive branch.[67] The only limitation on an appropriation act that the Court has invalidated[68] exceeded a constitutional limitation on the power of Congress -- the prohibi-

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tion against bills of attainder.[69] "Congress alone controls the raising of revenues and their appropriations," Justice Robert Jackson wrote in the Steel Seizure Case.[70] Only it "may determine in what manner and by what means they shall be spent for military and naval procurement."[71]

Congress thus relied upon its sole power over the purse to end the Vietnam War. Beginning in 1973, seven statutory funding limitations -- worded much like the Boland Amendment -- prohibited the use of any appropriated funds for military or paramilitary operations in, over, or off the shores of North Vietnam, South Vietnam, Cambodia and Laos.[72] Though strongly objecting on policy grounds, the Nixon Administration never challenged the constitutional power of Congress to cut off funds for the war. Similarly, in 1975, when President Ford sent in the Marines to rescue the container ship Mayaguez from the Cambodian military, his administration never argued that those funding limitations were unconstitutional -- only that they were inapplicable. If Congress can use its power over the purse in time of war to control the use of the armed forces, a fortiori Congress can employ that power in time of peace to control the use of pre-publication review agreements.

Nowhere does the AFSA court explain how the President can expend funds for enforcing specified pre-publication review agreements when no money has been appropriated for that purpose.

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PRE-PUBLICATION REVIEW AGREEMENTS

Mr. Chairman, the public policy issues raised by the use of pre-publication review agreements are largely beyond the scope of my testimony today, in which I was asked to analyze the case of AFSA v. Garfinkel. Nonetheless, I would be remiss if I failed, as a citizen, to comment upon this matter.

Over the last decade, something terribly significant has happened in this country, mostly unnoticed "beyond the Beltway" and often unheeded within it. The pall of government censorship has descended upon vast numbers of persons who are among the most expert on key matters of public concern. A regime of licensing has been imposed upon a vitally important class of informed public discussants. These individuals must seek the permission of a government censor before publishing written work within their areas of expertise. If a work is not submitted for government censorship, the author may be penalized -- even though it contains no classified information.

This system of censorship has been put in place following one of the most unfortunate Supreme Court decisions in decades -- Snepp v. United States.[73] The Court there upheld the validity of a pre-publication review agreement which was applied to information that the government conceded was not classified and, indeed, was available entirely on the public record. Snepp had breached no duty to protect classified information. Yet the Court disposed of the First Amendment issue in a footnote, without even hearing oral argument. It did not consider "whether national security is harmed

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by such disclosures, or, if so, whether the adverse effects are resolved effectively by the Agency's scheme of secrecy agreements."[74] Most important, the Court declined to consider the countervailing interests undercut by secrecy agreements.

Those interests are weighty. Indeed, they lie at the core of our structure of government. Since the time of Blackstone, Anglo-American law has taken a dim view of prior restraints on speech and the press. In Near v. Minnesota,[75] the Supreme Court found prior restraints to be presumptively unconstitutional. The reason is known to every student of American constitutionalism: our First Amendment, as Justice Brennan wisely put it,

> has a structural role to play in securing and fostering our republican system of self-government . . . . Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open' . . . but the antecedent assumption that public debate must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive . . . .[76]

The censorship agreements at which section 630 was directed undercut "uninhibited, robust, and wide-open" public debate. They undercut the "process of communication necessary for a democracy to survive." Who can begin to assess the chilling effect these agreements have had upon free expression? How many articles about the "disinformation" campaign against Libya -- about the illegal mining of the harbors of Nicaragua -- about the sale of Hawk missiles to Iran and the diversion of funds to the contras -- about the most massive Pentagon procurement scandal in the nation's history -- how many articles have never been written -- how many

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speeches have never been given -- because a would-be author or speaker was unwilling to submit to the heavy hand of the government's censor? Can we ever begin to measure the damage inflicted upon the marketplace of ideas in this country by excluding from it information and ideas vitally important to to petitioning Congress for a redress of grievances or to casting an informed vote?

Mr. Chairman, I do not suggest that government has no interest in keeping secrets. Nor do I suggest that secrecy agreements are always necessarily to be avoided. Narrow and precisely drafted agreements might, for example, be justified in rare circumstances involving individuals, employed by intelligence agencies, who have direct access to extraordinarily sensitive information that is legitimately classified because it relates to bona fide intelligence sources or methods.

The point is, however, that Congress ought not be deluded into accepting a false choice, one that suggests that our nation must choose between massive censorship or national annihilation. It does not. The art of statesmanship, in Congress or on the bench, lies in devising a solution that strikes a balance between the competing interests of free expression and national security, not a solution of the sort imposed in AFSA that affirms one interest while discarding altogether another set of vital interests.

