

# NATIONAL SECURITY DECISION DIRECTIVE 84

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## HEARING BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE NINETY-EIGHTH CONGRESS FIRST SESSION

SEPTEMBER 13, 1983

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# NATIONAL SECURITY DECISION DIRECTIVE 84

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TUESDAY, SEPTEMBER 13, 1983

U.S. SENATE,  
COMMITTEE ON GOVERNMENTAL AFFAIRS,  
*Washington, D.C.*

The committee met, at 10:05 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr., presiding.

Present: Senators Mathias, Cohen, Eagleton, Levin, and Bingaman.

## OPENING STATEMENT OF SENATOR MATHIAS

Senator MATHIAS. The committee will come to order.

Today the Committee on Governmental Affairs opens hearings on National Security Decision Directive 84. The chairman of the full committee, Senator Roth, has asked me to preside at this hearing as the Senate for the first time turns its attention to what we believe is a significant new development.

Controversy has surrounded National Security Decision Directive 84 since its issuance about 6 months ago. In one sense, the public debate treads what is already familiar ground. The history of the last few decades has continually challenged our national commitment to the values of free speech and free press which are crystallized in the first amendment to the Constitution. Time and again, the demands of national security in a troubled world have clashed with these traditional standards. In particular, the tension between the legitimate need to protect our Government's secrets and the right of Americans to speak and write what they believe has repeatedly confronted us.

President Reagan's directive of last March, entitled "Safeguarding National Security Information," proceeds from the premise that the balance between these conflicting values has gone askew. In expressing grave concern about unauthorized disclosures of classified information, the President ordered executive branch agencies to take certain steps designed to prevent such disclosures and to investigate them more effectively when they occurred. Three of the requirements contained in NSDD-84 have proven particularly controversial.

First, the President called for standard nondisclosure agreements, to be signed by all persons with access to classified information. He specified that persons with access to the most heavily restricted materials—sensitive compartmented information—must be required to agree to prepublication review of their writings, to permit the deletion of classified information.

Second, the directive called on agencies to adopt appropriate policies about contacts with the media, to make deliberate or negligent leaks of classified information more difficult.

Third, the President authorized the use of polygraph examinations in investigations of leaks and empowered Federal agencies to take adverse actions against employees who refuse to submit to such tests.

None of these elements—a prepublication review requirement, media contacts policy, or investigative use of polygraphs—is without some precedent in the Federal Government. But when they are all taken together, they raise troubling questions about the degree to which they might impair the robust public discussion, particularly on issues of foreign policy and national defense, which so strikingly characterizes our recent history.

Could, for example, widespread prepublication review requirements deprive that public debate of the valuable contributions of former Government officials? Could stricter media contact policies prevent the press from doing its job fully? Could increased use of the polygraph improperly coerce or unfairly harm Government employees?

The summary provisions of the directive have raised not only these questions but many more. So far we have relatively few answers. Today, however, the contours of the new regime of national security information policies are becoming clearer.

On August 25, the texts of the new standardized nondisclosure agreements were released. Six months after the issuance of the President's directive, the administration's implementation plans are ready. Today it is to them that we will turn our scrutiny.

This hearing will focus primarily on the prepublication review requirement. We will also look at the polygraph issue, although perhaps I should note that that question will be taken up in more detail in the near future in hearings by other committees in both Houses of Congress. But the expansion of prepublication review raises questions that go to the heart of the conflict between national security and free speech interests.

When the directive is implemented, thousands of civil servants and political appointees will be required to submit their writings for Government scrutiny. The obligation which they undertake will be a permanent one. It will follow them even after they leave public service and take up positions in business or in educational institutions or in the media or as private individuals. A broad interpretation of the President's directive would consign these thousands of men and women to a virtual vow of silence on some of the crucial issues facing our Nation. That silence could only be broken with the approval of the Federal Government.

Now I am confident that this chilling scenario—so antithetical to our most cherished values—is not what the President intended. But the fact that thoughtful critics could find that interpretation in the text of the directive should focus our attention on the crucial questions of implementation. A regime of prepublication review—that very prior restraint to which the framers of the Constitution were so hostile—must be limited to those situations in which it is demonstrated that there is a need to preserve the Government's most sensitive secrets. And the scope of the prepublication review

requirement must be spelled out with enough clarity so that these public servants need not forever fear that they speak or write on public affairs at their peril.

Today we will hear first from three of the agencies most directly affected. The Department of Justice will be represented by the Deputy Assistant Attorney General Richard K. Willard. The Defense Department will be represented by Deputy Under Secretary Richard G. Stilwell, while Ambassador Willard A. DePree, Director of Management Operations, will speak on behalf of the State Department.

[The prepared statement of Senator Mathias follows:]

PREPARED STATEMENT OF SENATOR CHARLES MCC. MATHIAS, JR.

Today the Senate Committee on Governmental Affairs opens hearings on National Security Decision Directive 84. I am pleased to act as chairman for this hearing, at the request of Chairman Roth, as the Senate for the first time turns its attention to this significant new development.

Controversy has surrounded NSDD-84 since its issuance six months ago. In one sense, the public debate treads familiar ground. The history of the last few decades has continually challenged our national commitment to the values of free speech and free press which are crystallized in the First Amendment to the Constitution. Time and again, the demands of national security in a troubled world have clashed with the traditional standards. In particular, the tension between the legitimate need to protect our government's secrets, and the right of Americans to speak and write what they please, has repeatedly confronted us.

President Reagan's directive of last March, entitled "Safeguarding National Security Information," proceeds from the premise that the balance between these conflicting values has gone awry. Expressing "grave concern" about unauthorized disclosures of classified information, the President ordered Executive Branch agencies to take certain steps designed to prevent such disclosures, and to investigate them more effectively when they occurred. Three of the requirements contained in NSDD-84 have proven particularly controversial.

First, the President called for standard nondisclosure agreements, to be signed by all persons with access to classified information. He specified that persons with access to the most heavily restricted materials—Sensitive Compartmented Information, or SCI—must be required to agree to prepublication review of their writings, to permit the deletion of classified information.

Second, NSDD-84 called on agencies to adopt "appropriate policies" about contacts with the news media, to make deliberate or negligent leaks of classified information more difficult.

Third, the President authorized the use of polygraph examinations in investigations of leaks, and empowered Federal agencies to take adverse actions against employees who refuse to submit to such tests.

None of these elements—a prepublication review requirement, media contacts policy, or investigative use of polygraphs—is without precedent in the Federal government. But taken together, they raise troubling questions about the degree to which they might impair the robust public discussion, particularly on issues of foreign policy and national defense, which so strikingly characterize our recent history.

Could widespread prepublication review requirements deprive that public debate of the valuable contributions of former government officials? Could stricter media contact policies prevent the press from doing its job of fully informing the public? Could increased use of the polygraph improperly coerce, or unfairly harm, government employees?

The summary provisions of NSDD-84 raised these and many more questions, but provided relatively few answers. Today, however, the contours of the new regime of national security information policies have become clearer. On August 25, for example, the texts of the new standardized nondisclosure agreements were released. Six months after the issuance of the President's directive, the Administration's implementation plans are ready. Today it is to them that we turn our scrutiny.

This hearing will focus primarily on the prepublication review requirement of NSDD-84. We will also look at the polygraph issue, although I should note that that question will be taken up in more detail in the near future in hearings of other committees in both Houses of Congress. But the expansion of prepublication review

raises questions that go to the heart of the conflict between national security and free speech interests.

When NSDD-84 is implemented, thousands of civil servants and political appointees will be required to submit their writings for government scrutiny. The obligation which they undertake will be a permanent one. It will follow them even after they leave public service, and take up positions in business, academia, the media, or private consulting. A broad interpretation of the President's directive would consign these thousands of men and women—among them some of our most talented and dedicated citizens—to a virtual vow of silence on some of the crucial issues facing our nation. That silence could only be broken with the approval of the Federal Government.

I am confident that this chilling scenario—so antithetical to our most cherished values—is not what the President intended in this directive. But the fact that thoughtful critics could find that interpretation in the brief text of NSDD-84 should focus our attention on the crucial questions of implementation. A regime of prepublication review—that prior restraint to which the Framers of our Constitution were so unremittingly hostile—must be limited to those situations in which it is demonstrably needed to preserve the government's most sensitive secrets. And the scope of the prepublication review requirement must be spelled out with enough clarity so that these public servants need not forever fear that they speak or write on public affairs at their peril.

We will hear first today from three of the agencies most directly affected by the provisions of NSDD-84. The Department of Justice will be represented by Deputy Assistant Attorney General Richard K. Willard, who served as chairman of the interdepartmental working group upon whose recommendations the President's directive is based. The Defense Department will be represented by Deputy Undersecretary Richard G. Stilwell, while Ambassador Willard A. DePree, Director of Management Operations, will speak on behalf of the State Department.

Following this panel, we will be privileged to receive the testimony of three distinguished former high-ranking officers of the government, Lloyd Cutler, formerly Counsel to President Carter; William E. Colby, formerly Director of Central Intelligence; and Admiral Noel Gayler, formerly Director of the National Security Agency, will share their insights about the wisdom and efficacy of the prepublication review requirements to which their successors in office may be subject.

Finally, we will hear from two experts on the issue of reliability of the polygraph examination: Professor David Lykken, of the University of Minnesota School of Medicine, and Norman Ansley of the National Security Agency.

Senator MATHIAS. Before we call on this panel, let me ask Senator Eagleton if he has any remarks.

#### OPENING STATEMENT OF SENATOR EAGLETON

Senator EAGLETON. Thank you, Mr. Chairman. I do have an opening statement.

The national security directive which we consider today presents the classic dilemma of balancing protection of national security interests with preservation of civil liberties.

No one underestimates the importance of maintaining effective internal security procedures to insure against national vulnerability. The brutal Soviet action of 2 weeks ago serves as a reminder of the need to vigilantly protect our national security. It is for this reason that we need to be concerned about disclosures of classified information by those in the best position to have access; namely, the current and former Government officials and employees. These individuals, above all, bear a solemn responsibility not to reveal information which would only aid our enemies.

The national security directive's prepublication review provision, however, enters into the constitutionally sensitive area of the first amendment exercise of free speech. The directive, I believe, goes beyond its intended purpose of curtailing leaks by Government officials and covers former Government officials first amendment in-

terest in speaking openly on subjects of overriding national concern.

Certainly the right to exercise constitutionally guaranteed freedom of speech does not give a former official the right to breach a confidence by divulging classified information. However, because our society places great weight on the first amendment, advocating a policy which may infringe on its exercise imposes a serious and heavy burden on the administration to prove that it is overwhelmingly necessary and that less onerous means were not possible. By curtailing the free expression of those best able to enhance public debate, this directive strikes at the heart of the ability of the public to be informed.

This is regrettable because one of this country's great virtues is its adherence to the principle that informed public discussion is essential to wise policy. As of now, I am simply not convinced that the burdensome and intrusive prior restraint procedure mandated by this directive will enhance our national security and will be worth the sacrifices.

There is no assurance that each agency's review board will consist of objective personnel and whether screening will be idiosyncratic or political.

There is no assurance that the review board will give rapid consideration to reviewable materials. The procedure is supposed to take not more than 30 days. Of course, with newspaper articles which are invariably time sensitive, even this delay would be unacceptable. Moreover, the limited but telling experience we have with the CIA procedure, in operation for several years, suggests that contested review can take years.

There is no assurance that the very thought of an impending review will not simply intimidate authors as they write, causing the most injurious form of prior restraint: self-censorship.

To spare themselves the delay, cost and questionable objectivity of the review board, many individuals may well tone down or even substantially change their prose.

It is worth noting that through this directive, the administration is attempting to extend the Snapp doctrine, as enunciated by the Supreme Court, to apply across the Government. I question whether it is wise policy to extend a highly controversial principle beyond the limited number of intelligence agencies to all Government agencies.

I have said enough about my grave doubts on the utility, necessity and enforceability of the prepublication review provision of the directive. I would like to turn for a moment to the provision expanding the use of polygraphs.

It is beyond dispute that Federal and most State courts consider polygraph results inadmissible. It is beyond dispute that the polygraph is still not a scientifically proven, reliable instrument. It is also beyond dispute that its accuracy is less than 100 percent—often substantially less. Even within this administration, use of the polygraph has become so controversial as to cause the present Acting Secretary for Health Affairs at the Defense Department, who is himself an M.D., to state in a letter to Secretary Weinberger on December 16, 1982:

\* \* \* a preliminary review of the literature \* \* \* reveals that the polygraph has some limitations of which you should be aware \* \* \*. No machine can detect a lie \* \* \*. Even setting aside the argument that the theory is flawed, there are accuracy problems \* \* \*. In one (test) the polygraph accuracy is 62 percent. In the other, the accuracy is 73 percent. (You get 50 percent accuracy by tossing a coin) \* \* \*. The polygraph misclassifies innocent people as liars.

Despite all of this, the directive seeks to expand the use of polygraphs and to present to Government employees the choice of submitting to a polygraph or possibly losing their jobs. To justify such a practice, this administration should be expected to come forward with sufficiently impressive evidence of the polygraph's accuracy and reliability. Maybe expanded use of the polygraph will plug a few more leaks—although not even this is assured—but the Nation will pay a large price in candor and human dignity.

In conclusion, not one of us here today would want to make it easy for Government employees, entrusted with valuable classified information, to reveal materials containing such critical facts. To the contrary, we must take all reasonable steps to prevent such conduct.

But there are limits; namely, where restrictions go further than necessary and at the same time put at risk fundamental constitutionally protected rights. This directive appears to go well beyond legitimate bounds. I look forward to hearing from the witnesses before us today. Perhaps they can allay the deep concerns I have.

Thank you, Mr. Chairman.

[Senator Eagleton's prepared statement follows:]

#### PREPARED STATEMENT OF SENATOR THOMAS F. EAGLETON

The National Security Directive which we consider today presents the classic dilemma of balancing protection of national security interests with preservation of civil liberties.

No one underestimates the importance of maintaining effective internal security procedures to insure against national vulnerability. The brutal Soviet action of two weeks ago serves as a reminder of the need to vigilantly protect our national security. It is for this reason that we need to be concerned about disclosures of classified information by those in the best position to have access: the current and former government officials and employees. These individuals, above all, bear a solemn responsibility not to reveal information which would only aid our enemies.

The National Security Directive's prepublication review provision, however, enters into the constitutionally sensitive area of the First Amendment exercise of free speech. The Directive, I believe, goes beyond its intended purpose of curtailing leaks by government officials and covers former government officials' First Amendment interest in speaking openly on subjects of overriding national concern.

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There is no assurance that each agency's review board will consist of objective personnel, and whether screening will be idiosyncratic or political.

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the CIA procedure, in operation for several years, suggests that contested review can take years.

There is no assurance that the very thought of an impending review will not simply intimidate authors as they write, causing the most injurious form of prior restraint: self-censorship. To spare themselves the delay, cost and questionable objectivity of the review board, many individuals may well tone-down or even substantially change their prose.

The Directive has an even more long-term negative effect, which should not be overlooked today. The review—some would say censorship—system will have a deleterious impact on the consideration talented people give to entering government service. If this Directive had been in effect in the past, Henry Kissinger and Zbigniew Brzezinski would now have to clear some of their college lectures; Al Haig and Harold Brown would have to clear some memos intended for clients; and Leslie Gelb and William Safire would be required to submit for review some of their weekly articles. Such results would certainly create one more reason for good people to run from government service.

It is worth noting that through this Directive the Administration is attempting to extend the Snepp doctrine, as enunciated by the Supreme Court, to apply across the government. I question whether it is wise policy to extend a highly controversial principle beyond the limited number of intelligence agencies, to all government agencies.

I have said enough about my grave doubts on the utility, necessity and enforceability of the prepublication review provision of the Directive. I would like to turn for a moment to the provision expanding the use of polygraphs.

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"... a preliminary review of the literature ... reveals that the polygraph has some limitations of which you should be aware ... No machine can detect a lie ... Even setting aside the argument that the theory is flawed, there are accuracy problems ... In one [test] the polygraph accuracy is 62 percent. In the other, the accuracy is 73 percent. (You get 50 percent accuracy by tossing a coin) ... The polygraph misclassifies innocent people as liars."

Despite all of this, the Directive seeks to expand the use of polygraphs and to present to government employees the choice of submitting to a polygraph or possibly losing their jobs. To justify such a practice, this Administration should be expected to come forward with sufficiently impressive evidence of the polygraph's accuracy and reliability. Maybe expanded use of the polygraph will plug a few more leaks (although not even this is assured), but the nation will pay a large price in candor and human dignity.

Not one of us here today would want to make it easy for government employees, entrusted with valuable, classified information, to reveal materials containing such critical facts. To the contrary, we must take all reasonable steps to prevent such conduct. But there are limits; namely where restrictions go further than necessary and at the same time put at risk fundamental constitutionally-protected rights. This Directive appears to go well beyond legitimate bounds. I look forward to hearing from the witnesses before us today. Perhaps they can allay the deep concerns I have. Thank you.

Senator MATHIAS. Thank you, Senator Eagleton.

Senator Cohen.

Senator COHEN. No statement.

Senator MATHIAS. Senator Bingaman.

#### OPENING STATEMENT OF SENATOR BINGAMAN

Senator BINGAMAN. Thank you, Mr. Chairman.

Let me just indicate that I also am looking forward to the testimony today, particularly with regard to the provisions in this national security decision Directive which called for prepublication review of writings, both by current employees and by prior employ-

ees and officials of the Government. I think that this raises serious constitutional and procedural questions which need to be addressed.

I would also echo some of the comments that the chairman made and Senator Eagleton made about the problems with the anticipated use of polygraphs. As many of you know, Senator Jackson took the lead, with several others of us in the Senate, in putting some language into the defense authorization bill which is expected to be considered by the Senate any day now. The language will see to it that there could not be indiscriminate use of polygraph examinations until we could have some serious hearings.

The question about the inherent unreliability of polygraph exams has been raised repeatedly. It is clear that the threat of the use of a polygraph exam can stifle legitimate comments by people. I think that there are potential abuses throughout the language of this directive which need to be fully explored by the Congress. I think this will be a useful hearing to do that.

Thank you.

[Senator Bingaman's prepared statement follows:]

#### PREPARED STATEMENT OF SENATOR JEFF BINGAMAN

Mr. Chairman, I am pleased the committee is holding this hearing today. The President's March 11, 1983 National Security decision directive (NSDD or Directive) deals with a very important subject—protecting information appropriately identified through the classification process as being of great sensitivity. We cannot allow these data to be dealt with cavalierly for personal gain or political purposes. I do not quarrel with the goal of the President's directive; it is a meritorious one.

But attainment of a meritorious goal does not justify the indiscriminate use of particular means. Some of the mechanisms required by the directive—which will apply just about government-wide—must be given careful and thorough consideration. This committee is the most appropriate forum in the Senate to do so. Therefore, I urge my colleagues to participate fully today so that the committee can make informed judgments about each element of the program the President has outlined in NSDD 84.

I am extremely concerned with the direct and indirect implications of the requirement in the directive calling for prepublication review of the writings of both current and former government employees. This extraordinary measure, in my opinion, not only would be time consuming, it would be open to possible misuse if used to suppress unpopular or disfavored political ideas and it raises serious 1st Amendment Constitutional questions. This provision applies to books and memoirs, speeches, book reviews, scholarly papers, and even fiction, including novels and short stories. It also covers virtually all employees in an agency from the Secretary down to career civil servants. I am very concerned with the possible misuse of such publication review as a form of censorship and suppression of freedom of speech.

I have already expressed my strong concern about the greater reliance on polygraph examinations envisioned by the directive. I joined with Senator Jackson and others to slow down the process of placing greater reliance on polygraphs in the Department of Defense; restraining legislation is contained in the conference report on the fiscal year 1984 Defense Authorization bill which is now pending senate floor action.

We must be extremely careful because the polygraph is an inherently unreliable instrument. I make that statement based on my own experience as an attorney, including my years as Attorney General of New Mexico. Countless others have also recognized the limitations of the polygraph; for instance, some studies have shown that up to 55 percent of those tested have been misidentified as untruthful: other studies assert a greater accuracy—but most all studies reflect a probability of misidentification which could be significant if the device is applied widely. Thus, a polygraph examination—or the refusal to submit to one—should never be the sole basis for taking action against an individual; yet the directive mandates agency regulations which permit "appropriate adverse consequences" against an otherwise cooperative individual who refuses to submit to a polygraph exam. This approach, along with the potential for abuse of the polygraph in leak investigations, give me great



pause for concern. Greater reliance on the polygraph could have an adverse impact on the careers of hardworking, truthful government employees. I look forward to questioning the witnesses about the reliability and accuracy of the polygraph and the apparent desire to place greater reliance on polygraphs in the investigative process. I trust all witnesses will be prepared to respond fully.

I look forward to the discussion and questioning on all aspects of this important directive; this hearing is essential for the committee to have a full understanding of the problem and the Administration's proposed solution. The committee needs to judge whether the means employed to reach the Administration's goal are reasonable or excessive. Thank you Mr. Chairman.

Senator MATHIAS. Thank you very much.

I will ask the first panel—Mr. Willard, Mr. Stilwell and Mr. DePree—to come to the witness table. While they are coming, let me ask unanimous consent to insert some background material in the record which I think will be useful. ◊

First, the text of directive 84 and the supporting documents accompanying it;<sup>1</sup> second, the text of the Justice Department's release dated August 25, 1983, entitled "Materials Concerning Prepublication Review";<sup>2</sup> and third, the correspondence between Senator Roth, the chairman of the full committee, and the Departments of State, Justice, and Defense, the Central Intelligence Agency, and the National Security Council, concerning prepublication review.<sup>3</sup>

Finally, let me ask the witnesses, in order to expedite what is a long and important hearing, if you would limit your oral statements to 5 minutes each so that we will then have time for some colloquy between the members of the committee and the panel.

Gentlemen, do you have any preference as to your order of speaking? Mr. Willard, you look cocked and primed.

**TESTIMONY OF RICHARD K. WILLARD, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; RICHARD D. STILWELL, GENERAL, USA, RETIRED, DEPUTY UNDER SECRETARY, DEPARTMENT OF DEFENSE (POLICY); AND WILLARD A. DE PREE, DIRECTOR, OFFICE OF MANAGEMENT OPERATIONS, DEPARTMENT OF STATE**

Mr. WILLARD. Thank you, Senator Mathias. As you have suggested, I will briefly summarize my prepared statement at this time.

Senator MATHIAS. Let me make this suggestion, then. Without objection, the full text of all statements will be printed in the record.

Mr. WILLARD. Thank you, Senator.

This directive issued on March 11 by President Reagan, known as National Security Decision Directive 84, was based on the recommendations of an interdepartmental group, of which I was the chairman. It is important to recognize that NSDD-84 deals with protecting classified information. By Executive order, classification can only be used for information which reasonably could be expected to cause damage to the national security if released without proper authorization.

The unauthorized disclosure of classified information in the media is a startlingly frequent occurrence. President Reagan has

<sup>1</sup> See p. 85.

<sup>2</sup> See p. 117.

<sup>3</sup> See p. 91.

recently expressed his personal concern about this problem in a memorandum for all Federal employees where he stated that the unauthorized disclosure of our Nation's classified information by those entrusted with its protection is "improper, unethical, and plain wrong."

In addition to reminding Federal employees of their personal responsibilities, the President has directed in NSDD-84 that a number of additional steps be taken to protect against unlawful disclosures of classified information.

A significant aspect of implementing this directive has been the development of two new nondisclosure agreement forms for Government-wide use. These forms have been reviewed by the Department of Justice, which has determined that they would be enforceable in civil litigation initiated by the United States.

One of the new nondisclosure agreements includes a provision for prepublication review. It will be signed as a condition of access to sensitive compartmented information or SCI.

Prepublication review agreements have been used at CIA for a number of years, and in 1980 the Supreme Court approved their use in the case *Snepp v. United States*. The sole purpose of prepublication review is to permit deletion of classified information before it is made public. The program does not permit the Government to delete information or censor material because it is embarrassing or critical.

In conclusion, unlawful disclosure of classified information is a longstanding problem that has resisted efforts at solution under a number of administrations. Our current program will not solve this problem overnight. It is designed to improve the effectiveness of our enforcement effort and, over time to reduce the frequency and seriousness of unlawful disclosures of classified information.

Thank you very much, Senator Mathias. That concludes my statement.

Senator MATHIAS. Thank you, Mr. Willard.

General Stilwell.

General STILWELL. Mr. Chairman, I would only make one comment on my prepared statement that bears on the focus of this particular hearing. The Department of Defense has had in effect since March of 1982 a nondisclosure agreement for all employees with access to sensitive compartmented information, which includes the requirement for prepublication review. Up to now, we have had no problem with the implementation of that particular agreement.

The new one now, the uniform agreement, applicable to the executive branch of the whole, would simply replace the one that we have had for the past 1½ years.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, General Stilwell.

Mr. DePree.

Mr. DEPREE. Senator, I am pleased to appear before the Committee on Governmental Affairs to testify on behalf of the Department of State on national security decision directive 84. I will submit my statement for the record.

With me here today is Ambassador John Burke, Deputy Assistant Secretary in the Bureau of Administration and head of our center for classification and declassification. Ambassador Burke

will be available to answer questions on prepublication review. We are prepared to answer your questions.

Senator MATHIAS. Let me impose the same time limits on the committee that we imposed on the witnesses and suggest we limit each round of questions to 5 minutes per member, if that is agreeable.

Mr. Willard, as you know, letters were sent out by this committee in advance of the hearing to each of the agencies represented on the panel. We asked each agency the same question: Are there any instances within the past 5 years in which former officials of your department published classified materials without securing the permission of the department?

Now, the State Department replied that it didn't know of any such instances; it was unaware that that had happened in the last 5 years. The Justice Department gave us the same answer, that it didn't know of any instances of this sort within the last 5 years. It was only the Defense Department that had some indication of disclosure made by former employees.

The Defense Department pointed to two instances over the last 5 years in which classified information had been published. In one of those two cases, a former employee was identified as the source. In the other case, it was not clear what the source was. An investigation failed to confirm that the suspected former employee was in fact the source.

So over the past 5 years, which have been unhappily a very busy 5 years for the U.S. Government, we have had a grand total of one, possibly two instances in which a former official published classified material without permission.

Now that is what we know as we enter this hearing about the scope of the problem, about the size of the difficulty. The solution which the directive proposes is a system of prepublication review of writings by every person who has had a clearance. You can tell us, but my guess is that there are thousands of such people.

Now, is such an extensive prepublication review system justified when there is such slender evidence that there is really a problem with the writings of former officials?

Mr. WILLARD. Senator Mathias, the reason I suspect that Justice, State, and Defense do not have better information about classified information disclosed by former employees is that in the past we have not maintained a program of monitoring writings by former employees. So we don't know——

Senator MATHIAS. There hasn't been a censor up to this time?

Mr. WILLARD. Well, up to now there wasn't anything we could do about it. If a former employee wrote a book and disclosed classified information, not having signed one of these agreements, the cat was out of the bag and the Government had no remedy.

Senator MATHIAS. But if it drew blood, you would know about it, wouldn't you?

Mr. WILLARD. Well, it depends. There has been such a steady flow of unauthorized disclosures by leaks and other methods in the media over the years that it is hard to know which one is going to draw blood. There have been hundreds. Blood has been drawn. That is, there has been a steady flow of classified information. However, it is difficult for us to say which came from which book.

We had no program to try to determine that information because it wasn't necessary.

We can look at the flip side of the coin. That is, we can look at situations where we did conduct a prepublication review, we did find classified information, and we were able to prevent it from being disclosed as a result of the program.

CIA has collected statistics. They conducted over the last few years—and they submitted this in a response to the committee—over 900 prepublication reviews. Most of the materials they reviewed did not contain classified information, but about 250 of the publications did, and they were able to delete the classified information and protect it as a result of that program.

We have had similar experiences where former high-ranking officials have voluntarily submitted materials for review, where we have been able to protect classified information that otherwise would have come out. So we think that there is ample justification for the effectiveness of this program.

Senator MATHIAS. Does it seem something of an anomaly to you that an administration which has come to office to take Government off the backs of the people should be extending its reach in this way?

Mr. WILLARD. No, Senator, this is simply an effort to ask Government employees to adhere to their fiduciary obligations. When we go to work for the Government, we are entrusted with access to very sensitive classified information. We think the people expect us to live up to that trust. That is what this agreement provides.

Senator MATHIAS. Senator Eagleton?

Senator EAGLETON. As a followup to Senator Mathias' question, General Stilwell, the two instances that the Department of Defense reported, one and possibly another, did the disclosure in either one of those two instances in your opinion adversely impact on national security?

General STILWELL. In the first of the two instances cited in our reply, over my signature, to Chairman Roth, sir, the damage was assessed as serious and, therefore, I have to assume on that basis, although I am not personally familiar with the details, that it did adversely affect to a degree, not quantifiable by me, the national security.

Senator EAGLETON. In that one instance?

General STILWELL. In that one instance.

Senator EAGLETON. Mr. Willard, under the directive, when a determination is made about what is to be reviewed, is it to be based on the individual's reasonable belief that such information is or is not present, or is some other standard contemplated?

Mr. WILLARD. Senator, the test provided in the agreement is an objective rather than a subjective test.

Senator EAGLETON. What is it?

Mr. WILLARD. The test is provided in paragraph 5 of the prepublication review agreement. That is, if the manuscript contains or purports to contain information that falls within any of three categories listed in subparagraphs a, b, or c of paragraph 5 of the agreement, then it is required to be submitted for review.

Senator EAGLETON. Well, I understand that, the three categories, a, b, and c. But is that predicated on what the individual believes

insofar as his interpretation of a, b, and c, or is it given the Department's internal determination?

Mr. WILLARD. Ultimately, Senator Eagleton, it would be a court's determination, as in other contract enforcement situations. But there is not a subjective test.

Senator EAGLETON. Would reasonable belief be a defense to the individual in civil litigation?

Mr. WILLARD. No, Senator.

Senator EAGLETON. It would not be?

Mr. WILLARD. It would not be.

Senator EAGLETON. That he acted reasonably?

Mr. WILLARD. That would not be a sufficient defense by itself.

Senator EAGLETON. Is the material to be submitted limited to only the actual language believed to be within the designated categories or must the submission also include sufficient context to understand its intended meaning, or is the individual required to submit the paragraph, page, chapter, or the entire work because the covered information is present?

Mr. WILLARD. The requirement to submit material extends only to material that falls within the categories, and that could include a portion of a manuscript or other document. However, there would need to be a sufficient submission to understand the context of what is being submitted.

Senator EAGLETON. But it wouldn't necessarily have to be the whole book or the whole article?

Mr. WILLARD. It would not necessarily have to be, sir.

Senator EAGLETON. Paragraph 7 of the agreement—we have already talked briefly about paragraph 5—provides that the purpose of the review is for the Government to determine whether information or materials submitted:

Set forth any SCI or other information that is subject to classification under any Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security.

Do the words "subject to classification"—I want to focus on those words particularly—mean that the Government can delete all classifiable information?

Mr. WILLARD. Yes, Senator.

Senator EAGLETON. By requiring submission of any information subject to classification—under literally any Executive order or statute relating to national security, rather than just information within the categories of paragraph 5—that seems to expand the scope of paragraph 5 to almost limitless proportions. Is that what you really intend?

Mr. WILLARD. The two requirements are different. The first requirement of paragraph 5 is the requirement of what has to be submitted for review. Then, as you have noted, paragraph 7 says once something comes in for review, this is what the Government insist be taken out.

The test in paragraph 7 is based on the court decisions interpreting the CIA's employment agreement—specifically the *Marchetti* and the *Knopf* cases—which indicated that any information that is subject to classification by Executive order or statute can be deleted by the Government in a prepublication review.

That is a different standard, though, from paragraph 5, which covers what has to be submitted for review in the first place.

Senator EAGLETON. So paragraph 5, just to summarize this portion of the question, limits what has to be submitted for review.

Mr. WILLARD. That is correct, sir.

Senator EAGLETON. But paragraph 7 is much broader in scope in terms of that which the Government can order to be deleted, correct?

Mr. WILLARD. It is different. It is both broader and narrower in some regards. There are two different tests, and they are designed to serve two different purposes.

Senator EAGLETON. Well, I read it as being much broader in scope than paragraph 5. So you submit one thing, but you find that not only what you submitted may have to be deleted but much more than that under the scope of paragraph 7.

Mr. WILLARD. Senator, I would like to add an example to clarify my answer. Paragraph 5(c) includes information that may not actually be classified, concerning intelligence activities, sources or methods. So in that regard, paragraph 5 is somewhat broader than paragraph 7.

But you correctly note that in other regards paragraph 7 may be broader because it includes any kind of classified information, even if it is unrelated to intelligence. It could concern foreign policy or defense information.

Senator EAGLETON. My time is up.

Senator MATHIAS. Senator Bingaman.

Senator BINGAMAN. Let me just ask Mr. Willard, you were the head of this interdepartmental group that put together this directive; is that correct?

Mr. WILLARD. Yes, Senator.

Senator BINGAMAN. At whose direction was this group constituted and the directive issued?

Mr. WILLARD. The President's National Security Adviser, Judge Clark, asked the Attorney General to convene this group. The Attorney General then invited the heads of the participating departments and agencies to designate representatives to serve on the board.

Senator BINGAMAN. As far as you know, what was the factor that triggered Judge Clark's request for this group?

Mr. WILLARD. Early in Judge Clark's service as the President's National Security Adviser, the question of unauthorized disclosures came up. There was a national security decision directive issued at that time which provoked some controversy. As a result of that decision, Judge Clark thought it was wise to follow up and undertake a more in-depth study of the problem. That is why our group was chartered to undertake that kind of study.

Senator BINGAMAN. You refer to unauthorized disclosures and concern about unauthorized disclosures. It seems to me the crux of the problem, at least as I see it, is that obviously we all would favor limiting or prohibiting release of classified sensitive information, but it is sometimes difficult to prohibit the release of that without going on and prohibiting the leak of what might be termed embarrassing information.

Could you describe how you attempt to draw that line so that just unauthorized disclosures of classified information are prohibited and some unauthorized disclosures of perhaps embarrassing information that should take place still might take place?

Mr. WILLARD. Senator, the test for what can be classified is set forth in Executive Order 12356, which was issued in early 1982 by President Reagan and is similar in most regards to its predecessor Executive orders. That Executive order provides that information cannot be classified in order to prevent embarrassment or for other improper purposes, and that the only basis for classification can be if disclosure of the information could reasonably be expected to damage national security.

Now, there are safeguards built into the system to insure that people are not punished for disclosing something that should not have been classified in the first place. In the area of prepublication review, for example, judicial review is available. If an author thinks an agency is deleting something just because it is embarrassing and it is not classified, he has a right to go to court and get the court to make a de novo determination as to whether the information should be classified or not.

Senator BINGAMAN. Let me ask you on polygraph exams: What the administration's position is with regard to the reliability or accuracy of polygraph exams?

Mr. WILLARD. Our experience has been that the polygraph is a useful investigatory technique; that is to say, that it provides results that are helpful in resolving investigatory situations. We have never suggested that the polygraph is 100 percent reliable, and that would be unusual for investigators only to use techniques that are 100 percent reliable. Almost every investigatory technique—interviewing witnesses, physical surveillance of witnesses, other kinds of demonstrative evidence—have margins for error, and the polygraph does, too.

Senator EAGLETON. Let me just ask General Stilwell, if I could, you are familiar, I assume, with the memorandum that Dr. Berry has issued to the Secretary of Defense regarding his concerns about the reliability of polygraph exams.

General STILWELL. I am indeed, sir.

Senator EAGLETON. He says, as I understand it, in that December 1982 memorandum, and this is a quote, "The polygraph misclassifies innocent people as liars. In one study, 49 percent of the truthful subjects were scored as deceptive. In another study, 55 percent of the innocent were classified." I would like to get your opinion as to the accuracy of that assessment by Dr. Berry.

General STILWELL. Dr. Berry has written me several memoranda on that subject, Senator. As Mr. Willard has suggested, the scientific community has a wide variety of opinions on this. I understand these are now under study by the Office of Technology Assessment in preparing a report for the Congress.

There are, on the other side, counterpoised to Dr. Berry, those who assess it to have the reliability of 95 percent or more.

So in our assessment, overall, we have taken account of Dr. Berry's view, but we have additional views, including my own, which holds that the polygraph has a reliability ranging some-

where between 50 and 95 percent and, therefore, constitutes a very significant additional investigatory tool.

Senator EAGLETON. Thank you, Mr. Chairman. That is all the time I have.

Senator MATHIAS. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

Mr. Willard, I would like to go back to your response to Senator Eagleton's question regarding whether only a portion of the material be submitted under your nondisclosure agreement. I refer you to paragraph 5 of the agreement which states that "all materials, including works of fiction," which contain the items identified in subsections (a), (b), or (c), must be submitted for review. That sounds a lot broader than only portions of material. If there is any doubt in your mind that it is only the portions of the material which the author believes contain information identified in paragraph 5, subsections (a), (b), or (c), which must be submitted, rather than the entire work itself.

Mr. WILLARD. Senator, first of all, as I told Senator Eagleton, it is my view that an author's subjective belief is not a determinant here. This is a contract.

Senator LEVIN. The author has to make the determination, though.

Mr. WILLARD. Right.

Senator LEVIN. The author has to make the determination in the first instance whether or not something contains prohibited information. I know it is an objective test, but it is the author who has to say do I or don't I submit it. Then he or she has to go back and look at that agreement that they signed maybe 20, 30 years ago and decide whether the material does or doesn't contain the information described in subsections (a), (b), or (c), or he decides yes, it contains (b), and I am therefore going to submit it.

What does he submit? In answer to Senator Eagleton's question, you said he can submit only the portions of the work which contain the prohibited information; the author doesn't have to submit the entire work. Is there any doubt in your mind that that answer is accurate?

Mr. WILLARD. The question would obviously depend on the circumstances and the extent to which the full information would be necessary for context. I can provide an example.

Former Attorney General Griffin Bell submitted his book for pre-publication review voluntarily to the Justice Department in 1981. The book was about his time as Attorney General. It included two chapters on intelligence and espionage matters. Those are the chapters he submitted for review. He did not submit for review chapters that dealt with the antitrust matters or criminal prosecutions or other things that were unrelated. That approach was perfectly satisfactory.

Senator LEVIN. Paragraph 5 of the agreement states that you must submit for approval "all materials, including works of fiction," which contain information described in subsections (a), (b), or (c). Now, my question to you is, If you write a work of fiction which contains information concerning intelligence activities outlined in subsection (c), must the whole work of fiction be submitted?



Mr. WILLARD. Again, Senator, it would depend on the context, whether it is necessary to have the entire work in order to understand the materials that are submitted.

Senator LEVIN. Is that what the agreement says?

Mr. WILLARD. The agreement simply says that materials must be submitted that contain this information. What the word materials means, whether that is a full book or a chapter, would depend on the context of the material.

Senator LEVIN. Does the agreement explain to the author that whether he or she submits a portion or all of the work depends on how much of the work is necessary in order to understand the context in which the information is presented? Is that set forth somewhere?

Mr. WILLARD. The agreement is designed to be implemented through each agency's instructions. The Justice Department, for example, has an implementing order, which tells people where they can go if they have questions; CIA does similarly. So the author does not have to be in the dark about how to comply or not. The author can make a phone call to the designated agency official and get guidance on what is necessary to comply with the agreement.

Senator LEVIN. I would suggest to you if indeed a portion of material would satisfy or constitute compliance with the agreement, then that is what the agreement should say. This agreement is overly broad in a number of ways. Today you say a portion can do it, but when you read the agreement, in particular paragraph 5, what you have is an agreement which is very broad and says you must submit "all materials, including works of fiction," which contains a wide range of information. What must be remembered is that you talking about a nondisclosure agreement, which means censoring literary works, which could include works of fiction, creative works. You are talking about censoring works, written perhaps decades after their authors have left office; the civil penalty for noncompliance being the loss of royalties, putting aside the criminal penalty.

This morning you say you can submit a portion of the work, but that is not in the agreement. Let me suggest it is overly broad with regard to how much of the work needs to be submitted.

It is also overly broad in its description of what information is prohibited as outlined in paragraph 5, subsection (c), which includes "any information concerning intelligence activities, sources or methods." The agreement doesn't limit nondisclosure to classified information. So you could have, for instance, fictitious, imaginary descriptions concerning intelligence activities which might indeed be considered, in the words of this agreement, information concerning intelligence activities.

I would think that the agreement should clearly be limited to classified information concerning intelligence activities, particularly when you are dealing with works of fiction, or else you have an overly broad agreement.

Finally, just summarizing, it seems to me that this agreement is open ended in terms of the amount of time the department or agency has to review the materials that are submitted and what the consequences are if the 30-day period ends with a statement

from the department or agency saying we think (a), (b), and (c) violate the agreement. What happens then? It leaves it up in the air and open ended. I would suggest that this information ought to be clearly outlined in the agreement.

I am out of time.

Mr. WILLARD. If I could answer with regard to the last observation about what happens then, that matter is provided for in the agency regulations. For example, the Department of Justice regulations, which were submitted to the committee at the same time, provide for a 15-day period for an administrative appeal to the Deputy Attorney General, followed by a judicial review. At the option of the author, he can either initiate the lawsuit himself or give notice to the department and require the department to institute judicial review.

The reason that this procedure is not in the agreement is that other agencies may have different administrative procedures they wish to set up. That is why we thought it was better handled in implementing regulations.

With regard to the requirement to submit potentially unclassified information under subparagraph c, the purpose of this review, as determined by the Supreme Court in the *Snepp* case, is to allow the agency, not the author, to make the decision about what is classified and what isn't. If the author only has to submit information that he determines is classified in the first place, then the review function cannot be as effective as it otherwise would be.

Senator MATHIAS. Gentlemen, there is a qualitative and quantitative aspect to this problem, and I addressed the quantitative side in my first question, but what about the qualitative side? The directive is addressed to writings by former officials. Nothing really gets stale quicker than intelligence. The chance of damage to the national interest of the United States from some disclosure by a former official is there, of course, but it is a much less active risk, it seems to me, than that of the incumbent who leaks current information, intelligence that is not stale.

Now I don't know what you do about the President or the Secretary of State or the Secretary of Defense who as a matter of high national policy makes a deliberate disclosure of intelligence information. You haven't addressed that problem here. We all know it happens. But what about the fellow down the line somewhere in the civil service who is on duty and who picks up the phone and tells his favorite reporter something? That is the thing that can really hurt. That is what draws blood. Wouldn't it be more sensible to direct your efforts at the problem that is most damaging than this rather vague question about former employees' writings, which on the record are not very numerous and which are less likely to be damaging than the problem of the active leaker?