Mr. Chairman, in my judgment section 630 represented a soundly reasoned and constitutionally valid act of statesmanship. I expect

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that the AFSA decision will in due course be reversed.

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NOTES

1. Pub.L. No. 100-202 (Dec. 21, 1987).

2. Mem. op. at 25-30.

3. 6 U.S. (2 Cranch) 170, 179 (1804).

4. Id. at 179.

5. Id. at 173, 177. See H. BLUMENTHAL, FRANCE AND THE UNITED STATES: THEIR DIPLOMATIC RELATIONSHIP 1789-1914, 13-17 (1970); D. MCKAY, THE UNITED STATES AND FRANCE, 81-83 (1951).

6. Non-Intercourse Act, ch. 2, §1, 3 Stat.613 (1799) (expired 1800).

7. Id. at §5.

8. Id.

9. Id. at § 1.

10. Id. at 171.

11. Id.

12. Id. at 176. Little had some reason to suspect the Flying Fish's true nationality: "[D]uring the chase by the American frigates, the [Flying Fish's] master threw overboard the logbook, and certain other papers." Id. at 173 [emphasis in original].

13. Id. at 172, 175-76.

14. Id.

15. Id. at 178-79.

16. Id.

17. Id. at 179.

18. Id. at 177.

19. Id.

20. Id.

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21. Id.

22. 6 ANNALS OF CONG. 613 (1800).

23. Jay Treaty, Nov. 19, 1794, United States-United Kingdom, 8 Stat. 116, T.S. No. 105.

24. Id.

25. Lord Frederick North, Prime Minister to George III at the time of the War of Independence, was seen by many Englishmen and Americans alike as subverting the British constitution with the aim of achieving royal absolutism. S. MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 198-99 (1965).

26. The Steel Seizure Case, 343 U.S. at 583.

27. Id. at 587-89.

28. Id. at 585.

29. 343 U.S. at 635 (Jackson, J., concurring).

30. The Steel Seizure Case, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

31. 453 U.S. 654 (1981).

32. Id. at 688.

33. Id. at 661.

34. Id. at 662. Compare Alexander Hamilton, no admirer of legislatures:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of . . . a President of the United States.

THE FEDERALIST No. 75, at 505-06 (A. Hamilton)(J. Cooke ed. 1961).

An important recent reaffirmation of this approach is found in Webster v. Doe, 56 U.S.L.W. 3880 (U.S., June 27, 1988), discussed further below. Despite the protestations of the two dissenters, the Court -- speaking again through Chief Justice Rehnquist -- grounded on congressional will rather than constitutional principle its conclusion that a former CIA employee was not precluded from seeking judicial review of the decision by which he was dismissed. Justice Scalia, dissenting, worried that the majority's opinion

> will have ramifications far beyond creation of the world's only secret intelligence agency that must

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litigate the dismissal of its agents. If constitutional claims can be raised in this highly sensitive context, it is hard to imagine where they cannot. The assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid.

35. 343 U.S. at 635 (Jackson, J., concurring).

36. The Steel Seizure Case, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

37. 108 S.Ct. 818 (1988).

38. Id. at 825 [quoting Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984)].

39. Id. [emphasis added].

40. New York Times v. United States, 403 U.S. 713 (1971).

41. 551 F.2d 384 (1976).

42. Id. at 394. These issues related to the petition of the Justice Department to enjoin a telephone company from complying with a congressional subpoena issued in the course of an investigation into warrantless "national security" wiretaps.

43. Id. at 393.

44. 299 U.S. 304 (1936).

45. MR. NORTH. [I]n the 1930s in the U.S. vs. Curtiss-Wright Export Corporation . . . the Supreme Court again held that it was within the purview of the President of the United States to conduct secret activities and to conduct secret negotiations to further the foreign policy goals of the United States.

MR. MITCHELL. If I may just say, Colonel, the Curtiss-Wright case said no such thing. It involved public matters that were the subject of a law and a prosecution. . . .

I just think the record should reflect that Curtiss-Wright was on a completely different factual situation and there is no such statement in the Curtiss-Wright case.

MR. SULLIVAN. I disagree with you. I think it is a little unfair . . . to have a debate with Colonel North. . . .

Testimony of Oliver North, IRAN-CONTRA INVESTIGATION: JOINT HEARINGS BEFORE THE HOUSE SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND THE SENATE SELECT COMMITTEE ON

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SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, 100th Cong., 1st Sess. [part II] 38 (1987).

46. Id.

47. Id. at 319-20.

48. He refers to these powers as "exclusive" and, in the next sentence, contends that legislation "within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Id. at 320.