Mr. WILLARD. Senator Mathias, I think your observations are quite accurate, and most of NSDD-84 is directed at current Government employees. There is only one provision that deals with former employees and that is the prepublication review section. I think you are right, that the current intelligence that is leaked is often more damaging.

Senator MATHIAS. Why divert from that effort? You know, this is not going to be without cost. How many censors are going to have to be hired?

Mr. WILLARD. We think it can be handled through the existing declassification review process, in that there will not be an enormous volume.

Senator MATHIAS. You are telling this committee there is no cost to this part of NSDD-84?

Mr. WILLARD. The problem of declassification review is very similar, whether it is in the form of reviewing a manuscript or reviewing information under the Freedom of Information Act. We process an enormous volume of classified information to determine whether it can be declassified or released under the Freedom of Information Act every year. I suspect prepublication reviews under this program will be a minute fraction of that.

So far, for example, under the more limited program in effect last year, at DOD and at Justice, only a handful of documents came in for review.

Let me get back to the need, if I could, Senator. It is true that intelligence does become stale. But intelligence sources and methods do not. The fact that we knew a particular piece of information 5 or 10 years ago may not be all that topical or harmful today, except that it may disclose something about the way we find it out. This could include the human agent that may have been involved in obtaining the information, or technical collection systems that still may be in use in providing information to us. That is the kind of damage we are concerned about.

Senator MATHIAS. Let me give you an example of the prepublication review and let me see how it reflects on sources and methods. The CIA did some prepublication reviews. Just let me quote very briefly what they deleted. "The Director demanded and received a limousine of the type usually reserved for Cabinet-level officers." And another quote, "When he learned that the agency had no executive dining room, he ordered one." And, "The purpose of the NSC meeting was to decide what American policy should be toward the governments of southern Africa."

Now, those aren't very encouraging examples of the protection of sources and methods. I mean, the record on prepublication review is one that is disturbing.

Mr. WILLARD. Senator, may I suggest, though, that the recent record has been much better. I think the examples you gave were from a book published about 10 years ago, the Marchetti book. The information that was originally deleted was later released in the course of judicial review because it was determined, quite properly, that the things you quoted were not classified and should never have been. They should not have been deleted.

Senator MATHIAS. That is the kind of thing censors do.

Mr. WILLARD. I would suggest that our record is better now because of the experience we have had over the last 10 years under the Freedom of Information Act and because of the existence of judicial review. I am not aware of instances within the last 5 years where clearly unclassified information has sought to be deleted by CIA or any other agency conducting prepublication reviews. If they do try it, there is a ready remedy available. People can go to court

and get a court order allowing disclosure or they can require the agency to go to court.

Senator MATHIAS. Let me impose on Senator Eagleton's time for just one question that is not entirely facetious, but have you compared this prepublication review requirement with the contracts that are signed by the chambermaids and footmen in Buckingham Palace?

Mr. WILLARD. No, Senator.

Senator MATHIAS. Well, you might want to do that.

Senator Eagleton.

Senator EAGLETON. As you can tell, Mr. Willard, from the questions by Senator Mathias and myself and Senator Levin and Senator Bingaman, what seems to be troubling us is the broad scope and sweep of this directive. It seems to be continually expanding. Let me see if I can put it in context and then get a comment from you.

The *Snepp* case upheld the prepublication process in the context of the CIA. Many people were troubled by that program and by that Supreme Court decision. But the coverage was confined to the intelligence agencies with their unique mission.

Now, the President's national security directive that we are discussing today starts with a prepublication review process for that class of individuals with access to SCI, whatever agencies they might be found in, policymakers as well as intelligence officials. That in and of itself is a substantial and large qualitative—to use Senator Mathias' phrase—as well as a quantitative change. But it is still presumably directed to a limited class of officials with access to the most sensitive information.

But let's take a look at what happens from that starting point; that is, the starting point of this directive. First, those with access to SCI must submit writings that not only which contain or purport to contain SCI but which will also contain any classified information from intelligence reports and information concerning intelligence activities, presumably even nonclassified or nonclassifiable information. And then we go to paragraph 7 that we discussed in my previous round of questioning which talks about classifiable information and information subject to classification.

So you start from SCI, as the beginning point, and then the directive requires individuals with access to classified information to sign a nondisclosure agreement. They are not required to submit to a prepublication review process. However, in fact they will be doing so as well because they could be subject to civil penalty if they make a mistake—failing to obtain authorization.

The point I am making is that you start with the CIA and their uniquely sensitive role and the information that they handle—intelligence sources and methods—and the *Snepp* case, but then you make a very broad sweep, going far beyond CIA and *Snepp*, and bring within the scope of your directive a whole host of publications that I think go way too far. Would you respond to that observation?

Mr. WILLARD. Senator Eagleton, I think you have suggested a very useful comparison between the *Snepp* case and the President's directive here. The issue in *Snepp* involved a CIA secrecy agreement, and it was signed by all CIA employees, which is a large

number of people, although the exact number is classified. They promised to submit for review anything they ever wrote about anything they did at CIA or any other intelligence activities.

The President's directive extends the *Snepp* concept to other government officials with access to SCI, who—in our view—have access to information that is equally sensitive as people who are covered by the CIA agreement. Outside the intelligence agencies, it is primarily, as you observed, the people at the top policymaking level of Government. Many of those people have access routinely to more sensitive intelligence product than an average CIA employee who may work in a compartmentalized project. I would suggest that the high-ranking officials at the Departments of Defense and State and at the White House carry in their minds a lot more sensitive intelligence that could damage national security if revealed than the average CIA employee. That is because they have access to all sources of intelligence, a cross-cutting view, and usually many of the most sensitive secrets filter up to them.

So in our view the justification that was upheld by the Supreme Court in *Snepp* applies with at least as much force to high-ranking officials in the other parts of the Government who have access to the same kind of information.

However, the agreement we are discussing today is in many ways narrower than the decision before the Supreme Court in *Snepp*. It does not require the submission of materials that deal with anything these officials ever did when they were in the Government. It only requires them to submit materials that discuss or relate to SCI, classified intelligence reports, or intelligence activities, sources or methods. They are perfectly free to write, without review, about anything else that deals with their Government experience. So in that regard it is a narrower agreement than the Supreme Court upheld in the *Snepp* case.

Senator EAGLETON. My time is up. If you read the directive—really there are two directives. There is the SCI type directive and then the non-SCI type directive. If you read those two directives, I submit that they broaden the scope far beyond what was envisioned or contemplated at the time of the *Snepp* case.

Senator MATHIAS. Senator Bingaman.

Senator BINGAMAN. Let me ask Mr. Willard how the Justice Department anticipates monitoring unauthorized leaks of information?

Mr. WILLARD. The responsibility for reporting those in the first place will rest on the agency that originates the information that is the subject of the unauthorized disclosure. Ninety-eight percent of the time that is either the Department of Defense or CIA, because those are the agencies that originate most classified information. They are in the best position to know if some information they originated has leaked. They then are required under the terms of the directive to conduct a preliminary investigation to discover the nature of the information that was leaked: what document it came from, if possible; the level of classification; whether it was properly classified; who had access to it; and if there are any other investigative leads. Then they refer this information to the Department of Justice, which makes a determination as to the possibility of solving the case.

Many times the case cannot be solved because so many people have access to the information that there is no logical way to focus an investigation. But based on that determination, weighing also the seriousness of the disclosure and the damage caused, Justice's Criminal Division will decide whether or not to ask the FBI to undertake an investigation. That is the process by which the investigation will be launched.

Senator BINGAMAN. How many people are we talking about in Government that are subjected to this prepublication review requirement? Do we have an estimate?

Mr. WILLARD. I don't know the exact number. At the Department of Justice, it is about 2,500; 2,000 in the FBI, 500 in the rest of the Department, out of a total of 58,000 employees. The number of Government-wide is larger. In some of those agencies, the number is classified; CIA, for example, and NSA. So I don't have an exact estimate.

General STILWELL. May I, Senator, add to Mr. Willard's response?

Senator BINGAMAN. Yes.

General STILWELL. We have somewhat over 100,000 persons, including 8,000 contractors, who are currently accessed to sensitive compartmented information. All have signed a nondisclosure agreement which, as I indicated earlier, includes an undertaking for prepublication review.

Senator BINGAMAN. So you have something over 100,000 people in the Department of Defense that you think this directive applies to?

General STILWELL. Yes, sir; that the SCI agreement applies to.

Senator BINGAMAN. Yes.

General STILWELL. The other nondisclosure agreement for collateral will apply to a much larger number.

Senator BINGAMAN. OK. What about the polygraph requirement that you indicate you have already put into effect at the Department of Defense? Does that apply to everybody or what is the number there?

General STILWELL. We have an extant directive in the Department of Defense of some long standing relating to the utilization of the polygraph as an investigative tool under various conditions. We had in coordination, as I think you know, Senator, a revision to that document which has been put on hold as a result of the current amendment to the DOD fiscal year 1984 authorization bill, which says there will be no change in our extant directives as they stood prior to August 5, 1982, until at least April 15, 1984.

Senator BINGAMAN. Let me just ask Mr. Willard one last question here. As I understand the directive, it requires that the agency issue regulations to administer appropriate adverse consequences when an individual refuses to submit to a polygraph exam in the course of a leak investigation. Is it the administration's position that firing of an individual would be an appropriate consequence for refusal to submit to an exam?

Mr. WILLARD. As our report indicated, Senator, a variety of consequences could be considered. Whether one would be appropriate would depend on the facts and circumstances.

For example, one consequence could be the denial of further access to classified information. Another could be transfer to a less sensitive job. Firing, though, could also be accomplished.

I would note that the directive requires that the results of the polygraph examination not be used in isolation; that is, it can be used only in the context of other information. An employee would not be subject to being fired unless the entire investigatory record indicated culpability, including the polygraph results.

Senator BINGAMAN. Thank you.

Senator MATHIAS. Now we will ask unanimous consent for further questions to members of this panel to be submitted in writing. Without objection, we will follow that procedure.

I hope, gentlemen, that you will be agreeable to responding in writing for the record.

Mr. WILLARD. Yes, Senator.

General STILWELL. Yes, sir.

Senator MATHIAS. Let me just say, before you leave, that this is obviously a very complex subject. As Mr. Willard has observed, it is not one that arose in this administration. It has been around for a long time. The fact that it took nearly 6 months to draft the regulations, the implementing regulations, is an indication of the fact that the administration has taken care and has been deliberate in approaching the problem. But this hearing is the first opportunity the Congress has had to look at Directive 84. The standard nondisclosure agreement, I am told, was just published on September 9, 4 days ago, which does not give us a great deal of time to review it. I would hope that you would consider some delay in the full implementation of the directive to give the Congress an opportunity to comment.

Thank you for being here.

[The prepared statements of Mr. Willard, General Stilwell, and Mr. DePree, with responses to written questions, follow:]

#### PREPARED STATEMENT OF RICHARD K. WILLARD

Thank you, Mister Chairman. I appreciate the opportunity to describe for this committee the background and purpose of President Reagan's March 11, 1983, directive on safeguarding national security information.

This directive, known as National Security Decision Directive 84, or NSDD-84, was based on the recommendations of an interdepartmental group convened by the Attorney General. I served as chairman of this group, which also included representatives designated by the Secretaries of State, the Treasury, Defense, Energy and the Director of Central Intelligence. Copies of the report of this group, which is unclassified, have been furnished to the Committee.

#### BACKGROUND

The protection of national security information is a fundamental constitutional responsibility of the President. This responsibility is derived from the President's powers as Chief Executive, Commander-in-Chief, and the principal instrument of United States foreign policy. Since the days of the Founding Fathers, we have recognized the need to protect military and diplomatic secrets.

Since at least 1940, Presidents have provided for the protection of national security information by promulgating Executive orders providing for a system of classification. President Reagan's Executive Order limits the use of classification to information which "reasonably could be expected to cause damage to the national security" if released without proper authorization. This Executive Order also prohibits the use of classification to conceal violations of law, inefficiency or administrative error, or to prevent embarrassment to a government agency or employee.

The unauthorized disclosure of classified information has been specifically prohibited by each of the Executive orders on this subject. Such disclosures also violate numerous more general standards of conduct for government employees based on statutes and regulations. Moreover, in virtually all cases the unauthorized disclosure of classified information potentially violates one or more federal criminal statutes.

Notwithstanding the clear illegality of this practice, unauthorized disclosures of classified information appear in the media with startling frequency. Such disclosures damage national security by providing valuable information to our adversaries, by hampering the ability of our intelligence agencies to function effectively, and by impairing the conduct of American foreign policy.

President Reagan has recently expressed his personal concern about this serious problem in a memorandum for all federal employees. The President stated that: "The unauthorized disclosure of our Nation's classified information by those entrusted with its protection is improper, unethical, and plain wrong."

#### SCOPE OF NSDD-84

In addition to reminding federal employees of their personal responsibilities, the President has directed in NSDD-84 that a number of additional steps be taken to protect against unlawful disclosures of classified information.

The directive impose additional restrictions upon government employees who are entrusted with access to classified information, and upon government agencies that originate or handle classified information.

The directive also provides for a more efficient approach to investigating unauthorized disclosures, including additional use of polygraph examinations under carefully controlled circumstances.

The directive provides for mandatory administrative sanctions for employees found to have knowingly disclosed classified information without authorization, or who refuse to cooperate with an investigation.

Implementation of NSDD-84 has required a careful review of security regulations and practices throughout the government. A number of changes are being made as a result of this review.

#### NONDISCLOSURE AGREEMENTS

A significant aspect of implementing NSDD-84 has been the development of two new nondisclosure agreement forms for government-wide use. These forms have been reviewed by the Department of Justice, which has determined that they would be enforceable in civil litigation initiated by the United States. Copies of the forms, and letter signed by me regarding their enforceability, have been provided to the Committee.

One of the new nondisclosure agreements will be signed as a condition of access to Sensitive Compartmented Information, or SCI. This agreement is being promulgated as a revision to Form 4193, which was adopted in 1981. Both versions of this form include provisions for prepublication review, but we believe that the new form will provide the government with an enhanced ability to safeguard classified information.

Prepublication review agreements have been used at CIA for a number of years, and in 1980 the Supreme Court approved their use in *Snepp v. United States*. The sole purpose of prepublication review is to permit deletion of classified information before it is made public. This program does not permit the government to censor material because it is embarrassing or critical.

#### CONCLUSION

Unlawful disclosure of classified information is a longstanding problem that has resisted efforts at solution under a number of Administrations. Our current program will not solve the problem overnight. It is designed to improve the effectiveness of our enforcement effort and, over time, to reduce the frequency and seriousness of unlawful disclosures of classified information.

Thank you very much, Mister Chairman. This concludes my statement. I would be happy, of course, to answer any questions you or the committee members may have.

#### RESPONSES OF MR. WILLARD TO WRITTEN QUESTIONS SUBMITTED BY SENATOR MATHIAS

*Question 1.* What are the disclosures to which the pre-clearance requirement extends? Although we have been referring to the requirement as one of pre-publication review, doesn't it in fact extend beyond published writings? For example, does



the pre-clearance requirement of paragraph 5 of the SCI agreement extend to reports or correspondence that a former employee might prepare in the course of his business? Does it cover lecture notes of a former official who enters the academic world?

Answer. The agreement not to disclose classified information extends to any method by which such information can be communicated, including oral disclosures. The prepublication review obligation extends only to "materials" that contain or purport to contain certain kinds of information. This could include reports, correspondence or lecture notes. Implementing regulations recognize that oral statements cannot be subjected to prepublication review in the same manner as writings. DOJ Order 2620.8 ¶5.g.; CIA Policy Statement ¶B.4.

*Question 2.* Admiral Gayler testified that the government should use a "rifle" rather than a "shotgun" approach. He stated that long-term protection is justified only in very special cases having to do with intelligence methods. You yourself pointed out that while intelligence does become stale, intelligence sources and methods do not. Given the substantial agreement on this point, shouldn't a long-term pre-publication review requirement apply only to information about intelligence sources and methods, and not to other categories of information, much of which quickly goes stale? Wouldn't a short-term pre-publication review requirement be ample for the other categories of information?

Answer. Although information concerning intelligence sources and methods (including SCI) is likely to have long-term sensitivity, the same may also be true of certain information from intelligence reports or concerning intelligence activities. Of course, once a particular information no longer requires protection in the interest of national security, then it must be declassified and cannot be deleted from materials submitted for prepublication review.

*Question 3.* Many of us in Congress have been concerned for some time about the problem of unauthorized disclosures. What congressional input was sought in the drafting of the directive, or of its implementing regulations?

Answer. A number of congressional hearings and reports were consulted in preparing the report leading up to NSDD-84, including the following: Senate Select Committee on Intelligence, Subcommittee on Secrecy and Disclosure, Report on National Security Secrets and the Administration of Justice, 95th Cong., 2d Sess. (Comm. Print 1978); House Permanent Select Committee on Intelligence, Staff Report on Security Clearance Procedures in the Intelligence Agencies (Comm. Print 1979); Espionage Laws and Leaks, Hearings before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence (1979); Pre-employment Security Practices in the Intelligence Agencies, Hearings before the Subcommittee on Oversight of the House Permanent Select Committee on Intelligence (1979); and Prepublication Review and Secrecy Agreements, Hearings before the Subcommittee on Oversight of the House Permanent Select Committee on Intelligence (1980).

Since NSDD-84 was adopted on March 11, 1983, Administration witnesses have testified at a joint hearing of subcommittees of the House Judiciary and Post Office and Civil Service Committees on April 28, 1983, and at the hearing chaired by Senator Mathias on September 13, 1983, at a hearing of a subcommittee of the House Government Operations Committee on October 20, 1983. We have provided information and documents to these and other committees in response to requests. The Administration has been, and remains, open to specific congressional suggestions for solving the problem of unauthorized disclosures.

*Question 4.* The report of the interdepartmental group which you headed recommended the enactment of a general criminal statute prohibiting the unauthorized disclosure of classified information. Some observers, including former CIA Director William Colby, feel that criminal sanctions would be the most effective way to punish unauthorized disclosures, and would be more workable than pre-publication review and other measures contained in the directive.

In the 6 months since the issuance of the directive, or in the year and a half since the report of your group, what has happened to the idea of a general criminal sanction? Has the interdepartmental group's recommendation been accepted by the Administration?

Answer. Nearly all unauthorized disclosures of classified information potentially violate one or more existing criminal statutes. Although a new criminal statute could be useful in clarifying ambiguities in existing law, it is unlikely that criminal prosecution would ever by itself be a satisfactory response to most unauthorized disclosures. We believe that a realistic prospect of administrative sanctions can effectively deter most unauthorized disclosures. Of course, criminal prosecution can and will be considered where circumstances warrant.

**Question 5.** Some portions of the SCI Agreement appears to sweep very broadly. In particular, a former official is required to pre-clear any materials that contain "any information about intelligence activities, sources or methods"—whether or not the information is classified. This broad language appears to include information about intelligence activities of all nations and all times. The "escape clause" of paragraph 5 of the SCI Agreement does not completely solve this problem, since it excludes from the preclearance obligation only information obtained by an official when he is out of office. Thus it would not protect an official who learned about intelligence activities during the War of 1812 through his leisure reading while in office, and wanted to write about that subject after leaving office. Might the Agreement be interpreted to cover such a situation, and if so, shouldn't it be more narrowly tailored to avoid sweeping in such obviously harmless material?

**Answer.** The term "intelligence sources and methods" is found in the National Security Act, 50 U.S.C. § 403(d)(3). The term "intelligence activities" is defined in Executive Order 12333, § 3.4(e). Together, these terms comprise a category of information that must be considered for classification under Executive Order 12356, § 1.3(a)(4). We believe the terms are sufficiently precise as to be understood by persons who sign the SCI Nondisclosure Agreement, although it would certainly be appropriate for agencies to provide further explanations in their implementing regulations.

The purpose of the "escape clause" is to permit former officials to work as journalists or scholars after they leave government employment, without requiring them to submit for review materials containing information acquired outside the scope of government employment. This clause provides a clear test to protect such former employees in the most likely practical situations.

We will interpret the protection of the "escape clause" as extending to published information that is generally available to the public, even if the employee may have consulted the publication during the time he was employed. Thus in your hypothetical question, the employee would not be required to submit his manuscript for review.

This interpretation is necessary as a practical matter, since it will normally be impossible to establish when publicly available publications were actually consulted. This interpretation is also consistent with the fiduciary obligation underlying the nondisclosure agreement, which applies to information acquired as a consequence of government employment.

However, it is important to recognize that former employees cannot speak or write in a manner that expressly or impliedly confirms the accuracy of classified information that may have entered the public domain as the consequence of an unauthorized disclosure. Any such confirmation of the accuracy of published information thus a separate disclosure, which is subject to prepublication review if it otherwise falls within the terms of the agreement.

Finally, the Attorney General's decision to authorize the filing of litigation to enforce the prepublication review requirement for a manuscript that did not actually contain classified information would depend on all the facts and circumstances of the particular situation.

**Question 6.** At the hearing, you indicated that an objective standard would be used to determine whether an individual had complied with his obligations to submit materials for pre-publication review. However, you went on to say that the usual objective standard—objectively reasonable belief—would not apply. Instead, the standard would effectively be one of absolute liability, since an honest and reasonable mistake would not provide a defense. Given this absolute liability standard, won't the only safe course be to submit every manuscript that could conceivably be thought to be covered by the agreement?

**Answer.** The SCI nondisclosure agreement, like most contracts, is enforceable according to its terms. Employees who are uncertain whether material must be submitted are encouraged to consult with designated officials who are authorized to express the views of the government on the interpretation and application of the agreement. See DOJ Order 2620.8, ¶ 5.b; CIA Policy Statment ¶A.5, B.1.

**Question 7.** In your testimony, you indicated that the Classified Information Nondisclosure Agreement did not contain a pre-publication review requirement. However, in litigation against former CIA employee Wilbur Crane Eveland, the CIA has taken the position that a very similar non-disclosure agreement imposed on the employee an implicit duty to submit manuscripts for pre-publication review. If no pre-publication review requirement is intended for persons with access only to classified information, wouldn't it make sense to spell that out explicitly in the agreement, rather than leaving former employees in doubt about their obligations?

Answer. The Eveland matter was settled without litigation. In any event, it is our view that the obligation to submit materials for prepublication review may be imposed by express agreement or by agency regulations interpreting the fiduciary obligations of employees. See *Snepp v. United States*, supra, 444 U.S. at 511 n.6, 515 n.11; *McGehee v. Casey*, No. 81-2233 (D.C. Cir., Oct. 4, 1983), Slip Op. at 7-8 n.10. CIA requires prepublication review of all persons bound to an express or implied secrecy agreement with it. CIA Policy Statement ¶B.2. The Department of Justice requires prepublication review only as expressly provided in an agreement. DOJ Order 2620.8, ¶5.c.

**Question 8.** Regarding the first category of information that would trigger pre-clearance, is "information derived from SCI" limited to only that which reveals the SCI source but is not itself labeled SCI? If not, how is an individual to know that information is "derived from SCI"? What is encompassed by the phrase "any description of activities that produce or relate to SCI"?

For example, I assume SCI is used in preparing all sorts of unclassified information—for example, Congressional testimony on a national security topic, or a press release on a matter of public concern. If an author does what an agency does in these circumstances—that is, if he prepares a statement which takes into account SCI, but which does not contain any—must he submit for pre-publication review?

Answer. The language of paragraph 5(a) is taken from the prior SCI Nondisclosure Agreement, Form 4193, which was adopted in 1981. SCI and information derived from SCI are required to be distinctively marked so that individuals with authorized access to such information would be aware of its identity. Activities that produce or relate to SCI include the operations associated with the acquisition, analysis and reporting of SCI.

It is true that some information falling within this category may be unclassified. However, the nondisclosure agreement requires that the government review such materials before they are published to determine whether in fact they are unclassified.

**Question 9.** With regard to the reference in paragraph 7 of the SCI nondisclosure agreement to "any other Executive Order or statute that prohibits the unauthorized disclosure of information in the interest of national security," is this an attempt to incorporate by reference future executive orders and statutes (e.g., any successor to E.O. 12356), or is it intended to refer to executive orders and statutes currently in existence?

If the latter, please specify which executive orders or statutes contain classification authority upon which a deletion may be based. If the identical language in paragraph 1 of the classified information nondisclosure agreement does not have the same meaning, please explain the difference.

Answer. This reference in both nondisclosure agreements is intended to refer to future executive orders and statutes as well as those currently existing. Other than Executive Order 12356, the primary current authority is the Atomic Energy Act, 42 U.S.C. § 2274-77 ("Restricted Data and Formerly Restricted Data"). A number of other statutes also prohibit the unauthorized disclosure of national security information. See, e.g., 18 U.S.C. § 793, 798; 50 U.S.C. § 403(d)(3).

**Question 10.** Please explain the rationale for paragraph 11 of the SCI nondisclosure agreement and paragraph 7 of the classified information nondisclosure agreement. Is the government asserting a property interest in the information, or in the documents or other formats in which it is embodied? If the former, what is the legal basis for this assertion? Is there any inconsistency with 17 U.S.C. 105, prohibiting a copyright in government works? If the former, what about government information which enters the public domain? Does it "remain the property of the U.S. Government"? To what extent, if any, does this assertion affect the rights of persons not signatory to the SCI nondisclosure agreement?

Answer. We believe that the government has a property interest in classified information itself, which is not limited to ownership of the tangible medium in which the information is embodied. This property interest is a consequence of statutes and Executive orders that establish a government monopoly in the creation and use of classified information. Although the United States cannot obtain a statutory copyright for its works, 17 U.S.C. § 105, we are prepared to argue in an appropriate case that its property interest in classified information is entitled to common law protection. Cf. *United States v. Girard*, 601 F. 2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979) (statutory protection of copyright laws is not exclusive). The United States would lose any property interest in classified information when it is declassified pursuant to Executive Order 12356. The ability of the government to bring a prosecution under 18 U.S.C. § 641 for theft of government property is not determined by the provisions of a nondisclosure agreement and, in any event, has not been defini-

tively decided by the courts. Compare *United States v. Truong*, 629 F. 2d 908, 927 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981), with id. at 932; see *United States v. Boyce*, 594 F. 2d 1246, 1252 (9th Cir.), cert. denied, 444 U.S. 855 (1979); *United States v. Hubbard*, 474 F. Supp. 64, 29-80 (D.D.C. 1979).

**Question 11.** Is the SCI nondisclosure agreement enforceable against the estate of a deceased former official? If the Department believes that the answer is yes, why is there no specific provision in the agreement addressing this issue?

**Answer.** The extent to which the agreement is enforceable would depend upon the facts and circumstances. We believe it is advisable to address this question on a case-by-case basis rather than attempt to cover it in a specific provision of the agreement.

**Question 12.** The Justice Department's written response to the Chairman's letter of August 12 indicated that the Department has not, in the past, had "a program for monitoring the publications of former employees." Does the Department plan to institute such a program, in light of NSDD-84? If so, what are the department's plans in this regard?

**Answer.** The Department will review materials submitted by former employees as provided in DOJ Order 2620.8. The Department will consider complaints or referrals regarding materials that were published without being submitted for review.

**Question 13.** What does the Department see as the roles of the various agencies in enforcing the nondisclosure agreements? For example, one element of enforcement would be monitoring the speeches and publications of former officials who held the clearance. Is that monitoring task primarily the responsibility of the agency which issued the clearance? or of the Justice Department? or of some other agency?

**Answer.** Agencies that originate classified information are primarily responsible for detecting threatened or actual unauthorized disclosures of their information. Enforcement of a nondisclosure agreement is primarily the responsibility of the agency that last granted the individual either a security clearance or SCI access approval. The approval and conduct of litigation is the responsibility of the Justice Department.

**Question 14.** As you know, E.O. 12356 contains new provisions authorizing reclassification of information which has been declassified. How does the potential for reclassification affect the scope of the pre-publication review requirement, and the agency's power to require deletions? For example, is information which has been declassified, but which is subject to possible reclassification, considered "classified," "classifiable," "subject to classification," or none of the above?

**Answer.** Information may be reclassified only if it may reasonably be recovered. Executive Order 12356, § 1.6(c). Information that meets the standard for reclassification is not "classified" but is "classifiable" and "subject to classification."

**Question 15.** How should agencies plan to notify former employees of reclassification decisions? If there is no plan for such notification, how is a former employee to know whether or not he may disclose formerly classified information which has been declassified, and which may or may not have been reclassified?

**Answer.** The authority to reclassify has been used quite infrequently and under circumstances where employees aware of the declassification also knew of its reclassification. Where declassified information has received any substantial public dissemination, it is not reasonably recoverable and thus is not subject to reclassification. Therefore, it is most unlikely that former employees would be in a position of disclosing declassified information without being aware that it has been reclassified. In any event, the Department would not seek to penalize anyone for disclosing such information in good faith.

**Question 16.** Has the Justice Department developed guidelines for enforcement of pre-publication agreements authorized under the Directive? If not, does it intend to do so?

**Answer.** Under what circumstances would the Justice Department seek a prior restraint of a publication assertedly subject to the pre-publication review requirements? Of a publication assertedly subject to the classified information non-disclosure agreement?

**Answer.** In the Justice Department's view, what standard should a court apply in ruling upon an application for a prior restraint on the grounds of violation of a pre-publication submission requirement? Of violation of the classified information nondisclosure agreement?

**Answer.** Enforcement of the nondisclosure agreements for Department of Justice employees will be consistent with DOJ Order 2620.8 (Aug. 25, 1983). Otherwise, the policy of the Justice Department is as stated in a memorandum of Attorney General William French Smith, dated September 3, 1981, a copy of which is attached. The Department has no plans to develop any other guidelines.

The Department of Justice would seek to enjoin a publication in violation of the nondisclosure agreements only with the approval of the Attorney General, based upon a determination that the facts and circumstances of the case warranted this remedy. The courts have approved the issuance of injunctions to compel individuals to comply with secrecy agreements, including provisions for prepublication review. *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); *Agee v. CIA*, 500 F. Supp. 506 (D.D.C. 1980). There is, however, an unresolved question as to the legal standard that should be applied. Compare *McGehee v. Casey*, *supra*, slip op. at 20-21 n.22 (dictum), with *id.* at 1-2 (MacKinnon, J., concurring).

**Question 17.** Can a former employee's pre-publication review obligation be ascertained from the four corners of the nondisclosure agreement which he or she has signed? What effect, if any, will subsequent changes in departmental regulations have on this obligation? If subsequent regulatory changes can modify the obligation, what steps will be taken to inform former officials of these modifications? If the regulations and the terms of the nondisclosure agreement conflict, which controls?

If a former employee complies with the obligations set forth in the agreement which he or she has signed, will the government waive any claim that the employee is obliged to submit manuscripts for pre-publication review based upon fiduciary duty or any other ground not contained in the agreement? Put another way, does the obligation contained in the agreement exhaust the government's right to demand pre-publication review?

**Answer.** In our view, prepublication review requirements may be imposed by agreement or by regulations interpreting fiduciary obligations. Agency regulations on this subject should be made available to former employees upon request and published in the same manner as similar regulations of the agency. Employees who have had access to classified information may have a fiduciary obligation to ascertain current agency policy prior to publishing information that may be subject to prepublication review.

Each agency must decide the extent to which it will seek to impose prepublication review obligations apart from those expressly contained in an agreement. The Department of Justice regulation on this subject requires prepublication review only as expressly provided for in an agreement.

In situations where employees have signed express agreements, agencies could not as a matter of contract law impose more onerous obligations by subsequent regulations. Such regulations, however, could operate to reduce the obligations of the express agreement.

The requirements imposed upon former employees, whether grounded in contract or fiduciary obligation, must be sufficiently reasonable to survive judicial scrutiny under the First Amendment.

**Question 18.** In your testimony, you stated that if a former official has prepared a manuscript that contains information covered by the pre-publication review agreement, he need not submit the entire manuscript, but only those materials actually within the designated categories of covered information, plus sufficient surrounding material to give adequate context to the information. If so, shouldn't this be made cleared in the contract itself, since that is the document upon which officials will primarily rely in determining their obligations?

**Answer.** The extent to which partial manuscripts may be submitted in satisfaction of a prepublication review obligation will depend upon whether additional material is necessary for context. Since this determination will depend upon the circumstances, it has been left to be decided on a case-by-case basis.

**Question 19.** What would be the standard of judicial review in a lawsuit in which an author challenged the censorship of his manuscript by his former agency?

**Answer.** We believe the standard of review would be a practical matter be the same as under the Freedom of Information Act. See *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367-70 (4th Cir. 1974), cert. denied 421 U.S. 892 (1975). But see *McGehee v. Casey*, *supra*, slip op. at 19-24 (more exacting standard of review applied).

**Question 20.** Since the pre-publication review obligation is a permanent one, and considering the normal turnover due to resignations, retirements, and the like, we can expect the population of former Justice Department officers who are subject to a pre-publication review requirement to increase over the years. What is the Department's estimate of the number of persons subject to such a requirement, and of the volume of anticipated submissions, in 1984? 1985? 1990? 2000?

How many officials with SCI clearance left the Justice Department's employ in 1981? 1982?

**Answer.** In 1981, 387 officials had their SCI clearance terminated. In 1982, this figure was 210. We assume many of these officials left the employment of the De-

partment, but others may simply have no longer required SCI access in order to perform their jobs. Assuming that 200 SCI officials leave the Department's employment each year and that none of these former employees die, then the number subject to the prepublication review requirement would grow from 200 in 1984 and 400 in 1985, to 1600 in 1990 and 3600 in 2000. We have insufficient experience to estimate the proportion of these individuals who would prepare materials for prepublication review in any given year.

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RESPONSES OF MR. WILLARD TO WRITTEN QUESTION SUBMITTED BY SENATOR LEVIN

*Question 1.* Would you please tell the committee whether Presidential Directive 84 and its proposed security measures applies only to officials and employees of the executive branch? If not, would you please indicate what portion of the Directive applies to members, official and employees of the legislative branch?

*Answer.* The directive, and measures to implement it, apply only to officials, employees and contractors of agencies within the Executive Branch that originate or handle classified information.

*Question 2.* Paragraph 5(c) of the Sensitive Compartmented Information (SCI) non-disclosure agreement requires that a person with SCI or classified information access submit for pre-disclosure/publication review any material, including "works of fiction", containing "information concerning intelligence activities, sources or methods", which such person contemplates disclosing to the public or persons "not authorized to have such information". Paragraph 9 of the agreement requires that an individual forfeit any proceeds resulting from the unauthorized "disclosure, publication or revelation of information inconsistent with the terms of the agreement." Would you please tell the Committee whether an author would be required to forfeit the proceeds from his or her work if the author did not submit the work for prepublication review, and subsequently a court determined that the work contains a description of "intelligence activities, sources or methods", but does not contain any SCI or classified information?

*Answer.* Failure to submit material for prepublication review as provided in paragraphs 5-7 would subject the employee to forfeiture as provided in paragraph 9, regardless of whether the material actually contained SCI or classified information. See *Snepp v. United States*, 444 U.S. 507, 511-13 (1980).

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PREPARED STATEMENT OF GEN. RICHARD G. STILWELL, USA (RET.)

Mr. Chairman, it is a pleasure for me to appear before the Committee. I have a short statement that describes the status of Defense Department's implementation of NSDD 84, after which I shall be pleased to answer any of your questions.

It is important to keep in mind at the outset the status of this effort within the executive branch. As of this date, Defense has not issued new regulations to implement NSDD 84, pending adoption of further implementing guidance within the executive branch. Once received, this guidance will be incorporated, as appropriate, into relevant Departmental directives to the extent permitted by law.

Let me begin with that part of NSDD 84 that requires non-disclosure agreements of government employees. Mr. Willard has already explained what those requirements are. It is our intent to require new employees who will be cleared for access to classified information to sign the "Classified Information Non-disclosure Agreement"—the "non-SCI" Agreement—as a condition of such access. This requirement will be implemented prospectively—we will not ask current employees to sign them, unless they are processed in the future for a new level of clearance. With respect to persons with access to Sensitive Compartmented Information or "SCI", we also intend to require employees requiring such access to sign the new agreement, which contains, as Mr. Willard explained, the prepublication review provision. As you may know, the Department has required a similar non-disclosure agreement for all its employees with SCI access since March, 1982. The new non-disclosure agreement will simply replace the one we have been using. Incidentally, we have had no problems in having employees sign the old agreement, and the impact of the pre-publication review requirement has been negligible. Only five documents have been submitted under its provisions since March, 1982.

With respect to the provisions of NSDD 84 regarding media contacts, and procedures for reporting and investigating unauthorized disclosures, we are still awaiting further guidance with respect to our implementation.

I have a few words, however, regarding the NSDD provision on use of the polygraph. As you recall, it requires departments and agencies to amend their regula-

tions, as necessary, to permit appropriate adverse consequences to follow an employee's refusal to take a polygraph examination in the course of an investigation of an unauthorized disclosure. The Committee is no doubt aware that the fiscal year 1984 Defense Authorization Bill, now waiting final action by the Congress, contains a provision which places a moratorium on any changes to the DoD polygraph policy until 15 April 1984. Assuming this is enacted as expected, DoD will be precluded, at least until April 15th, from changing its policies with respect to this aspect of the Presidential directive. I would point out, however, Mr. Chairman, that even though the NSDD permits adverse actions to follow refusals to take polygraph examinations under the circumstances described, it does not require that they do so. Agency heads are still left with discretion to direct such actions, and it is difficult for me to imagine under any circumstances a refusal to take a polygraph alone providing the basis for actions adverse to the employee. In DoD, at least, it would be highly unlikely, as a practical matter, that the Secretary would take action against any employee without independent evidence establishing the employee's culpability. NSDD 84, as we see it, would permit us to consider a refusal to take a polygraph in the context of the case as a whole, but it does not mandate action based solely upon a refusal.

This, then, is where DoD presently stands on NSDD 84. I will be pleased to answer any questions you may have.

#### RESPONSES OF GENERAL STILWELL TO WRITTEN QUESTIONS SUBMITTED BY SENATOR MATHIAS

**Question 1.** Does the Department currently have a program for monitoring the speeches and publications of former officials who are subject to a pre-publication review requirement? Does the Department anticipate any changes in this monitoring program as a result of NSDD-84?

**Answer.** The Department does not have a program for monitoring former officials' speeches and publications and does not intend to institute such a program.

**Question 2.** In its previous submission to this Committee, the Defense Department indicated that in the past five years there have been one, or possibly two, instances of which the Defense Department is aware in which former officials released classified information without authorization. Did either of the former officials involved have an SCI clearance when they worked for the Defense Department?

**Answer.** No.

**Question 3.** Since the pre-publication review obligation is a permanent one, and considering the normal turnover due to resignations, retirements, and the like, we can expect the population of former Department officers who are subject to a pre-publication review requirement to increase over the years. What is the Department's estimate of the number of persons subject to such a requirement, and of the volume of anticipated submissions, in 1984? 1985? 1990? 2000?

How many officials with SCI clearance left the Defense Department's employ in 1981? 1982?

**Answer.** The estimated numbers of former DoD officials (rank not considered) who will become subject to the pre-publication review requirement in each year of the question are indicated below.

Year:	Estimates
1984.....	8,685
1985.....	8,786
1990.....	9,237
2000.....	10,980

The above estimates are based on existing SCI billets, expected increases in such billets, and normal personnel attrition rates.

The number of submissions in compliance with previously existing pre-publication review requirements in the Defense Intelligence Agency (DIA) has been extremely low; no more than one or two a year for the past few years.

The Department does not have available data with regard to the number of DoD officials with SCI clearance that left the Department's employ in 1981 and 1982. This information is not obtainable without an extensive world-wide data collection effort, to include input from the Military Services, Unified and Specified Commands, and the Defense Agencies. Available information shows that in 1982, DIA debriefed or terminated SCI access for 2,147 members of DIA, the Office of the Secretary of Defense, and the Organization of the Joint Chiefs of Staff. A major effort would be required to determine what percentage of these personnel left DoD employment and how many simply terminated access due to transfer to non-SCI positions within the Department of Defense. Figures for 1981 are not available.

**Question 4.** The Justice Department's implementing regulations encourage voluntary submissions for pre-publication review, even by persons not subject to the SCI nondisclosure agreement. Will the Defense Department take a similar position? If so, do your estimates provided in response to the previous questions include the anticipated volume of voluntary submissions? If not, what are the Department's estimates of the volume of such submissions for each of the years listed in the previous question?

**Answer.** The Department of Defense does encourage voluntary submission of manuscripts for pre-publication review and provides for such review service in DoD Directive 5230.9, "Clearance of DoD Information for Public Release." This DoD Directive states that retired military personnel, former DoD employees, and non-active duty members of reserve components may use the review services to ensure that information they propose to publish or disclose does not compromise classified information.

The estimated data provided in response to the previous question do not include voluntary submissions. The Department does not have statistics regarding previous voluntary submissions but anticipates that the number, believed to be low at the present time, may increase in light of NSDD-84.

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#### PREPARED STATEMENT OF WILLARD A. DEPREE

Senator Mathias and Members of the Committee, I am pleased to appear before the Committee on Governmental Affairs to testify on behalf of the Department of State on National Security Decision Directive 84 on safeguarding national security information, issued by the President on March 11, 1983. For the past six months I have been serving as Coordinator of the Department of State working group that was assembled to implement NSDD-84. Some of the members of that working group are here to answer your questions.

As you are aware, NSDD-84 dealt with three main areas: standardized nondisclosure agreements, contacts with the media, and use of the polygraph as a technique to investigate unauthorized disclosure of classified information. Two standardized nondisclosure agreements have been developed, one for persons with access to Sensitive Compartmented Information (SCI) and one for persons with access to general classified information. The texts of the agreements were made public by the Department of Justice on August 25, 1983. We recently received these forms and will be implementing them.

The Department of State has submitted to the National Security Council its preliminary views on media contacts and on use of the polygraph as an investigative technique in the case of unauthorized disclosures of classified information. The NSC is reviewing these materials to ensure that they fall within the terms of NSDD-84.

It may be useful for the Committee to have some background on the current practice of the Department of State in these areas. Since July 1981 the Department has used a standard government-wide agreement which persons with access to SCI have been required to sign. This legally enforceable agreement requires signatories to submit certain materials for pre-publication review in order to assure the deletion of classified information. The obligation continues after such persons leave the government. The Department also has regulations which require current employees to submit for pre-publication review all material which is to be published that is of official concern to the Department. This submission requirement is based on the employer-employee relationship and has been in effect for many years. The answers which the Department prepared in response to Senator Roth's questions would be relevant here.