49. The Steel Seizure Case, 393 U.S. 579, 587-88 (1952).

50. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

51. The piece cited is Developments in the Law -- The National Security Interest and Civil Liberties, 85 HARV. L. REV. 1130 (1972).

52. Id. at 1198 [emphasis added].

53. The court apparently accepts without criticism the Administration's argument "that Congress [can] be excluded from restricting the means by which the Executive protects national security." It is difficult to take seriously the suggestion that any means elected by the Executive to protect the national security is constitutionally permissible and immune from congressional restriction as well as judicial review -- yet that clearly seems to be the implication of the court.

54. U.S. CONST, art. II, § 1, cl. 6; art. III, § 1.

55. Id., art. I, § 8, cl. 12.

56. Id., art. I, § 8, cl. 13.

57. See generally R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 125-27 (1974).

58. J. KENYON, THE STUART CONSTITUTION 58 (1966).

59. F. DIETZ, ENGLISH PUBLIC FINANCE 1558-1641 (2d ed. 1964).

60. 30 Car. II. c. 1 (1678).

61. See generally W. Abbot, The Long Parliament of Charles II, 21 ENG. HIST. REV. 254 (1906).

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62. M. FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144 (1937).

63. THE FEDERALIST NO. 26 (Madison).

64. Farrand, note 62 supra at 81.

65. 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd, ed. 1958).

66. THE CHAIRMAN [Fulbright]: Do you question the constitutionality of the right of Congress to bring back the troops from Europe? Do you think it is going beyond our constitutional power?

Secretary [of State William] ROGERS: Well, no. As I understand Senator Mansfield's resolution, it refers to appropriation of funds, and that is, of course, within the constitutional powers of the Congress.

THE CHAIRMAN: It is clearly within our powers.

WAR POWERS LEGISLATION: HEARINGS BEFORE THE COMM. ON FOREIGN RELATIONS, U. S. SENATE, 92d Cong., 1st Sess. 504 (1971).

67. CONGRESSIONAL RESEARCH SERVICE, U.S. LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 1597-1619 (1973) (setting forth a summary of all acts of Congress held unconstitutional in whole or in part).

68. United States v. Lovett, 328 U.S. 303 (1946).

69. U.S. CONST. art I, § 9, cl. 3.

70. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 643 (Jackson, J., concurring).

71. Id. at 644.

72. Section 30 of the Foreign Assistance Act of 1973 was typical except in referring to "military or paramilitary operations" rather than to "combat activities" or "involvement. . . in hostilities." Section 30 provides: "No funds authorized or appropriated under this or any other law may be expended to finance military or paramilitary operation by the United States in or over Vietnam, Laos, or Cambodia." 87 Stat. 732. The other provisions were: Department of Defense Appropriation Act, 1975 Pub. L. No. 93-437, Section 839, 1974 U.S. CODE CONG. & ADM. NEWS 1400 (1974); Department of Defense Appropriations Act, 1974 Section 741, 87 Stat. 1045; Department of Defense Appropriation Authorization Act, 1974, Section 806, 87 Stat. 615 (1973); Department of State Appropriations Authorization Act of 1973 Section 123, 87 Stat. 454; Joint Resolution of July 1, 1973, Pub. L. No. 93-52, Section 108, 87 Stat. 134; Second Supplemental Appropriations Act, 1973 Section 307, 87 Stat. 129.

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73. 444 U.S. 507 (1980).

74. Franck & Eisen, Balancing National Security and Free Speech, 14 N.Y.U. J. INT'L. L. & POL. 339, 343 (1982).

75. 283 U.S. 967 (1931)

76. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 587-88 (1980)(Brennan, J., concurring)(emphasis in original).

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United States General Accounting Office

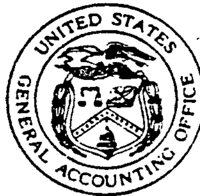
GAO Testimony

FOR RELEASE ON
DELIVERY EXPECTED
AT 10:00 A.M. EDT
WEDNESDAY
AUGUST 10, 1988

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENTS

STATEMENT OF
LOUIS J. RODRIGUES
ASSOCIATE DIRECTOR
NATIONAL SECURITY AND INTERNATIONAL
AFFAIRS DIVISION

BEFORE THE
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY
COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES HOUSE OF REPRESENTATIVES



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Mr. Chairman and Members of the Committee:

We are pleased to be here today to discuss the use of nondisclosure agreements by executive branch agencies.

The data we are summarizing today were compiled from responses to questionnaires sent to executive branch agencies and preliminary data provided by the Department of Defense (DOD) for calendar years 1986 and 1987. We have not received DOD's formal response to the current questionnaire; therefore, some changes to the overall data are likely.

BACKGROUND

You and the Chairmen of the House Committee on Post Office and Civil Service and Senate Committee on Governmental Affairs, Subcommittee on Federal Services, Post Office, and Civil Service, requested the General Accounting Office to update information obtained through previous questionnaires on the federal government's personnel and information security programs. Specifically, you asked that we compile data from a questionnaire you sent to about 50 executive branch agencies and identify trends using prior data. This questionnaire is the fourth one sent to federal agencies since 1983. We reported the results of the responses to the earlier questionnaires in 1983, 1984, and 1986. We are in the process of obtaining the final responses to the recent questionnaire and drafting a report.

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REQUIREMENTS FOR NONDISCLOSURE AGREEMENTS

National Security Decision Directive 84, dated March 11, 1983, requires government and contractor employees to sign a nondisclosure agreement as a condition of access to classified information. In addition, the Director of Central Intelligence requires individuals with access to sensitive compartmented information (SCI)--information related to intelligence matters--to sign a separate nondisclosure agreement. Those individuals must sign such agreements as Form 4193, its successor Form 4355, or DD Form 1847-1 (see atts. I through III). Other government agencies also require specialized agreements before granting access to the government's many non-SCI special access programs.

National Security Decision Directive 84 required the Director, Information Security Oversight Office, General Services Administration, to develop a standardized agreement form for all persons to sign as a condition of access to classified information. He issued Standard Form 189 in September 1983 for use by government employees and Standard Form 189-A in November 1986 for use by contractor employees (see atts. IV and V). Because of the large number of individuals involved, only newly cleared individuals must sign the agreements before receiving access to classified information. DOD uses the annual security refresher briefings as

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an appropriate time for individuals with existing clearances to sign the agreements.

The Directive also provides that agreements for persons authorized access to SCI must include a provision requiring a prepublication review. These reviews are required of all materials prepared for public disclosure that contain SCI or related classified information or a description of activities that produce or relate to SCI. However, as reported to you in September 1986,[1] agency employees with SCI access have been required to sign nondisclosure agreements with lifetime prepublication review requirements since the issuance of Form 4193 in 1981. Although the President suspended the prepublication review provision of the Directive on February 15, 1984, the suspension has had little effect on prepublication review requirements. This is because employees are still required to sign a Form 4193 or DD Form 1847-1 before being granted access to SCI.

NUMBER OF NONDISCLOSURE AGREEMENTS INCREASED

Executive agencies reported that about 2.5 million current and former government employees had signed Standard Form 189 as of December 31, 1987. The total number of contractor employees who had signed Standard Form 189-A was unknown. DOD, which accounted

[1] Information and Personnel Security: Data on Employees Affected by Federal Security Programs (GAO/NSIAD-86-189FS), Sept. 29, 1986.

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for about 85 percent of all contractor employees with clearances, said that the number signed was not available. DOD said that its contractors' 1.1 million employees with security clearances had until December 31, 1988, to sign the agreements. Other agencies reported that about 102,000 contractor employees (about half of their contractor employees with clearances) had signed Form 189-A.

The number of current and former agency employees who have signed SCI nondisclosure agreements with a provision for prepublication review has increased substantially since calendar year 1982. During this Committee's hearing on National Security Decision Directive 84 in October 1983, we reported that, excluding employees of the Central Intelligence Agency (CIA) and the National Security Agency (NSA), about 113,000 government employees with SCI access would have been required to sign nondisclosure agreements containing a prepublication review provision. We estimate that, as of December 31, 1987, about 453,000 current and former employees, excluding those employees of the CIA and NSA, have signed such SCI agreements.

In addition, other agreements also require prepublication reviews. For example, the Federal Bureau of Investigation's employment agreement contains a prepublication review provision (see att. VI). Data available showed that about 49,000 non-SCI agreements included prepublication review provisions in December 1985, increasing to about 53,000 in December 1987.

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In summary, over 500,000 signed nondisclosure agreements require prepublication reviews.

You asked agencies to report the number of nondisclosure agreements signed after section 630 of Public Law 100-202 became effective on December 22, 1987. The law put a moratorium on the use of Forms 189, 4193, and any other nondisclosure agreements that contained objectionable items, such as use of the word classifiable. Critics of the agreements have expressed concern, for example, that use of such a term could subject employees to penalties for disclosing unclassified information that the government later classifies.

On December 29, 1987, the Information Security Oversight Office advised agencies of the law. The Office instructed the agencies to cease implementation of Standard Forms 189 and 189-A, pending resolution of the congressional concerns.