The Department's policy on contracts with the media is influenced by two somewhat conflicting concerns. The first is the protection of information that is sensitive, relates to the conduct of current foreign relations, has been obtained from a foreign government, or for some other reason must not be disclosed in an unauthorized manner. The other equally important concern is to ensure that our foreign policy is understood by the American people. This latter interest requires that certain information be made public, particularly through the media. Current Department of State policy is that while classified material cannot be disclosed to unauthorized persons, statements of policy and rationale for decisions should be made available. Employees of the Department are to act in a responsible manner and use their judgment to determine if the substance of a conversation should be reduced to writing. Of course, particular bureaus within the Department which deal with sensitive information on a frequent basis may implement more specific instructions.



The Department of State Office of Security investigates a number of matters of concern to the Department, including employee malfeasance and unauthorized disclosure of classified information by Department employees. The Office of Security utilizes a number of investigative techniques to assemble information which would allow an informed decision to be made. In the past, the polygraph has been used when other means of investigation have narrowed the number of persons under investigation and the information derived from a polygraph examination would shed light on the matter. However, submission to polygraph examination has been a purely voluntary matter, with no adverse inferences to be drawn from an employee's refusal to take such an exam. If an employee has consented to an exam, the material developed is weighed along with the other information already gathered and a determination is made based on the totality of the evidence.

I hope that this information allows the Committee to understand current Department of State practice in this area. I and the other representatives of the Department who are here this morning would be happy to answer any questions you may have on this subject.

#### RESPONSES OF MR. DEPREE TO WRITTEN QUESTIONS SUBMITTED BY SENATOR MATHIAS

*Question 1.* Approximately how many individuals in the State Department have the kind of clearance that would subject them to the pre-publication review requirement?

*Answer.* Approximately 4,352 employees, plus 163 contractors have the type of clearance which would subject them to the pre-publication review requirement.

*Question 2.* Since the pre-publication review obligation is a permanent one, and considering the normal turnover due to resignations, retirements, and the like, we can expect the population of former State Department officers who are subject to a pre-publication review requirement to increase over the years. What is the Department's estimate of the number of persons subject to such a requirement, and of the volume of anticipated submissions, in 1984? 1985? 1990? 2000?

*Answer.* At a rough estimate, the number of former Department of State officers who are subject to the pre-publication review requirement may increase as follows: 5,100 by 1984; 5,400 by 1985; 6,900 by 1990; and 10,000 by 2000.

*Question 3.* Does the Department currently have a program for monitoring the speeches and publications of former officials who are subject to the pre-publication review requirement? Does the Department anticipate any changes in this monitoring program as a result of NSDD-84?

*Answer.* While the Department has no absolute requirement that former officers submit material for pre-publication review (other than as they may be bound by current SCI or other non-disclosure agreements which remain in force indefinitely), many officers voluntarily submit their material for review, and this material is reviewed by the Department's Classification/Declassification Center. The Department has also for many years granted access to former Presidential appointees, under E.O. 12356 and earlier Orders, to their papers, on condition that they sign an agreement to submit their notes, MSS, etc. for review. (All officers on leaving the Department are required to sign a Separation Statement which includes an undertaking to safeguard sensitive information they may have acquired as a result of their service.)

**Senator MATHIAS.** Our next panel is Mr. Lloyd Cutler, Mr. William E. Colby, and Adm. Noel Gayler, all of whom are of such eminence and distinction that they need no further introduction.

Gentlemen, have you established your own order of precedence? I have Mr. Cutler first on the list, but whatever is agreeable to you.

**Mr. CUTLER.** I don't think we have had an opportunity to consult, Mr. Chairman, and we will have to leave it to you.

**Senator MATHIAS.** We will take you as you come down the row.

#### TESTIMONY OF LLOYD CUTLER, FORMER COUNSELOR TO PRESIDENT CARTER, WILMER, CUTLER & PICKERING; WILLIAM E. COLBY, FORMER DIRECTOR, CENTRAL INTELLIGENCE AGENCY; AND ADM. NOEL GAYLER, USN, (RETIRED), FORMER DIRECTOR, NATIONAL SECURITY AGENCY

**Mr. CUTLER.** Thank you very much, Mr. Chairman.

My name is Lloyd Cutler. I have had experience that goes back some time in the intelligence production agencies, and during the last year or so of the Carter administration I was an intelligence consumer in my capacity as Counsel to the President. In that capacity, I struggled with some of the problems to which the new directive is now aimed.

I have not presented any prepared testimony. I do have an outline which I think has been made available to the staff and should be available to you.

I am not an extremist one way or the other on this issue. As the chairman just observed, it is a very complex and difficult one. I do think that at least for intelligence agency personnel, producers of intelligence as distinguished from consumers, that some form of prepublication review probably is desirable to insure that national security and especially intelligence security information is not disclosed. But I think the *Snepp* directive goes much too far and, as any regulation in this area of speech should, does not strike a reasonable and satisfactory balance between the Government's need for review and a present or former official's, especially a policy official's, right to speak out on matters of public interest.

The critical step beyond, the one more step that this administration has taken that has never previously been taken, to my knowledge, is to impose a prior review requirement on policymakers in the government: Secretaries and Assistant Secretaries of State and Defense, former White House and National Security people. I don't think a case has been made that prior review of the statements of such officials is necessary to prevent serious breaches of intelligence security. I don't think a factual case has been made.

Beyond that, I think there is a real question whether the *Snepp* case, aimed as it was at a prior disclosure agreement with an intelligence producer, someone who went to work in an intelligence agency, can automatically be extended to all of the intelligence consumers, all of the policymakers, present and past, in the Government. They don't present a *Snepp* type of case or a *Marchetti* type of case.

The public interest in access to the views of policymaking officials, present and past, in the foreign policy, national defense, and national security field is much higher than the public interest in access to the views of former intelligence personnel. That is where I part company with the new directive.

I won't stop to go over the reasons why it is important to protect intelligence information. I think the administration makes a very sensible and a very good case for that. I won't even debate the proposition that for intelligence producing personnel, particularly those who wish to write books, let's say, about intelligence-gathering activities, whether real or fictional, it seems to me the case for prior review for the work, for the new statements or publications those people are going to produce is a reasonable case, and *Snepp* certainly confirms that. Even the lower court's opinion in the *Snepp* case accepted that.

Prepublication review, of course, is never cost-free. All prior restraints involve some suppression of speech. The case is probably a justifiable one, in the case of intelligence producing personnel, par-

ticularly career personnel, who make that bargain when they go into the intelligence services.

It obviously has potential for abuse. I don't think anyone can make the case that there has been abuse to date; that is, censorship going beyond the censorship of intelligence information. But there is always the prospect of the chilling effect, the prevention of even speech that would not have been restrained if it had been reviewed, that exists with any form of standing prior restraint. It is just too much trouble to go through the clearance and the clearance process can operate to prohibit speech.

But I do think the case falls down in trying to establish that policymakers, and no one suggests deliberately, but even inadvertently, do commit serious breaches of intelligence security; and the laws that exist which would punish such breaches, and the opprobrium, the disgrace a policymaker brings on himself when he commits such a breach ought to be sufficient without imposing this prior review requirement.

The prior review requirement, moreover, is wholly impractical when it comes to interviews with the press, when it comes to op. ed. pieces, even when it comes to short articles with very short publication times. The best proof of that is that the Government, to my knowledge, even though it has had these agreements in effect for a while, never has invoked them in the case of interviews or even of opinions of editor pieces. Nothing happens when somebody just gives that.

Beyond that, there are issues, of course, on which policymakers must speak. Let's take, for example, the issue of verification of arms control agreements through so-called national technical means. Over and over again, in the SALT 2 hearings, as one example, the issue arose—and it was a public, debated issue—are our means of verification adequate.

Mr. Willard has said you can speak freely as long as you don't disclose any of this type of information. But simply for a policymaker to express the opinion that our means of verification are adequate, reading these restraints literally, would require prior review, because he is dealing with sensitive compartmented information and its existence. The same would be true as to what we spend on it, what new types of satellites we have, and other things, much of which is highly classified.

I submit no real harm has been done by permitting policymakers to give statements on issues of this type, subject to the criminal laws and the existing orders not to disclose anything of intelligence value, without imposing on them the prior restraint requirement.

Senator MATHIAS. Thank you, Mr. Cutler.

Admiral Gayler.

Admiral GAYLER. My name is Noel Gayler. I am a Retired Admiral of the Navy, at one time Director of the National Security Agency, at one time Commander in Chief of U.S. Forces in the Pacific.

I want to talk this morning not specifically to the directive but to the characteristics of the information needing protection and some practical observations on what is effective in that protection.

I think it is taken as a given, for example, that all U.S. codes and ciphers, and the policy that they should be protected, is beyond dis-

pute. I do observe, however, that large volumes purporting to deal with inside information on this have been published in this country, and only their general inaccuracy has saved them from doing considerable damage.

More important is signals intelligence, derived from reading transmissions. For example, those having to do with the shoot-down of the Korean airliner; information from other than communications; radar, telemetry; the measures and the countermeasures and support measures in this wizard war of electronics, all of that has to be protected at a very high level of classification. Clearly, agents and agent operations dealing with collection of information. In that I would not personally include, however, massive operations. They are bound to be disclosed, or ones having to do with what we call dirty tricks, rather than the collection of intelligence. And certainly counterintelligence methods and results, the way in which spies are detected, deserves high classification.

Characteristics of this kind of information are, first, that you lose it if it becomes knowledge to the adversary; second, that lives are often at stake; third, that the national security interest is involved, not only in peacetime but particularly if there were hostilities. Some of the methods that we have should be reserved and protected against the contingency of military action. The fourth and the most difficult is that some of these things can be deduced rather readily from disclosure of product. For example, if you know what a Soviet pilot said on a particular occasion, it is not much of a deduction to figure that you are monitoring his radio transmissions.

The further characteristic of this sort of information and these sources is that they do need careful oversight for reasons of public policy, but that that oversight should not be public. The methods used have to be consistent with our American ethos and constitutionality. This should be an appeals process, but, unfortunately, outsiders to the intelligence community are not in a position to judge the damage that will be done from a particular disclosure. Then, of course, there is the case where disclosure is in the public interest, and it is certainly the President's right and duty to determine those circumstances.

The policy problems will be covered by other witnesses. I see that I am short on time, so I will come to my bottom line, which is that I believe protection rather than being broad should be selective and narrow, that the distribution of this material should be much narrower than it is at present, that there is a major distinction between SCI and other classified material, that long-term protection is justified only in very special cases having to do with intelligence methods, and that competent monitoring and watchdogging is necessary for these things which are protected from public disclosure. So I would rather that we protect very carefully special categories supervised at an independent level through thoughtful and carefully drawn directives and use the rifle rather than the shotgun approach.

Thank you.

Senator MATHIAS. Thank you.

Mr. Colby.

Mr. COLBY. Mr. Chairman, thank you for inviting us today. I will not repeat my prepared testimony but merely make two overall points, Mr. Chairman.

I have had experience on both sides of this question, enforcing these agreements and having them enforced against me, so I think I can see both sides of the problem and where it is and what it is like.

I support this directive. I support it because it is limited to a very critical kind of intelligence, sensitive compartmented intelligence. This is not a broad provision. It is a very narrow category of very highly sensitive kinds of information. They are carefully controlled in the administration. They are carefully documented in most cases. A careful inventory is kept of this material and, at a certain period, in some cases, it is moved out of the sensitive category into another category, when it becomes less sensitive. So that we are only talking about protection of a particular kind of information.

Now, in that process, the intelligence officers are under a prepublication review requirement under their directive, under their contract. However, in my own case, for instance, I know of one particular case where I was barred from saying something about a particular activity, even though a fellow high officer in the U.S. Government had just written an article about it describing it in considerable detail.

I used his article when I wrote my material and submitted it. I have a question as to whether the Government was actually right in asking me not to. But I do understand that they had a basis for it. I understand their rationale. And I agreed a long time ago to let them make the decision. The question is why should the producer be under that restriction and the recipient of it under no controls of that nature? I think that is not appropriate, and I support the effort to include the recipients of this highly sensitive information in the prepublication review.

Once the material is in the Government's hands, of course, it is going to be looking for all classified material. There is nothing you can do about that. But that doesn't mean that all classified material is being subjected to the prepublication review requirement. It is only recipients of the sensitive information that are covered by that requirement.

The second major point I would make, Mr. Chairman, is that this prepublication contract and the various other things are desperation efforts by a whole series of administrations over the years to compensate for the fact that Congress has never adequately moved to protect our classified information. Congress has walked up to this particular trench on several occasions in the early 1900's, in the 1930's, the 1940's, and each time thrown up its hands and said it can't really define classified information adequately. It can't figure out what kind of restraints and what kind of punishments we should have for the release of it, and, consequently, it left the field wide open.

As a result, the administrations, on a series of occasions, have developed these techniques, such as the contracts, the prior prepublication review and so forth, in a desperate effort to control the leakage that occurs.

The real way that our Government should be protecting its classified information is by some more direct method than going through the legal gimmickry of a contract with its employees. I think there ought to be a clear criminal sanction for the release of classified information.

That could be graduated by the seriousness of the information. It can be applied to various recipients who have a particular position of responsibility. And I would think that a law could be developed which would give us a reasonable criminal sanction for the release of classified information and obviate the need for this kind of legal gimmickry in order to protect our secrets.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Colby.

Mr. Cutler spoke of the possible chilling effect. Of course, that recalls the purposes for which the first amendment was adopted, to promote the freest possible flow of information, of opinion, of argument, discussion, all of which was conceived by the Founding Fathers to be a necessary ingredient to a free Government.

Let me ask, and perhaps it would be useful to ask each of you, because you were all in the same boat on this, what would you do if you were subject to one of these agreements and you had some doubt—Mr. Colby has in part answered this question—but you had some doubt as to whether or not you were required to submit your manuscript? If you guess wrong, you could be facing an injunction, so you are going to be cautious about it. What would be your personal view, if you sat down in your study, took up your pen, and began to meditate on some of your personal experiences? How would you feel? Would you rather submit it for publication review or would you rather tailor the article?

Mr. CUTLER. If I were writing a book, Mr. Chairman, I have seen relatively little difficulty in submitting a book or even let's say an article for The Atlantic Monthly or Harper's to prepublication review. When it comes to giving an oral interview or responding to a request to write something for the opinion of editor page of the Washington Post or volunteering to write something like that for publication 3 or 4 days later on an issue of immediate importance, like the shoot down of Korean flight 007, which almost certainly involves SCI, it seems to me it does have a chilling effect.

Thinking back, if I were back in the White House again, if there had been such an order, or such a rule in effect, in one way it would have helped me. I could have told a lot of reporters I can't give you an interview, period. But there is a public interest in visible policymaking, public officials being accountable to the press. And I don't see how you can accommodate that with this kind of a requirement.

We can't have somebody sitting deep in the NSC basement in the White House fielding questions from the 500 Presidential appointees who the press talks to every day about major international incidents. It just isn't going to work.

A much better method for the Government, if it is this important to protect itself, and I agree it is, is to do what Admiral Gayler said, and that is very sharply restrict the number of people with access to SCI and much more clearly identify in the publications

that circulate within the intelligence community to consumers what is and what is not SCI.

There is a sort of lust to publish and be first with the scoop among the various intelligence agencies who print daily or weekly items of one kind or another that leads too far to indiscriminate distribution of SCI material. I imagine all three of us would agree on that.

Senator MATHIAS. Admiral, do you want to comment on that question?

Admiral GAYLER. The answer has to be personal. I wouldn't have any personal difficulty, I don't think, in distinguishing between SCI and other kinds of information. I would certainly not write in the first instance for publication on SCI.

The other point I think has to do with the permanent nature of the disclosure, where intelligence methods or real secrets of state, if you will, are involved. One can understand a permanent restriction. The rest of it is so evanescent that it seems to me that fairly prompt declassification is usually OK.

Mr. COLBY. Two items, Mr. Chairman. I have submitted material. I have submitted a book and I intend to submit another one. I have submitted articles. I have submitted short pieces, long pieces, various kinds of pieces. I have never had any real problem. I have been asked not to say certain things and I have complied, and I have tried to live up to that agreement. It has not been a limitation on my ability to operate, to talk, to cover subjects, and so forth.

I have gotten rather rapid responses from the agency to my submissions. I have had sensible exceptions to the things that I have wanted to say and not arbitrary ones. There are some that I have disagreed with, but I understand why they did it and I consequently haven't objected.

With respect to the problem of the oral leak, Mr. Chairman, there is a very simple way to solve that one. You asked how are you going to solve that in our Government. It is very simple. If it is attributed and the officer has authority to declassify, fine. It is the unattributed one where you get the real leaks. All you have to do is make that rule and you will have an end to the problem.

Senator MATHIAS. Thank you very much, Mr. Colby.

Senator Eagleton.

Senator EAGLETON. Mr. Colby, I am a little hard of hearing. I think I heard you say you do support this directive.

Mr. COLBY. Yes. I wouldn't support every little word in it, but in general I understand the reason for it.

Senator EAGLETON. I thought I heard you say you found the categories in the directive to be clear.

Mr. COLBY. I think reasonably, yes. Operating under this kind of directive myself, I haven't had any trouble.

Senator EAGLETON. But this directive goes beyond anything that you have operated under, in my opinion. Not only does it deal with SCI—and I guess we are unanimous on the committee that we would agree that SCI ought to be covered—but it deals with the following kinds of materials, and I quote the exact words from the directive. Paragraph 1 deals with materials that are "classifiable." Paragraph 5, subsection c deals with materials that are "informa-

tion concerning intelligence activities." Paragraph 7 deals with materials "subject to classification."

Now, SCI is clear to me, and abundantly clear to you. You dealt with it all your life. But words such as "classifiable," or "subject to classification," or "information concerning intelligence activities," that is less clear to me, much more broad, much more sweeping. Are you comfortable with that language?

Mr. COLBY. We are talking, in the first place, Senator, of a group of people who are given access to highly sensitive material. When they take on that access, they take additional responsibility to protect not only that material but other intelligence activities.

The reason for the "subject to classification" or "classifiable" as a legal term is that if you can find someplace that the thing had not actually been stamped, although it has the name of our principal agent in country Y then you could say it isn't classified, and still it is very important that it should be classified. That is why that phrase is in there.

But the context of the directive I think is fairly clear. It applies basically to people who received SCI clearance and it says that they will keep their mouths shut about intelligence activities. That is essentially what it says.

Senator EAGLETON. It troubles me, because I think the sweep is much broader than SCI—maybe the directive isn't as readily discernible as you make it out to be. Do I interpret your testimony where you were critical of Congress—and we are subject to frequent criticism—

Mr. COLBY. You haven't solved the problem.

Senator EAGLETON. That is perfectly permissible.

Do you favor some sort of official secrets act similar to what they have in Great Britain?

Mr. COLBY. That would be totally unconstitutional, Senator. No, I do not. But I think a reasonable kind of an act where you have to prove that the material was properly classified as part of the indictment, that we could have a statute that would protect classified information. You could have gradations of the seriousness of it, affecting whether it is a misdemeanor or felony or whatever. I think you can work it out.

Senator EAGLETON. Mr. Cutler, let me ask you a similar question.

Mr. COLBY. And it would eliminate the need for prior restraint, incidentally.

Senator EAGLETON. I understand.

Mr. COLBY. That is the benefit of it, that it puts it right smack on the criminal level. If you want to go ahead and publish it at risk, go ahead, take your chances. Today you can go ahead and nothing happens at all.

Senator EAGLETON. Mr. Cutler, as a pretty distinguished attorney, are you at all troubled by some of the phraseology in this directive which I read to Mr. Colby: Paragraph 1 referring to information that is "classifiable"; paragraph 7, referring to material that is "subject to classification," and paragraph 5(c) referring to "information concerning intelligence activities"? Is that language of art that is sufficiently specific as far as you are concerned?

Mr. CUTLER. No, I don't think it is, Senator Eagleton. I think also it is discriminatory in the sense that, as you will notice, in the



agreements signed by persons who receive classified information, not rising to the level of SCI, there is no prior review requirement. They are not subjected to prior review. They are required not to disclose it, but they have no prior review as to classified information falling short of SCI. If you have SCI information, then you have a prior restraint requirement both as to SCI information and lower levels of classified information.

I can understand why they do that, because of the difficulty the user has in discriminating between what he heard from an SCI source and what he heard from a less important but classified source. The answer to that I think is in restricting the circulation of the SCI information and not commingling it with other types of classified information, as is now done.

Senator EAGLETON. Thank you very much.

Senator MATHIAS. Senator Bingaman.

Senator BINGAMAN. Let me just ask, maybe Mr. Cutler, or if either of the other witnesses want to comment, how large a group are we talking about here that are subject to this prepublication requirement? I asked General Stilwell, and I think he said that he thought maybe 100,000 people in the Defense Department would be subject to the prepublication requirement, as I understood his testimony. Is that your understanding?

Mr. CUTLER. This is on SCI?

Senator BINGAMAN. I believe that is what he was referring to. He didn't distinguish exactly.

Mr. CUTLER. I don't know, but I would imagine if it is that high, 95 percent of them must be producers of information rather than users. But this new directive does subject certainly hundreds, and possibly thousands, of nonproducers, but policymakers, in Defense, State, other departments, and the White House to a new prior review, prior restraint requirement, that was never put on them before.

Senator BINGAMAN. With regard to this, I think you also said, Mr. Cutler, in your testimony that there was at the present time no real enforcement of the requirement for prepublication review and that people could write letters to the editor or whatever without having them reviewed and there was really no sanction imposed.

Mr. CUTLER. They do, and no one does anything about it. The clearest case, of course, is while the directive reads in terms of press queries and oral statements to the press, I have never heard of anyone in or out of an administration subject to this requirement who has been even chastised for giving an interview without prior clearance, unless perhaps in the rare case where he actually does disclose some SCI information. But nobody follows this requirement, and nobody will. It is just totally impractical.

Senator BINGAMAN. Assume that is the case, that nobody will follow it and nobody is following it. Do we have a situation where the only enforcement that might take place would have to be a very selective type of enforcement for some type of political or other reason that the matter would rise to such a profile or stature that the Justice Department would get involved?

Mr. CUTLER. For the oral interview type of case, disclosure, or the short leadtime opinion of editor piece, it seems to me there are

going to be very few cases in which this rule will be followed by persons subject to the agreement.

Senator BINGAMAN. Let me ask you one other question in an area that we really haven't gotten into yet and that you didn't get into in your prepared comments. You talked about the chilling effect of the prepublication requirement—would you have an opinion as to the chilling effect of the broadened requirement of polygraph examinations of Government officials and employees that is contemplated in this Directive?

Mr. CUTLER. I have a great deal of concern about polygraph requirements, Senator Bingaman. I appreciate that they have a certain in terrorem effect on employees and the knowledge that there may be such tests will tend to deter people from violating their commitments. But I have so little confidence in the accuracy of polygraphs—we don't accept them in any court, you know. They are not valid under civil service regulations as a basis for discharging any employee—that I hesitate to see polygraph usage rules extended.

I am very glad that I managed to come in and get out of the Government without ever having to be subjected to a polygraph test myself. I don't know what I would have done or how I would have come out.

I did have a few cases in which I had to pass on the use of polygraphs as applied to other people, and the whole subject troubles me very much. I regret any extension of polygraph usage.

Mr. COLBY. Senator Bingaman, may I comment on that?

Senator BINGAMAN. Certainly.

Mr. COLBY. I have taken a polygraph twice. It is a miserable experience, no doubt about it. But we in CIA some years ago reported to one of the committees of the House that we would have hired 150 people but for the fact of what came out after they were put through the polygraph. In other words, we had done the other investigations on them and apparently nothing much showed. It is not that they flunked the polygraph, don't get me wrong. It is what came out as a result of discussions, using the polygraph. And these people would have been hired despite very negative things in their background that we didn't know anything about.

Now this polygraph use is not that kind of a clearance. It is an investigative aid, as was clearly pointed out. It has to be supplemented by other real evidence. So I think there is a case for using it, as one can use various other kinds of investigative aids.

Senator BINGAMAN. I see my time is up. Thank you, Mr. Chairman.

Senator MATHIAS. Senator Eagleton had one question.

Senator EAGLETON. Yes. I have one question for Admiral Gayler. Admiral, would you comment on the dilemma raised by Mr. Cutler in his opening statement; to wit, assume this: Assume the President at some later date comes in with an INF Treaty or a START Treaty. Assume that you think the treaty is very adverse to our national interests, because of inadequate verification. Would this directive constrain you from speaking out vigorously and with specificity as to why you were alarmed by what you deemed to be inadequate verification techniques called for in the treaty?

Admiral GAYLER. I don't think it would be proper to have a public discussion of verification techniques which fall into the category of SCI. In an instance like that, I think that the degree of verification possible should be ascertained, if necessary, independently by appropriate committees of the Congress in classified sessions where they could make an independent judgment as to their adequacy. I do not think that it falls within this category of public advocacy, however.

Senator EAGLETON. Would you feel free to write an article expressing your reluctance to support the treaty because of inadequate verification?

Admiral GAYLER. Senator, this is a tough one for me. I would never write such an article because I think the requirements for verification which most people believe are absurdly high and detailed, that's another subject, but the amount of cheating required to make any difference in a nuclear exchange is so enormous that the question is almost moot.

Senator EAGLETON. Thank you.

Mr. CUTLER. Could I respond just briefly to that, or comment, Senator Eagleton?

I agree with Admiral Gayler, that detailed discussion of the verification techniques that come within SCI probably should be avoided. But let me put to you a hypothetical which may not turn out to be very hypothetical. That is that the administration declines to go forward with a particular type of arms control agreement on the ground that it would not be sufficiently verifiable, and there are sincere people, let us say from former administrations, with experience in the field and up-to-date knowledge of what our techniques are who believe that is wrong, that verification is at least adequate, and that you should go forward with the treaty. And the central issue is the adequacy of the verification techniques.

At the very least, they ought to be able to say that in their judgment these techniques are adequate and give at least some detail. It would have to be detail that did not compromise us in any way, I recognize that, but enough to enter into the debate. This requirement, if it applied to those individuals, if they had to sign a piece of paper like this, I think would be very inhibiting.

Senator EAGLETON. Would you care to comment on that, Mr. Colby?

Mr. COLBY. Senator Eagleton, I have spoken out on the verification subject. I have obviously left out the kinds of detail Admiral Gayler has mentioned. I have received clearance for my statements. All you have to do is submit it and they will take out something which is really something they do not want said for a good reason. But as to your policy position, you can be either for it or against it and they will send it right back to you.

Senator MATHIAS. That raises just one quick question of perception, the public perception. Now after this hearing, more Americans are going to be aware of this preclearance concept. Each of you have been extraordinarily articulate and vocal on a number of subjects. You have contributed to the public education, the public knowledge of a number of issues. In each case it was Lloyd Cutler or Noel Gayler or Bill Colby speaking, and the public accepted that.

What will be the perception after there is widespread knowledge of the fact that there had to be some preclearance? Is that going to change the way the public views what you say and what you write?

Admiral GAYLER. In effect, you are asking if it raises a question of candor, would we be able to be candid?

Senator MATHIAS. Yes. It is the other end of the chilling question.

Admiral GAYLER. I think I am with Mr. Colby, that generally you can talk to the policy matters without getting into intelligence details of the kind that I think should be very carefully protected. I don't think there is any difficulty in saying that this is your belief, that within the necessary limits you can verify this, that or the other, without saying publicly how you think it might be verified.

Mr. COLBY. I have debated this issue with good friends like General Stilwell, publicly, during the SALT II discussions. He was against it and I was for it.

Mr. CUTLER. I would come back to the distinction I drew earlier between the intelligence producers and the policymakers, the intelligence consumers in the Government. But if every time Cy Vance or Warren Christopher or former President Carter or Mr. Brzezinski or Henry Kissinger got into a debate on any of these various subjects, whatever he said, even his oral statements to reporters, that he had to go through somebody sitting in the bowels of the White House, it seems to me that does detract from public credibility about the integrity of the debate.

Senator MATHIAS. Gentlemen, we are under some pressure of time. I am wondering if there are further questions from the committee if you would be willing to answer them in writing for the record.

Mr. CUTLER. Of course.

Mr. COLBY. Yes.

Admiral GAYLER. Yes.

Senator MATHIAS. Thank you very much for being here.

[Mr. Colby's prepared statement follows:]

UNITED STATES SENATE  
COMMITTEE ON GOVERNMENTAL AFFAIRS  
TESTIMONY OF WILLIAM E. COLBY  
DIRECTOR OF CENTRAL INTELLIGENCE 1973-1976  
SEPTEMBER 13, 1983

Mr. Chairman, thank you for your invitation to testify during your committee's review of the Administration's National Security Decision Directive 84. I have long had an interest in the problems of protecting our government and especially our intelligence agencies against unauthorized leaks. I have also had some experience on the other side of the relationship as I have continued to write and speak publicly on the subject of intelligence after my departure from the government in 1976.

The subject of unauthorized disclosure of classified information has a long history in the United States. Congress has on several occasions refused to adopt a broad statute which would provide criminal sanctions for the mere disclosure of classified information. In part, this has been a reflection of Congress' inability to define the subject of classified information. It has only resolved this, in certain cases, by referring to information classified under executive order. In certain specified categories of information Congress has provided for punishment of unauthorized disclosure: restricted data with respect to nuclear information, communications intelligence and, I am pleased to say, the protection of intelligence sources, just

recently. In the background there, of course, is broader legislation referring to espionage or the conscious delivery of secret information to a foreign power, which is clearly punishable.

Even in these cases, however, the prosecution of such disclosures has proved to be very difficult, as the interagency committee whose studies led up to National Security Decision Directive 84 pointed out. The Congress has been helpful in reducing one of these problems through the Classified Information Procedures Act of 1980, limiting the ability of an accused to threaten disclosure of vast amounts of sensitive information in the event he is prosecuted. There are other problems in such prosecutions, however, including the requirement that the government actually confirm that the information released is accurate, which it may not wish to do in certain situations for very good reasons.

As a result of these problems, a series of Administrations have sought tools by which to limit the unauthorized disclosure of classified information. To prevent the publication of the Pentagon papers, an effort was made to obtain a preliminary injunction, which failed although there is language in some of the justices' opinions that such a remedy might be available in the case of "clear and irreparable damage to the United States".

As one of these efforts to reduce the unauthorized disclosure of classified information, the Central Intelligence Agency some years ago developed the concept of the private

contract which would not only bind the employee who signed it not to reveal the information to which he was to become privy but in which he also agreed to submit any future publications for prior review. This arrangement was given Supreme Court approval in the case of Mr. Frank Snepp, in which the court indicated that there might not only be a contract basis for such a requirement but also that the government official in such a sensitive field might be the subject of fiduciary trust as to the information involved. It is this approach which underlies National Security Decision Directive 84, extending beyond the limited intelligence agencies the agreement for prepublication review.

In the form in which the Directive expresses it, it has my full support. You will note that there is a distinct difference between the general commitment to respect the secrecy of the material to which an employee will become privy in the case of ordinary classified information and that covering sensitive compartmented information. Only the latter provides for prepublication review of future works by the employee in question. In my experience, Mr. Chairman, the sensitive compartmented information is quite a limited category of overall information and applies only to matters of truly high sensitivity. The dilemma has been that the intelligence officer dealing with this material has long been under a requirement for prepublication review of any materials he wishes to write on intelligence. The recipient of the information elsewhere in the government, who needs the information in order to do his job at a

high policy or defense level, has not been under a similar restriction. In my own personal experience, Mr. Chairman, I used the writings of a former high official of the Defense Department who wrote a very detailed description of a particular intelligence operation that I wished to cover in my book and repeated only what he published about the operation. In my prepublication review however, the Agency took the position that I should not make these statements and they were taken out of my book. A series of mistakes led to them appearing in one particular edition for which appropriate action was taken against me. If we believe that the intelligence officer should be under the prepublication restriction it seems only right that the recipient of the same information elsewhere in the government should be subject to the same controls.

At the same time, Mr. Chairman, I must confess that it is undignified for the United States to rest upon contract law to protect its sensitive classified information. It is also somewhat illogical for us to be making this effort to protect information against public disclosure while our protections against its private disclosure to other than foreign intelligence officers are so weak. Prepublication review also has many weaknesses both in practice in terms of adhering to a consistent standard over the years and in its reversal of well-established constitutional doctrine that prior restraint should be the last of the actions taken against the publication of opinion and discussion in our free society. While a sharply limited



prepublication review can certainly be justified in the absence of any better way of protecting us against unauthorized disclosure of classified information, I still believe that a frank and direct approach to this problem would be far preferable both in the light of our open democratic society and of the difficulties of consistent prepublication review.

Thus again, I suggest the desirability of a clear criminal sanction for the unauthorized disclosure of classified information. In deference to the problems involved in this subject, and the widespread existence of classified information, it would seem that a proper statute could be drawn which would not have too broad an impact but would still have the main function of deterring some of the more outrageous leaks and disclosures that go on in our government. Thus, it would seem that instead of a broad statute punishing the release of any classified information, a series of graduated steps could be made from a very minor and possibly only administrative sanction for the disclosure of confidential material to a misdemeanor for secret material to a felony for top secret material. Again, this should require only proof that the matter was properly classified at this level and not have as an issue in the case the question of injury to the United States, which admittedly is sometimes difficult to prove in a specific case but clearly exists in the light of the widespread leakage from our Government. In such a case of course arrangements could be made for the voluntary submission of material for prepublication review, the approval of

which of course would constitute a bar to prosecution. And in recognition that much of the so-call "leakage" that goes on in Washington actually consists of background interviews by senior officials with journalists and the senior official actually has authority to declassify the material, a provision could be made that the attributed release of classified information by an authorized official would not be a basis for prosecution whereas unattributed release could potentially place him within the provisions of the statute. A requirement that material given to our press be given in an attributed form in my opinion would reduce the amount of "leakage" by many orders of magnitude.

Mr. Chairman, we have wrestled with this problem of protecting classified information in our free society for many decades. While I sympathize with the Administration in this latest attempt to limit disclosure of the more sensitive material through a requirement for prepublication review, I do believe that we are never going to solve this problem unless we frankly face up to the definitional problem of classified information and establish as a national policy that its unauthorized disclosure is a criminal act. I respectfully suggest that the above technique would be one in which we could move in that direction.

Senator MATHIAS. Our next panel is Dr. David Lykken, professor of psychiatry and psychology, Department of Psychiatry, University of Minnesota Medical School; and Mr. Norman Ansley, chief, polygraph division, Office of Security, National Security Agency.

Gentlemen, do you have a preference as to the order of presentation? Dr. Lykken?

**TESTIMONY OF DAVID T. LYKKEN, PROFESSOR OF PSYCHIATRY AND PSYCHOLOGY, DEPARTMENT OF PSYCHIATRY, UNIVERSITY OF MINNESOTA MEDICAL SCHOOL; AND NORMAN ANSLEY, CHIEF, POLYGRAPH DIVISION, OFFICE OF SECURITY, NATIONAL SECURITY AGENCY**

Mr. LYKKEN. Senator Mathias, and members of the committee, I first want to apologize for the fact that my prepared statement was posted from Minneapolis a week ago and it seems not to have arrived. It may be that I should appear before another committee dealing with the Postal Service before I leave Washington. I have just one copy, and I hope that the full statement will be available for the record.

Senator MATHIAS. This committee also comprehends jurisdiction over the Postal Service. [Laughter.] So you can feel that your complaint has been registered.

However, I should tell you that we have the same problems with the Postal Service. While I was away, a week ago, I mailed urgent correspondence back to my office, and I thought that when I arrived back yesterday it would all be taken care of. I find that I arrived with the envelope. [Laughter.]

Mr. LYKKEN. Thank you for your understanding.

Very briefly, I have recently surveyed all of the scientific literature that I could find relating to the accuracy of the polygraph test. This literature is of extremely variable quality. Some of it is awful, frankly; awful.

It is my belief that the scientific studies, or the alleged studies on which these claims of high accuracy, 95, 97 percent are based is research which would not pass the minimum standards for a sophomore taking one of my classes at the university.

I feel that the only scientifically credible research consists of three studies, all of them published since 1976, all of them agreeing with one another, so that we tend to be more confident of each of them. These studies seem to indicate in brief that the polygraph procedure at best is wrong about one-third of the time. Moreover, the studies are all in agreement in showing that the polygraph test is biased against the truthful or innocent person.

As many as 50 percent of the known, later-proved-to-be innocent suspects studied in these three experiments actually failed the lie detector.

I am not aware of any scientifically trained person who is not personally involved in the polygraph industry who does not accept in general terms my reading of this literature. Scientists don't tend to take opinion polls, but the basic science, to the extent there is one, underlying polygraphic interrogation is the field called psychophysiology. The national organization of specialists in this area is the Society for Psychophysiological Research. The members of that

organization were fully aware of my views about this issue when they elected me president of the society in 1980, and I take that as some kind of scientific endorsement or agreement on the part of the society of my reading of the literature.

It is important to realize that there is no scientific evidence at all on the accuracy of the type of lie detector test or polygraph test that is used in screening job applicants. The only evidence we have concerns the specific issue tests that are used in criminal investigations where a particular allegation is made and the question is whether the subject is lying or telling the truth when he denies it.

I would like to mention that there is a great mystique or mythology about the lie detector in this country. Its outcome is usually very simple, seductively simple. The person is lying or he is telling the truth. And there is a gresham's law effect of this kind of simple direct outcome. Agencies and other authorities that use the polygraph I believe tend to, as a result, slight other more expensive, more time consuming, but more accurate sources of information, such as background investigations.

Now, based on all these considerations, the President's directive worries me a lot because of the test bias against innocent persons. Honest officials and other employees of the Federal Government are going to be victimized, stigmatized. Their careers are going to be blighted. And it is important to remember that their abilities and experience will then be lost to the Government because of mistakes on the polygraph.

The polygraph test is biased not only against innocent people but it is specifically biased against those persons with the highest moral standards: Deeply religious people, people who are more than usually conscientious. There was a study done at the University of Pennsylvania several years ago which showed that highly socialized people are more likely to fail a polygraph test whether they are innocent or guilty; that poorly socialized people, on the other hand, are more likely to pass polygraph tests where they are lying.

Senator MATHIAS. By socialized people you mean people with a good social adjustment?

Mr. LYKKEN. That have high social standards, that have a strong sense of conscience, that have a clear sense of right and wrong, and who govern their behavior accordingly.

So that increased use of the polygraph by the Government may have the opposite effect to that intended: Weeding out of Government service the more conscientious people; weeding out the West Point graduates with their tradition of the honor code, which in my opinion makes them especially vulnerable to failing the polygraph test, even though they are telling the truth; and substituting, replacing them with the poorly socialized and even with the borderline psychopath.

Finally, because I have no doubt at all that the polygraph test can be beaten by sophisticated people and that it is beaten frequently, both in the Federal situation and also in the criminal justice system, the idea that our security agencies already depend heavily on the polygraph test I think is a serious cause for concern.

The CIA's extensive use of the polygraph has been mentioned. The CIA's notorious alumnus, was it Edwin Wilson, must have

passed the lie detector many times administered by the agency prior to his going to work for the Government of Libya, for example.

Now that beating the lie detector has become or is threatening to become almost an open sesame to official secrets in Washington, it seems to me that the KGB, if they are all that they are supposed to be, must already be running classes in how to beat the polygraph. It may be even that they are using my book as a text.

Thank you.

Senator MATHIAS. Mr. Ansley.

Mr. ANSLEY. Thank you for the opportunity to appear before you, Senator Mathias, Senator Eagleton, Senator Bingaman.

I do not have a prepared text. In the interest of time, I will not read one. I should like to comment that I did vote for Dave Lykken as president of the SPR, but not as an endorsement of his views, but because he is an eminent scientist in many other fields, too. [Laughter.]

I have come here really to answer any questions you may have about the Government's use of the polygraph. I would be happy to do so.

Senator MATHIAS. Let me start out by asking Dr. Lykken what I suppose the opposite of the chilling effect I was referring to under the prepublication clearance provisions that we were discussing with the last panel. Is there a warming effect in the polygraph? This is in essence what I gathered from Mr. Colby's comment, that the administration of the polygraph test is a stimulant to truth-telling, that it may not, as you suggest, detect every liar, but that it can motivate some subjects to tell the truth.

Mr. LYKKEN. Yes, Senator. I think there is no doubt, No. 1, that periodic administration of polygraph tests has a deterrent effect on some people. Employees in stores where polygraph tests are used no doubt are likely to keep their hands out of the till if they know they are going to have to face the machine every 6 months.

The other aspect of this is that the polygraph test is a remarkable inducer of confession. It is an extremely stressful experience to be hooked up to this device. It functions effectively as a kind of bloodless third degree. It produces damaging admissions. It produces confession.

What Mr. Colby referred to, as I understood him, was that in the CIA practice, many people under the stress of this examination had been led to make damaging admissions that hadn't been revealed before and that were useful in screening them out.

The question has to be raised, though, whether with increased dependence on this procedure, this will continue to be possible, because after all, the confessional aspects of the polygraph test depend upon a kind of ignorance or naivete on the part of the subject. A KGB agent, for example, is not going to be so naive that he will let the wiles and techniques of the polygraph examiner lead him to blurt out the fact that he is working for the other side. It is only the gullible, it is only the people who have a real desire to come clean and be straightforward I think who are most inclined to make these sorts of damaging admissions under the stress of the polygraph.

It is useful in police work, for example, because it leads a certain proportion of rather naive criminal suspects to come clean. It sometimes leads to false confessions, which is another problem. But whether extensive use of the polygraph and extensive polygraph usage and increased sophistication on the part of people who it is going to be used on will allow this sort of situation to continue I think is problematical.

Senator MATHIAS. In other words, you are saying that familiarity breeds contempt.

Mr. LYKKEN. It has in my case, yes, sir.

Senator MATHIAS. Do you want to comment on that, Mr. Ansley?

Mr. ANSLEY. I think that we would share the experience with Mr. Colby, that the polygraph has detected attempts at penetration of our intelligence agencies, that they have received admissions in support of the reactions on those charts, indicating that individuals were attempting to penetrate the agencies for the purpose of intelligence activities against us. And it is certainly the primary reason that we use the polygraph, that it has a deterring effect on people who might be considering engaging in espionage against the United States. The deterring effect is perhaps one of the primary reasons to use it on an aperiodic basis rather than a scheduled basis.

Senator MATHIAS. What about your own experience? If you have the polygraph available, how does that affect your judgment as to other investigative techniques that you may have also available?

Mr. ANSLEY. It is very important to realize that the polygraph is just one portion of the total investigative picture. It never stands alone. We do not conduct a polygraph examination in a specific case until there has been a thorough investigation, as thorough as circumstances permit. Moreover, the use of the results of the polygraph is considered along with the results of all the other investigation activities that have taken place. It doesn't stand apart or by itself. The total picture is what the people have to consider, not just polygraph results. They never stand alone.

Senator MATHIAS. Could it become a crutch?