However, federal employees with access to SCI were still required by the Director of Central Intelligence to sign an amended Form 4193. The amendment consisted of a paragraph which states that the agreement will be enforced in a manner consistent with section 630 of Public Law 100-202. On March 22, 1988, Standard Form 4193 was replaced by Standard Form 4355, which omits the term "classifiable information" but continues the requirement of prepublication review.

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Eighteen agencies reported about 43,000 Standard Forms 189 and 6,000 SCI nondisclosure agreements were signed from December 22, 1987, to March 31, 1988. This does not include the Army, which reported that the number of agreements signed during the period was unknown. DOD did not tell its contractors to stop using Standard Form 189-A until March 22, 1988. As noted previously, DOD does not know how many contractor employees had signed Form 189-A.

UNAUTHORIZED DISCLOSURES

National Security Decision Directive 84 also requires agencies to adopt procedures to report and investigate unauthorized disclosures of classified information, and to maintain records of such disclosures and investigations. The Directive requires agencies to report unauthorized disclosures to the Department of Justice.

Agencies reported a total of 328 unauthorized disclosures for the 5 years ending December 1982. For the years 1983 through 1987, they reported unauthorized disclosures of 43, 151, 165, 60, and 81, respectively.

The percentage of unauthorized disclosures referred to the Department of Justice increased since the Directive was issued. In 1984, agencies referred about 30 percent of the unauthorized

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disclosures to the Department. This percentage increased to about 32 percent in 1985, 53 percent in 1986, and 60 percent in 1987.

You asked for information on unauthorized disclosures through writings or speeches by current or former employees. These comprised 21 of 328 reported unauthorized disclosures for 1978-82. For subsequent years, agencies reported the following:

-- One of 43 disclosures in 1983 was through a speech or publication by a then-current employee of a contractor.

-- Eight of the 151 disclosures in 1984 were made through published writings or speeches. Six of the 8 were by then-current employees, and 2 were by former employees.

-- Seven of the 165 unauthorized disclosures in 1985 were made through speeches or published writings. Five of the 7 were by then-current employees and 2 were by former employees.

-- Six of 60 disclosures in 1986 were by published writings or speeches of then-current employees.

-- Three of the 81 in 1987 were by published writings or speeches of then-current employees.

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We do not know how many of these disclosures were by individuals who had signed nondisclosure agreements with prepublication review provisions. Agencies reported no disclosures by former employees' published writings or speeches in 1986 or 1987.

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Mr. Chairman, this concludes my prepared statement. We would be pleased to answer any questions.

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An Agreement Between ______________________________ and the United States
(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12065 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. I have been advised that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge such information to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I further understand that I am obligated by law and regulation not to disclose any classified information in an unauthorized fashion.

4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information, all information or materials, including works of fiction, which contain or purport to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such information and materials for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the information or materials with, or showing them to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose such information or materials to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the information or materials submitted pursuant to paragraph 4 set forth any SCI. I further understand that the Department or Agency to which I have submitted materials will act upon them, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and retention in a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials, which may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12065, as amended, so that I may read them at this time, if I so choose.

12. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

FORM 4193 OBSOLETE PREVIOUS EDITION [Replaces Forms 4066, 3968, 4193a and 4193b which are obsolete and will not be used]
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13. I make this Agreement without any mental reservation or purpose of evasion.

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SIGNATURE DATE

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

WITNESS and ACCEPTANCE:

SIGNATURE DATE

SECURITY BRIEFING ACKNOWLEDGMENT

I hereby acknowledge that I was briefed on the following SCI Special Access Program(s):

(Special Access Programs by Initials Only)

Signature of Individual Briefed

Date Briefed

Printed or Typed Name

Social Security Number (See Notice Below)

Organization (Name and Address)

I certify that the above SCI access(es) were approved in accordance with relevant SCI procedures and that the briefing presented by me on the above date was also in accordance therewith.

Signature of Briefing Officer

Printed or Typed Name

Organization (Name and Address)

Social Security Number (See Notice Below)

* * * * *

SECURITY DEBRIEFING ACKNOWLEDGMENT

Having been reminded of my continuing obligation to comply with the terms of this Agreement, I hereby acknowledge that I was debriefed on the following SCI Special Access Program(s):

(Special Access Programs by Initials Only)

Signature of Individual Debriefed

Date Debriefed

Printed or Typed Name

Social Security Number (See Notice Below)

Organization (Name and Address)

I certify that the debriefing presented by me on the above date was in accordance with relevant SCI procedures.