Mr. ANSLEY. It hasn't become a crutch yet, in more than 30 years of use.

Senator MATHIAS. My question is, Could it?

Mr. ANSLEY. Could it? Possibly.

Mr. LYKKEN. If I could just comment briefly on that. The House Committee on Oversight held hearings 2 or 3 years ago on this issue of the use of the polygraph by the Federal security agencies. My reading of their report was that the committee came to the conclusion that there was excessive dependency upon the polygraph test, slighting other sources of information.

Now that is a matter of interpretation, but that was my understanding from reading the report, that that was what the committee concluded.

Senator EAGLETON. Dr. Lykken, can you comment on the administration's attempt to expand the use of the polygraph in these ways: Employees may be required by an agency to submit to a polygraph in unlawful disclosure cases and appropriate adverse consequences could follow, including termination of employment?

Mr. LYKKEN. I think that the result of that requirement will mean that people suspected of leaking information who are innocent of leaking information will find themselves strapped into a polygraph machine, will find themselves in at least some cases being told by the examiner that the polygraph indicates that they are deceptive, and will be victimized and stigmatized. And if they are important employees, people with long years of service and training for the Government, their abilities will be lost to the Government as a result.

I can't believe that the net effect, the net benefit of this regulation to the protection of national security or to the efficient operation of the Government will be positive.

Senator EAGLETON. You mentioned three studies since 1976. Each study tracked the other study, giving some credibility to the previous one. Did you cite those three studies in your prepared statement?

Mr. LYKKEN. Yes, they are cited there.

Senator EAGLETON. So that will be part of the record?

Mr. LYKKEN. Yes.

Senator EAGLETON. Senator Bingaman read a portion of a quote from the Acting Secretary for Health Affairs at the Department of Defense. I would like to read a little fuller version of that quote and ask each of you to comment on it, both Dr. Lykken and Mr. Ansley. This comes from Dr. John F. Berry, M.D., Acting Secretary of Health Affairs, Department of Defense, dated December 16, 1982:

A preliminary review of the literature reveals that the polygraph has some limitations of which you should be aware.

He is writing to Mr. Weinberger.

No machine can detect a lie. Even setting aside the argument that the theory is flawed, there are accuracy problems. In one test, the polygraph accuracy is 62 percent. In another, the accuracy is 72 percent—you get a 50 percent accuracy by tossing a coin—The polygraph misclassifies innocent people as liars.

Dr. Lykken, do you substantially agree with that statement by Dr. Berry?

Mr. LYKKEN. I agree with it entirely. It should be understood that these figures are based upon studies of polygraph tests administered in real life situations to real criminal suspects. There are difficulties in doing that kind of research, which is one reason that there is so little good research. The studies that I consider to be scientifically credible lead to exactly the kinds of conclusions that Dr. Berry has summarized, yes.

Senator EAGLETON. What is your comment, Mr. Ansley, on Dr. Berry's letter to Secretary Weinberger?

Mr. ANSLEY. It was very obviously a preliminary review of the literature because there are some 50 other studies that have contrary results. I would say that of those studies where we follow up real life cases, and there are studies that amount to the followup of more than a thousand real cases, both in Federal and in law enforcement areas, the followup has indicated a validity rate of well above 90 percent in all of them.

In the Commonwealth of Virginia, for example, an extensive study was done under Edwards to follow up large numbers of cases.

The polygraph results for both truthful and deceptive were in keeping with the disposition of those cases. That does not discount the laboratory studies, however, which people like to do. There have been significant studies, many financed by the Federal Government—two done by Dr. Lykken, as I recall, for arms control purposes—where his results were 93 percent validity in one study and the following year, 1960, when he tested people again and taught them how to engage in countermeasures, his detection rate was 100 percent.

I should mention also that there were many other studies. He mentioned a weakness in screening. There is a great confusion between techniques and applications. A polygraph technique like an intelligence test or aptitude test comes in specific formats. We apply these formats. Each one has its own utility in specific kinds of applications. In screening, we have certain formats we use. Those formats have been independently verified by scientific studies. To say that there is no validity to screening is simply talking about the use of the polygraph, rather than the studies.

Senator MATHIAS. May I call upon Senator Bingaman, not only to address his questions but to assume the Chair. Senator Eagleton and I have some pressing engagements and we have to leave at this point.

Thank you very much, gentlemen, for being here.

Senator BINGAMAN [presiding]. Let me just ask one question here of either of you gentlemen and then we can adjourn the hearing.

The purpose of this directive, as I understand it, is to limit the disclosure of classified information that should not be disclosed while at the same time not restricting the access or release of unclassified information. Now, Mr. Cutler referred to, I think he used the phrase, interregnum effect of polygraph examinations. I am also concerned about this effect of polygraph examinations. When applied to the issue of disclosure of information, will it in fact discourage an employee from talking so that the safe thing for an employee to do will be to disclose nothing, so that the question never arises and the danger of being polygraphed about it never arises? If so, won't there be a substantial reduction in the flow of information?

Could I just get each of you to comment on that, please?

Mr. LYKKEN. I think that the fear of the polygraph on the part of many people is considerable and that the likelihood of having to submit to a polygraph test would indeed have a chilling effect on the behavior of all those persons who were not sophisticated enough to know how to cope with this technique. And I would like to say again that my concern about this contemplated action of the polygraph is not just a concern for the innocent people who are going to be victimized, but it is a concern that some scoundrels, some people with very malignant intentions, with respect to national security, will be the ones most likely to get through this very porous screen.

I think the polygraph test victimizes innocent people who are unsophisticated but that it errs in the direction of passing liars who know how to beat it. I think both sides of that picture have to be taken into account.



I must, if you will permit me, comment on something that Mr. Ansley said about all this research, other research that indicates high validity.

The Edwards study that he referred to, for example, is discussed in my written report. Briefly, what that study involved was asking the licensed polygraph examiners in the State of Virginia how accurate their techniques had been the year before, how many tests they had given, how many had been verified to their satisfaction, and of those how many had been correct. The average claim was 97-odd percent.

I suggest to you, Senator, that a similar study carried out with the licensed astrologers in the State of Virginia would have been likely to produce the same result.

Senator BINGAMAN. Mr. Ansley.

Mr. ANSLEY. I cannot speak for the Government as to the policy or the results that might occur with the expanded use of the polygraph. I can only speak as a practitioner.

First, I have to say there is no practical evidence to indicate we are misclassifying large numbers of liars as that would certainly be obvious in the short term. But in the long use of the polygraph in the Government, it is the opposite. We find a high degree of practical evidence as to the high moral character of people we select. I can say the intelligence agencies have a great many scientists, a great many graduates of the leading universities, happily a great many people of high moral character. The polygraph really has no adverse effect in selecting those people. Quite the opposite, I find people of high moral character are the easiest and best people to test when it comes to giving polygraph tests.

I think that Dr. Lykken is just completely 180 degrees off center on that. I do have to say I believe the studies that support the validity of the polygraph far outnumber those that do not. They have been conducted by distinguished scientists, not by the practitioners. I think those, too, need to be looked at as thoroughly as the three studies he cites.

I want to comment on a couple of the studies. One of the studies they hold up as saying the polygraph is not very valid was reported in the literature as having a very low degree of validity and reported as though it was polygraph examiners who did it. In fact, it was students who did not yet have a day of practical experience. Moreover, when you would normally take a group of X-rays to a doctor and ask him to predict what was wrong with this person before they operate, he wants to see all those X-rays, all seven or eight. These students were allowed to study one chart out of five or six or seven charts conducted in the course of the examination. That is typical of the other two studies, too, where they didn't see all the charts. That is interesting scientifically, but it is not a very good measure of how valid the polygraph test results are.

Mr. LYKKEN. It is also mistaken, Senator.

Senator BINGAMAN. We appreciate your testimony very much.

[Mr. Lykken's prepared statement follows:]

The American Behavioral Scientist

(in press)

Detecting Deception in 1984

David T. Lykken

University of Minnesota

In God We Trust: Others We Polygraph

-- Motto on an office wall, The Pentagon, Washington, D.C.

The United States Government has become increasingly dependent upon the so-called "lie detector" or polygraph test to keep its secrets, foreign and domestic. In 1979 a committee of the House of Representatives discovered that federal security agencies -- the CIA, the NSA, the Defense Intelligence Agency, and others -- for years have been relying upon polygraph testing to screen case officers, agents, and spies (Hearings, 1979). In January of 1982 the Pentagon's Defense Resources Board, including such high officials as the Secretaries of the Army and the Air Force, met to discuss cost projections for the Administration's re-armament program. A highlight of that meeting, that the program would cost some \$700 billion more than the public had been told, appeared the next day in the Washington Post. Secretary Weinburger, outraged by this leak, required all members of the Board to submit to polygraph tests in (vain) hopes of discovering its source (Fialka, 1982.) Undeterred by this fiasco, President Reagan, on March 11, 1983, signed an executive order requiring hundreds of thousands of federal employees to undergo lie detector tests in any investigation of information leaks; those who refuse are to suffer "adverse consequences" (Safire, 1983).

In the American criminal justice system, prosecutors in many parts of the U.S. rely on the results of polygraph tests in deciding which suspects will be

prosecuted and who will be set free. In a number of jurisdictions, rape charges will not even be investigated until the alleged victim has managed to pass a lie detector test<sup>1</sup>. Nearly half of the states admit polygraph results as evidence in court providing both sides have so stipulated in advance of the testing<sup>2</sup>. In Massachusetts and New Mexico either side can introduce such evidence without prior stipulation. In 1983, the California Legislature passed an "emergency statute" which prohibits introduction of polygraph findings in criminal trials without the agreement of both parties.

Meanwhile, in the private sector, some 30 percent of the Fortune 500 companies are reported to make use of the polygraph for pre-employment testing, for periodic screening of employees, or in the investigation of possible employee theft, sabotage, or other misconduct (Belt and Holden, 1978). At least 8,000 polygraph examiners are now practicing in the United States, trained in one of dozens of polygraph schools (26 in Florida alone!) that offer courses of instruction lasting six to eight weeks<sup>3</sup>. A daily television program, "Lie Detector", hosted by the celebrated attorney, F. Lee Bailey, urges potential participants to: "Bring us your question. We'll give you the truth!" Volunteers wishing to affirm or refute some allegation that is important in their own lives are tested right in the studio and then dramatically endorsed as truthful or denounced as liars by Mr. Bailey, after he and polygrapher Ed Gelb, a past-president of the American Polygraph Association, have examined the polygraph charts. This program, Mr. Bailey proudly asserts, is dedicated to the principle that "every American has the right to prove his innocence" -- by submitting to the lie detector.

An older principle, one apparently not taught at Mr. Bailey's law school, held that Americans do not have to prove their innocence, that one is assumed to

be innocent until one's accuser, within the constraints of due process, has managed to prove one's guilt. Yet, if there exists a simple test which, with sure and scientific accuracy, can separate the truthful from the liars then, one must admit, that old Constitutional principle indeed may be passé.

The leading textbook of lie detection claims that, in competent hands, the polygraph technique leads to fewer than one percent errors (Reid and Inbau, 1977, p.304.) In 1982, a San Francisco television station (KRON-TV) did a survey of the lie detection firms in the Bay Area and found that their claims of accuracy ranged from 95 to 100 percent. David Raskin, one of the handful of practicing polygraphers who have training in psychology or psychophysiology, has asserted that the lie detector is 95 percent accurate "even on convicted felons" (Dunleavy, 1976.) As Stanley Abrams, another psychologist-polygrapher, points out, not the Rorschach, the Minnesota Multiphasic Personality Inventory, nor any other psychological test in common use can separate the truthful sheep from the deceptive goats with anything approaching such validity (Abrams, 1977.) Abrams might have added that no jury of 12 lay persons could be expected consistently to separate the innocent from the guilty, even after hearing masses of evidence and deliberating perhaps for days, with 99 percent accuracy. If the lie detector is as accurate as the industry claims, must we not in the interests of justice replace the jury box with a polygraph machine? -- in the interests of efficiency replace protracted and expensive trials with a simple and impartial test? Since the internal logic of his position seems to argue the demise of his profession, one can only admire defense attorney Bailey's selfless advocacy of the polygraph test.

## WHAT IS A POLYGRAPH TEST?

The polygraph instrument used in lie detection records four channels of information on a moving paper chart. Two of the four pens are connected to pneumatic tubes strapped about the examinee's chest and stomach; these pens record thoracic and abdominal breathing movements. A third pen is connected to an ordinary blood pressure cuff on the subject's upper arm. At the start of a question series, this cuff is inflated to partially occlude the flow of blood in the arm and then, with every heartbeat, the pressure in the system varies about this arbitrary mean value. Thus, the "cardio" pen deflects with each heartbeat and the entire tracing moves up or down with transitory changes in blood pressure. The fourth pen is connected electrically to metal electrodes attached to two fingers of the subject's hand. This is the "electrodermal" channel which records wave-like changes in the electrical resistance of the skin that are in turn related to the sweating of the palms. Another instrument, known as a "voice stress analyzer", has become popular in recent years for purposes of lie detection. Because they require no attachment to the subject, voice analyzers can be used covertly, even over the telephone, and are used, e.g., by insurance adjusters for evaluating the truthfulness of claimants.

Contrary to popular belief, there is no such thing as a literal lie detector because there is no distinctive involuntary reaction that people produce when, and only when, they are lying. The polygraph and, possibly, the voice analyzers are sensitive to emotional disturbance or stress but they are intractably ambiguous with respect to the nature and source of that stress. An experienced examiner may be able to determine from the polygraph chart that your reaction to Question A was stronger than your reaction to Question B but no one, no matter

how experienced, can tell from the chart why you responded as you did, whether the question made you feel guilty, or frightened, or angry, or indeed whether you artificially induced the reaction by, e.g., biting your tongue after answering the question. For the first 30 years or so of the polygraph's history, examiners assumed that a strong emotional reaction to an accusatory question was ipso facto evidence of guilt and the attempt to deceive. In a tract published in 1730 Daniel Defoe expressed the same idea: "There is a Tremor in the Blood of a Thief that, if attended to, would effectually discover him". What the early polygraphers, like Defoe, failed to recognize is that there is also a tremor in the blood of the innocent accused -- and the polygraph cannot detect the difference.

In the late 1940s, because of this ambiguity of the polygraph's message, a new question format was developed that has now become standard in the industry (Reid, 1947.) Because of the discomfort of the blood pressure cuff, only about ten questions can be asked in any one series before the cuff pressure must be released for a time. In the modern "control question" polygraph test, these questions are a mixture of three types: (1) irrelevant questions (e.g., "Is today Tuesday?") used as buffers or strain relievers; (2) relevant questions (e.g., "Did you shoot William Fischee on May 21st?") which are the true focus of interest; and (3) control questions (e.g., "Before two years ago, did you ever deliberately hurt anyone?"). It is intended that the subject will answer these control questions in the negative and, moreover, that his answer will either be deceptive or at least that he will be uncertain as to whether his answer is really strictly true. These questions are developed and reviewed with the subject during the pretest interview and the examiner attempts to convey the impression that the examinee will be regarded suspiciously or placed in a bad light if

he does not answer each control question, "No." The ten questions in a typical control-question test will include three relevant questions interspersed with three control questions and the entire list will be repeated from three to five times.

The control question test rests on two basic assumptions: First, it is assumed that a guilty person who must answer the relevant questions deceptively will be most disturbed by these questions and therefore that the polygraph chart will show the largest perturbations following the relevant questions. Secondly, it is assumed that an innocent person who answers the relevant questions truthfully will be more disturbed by the control questions than by the relevant ones (see Lykken, 1981, for a more detailed analysis.) Many polygraph examiners still arrive at their conclusions intuitively, combining what they know of the case facts, their observations of the subject's behavior and demeanor during the test, plus what they infer from the polygraph recordings, into a global or clinical judgement of truth or deception. A growing trend among polygraphers, however, is to try to base the conclusion solely on the charts, employing toward this end one of several relatively objective methods of "numerical scoring". Each pair of reactions to adjacent relevant and control questions are compared, separately for each channel. If the response to the relevant question is larger, a score of -1 or -2 is awarded; if the response to the control question is larger, the score may be +1 or +2. If the control and relevant response s are about equal, the score is zero. These scores are summed over all 4 channels, over all pairs of questions and over all charts. If the total score falls within an arbitrary range about zero (e.g., from -6 to +6), the test is considered to be inconclusive. Negative scores outside this range (e.g., -7 or larger) are construed to indicate deception. To pass a control question poly-

graph test, one must achieve a positive score (e.g., +7 or larger) by reacting rather consistently more strongly to the control questions than to the relevant or "Did you do it?" questions.

#### HOW ACCURATE IS THE LIE DETECTOR? PART I.

As with any psychological test, we can ask two separate questions about the lie detector: (1) How reliable is it? (i.e., how consistently does it yield the same results?), and (2) How valid is it? (i.e., how accurate are its results?). The reliability of the lie detector could be measured either by having the same subjects tested more than once or by having the results of a single testing scored independently by different examiners. Reliability is important because a test that is not reliable cannot be valid. The only voice stress analyzer that has been extensively studied by independent researchers, the Psychological Stress Evaluator or PSE, fails by the reliability criterion. Different trained examiners apparently cannot agree about the interpretation of PSE charts at much better than chance levels (Lykken, 1981, pp. 151-161).

To assess the validity of the lie detector, one must have an independent criterion of "ground truth" -- of who was telling the truth and who lying. This is easily done in the laboratory where one need only to instruct one group of volunteer subjects to lie and another to be truthful. But one cannot simulate in the laboratory the kinds of emotional stresses nor impose the serious consequences that are associated with the lie detector test in real life; since the procedure depends directly upon the subject's emotional reactions, this is a fatal limitation. The accuracy of the lie detector in real life applications can properly be studied only in real life situations where it is the subject



alone who, privately, decides whether to be truthful or deceptive. Ground truth here is harder to determine. Thanks to the extensive current use of the polygraph, however, cases can be collected in which the respondent subsequently confessed his guilt, showing that he had been deceptive when tested, and other cases where the respondent is subsequently cleared of suspicion by the confession of some other person. Another method has been to submit dossiers of evidence on each tested suspect to a panel of experts (e.g., criminal lawyers or prosecutors) and use the panel's judgment as a criterion. A third method makes use of jury verdicts reached after conventional criminal trials. None of these criteria is perfect. Suspects who eventually confess may not be representative of guilty suspects generally. Juries under our traditions are presumably biased toward Not Guilty verdicts. Even panels of experts are fallible especially since the dossiers of evidence that can be accumulated in criminal cases are often not dispositive. As is common in applied research, therefore, it is difficult for any single study to produce definitive results and one looks instead for general agreement among properly designed studies using different methods.

All of us are "human lie detectors", capable of assessing the credibility of witnesses with accuracy at least better than chance. Experienced polygraphers undoubtedly have similar abilities and, when the examiner who administered the test also scored the charts, we cannot tell what portion of the accuracy achieved was due to his assessment of the case facts or the subject's behavior rather than to the polygraph findings themselves. Therefore, another requirement for the scientific study of the validity of the lie detector is that the charts must be scored independently ("blindly") by a second examiner who knows nothing about the case or the respondent. Finally, it is necessary that the charts evaluated must be an unselected or representative sample of polygraph

tests administered in the given setting. If the verified charts that are to be re-scored are selected by a polygrapher who makes sure that those from guilty suspects ought to be scored "deceptive" and that those from innocent suspects look like "truthful" charts should look according to polygraph doctrine, then obviously the subsequent re-scoring will give a false impression of high accuracy. Such a study actually estimates polygraph reliability rather than validity -- the extent to which the polygraphers doing the re-scoring agree with the polygrapher who selects the charts in the first instance. The reliability of psychological tests is normally higher than the validity; when the apparent validity approximates the known reliability of scoring, this is a clue to the possibility that the charts have been improperly pre-selected.

That such egregious violations of proper experimental design should occur in alleged studies of polygraph validity should surprise no one and for at least two reasons. First, the polygraph industry in the United States is large and profitable and when polygraphers themselves assess the validity of the technique on which their livelihood depends, it is asking a lot to expect them to resist tipping the scales in favor of a good result. Secondly, most polygraphers are innocent of any training in psychological research techniques or in the rudiments of scientific method; many invalid studies of polygraph "validity" should be attributed to scientific naivete rather than to deliberate cheating. Before proceeding to a consideration of the scientifically credible studies of lie detector accuracy, it will be worthwhile to first clear the decks by briefly considering a few that are less credible.

A witness at hearings before a U.S. Senate subcommittee in 1977 was a Vermont physician named J.W. Heisse, Jr., the president of an organization of voice stress analysts, persons who employ the PSE "voice stress" device in giving

lie detector tests to employees and job applicants for their clients in the business community. Heisse reported a study purporting to show that the PSE detects lying with 96 percent accuracy (Hearings, 1977.) The study was conducted by inviting 12 PSE examiners to submit charts from verified cases to be re-scored "blindly" by other examiners. Fifty-two such charts were "selected" (27 of them provided by Heisse himself) and submitted to 12 PSE examiners for re-scoring. Since some of the re-scorers had also submitted one or more charts, there should have been at least 11 re-scorings of each chart but, for unexplained reasons, only 5 re-scorings are reported. The faults of this study are legion. First, the "verification" of the tested person's actual guilt or innocence was essentially left to the original examiner's opinion. Secondly, if all of the re-scorers actually re-scored all of the charts, as should have been done, then more than half of these re-scorings are inexplicably left out of account. Third, and fatal to the entire enterprise, the original charts to be re-scored in this study of PSE "validity" were selected first by the original examiners themselves and then apparently selected again by Heisse. If a professional PSE examiner is invited to submit for formal re-scoring verified charts from his collection, can we really suppose that he will offer charts that he scored incorrectly in the first instance? If Heisse, who is conducting this study to confirm the accuracy of this technique from which he makes his living, receives a verified guilty chart that he would score as "truthful", or a verified innocent chart that he would score as "deceptive", are we to suppose that he would nonetheless submit this mischievous chart to his 11 colleagues for re-scoring? Studies of the PSE by investigators having no personal stock in the outcome have consistently found that pairs of trained "analysts" cannot agree in their scoring of a truly unselected run of charts at much above chance

levels. Studies reported by professional PSE examiners, untrained in scientific method, have consistently reported remarkable validity. The reader can be left to draw his own conclusions.

A number of polygraph studies must be rejected from serious consideration for similar reasons. The inventor of the control-question procedure, the late John Reid, attorney and founder of the Reid College for the Detection of Deception in Chicago, and his then chief examiner, Frank Horvath, published such a study in 1971 (Horvath and Reid, 1971.) These authors obtained 75 verified polygraph charts from the files of the Reid firm and then had 40 of them independently re-scored by 10 trained polygraph examiners, 7 of whom had more than one year's experience in the polygraph business. These 7 experienced examiners, on the average, scored about 91 percent of the 40 charts correctly. But 35 of the original 75 charts were never re-scored at all, either because they were "dramatically indicative of truth or deception" or because they were "uninterpretable by even the most skilled examiner". It is plain that these authors did not mean to attempt a deliberate fraud since, if that was their intention, they would never have mentioned the 35 excluded charts at all. But it is also plain that the 91 percent "accuracy" achieved by the blind scorers was not an estimate of the typical validity of polygraph testing within the Reid organization; instead, it provides an estimate of the extent to which examiners trained in the same school of chart interpretation are able to agree in their scoring with one another -- it is an estimate of reliability rather than validity. Since it is based on selected rather than representative charts, it may be an over-estimate even of inter-scorer reliability.

Three similar studies from the Reid group, published in the same non-refereed journal and lacking sufficient documentation for a reader to be sure

exactly how they were conducted, employed a design like that of Horvath and Reid and seem to have suffered from similar defects (Hunter and Ash, 1973; Slowick and Buckley, 1975; Wicklander and Hunter, 1975.) Hunter and Ash, for example, had 7 polygraphers re-score 10 verified truthful and 10 verified deceptive charts from cases tested by polygrapher Hunter; the method of verification is not specified. The blind re-scoring agreed with Hunter's original scoring about 86 percent of the time. It is not stated in the article how the charts were selected and the second author, a psychologist, has assured me that he did not select them on any basis. One can assume, however, that Hunter, a professional polygrapher, did not offer for re-scoring in this study any charts on which his own original scoring had been proven incorrect by the subsequent criterion of ground truth (whatever that might have been).

The most recent example of such a psuedo-study of polygraph validity was published in the trade journal Polygraph in 1982 by a polygraph examiner employed by the Virginia State Crime Laboratory (Edwards, 1982.) This 41 page article, with its 12 bar diagrams and its statistical appendix, describes a study in which all licensed polygraph examiners residing in Virginia were invited to provide, via a mailed questionnaire, the following information: (1) how many polygraph examinations they had conducted in 1980; (2) how many of these cases had been subsequently verified to the examiner's satisfaction; and (3) of the verified tests, how many had been correct. Reports were received from 41 of Virginia's 147 examiners who had, collectively, conducted 2,620 polygraph tests in 1980. The average number of tests per active examiner was 85, a figure that does not include the type of screening test used with job applicants; only 13% of the private examiners responded to this survey. The responders, mostly police polygraphers, claimed to have been able to verify

about 40 percent of the tests they administered and, on this set of verified cases, they reported that they were correct in their polygraph interpretations more than 97 percent of the time. It seems supererogatory to criticize this alleged study in detail. One wonders what would happen if one were to send a similar questionnaire to all of the licensed astrologers in the State of Virginia asking how many predictions they had made during 1980, how many had been "verified", and how many of these had proved correct. As long as the American Polygraph Association, publishers of Polygraph, continues to encourage such psuedo-science, it will be difficult to take that organization or its claims seriously.

#### HOW ACCURATE IS THE LIE DETECTOR? PART II.

There now have been reported three studies of polygraph accuracy that meet reasonable standards of scientific credibility. All three used polygraph tests administered to criminal suspects under real life conditions. All three employed independent re-scoring of the charts by trained polygraph examiners other than those who administered the tests. All three obtained reasonable criterion data using either confessions or, in one case, a panel of judges or lawyers. Finally, in none of the three studies were the charts selected for re-scoring because some polygraph examiner believed that, when re-scored, they should be scored correctly. Two of the three studies were doctoral dissertations conducted by trained polygraph examiners who had gone back to their universities for an advanced degree. In the first of these, Gordon Barland administered control-question lie tests to 92 criminal suspects referred by local police agencies while his academic advisor, David Raskin, who is also a professional

polygrapher, scored the charts independently (Barland and Raskin, 1976.) Raskin's scoring was appropriately cautious; he classified more than 20 percent of the charts as inconclusive. The panel of experts who evaluated the dossier of evidence on each case (two prosecutors, two defense attorneys, and one judge), were also apparently cautious, discarding some 30 percent of the cases as indeterminate. This left 51 cases on which there was both a criterion judgment and also a definite conclusion of "truthful" or "deceptive" by the polygrapher. Since Raskin scored more than 88 percent of these charts as deceptive, it is perhaps not too surprising that he correctly classified all but one -- 98 percent -- of the guilty suspects. He did this, however, at the expense of the innocent suspects, 55 percent of whom were erroneously classified also as deceptive. Raskin's average accuracy over all can be obtained by averaging his success rate on the guilty and innocent subgroups,  $(98 + 45)/2 = 72$  percent.

Horvath, formerly chief examiner for the Reid firm, published his doctoral dissertation in 1977. From the files of "a large police agency", he obtained 56 charts from cases that had been subsequently verified by confession. These charts were independently re-scored by 10 experienced polygraph examiners. The inter-scorer agreement achieved was quite good, about 89 percent. Of the guilty suspects, 77 percent were correctly classified as deceptive while 51 percent of the innocent suspects were classified as truthful. Thus, as in the Barland & Raskin study, about half of the innocent suspects were misclassified "deceptive" by the polygraph test. The overall accuracy was  $(77 + 51)/2 = 64$  percent.

It must be said that, since the publication of these two studies, apologists for the polygraph industry have tended to denigrate them, insisting that these findings -- and especially these alarming rates of false-positive errors -- are not representative of actual polygraph practice. Yet there is every reason to

suppose that both studies were conducted carefully and honestly, under the supervision of experienced scientists; there is no reason to suppose that the authors, polygraphers themselves, had hoped or expected to produce such embarrassing findings; and I can find no serious flaws in the designs. The implication that an innocent person has about a 50:50 chance of failing a polygraph test administered under real life conditions must be tempered by the realization that it is usual in practice for several suspects to be examined with respect to any given crime and the examiner is able to withhold judgment until all results are in. In the recent Pentagon scandal referred to at the start of this article, one would not have expected 18 of the 36 officials examined to have "failed" their polygraph tests and then accused of leaking information to the Washington Post. Quite understandably, the examiners in that case tested everybody and then selected that one individual whose test results seemed most obviously deceptive. As it turned out, they were mistaken in their choice. When that individual was identified and about to be fired, career destroyed, George Wilson, the Post reporter who had printed the story, told the Secretary of Defense that, while he would not reveal his actual source, the man who had been selected by the polygraphers was not the culprit.

One aspect of the Barland & Raskin study deserves further comment. It is reported that 16 of the 51 cases that figured in that study were subsequently confirmed by confession. The charts from these 16 cases were submitted to 25 polygraph examiners for independent scoring. Excluding charts scored as inconclusive, these blind re-scorings were correct 90 percent of the time. The 7 examiners who scored the charts numerically, as Barland and Raskin do, were correct 99 percent of the time. Raskin has presented these findings as if they constituted a valid and independent study of polygraph validity (Raskin and



Podlesny, 1978) but plainly they do not. These 16 charts were a subset of the larger study in which Raskin scored more than half of the innocent suspects erroneously as deceptive. However, these 16 charts selected for re-scoring were ones on which Raskin had made no errors at all! Since numerical scoring can be an objective and reliable procedure, it is not at all surprising that other examiners, employing this procedure, should agree with Raskin's scoring. The fact that they did, however, cannot be taken as evidence that, in the general run of unselected cases, Raskin or they will tend to be correct in their diagnoses 99 or 90 percent of the time. We have already observed Raskin at his best in the larger study, funded by the U.S. Department of Justice and conducted as Barland's doctoral research; averaging his results on the guilty and the innocent, Raskin achieved 72 percent accuracy, clearly better than the chance expectancy of 50 percent but certainly not high enough to determine who will go to jail and who will be set free.

The third credible study was reported in 1982 by Kleinmuntz & Szucko (1982) and it is particularly valuable because of the further light it sheds on the reports of the Reid group mentioned above. These investigators were able to obtain charts on 100 verified cases from the files of that same Reid organization, 50 verified as deceptive by the confession of the person tested and 50 verified as truthful by the confession of other persons. These 100 charts were independently re-scored by three Reid polygraphers. The average accuracy achieved was 73 percent (about equal to Raskin's results) while 39 percent of the innocent suspects were mistakenly classified as deceptive. Thus, we see that when charts from the Reid files are selected for re-scoring by one of Reid's polygraphers the "accuracy" achieved tends to be high, but when a larger number of charts from those same files are selected by an independent investiga-

tor, and without regard to whether the guilty charts look deceptive or the innocent charts should be scored as truthful, then the accuracies achieved are very similar to those obtained by Horvath and by Barland & Raskin.

We can summarize the available evidence as follows: When scored without knowledge of the case facts or clues based on the suspect's behavior or demeanor, the modern polygraph test can be expected to be wrong about one-third of the time. The polygraph test is strongly biased against the innocent person; truthful suspects failed the polygraph 39, 49, and 55 percent of the time in the three investigations?

#### WHAT KIND OF TRUTHFUL PERSON FAILS THE LIE DETECTOR?

A study reported in 1979 found that poorly socialized individuals are more likely to pass polygraph tests, whether truthful or deceptive, while highly socialized people, with clear moral standards and a well-developed conscience, tend to fail the lie detector even though truthful (Waid et al, 1979.) Over the past ten years I have been contacted by hundreds of victims of invalid lie tests and have formed the impression that many of these people were made vulnerable by their own good character. One of the first I heard about was a young accountant who had failed two of three polygraph tests administered in connection with a theft at the bank where he had worked for six years and who then was discharged and found himself unable to find another employer who would hire him. I was contacted by the pastor of the fundamentalist church that this young man had attended since boyhood, where he taught Sunday School and coached the baseball team, and to which he had regularly contributed a tithe of his earnings. Many

other victims who have written or called me since then also have been deeply religious people; others had strong personal standards based no less staunchly upon secular grounds. Graduates of West Point with its traditions and its honor code seem particularly vulnerable.

There is nothing surprising in this. A preacher is likely to be more distressed than a felon would be to be accused of theft. Ask a West Point alumnus if he has betrayed an official secret and you may find that his heart beats harder and his palms sweat more than those of a psychopath asked the same question. The irony is that by basing more and more important social decisions on the results of polygraph tests we may be producing an effect opposite to that intended, firing the most honorable police officers, refusing to hire the potentially most reliable employees, putting highly socialized citizens into unemployment lines or even in prison, while staffing our security agencies with the under-socialized -- e.g., people like the CIA's notorious Edwin Wilson -- or with those clever enough to know how to beat the polygraph.

#### CAN THE LIE DETECTOR BE BEATEN?

John Reid, the inventor of the control-question test, published a report in 1945 acknowledging that one can produce synthetic responses on the polygraph by a process of covert self-stimulation, undetectable by the examiner. Since one "passes" a control-question test by showing stronger reactions to the controls than to the relevant questions, Reid recognized that a clever subject might beat the lie detector by covertly augmenting his spontaneous reactions to the control questions. The methods of self-stimulation that Reid worked with included pressing down with one's free arm against the arm of the chair or tensing the

muscles of the legs and he suggested using a "wobble seat" especially equipped with sensors to detect such countermeasures. But no one actually uses Reid's special chair and, in any case, it provides no protection against the subject who self-stimulates by biting his tongue or his lip or by hiding a nail in his sock and pressing on it after each control question.

An experiment to test whether these methods work in real life would be difficult to implement. An academic researcher who undertakes to train guilty felons to beat the lie detector might risk criminal charges. Fortunately, one such study was accomplished by an investigator who thought at the time that he had nothing more to lose. Floyd Fay was arrested one March morning in 1978 on a charge of murder. The manager of a take-out store had been shot the night before by a robber wearing a ski mask. Before dying, the victim told the police that his assailant had resembled his friend, 'Buzz' Fay. Fay, a construction worker with no prior criminal record, languished in jail for two months while police searched fruitlessly for evidence to tie him to the crime. At last the prosecution offered Fay a deal; if he could pass a polygraph test the charges would be dropped. He was required to stipulate, however, that if he failed the test the results could be used in evidence against him. Fay, whom we know now to have been innocent, agreed to this proposition, submitted to a lie detector test administered by Ohio's Bureau of Criminal Investigation, and failed the test. He was then taken to Dearborn, Michigan, to be tested again by a polygraph firm run by Lynn Marcy, subsequently president of the American Polygraph Association. Fay failed again. Hearing this evidence, a jury convicted Fay of aggravated murder, a crime punishable by death in Ohio until shortly before Fay went to trial, and he was sentenced to life in prison. In 1980 a young public defender named Adrian Ciemian took over Fay's request from prison for a review

of his case. Acting on a tip, Cimerman uncovered evidence pointing to the real killers who were duly apprehended and confessed, exonerating Fay (Cimerman, 1981.)

During the more than two years that Fay served of his life sentence, he found himself in a prison where polygraph testing was used to adjudicate charges against inmates of violations of prison rules, drug smuggling and the like. Fay had developed a lively interest in the polygraph, which he had trusted but which had landed him in prison, and wrote to experts around the country for information. In an article of mine he found a discussion of how one might beat the lie detector and he determined to conduct his own experiment. In December of 1979 I received a letter from Fay saying that he had contacted 9 inmates scheduled to take polygraph tests, all of whom admitted to him that they were guilty of the offense charged. Fay explained to them how to recognize the control questions and how to augment their responses to these questions by biting their tongues. He reported that all 9 of them had managed to pass their polygraph tests. Flushed with success, Fay then decided to try out a different technique that seemed promising to him. The next three inmates were instructed to answer the relevant questions "No" out loud but "Yes" silently and repeatedly in their minds. What he did not realize at the time is that it is the question, rather than the answer, that is the main emotional stimulus and such mental gymnastics probably augmented the relevant response rather than making it smaller as he had hoped. All three of these unlucky inmates failed their lie tests. Fay thereupon reverted to self-stimulation during the control questions. By the time of his release from prison, Fay had coached 27 guilty inmates in how to beat the lie detector and 23 of the 27 were successful."

## POLYGRAPHS IN THE PENTAGON

A principle that I modestly refer to as Lykken's Law, a hybrid of Gresham's and Murphy's Laws and the Peter Principle, asserts that in any complex decision-making situation a datum or piece of evidence that is simple and definite in its implications will tend to be given more weight than it deserves. That is one reason why juries in criminal cases should not be told whether the defendant passed or failed a lie detector test. Even if they are warned by the judge that polygraph tests tend to be wrong about a third of the time, a jury confronted by a welter of ambiguous and conflicting evidence may be too ready to grasp at the lie test result that so clearly tells them what to do. Because of this principle, I worry about the way in which the American military and intelligence communities rely on the polygraph in hiring spies and in deciding who can be trusted with Top Secret clearances. The results of psychological test batteries are complex and inconclusive. Good background investigations are expensive, time consuming, and not always definitive either. If the candidate failed the polygraph, why take a chance on him? If she passed the polygraph, on the other hand, since we know the test is biased against the innocent person, should we not therefore tend to trust at least those tests that are passed? Other kinds of evidence just sit there, waiting to be painfully weighed and interpreted; the polygraph result needs no interpretation -- it tells us at once what decision to make.

For this reason (combined with a lack of knowledge of the real perils of trusting the polygraph) official Washington is becoming a kind of happy hunting ground for polygraph examiners. I know a young attorney who has a Master's degree in Oriental Studies and is fluent in Chinese who applied for a position

with the National Security Administration. Although he has a rare and valuable combination of talents and is a patriotic citizen with an unblemished record, he "failed" the polygraph test and was rejected. I know three graduates of West Point, men in whom hundreds of thousands of taxpayer dollars have been invested in preparing them for important positions in the military establishment, whose careers were blighted or terminated because some graduate of an 8 week course in polygraphy decided that they were deceptive on a polygraph test. Some of the individual stories have a truly Kafkaesque quality. Here you are working at the Pentagon, an unsullied record of ten year's outstanding service behind you, being strapped in for a lie detector test. "Just a routine screen before your next promotion, Major. If you've been a good boy you have nothing to worry about." But your heart thuds a little harder when they ask you, "Have you in the last year had any contact with agents of a foreign intelligence agency?" Now, suddenly, you are on the defensive; it is up to you to prove that the test is mistaken, that you are not a traitor. "What I'd suggest, Major, is that you search your mind for anything you've thought or done in recent years that might be causing these reactions, anything at all that you're ashamed of. A kind of mental cleansing. You tell me about these things before the next examination and maybe we'll be able to get a clean record." The worst possible interpretation is likely to be put on anything you may come up with in this forced confessional. On the other hand, if you just insist the test is wrong and stand on your rights, you may find that you have no rights. Remember what President Reagan has said about "adverse consequences."

While the West Pointers and the China scholars are being weeded out of the secret sanctums, the KGB -- if they are as clever as they are made out to be -- will be training agents how to beat the polygraph. For all we know, they may be using an appearance on F. Lee Bailey's "Lie Detector" program as a sort of graduation exercise.

## NOTES

1. I know of specific instances in Florida, Maryland, Michigan, Texas, Washington, and Wyoming.
2. Appellate or supreme courts of the following states have ruled polygraph evidence inadmissible under any circumstances: Alaska, Colorado, Hawaii, Illinois, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Oklahoma, South Dakota, Texas, Virginia, West Virginia, and Wisconsin. High courts of 14 states have ruled that polygraph tests can be admitted under prior stipulation of the parties, viz.: Arizona, California, Delaware, Georgia, Indiana, Iowa, Kansas, Massachusetts, Nevada, North Dakota, Ohio, Oregon, Washington, and Wyoming. In other jurisdictions admissibility is determined by local tradition - case law - and varies from never, as in Minnesota, to commonplace as in Florida.
3. The U.S. Army school and the Reid College for the Detection of Deception require 6 months of instruction but the typical curriculum lasts only 6 to 8 weeks. The usual barber college curriculum, by way of contrasts, lasts from 9 to 12 months.



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Senator EINGAMAN. At this time the committee will recess.  
[Whereupon, at 12:25 p.m., the committee was recessed, to reconvene subject to the call of the Chair.]

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

### NATIONAL SECURITY DECISION DIRECTIVE 84

#### SAFEGUARDING NATIONAL SECURITY INFORMATION

As stated in Executive Order 12356, only that information whose disclosure would harm the national security interests of the United States may be classified. Every effort should be made to declassify information that no longer requires protection in the interest of national security.

At the same time, however, safeguarding against unlawful disclosures of properly classified information is a matter of grave concern and high priority for this Administration. In addition to the requirements set forth in Executive Order 12356, and based on the recommendations contained in the interdepartmental report forwarded by the Attorney General, I direct the following:

1. Each agency of the Executive Branch that originates or handles classified information shall adopt internal procedures to safeguard against unlawful disclosures of classified information. Such procedures shall at a minimum provide as follows:

a. All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access. This requirement may be implemented prospectively by agencies for which the administrative burden of compliance would otherwise be excessive.

b. All persons with authorized access to Sensitive Compartmented Information (SCI) shall be required to sign a nondisclosure agreement as a condition of access to SCI and other classified information. All such agreements must include a provision for prepublication review to assure deletion of SCI and other classified information.

c. All agreements required in paragraphs 1.a. and 1.b. must be in a form determined by the Department of Justice to be enforceable in a civil action brought by the United States. The Director, Information Security Oversight Office (ISOO), shall develop standardized forms that satisfy these requirements.

d. Appropriate policies shall be adopted to govern contacts between media representatives and agency personnel, so as to reduce the opportunity for negligent or deliberate disclosures of classified information. All persons with authorized access to classified information shall be clearly apprised of the agency's policies in this regard.

2. Each agency of the Executive branch that originates or handles classified information shall adopt internal procedures to govern the reporting and investigation of unauthorized disclosures of such information. Such procedures shall at a minimum provide that:

a. All such disclosures that the agency considers to be seriously damaging to its mission and responsibilities shall be evaluated to ascertain the nature of the information disclosed and the extent to which it had been disseminated.

b. The agency shall conduct a preliminary internal investigation prior to or concurrently with seeking investigative assistance from other agencies.

c. The agency shall maintain records of disclosures so evaluated and investigated.

d. Agencies in the possession of classified information originating with another agency shall cooperate with the originating agency by conducting internal investigations of the unauthorized disclosure of such information.

e. Persons determined by the agency to have knowingly made such disclosures or to have refused cooperation with investigations of such unauthorized disclosures will be denied further access to classified information and subjected to other administrative sanctions as appropriate.