Signature of Debriefing Officer

Printed or Typed Name

Organization (Name and Address)

Social Security Number (See Notice Below)

NOTICE: The Privacy Act, 5 U.S.C. 522a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above, 2) determine that your access to the information [illegible] terminated, or 3) certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure do so [illegible] such certifications or determinations.

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SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between ______________________________ and the United States
(Name - Printed or Typed)

1. Intending to be legally bound. I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information or material protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or is in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information or material have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I understand that it is my responsibility to consult with appropriate management authorities in the Department or Agency that last authorized my access to SCI, whether or not I am still employed by or associated with that Department or Agency or a contractor thereof, in order to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be SCI, or related to or derived from SCI, is considered by such Department or Agency to be SCI. I further understand that I am also obligated by law and regulation not to disclose any classified information or material in an unauthorized fashion.

4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose the contents of such preparation to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the preparation submitted pursuant to paragraph 4 sets forth any SCI. I further understand that the Department or Agency to which I have made a submission will act upon it, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and removal from a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will remain the property of the United States Government unless and until otherwise determined by an appropriate official or final ruling of a court of law. Subject to such determination, I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials that may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12356, as amended, so that I may read them at this time, if I so choose.

FORM 3/88 4355 (Replaces Form 4193 which is obsolete and will not be used)

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12. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

13. This Agreement shall be interpreted under and in conformance with the law of the United States.

14. I make this Agreement without any mental reservation or purpose of evasion.

SIGNATURE DATE

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

WITNESS and ACCEPTANCE: SIGNATURE DATE

SECURITY BRIEFING ACKNOWLEDGMENT

I hereby acknowledge that I was briefed on the following SCI Special Access Program(s):

(Special Access Programs by Initials Only)

Signature of Individual Briefed | Date Briefed

Printed or Typed Name

Social Security Number (See Notice Below) | Organization (Name and Address)

I certify that the above SCI access(es) were approved in accordance with relevant SCI procedures and that the briefing presented by me on the above date was also in accordance therewith.

Signature of Briefing Officer | Social Security Number (See Notice Below)

Printed or Typed Name | Organization (Name and Address)

SECURITY DEBRIEFING ACKNOWLEDGMENT

Having been reminded of my continuing obligation to comply with the terms of this Agreement, I hereby acknowledge that I was debriefed on the following SCI Special Access Program(s):

(Special Access Programs by Initials Only)

Signature of Individual Debriefed | Date Debriefed

Printed or Typed Name

Social Security Number (See Notice Below) | Organization (Name and Address)

I certify that the debriefing presented by me on the above date was in accordance with relevant SCI procedures.

Signature of Debriefing Officer | Social Security Number (See Notice Below)

Printed or Typed Name | Organization (Name and Address)

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SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between ______________________________ and the United States
(Name–Printed or Typed) (Last, First, Middle Initial)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information. I have been advised that Sensitive Compartmented Information involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12356 or other Executive order or statute. I understand and accept that by being granted access to Sensitive Compartmented Information special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of Sensitive Compartmented Information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and I understand these procedures. I understand that I may be required to sign an appropriate acknowledgment upon being granted access to each category of Sensitive Compartmented Information. I further understand that all my obligations under this Agreement continue to exist with respect to such categories whether or not I am required to sign such an acknowledgment.

3. I have been advised that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of Sensitive Compartmented Information by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge such information to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to Sensitive Compartmented Information. I further understand that I am obligated by law and regulation not to disclose any classified information in an unauthorized fashion.

4. In consideration of being granted access to Sensitive Compartmented Information and of being assigned or retained in a position of special confidence and trust requiring access to Sensitive Compartmented Information, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information, all information or materials, including works of fiction, which contain or purport to contain any Sensitive Compartmented Information or description of activities that produce or relate to Sensitive Compartmented Information or that I have reason to believe are derived from Sensitive Compartmented Information, that I contemplate disclosing to any person not authorized to have access to Sensitive Compartmented Information or that I have prepared for public disclosure. I understand and agree that my obligation to submit such information and materials for review applies during the course of my access to Sensitive Compartmented Information and thereafter, and I agree to make any required submissions prior to discussing the information or materials with, or showing them to anyone who is not authorized to have access to Sensitive Compartmented Information. I further agree that I will not disclose such information or materials to any person not authorized to have access to Sensitive Compartmented Information until I have received written authorization from the Department or Agency that last authorized my access to Sensitive Compartmented Information that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the information or materials submitted pursuant to paragraph 4 set forth any Sensitive Compartmented Information. I further understand that the Department or Agency to which I have submitted materials will act upon them, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to Sensitive Compartmented Information and retention in a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to Sensitive Compartmented Information. In addition, I have been advised that any unauthorized disclosure of Sensitive Compartmented Information by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I do not now, now will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials, which may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to Sensitive Compartmented Information, I understand that all the conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to Sensitive Compartmented Information, and at all times thereafter.