3. Unauthorized disclosures of classified information shall be reported to the Department of Justice and the Information Security Oversight Office, as required by statute and Executive orders. The Department of Justice shall continue to review reported unauthorized disclosures of classified information to determine whether FBI investigation is warranted. Interested departments and agencies shall be consulted in developing criteria for evaluating such matters and in determining which cases should receive investigative priority. The FBI is authorized to investigate such

matters as constitute potential violations of federal criminal law, even though administrative sanctions may be sought instead of criminal prosecution.

4. Nothing in this directive is intended to modify or preclude interagency agreements between FBI and other criminal investigative agencies regarding their responsibility for conducting investigations within their own agencies or departments.

5. The Office of Personnel Management and all departments and agencies with employees having access to classified information are directed to revise existing regulations and policies, as necessary, so that employees may be required to submit to polygraph examinations, when appropriate, in the course of investigations of unauthorized disclosures of classified information. As a minimum, such regulations shall permit an agency to decide that appropriate adverse consequences will follow an employee's refusal to cooperate with a polygraph examination that is limited in scope to the circumstances of the unauthorized disclosure under investigation. Agency regulations may provide that only the head of the agency, or his delegate, is empowered to order an employee to submit to a polygraph examination. Results of polygraph examinations should not be relied upon to the exclusion of other information obtained during investigations.

6. The Attorney General, in consultation with the Director, Office of Personnel Management, is requested to establish an interdepartmental group to study the federal personnel security program and recommend appropriate revisions in existing Executive orders, regulations, and guidelines.



Office of the Attorney General  
Washington, D. C. 20530

March 11, 1983

MEMORANDUM

TO: Heads of Offices, Boards,  
Divisions and Bureaus

FROM: William French Smith *WFS*  
Attorney General

SUBJECT: Presidential Directive on Safeguarding  
National Security Information

The President has issued a directive to strengthen our efforts to safeguard national security information from unlawful disclosure. This directive, a copy of which is attached, is based upon the recommendations of an interdepartmental group chaired by the Department of Justice. I fully support the President's policy and expect that it will be faithfully implemented throughout the Department.

This directive does not alter the existing obligation of Department personnel to comply with statutes and regulations pertaining to national security information. We must be careful to avoid the unnecessary or improper use of classification. Whenever possible, information should be kept unclassified or declassified so as to permit public access. However, information that is properly classified in the interest of national security must be protected from unauthorized disclosure.

Many of the specific requirements of the directive involve no change from current Department of Justice policy.

- The use of nondisclosure agreements and the requirement of prepublication review in appropriate cases are consistent with current policies. More detailed guidance on these policies will be provided in the near future.
- The directive requires no change in existing Department policies on use of the polygraph, with regard to attorneys or FBI employees. Policies with regard to employees in the competitive service will be changed to conform with expected revisions in OPM regulations on this subject.
- Internal investigations of unauthorized disclosures will continue to be coordinated by the Office of Professional Responsibility, with assistance from the FBI as needed.

To the extent implementation of the President's directive requires changes in Department of Justice policies and procedures, you will be kept fully informed.

Embargoed for Conclusion of Background Briefing  
Held March 11, 1983, at the Department of Justice

Fact Sheet

Presidential Directive on  
Safeguarding National Security Information

Background

- Unlawful disclosures of classified information damage national security by providing valuable information to our adversaries, by hampering the ability of our intelligence agencies to function effectively, and by impairing the conduct of American foreign policy.
- The President has issued a directive requiring that additional steps be taken to protect against unlawful disclosures of classified information.
- This directive is based on the recommendations of an inter-departmental group convened by the Attorney General.

Scope of Directive

- The directive deals only with disclosures of classified information.
- By Executive Order, the only information that can be classified is information which "reasonably could be expected to cause damage to the national security" if released without proper authorization. (E.O. 12356 § 1.1(a)(3).)
- The Executive Order also prohibits the use of classification to conceal violations of law, inefficiency or administrative error, or to prevent an embarrassment to a government agency or employee. (E.O. 12356 § 1.6(a).)

Summary of Provisions

- The directive imposes additional restrictions upon government employees who are entrusted with access to classified information, and upon government agencies that originate or handle classified information.
  - More employees will be required to sign nondisclosure agreements, including provisions for prepublication review, such as were approved by the Supreme Court in United States v. Snapp (1980).

Agencies will be required to adopt policies concerning contacts between journalists and persons with access to classified information, so as to reduce opportunities for unlawful disclosures. However, no particular policies are mandated in the directive.

- Agencies will be required to adopt new procedures so that unlawful disclosures of classified information will be reported and analyzed more efficiently.

The directive establishes a new approach to investigating unlawful disclosures to replace the past practice of treating such matters as purely criminal investigations.

- Although unauthorized disclosures of classified information potentially violate a number of criminal statutes, there has never been a successful prosecution. There are a number of practical barriers to successful criminal prosecution in most of these cases.
- This directive clarifies FBI's authority to investigate unlawful disclosures of classified information, even though it is anticipated that a successful investigation will lead to administrative sanctions (such as demotion or dismissal) rather than criminal prosecution.
- All agencies with employees having access to classified information will be required to assure that their policies permit use of polygraph examinations under carefully defined circumstances. The polygraph is already used on a regular basis by our largest intelligence agencies. The directive provides for a greater degree of consistency in government-wide policy regarding use of this investigative technique.
- The use of the polygraph in any particular case will be subject to the discretion of an employee's agency head.
- There will be no change in the current practice of targeting investigations at employees who are suspected of unlawfully disclosing classified information, rather than at journalists who publish it.



- The directive provides that employees found by their agency head to have knowingly disclosed classified information without authorization or to have refused cooperation with investigations will be subject to mandatory administrative sanctions to include, as a minimum, denial of further access to classified information. Existing procedural safeguards for personnel actions involving federal employees remain unchanged.

#### Expected Results

- This directive is not expected to eliminate all unlawful disclosures of classified information.
- The directive is designed to improve the effectiveness of our present program and, over time, to reduce the frequency and seriousness of unlawful disclosures of classified information.
- The directive also emphasizes that government employees who are entrusted with classified information have a fiduciary duty to safeguard that information from unauthorized disclosure.

UNITED STATES SENATE  
 COMMITTEE ON GOVERNMENTAL AFFAIRS  
 WASHINGTON, D.C. 20510

# United States Senate

COMMITTEE ON  
 GOVERNMENTAL AFFAIRS  
 WASHINGTON, D.C. 20510

August 12, 1983

The Honorable George P. Shultz  
 Secretary  
 Department of State  
 Washington, D. C. 20520

Dear Mr. Secretary:

The Senate Committee on Governmental Affairs will hold a hearing on September 13, 1983 on National Security Decision Directive 84, issued by the President last March. At my request, Senator Mathias will preside at this hearing. Since the State Department will be affected by this directive, I would like to invite your representative to appear at this hearing to testify on the matter. Further details concerning the hearing will be supplied in the near future.

As you know, one of the issues addressed by the President's directive is a requirement for pre-publication review of certain writings by former government officials. In this connection, I would be most appreciative if you could provide the Committee with the following information, to assist in our preparation for this hearing:

1. Are there any instances within the past five years in which former officials of the State Department published classified materials without securing the permission of the department?
2. If so, please provide a description of the episode including any communications with the former official and any damage assessment of the unauthorized disclosure. (If a full response to this question cannot be made public, please provide as detailed a response as possible, and indicate whether a more complete answer will be provided in a classified annex.)
3. Please describe the current procedures for dealing with publications by former officials. For example, have such officials voluntarily submitted manuscripts which contain information which they believe may be classified? Does the State Department monitor the publications or speaking engagements for former officials for compliance with pre-publication review procedures? How are disputes about deletions of material resolved? What is the volume and nature of materials which the department reviews?
4. In your view, are there flaws in the current system which prevent it from operating in a satisfactory manner to protect the national interest? If so, what are those flaws?
5. As a result of the President's directive, have any changes in the pre-publication review system been put into effect? In this connection, I would appreciate receiving drafts of any proposed contract which officials will be asked to sign, and which provide for pre-publication review, as well as copies of any documents explaining the meaning of any such draft contracts and any documents describing the views of the State Department on what should be incorporated in such a contract.

If you have any questions concerning these requests, please have your staff call Link Hoewing of my staff, on 224-4751 or Steve Metallits of Senator Mathias' staff at 224-5617.

I would appreciate receiving your response before the end of this month.

Sincerely,



William V. Roth, Jr.  
 Chairman



United States Department of State

Washington, D.C. 20520

Dear Mr. Chairman:

The Secretary has asked me to reply to your letter of August 12, 1983, and to assure you that the Department of State will be pleased to appear before your committee on September 13 to testify on National Security Decision Directive 84. Ambassador Willard A. De Pree, Director of the Office of Management Operations, will be the Department's representative at the hearing. To assist your staff in preparing for this hearing the following answers are provided to the questions contained in your letter of invitation:

1) We are unaware of any instances within the past five years in which former officials of the Department of State have published classified material without securing the permission of the Department.

2) Not applicable (See above).

3) (a) Several former officials, including former senior officers, have voluntarily submitted MSS to the Department for review. All MSS submitted are reviewed by the Classification/Declassification staff of the Department, which consults when necessary with the Bureau of Public Affairs and the geographic or functional bureaus concerned with the substance of the MSS. The Classification/Declassification staff consists of retired Foreign Service Officers, all experts in particular fields, who also review material requested under the Freedom of Information Act and E.O. 12356. When differences arise as to the publication of portions of these MSS, these are discussed by the Department with the writers, and hitherto in all instances the parties have been able to reach an accommodation.

The Honorable  
William V. Roth, Jr.,  
Chairman, Committee on Governmental Affairs,  
United States Senate.

(b) In accordance with the terms of E.O. 12356, the Department permits former Presidential appointees (i.e., those confirmed by the Senate) to have access to their own official papers (those which they originated, reviewed, signed or received during their service as a Presidential appointee), on certain conditions. One of these conditions is that the Presidential appointees sign a form (Enclosure 2) agreeing to submit to the Department for review all notes, etc. taken from their papers.

(c) The Department has no way to monitor speeches by former officials, other than by the general undertaking in the non-disclosure forms at present in use by the Department that the signing employee not disclose classified information at any time, including after separation from employment, without permission. These forms, Acknowledgement of Security Briefing (Enclosure 3) and Separation Statement (Enclosure 4) must be signed by all employees, but do not include a pre-publication review agreement. The limited number of employees who have signed the existing Sensitive Compartmented Information (SCI) Agreement, are of course bound by that agreement which includes a pre-publication review clause and is in use government-wide.

(d) Section 628 of the Foreign Affairs Manual (FAM) embodies the Department's regulations governing writing, speaking, teaching, etc. by active employees, and provides for submission of MSS and other texts for review if they contain material "of official concern" (Enclosure 5). These regulations do not, however, specifically cover former employees.

(e) With regard to the volume and nature of materials submitted, we estimate that we receive perhaps ten major book MSS per year and numerous articles and lesser publications. All deal with aspects of foreign affairs, particularly those with which the writer was most concerned during his/her tenure. The longer MSS are usually in the form of memoirs.

4) In our experience the present system has operated reasonably well for the Department of State. The most sensitive, i.e. SCI, material is already protected by a pre-publication agreement and we believe that this protection should be continued and expanded to cover sensitive intelligence material not clearly included in the present agreement. We believe that the non-disclosure provisions of the existing Department agreements have been successful hitherto in protecting other types of classified information. There is, however, some difference of opinion as to the enforceability of those agreements.

5) The collateral classified information forms which new employees will soon be required to sign will be more specific but will have substantially the same effect as the current Department of State forms. They will not include a pre-publication review clause, but will be legally enforceable and we foresee no difficulty in applying them. The SCI forms will contain a more specific description of the types of intelligence material covered. They will, as now, include a prepublication review clause. We do not anticipate a need for an employee to sign any other agreement requiring pre-publication review. When the final forms are received by the Department, we shall issue a detailed explanation of them to all-employees and shall amend our regulations accordingly. In particular we shall revise Section 628 of the FAM to indicate that the new collateral classified information agreement will apply to all persons who have signed them, whether they are current or former employees, in conformity with the provisions of NSDD-84.

Sincerely,



Alvin Paul Drischler  
Acting Assistant Secretary  
Legislative and Intergovernmental Affairs

Enclosures:

1. Correspondence returned.
2. Presidential appointees agreement.
3. Acknowledgement of Security Briefing.
4. Separation Statement.
5. 3 FAM 628

Enclosure 2

DATE \_\_\_\_\_

Statement by Former Presidential Appointee  
Applicant for Access to Department of State Records

In consideration of being granted access to Department of State records, I the undersigned certify that:

A. I, [PRESIDENTIAL APP], am a former Presidential appointee, having been approved by the Senate and having served in the Department as a Presidential appointee.

b. I agree to safeguard any information made available to me by the Department of State, from unauthorized disclosure and to observe all statutes and regulations relating to safeguarding of such information.

c. I authorize the appropriate officials of the Department of State to review any notes and manuscripts I may make, for the purpose of determining that they contain no classified information.

d. I agree that any classified information will not be further disseminated in any manner without the express permission of the Department.

e. I agree to pay any copying fees involved in reproducing documents which the Department may agree to release to me. I also agree, if the information I request cannot be located and compiled with a reasonable amount of effort, and provided I am informed of this fact by the Department before compilation, to pay search and other related fees in accordance with the schedule in 22 CFR 171.6 and 171.13.

\_\_\_\_\_  
[TYPED NAME]

Former Presidential  
Appointee

**BEST AVAILABLE COPY**

DATE \_\_\_\_\_

**Statement by Research Assistant to  
Former Presidential Appointee, Applicant for Access to  
Department of State Records**

in consideration of being granted access to Department of State records, I the undersigned certify that:

a. I am a research assistant for [PRESIDENTIAL APPOIN.], a former Presidential appointee. I request access to Department of State information on behalf of [PRESIDENTIAL APPOIN.], and not for my own personal research.

b. I agree to safeguard any information made available to me by the Department of State, from unauthorized disclosure and to observe all statutes and regulations relating to safeguarding of such information.

c. I authorize the appropriate officials of the Department of State to review any notes and manuscripts I prepare, for the purpose of determining that they contain no classified information.

d. I agree that any classified information will not be further disseminated in any manner without the express permission of the Department.

e. I agree to pay any copying fees involved in reproducing documents which the Department may agree to release to me. I also agree, if the information I request cannot be located and compiled with a reasonable amount of effort, and provided I am informed of this fact by the Department before compilation, to pay search and other related fees in accordance with the schedule in 22 CFR 171.6 and 171.13.

[TYPED NAME]

Research Assistant

## SECURITY ACKNOWLEDGEMENT

I, \_\_\_\_\_, in anticipation of my employment by, or assignment or detail with, the Department of State, the United States Information Agency or the Agency for International Development, or my forthcoming assignment to duties which require access to classified or administratively controlled information make the following statement with the understanding and intent that my statement will be used by State, USIA or AID in carrying out its obligation to protect the security of classified or administratively controlled information. (The security regulations, with which each employee should become familiar, can be found in Volume 5 Foreign Affairs Manual, Chapter 900; AID M.O. 631.1. They may be obtained from your administrative or executive officer, or from your post or unit security officer.)

1. I understand that it is the policy to control the dissemination of classified or administratively controlled information in such a manner as to assure the common defense and security.

2. I understand that, in carrying out the aforesaid policy, certain instructions have been officially promulgated, and others will be promulgated and revised, as circumstances will require, pertaining to the control and dissemination of classified or administratively controlled information.

3. I shall not publish, nor reveal to any person, either during or after my employment, any classified or administratively controlled information, or other information transmitted to me in confidence in the course of my official duties, except in accordance with these official instructions or regulations or except as may be hereafter authorized by officials empowered to grant such authority.

4. I have been advised by the interviewing officer whose name appears below and fully understand that the provisions of Chapter 37, Title 18, U.S. Code and Sub Chapter XVII of Chapter 23 of Title 42, U.S. Code prescribe penalties for the disclosure to unauthorized persons of the information described in the aforesaid chapters and for the loss, destruction or compromise of such information through gross negligence.

\_\_\_\_\_  
(Signature in Presence of Interviewing Officer)

\_\_\_\_\_  
(Department or Agency)

\_\_\_\_\_  
(Signature of Interviewing Officer)

\_\_\_\_\_  
(Date)



Enclosure 4

OPTIONAL FORM 100  
February 1979  
STATE - AID - USICA

## SEPARATION STATEMENT

I, \_\_\_\_\_, make the following statement in connection  
(please type or print)

with my separation from employment in the Department of State, the International Communication Agency or the Agency for International Development. As used herein, the term "employment" includes all periods of assignment or detail, as well as any periods of temporary, part-time or intermittent employment therein, and the term "separation" includes suspension for any period in excess of 30 days, retirement from active duty, transfer to another agency, resignation, furlough to enter military service, etc.

1. I have surrendered to responsible officials all classified or administratively controlled documents and material with which I was charged or which I had in my possession, and I am not retaining in my possession, custody, or control, documents or material containing classified or administratively controlled information furnished to me during the course of such employment or developed as a consequence thereof, including any diaries, memorandums of conversation, or other documents of a personal nature that contain classified or administratively controlled information.

2. I have surrendered to responsible officials all unclassified documents and papers relating to the official business of the Government acquired by me while in the employ of the Department, USICA or AID.

3. I shall not publish, nor reveal to any person, any classified or administratively controlled information of which I have knowledge, or any other information transmitted to me in confidence in the course of my official duties, except as may be authorized by officials of the employing Department or Agency empowered to grant permission for such disclosure.

4. I have been advised by the interviewing officer whose name appears below and understand the criminal penalties relating to U.S. Government records and information and the use thereof:

Title 18, U. S. Code		Title 50, U. S. Code	
Section	641 - Public Money, Property or Records	Section	783(b) - Communication of Classified Information by Government Officer or Employee
	783 - Gathering, Transmitting or Losing Defense Information		783(d) - Penalties for Violation
	794 - Gathering or Delivering Defense Information to Aid Foreign Govt.	Title 42, U. S. Code	
	798 - Disclosure of Classified Information	Section	2272 - Violation of Specific Sections
	952 - Diplomatic Codes and Correspondence		2273 - Violation of General Sections
	1906 - Disclosure of Confidential Information		2274 - Communication of Restricted Data
	2071 - Concealment, Removal, or Mutilation of Records		2275 - Receipt of Restricted Data
			2276 - Tampering With Restricted Data
			2277 - Disclosure of Restricted Data

5. I have been advised by the interviewing officer whose signature appears below and fully understand that Section 1001 of Title 18, United States Code, provides criminal penalties for knowingly and willfully falsifying or concealing a material fact in a statement or document submitted to any department or agency of the United States Government concerning a matter under its jurisdiction.

(Signature of Interviewing Officer)

(Signature in Presence of Interviewing Officer)

(Date)

(Date of Birth)

(Date Signed)

(Typed Name of Interviewing Officer)

(Typed Name of Employee)

(Post, Department or Agency)

(Other Names Used During This Period of Employment)

'Enclosure 5'

UNIFORM STATE/AID/USIA REGULATIONS\*628 Speaking, Writing, and Teaching628.1 Applicability

The provisions of this section apply to all employees, including foreign nationals, of State, A.I.D., and USIA, in the United States and abroad, with respect to:

- a. Clearance of writings; and
- b. Clearance of engagements to speak, lecture, teach, or participate in conferences.

Certain employees are assigned to duties which require making speeches, holding interviews, or otherwise engaging in discussions on a variety of topics. The following provisions are not intended to interfere with the normal performance of these duties or to require clearance for any such activities carried out within established policy guidelines, except as may be dictated by the exercise of prudence and good judgment.

628.2 General Policy and Procedures

- a. The foreign affairs agencies encourage participation by their employees in activities of a responsible and nonpartisan character devoted to increasing public study or understanding of the nation's foreign relations and of the work of the agencies.

Such activities may be performed in an official or private capacity, but, until shown to be otherwise, it will be presumed, for the purpose of determining when compensation may be received, that all speaking or writing by an employee which concerns the current responsibilities, programs, or operations of his agency is done in an official capacity. All speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States are of official concern and shall be submitted, as provided in the following pertinent sections, for clearance by the employee's agency, whether the employee is acting officially or privately.

- b. No employee shall publish any material of official concern under paragraph a until it has been cleared. The purpose of this clearance requirement is to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning his agency's responsibilities or what conclusions should be drawn from such information. Accordingly, clearance is not required to reprint or republish in other form material that has been cleared at an earlier date.

- c. Clearance will not be granted until all classified material and all material of official concern under paragraph a which is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations, has been deleted from the proposed speaking, writing, or teaching material.

- d. The foreign affairs agencies will adopt interagency procedures to assure review of and guidance on material of official concern in their primary fields of responsibility. \*

## UNIFORM STATE/AID/USIA REGULATIONS

## \*628.5 Writing

628.5-1 Acting as Correspondent for Communications Media

Certain employees carry on active liaison with representatives of communications media. However, no employee shall act as correspondent for any newspaper, press syndicate, association, or other media unless special authorization has been obtained in advance from the appropriate official. The appropriate official for State is the Assistant Secretary for Public Affairs; for A.I.D., the Director, Information Staff; and for USIA, the Assistant Director (Public Information).

628.5-2 Official Writing for External Publication

To ensure consistency with U.S. policy, heads of State, A.I.D., and USIA and overseas establishments and employees in the United States with the rank of office director or above for State, and A.I.D., or with the rank of Assistant Director for USIA, shall submit for clearance by the appropriate office named in section 628.3-1 all written material prepared in an official capacity for external publication under bylines or official titles. Preliminary clearances shall first be obtained from appropriate offices of the agency concerned with the subject matter.

Subordinate personnel shall, after obtaining any necessary preliminary substantive clearances from appropriate offices of the agency concerned with the subject matter, submit such material for clearance to (1) the head of their overseas establishment, if serving abroad, or (2) their office director or official of comparable rank if in State or A.I.D., or by the office or service head if in USIA, if assigned in the United States, who may either disapprove the material or approve it and refer it for further review by the appropriate office named in section 628.3-1a.

628.5-3 Unofficial Writing

All books, articles, and other manuscripts of official concern under section 628.2, prepared for publication by an employee in an unofficial capacity, shall be submitted for clearance in advance of publication in accordance with the procedures in section 628.5-2. Authors will be notified of decisions with respect to clearance of manuscripts, and the manuscripts will be either returned or forwarded, upon written request, to publishers or agents designated by the author.

All such writings which are not on matters of official concern need not be submitted for clearance; however, unless the unofficial writing is clearly not on a subject of official concern under section 628.2, the employee is responsible for having published with it a specific statement to the effect that the opinions and views expressed are his own and not necessarily those of his agency. If there is doubt as to the propriety of the proposed publication, the employee should seek guidance or advice from the areas concerned with the subject matter.

To avoid possible embarrassment, employees should not make commitments to publishers until manuscripts have been approved. Personnel stationed abroad shall use their best efforts to assure that members of their families (as defined in 3 FAM 620 section 10.735-102) also follow these procedures.\*

## UNIFORM STATE/AID/USIA REGULATIONS

## \* 628.6 Teaching

## 628.6-1 In the United States

Officers of the rank of office director and above in State and A.I.D., and of Assistant Director, General Counsel, and Inspector General and above in USIA, may accept teaching engagements in the United States at their own discretion without approval by higher authority.

Any other employee before accepting a teaching engagement must obtain approval of his office director if he is in State or A.I.D., or of his office or service head if he is USIA, and of the appropriate office named in section 628.3-1a. If the subject matter to be taught is of official concern under section 628.2, the request for approval shall include a detailed outline of the course to be taught, including the names of required texts and brief descriptions of other reading materials, the name of the institution for which the class is to be taught, the frequency of classes, and the period of time involved; and the request shall be routed for clearance through the areas of his agency concerned with the subject matter. If the subject matter to be taught is clearly not of official concern, the request for approval shall be in the form indicated above but a brief description of the course may be substituted for the detailed outline. All approvals of teaching engagements must be renewed each school year.

## 628.6-2 Abroad

Before accepting an engagement to teach abroad an employee must obtain approval as required by the Uniform State/A.I.D./USIA regulations on employee responsibilities and conduct, 3 FAM 620 (A.I.D. M.O. 443.1) section 10.735-206(b). The request for approval shall include a detailed outline of the course to be taught, including the names of required texts and brief descriptions of other reading materials, the name of the institution for which the class is to be taught, the frequency of classes, and the period of time involved. The restrictions contained in section 628.3-2b apply to all courses taught abroad. All approvals of teaching engagements must be renewed each school year. Personnel stationed abroad shall use their best efforts to assure that members of their families (as defined in 3 FAM 620 section 10.735-102) follow the procedures for obtaining approval to teach set forth in 3 FAM 620 (A.I.D. M.O. 443.1) section 10.735-206. \*

WILLIAM V. ROTH, JR., SEN., CHAIRMAN  
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 SEN. BYRON D. RIGGS  
 CHARLES E. MATTHEWS, JR., SEN.  
 WILLIAM E. COCHRAN, SEN.  
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## United States Senate

COMMITTEE ON  
 GOVERNMENTAL AFFAIRS  
 WASHINGTON, D.C. 20510  
 August 12, 1983

The Honorable Caspar W. Weinberger  
 Secretary  
 Department of Defense  
 Washington, D. C. 20301

Dear Mr. Secretary:

The Senate Committee on Governmental Affairs will hold a hearing on September 13, 1983 on National Security Decision Directive 84, issued by the President last March. At my request, Senator Mathias will preside at this hearing. Since the Defense Department will be affected by this directive, I would like to invite your representative to appear at this hearing to testify on the matter. Further details concerning the hearing will be supplied in the near future.

As you know, one of the issues addressed by the President's directive is a requirement for pre-publication review of certain writings by former government officials. In this connection, I would be most appreciative if you could provide the Committee with the following information, to assist in our preparation for this hearing:

1. Are there any instances within the past five years in which former officials of the Defense Department published classified materials without securing the permission of the department?
2. If so, please provide a description of the episode including any communications with the former official and any damage assessment of the unauthorized disclosure. (If a full response to this question cannot be made public, please provide as detailed a response as possible, and indicate whether a more complete answer will be provided in a classified annex.)
3. Please describe the current procedures for dealing with publications by former officials. For example, have such officials voluntarily submitted manuscripts which contain information which they believe may be classified? Does the Defense Department monitor the publications or speaking engagements for former officials for compliance with pre-publication review procedures? How are disputes about deletions of material resolved? What is the volume and nature of materials which the department reviews?
4. In your view, are there flaws in the current system which prevent it from operating in a satisfactory manner to protect the national interest? If so, what are those flaws?
5. As a result of the President's directive, have any changes in the pre-publication review system been put into effect? In this connection, I would appreciate receiving drafts of any proposed contract which officials will be asked to sign and which provide for pre-publication review, as well as copies of any documents explaining the meaning of any such draft contracts and any documents describing the views of the Defense Department on what should be incorporated in such a contract.

If you have any questions concerning these requests, please have your staff call Link Hoewing of my staff, on 224-4751 or Steve Metalitz of Senator Mathias' staff at 224-5617.

I would appreciate receiving your response before the end of this month.

Sincerely,

*Bill Roth*  
 William V. Roth, Jr.  
 Chairman



POLICY

## THE UNDER SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

7. 1 SEP 1983

In reply refer to:  
I-12976/83

Honorable William V. Roth, Jr.  
Chairman, Committee on  
Governmental Affairs  
United States Senate  
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your letter dated August 12, 1983, in which you asked that the Department of Defense provide the Committee with information in connection with the requirement for prepublication review of certain writings by former government officials. More specifically, you inquired whether there are any instances within the past five years in which former officials of the Defense Department published classified materials without permission. Although the Department does not routinely or systematically monitor publications or speaking engagements by former officials, a review of departmental records shows that, on two occasions, former officials disclosed or were reasonably suspected to have disclosed classified information without obtaining proper authority.

° In November 1980, classified information concerning weapons systems technical data was discovered in the book Raid On The Bremerton (Viking Press). Investigation revealed that the source of the unauthorized disclosure was Irving A. Eachus, the author of the book and a former Navy employee. The disclosure included CONFIDENTIAL/Restricted Data: the damage was assessed as serious.

° In 1980, the San Diego Union published an article under the by-line of a retired Navy captain. The article contained CONFIDENTIAL information concerning general defense matters and JCS planning. The investigation, however, failed to confirm the retired officer as the principal source of the information.

In March 1982, the Department of Defense adopted a policy which requires execution of a nondisclosure agreement (NdA) by all persons with access to sensitive compartmented information (SCI). The agreement provides for prepublication review of certain materials related to or derived from an individual's access to SCI. The obligation to submit such information and materials for review extends beyond termination

of access. The policy also requires that the Defense Intelligence Agency (DIA) and the military departments establish a security review process. Pursuant to the Nda, requests for review must be submitted to the agency or department that last granted the requester access. The Senior Intelligence Officer within the agency or department will coordinate the security review with appropriate intelligence community departments and agencies. Response to a request must be provided within 30 working days of the date of the request. If it appears that a final reply within the 30 day period will not be possible, the requester will be provided an interim reply by the agency or department explaining the status of the review. Should the agency or department identify SCI or SCI related information, the requester will be advised to excise the information prior to publication or disclosure. If the requester disagrees with the determination, he or she will be advised of his or her right to appeal. Such appeals shall be submitted to the Secretary of Defense, the Secretary of Army, the Secretary of Navy, or the Secretary of Air Force, as appropriate, for final determination. It is not contemplated that these procedures will change under the new Nda.

The Army has reported that, since March 1982, four requests for review have been processed. The Air Force has reported one request. The Navy and DIA have yet to receive a request.


Former officials who have not executed the SCI Nda are not required to submit materials for prepublication review, nor will they be required to do so under the new Classified Information Nda. DoD policy, however, does permit former officials to avail themselves of the review service provided by the Assistant Secretary of Defense for Public Affairs (ASD(PA)) to ensure that proposed disclosures and publications do not violate security. (Department of Defense Directive 5230.9; subject: Clearance of DoD Information for Public Release; dated April 2, 1982.) Although such requests are seldom received, ASD(PA) is presently reviewing a manuscript of a proposed book written by a retired general officer.

The new NdAs required by NSDD 84 were approved on August 24, 1983 by the Department of Justice for general use in the executive branch. The Department of Justice stated that they have provided copies of these agreements to your Committee. It is our understanding that the new NdAs will be provided officially to departments and agencies for use within the near future.

Enclosed at the request of the Committee staff is the list of unauthorized disclosures which the Department of Defense recently provided to the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, and the House Committee on Post Office and Civil Service, Subcommittee on Civil Service.

If I can provide any further assistance, I hope that you will not hesitate to call upon me.

Sincerely,

  
Richard G. Stilwell  
General, USA (Ret.)  
Deputy

Enclosure



UNAUTHORIZED DISCLOSURES

(The following cases were investigated and prepared by the U. S. Army Intelligence and Security Command.)

1. Case # CE 79-136-02: Secret and Confidential information concerning Army signals intelligence capabilities was published in the Defense Electronics Magazine in 1979. An investigation was opened on 10 September 1979, and is still pending.
2. Case # SO 80-020-02: Secret information concerning an Army communications jammer was published in the Defense Electronics Magazine in 1979. An investigation was conducted, during which the purported source, a DoD employee, was polygraphed with negative results. The case was closed on 21 May 1981, due to lack of leads.
3. Case # SO 80-070-01: In 1979, technical Secret and Confidential information was published in the Microwave Systems News Magazine. Investigation was begun on 24 March 1980. The publisher denied that he used classified information as source material for the article. The case was closed with no further leads on 11 August 1981.
4. Case # SO 80-089-03: Secret intelligence information involving reports of chemical warfare by Soviet forces in Afganistan was published in the Baltimore Evening Sun in 1980. An investigation, opened on 8 April 1980, determined that the leak originated at the NSC or Department of State. The case was closed 16 September 1980 because the leak was determined to be outside of Army investigative jurisdiction.
5. Case # SO 81-017-02: Top Secret intelligence information concerning new Soviet missile capabilities was published in International Defense Review in 1980. Investigation disclosed that the information was derived from two NSA documents. The investigation was closed on 1 July 1981 because the magazine was published in Switzerland and there were no tangible CONUS leads.
6. Case # SO 81-200-02: Secret information concerning Army force expansion was found published in Army Times in 1981. The investigation, which was begun on 14 July 1981, revealed that the same information had appeared in numerous unclassified internal Army Staff memos and on an unclassified page of the draft Program Objectives Memorandum (POM). The case was closed on 5 October 1981.

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(The following cases were prepared and investigated by the Navy Investigative Service (NIS). Case Numbers were not assigned by NIS.)

7. An article believed to contain Secret compartmented information appeared in Electronic Warfare magazine in 1974. Investigation revealed that the article may have been drawn from official unclassified data. Investigation stopped as DoD officials did not desire contact with magazine.
8. Sea Technology magazine contained Confidential information about a nuclear powered submersible. Investigation was closed 23 January 1975 due to lack of leads and minimal damage to national security.
9. In 1975, a radioman assigned to the USS CORAL SEA disclosed a Confidential message to his dependents concerning personnel problems aboard his ship. Contents of the message appeared in the San Francisco Examiner. Action is still pending.
10. An article appeared in Aviation Week Magazine in 1975 containing information classified Confidential. Investigation was closed after it was discovered that the information had been developed from an open source, The Congressional Record.
11. In 1977, the London Economist published an article containing Top Secret intelligence information. A retired Navy Commander, the author of the article, was considered a principal suspect. The matter, however, has never been successfully resolved.
12. An article appeared in the Stars and Stripes concerning Confidential messages found in trash in Subic Bay. The investigation, opened on 1 November 1979, identified suspects who provided the media with a copy of a Confidential message. The case is still open.
13. In 1979, an edition of Aviation Week carried an article which was determined to contain Top Secret intelligence information. The investigation was closed without establishing culpability.
14. The Defense Electronics magazine contained an article in a 1979 issue which disclosed Secret information concerning computers. The investigation cancelled (for unspecified reasons).
15. In 1980, a retired Navy Captain working with the Copley News Service wrote an article for the San Diego Union concerning boost in combat ships. The article contained Confidential information. An investigation was conducted.

16. In 1980, an article appeared in Aviation Week concerning undersea weapons. The information was classified Secret/WNINTEL. NIS investigation determined that the unauthorized disclosure resulted from a briefing given to members of the Senate Armed Services Committee's Staff on 26 November 1980 by the Naval Intelligence Support Center. Only six staff members were determined to have attended the briefing and the investigation was referred to the FBI. All six attendees were interviewed by FBI Special Agents. All denied culpability and agreed to undergo polygraph. The Department of Justice decided to forgo polygraph examinations.
17. In 1981, the Boston Herald American published an article on Russian submarines that contained Confidential information. Investigation was cancelled due to minimal national security damage.
18. In 1980, a petty officer assigned to the USS RICHARD E. BYRD disclosed classified information pertaining to the BYRD's operations in the Mediterranean to a writer for the Virginian Pilot. That information subsequently appeared in a newspaper article. As a result, the petty officer received a letter of reprimand and a reduction in rate under Article 15 of the Uniform Code of Military Justice.

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(The following cases were investigated by the U.S. Air Force Office of Special Investigations.)

19. 75HQD34-8682: In 1975, articles appeared in the Rocky Mountain News and Baltimore Sun which contained information on possible Soviet violations of SALT agreements. The information most probably came from a widely disseminated SECRET document.
20. 7669D34-85: In 1976, a USAF NCO pending court-martial for other offenses sent a letter containing a description of his job to Stars and Stripes newspaper. That information was evaluated as Confidential. The letter was retrieved without publication.
21. 76HQD34-8686: In 1976, an article in Commerce Business Daily identified the specific site of a construction project involving a sensitive weapons security system. The information was classified Confidential/Formerly Restricted Data, but had been provided along with other unclassified data due to administrative error.
22. 78HQD34-8690: In 1978, a syndicated reporter asked a senior USAF officer for information regarding capabilities of Soviet vs. U.S. missiles and aircraft. The content of the reporter's questions revealed specific knowledge of classified information, including material classified Top Secret plus special accesses required. It is not known whether the reporter actually published his classified knowledge.
23. 7910D34-740: In 1978, articles in the Austin American-Statesman and San Antonio Express News contained information on the location of a USAF unit with a classified mission. While the classification of the material was Secret/Formerly Restricted Data, the same information had also appeared in other news publications as early as 1975.
24. 7804D34-1153: 780D34-888 - Articles in several 1978 issues of Electronics Warfare - Defense Electronics magazine contained information regarding electronic warfare capabilities and countermeasures of the U.S. and other nations. Data apparently came from a Secret document which had been inadvertently mailed to the publisher.
25. 8013D34-522: In March 1980, in a television interview for the "Jack Van Impe Presents" show, aired in San Diego, CA, a USAF member allegedly disclosed classified information regarding Strategic Air Command alert procedures in case of nuclear attack. Investigation revealed that the information was not classified.

26. 8004D34-1158: In 1980, an RKO-TV reporter produced one Secret and two Confidential Air Force films during an interview with a senior Department of Defense official. The films had been improperly released to the reporter on a telephone request. Established procedures at the releasing activity were not followed.
27. 8013D34-525: In 1980, a newspaper reporter submitted several Freedom of Information Act (FOIA) requests to various Air Force and Department of Defense officials. Some FOIA requests contained Secret correspondence and actual excerpts from Congressional testimony by the Commander-in-Chief, Strategic Air Command, regarding mission, capabilities and future plans.
28. 8018D93-13: In 1980, a freelance reporter and aviation author asked a senior USAF officer by telephone for information on a joint Navy-Air Force flying training program. The reporter revealed specific knowledge of material classified SECRET. The reporter made a personal pledge to the officer not to publish the material, a pledge he apparently honored.
29. 8162D34-396: In a 1981 interview with a foreign newspaper reporter, a USAF member disclosed information on a U.S. nuclear weapons location, classified Secret/Formerly Restricted Data. The USAF member was already awaiting discharge for an unrelated offense. The reporter's interview was not published.

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(The following cases were investigated by the Defense Investigative Service.)

30. 75009-DO5-4529-3C9: In 1974, Aviation Week and Space Technology printed information concerning the production figures of the Condor Missile. The information was classified Confidential.
31. 75184-Do5-4535-3D9: In 1975, a newspaper disclosed the payload of the Poseidon Missile. The information concerning its accuracy, and explosive yield were classified Secret/Restricted Data.
32. 75259-DO5-4501-3B9: Confidential Naval position paper data dealing with force level of Navy aircraft was printed in 1975.
33. 75328-DO5-4527-3D9: Secret information concerning Trident Missile capabilities and fuels appeared in the print media in 1975.
34. 76335-DO5-4601-3C9: Top Secret/Code Word information was released to the news media. The information related to the threat to NATO posed by the Soviet military build up in 1976.
35. 76336-DO5-5114-3C9: Information marked Secret (NOFORN) Sensitive Sources was released by the Associated Press. The information concerned the shipment of military equipment to another country.
36. 76336-DO5-5115-3C9: News article released by the Associated Press contains information relating to arms for Rhodesian nationalists and to Soviet and Cuban involvement in South Africa. The information was classified Secret/NOFORN WINTTEL.
37. 77292-DO4-4701-3C9: Top Secret Code Word information concerning Soviet charged particle beam weapon capabilities appeared in the print media in 1977.
38. 78041-DO4-4701-3B9: In 1977, media published classified information concerning high altitude large optics project. The information was classified Secret/Code Word.
39. 78165-Do4-4701-3B9: DoD employee furnished a Secret document to an uncleared Senate staffer in 1978.
40. 79184-DO4-5401-3B9: In 1979, media published information concerning the Salt II monitoring documents. The information was Top Secret intelligence.

41. 80244-DO4-3101-3E9: Information classified Secret appeared in the print media in 1980 concerning Stealth technology.
42. 81118-DO4-3202-3C9: Secret information concerning reloading capability of SS-18 silos was used by a broadcaster in 1981.
43. 81134-DO4-3201-3C9: Top Secret/Code Word information concerning Russian troop movements around Poland was published in the press in 1981.
44. 81166-DO4-3201-3E9: Secret/Special Access information concerning Stealth technology appears in media in 1981.
45. 81224-DO4-3101-3C9: Secret information was published by the local press. The information was regarded as highly sensitive because it concerned meetings of the ongoing Salt talks.
46. 81247-DO4-3001-3E9: In 1980, the print media disclosed Top Secret information concerning some phases of the rescue mission in Iran.
47. 81342-VO1-0002-3B9: In 1981, the print media disclosed Secret information concerning the alleged Libyan plot to assassinate the President.
48. 82027-VO1-0001-3C9: Print media carried Secret intelligence photo of Russian aircraft in 1981.
49. 82027-VO1-0002-3C9: Print media carried Secret information concerning Defense Resources Board meeting.
50. 82027-VO1-0003-3C9: Print media published Secret information concerning the location of MIG-23's in Cuba in 1982.
51. 82049-VO1-0004-3C9: In 1982, the print media disclosed Secret information concerning a military exercise. The case is still pending.
52. 82049-VO1-0005-3C9: In 1981, the CIA requested DoD investigative assistance concerning print media release of information concerning "Laser Battle Stations."
53. 82049-VO1-0006-3C9: In 1982, the Department of State requested DoD investigative assistance concerning news release of classified/sensitive diplomatic information.
54. 81009-DO4-3301-3B9: In 1980, a reporter possessed and printed excerpts from classified document.

(The following cases were investigated by the Defense Investigative Service. These cases deal with unauthorized disclosures to a contractor.)

55. 76281-DO5-5614-3B9: In 1975, Top Secret intelligence was disclosed concerning Soviet chemical warfare; doctrine and capabilities to a contractor.
56. 77080-DO5-5601-3B9: In 1977, Confidential information was provided to a private contractor concerning foreign sales of military equipment.
57. 78082-DO4-4701-3Z9: In 1977, Secret and Confidential documents were released improperly to a contractor concerning DoD budgetary information.
58. 78026-DO4-6301-3B9: In 1977, Confidential information was released to a contractor concerning a study of guns/ammunition.

(The following cases were investigated by the Defense Investigative Service. These cases deal with unauthorized disclosures by a contractor.)

59. 76096-DO4-4701-3B9, also reopened as 78096-DO4-4701-3B1: A Top Secret draft message from SECDEF to the President concerning the MX missile illegally obtained by contractor and sent to their corporate HQ via nonsecure means.
60. In 1979, a DoD contractor was alleged to have made unauthorized disclosure of Secret information which was contained in a draft GAO report concerning F/A-18 fighter.