DD FORM 1847-1
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10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns Sensitive Compartmented Information and does not set forth such other conditions and obligations not related to Sensitive Compartmented Information as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12356, as amended, so that I may read them at this time, if I so choose.

12. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

13. I make this Agreement without any mental reservation or purpose of evasion.

Signature ______________________ Organization ______________________

Printed/Typed Name (Last, First, Middle Initial) ______________________ SSN (See Notice Below) ______________________

Rank/Grade ______________ Date (YY, MM, DD) ______________ Billet Number (Optional) ______________________

FOR USE BY MILITARY AND GOVERNMENT CIVILIAN PERSONNEL

Witness and Acceptance:

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

Signature ______________________ Organization ______________________

Printed/Typed Name (Last, First, Middle Initial) ______________________ Date (YY, MM, DD) ______________________

FOR USE BY CONTRACTORS/CONSULTANTS/NON-GOVERNMENT PERSONNEL

Witness:

The execution of this Agreement was witnessed by the undersigned.

Signature ______________________ Organization ______________________

Printed/Typed Name (Last, First, Middle Initial) ______________________ Date (YY, MM, DD) ______________________

Acceptance:

This Agreement was accepted by the undersigned on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

Signature ______________________ Organization ______________________

Printed/Typed Name (Last, First, Middle Initial) ______________________ Date (YY, MM, DD) ______________________

Notice: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to certify that you have access to the information indicated above. While your disclosure of SSN is not mandatory, your failure to do so may delay the processing of such certification.

GPO 895-465

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CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between ______________________________ and the United States.
(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, 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. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge such information unless I have officially verified that the recipient has been properly authorized by the United States Government to receive it or I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) last granting me a security clearance that such disclosure is permitted. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised and am aware that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; and the termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised and am aware that any unauthorized disclosure of classified information by me may constitute a violation or violations of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, and 952, Title 18, United States Code, the provisions of Section 783(b), Title 50, United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. 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, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance. If I do not return such materials upon request, I understand that this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

10. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available to me Sections 641, 793, 794, 798, and 952 of Title 18, United States Code, Section 783(b) of Title 50, United States Code, the Intelligence Identities Protection Act of 1982, and Executive Order 12356, so that I may read them at this time, if I so choose.

11. I make this Agreement without mental reservation or purpose of evasion.

SIGNATURE	DATE	SOCIAL SECURITY NO. *(See notice below)*

ORGANIZATION

The execution of this Agreement was witnessed by the undersigned, who, on behalf of the United States Government, agreed to its terms and accepted it as a prior condition of authorizing access to classified information.

WITNESS AND ACCEPTANCE:

SIGNATURE	DATE

ORGANIZATION

NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above or 2) determine that your access to the information indicated has terminated. Although disclosure of your SSN is not mandatory, your failure to do so may impede the processing of such certifications or determinations.

STANDARD FORM 189 (8-83)
Prescribed by GSA/ISOO
[illegible]

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CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT (INDUSTRIAL/COMMERCIAL/NON-GOVERNMENT)

AN AGREEMENT BETWEEN ________________________________ AND THE UNITED STAT
(Name of Individual - Type or print)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of r being granted access to classified information. As used in this Agreement, classified information is information tha classified under the standards of Executive Order 12356, or under any other Executive order or statute that prohib the unauthorized disclosure of information in the interest of national security. I understand and accept that by bei granted access to classified information, special confidence and trust shall be placed in me by the United States Gover ment.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of clas fied information, including the procedures to be followed in ascertaining whether other persons to whom I contempla disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or neg gent handling of classified information by me could cause irreparable injury to the United States or could be used advantage by a foreign nation. I hereby agree that I will never divulge such information unless I have officially verifi that the recipient has been properly authorized by the United States Government to receive it or I have been given pri written notice of authorization from the United States Government Department or Agency (hereinafter Department Agency) responsible for the classification of the information that such disclosure is permitted. I further understand th I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised and am aware that any breach of this Agreement may result in the termination of any securi clearances I hold and removal from any position of special confidence and trust requiring such clearances. In addition have been advised and am aware that any unauthorized disclosure of classified information by me may constitute a vio tion, or violations, of United States criminal laws, including the provisions of Sections 641, 793, 794, and 798, Title 1 United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulte will result or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreemen

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement i cluding, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agre ment.