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WILLIAM V. ROTH, JR., CHAIRMAN  
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## United States Senate

COMMITTEE ON  
 GOVERNMENTAL AFFAIRS  
 WASHINGTON, D.C. 20510

August 12, 1983

The Honorable William French Smith  
 Attorney General  
 Department of Justice  
 Washington, D. C. 20530

Dear Mr. Attorney General:

The Senate Committee on Governmental Affairs will hold a hearing on September 13, 1983 on National Security Decision Directive 84, issued by the President last March. At my request, Senator Mathias will preside at this hearing. Since the Justice Department will be affected by this directive, I would like to invite your representative to appear at this hearing to testify on the matter. Further details concerning the hearing will be supplied in the near future.

As you know, one of the issues addressed by the President's directive is a requirement for pre-publication review of certain writings by former government officials. In this connection, I would be most appreciative if you could provide the Committee with the following information, to assist in our preparation for this hearing:

1. Are there any instances within the past five years in which former officials of the Justice Department published classified materials without securing the permission of the department?
2. If so, please provide a description of the episode including any communications with the former official and any damage assessment of the unauthorized disclosure. (If a full response to this question cannot be made public, please provide as detailed a response as possible, and indicate whether a more complete answer will be provided in a classified annex.)
3. Please describe the current procedures for dealing with publications by former officials. For example, have such officials voluntarily submitted manuscripts which contain information which they believe may be classified? Does the Justice Department monitor the publications or speaking engagements for former officials for compliance with pre-publication review procedures? How are disputes about deletions of material resolved? What is the volume and nature of materials which the department reviews?
4. In your view, are there flaws in the current system which prevent it from operating in a satisfactory manner to protect the national interest? If so, what are those flaws?
5. As a result of the President's directive, have any changes in the pre-publication review system been put into effect? In this connection, I would appreciate receiving drafts of any proposed contract which officials will be asked to sign and which provide for pre-publication review, as well as copies of any documents explaining the meaning of any such draft contracts and any documents describing the views of the Justice Department on what should be incorporated in such a contract.

As I am sure you are aware, there is considerable interest in the Congress, as well as among the press and the public as a whole, in the pre-publication review requirement contained in the President's directive. I would appreciate your advising the Committee of the current status of this program. I would also appreciate your cooperation in supplying the Committee with a projected schedule for future implementation activities since they will affect the structure and substance of our hearings.

If you have any questions concerning these requests, please have your staff call Link Hoewing of my staff, on 224-4751 or Steve Metalits of Senator Mathias' staff at 224-5617.

I would appreciate receiving your response before the end of this month.

Sincerely,

*Bill Roth*  
 William V. Roth, Jr.  
 Chairman



U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable William V. Roth, Jr.  
Chairman  
Committee on Governmental Affairs  
United States Senate  
Washington, D.C. 20510

Dear Senator Roth:

In response to your invitation, the Department of Justice wishes to designate Richard K. Willard, Deputy Assistant Attorney General, Civil Division, as its representative for the hearing scheduled for September 13, 1983. Mr. Willard served as chairman of the Interdepartmental Group on Unauthorized Disclosures of Classified Information, whose recommendations led to the directive that is the subject of your hearing.

We are unaware of any instance within the past five years in which a former Justice Department official published classified information without authorization. However, during this time the Department did not have a program for monitoring the publications of former employees and thus it is possible that some disclosures may have occurred.

Current procedures regarding publications by former employees are set forth in DOJ Order No. 2620.8, dated August 25, 1983, a copy of which is enclosed. In our view, these new procedures, which were adopted in response to the President's directive, will satisfactorily protect the national interest. At the same time, care has been taken to ensure that prepublication review is limited to the protection of classified information and involves no censorship of viewpoints expressed. Moreover, time limits have been established to ensure prompt review.

Prior to adoption of the current procedures, DOJ employees with access to Sensitive Compartmented Information were required to sign Form 4193, which included a prepublication review provision. A copy of Form 4193 is attached. Apart from this agreement, all other prepublication review was conducted on a voluntary basis. During calendar year 1982, 3 books and 2 articles were submitted for prepublication review at the Department of Justice.

During 1981, former Attorney General Griffin Bell voluntarily submitted portions of a book manuscript for prepublication review. Thus far, all disputes regarding deletion of material have been resolved by agreement.

Enclosed are texts of nondisclosure agreements which have been prepared for general use in the Executive Branch. Also enclosed are Justice Department letters regarding the enforceability of these agreements in civil litigation. The Classified Information Nondisclosure Agreement is being promulgated by the Information Security Oversight Office as a new standard form. The Sensitive Compartmented Information Nondisclosure Agreement is being promulgated by the Director of Central Intelligence as a replacement for Form 4193.

Sincerely,

(Signed) Robert A. McConnell

ROBERT A. MCCONNELL  
Assistant Attorney General

Enclosures

U.S. Department of Justice



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Washington, D.C. 20530

August 25, 1983

Materials Concerning Prepublication Review

- 1) SCI Nondisclosure Agreement Form
- 2) Classified Information Nondisclosure Agreement Form
- 3) DOJ Letters on Enforceability of Agreements
- 4) DOJ Implementing Regulations

## SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between \_\_\_\_\_ and the United States  
(Name-Printed or Typed)

1 1. Intending to be legally bound, I hereby accept the obligations  
2 contained in this Agreement in consideration of my being granted  
3 access to information known as Sensitive Compartmented Information  
4 (SCI). I have been advised and am aware that SCI involves or  
5 derives from intelligence sources or methods and is classified or  
6 classifiable under the standards of Executive Order 12356 or under  
7 other Executive order or statute. I understand and accept that by  
8 being granted access to SCI, special confidence and trust shall be  
9 placed in me by the United States Government.

1 2. I hereby acknowledge that I have received a security indoctrination  
2 concerning the nature and protection of SCI, including the procedures  
3 to be followed in ascertaining whether other persons to whom I  
4 contemplate disclosing this information have been approved for  
5 access to it, and that I understand these procedures. I understand that  
6 I may be required to sign subsequent agreements as a condition of  
7 being granted access to different categories of SCI. I further  
8 understand that all my obligations under this Agreement continue to  
9 exist whether or not I am required to sign such subsequent agreements.

1 3. I have been advised and am aware that direct or indirect unauthorized  
2 disclosure, unauthorized retention, or negligent handling of SCI by  
3 me could cause irreparable injury to the United States or could be  
4 used to advantage by a foreign nation. I hereby agree that I will  
5 never divulge such information unless I have officially verified  
6 that the recipient has been properly authorized by the United States  
7 Government to receive it or I have been given prior written notice of  
8 authorization from the United States Government Department or Agency  
9 (hereinafter Department or Agency) last granting me either a security  
10 clearance or an SCI access approval that such disclosure is permitted.

1 4. I further understand that I am obligated to comply with laws and  
2 regulations that prohibit the unauthorized disclosure of classified  
3 information. As used in this Agreement, classified information is  
4 information that is classified under the standards of E.O. 12356, or  
5 under any other Executive order or statute that prohibits the  
6 unauthorized disclosure of information in the interest of national  
7 security.

1 5. In consideration of being granted access to SCI and of being  
2 assigned or retained in a position of special confidence and trust  
3 requiring access to SCI and other classified information, I hereby  
4 agree to submit for security review by the Department or Agency  
5 last granting me either a security clearance or an SCI access  
6 approval all materials, including works of fiction, that I contemplate  
7 disclosing to any person not authorized to have such information,

8 or that I have prepared for public disclosure, which contain or  
9 purport to contain:

- 10 (a) any SCI, any description of activities that produce or
- 11 relate to SCI, or any information derived from SCI;
- 12 (b) any classified information from intelligence reports
- 13 or estimates; or
- 14 (c) any information concerning intelligence activities,
- 15 sources or methods.

16 I understand and agree that my obligation to submit such information  
17 and materials for review applies during the course of my access to  
18 SCI and at all times thereafter. However, I am not required to  
19 submit for review any such materials that exclusively contain  
20 information lawfully obtained by me at a time when I have no employment,  
21 contract or other relationship with the United States Government,  
22 and which are to be published at such time.

1 6. I agree to make the submissions described in paragraph 5 prior  
2 to discussing the information or materials with, or showing them to  
3 anyone who is not authorized to have access to such information. I  
4 further agree that I will not disclose such information or materials  
5 unless I have officially verified that the recipient has been  
6 properly authorized by the United States Government to receive it or  
7 I have been given written authorization from the Department or  
8 Agency last granting me either a security clearance or an SCI  
9 access approval that such disclosure is permitted.

1 7. I understand that the purpose of the review described in paragraph 5  
2 is to give the United States a reasonable opportunity to determine  
3 whether the information or materials submitted pursuant to paragraph 5  
4 set forth any SCI or other information that is subject to classification  
5 under E.O. 12356 or under any other Executive order or statute that  
6 prohibits the unauthorized disclosure of information in the interest  
7 of national security. I further understand that the Department or  
8 Agency to which I have submitted materials will act upon them,  
9 coordinating with the Intelligence Community or other agencies when  
10 appropriate, and substantively respond to me within 30 working days  
11 from date of receipt.

1 8. I have been advised and am aware that any breach of this Agreement  
2 may result in the termination of any security clearances and SCI  
3 access approvals that I may hold; removal from any position of  
4 special confidence and trust requiring such clearances or access  
5 approvals; and the termination of my employment or other relationships  
6 with the Departments or Agencies that granted my security clearances  
7 or SCI access approvals. In addition, I have been advised and am  
8 aware that any unauthorized disclosure of SCI or other classified  
9 information by me may constitute a violation or violations of United  
10 States criminal laws, including the provisions of Sections 641, 793,  
11 794, 798, and 952, Title 18, United States Code, the provisions

12 of Section 783(b), Title 50, United States Code, and the provisions  
13 of the Intelligence Identities Protection Act of 1982. I recognize  
14 that nothing in this Agreement constitutes a waiver by the United  
15 States of the right to prosecute me for any statutory violation.

1 9. I hereby assign to the United States Government all royalties,  
2 remunerations, and emoluments that have resulted, will result, or  
3 may result from any disclosure, publication, or revelation not  
4 consistent with the terms of this Agreement.

1 10. I understand that the United States Government may seek any  
2 remedy available to it to enforce this Agreement including, but not  
3 limited to, application for a court order prohibiting disclosure of  
4 information in breach of this Agreement.

1 11. I understand that all information to which I may obtain access  
2 by signing this Agreement is now and will forever remain the property  
3 of the United States Government. I do not now, nor will I ever,  
4 possess any right, interest, title, or claim whatsoever to such  
5 information. I agree that I shall return all materials which have  
6 or may come into my possession or for which I am responsible  
7 because of such access, upon demand by an authorized representative  
8 of the United States Government or upon the conclusion of my employment  
9 or other relationship with the Department or Agency that last  
10 granted me either a security clearance or an SCI access approval.  
11 If I do not return such materials upon request, I understand that  
12 this may be a violation of Section 793, Title 18, United States  
13 Code, a United States criminal law.

1 12. Unless and until I am released in writing by an authorized  
2 representative of the United States Government, I understand that  
3 all conditions and obligations imposed upon me by this Agreement  
4 apply during the time I am granted access to SCI and at all times  
5 thereafter.

1 13. Each provision of this Agreement is severable. If a court should  
2 find any provision of this Agreement to be unenforceable, all other  
3 provisions of this Agreement shall remain in full force and effect.

1 14. I have read this Agreement carefully and my questions, if any,  
2 have been answered to my satisfaction. I acknowledge that the  
3 briefing officer has made available to me Sections 641, 793, 794,  
4 798, and 952 of Title 18, United States Code, Section 783(b) of  
5 Title 50, United States Code, the Intelligence Identities Protection  
6 Act of 1982, and Executive Order 12356 so that I may read them at  
7 this time, if I so choose.

1 15. I make this Agreement without mental reservation or purpose of  
2 evasion.

SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

SOCIAL SECURITY NUMBER  
(SEE NOTICE BELOW)

ORGANIZATION \_\_\_\_\_

- 1 The execution of this Agreement was witnessed by the undersigned,
- 2 who, on behalf of the United States Government, agreed to its terms
- 3 and accepted it as a prior condition of authorizing access to
- 4 Sensitive Compartmented Information.

WITNESS and ACCEPTANCE:

SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

ORGANIZATION \_\_\_\_\_

## SECURITY BRIEFING ACKNOWLEDGEMENT

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 ACKNOWLEDGEMENT

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)

1 NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal  
2 agencies inform individuals, at the time information is solicited  
3 from them, whether the disclosure is mandatory or voluntary, by  
4 what authority such information is solicited, and what uses will  
5 be made of the information. You are hereby advised that authority  
6 for soliciting your Social Security Account Number (SSN) is Executive  
7 Order 9397. Your SSN will be used to identify you precisely when  
8 it is necessary to 1) certify that you have access to the information  
9 indicated above, 2) determine that your access to the information  
10 indicated has terminated, or 3) certify that you have witnessed  
11 a briefing or debriefing. Although disclosure of your SSN is not  
12 mandatory, your failure to do so may impede the processing of such  
13 certifications or determinations.

## CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between \_\_\_\_\_ and the United States  
(Name-Printed or Typed)

1 1. Intending to be legally bound, I hereby accept the obligations  
2 contained in this Agreement in consideration of my being granted  
3 access to classified information. As used in this Agreement, classified  
4 information is information that is either classified or classifiable  
5 under the standards of Executive Order 12356, or under any other Executive  
6 order or statute that prohibits the unauthorized disclosure of information  
7 in the interest of national security. I understand and accept that  
8 by being granted access to classified information, special confidence  
9 and trust shall be placed in me by the United States Government.

1 2. I hereby acknowledge that I have received a security indoctrination  
2 concerning the nature and protection of classified information,  
3 including the procedures to be followed in ascertaining whether  
4 other persons to whom I contemplate disclosing this information have  
5 been approved for access to it, and that I understand these procedures.

1 3. I have been advised and am aware that direct or indirect unauthorized  
2 disclosure, unauthorized retention, or negligent handling of classified  
3 information by me could cause irreparable injury to the United States  
4 or could be used to advantage by a foreign nation. I hereby agree  
5 that I will never divulge such information unless I have officially  
6 verified that the recipient has been properly authorized by the  
7 United States Government to receive it or I have been given prior  
8 written notice of authorization from the United States Government  
9 Department or Agency (hereinafter Department or Agency) last granting  
10 me a security clearance that such disclosure is permitted. I  
11 further understand that I am obligated to comply with laws and  
12 regulations that prohibit the unauthorized disclosure of classified  
13 information.

1 4. I have been advised and am aware that any breach of this Agreement  
2 may result in the termination of any security clearances I hold; removal  
3 from any position of special confidence and trust requiring such  
4 clearances; and the termination of my employment or other relationships  
5 with the Departments or Agencies that granted my security clearance or  
6 clearances. In addition, I have been advised and am aware that any  
7 unauthorized disclosure of classified information by me may constitute  
8 a violation or violations of United States criminal laws, including  
9 the provisions of Sections 641, 793, 794, 798, and 952, Title 18,  
10 United States Code, the provisions of Section 783(b), Title 50,  
11 United States Code, and the provisions of the Intelligence Identities  
12 Protection Act of 1982. I recognize that nothing in this Agreement  
13 constitutes a waiver by the United States of the right to prosecute  
14 me for any statutory violation.

1 5. I hereby assign to the United States Government all royalties,  
2 remunerations, and emoluments that have resulted, will result or may  
3 result from any disclosure, publication, or revelation not consistent  
4 with the terms of this Agreement.

1 6. I understand that the United States Government may seek any  
 2 remedy available to it to enforce this Agreement including, but  
 3 not limited to, application for a court order prohibiting disclosure  
 4 of information in breach of this Agreement.

1 7. I understand that all information to which I may obtain access  
 2 by signing this Agreement is now and will forever remain the property  
 3 of the United States Government. I do not now, nor will I ever,  
 4 possess any right, interest, title, or claim whatsoever to such  
 5 information. I agree that I shall return all materials, which have,  
 6 or may have, come into my possession or for which I am responsible  
 7 because of such access, upon demand by an authorized representative  
 8 of the United States Government or upon the conclusion of my employment  
 9 or other relationship with the Department or Agency that last  
 10 granted me a security clearance. If I do not return such materials  
 11 upon request, I understand that this may be a violation of Section 793,  
 12 Title 18, United States Code, a United States criminal law.

1 8. Unless and until I am released in writing by an authorized  
 2 representative of the United States Government, I understand that  
 3 all conditions and obligations imposed upon me by this Agreement  
 4 apply during the time I am granted access to classified information,  
 5 and at all times thereafter.

1 9. Each provision of this Agreement is severable. If a court  
 2 should find any provision of this Agreement to be unenforceable, all  
 3 other provisions of this Agreement shall remain in full force and  
 4 effect.

1 10. I have read this Agreement carefully and my questions, if  
 2 any, have been answered to my satisfaction. I acknowledge that  
 3 the briefing officer has made available to me Sections 641, 793,  
 4 794, 798, and 952 of Title 18, United States Code, Section 783(b) of  
 5 Title 50, United States Code, the Intelligence Identities Protection  
 6 Act of 1982, and Executive Order 12356, so that I may read them  
 7 at this time, if I so choose.

1 11. I make this Agreement without mental reservation or purpose  
 2 of evasion.

SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

SOCIAL SECURITY NUMBER  
 (SEE NOTICE BELOW) \_\_\_\_\_

ORGANIZATION \_\_\_\_\_

1 The execution of this Agreement was witnessed by the undersigned,  
2 who, on behalf of the United States Government, agreed to its terms  
3 and accepted it as a prior condition of authorizing access to  
4 classified information.

WITNESS and ACCEPTANCE:

SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

ORGANIZATION \_\_\_\_\_

1 NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal  
2 agencies inform individuals, at the time information is solicited  
3 from them, whether the disclosure is mandatory or voluntary, by what  
4 authority such information is solicited, and what uses will be made  
5 of the information. You are hereby advised that authority for  
6 soliciting your Social Security Account Number (SSN) is Executive  
7 Order 9397. Your SSN will be used to identify you precisely when it  
8 is necessary to 1) certify that you have access to the information  
9 indicated above or 2) determine that your access to the information  
10 indicated has terminated. Although disclosure of your SSN is not  
11 mandatory, your failure to do so may impede the processing of such  
12 certifications or determinations.



U.S. Department of Justice  
Civil Division

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Deputy Assistant Attorney General

Washington, D.C. 20530

August 16, 1983

Mr. Robert M. Kimmitt  
Executive Secretary  
National Security Council  
The White House  
Washington, D. C. 20506

Re: NSDD-84 Nondisclosure Agreement Forms

Dear Mr. Kimmitt:

In my letter of July 19, 1983, a copy of which is attached, I advised Steven Garfinkel that two draft nondisclosure agreements had been determined by the Department of Justice to be enforceable in civil litigation brought by the United States. Since then, the nondisclosure agreements have been revised, and copies of the final versions are attached to this letter. None of the revisions affect any of the legal analysis contained in my July 19 letter. Therefore, we have concluded that each of the final nondisclosure agreements would be enforceable in accordance with its terms in civil litigation initiated by the United States.

Sincerely,

(Signed)

Richard K. Willard

Richard K. Willard  
Deputy Assistant Attorney General

Attachments

cc: Steven Garfinkel



U.S. Department of Justice  
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

July 19, 1983

Mr. Steven Garfinkel  
Director, Information Security Oversight Office  
General Services Administration  
Washington, D.C. 20403

Dear Mr. Garfinkel:

Your letter to the Attorney General dated July 1, 1983, requests that the Department of Justice review two nondisclosure agreements drafted pursuant to National Security Decision Directive 84, entitled "Safeguarding National Security Information" (referred to herein as NSDD-84), which was signed by the President on March 11, 1983.

Paragraph 1.a. of NSDD-84 requires all persons with authorized access to classified information to sign a nondisclosure agreement as a condition of access. Paragraph 1.b. imposes the same requirement on persons with authorized access to Sensitive Compartmented Information (SCI) and requires, in addition, that such nondisclosure agreements "include a provision for prepublication review to assure deletion of SCI and other classified information." Paragraph 1.c. provides that the agreements required in paragraphs 1.a. and 1.b. must be in a form determined by the Department of Justice to be enforceable in a civil action brought by the United States.

We understand that the draft agreements transmitted with your letter were prepared pursuant to the provision in paragraph 1.c. of NSDD-84 that your office develop standardized forms to satisfy the requirements of the directive. We also understand that use of these forms will be mandatory for each agency of the Executive Branch that originates or handles classified information, unless the National Security Council grants permission to use an alternative form of agreement that has been approved by your office and the Justice Department.

Classified Information Nondisclosure Agreement

The essence of the proposed Classified Information Nondisclosure Agreement is an undertaking by the person receiving access to classified information never to disclose such

information in an unauthorized manner. This undertaking is consistent with the provisions of Executive Order 12356, as well as various statutes and other regulations that prohibit the unauthorized disclosure of classified information. In addition, government employees and others who are entrusted with classified information have a fiduciary obligation to protect it from unauthorized disclosure. See Snepp v. United States, 444 U.S. 507, 511 n.6, 515 n.11 (1980).

The protection of national security information is a primary and fundamental constitutional responsibility of the President that derives from his responsibilities as Chief Executive, Commander-in-Chief, and the principal instrument of United States foreign policy. Agreements to preserve the secrecy of classified information are an appropriate method for the President to discharge these constitutional responsibilities. United States v. Marchetti, 466 F.2d 1309, 1315-16 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); cf. Snepp v. United States, supra, 444 U.S. at 509 n.3 (agreement serves "compelling interest" of Government in safeguarding national security information). These same cases also rely upon the statutory authority of the Director of Central Intelligence to protect "intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403(d)(3). However, the agreements sustained in Marchetti and Snepp were not limited to information concerning intelligence sources and methods but included promises never to disclose any classified information. Therefore, we believe that the President may require the signing of such agreements as a condition of access to classified information.

#### SCI Nondisclosure Agreement

The proposed SCI Nondisclosure Agreement has the same basic terms as the Classified Information Nondisclosure Agreement discussed above. SCI is a category of classified information that is subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods. The power to require signing such an agreement as a condition of access to SCI is thus supported by the statutory authority of the Director of Central Intelligence to protect intelligence sources and methods, 50 U.S.C. § 403(d)(3), as well as the more fundamental constitutional responsibilities of the President regarding national security.

The proposed SCI Nondisclosure Agreement includes provisions for the Government to conduct prepublication review of certain writings by persons who have signed the agreement. The prepublication review provisions of the proposed agreement are similar to the agreement found by the Supreme Court to be enforceable in Snepp v. United States, supra. See also Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975); United States v. Marchetti, supra; Agee v. CIA, 500 F. Supp. 506 (D.D.C. 1980).

The rationale of the above-cited cases supports the inclusion of prepublication review provisions in agreements that extend beyond CIA to include other persons with authorized access to SCI. Neither the statutory authority of the Director of Central Intelligence nor the constitutional responsibilities of the President are limited to CIA and its employees. Moreover, a high degree of trust, which creates a fiduciary obligation on the part of CIA employees, would also be involved for government officials outside CIA who are entrusted with equally sensitive information such as SCI.

Paragraph 5 of the proposed SCI Nondisclosure Agreement defines the scope of materials required to be submitted for prepublication review. In certain respects, this provision is narrower than the agreement at issue in Snepp. As in the Snepp agreement, however, certain materials must be submitted for review even if they are not thought to contain classified information. The Supreme Court in Snepp upheld the validity of such a requirement. 444 U.S. at 511-13.

Among the categories of materials required in paragraph 5 to be submitted for prepublication review is "(c) any information concerning intelligence activities, sources or methods." This category is not limited to classified information as such, but includes any information that is required to be considered for classification pursuant to Executive Order 12356, § 1.3(a)(4). We believe that agencies using the proposed SCI Nondisclosure Agreement should include in their implementing instructions some definition of the term "intelligence activities," to include at least a reference to the definition contained in Executive Order 12333, § 3.4(e).

Once material is submitted for prepublication review, there is no authority in the proposed agreement for the Government to delete unclassified information. However, any information that is subject to classification may be deleted pursuant to paragraph 7, even if it does not pertain to SCI or other intelligence matters. See Alfred A. Knopf, Inc. v. Colby, supra, 509 F.2d at 1368-69.

#### Conclusion

We have reviewed the specific provisions of the two draft agreements transmitted with your letter and have concluded that each would be enforceable in accordance with its terms in civil litigation initiated by the United States.

Sincerely,

(Signed)

Richard K. Willard

Richard K. Willard

Deputy Assistant Attorney General



**DEPARTMENT  
OF JUSTICE****Order**

DOJ 2620.8

**Subject: EMPLOYEE OBLIGATIONS TO PROTECT CLASSIFIED INFORMATION  
AND SUBMIT TO PREPUBLICATION REVIEW**

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1. **PURPOSE.** The purpose of this order is to explain and clarify Department of Justice (DOJ) policies concerning implementation of the prepublication review program.
2. **SCOPE.** This order applies to all persons granted access to classified information in the course of their employment at the DOJ and DOJ contractors granted such access.
3. **AUTHORITY.**
  - a. Executive Order 12356, "National Security Information."
  - b. National Security Decision Directive-84 entitled "Safeguarding National Security Information."
  - c. 28 C.F.R. 0.75(p).
4. **POLICY.** All persons granted access to classified information in the course of their employment at the DOJ are required to safeguard that information from unauthorized disclosure. This nondisclosure obligation is imposed by statutes, regulations, access agreements, and the fiduciary relationships of the persons who are entrusted with classified information in the performance of their duties. The nondisclosure obligation continues after DOJ employment terminates.

As an additional means of preventing unlawful disclosures of classified information, the President has directed that all persons with authorized access to Sensitive Compartmented Information (SCI) be required to sign nondisclosure agreements containing a provision for prepublication review to assure deletion of SCI and other classified information. SCI is information that not only is classified for national security reasons as Top Secret, Secret, or Confidential, but also is subject to special access and handling requirements

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**Distribution:** BUR/H-1  
OBD/F-2 OBD/H-1

**Initiated By:** Security Staff  
Justice Management Division

because it involves or derives from particularly sensitive intelligence sources and methods.

5. RESPONSIBILITIES.

- a. The prepublication review provision requires that DOJ employees granted access to SCI submit certain material to the Department, whether prepared during or subsequent to DOJ employment, prior to its publication to provide an opportunity for determining whether an unauthorized disclosure of SCI or other classified information would occur as a consequence of its publication.

The obligations not to disclose classified information and to comply with agreements requiring prepublication review have been held by the Supreme Court to be enforceable in civil litigation. Snepp v. United States, 444 U.S. 507 (1980).

- b. It must be recognized at the outset that it is not possible to anticipate each and every question that may arise. The Department will endeavor to respond, however, as quickly as possible to specific inquiries by present and former employees concerning whether specific materials require prepublication review. Present and former employees are invited to discuss their plans for public disclosures of information that may be subject to these obligations with authorized Department representatives at an early stage, or as soon as circumstances indicate these policies must be considered. All questions concerning these obligations should be addressed to the Counsel for Intelligence Policy, Office of Intelligence Policy and Review, Room 6325, U.S. Department of Justice, 10th & Constitution Avenue, N.W., Washington, D.C. 20530. The official views of the Department on whether specific materials require prepublication review may only be expressed by the Counsel for Intelligence Policy and persons should not act in reliance upon the views of other Department personnel.
- c. Employees with access to SCI will be required to sign agreements providing for prepublication review. Prepublication review is required only as expressly provided for in an agreement. However, all persons who have had access to classified information have an obligation to avoid unauthorized disclosures of such information and are subject to enforcement actions if they disclose classified information in an unauthorized manner. Therefore, present or former employees are encouraged voluntarily to submit material for

prepublication review if they believe that such material may contain classified information even if such submission is not required by a prepublication review agreement. Where there is any doubt, present and former employees are urged to err on the side of prepublication review to avoid unauthorized disclosures and for their own protection.

- d. Present or former employees who have signed agreements providing for prepublication review are required to submit any material prepared for disclosure to others that contains or purports to contain:
- (1) any SCI, any description of activities that produce or relate to SCI, or any information derived from SCI;
  - (2) any classified information from intelligence reports or estimates; or
  - (3) any information concerning intelligence activities, sources or methods.

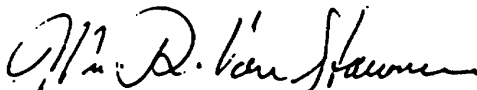
The term "intelligence activities" in paragraph 5.d.(3) means all activities that agencies within the Intelligence Community are authorized to conduct pursuant to Executive Order 12333. However, there is no requirement to submit for review any materials that exclusively contain information lawfully obtained at a time when the author has no employment, contract, or other relationship with the United States Government and which are to be published at such time.

- e. A person's obligation to submit material for prepublication review remains identical whether such person actually prepares the material or causes or assists another person, such as a ghost writer, spouse or friend, or editor in preparing the material. Material described in paragraph 5.d must be submitted for prepublication review prior to discussing it with or showing it to a publisher, co-author, or any other person who is not authorized to have access to it. In this regard, it should be noted that a failure to submit such material for prepublication review constitutes a breach of the obligation and exposes the author to remedial action even in cases where the published material does not actually contain SCI or classified information. See *Snepp v. United States*, *supra*.

- f. The requirement to submit information or materials for prepublication review is not limited to any particular type of material or disclosure. Written materials include not only books but all other forms of written materials intended for public disclosure, such as (but not limited to) newspaper columns, magazine articles, letters to the editor, book reviews, pamphlets, and scholarly papers. Because fictional treatment may convey factual information, fiction is also covered if it is based upon or reflects information described in paragraph 5.d.
- g. Oral statements are also included when based upon written materials, such as an outline of the remarks. There is no requirement to prepare such material for prior review, however, unless there is reason to believe in advance that oral statements may contain SCI or other classified information. Thus, a person may participate in an oral presentation of information where there is no opportunity for prior preparation (e.g., news interview, panel discussion) unless there is reason to believe in advance that such oral expression may contain SCI or other classified information. This recognition of the problems with oral representations does not, of course, exempt present or former employees from liability for any unauthorized disclosures of SCI or classified information that may occur in the course of even extemporaneous oral expressions.
- h. Material that consists solely of personal views, opinions or judgments and does not contain or imply any statement of fact that would fall within the description in paragraph 5.d is not subject to the prepublication review requirement. For example, public speeches or publication of articles on such topics as proposed legislation or foreign policy do not require prepublication review as long as the material does not directly or implicitly constitute a statement of an informational nature that falls within paragraph 5.d. Of course, in some circumstances the expression of "opinion" may imply facts and thus be of such a character as to require prior review.
- i. Obviously, the purposes of prepublication review will be frustrated where the material in question already has been disseminated to unauthorized persons. Comparison of the material before and after the review would reveal which items of classified information, if any, had been deleted at the Department's request. Consequently, the Department will consider these obligations to have been breached in any case, whether or not the written material is subsequently

submitted to the Department for prepublication review, where it already has been circulated to publishers or reviewers or has otherwise been made available to unauthorized persons. While the Department reserves the right to review such material for purposes of mitigating damage that may result from the disclosure, such action shall not prevent the United States Government and the Department from pursuing all appropriate remedies available under law as a consequence of the failure to submit the materials for prior review and/or any unauthorized disclosure of SCI or classified information.

- j. Materials submitted for prepublication review will be reviewed solely for the purpose of identifying and preventing the disclosure of SCI and other classified information. This review will be conducted in an impartial manner without regard to whether the material is critical or favorable to the Department. No effort will be made to delete embarrassing or critical statements that are unclassified. Materials submitted to the Office of Intelligence Policy for review will be disseminated to other persons or agencies only to the extent necessary to identify classified information.
- k. The Counsel for Intelligence Policy will respond substantively to prepublication review requests within 30 working days. Priority shall be given to reviewing speeches, newspaper articles, and other materials that the author seeks to publish on an expedited basis. The Counsel's decisions may be appealed to the Deputy Attorney General, who will process appeals within 15 working days. The Deputy Attorney General's decision is final and not subject to further administrative appeal. Authors who are dissatisfied with the final administrative decision may obtain judicial review either by filing an action for declaratory relief or by giving the Department notice and a reasonable opportunity (30 working days) to file a civil action seeking a court order prohibiting disclosure. Of course, until any civil action is resolved in court, employees remain under an obligation not to disclose or publish information determined by the Government to be classified.
- l. Nothing in this order should be construed to alter or waive the Department's authority to seek any remedy available to it to prohibit or punish the unauthorized disclosure of classified information.
- m. A former DOJ employee who subsequently receives a security clearance or SCI access approval from another department or agency is permitted to satisfy any obligation regarding prepublication review by making submissions to the department or agency that last granted the individual either a security clearance or an SCI access approval.
- n. The obligations described herein as applying to DOJ employees also apply with equal force to contractors who are authorized by the Department to have access to SCI or other classified information.



WILLIAM D. VAN STAVOREN  
Acting Assistant Attorney General  
for Administration

## 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 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.

13. 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 \_\_\_\_\_

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 indicated has terminated, or 3) certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure to do so may impede such certifications or determinations.

COMMITTEE ON  
GOVERNMENTAL AFFAIRS  
WASHINGTON, D.C. 20510

**August 12, 1983**

The Honorable William J. Casey  
Director  
The Central Intelligence Agency  
Washington, D. C. 20505

Dear Mr. Casey:

The Senate Committee on Governmental Affairs will hold a hearing on September 13, 1983 on National Security Decision Directive 84, issued by the President last March. At my request, Senator Mathias will preside at this hearing.

As you know, one of the issues addressed by the President's directive is a requirement for pre-publication review of certain writings by former government officials. While we are not asking your agency to testify, we would be most appreciative if you could provide the Committee with the following background information, to assist in our preparation for this hearing:

1. Are there any instances within the past five years in which former officials of the C.I.A. published classified materials without securing the permission of the department?
2. If so, please provide a description of the episode including any communications with the former official and any damage assessment of the unauthorized disclosure. (If a full response to this question cannot be made public, please provide as detailed a response as possible, and indicate whether a more complete answer will be provided in a classified annex.)
3. Please describe the current procedures for dealing with publications by former officials. For example, have such officials voluntarily submitted manuscripts which contain information which they believe may be classified? Does the C.I.A. monitor the publications or speaking engagements for former officials for compliance with pre-publication review procedures? How are disputes about deletions of material resolved? What is the volume and nature of materials which the department reviews?
4. In your view, are there flaws in the current system which prevent it from operating in a satisfactory manner to protect the national interest? If so, what are those flaws?
5. As a result of the President's directive, have any changes in the pre-publication review system been put into effect? In this connection, I would appreciate receiving drafts of any proposed contract which officials will be asked to sign and which provide for pre-publication review, as well as copies of any documents explaining the meaning of any such draft contracts and any documents describing the views of the C.I.A. on what should be incorporated in such a contract.

If you have any questions concerning these requests, please have your staff call Link Hoewing of my staff, on 224-4751 or Steve Metalitz of Senator Mathias' staff at 224-5617.

I would appreciate receiving your response before the end of this month.

Sincerely,

*Bill Roth*  
William V. Roth, Jr.  
Chairman



Central Intelligence Agency



Washington, D.C. 20505

7 September 1983

Honorable William V. Roth, Jr.  
Chairman, Committee on Governmental Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is written in response to your request of 12 August 1983 for certain background information concerning the Agency's prepublication review process in preparation for your Committee's 13 September 1983 hearing on National Security Decision Directive (NSDD) 84.

With respect to your first question concerning instances within the past five years in which a former Agency official published classified information without authorization, we are aware of four such cases. In 1978, former Director of Central Intelligence (DCI) William E. Colby, in violation of his secrecy agreement, provided a draft of his book Honorable Men: My Life In The CIA simultaneously to his publisher, Simon and Schuster, and for review to the Agency. The manuscript was provided to his publisher with the understanding that Mr. Colby's approval of final publication would be subject to any changes required by the CIA following its review. Simon and Schuster, however, provided the original manuscript to a French publisher prior to final CIA clearance. The French version of Mr. Colby's book consequently included some material which the CIA had identified as classified. Also in 1978, former employee John Robert Stockwell published his book In Search of Enemies, A CIA Story. The book, which contained classified information, had not been submitted to the Agency for prepublication review. In addition, in 1980 former Agency employee Wilbur Crane Eveland provided his publisher with a draft of his book Ropes of Sand prior to submitting this manuscript to the Agency for prepublication review. This manuscript was determined by the Agency to contain classified information. Finally, former Agency employee Philip Agee, in three separate publications, Dirty Work in 1978, Dirty Work 2 in 1979, and White Paper Whitewash in 1981, disclosed certain

classified information without submitting these materials to the Agency for prepublication review.\*

As to your second question requesting a description of each of the above episodes, attached at Tab A are the settlement agreements reached with Messrs. Eveland and Colby, the consent judgment decree obtained with respect to Mr. Stockwell, and the injunction sought and obtained by the Agency against Mr. Agee. Each of these documents describes the circumstances surrounding the publication of the book or information at issue as to each of the above employees. Both the Federal District Court for the Eastern District of Virginia in Stockwell, and the Federal District Court for the District of Columbia in Agee, affirmed the validity and enforceability of the Agency's secrecy agreement, which agreement serves as the basis for the CIA's prepublication review process. More importantly, regardless of whether the unauthorized disclosure in the above four cases was made by a former DCI or a mid-level employee or portrayed the Agency in a favorable or unfavorable light, the Agency took uniform action in each of these cases in enforcing the obligations undertaken by all of these former employees in signing their secrecy agreements. In each case, appropriate remedial relief was sought and obtained by the Agency, either in the form of a court order or approved decree, or through an out-of-court settlement. As to your request for a damage assessment of each of the above unauthorized disclosures, the Agency cannot respond to this question on the public record. If desired, such an assessment could be provided to the Committee in a classified format.

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\* Also of relevance, although not strictly within the five year period referenced in your question, is the publication of Decent Interval by former Agency employee Frank Snepp in 1977. The Supreme Court in Snepp v. United States, 444 U.S. 507, 511 (1979), held that the fiduciary relationship created by Mr. Snepp's execution of his secrecy agreement did not depend upon whether his book contained classified information, but instead imposed an "obligation not to publish any information relating to the Agency without submitting the information for clearance." The court found that Mr. Snepp had violated this fiduciary obligation by failing to submit his manuscript to the Agency for clearance prior to publication and imposed a constructive trust on Mr. Snepp's profits for the Government's benefit. Thus, although the four examples cited above all involved publications which disclosed classified material, CIA believes, pursuant to the holding in Snepp, that the Government can take appropriate legal action against an author who publishes in violation of his prepublication review obligation, without having to show that classified information was in fact disclosed.

As to your third question requesting a description of the Agency's current prepublication review process, the Agency in 1977, promulgated a regulation, HR 6-2 (attached at Tab B), which established the Publications Review Board and vested it with the function of conducting prepublication review of manuscripts submitted by current and former employees. The Board is currently comprised of the Deputy Director, Public Affairs Office, who serves as Chairperson, and senior representatives from each of the Agency's four directorates, with two representatives from the Directorate of Operations and the Directorate for Administration currently serving on the Board. In addition, the General Counsel serves as Legal Advisor to the Board, working with the Board throughout all stages of the prepublication review process, advising it as to the legality and propriety of its decisions.

The actual prepublication review process undertaken by the Board is depicted graphically on the chart entitled "Publications Review Board--Review Process" (attached at Tab C). This process is initiated by former employees through the submission of their manuscript to the Office of General Counsel (OGC), which has been designated by HR 6-2 as spokesperson for the Agency in communicating with former employees on these matters. OGC immediately forwards the submission to the Board and notes any time constraints under which the author may be operating. As to current employees, they may submit their writings to the responsible Deputy Director or Independent Office Head, who may determine that Board review is unnecessary and thereafter authorize publication, with or without deletions, or disapprove publication. The Deputy Director or Office Head also may determine that referral of the writing to the Board for further review is necessary. Current employees also may elect to bypass their immediate Deputy Director or Office Head and submit their writings directly to the Chairperson of the Board for a decision as to whether full Board review is necessary.

For former employees and those current employees for whom a full Board review is determined to be necessary, the Board, after receiving the manuscript, establishes a review schedule consistent with any time constraints and forwards copies of the submission to each of the components represented on the Board. Upon receipt of the manuscript, the components then disseminate it to those persons or subcomponents having expertise in the subject matter involved. The submission is then reviewed and if no classified information is identified in the submission, the author is immediately informed. If, however, a component identifies classified information in the manuscript, the Board is so advised. The Board then meets to review the classification determinations at issue and these determinations are examined by the legal advisor to ensure compliance with

applicable law. Once a final decision as to classification is made, OGC immediately advises former employees of the Board's findings, and current employees are notified by their component of these determinations.

In meeting its responsibilities under HR 6-2, the Board recognizes that time is often of the essence in this review process. Thus, it strives in all cases to complete its review in a timely fashion. HR 6-2 and the relevant court cases in this area impose a 30-day time limit for completion of this initial review. With few exceptions, this standard has been met in virtually all cases. The length of a review obviously depends upon the length of the submission involved and the amount of classified information which is identified. In 1982, the average review was completed in 13 days. In a number of instances, the Board has completed its review in a matter of hours to accommodate authors working with short deadlines. There have been very few instances in which more than 30 days have elapsed from submission of a book to clearance for final publication. Those rare cases occur most often because of the revision process. An author will frequently choose to rewrite his material and indeed may add substantial new material, all of which also must be reviewed.

In 1977, the Board reviewed a total of 43 books and articles. This number has risen steadily since that time as indicated by the Chart "Total Manuscripts by Form" (attached at Tab D). Since its inception in 1977, the Board has reviewed a total of 929 manuscripts consisting of approximately 66,320 pages (see chart at Tab E entitled "Total Pages Reviewed by Year"). Of these 929 manuscripts, 672 were approved without deletions; 225 were approved with some required changes, most of these quite minor in nature; and 11 manuscripts were withdrawn by their authors. Sixteen of the 929 manuscripts were determined to contain so much classified information that, when the information was deleted, the remaining material was incomprehensible and could not be rewritten in an intelligible manner. These 16 manuscripts were disapproved. Five manuscripts are currently undergoing review, thus accounting for the total of 929 manuscripts reviewed by the Board.

When classified information is identified in a manuscript, the court decisions in this area indicate that the Board can require the deletion only of those words or portions which are necessary to protect the classified information. The Board adheres strictly to this standard. In most cases, an author can rephrase the material in question so that his message can be communicated without disclosing classified information. In fact, the Board affirmatively seeks to work with an author in such cases so as to accommodate his literary goals while, at the same time, ensuring that the final product does not disclose classified information.

An administrative appeal mechanism is built into the Board's review process. This mechanism enables authors to challenge decisions of the Board by appeal through the Agency's Inspector General to the Deputy Director of Central Intelligence. A chart depicting the appeal process is attached at Tab F. The Board's initial decisions have been sustained in some cases, but the Board also has been overturned on appeal.

The general policies which guide the Board in its review process are set forth in the Agency publication attached at Tab G entitled, "Agency Policies on Prepublication Review Provision of Secrecy Agreement." This publication is routinely made available to former employees. A paramount principle guiding the Board since its creation has been one of evenhanded and fair treatment to all authors, regardless of their expressed or implied friendliness or unfriendliness towards the Agency. As stated in subsection (b)(4) of regulation HR 6-2, the Board is prohibited from denying publication of material solely "because the subject matter may be embarrassing to, or critical of, the Agency."

The above is a general description of how the Agency's prepublication process works. With respect to the specific questions raised in paragraph 3 of your letter, Agency officials are required by the terms of their secrecy agreements to submit such materials for review which contain any mention of intelligence data or activities, or contain data which may be based upon information classified pursuant to Executive Order. HR 6-2 clearly places the responsibility upon the employee or former employee to learn from the Agency whether the material intended for publication fits into the above categories of information. The employee's responsibility in this regard results from the obligations undertaken in the individual's secrecy agreement, which agreement is executed in consideration of an individual's Agency employment and as a condition to being granted access to classified information.

As to whether the CIA monitors speaking engagements of former officials, the Agency will on occasion, when it learns that an individual intends to make an oral presentation, remind the individual of his or her obligation to submit any prepared text that might be available to the Agency for review. The Agency does not, however, have any established program or review mechanism established similar to the prepublication review process for written materials that applies to oral presentations of this type. Such oral presentations, of course, are still subject to the terms of an individual's secrecy agreement and the limitations contained therein as to publication of classified information whether in oral, written or other form or manner. As to your questions regarding the resolution of disputes and the volume and nature of the Agency's review process, these questions are answered above in the general description provided of the Agency's prepublication review process.

With respect to your fourth question as to whether there are any flaws in the current system, we are unaware of any flaws or deficiencies in the current process which prevents the system from operating in a satisfactory manner in protecting the national security of this country.

Finally, with respect to your last question, there have been no changes in the Agency prepublication review process that have been implemented as a response to NSDD 84. This is due in large part to the fact that the Agency's procedures have been established and in place for some time and did not require any modification to comport with the requirements of NSDD 84. In response to the remainder of this question, a copy of the secrecy agreement currently in use at the Agency is attached hereto (Tab H).

If you have any further questions concerning the above responses or the Agency prepublication review process, do not hesitate to call me at 351-4151, or Steven W. Hermes of my staff at 351-6126.

Sincerely,



Ernest Mayerfeld

Deputy Director, Office of Legislative Liaison

Attachments

SETTLEMENT AGREEMENT

In full and complete settlement of the dispute arising from the publication of a manuscript entitled Ropes of Sand prior to Central Intelligence Agency prepublication review and clearance, Wilbur Crane Eveland and the United States agree as follows:

1. Mr. Eveland performed services for the CIA on a temporary basis at various times between 1955 and 1961.

2. While employed by the CIA, Mr. Eveland signed a secrecy agreement and three employment contracts. The secrecy agreement provides, inter alia:

3. I do solemnly swear that I will never divulge, publish or reveal [either] by word, conduct, or by any other means, any classified information, intelligence or knowledge, except in the performance of my official duties and in accordance with the laws of the United States unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representative.

. . . . .

5. I understand that no change in my assignment will relieve me of my obligation under this oath and that the provisions of this oath will remain equally binding upon me after the termination of my services with the Central Intelligence Agency.

In each of the employment contracts, Mr. Eveland accepted the following obligation:

Secrecy. You will be required to keep forever secret this contract and all information which you may obtain by reason hereof (unless released in writing by the Government from such obligation), with full knowledge that violation of such secrecy may subject you to criminal prosecution under the Espionage Laws, dated 25 June 1948, as amended, and other applicable laws and regulations.

Mr. Eveland continues to be bound by the agreement and contracts.

3. It is the position of the United States government that under these agreements Mr. Eveland had an obligation, confirmed by the Supreme Court in Snapp v. United States, 444 U.S. 507 (1980), to submit any manuscript or other writing containing information relating to the CIA, its activities, intelligence activities generally, or intelligence sources and methods, to the CIA for review and clearance prior to publication, which term includes

disclosure to any person not authorized to learn the information. The United States government believes that Mr. Eveland's prepublication review obligation was breached through the submission of the manuscript entitled Ropes of Sand to the publisher before submitting it to the CIA for prepublication review and clearance.

4. It is Mr. Eveland's position that Ropes of Sand, which was submitted to the publisher before the Snepp decision, does not contain any classified information. Mr. Eveland also contends that the CIA unreasonably refused to provide him with copies of his secrecy agreement and employment contracts, that he did not breach any obligation of which he was aware, and that his conduct was not willful, deliberate, or surreptitious.

5. Mr. Eveland has provided an accounting to the government of the sales of Ropes of Sand and his revenues therefrom. Mr. Eveland received an advance of \$11,250 for his autobiography. He has not realized any royalty payments or other profits from the book. At the time of the most recent accounting from the publisher, the book had an unearned balance of \$6,826.88, and it is not expected that the publisher will recoup the advance payment in the future.

6. In consideration of the above, Wilbur Crane Eveland agrees:

(a) To submit to the Agency for its review and clearance prior to release to any person who is not authorized by the CIA to read such materials, all future writings, including prepared texts of speeches, which relate to the CIA, its activities, intelligence activities generally or intelligence sources and methods, which information he gained during the course of or as a result of his employment with the CIA.

(b) Except as provided in paragraph 7(a), to pay to the Treasurer of the United States, immediately upon receipt, all future proceeds which Mr. Eveland derives from the serialization or republication in any form, including paperback book sales, sale of movie rights or other distribution for profit of the present version of Ropes of Sand published by W.W. Norton & Company, Inc.



(c) That he is bound by the contract and agreements quoted in paragraph 2. While the Agency and Mr. Eveland differ in their interpretation of the obligations imposed by these documents, Mr. Eveland believes that as interpreted by the Supreme Court in the Snepp case they impose on him the obligation set forth in paragraph 6(a), and he will not contest that obligation. However, he reserves the right to contest any disputed requirement beyond that to which he has agreed in paragraph 6(a).

(d) That he shall account annually under oath to the United States for any and all revenues, gains, profits, royalties and other financial advantages derived from the sale, serialization, republication in any form, movie rights and other distribution for profit of the work entitled Ropes of Sand with copies of any accounting Mr. Eveland has received from those acting as an agent or in any other capacity for such sales.

7. The United States agrees in consideration of the above stipulations by Wilbur Crane Eveland:

(a) That no suit will be brought against Mr. Eveland for the breach referred to in paragraph 3, and the United States will not attempt to impose a constructive trust over the past proceeds which Mr. Eveland has derived from the sale of the manuscript of the present hardcover version of Ropes of Sand or any future proceeds from the sale of that hardcover edition in the unexpected event that such future profits are realized.

(b) That Agency review shall be completed within thirty (30) days after future receipt of material intended for publication and that approval for publication will be withheld only for information which the Agency determines to be classified.

(c) That if Mr. Eveland should revise the present version of Ropes of Sand and submit the revised version to the CIA for prepublication review and clearance in accordance with his agreements, after obtaining clearance from the Agency, Mr. Eveland shall be entitled to all proceeds from the sale of the cleared revised version of the book.

(d) The Agency reserves the right to seek a judicial resolution of any dispute involving interpretation of Mr. Eveland's contract and agreements, including but not limited to determination of his prepublication review obligation beyond the undertaking agreed to by Mr. Eveland in paragraph 6(a) and what the Agency views as his overly narrow interpretation of that obligation under the Snepp decision.

Barbara S. Woodall  
 BARBARA S. WOODALL  
 Counsel for the United States

Wilbur Crane Eveland  
 WILBUR CRANE EVELAND

Mark H. Lynch  
 MARK H. LYNCH  
 Counsel for Mr. Eveland

DATED: 12/12/82

SETTLEMENT AGREEMENT

In full and complete settlement of the dispute arising from the publication of a manuscript containing intelligence information prior to Central Intelligence Agency pre-publication review and clearance, William E. Colby and the United States agree as follows:

1. As a former employee of the Central Intelligence Agency ("the CIA" or "the Agency"), William E. Colby continues to be bound by two secrecy agreements which he signed on July 26, 1950 and October 1, 1958 as a condition of his employment with the CIA. Pursuant to the terms of the 1958 agreement, he agreed, inter alia: (i) not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of his employment, without specific prior approval by the Agency; and (ii) not to discuss with or disclose to any person not authorized to hear it, classified information relating to the Central Intelligence Agency, its activities or to intelligence materials under the control of the Agency.

2. In August 1977, Mr. Colby mailed to his publisher, Simon and Schuster, a manuscript containing a description of his career with the Agency which was eventually published under the title Honorable Men: My Life In The CIA. The manuscript was forwarded to the publisher with the understanding that the author's final approval for publication was subject to any changes that the CIA might require after its review. Simultaneously, Mr. Colby submitted the manuscript to the Agency for pre-publication approval. Simon and Schuster at a later time further disseminated the original manuscript to a French publisher. It was under these circumstances that the obligation under the secrecy agreements was breached through the dissemination of the manuscript before CIA clearance.

3. In consideration of the above, William Colby agrees:

a) To submit to the Agency for its review and clearance prior to release to any person who is not authorized by the CIA to read such materials, all future writings containing materials not previously cleared, including prepared texts of speeches, which relate to the CIA, its activities, intelligence activities generally, or intelligence sources and methods.

(b) In addition, having provided an accounting to the United States for all revenues, gains, profits, royalties, and other financial advantages derived from the publication of the book, Honorable Men: My Life In The CIA, to pay to the Treasury of the United States the sum of \$10,000 within ten (10) days of the execution of this agreement.

c) That he will not contest at any time his obligation to abide by the CIA policy statements or regulations on pre-publication review consistent with the secrecy agreements referred to in paragraph 1.

4. The United States agrees:

a) That Agency review shall be completed within thirty (30) days after receipt of material intended for publication and that approval for publication will be withheld only for information which the Agency determines to be classified or classifiable.

b) Further, in consideration of the above stipulations by William Colby and in light of his otherwise consistent adherence to the terms of the secrecy agreements, the United States agrees that no suit will be brought against Mr. Colby for the breach referred to in paragraph 2.

Barbara S. Woodall  
Barbara S. Woodall  
Counsel for United States

William E. Colby  
William E. Colby

Mitchell Rogovin  
Mitchell Rogovin  
Counsel for William E. Colby

Dated: December 28, 1981

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

*Copies mailed 6-24-80*

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN ROBERT STOCKWELL,

Defendant.

Civil No. 80-207-A

CONSENT JUDGMENT

The plaintiff, United States, and defendant, John Robert Stockwell, hereby consent to the entry of the following JUDGMENT:

(1) that a constructive trust for the benefit of the United States is hereby imposed over any and all revenues, gains, profits, royalties and other financial advantages which the defendant, John Robert Stockwell, hereafter derives from the sale, serialization, republication rights in any form, movie rights and other distribution for profit of the work entitled In Search of Enemies, A CIA Story;

(2) that the defendant, John Robert Stockwell, shall account semi-annually under oath to the United States for any and all revenues, gains, profits, royalties and other financial advantages hereafter derived by the defendant from the sale, serialization, republication rights in any form, movie rights and other distribution for profit of the work entitled In Search of Enemies, A CIA Story, with copies of any accounting Mr. Stockwell has received from those with whom the defendant has contracted for the sale or publication of In Search of Enemies, A CIA Story;

(3) that the defendant, John Robert Stockwell, shall cause to be paid forthwith to the Treasurer of the United States any and all revenues, gains, profits, royalties and other financial advantages hereafter derived by the defendant from the sale, serialization, republication rights in any form, movie rights and other distribution for profit of the work entitled In Search of Enemies, A CIA Story;

of Enemies, A CIA Story, or at his option defendant shall assign the rights to such payments to the United States, said monies to be paid by certified check or money order payable to the Treasurer of the United States and forwarded to the Chief, Judgment Enforcement Unit, United States Department of Justice; and

(4) that the defendant, John Robert Stockwell, is hereby permanently enjoined from further breaching the terms and conditions of the defendant's Secrecy Agreement and fiduciary duty with the Central Intelligence Agency by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, its activities, intelligence activities generally or intelligence sources and methods, which information the defendant gained during the course of or as a result of his employment with the CIA, for Agency review prior to publication; provided, however, that Agency review shall be made within thirty (30) days after receipt of such intended publication, and provided further, that the only material for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified.

DATED: 6/23/80

CFV. B. 1  
UNITED STATES DISTRICT JUDGE

We ask for this;

David J. Anderson  
DAVID J. ANDERSON  
Branch Director, Civil Division  
Department of Justice

On behalf of Plaintiff

John Robert Stockwell  
JOHN ROBERT STOCKWELL  
Defendant

George P. Williams  
 GEORGE P. WILLIAMS  
 Assistant U.S. Attorney  
 117 South Washington Street  
 Alexandria, Virginia 22314

Attorney for Plaintiff

Mark H. Lynch  
 MARK H. LYNCH  
 American Civil Liberties Union  
 Foundation  
 122 Maryland Avenue, N.E.  
 Washington, D.C. 20002

Tommy Jacks (mkt)  
 TOMMY JACKS  
 1206 San Antonio  
 Austin, Texas 78701

Leonard S. Rubenstein (mkt)  
 LEONARD S. RUBENSTEIN  
 108 North Columbia Street  
 P.O. Box 1726  
 Alexandria, Virginia 22313  
 Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PHILIP AGEE,

Plaintiff,

v.

CENTRAL INTELLIGENCE  
AGENCY, ET AL.,

Defendants;

UNITED STATES OF  
AMERICA,

Intervening  
Defendant/  
Counterclaimant)

Civil Action No. 79-2788

**FILED**

OCT - 2 1980

JAMES F. DAVEY, Clerk.

MEMORANDUM AND ORDER

As a condition of his employment with the CIA, Agee entered into a Secrecy Agreement with that agency which limited his right to disclose intelligence information. Alleging that the agreement had been violated and that Agee threatened to violate it again in the future, the United States intervened in this Freedom of Information Act suit. It seeks an order that would return to the Government all sums earned by Agee from certain prior writings disseminated in violation of the Secrecy Agreement and to enjoin further breaches of the agreement. The matter is before the Court on cross-motions for summary judgment which were fully briefed and argued.

In his Secrecy Agreement signed on July 22, 1957, Agee stated that he would "undertake not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment by the Agency without specific prior approval by the Agency." See Ex. A, Gambino Affidavit. Agee's CIA employment ceased on November 22, 1968. At no time has he been released from this undertaking.



Two essential facts are undisputed. Agee does not deny that he has published books containing intelligence information relating to CIA activities without prior submission to the agency and in violation of the Secrecy Agreement<sup>1/</sup> nor does he deny that he intends to continue his work as an author and journalist, writing on intelligence activities, without complying with the Secrecy Agreement. Moreover, the validity of the standard Secrecy Agreement which Agee executed has been strongly upheld in a recent decision of the Supreme Court, Snepp v. United States, 48 U.S.L.W. 3527 (U.S. Feb. 19, 1980).<sup>2/</sup>

Opposing the proposed order vigorously, Agee offers two affirmative defenses. First, he asserts that the United States comes before this Court with "dirty hands" and should not be granted the equity relief sought. Second, he contends that he is the victim of impermissible "discriminatory enforcement" because the United States has allegedly chosen to litigate against him on the basis of the content of his writings, an impermissible criterion for government action, while choosing not to prosecute individuals whose writings are not so unfavorable to the Agency.

Agee's "dirty hands" argument lacks merit. In a lengthy affidavit, Agee recites a litany of supposed wrongs allegedly perpetrated by government representatives against plaintiff beginning in 1971, three years after plaintiff left the CIA and about the same time that plaintiff began his activities against the agency. But even if these wrongs occurred, which - - -

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1/ The United States points to two books among Agee's many publications, Dirty Work: The CIA in Western Europe and Dirty Work II: The CIA in Africa. Agee was not the sole author of either book. He acknowledges having written a third book, Inside the Company: CIA Diary, that also was published without having been submitted for clearance.

2/ The Agreement also was considered in the lower court opinion in Snepp, see United States v. Snepp, 395 F.2d 926 (4th Cir. 1979), and in Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975), and United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

is disputed, they would not foreclose the relief sought by the United States here. In invoking the "dirty hands" doctrine, it is necessary that the wrongs complained of have a close nexus to the cause of action. See, e.g., Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 778 (D.D.C. 1974). There is no such nexus here.

Plaintiff had long since left the agency when these incidents occurred and the alleged wrong-doing by the agency since 1971 is not sufficiently related to Agee's failure to comply with the Secrecy Agreement.

The discriminatory enforcement argument, however, is more substantial. It is clear that the Government could not enforce the Secrecy Agreement solely on the grounds of sex or of race, i.e., by enforcing it only against women or against blacks. Similarly, it is certain that the Government cannot use enforcement of the Secrecy Agreement for the sole purpose of suppressing speech that is unfavorable to the agency. Agee contends that the agency's actions support his claim that the Government's present motion is primarily motivated by the agency's disagreement with his views. This is sharply denied. On the limited facts submitted by the parties it is difficult, however, to determine to what extent, if any, enforcement of the agreement against Agee is based on the impermissible ground that the agency was offended by the unfavorable material Agee has written.

The United States argues that Agee is in a category by himself with regard to enforcement of the Secrecy Agreement, and that his conduct has been egregious and totally in disregard of the agreement, to the severe detriment of the United States. There is no dispute that Agee has openly flouted his refusal to submit writings and speeches to the CIA for prior approval, and has expressed a clear intention to reveal

classified information and bring harm to the agency and its personnel.<sup>3/</sup> Thus the risks which attend Agee's continuing refusal to abide by the agreement are undoubtedly far greater than the risks posed by many others covered by the agreement.

Agee, however, has presented evidence indicating that the CIA's past enforcement record bears a considerable correlation with the agency's perception of the extent to which the material is favorable to the agency. A reading list of books concerning the CIA, prepared by the CIA itself for recruitment purposes, noted five works as "more critical of the Agency." Four of these works have spawned suits by the Government to enforce the agreement, whereas no suits have been filed against other authors whose works were not listed as "more critical," even though some of those authors concededly did not submit their material for prepublication review. Plaintiff thus has raised a factual issue as to whether the Government's past enforcement has been clouded by content considerations rather than wholly legitimate concerns for security.

In view of the foregoing, the Court has determined that it would not be appropriate, on these motions for summary judgment, to impose a constructive trust over the proceeds of Agee's two books, or to order an accounting. Not only is the civil law of discriminatory enforcement

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3/ The Government notes, in particular, a press release issued by plaintiff from London on October 3, 1974, in which plaintiff stated:

Today I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating; secondly, to seek within the United States to have the CIA abolished. See McMahon Affidavit at 3.

It should also be noted that Agee is seeking release of approximately 20,000 documents from the CIA alone in this action, obviously to support his continuing campaign.

uncertain but there are, as noted, unsettled factual issues that can only come clear through time-consuming discovery, if the issues were to be pursued. The past, however, is no mirror of the future. The agency has recently prepared a policy statement on its prepublication review program that demonstrates a sensitivity to First Amendment concerns. Backed by Snepp's endorsement, the agency currently is carrying out a far more systematic and organized program for enforcing its Secrecy Agreement rights. There is no showing that anyone who announces in advance an intention to ignore the agreement and who has egregiously violated it in the past will not be subjected to an enforcement action. The agency, moreover, expressly states that "[a]pproval will not be denied solely because the subject matter may be embarrassing to or critical of the Agency." Furthermore, the "expressed or presumed attitude of a person toward the United States Government or the Agency is not a factor" in determining whether a person, suspected of violating the Secrecy Agreement will be recommended for prosecution. (See Regulation HR6-2 and Policy of Enforcement, attached to Turner's Affidavit.)

Accordingly, the Court believes that it is entirely appropriate under all the facts and circumstances of this case to issue an injunction against Agee requiring his full compliance with the Secrecy Agreement in the future. Agee has shown a flagrant disregard for the requirements of the Secrecy Agreement, justifying this Court's action to require future compliance and to protect the security of the United States.

The motion for summary judgment filed by the United States is granted in part and a permanent injunction enjoining Agee from further breaches of his Secrecy Agreement shall issue in the form attached. In all other respects the motions of both parties are denied.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

October 2 , 1980.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PHILIP AGEE,

Plaintiff,

v.

CENTRAL INTELLIGENCE  
AGENCY, ET AL.,

Defendants;

UNITED STATES OF  
AMERICA,

Intervening  
Defendant/  
Counterclaimant)

Civil Action No. 79-2788

**FILED**

OCT - 2 1980

JAMES F. DAVEY, Clerk

PERMANENT INJUNCTION

This matter having been heard on cross-motions for summary judgment, and the Court having granted the United States a permanent injunction, now therefore it is hereby ORDERED:

(1) That the plaintiff, Philip Agee, is permanently enjoined from further violation of the terms of his Secrecy Agreement with the Central Intelligence Agency executed July 22, 1957, and, in particular, is enjoined from disseminating, or causing to be disseminated, any information or material relating to the Central Intelligence Agency, its activities, or intelligence activities generally, without the express written consent of the Director of the Central Intelligence Agency or his representative;

(2) That plaintiff's counsel shall promptly serve plaintiff with a certified copy of this Order and shall promptly file with the Court proof of receipt by plaintiff of this Order; and

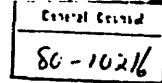
(3) That the Clerk of Court shall serve plaintiff with a certified copy of this Order by mailing the same to plaintiff at Schluterstrasse 81, Hamburg, Germany, by certified mail.

*Isabel A. Perez*

UNITED STATES DISTRICT JUDGE

October 2 , 1980.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA



PHILIP AGEE,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,  
ET AL.,

Defendants;

UNITED STATES OF AMERICA,

Intervening  
Defendant/  
Counterclaimant.

Civil Action No. 79-2788

FILED

NOV 21 1980

JAMES E. BAVEY, Clerk

MEMORANDUM AND ORDER

Agee has moved this Court to amend the Permanent Injunction against him entered by this Court on October 2, 1980. He contends that the injunction, which requires him to comply with the Secrecy Agreement he executed with the CIA in 1957, is over-broad, exceeding even the relief requested by defendant, and fails to include certain safeguard provisions approved by the Supreme Court in the similar case of Snepp v. United States, 48 U.S.L.W. 3527 (U.S., February 19, 1980). Defendant United States opposes Agee's motion, although defendant enters no objection to the safeguard provisions requested by Agee, namely, that any review by the CIA of submitted material be completed within thirty days of submission and that approval be withheld only for information which the CIA determines to be classified.

The Court has carefully considered the arguments of the parties and has determined that some amendment of the injunction would be useful in order to reassure Agee that his imagined fears are unwarranted.

Agee contends that the injunction should not extend to oral speech or to information learned outside his CIA employment. The Court cannot accept these contentions.

First, it is clear that the Secrecy Agreement executed by Agee in 1957 was not limited to written works nor to information learned during employment. Therefore the injunction as written goes no further than the obligation Agee already has incurred. Second, Agee has demonstrated an intent to violate that Agreement, thus requiring this Court to enter the broadest permissible injunction. Third, Agee's conduct demonstrates a clear pattern of using oral statements as well as written works to further his intention of undermining the work of the CIA. Fourth, the difficulty in unraveling the degree to which Agee's knowledge has come from that employment or otherwise, makes it essential that he not be the party to determine whether or not a given piece of information was learned during his CIA employment. Under these circumstances, this Court would be remiss if it entered an injunction limited in the manner Agee requests.

Nonetheless, the Court will amend the injunction to make clear that the activities conjured up by Agee in his brief -- i.e., reading a passage aloud from a book to another person, or telling his wife what a newspaper has reported -- will not make him subject to contempt. Agee's concerns are far too farfetched. However, the injunction will be amended to state:

Extemporaneous oral remarks that consist solely of personal views, opinions, or judgments on matters of public concern and that do not contain, or purport to contain, direct or indirect reference to classified intelligence data or activities, are not subject to this injunction.

With regard to the safeguard provisions sought by Agee, the Court believes that inclusion of the provisions is redundant but in view of the fact that defendant does not oppose, the provisions will be included as Agee requests. Both parties agree that the provisions are express agency policy and have been endorsed, if not mandated, by reviewing courts. See, e.g., Snapp v. United States, supra; United

States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). The Court assumed that all parties would conform to their own rules. Furthermore, if the CIA failed to comply with these requirements to the detriment of Agee, appropriate relief could have been sought. Nonetheless, the Court will amend the injunction to include the provisions as sought.

For the foregoing reasons, plaintiff's motion to amend the Permanent Injunction is granted in part and denied in part. The injunction, as amended, will read as set forth in the attached Modified Permanent Injunction, to be served in the same manner as the original Permanent Injunction.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

November 21, 1980.



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PHILIP AGEE,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,  
ET AL.,

Defendants;

UNITED STATES OF AMERICA,

Intervening  
Defendant/  
Counterclaimant.

Civil Action No. 79-2788

FILED

NOV 21 1980

JAMES E. DAVEY, Clerk

MODIFIED  
PERMANENT INJUNCTION

This matter having been heard on cross-motions for summary judgment, and the Court having granted the United States a permanent injunction, now therefore it is hereby ORDERED:

- (1) That the plaintiff, Philip Agee, is permanently enjoined from further violation of the terms of his Secrecy Agreement with the Central Intelligence Agency executed July 22, 1957, and, in particular, is enjoined from disseminating, or causing to be disseminated, any information or material relating to the Central Intelligence Agency, its activities, or intelligence activities generally, without the express written consent of the Director of the Central Intelligence Agency or his representative, provided that the Agency review of submitted material be completed within thirty days of submission and that approval for dissemination be withheld only for information which the Central Intelligence Agency determines to be classified;
- (2) That extemporaneous oral remarks that consist solely of personal views, opinions, or judgments on matters of public concern, and that do not contain, or purport to contain, any direct or indirect reference to classified intelligence data or activities, are not subject to this injunction;

(3) That plaintiff's counsel shall promptly serve plaintiff with a certified copy of this Order and shall promptly file with the Court proof of receipt by plaintiff of this Order; and

(4) That the Clerk of Court shall serve plaintiff with a certified copy of this Order by mailing the same to plaintiff at Schulterstrasse 81, Hamburg, Germany, by certified mail.

  
UNITED STATES DISTRICT JUDGE

November 21, 1980.

## PUBLIC AFFAIRS

HR 6-2

## 2. NONOFFICIAL PUBLICATIONS AND ORAL PRESENTATIONS BY EMPLOYEES AND FORMER EMPLOYEES

SYNOPSIS. This regulation reflects establishment of the Publications Review Board and sets forth policy, responsibilities, and procedures that govern the submission and review of nonofficial publications and oral presentations by current and former employees.

## a. GENERAL

- (1) The National Security Act of 1947, as amended, and Executive Order 12333 require the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure. Executive Order 12356 requires protection of classified information from unauthorized disclosure. Agency employees are required to sign a Secrecy Agreement whereby they assume a contractual obligation to protect certain categories of information from unauthorized disclosure. The fact that an employee or former employee has had access to information whose unauthorized disclosure can harm the national security imposes special obligations upon these persons.
- (2) Based on the above obligations and responsibilities, this regulation requires that all Agency employees (as defined by HR 20-2) and former employees submit for prior review by the CIA all materials (defined in paragraph b(2) below) intended for nonofficial publication or oral presentation. This regulation also establishes standards for approval by the Publications Review Board.

## b. POLICY

- (1) The Publications Review Board (hereafter the Board) was established to facilitate the review of nonofficial writings and oral presentations to determine whether or not they contain information as defined in paragraphs b(3)(a) through (d) and b(5) below. The Board consists of the Chief, Public Affairs Division (Chairperson), and representatives from the Directorate of Operations, the Directorate of Administration, the Directorate of Science and Technology, the Directorate of Intelligence, the Office of Security, and the cover unit. The Office of General Counsel provides a legal adviser. The Board will meet as required at the call of the chairperson to ensure that the provisions of this regulation are met.
- (2) Agency employees and former employees under the terms of their Secrecy Agreements must submit for review by the Board all writings and scripts or outlines of oral presentations intended for nonofficial publication\*, including works of fiction, which make any mention of intelligence data or activities, or contain data which may be based upon information that is classified or classifiable pursuant to law or Executive order. Submission to the Board will be made prior to disclosing such information to anyone who is not authorized by the Agency to have access to it. The responsibility is upon the employee or former employee to learn from the Agency whether the material intended for publication fits the description set forth in this paragraph. No steps will be taken toward publication until written permission to do so is received from the Agency.
- (3) For current employees, the Board may deny approval for nonofficial publication or oral presentation of any information obtained during the course of employment with the CIA which has not been placed in the public domain by the U.S. Government, and which is in any of the following categories:

- (a) That which is classified pursuant to law or Executive order.

\* "Publication" means communicating information to one or more persons.

HR 6-2c

PUBLIC AFFAIRS

- (b) That which is classifiable pursuant to law or Executive order but which, because of operational circumstances or oversight, is not formally classified by designation and marking
- (c) That which identifies any person or organization that presently has or formerly has had a relationship with a United States foreign intelligence organization, which relationship the U.S. Government has taken affirmative measures to conceal.
- (d) That which reasonably could be expected to impair the employee's performance of duties, interfere with the authorized functions of the CIA, or could have an adverse impact on the foreign relations or security of the United States
- (4) Approval will not be denied solely because the subject matter may be embarrassing to or critical of the Agency.
- (5) In the case of former employees, the Board will be governed in each case by the provisions of a former employee's Secrecy Agreement in applying the criteria in paragraphs b(3)(a), (b), and (c) above.
- (6) The Board will attempt to have the review and classification of manuscripts of writings and oral presentations completed within 30 calendar days.
- (7) Authors who are directed to delete material in accordance with this regulation are required to submit their revisions to the Board for final approval.
- (8) Authors may appeal the final classification decision approved by the Board to the Deputy Director of Central Intelligence (DDCI) (see paragraph c(6) below)
- (9) Approval for publication or oral presentation does not represent Agency endorsement or verification of, or agreement with, the subject matter. Consistent with cover status, authors are encouraged (current employees are required, unless waived by line authority) to use the following disclaimer: "This material has been reviewed by the CIA to assist the author in eliminating classified information, if any; however, that review neither constitutes CIA authentication of material as factual nor implies CIA endorsement of the author's views."

#### c. RESPONSIBILITIES AND PROCEDURES

- (1) Present employees may submit writings and scripts or outlines of oral presentations to the Board through the responsible Deputy Director or Head of Independent Office who may determine that review by the Board is unnecessary and that public release is authorized based on paragraph b(3) above. A Deputy Director or Head of Independent Office also may approve publication with deletions and/or changes or disapprove publication based on paragraph b(3) above. Employees may elect to make submissions directly to the Chairperson of the Publications Review Board for determination of the necessity for Board review.
- (2) Former employees will submit writings and scripts or outlines of oral presentations to the Office of General Counsel, which will forward them to the Board and subsequently notify the former employee of the Board's findings. The General Counsel or designee will act as spokesperson for the Board in all communications with former employees.
- (3) Should a present employee learn that a present or former employee is preparing a writing or an oral presentation that may contain information requiring Agency approval for public release, he or she is requested to advise the Board, which will be responsible for reminding the individual of the obligation to submit the material for Agency review.
- (4) The chairperson will ensure that each member of the Board has reviewed one copy of the submission and that appropriate individuals are designated to make a classification determination and return it to the chairperson with comments. If the Board unanimously

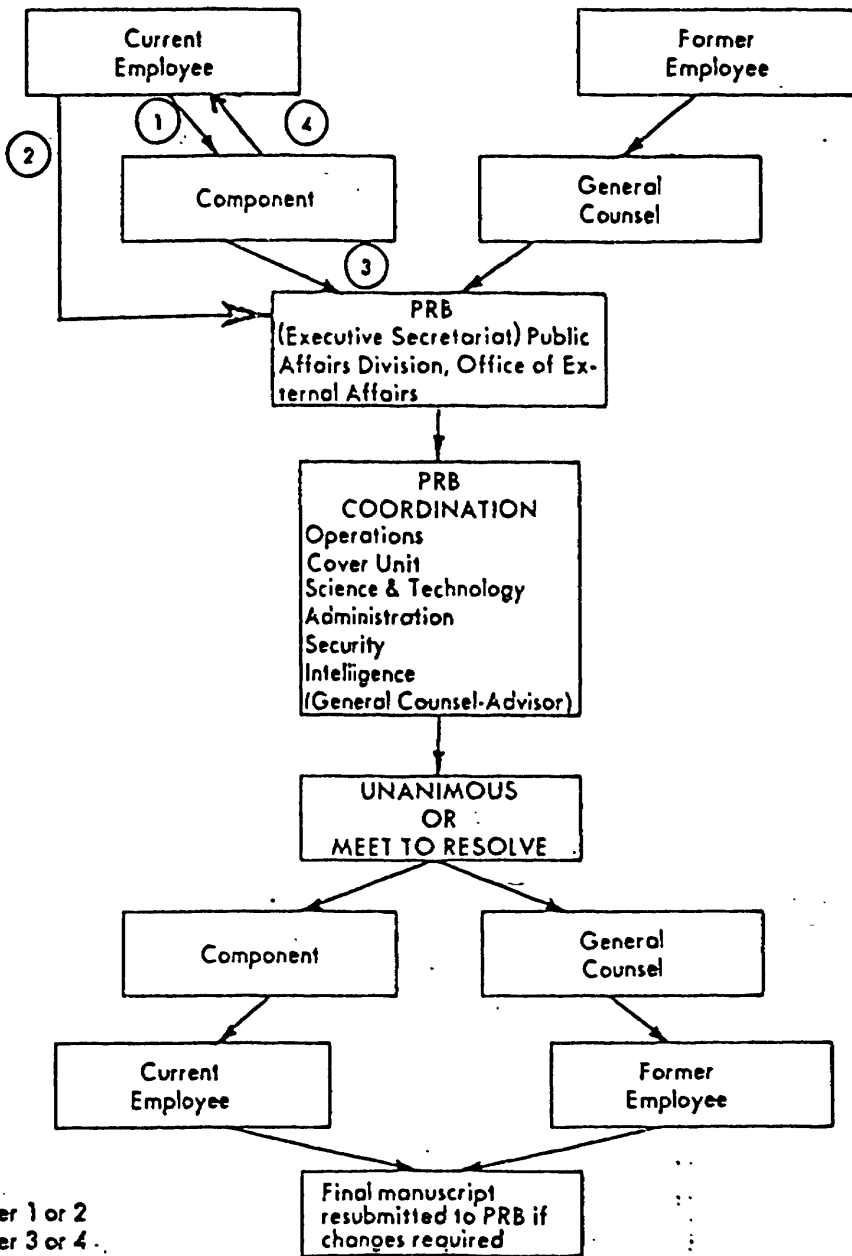
## PUBLIC AFFAIRS

HR 6-2c(5)

decides that it is unobjectionable under the standards and criteria listed above, the chairperson will notify the author through the appropriate channels. If any member of the Board objects to publication or oral presentation, the matter will be resolved at a Board meeting.

- ┐ (5) The chairperson is authorized unilaterally to represent the Board when time constraints or other unusual circumstances make it impractical or impossible to convene or consult the Board.
- ┐ (6) Authors who wish to appeal decisions should address such appeals in writing to the DDCI, accompanied by the manuscript the author wishes the DDCI to consider and any supporting materials. Appeals are to be submitted through the Inspector General or, in the case of former employees, to the General Counsel, who will forward them to the Inspector General. The Inspector General will review the data provided by both the author and the Board and will forward the material and his recommendation to the DDCI or designee, who then will issue a final determination. Every effort will be made to complete the appeal process within a 30-calendar-day period.

# PUBLICATIONS REVIEW BOARD Review Process



## TOTAL MANUSCRIPTS REVIEWED BY FORM

## NUMBER OF PUBLICATIONS REVIEWED BOARD SUBMISSIONS BY FORM

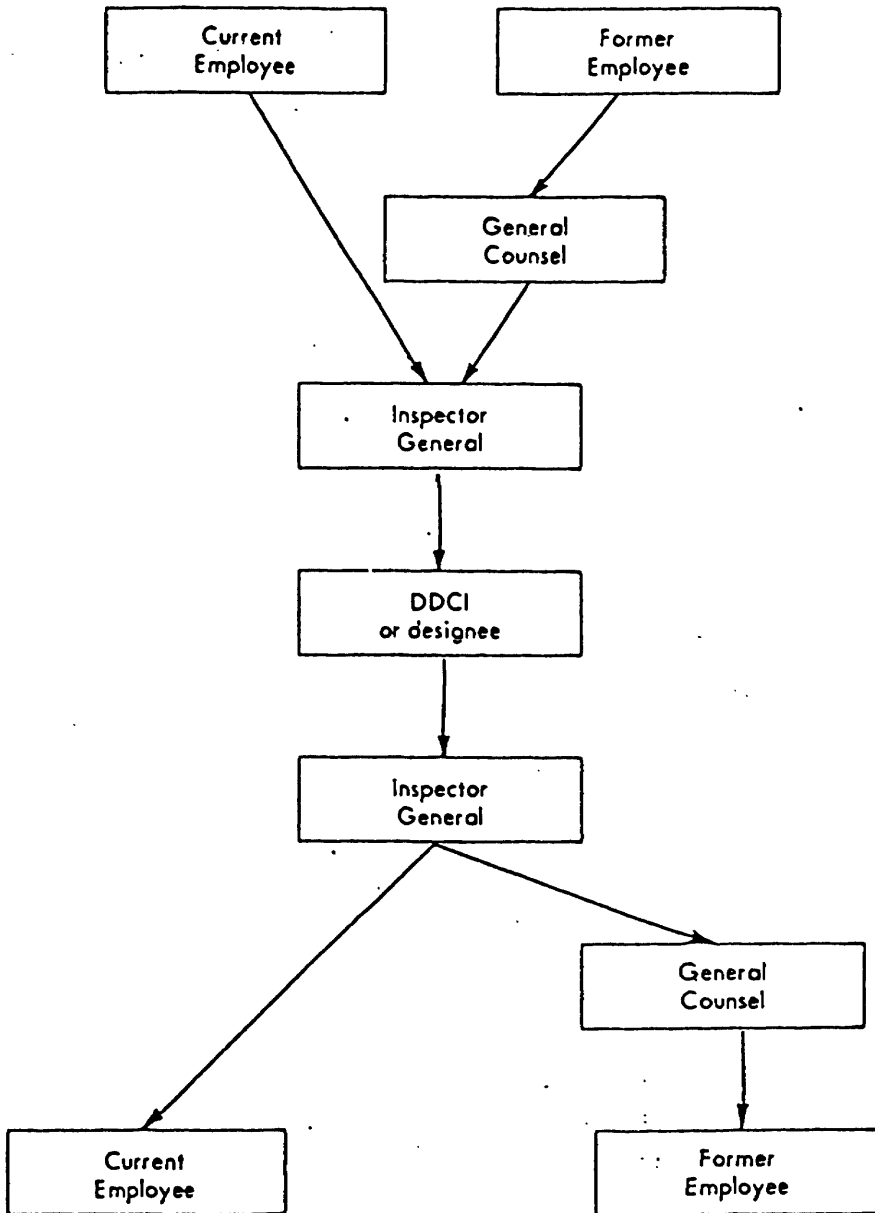
PUBFORM	BY YEAR							TOTAL
	77	78	79	80	81	82	83	
ARTICLE	26	28	63	81	127	123	86	534
BOOK	14	18	29	30	22	22	18	153
BOOKREVIEW	1	7	0	7	14	26	14	69
CHAPTER	0	1	0	9	16	20	32	78
LETTER TO ED	0	1	0	2	0	2	2	7
OTHER	0	4	0	4	1	3	12	24
OUTLINE	1	2	1	4	1	6	4	24
POETRY	1	1	2	2	0	0	0	6
SPEECH	0	1	0	9	7	11	6	34
TOTAL	43	63	95	148	193	213	174	929

TOTAL PAGES REVIEWED  
BY YEAR

YEAR	TOTAL PAGES
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77	5340
78	6247
79	10176
80	13705
81	10232
82	11434
83	9136
TOTAL	69320



PUBLICATIONS REVIEW BOARD  
Appeal Process



## AGENCY POLICIES ON PREPUBLICATION REVIEW PROVISIONS OF SECRECY AGREEMENTS

### A. POLICY ON ENFORCEMENT OF SECRECY AGREEMENTS RELATED TO PREPUBLICATION REVIEW

1. Subsequent to the Supreme Court's decision in *U.S. v. Snepp*, numerous inquiries have been received concerning the Agency's policy on enforcement of its secrecy agreement. The purpose of this notice is to set forth information concerning the Agency's policy, for purposes of assisting persons subject to secrecy agreements to comply in good faith with the requirements of those agreements.

2. The purpose of the prior review requirement in the secrecy agreement is to determine whether material contemplated for public disclosure contains classified or classifiable information and, if so, to give the Agency an opportunity to prevent the public disclosure of such information. Prior review means that written materials are submitted to the Agency before being circulated at each stage of their development to publishers, reviewers, or to the public. The reason for this prior review requirement is to prevent comparison of the material which would then reveal which items had been deleted by the Agency. For this reason, post-review of the materials, i.e., after they have been submitted to the publishers, reviewers, etc., does not comply with this policy. However, the Agency reserves the right to review any such material for purposes of taking necessary protective action to mitigate damage caused by disclosure of classified information it may contain, but such review and action shall be entirely without prejudice to the legal rights of the United States Government and the Agency under the secrecy agreement.

3. Persons bound by the secrecy agreement should understand that the Agency cannot determine unilaterally what action in court will be taken in the case of a breach of the agreement. The Agency's recommendations in this regard are subject to the decision of the Attorney General. The Agency Office of General Counsel will be notified in all cases when a known breach occurs. The expressed or presumed attitude of a person toward the United States Government or the Agency is not a factor in determining what recommendation may be made by the Agency to the Department of Justice.

4. The authors of material submitted to the Agency are expected to cooperate with and assist the review process. In particular, they may be called upon to identify any public sources of information which, in the Agency's judgment, appear to originate from classified sources and to cite the source when their confirmation of the information would, in the eyes of the Agency, cause damage. Failure or refusal to identify such public sources by itself may result in refusal of authorization to publish the information in question.