7. I understand that all classified information to which I may obtain access by signing this Agreement is now and w forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, intere title, or claim whatsoever to such information. I agree that I shall return all materials which have, or may have, com into my possession or for which I am responsible because of such access, upon demand by an authorized representati of the United States Government or upon the conclusion of my employment or other relationship that requires access classified information. If I do not return such materials upon request, I understand that this may be a violation of Se tion 793, Title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I unde stand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted acce to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be une forceable, all other provisions of this Agreement shall remain in full force and effect.

(Continue on reverse)

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[illegible] and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available to me Sections [illegible], of Title [illegible], United States Code, the Intelligence Identities Protection Act of 1982, and Executive Order 12356, so that I may read them at this time, if I choose.

11. I make this Agreement without mental reservation or purpose of evasion.

SIGNATURE	DATE	SOCIAL SECURITY NUMBER *(See Notice below)*

CONTRACTOR, LICENSEE, GRANTEE OR AGENT NAME, ADDRESS AND, IF APPLICABLE, FEDERAL SUPPLY CODE NUMBER *(Type or print)*

WITNESS		ACCEPTANCE	
THE EXECUTION OF THIS AGREEMENT WAS WITNESSED BY THE UNDERSIGNED.		THE UNDERSIGNED ACCEPTED THIS AGREEMENT ON BEHALF OF THE UNITED STATES GOVERNMENT.	
SIGNATURE	DATE	SIGNATURE	DATE
NAME AND ADDRESS *(Type or print)*		NAME AND ADDRESS *(Type or print)*	

SECURITY DEBRIEFING ACKNOWLEDGMENT

(The use of this acknowledgment for security debriefings is optional.)

I reaffirm that the provisions of the espionage laws and other Federal criminal laws applicable to the safeguarding of classified information have been made available to me; that I have returned all classified information in my custody; that I will not communicate or transmit classified information to any unauthorized person or agency; that I will promptly report to the Federal Bureau of Investigation any attempt by an unauthorized person to solicit classified information, and that I (have) (have not) (strike out inappropriate word or words) received a final oral security briefing.

SIGNATURE OF EMPLOYEE	DATE
NAME OF WITNESS *(Type or print)*	SIGNATURE OF WITNESS

NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above or 2) determine that your access to the information indicated has terminated. Although disclosure of your SSN is not mandatory, your failure to do so may result in the denial of your being granted access to classified information.

STANDARD FORM [illegible]

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EMPLOYMENT AGREEMENT

As consideration for employment in the Federal Bureau of Investigation (FBI), United States Department of Justice, and as a condition for continued employment, I hereby declare that I intend to be governed by and I will comply with the following provisions:

(1) That I am hereby advised and I understand that Federal Law including statutes, regulations issued by the Attorney General and Orders of the President of the United States prohibit loss, misuse or unauthorized disclosure or production of information in the files of the FBI.

(2) I understand that unauthorized disclosure of information in the files of the FBI or information I may acquire as an employee of the FBI could result in impairment of national security, place human life in jeopardy, or result in the denial of due process to a person or persons who are subjects of an FBI investigation, or prevent the FBI from effectively discharging its responsibilities. I understand the need for this secrecy agreement; therefore, as consideration for employment I agree that I will never divulge, publish, or reveal either by word or conduct, or by other means disclose to any unauthorized recipient without official written authorization by the Director of the FBI or his delegate, any information from the investigatory files of the FBI or any information relating to material contained in the files, or disclose any information or produce any material acquired as a part of the performance of my official duties or because of my official status. The burden is on me to determine, prior to disclosure, whether information may be disclosed and in this regard I agree to request approval of the Director of the FBI in each such instance by presenting the full text of my proposed disclosure in writing to the Director of the FBI at least thirty (30) days prior to disclosure. I understand that this agreement is not intended to apply to information which has been placed in the public domain or to prevent me from writing or speaking about the FBI but it is intended to prevent disclosure of information where disclosure would be contrary to law, regulation or public policy. I agree the Director of the FBI is in a better position than I to make that determination;

(3) I agree that all information acquired by me in connection with my official duties with the FBI and all official material to which I have access remains the property of the United States of America, and I will surrender upon demand by the Director of the FBI or his delegate, or upon separation from the FBI, any material relating to such information or property in my possession;

(4) That I understand unauthorized disclosure may be a violation of Federal law and prosecuted as a criminal offense and in addition to this agreement may be enforced by means of an injunction or other civil remedy.

I accept the above provisions as conditions for my employment and continued employment in the FBI. I agree to comply with these provisions both during my employment in the FBI and following termination of such employment.

____
(Signature)

____
(Type or print name)

Witnessed and accepted in behalf of the Director, FBI, on

____________________, 19________, by ______________________________
(Signature)

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