5. Persons subject to a secrecy agreement are invited at any stage to discuss their plans for disclosures covered by the agreement. The views of the Agency can only be given by an authorized representative specifically designated for this purpose by the Director in regulation or otherwise. No one should act in reliance on any position or views expressed by any person other than such authorized Agency representative.

### B. POLICY ON MATERIAL TO BE SUBMITTED FOR PREPUBLICATION REVIEW

1. It is not possible to anticipate each and every question that may arise. It is the policy of the Agency to respond, as rapidly as possible, to specific inquiries raised by persons subject to an Agency secrecy agreement as to whether specific materials require submission for review. Procedures for submission are contained in HR 6-2. Further questions should be referred to the Publications Review Board. Former employees should address all questions concerning secrecy agreements to the Office of General Counsel.

2. The Agency considers the prior review requirement to be applicable whenever a person bound by the secrecy agreement, express or implied, actually has prepared material for public disclosure which contains any mention of intelligence data or activities or which may be classified or classifiable pursuant to law or Executive order. The Agency views it to be that

December 1982

person's duty to submit such material for review in accordance with the secrecy agreement. A person's obligation under the agreement remains identical whether such a person prepares the material himself or herself or causes another person, such as a ghost writer, spouse, friend or associate to prepare the material.

3. The provisions of the secrecy agreement requiring submission of information or materials for review are not limited to any particular category of materials or methods of disclosure. In the view of the Agency, these provisions apply to both oral and written materials. With respect to written materials, the provisions apply not only to books but to all other forms of written materials intended for public disclosure, such as (but not limited to) newspaper columns, magazine articles, letters to the editor, book reviews, pamphlets, and scholarly papers. Because alleged fictional treatment can be used as a subterfuge to convey factual information, fiction about the CIA or about intelligence activities is covered by the agreements.

4. Oral statements constitute one of the most difficult areas in application of the secrecy agreement. The agreement applies to material that the person contemplates disclosing publicly or actually has prepared for public disclosure. It does not, in the Agency's view, require the preparation of such material. Thus, a person bound by the agreement is not in breach of the agreement if that person participates extemporaneously and without prior preparation in an oral expression of information (e.g., news interview, panel discussions, extemporaneous speech) and does not submit material for review in advance. This does not, of course, exempt such person from liability for any unauthorized disclosure of classified or classifiable information that may occur in the course of such extemporaneous oral expression.

5. The requirement under the secrecy agreement is only to submit materials on the subject matter of intelligence or the Agency and its activities or material which may be based upon information classified or classifiable pursuant to law or Executive order. Current employees must submit information which reasonably could be expected to impair the employee's performance of duties or interfere with the authorized functions of the Central Intelligence Agency, including information which could have an impact on foreign relations. The prepublication review requirement does not apply to topics that are totally unrelated to intelligence matters, such as a manuscript of a cookbook, a treatise on gardening, or writings on domestic political matters. Nor does the prepublication review requirement extend to discussion of foreign relations not purporting to contain or be based upon intelligence information.

6. Material that consists solely of personal views, opinions, or judgments on matters of public concern and does not contain or purport to contain any mention of intelligence data or activities or contain or purport to contain data which may be based upon information classified or classifiable pursuant to law or Executive order is not subject to the prepublication review requirement. For example, a person bound by the secrecy agreement is free, without prior review, to submit testimony to the Congress or make public speeches or publish articles on such topics as proposed legislation as long as the material prepared by such person does not directly or by implication constitute a statement of an informational nature about intelligence activities or substantive intelligence information, or in the case of current employees, impair the employee's performance or the authorized function of the Central Intelligence Agency, including information which could have an impact on foreign relations. It should be obvious that in some circumstances the expression of what purports to be an opinion may in fact convey information subject to prior review under the secrecy agreement. For example, a former intelligence analyst's opinion that the U.S. can or cannot verify SALT compliance is an implied statement of fact about Agency activities and substantive intelligence information, and would be subject to prior review. This does not mean that such a statement necessarily would be classified and require deletion, but merely that the subject matter required review by the Agency before publication. A discussion of the desirability of the SALT treaty based on analysis of its provisions and without discussion of intelligence information or activities would not. It should be clear that descriptions of an employee's Agency activities can be expected always to require prior review under these principles. At the other extreme, it is clear that a person subject to the secrecy agreement, who writes or speaks about areas of national policy from the perspective of an observer outside the Government and without purporting to rely on classified or classifiable information, intelligence information, or information on intelligence activities, does not have to submit such materials for prior review. While some "gray areas" may exist, persons subject to the secrecy agreement are expected to err on the side of voluntary prepublication review in keeping with the spirit and intent of the agreement.

## SECURITY AGREEMENT

1. I, \_\_\_\_\_ (print full name), hereby agree to accept as a prior condition of my being employed by, or otherwise retained to perform services for, the Central Intelligence Agency, or for staff elements of the Director of Central Intelligence (hereinafter collectively referred to as the "Central Intelligence Agency"), the obligations contained in this agreement.

2. I understand that in the course of my employment or other service with the Central Intelligence Agency I may be given access to information which is classified in accordance with the standards set forth in Executive Order 12356 as amended or superseded, or other applicable Executive Order, and other information which, if disclosed in an unauthorized manner, would jeopardize intelligence activities of the United States Government. I accept that by being granted access to such information I will be placed in a position of special confidence and trust and become obligated to protect the information from unauthorized disclosure.

3. In consideration for being employed or otherwise retained to provide services to the Central Intelligence Agency, I hereby agree that I will never disclose in any form or any manner any of the following categories of information or materials, to any person not authorized by the Central Intelligence Agency to receive them:

a. Information which is classified pursuant to Executive Order and which I have obtained during the course of my employment or other service with the Central Intelligence Agency;

b. Information, or materials which reveal information, classifiable pursuant to Executive Order and obtained by me in the course of my employment or other service with the Central Intelligence Agency;

4. I understand that the burden will be upon me to learn whether information or materials within my control are considered by the Central Intelligence Agency to fit the descriptions set forth in paragraph 3, and whom the Agency has authorized to receive it.

5. As a further condition of the special confidence and trust reposed in me by the Central Intelligence Agency, I hereby agree to submit for review by the Central Intelligence Agency all information or materials including works of fiction which contain any mention of intelligence data or activities, or contain data which may be based upon information classified pursuant to Executive Order, which I contemplate disclosing publicly or which I have actually prepared for public disclosure, either during my employment or other service with the Central Intelligence Agency or at any time thereafter, prior to discussing it with or showing it to anyone who is not authorized to have access to it. I further agree that I will not take any steps toward public disclosure until I have received written permission to do so from the Central Intelligence Agency.

6. I understand that the purpose of the review described in paragraph 5 is to give the Central Intelligence Agency an opportunity to determine whether the information or materials which I contemplate disclosing publicly contain any information which I have agreed not to disclose. I further understand that the Agency will act upon the materials I submit and make a response to me within a reasonable time. I further understand that if I dispute the Agency's initial classification determinations on the basis that the information in question derives from public sources, I may be called upon to specifically identify such sources. My failure or refusal to do so may by itself result in denial of permission to publish or otherwise disclose the information in dispute.

7. I understand that all information or materials which I may acquire in the course of my employment or other service with the Central Intelligence Agency which fit the descriptions set forth in paragraph 3 of this agreement are and will remain the property of the United States Government. I agree to surrender all materials reflecting such information which may have come into my possession or for which I am responsible because of my employment or other service with the Central Intelligence Agency, upon demand by an appropriate official of the Central Intelligence Agency, or upon the conclusion of my employment or other service with the Central Intelligence Agency.

8. I agree to notify the Central Intelligence Agency immediately in the event that I am called upon by judicial or congressional authorities to testify about, or provide, information which I have agreed herein not to disclose.

9. I understand that nothing contained in this agreement prohibits me from reporting intelligence activities which I consider to be unlawful or improper directly to the Intelligence Oversight Board established by the President or to any successor body which the President may establish. I recognize that there are also established procedures for bringing such matters to the attention of the Agency's Inspector General or to the Director of Central Intelligence. I further understand that any information which I may report to the Intelligence Oversight Board continues to be subject to this agreement for all other purposes and that such reporting does not constitute public disclosure or declassification of that information.

10. I understand that any breach of this agreement by me may result in the Central Intelligence Agency taking administrative action against me, which can include temporary loss of pay or termination of my employment or other service with the Central Intelligence Agency. I also understand that if I violate the terms of this agreement, the United States Government may institute a civil proceeding to seek compensatory damages or other appropriate relief. Further, I understand that the disclosure of information which I have agreed herein not to disclose can, in some circumstances, constitute a criminal offense.

11. I understand that the United States Government may, prior to any unauthorized disclosure which is threatened by me, choose to apply to any appropriate court for an order enforcing this agreement. Nothing in this agreement constitutes a waiver on the part of the United States to institute a civil or criminal proceeding for any breach of this agreement by me. Nothing in this agreement constitutes a waiver on my part of any possible defenses I may have in connection with either civil or criminal proceedings which may be brought against me.

12. In addition to any other remedy to which the United States Government may become entitled, I hereby assign to the United States Government all rights, title, and interest in any and all royalties, remunerations, and emoluments that have resulted or will result or may result from any divulgence, publication or revelation of information by me which is carried out in breach of paragraph 5 of this agreement or which involves information prohibited from disclosure by the terms of this agreement.

13. I understand and accept that, unless I am provided a written release from this agreement or any portion of it by the Director of Central Intelligence or the Director's representative, all the conditions and obligations accepted by me in this agreement apply both during my employment or other service with the Central Intelligence Agency, and at all times thereafter.

14. I understand that the purpose of this agreement is to implement the responsibilities of the Director of Central Intelligence, particularly the responsibility to protect intelligence sources and methods, as specified in the National Security Act of 1947, as amended.

15. I understand that nothing in this agreement limits or otherwise affects provisions of criminal or other laws protecting classified or intelligence information, including provisions of the espionage laws (sections 793, 794 and 798 of Title 18, United States Code) and provisions of the Intelligence Identities Protection Act of 1952 (P. L. 97-200; 50 U. S. C., 421 *et seq.*)

16. Each of the numbered paragraphs and lettered subparagraphs of this agreement is severable. If a court should find any of the paragraphs or subparagraphs of this agreement to be unenforceable, I understand that all remaining provisions will continue in full force.

17. I make this agreement in good faith, and with no purpose of evasion.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

The execution of this agreement was witnessed by the undersigned, who accepted it on behalf of the Central Intelligence Agency as a prior condition of the employment or other service of the person whose signature appears above.

#### WITNESS AND ACCEPTANCE:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Date

COMMITTEE ON  
GOVERNMENTAL AFFAIRS  
WASHINGTON, D.C. 20510

The Honorable William P. Clark  
Assistant to the President for  
National Security Affairs  
The White House  
Washington, D. C. 20500

The Senate Committee on Governmental Affairs will hold a hearing on September 13, 1983 on National Security Decision Directive 84, issued by the President last March. At my request, Senator Mathias will preside at this hearing.

1. Are there any instances within the past five years in which former officials of your office published classified materials without securing the permission of the department?

3. Please describe the current procedures for dealing with publications by former officials. For example, have such officials voluntarily submitted manuscripts which contain information which they believe may be classified? Does the your office monitor the publications or speaking engagements for former officials for compliance with pre-publication review procedures? How are disputes about deletions of material resolved? What is the volume and nature of materials which the department reviews?

5. As a result of the President's directive, have any changes in the pre-publication review system been put into effect? In this connection, I would appreciate receiving drafts of any proposed contract which officials will be asked to sign and which provide for pre-publication review, as well as copies of any documents explaining the meaning of any such draft contracts and any documents describing the views of your office on what should be incorporated in such a contract.

I would appreciate receiving your response before the end of this month.

Sincerely,  
*Bill Roth*  
William V. Roth, Jr.  
Chairman

NATIONAL SECURITY COUNCIL  
WASHINGTON, D.C. 20506

September 9, 1983

Dear Mr. Chairman:

This is in response to your request to Judge Clark regarding background information on pre-publication review of materials written by former government officials.

Members of the NSC Staff with access to Sensitive Compartmented Information have in the past been required to sign Form 4193, which included a requirement for pre-publication review. Other pre-publication review has been conducted on a voluntary basis, and all disputes regarding required deletions have been resolved in discussions with the authors.

During calendar year 1982 the NSC Staff received over 100 manuscripts (books, articles, and speeches) for pre-publication review, including manuscripts by three former Assistants to the President for National Security Affairs. Such review in all cases has been limited to protection of national security information.

NSC Staff members will be required to sign the nondisclosure agreements being promulgated by the Information Security Oversight Office and the Director of Central Intelligence (attached). More formalized procedures for systematic monitoring and pre-publication review are currently under consideration.

Sincerely,

  
Robert M. Kimmitt  
Executive Secretary

Attachments

The Honorable William V. Roth, Jr.  
Chairman  
Committee on Governmental Affairs  
United States Senate  
Washington, D.C. 20510

## S T A T E M E N T

of

THE AMERICAN JEWISH COMMITTEE

and

THE UNITED CHURCH OF CHRIST OFFICE OF COMMUNICATION

THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS

THE AMERICAN JEWISH CONGRESS

THE NEWSPAPER GUILD

THE NATIONAL EDUCATION ASSOCIATION

on

The Presidential Directive on Safeguarding  
National Security Information

to the

COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

The American Jewish Committee ("AJC"), founded in 1906, is a national organization of approximately 50,000 members dedicated to the defense of the civil rights and religious liberties of American Jews. We believe this goal can best be accomplished by helping to preserve the constitutional rights and liberties of all Americans. Specifically, AJC is committed to the belief that the free flow of ideas and information and informed, open discussion of governmental affairs, which lie at the heart of the First Amendment to the United States Constitution, are fundamental to a robust democratic system. We submit this Statement for consideration by this Committee because we are concerned that the Presidential Directive on Safeguarding National Security Information ("Directive") of March 11, 1983 unduly restricts public access to important information about our Government not justified by asserted reasons of national security. We are joined in this submission by the United Church of Christ Office of Communication, the American Society of Journalists and Authors, the American Jewish Congress, the Newspaper Guild and the National Education Association, all of whom share our commitment and concern on this issue.

Clearly, a government may and, indeed, should take all necessary steps to



prevent the disclosure of sensitive intelligence information and the sources of such information. However, the scope of the Directive is so broad as to create a potentially vast censorship system the purpose of which may be unrelated to legitimate national security. See Snepp v. United States, 444 U.S. 507, 516 (1980) (Stevens, J., dissenting) ("The purpose of /a non-disclosure/ agreement... is not to give the CIA the power to censor its employees' critical speech, but rather to ensure that classified, nonpublic information is not disclosed without the Agency's permission.") Government employees, by accepting employment which provides access to classified material, do not thereby surrender their First Amendment rights. They retain the right to speak and write about the Government, and to criticize it, as any other citizen may, so long as they do not disclose the classified information they have obtained during the course of government employment. United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

The first part of the Directive requires that all government employees with access to classified information, no matter how low the level of classification, must as a condition of access sign nondisclosure agreements that will be enforceable by the Justice Department. Formerly applying only to employees of the Central Intelligence Agency, National Security Agency and Defense Intelligence Agency, this requirement now applies to tens of thousands of Federal employees throughout the Government with access to any material technically stamped "classified." Furthermore, these employees may be forced to submit to lie-detector tests if suspected by Federal agents of leaking any classified data, regardless of whether the classified material is potentially harmful to security or is of trivial consequence. Refusal to take a polygraph test will permit the agency to conclude that "appropriate adverse consequences" should follow, including at a minimum, denial of future access to classified material. Polygraph tests

are considered by many legal experts to be unreliable and are not admissible as evidence in most Federal courts. Yet, under the Directive, not only failing the lie-detector test, but refusing to submit to one, could cost a Federal employee his job.

The second part of the Directive is even more potentially damaging to First Amendment rights, for it sets up a sweeping system of prior restraint that would not be constitutionally tolerated in any other context. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (the Government could not constitutionally restrain the press from publishing the contents of a classified government study); Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (restraining news media from publishing incriminating statements of accused murderer until jury was impaneled violated First Amendment guaranty of free press). The minimum procedures mandated by this part of the Directive require that all Federal employees with the highest level of clearance -- those with access to "sensitive compartmentalized information" ("SCI") -- sign a nondisclosure agreement that includes a pre-publication review of all their writings. The number of employees who have SCI clearance has been estimated at thousands of the highest government officials (Washington Post, 3/21/83), and perhaps as many as 100,000 (New York Times, 5/5/83).

Pre-publication review would apply to all writings of the subject employee, not merely non-fictional works concerning the subject of the author's government employment. Any books (even novels), reports, studies, articles, columns, lecture notes, speeches, letters to the editor, and book reviews would have to be submitted in advance for clearance by each agency involved. Such review is mandated whether or not any classified material appears in the writing, on the assumption

that only the agency itself can determine whether classified information would be disclosed by the publication. Furthermore, pre-publication review would be required, not only with respect to writings produced while the person is still employed by the Government and has access to classified data, but also with respect to any writings produced after the person has left the Government's employ and lost access to classified information. In fact, there is no indication in the Directive that this requirement is to be less than a binding lifetime commitment. Penalties for failure to comply include the confiscation of all profits from the publication. See Snepp v. United States, 444 U.S. 507 (1980). These penalties arise merely from the failure to obtain advance clearance, even if the publication contains no classified information whatsoever.

There is a strong likelihood that a chilling effect on legitimate public discussion of government policies will result from the Directive's discouragement of all writings by Federal employees. For example, the clearance and review process will inevitably cause delay, in light of the potentially massive quantity of written material which will require clearance. Material which has to go through the clearance process with one or more agencies, including appeals up through the agency before excisions can be challenged in court, will inevitably result in publication which is less than timely. These requirements, for example, would make it extremely difficult, if not impossible, for any former Federal official to function as a newspaper columnist or reporter, radio or television commentator, or even political activist, where time is of the essence. But even more damaging is the inability of every covered employee or former employee to contribute to debate in timely fashion on topical issues. Certain issues of immediate current concern will not await the pre-publication review process.

As a result, delay can have the effect of silencing an individual through preventing altogether, by rendering moot, the publication of numerous works.

The disincentives for challenging a reviewer's deletions -- namely, time, cost and disruption of the operating process of a free press -- indicate another serious potential evil of the pre-publication process. Those individuals subject to the Directive may be prevented from disclosing information which was illegally or improperly classified in the first place, and which belongs in the public domain.

Moreover, the potential for censorship through abuse of this vast prior restraint process is great. Government reviewers may harbor motives for secrecy unrelated to security, such as to protect themselves and their agencies from appropriate scrutiny and possible embarrassment. The Directive especially threatens censorship of former government officials. Each new Administration will be empowered to approve the writings of its predecessors. A possible result may be politically motivated excisions to harass those who might question or criticize their political successors.

The Government is already well-equipped to deal with and punish real violators of national security. See, e.g., 18 U.S.C. §798 (imposing a 10-year prison term and a \$10,000 fine for knowingly and willfully publishing certain types of classified information); 18 U.S.C. §794 (making it a criminal offense punishable by life imprisonment or death to communicate national defense information to a foreign government); and 5 U.S.C. §8312 (withdrawing the right to government retirement benefits from a person convicted of violating these statutes). Furthermore, and most importantly, the Directive is unlikely to deter those serious violators who truly wish to compromise our national security. Such people are unlikely to take the time to write books or articles.

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The Directive cannot be evaluated in a political vacuum. Following the Supreme Court's ruling in the Snepp case, the Carter Administration sought to harness the potentially sweeping censorship authority conferred upon the Government. In 1978, President Carter signed an executive order requiring government officials to consider the public's right to know before classifying data; to use the lowest level of secrecy clearance when in doubt; and to classify information only on the basis of identifiable potential damage to national security. In 1980, Attorney General Civiletti approved guidelines which would require the Government to consider a variety of factors before seeking to enjoin unintentional and possibly meaningless disclosures of information which may have been improperly classified in the first place.

Under the Reagan Administration, the Civiletti guidelines were revoked in 1981 by Attorney General William French Smith. And, in 1982, President Reagan signed Executive Order 12356 which reversed each of the critical features contained in President Carter's 1978 order. President Reagan's order, among many other things, eliminated the requirement that government officials consider the public's right to know in determining classification; eliminated the requirement of identifiable potential damage to national security for information to be classified; failed to provide for automatic declassification even where the classified information had already been disclosed; authorized the reclassification of previously declassified material; eliminated the requirement that classified material be reviewed for declassification after six years; allowed the classification or reclassification of unclassified material following the receipt of a request for it under the Freedom of Information Act; and developed several new categories of classifiable information.

When the Directive is viewed in the context of the expanded scope and duration of the Government's classification authority, the opportunity for censorship unrelated to legitimate national security concerns is great. Through overclassification, information may be withheld from the public that could not be shown to prejudice national security interests in any way. But, as the Supreme Court has recognized, "the First Amendment tolerates absolutely no prior judicial restraints...predicated upon surmise or conjecture that untoward consequences may result." New York Times Co. v. United States, 403 U.S. 713, 725 (1971) (Brennan, J., concurring). The potential damage done by overclassification and, in effect, suppression is far greater than a few foregone publishing opportunities by government officials. Rather, the potential damage is to the very foundation of our democratic and representative government, which the First Amendment sought to insure through a frank and free discussion of government affairs. Floyd Abrams, a leading First Amendment lawyer, has questioned the philosophy of imposing such a broad secrecy vow throughout the Government without indicating specifically what harm would result to national security:

What concept of national security leads to such results? It is less one of politics than of ideology, an ideology that seems distrustful of information itself.... It is a fearful ideology that focuses intently on the risks of information, but not on its benefits. Nor on the perils of its suppression. (New York Times, 3/22/83.)

Mr. Abrams echoes the sentiments of Justice Black in his concurring opinion in New York Times Co. v. United States, 403 U.S. 713 (1971). In that case, the Supreme Court, in a per curiam decision, ruled that the press could not be restrained from publishing the contents of a classified government study. In rejecting the Government's restraint of vital current news on the basis of "national security," Justice Black, joined by Justice Douglas, stated, at 719-720:

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged....

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. (cite omitted)

In reviewing the Directive, AJC urges this Committee to keep in mind that "secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors" and that "open debate and discussion of public issues are vital to our national health." New York Times Co. v. United States, 404 U.S. at 724 (Douglas, J., concurring). See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust and wide-open"). Thus, it is imperative that restrictions on nondisclosure of even classified government information be as narrowly tailored as possible to avoid unjustified curtailment of the fundamental First Amendment guarantee of free speech. Excessive restrictions, through classification, wholesale prior restraints and abusive excisions, serve neither the national security nor the Constitution. In the words of Justice Stewart, concurring in New York Times Co. v. United States, 403 U.S. at 729:

For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

The American Jewish Committee respectfully urges this Committee to consider carefully the implications of President Reagan's Directive, and to recommend to the Senate such legislative action as may be deemed necessary.



REPORT BY AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS, COMMITTEE  
A ON ACADEMIC FREEDOM AND TENURE  
(October 25, 1983)

GOVERNMENT CENSORSHIP  
AND  
ACADEMIC FREEDOM

Introduction

Within the past year, the American Association of University Professors has issued two reports which discuss the ramifications for academic freedom of restraints by government officials on the open circulation of ideas.<sup>1/</sup> Changes have been urged in the direction of limiting the impact of these restrictions upon scholarship and research, but to no discernible effect. Instead, there has been a significant enlargement of the scope of government restraints. These include:

1. Decisions by Department of State authorities to deny visas to foreign academics invited to attend scholarly meetings in this country on the basis of their political beliefs or associations.
2. A regulation proposed by the Department of Energy to require any holder of unclassified information relating to nuclear energy to assure the government that this information is protected in a manner similar to other restricted materials in its possession.

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<sup>1/</sup> "Federal Restrictions on Research: Academic Freedom and National Security," Academe: Bulletin of the AAUP (September-October, 1982), pp. 18a-20a, and "The Enlargement of the Classified Information System," ibid (January-February, 1983), pp. 9a-14a. An abridged version of the second report appeared in Science (21 January 1983), vol. 219, pp. 257-259. For a useful survey of the several actions taken by the current administration to impede the free flow of unclassified ideas see Floyd Abrams, "The New Effort to Control Information," The New York Times Magazine, September 25, 1983.

Stanford University has estimated that the regulation would apply to an unknowable portion of the some five million volumes in its libraries.

3. Executive Order 12356 (April, 1982), which extended the reach of the government's system for classifying information on the basis of national security concerns by relaxing the standard according to which the determination of classification is made. The likely result of this change is to remove from public and scholarly access additional tens of thousands of items that bear upon one's ability to determine the truth of statements made by executive branch officials, as well as upon the integrity of one's own work. The executive order also enlarged restrictions interdicting publication of research that is "born free" but that may, under the order, "die classified." It enables executive branch agencies to halt the presentation, publication, or mere scholarly exchange of papers not classified and not drawn from any classified sources.

It is plain that government officials are already intruding upon freedom of inquiry and academic research on a significant scale. And now, the most recent executive initiative, the Presidential Directive on Safeguarding National Security Information (March, 1983), the subject of the present report, proposes to add even more to these stringent measures.

Summary of the Presidential Directive's  
Prepublication Review Procedures

The Directive provides that each agency of the executive branch will adopt internal procedures to assure minimally that "all persons" who have access to high-level classified information will sign a prepublication review agreement to "assure deletion of . . . classified information." The Directive does not identify what is to be reviewed by the government agency or for what period of time a person is required to comply with the prepublication review agreement. Considering the emphasis that this administration has placed on restraining the dissemination of unclassified information and the broad language in which the Directive is cast, it seems entirely possible that government agencies will view the Directive as encompassing all writings by those with access to classified information for however long these individuals seek to publish what they write.

The Directive is silent with respect to whether it shall be applied only to those with current access to classified information. A government agency could presumably assert the need to review the writings of someone who no longer has a security clearance for whatever period of time the agency deems prudent.

The reason for the system of prepublication review to be established under the Directive is stated thus: "Safeguarding against unlawful disclosures of properly classified information is

a matter of grave concern and high priority for this Administration."<sup>2/</sup>

Sanctions can be applied to persons who, subject to a prepublication review agreement, do not submit everything which they may write to the government agency for prior review.

In addition, the Directive provides that government employees can be required to submit to polygraph examinations as a condition of employment, although the polygraph itself is of doubtful reliability, its use is widely feared, and submission to the examination may be required without regard to a stated probable cause and without any clear limits respecting the questions to be answered.

In sum, the effect of the Directive is that government officials may require anyone with current or lapsed access to high-level classified information to submit any writing intended for publication to the government agency for prior review. Those who have ever had access to classified information would accordingly, we take it, be placed indefinitely under the constraints of government censorship.

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<sup>2/</sup> The Department of Justice chaired the interdepartment group which drafted the Directive. In a fact sheet released upon the issuance of the Directive, the Department of Justice stated that "Unlawful disclosures of classified information damage national security by providing valuable information to our adversaries, by hampering the ability of our intelligence agencies to function effectively, and by impairing the conduct of American foreign policy."

Observations

The exercise of academic freedom by teachers and scholars requires freedom of thought and expression within colleges and universities and the freedom to transmit the fruits of inquiry to the wider community. To an increasing extent, society in general and government in particular have come to rely upon academic researchers for acquiring new skills and new knowledge. Plainly what is published by academic researchers also serves to enhance public discussion of political issues. Without the liberty to explore and the correlative right to publish the results of research, academic freedom and the advancement of learning are impaired. .

Within the academic community a researcher freely submits a manuscript to colleagues and other qualified persons for their judgment and evaluation. The assessment by peers gives confidence to the researcher of the usefulness of a path traversed. It can also warn against possible error or unnecessary duplication of research efforts. The exchange of criticism and ideas is also an indispensable condition for the continuance of research itself. The investigator's communications with peers may yield new insights or lead to research programs not thought possible or even imagined.

Free thought and free expression are significantly injured if researchers are unable to disseminate the results of their research and to publish what they have discovered except upon con-

dition that their writings are to be submitted to a government agency for prior review. The concept of academic freedom necessarily embraces the freedom to impart the findings of inquiries without previous restraint or fear of subsequent punishment.

The Directive cannot be justified on grounds that the system of prior review would not be onerous or that in practice few writings would be materially altered.

Each year countless numbers of professors representing a wide range of academic disciplines serve the government in various capacities. Some serve as consultants, lecturers, or researchers. Others accept short-term government assignments, in this country or abroad, while retaining their faculty appointments. Still others resign their academic positions for a government post and return to the teaching profession years later. There are also those who accept faculty positions after serving in government for varying lengths of time. Many among these faculty members are given, or once had, access to classified information. To accomplish what the authors of the Directive seek, and with consideration of the sheer numbers of academics and other persons with access to classified information, government agencies would need to establish a vast apparatus for administration and enforcement.

In addition, a system of prior review could not be limited only to those writings that a government agency is likely to identify as harmful to the nation if revealed to the public. A government official cannot be certain in advance of examining a manuscript

whether it contains sensitive information. A probable result is that the Directive would be administered to review a broader area of expression than might be restrained through actual revision or deletion of restricted information. One can also expect substantial delays in reviewing manuscripts, owing in part to the complexity of the undertaking and in part to the likely controversies between government agencies and authors concerning whether and how to alter a manuscript.

There is also reason to doubt the circumspection of government officials responsible for implementing the Directive. In 1970, a Department of Defense Task Force on Secrecy concluded that the amount of scientific and technical information which was classified could be profitably decreased by at least 90 percent. A report released by the General Accounting Office in 1979 found that nearly twenty-five percent of the classified materials it had reviewed contained one or more instances of improper classification. From the perspective of a government official accountable for failing to classify information that might be used to the detriment of the nation's security interests, the necessary choice in deciding whether or not to classify is to err overwhelmingly in the direction of classification. Only by accepting the premise that most information reviewed for classification should be secreted, whatever its actual adverse effect on national security if released to the public, can a government official discharge the responsibility of insuring that no information that should be classified will escape classification.

The factors accounting for mistaken classification would all too likely exercise their baleful influence under the Directive's system of prepublication review.

The process of administering the Presidential Directive will thus be piled on top of a system of classification which is already excessive, is already seriously compromising of academic freedom, and is known for its susceptibility to executive manipulation.

Moreover, the mere existence of the Directive is repressive. We want scholars to be uninhibited in challenging traditional habits of thinking, in testing new theories, in criticizing social and political institutions, and in advocating change in the policies and programs of government agencies and officials. The executive branch, the Directive asserts, may not curtail freedom except when it finds it advisable to do so. Yet uncertainty as to whether any particular manuscript should be submitted to a government agency for prior review can only inhibit the pursuit of intellectual and political truth. It is not merely that useful research may be frustrated. Rather, it is that the intimidating character of the Directive undermines the true foundation of our national security, the common confidence that things are as they seem and that our government's policies are not tragically misconceived on facts that are actually falsehoods.

The Directive can also be expected to take its toll by reducing the willingness of academics to accept government responsi-



bilities. Many will conclude that the diminution of their freedom is too great a price to pay for the opportunity to serve government.

The government claims, of course, that it is concerned with avoiding harm to the national security. If the broad reasons invoked in the Directive are a valid justification for the policy, then the executive branch would have complete discretion to determine what are any justifiable ends and could restrain manuscripts accordingly. Even if credit is given to the administration's position that the dangers it warns against are significant, two further issues arise.

The Directive seeks to prevent the unauthorized publication of classified information through a system of prior review. A claim to immunity from restraint is not unlimited. National security certainly requires secrecy in some areas, and the government must have the means to protect the nation against the wrongful disclosure of military secrets. It is equally certain, however, that procedures for restraining free expression, to the extent that any are required, must be precise, narrowly defined, and applied only in exceptional cases, for otherwise the exercise of the freedom would have slight value for the purpose it is meant to achieve. These limitations are not to be found in the Directive. The reach of the Directive is without parallel in modern memory. It may be applied to the writings of thousands of persons, whether or not

they are serving in government, who currently have or did have access to classified information. We do not find credible that any genuine problem faced by the administration in controlling the distribution of classified information can justify the unbridled sweep of this Directive.

We also question whether the dangers invoked by the administration in justifying the Directive are more pressing than those of the recent past. We would do well to remind ourselves of some crises through which the nation has passed since the end of World War II.

Each day for nearly a year the immediate prospect existed that American and Soviet troops would come to blows during the Berlin Blockade. That possibility was seriously revived with far vaster implications during the Cuban missile crisis. We fought two wars on the mainland of Asia, and neither in Korea nor in Vietnam were our apprehensions about the intentions and capabilities of the Soviet Union less acute than they are today. And the revolution in Iran and the Soviet Union's invasion of Afghanistan not only deprived us of intelligence stations on a large stretch of the border of the Soviet Union but for many raised the threat of a Soviet thrust toward the Persian Gulf and the undermining of the entire American position in the Middle East.

What greater urgency propels our current administration? We must continue to contend with a formidable adversary, but why should the same principles which have governed free inquiry by

academic researchers not be found serviceable in these anxious times? We make a fatal bargain if we allow the freedoms which have so long been exercised in this country to the benefit of all to become diminished, whatever the concerns which are now motivating some government officials.

The Directive should be withdrawn. Its infirmities are too many and they run too deep to be cured with textual refinements. Our penchant for executive secrecy is not in our own or in the world's best interest. We should be striving for reliable ways of reducing the government's system of classification to a bare minimum, and not for excuses for its protean enlargement.

Robert A. Rosenbaum (Mathematics)  
Wesleyan University, Chairman

Morton J. Tenzer (Political Science)  
University of Connecticut

Stephen H. Unger (Computer Science)  
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MILWAUKEE, WISCONSIN  
BENJAMIN F. SALTZSTEIN  
828 N. MILWAUKEE STREET

February 3, 1984

The Honorable Charles McC. Mathias  
387 SROB  
Washington, DC 20510

Dear Senator Mathias:

We are counsel to American Business Press (ABP), the association of over 500 specialized business periodicals. These publications include journals like Aviation Week, Datamation, Electronic Design, and Oil & Gas Journal. They are edited for businessmen, doctors, engineers, industrial managers and scientists.

On August 1, 1983 we wrote to you expressing our concern about the President's Directive on national security information. We know you have been concerned about the scope and the effect of this directive and have been working with other members of the Senate to insure that First Amendment rights are not endangered as a result of the directive.

We understand that legislation has been introduced by Congressman Brooks in the House to forestall implementation of the directive, and that you are considering similar legislation in the Senate. Mr. Olson of your staff called us as a result of our prior correspondence, and asked if we would like to submit any material for inclusion into the record of the hearings that you held last year on this subject.

We are pleased to forward to you the attached survey which was prepared by the American Business Press Government Affairs Committee. It was sent out to the Chief Editors of over 500 periodicals. The questions in the survey deal with both the Freedom of Information Act and the President's Directive.

The survey results show overwhelming support for the Freedom of Information Act and deep concern on the part of editors that the President's Directive will have an adverse impact on the availability to the press of government information.

We hope this letter and the attached survey will assist you. Please let us know if we can be of further assistance.

Sincerely,

  
Stephen M. Feldman

SMP:emb

Enclosure

CC:

Mr. David Heinly, Chairman ABP Gov't. Affairs Committee  
Wash. Bureau Chief, Cahners Pub. Co.

Mr. Carroll Dowden, Exec. V.P. & CEO, International Thomson  
Business Press

Chairman, ABP Washington Legal Committee  
Mr. Thomas King, President, American Business Press, Inc.

BCC:

✓Mr. Thomas Olson

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October 4, 1983

AMERICAN BUSINESS PRESS QUESTIONNAIRE ON  
FREEDOM OF INFORMATION ACT

Attached is a Freedom of Information Act Questionnaire which was sent to the chief editors of over 500 member periodicals of the American Business Press. The Questionnaire was authorized by the American Business Press Government Affairs Committee which monitors freedom of information developments.

One hundred twenty-one editors responded. Many editors took the time to supplement their answers with detailed comments on how they feel about both the Freedom of Information Act and the President's directive on national security information. Nearly all the comments express the opinion that government agencies are too restrictive, rather than too lax, in releasing government information.

Of the nineteen publications which have used the Freedom of Information Act, these are the agencies to which requests were directed:

Department of Agriculture  
Department of Energy  
Department of Labor  
Department of Justice

EPA

FDA  
Federal Highway Administration

Health and Human Services  
Highway Safety Administration

Internal Revenue Services

National Institute of Health  
National Institute of Mental Health

U. S. Postal Service  
U. S. Railway Association

## QUESTIONNAIRE ON FREEDOM OF INFORMATION ACT

1. Have you or any of the editors on your publication ever had occasion to use the Freedom of Information Act?  
19 Yes  
102 No
2. Have you ever had a Freedom of Information request denied?  
8 Yes  
113 No
3. Whether or not you have used the Freedom of Information Act, do you think that its presence encourages government agencies to make information (even in the absence of an FOI request) available to the press that otherwise would not be available?  
103 Yes  
14 No  
4 No reply
4. Recently, President Reagan issued a directive on national security information that requires present or former government employees who have access to classified or "sensitive" information to submit articles which they have written for publication in the press to a "pre-publication review" process. Additionally, the government would be able to administer lie detector tests to government employees to find out the source of unauthorized leaks. Do you believe that this directive will have an adverse impact on the availability of present or former government employees as contributors to periodicals or as news sources?  
95 Yes  
23 No  
3 No reply
5. In connection with the Presidential directive referred to above, does your periodical use present or former government employees as contributors to your publication.  
47 Yes  
64 No



## The Society of Professional Journalists, Sigma Delta Chi

Mr. Chairman, while this Committee has decided to hear today only from present and former government officials, the Society of Professional Journalists, Sigma Delta Chi, nevertheless feels strongly on this issue and submits this written statement of our views. While we do not want to minimize the importance of what you will hear today, we do feel it is a crucial oversight to limit these hearings to government witnesses. The impact on them is obvious. But equally strong is the impact on the public which looks to present and former government officials for their insights on the vital issues of the day. The Society, as the nation's largest organization of journalists with more than 28,000 members in all branches of the news media, print and broadcast, feels strongly that these actions by the Reagan Administration go directly to the core of the free speech rights that are this country's heritage.

President Reagan's March 11 national security directive requires all federal employees with access to classified information to sign a non-disclosure pledge and submit to polygraph tests if asked. It compels all employees with access to segmented compartmented information (SCI) to do much more -- to sign away their First Amendment rights for life and agree to obtain prior government clearance for all books, articles and speeches that might touch on government secrets. The implementation of that directive announced



August 25 by the Department of Justice strongly encourages other employees to submit to these same intrusive procedures and obtain clearance for their writings as well.

What is even more disturbing is that the Reagan Administration -- in keeping with its policies in direct contrast to its rhetoric on freedom -- does not want to discuss this issue. The Reagan Administration apparently does not want public debate on the amount of information the American people receive about their government. In addition to refusing, until today, to explain this overbroad policy, the Administration has failed to answer letters, including one sent last May by the Society, seeking information on this crucial government policy.

The combined effect of the President's directive and the August 25 packet implementing the directive is to give the Administration in power unprecedented control over the First Amendment freedoms of present and former government officials. A person who has worked for the United States government and has received a clearance to handle classified material must now clear any writing or statement with the very subject of that writing or commentary. This provides the Administration with a weapon to control what the American people can learn about their government.

While preventing the disclosure of the United States' legitimate security secrets is, of course, warranted, the effect of these actions is drastic overkill. This order will

effectively silence anyone who has served in the upper levels of the White House, State Department, Defense Department, and National Security Council.

It is particularly puzzling to us that the Administration fails to recognize the quandry it thrusts itself into with its obsession about leaks. As was demonstrated in the recent Korean airline tragedy, the government does reveal classified information and supposedly top-secret interceptions of Soviet internal communications if it suits its purposes. This classified material made the Administration's case in an extraordinarily forceful manner. Yet, at the same time, this instant declassification shows that the Administration is willing to leak classified information to help make its case. Selective leaking is acceptable. It is the embarrassing leaks to which the Reagan Administration objects.

In looking at the Administration's specific proposals, Mr. Chairman, the Society finds particularly ~~troublesome~~ troublesome:

-- The prior restraint implicit in requiring any present or former government official with access to SCI to submit all publications or comments to the government for prepublication review.

-- The use of polygraphs, whose reliability is, at best, questionable, as an accepted method of ferreting out "leakers."

Department of Justice order 2620.8, released on August 25, 1983, implements in DoJ and its agencies the prepublication

review program for all persons granted access to classified information. Drafted to serve as a model for other executive departments and agencies, the order includes these objectionable provisions:

-- Officials required to sign prepublication review agreements as a prerequisite to employment must "submit any material prepared for disclosure to others" if it contains or purports to contain any SCI or classified information or "any information concerning intelligence sources or activities." This broad definition allows an Administration in power to restrict any unfavorable comment about it by those most knowledgeable in the subject.

-- As evidence of the Administration's preoccupation with leaks, the Order prohibits an official from assisting or conferring with any other person who has or may have SCI or classified information, including "a ghost writer, spouse or friend, or editor." This provision would even preclude a journalist with information he suspects may be classified from checking it on background for accuracy or explanation with a knowledgeable official or former official.

-- The prohibitions extend not only to information an official wants to include in an article or commentary, but even in a fictional work.

-- Furthermore, these restrictions cover speeches and "extemporaneous oral expressions" and pure opinions "which

imply facts" that are classified or SCI.

-- The Justice Department's policies suggest that previously unclassified information contained in materials submitted by former employees for government clearance may be classified on receipt, a thought control technique that smacks of Orwell.

Consider the ways these Draconian measures would muzzle any official who signed the prepublication review contracts. A former or present official who became a political candidate would have to have many of his speeches cleared by his successors. A former official who wanted to become a journalist or commentator would have to have many of his writings cleared by the very people about whom he wished to comment. The same holds true for government officials who go into teaching. It would make fair game for the censor the writings of the successors in government of such Americans as Henry Kissinger, Walter Mondale, George Bush, Elmo Zumwalt and Jody Powell.

The Society urges the Committee and the Administration to consider options to the contract requirement, such as:

-- Reliance on the existing criminal statutes to prohibit the disclosure of classified information. The United States Code already includes severe sanctions for leakers of truly detrimental information.

-- If the contract requirement is continued, modify

it so that the government can collect civil damages only upon a showing that the official did disclose classified information that impaired the national security.

-- Consideration of a brief statute of limitations after which former employees would not be required to submit their writings, speeches and utterances for government review.

In conclusion, these Reagan Administration proposals are, at best, ill-conceived attempts to dispel a problem that is being overblown and miscast. The Administration has not provided sufficient justification to lay waste to the free speech principles upon which this country was founded. These proposals beg for oblivion. We urge the Administration to withdraw them, and, if not, we urge Congress to consider legislation that deals with the true problem at hand.

