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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Fred Fielding to Edwin Meese, et al. re portal to portal transportation 2 p. (p. 2, partial)	1/24/84	~~P5~~ 1/03 10/3/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

Exhibit A

THE WHITE HOUSE

WASHINGTON

August 30, 1983

MEMORANDUM FOR FEDERAL EMPLOYEES

SUBJECT: Unauthorized Disclosure of Classified Information

Recent unauthorized disclosures of classified information concerning our diplomatic, military, and intelligence activities threaten our ability to carry out national security policy. I have issued a directive detailing procedures to curb these disclosures and to streamline procedures for investigating them. However, unauthorized disclosures are so harmful to our national security that I wish to underscore to each of you the seriousness with which I view them.

The unauthorized disclosure of our Nation's classified information by those entrusted with its protection is improper, unethical, and plain wrong. This kind of unauthorized disclosure is more than a so-called "leak"--it is illegal. The Attorney General has been asked to investigate a number of recent disclosures of classified information. Let me make it clear that we intend to take appropriate administrative action against any Federal employee found to have engaged in unauthorized disclosure of classified information, regardless of rank or position. Where circumstances warrant, cases will also be referred for criminal prosecution.

The American people have placed a special trust and confidence in each of us to protect their property with which we are entrusted, including classified information. They expect us to protect fully the national security secrets used to protect them in a dangerous and difficult world. All of us have taken an oath faithfully to discharge our duties as public servants, an oath that is violated when unauthorized disclosures of classified information are made.

Secrecy in national security matters is a necessity in this world. Each of us, as we carry out our individual duties, recognizes that certain matters require confidentiality. We must be able to carry out diplomacy with friends and foes on a confidential basis; peace often quite literally depends on it--and this includes our efforts to reduce the threat of nuclear war.

We must also be able to protect our military forces from present or potential adversaries. From the time of the Founding Fathers, we have accepted the need to protect military secrets. Nuclear dangers, terrorism, and aggression similarly demand

that we must be able to gather intelligence information about these dangers--and our sources of this information must be protected if we are to continue to receive it. Even in peacetime, lives depend on our ability to keep certain matters secret.

As public servants, we have no legitimate excuse for resorting to these unauthorized disclosures. There are other means available to express ourselves:

-- We make every effort to keep the Congress and the people informed about national security policies and actions. Only a fraction of information concerning national security policy must be classified.

-- We have mechanisms for presenting alternative views and opinions within our government.

-- Established procedures exist for declassifying material and for downgrading information that may be overclassified.

-- Workable procedures also exist for reporting wrongdoing or illegalities, both to the appropriate Executive Branch offices and to the Congress.

Finally, each of us has the right to leave our position of trust and criticize our government and its policies, if that is what our conscience dictates. What we do not have is the right to damage our country by giving away its necessary secrets.

We are as a Nation an open and trusting people, with a proud tradition of free speech, robust debate, and the right to disagree strongly over all national policies. No one would ever want to change that. But we are also a mature and disciplined people who understand the need for responsible action. As servants of the people, we in the Federal Government must understand the duty we have to those who place their trust in us. I ask each of you to join me in redoubling our efforts to protect that trust.

Ronald Reagan

Statistics on Security Clearances and Classification Activity

Security Clearances (Excluding CIA and NSA)

	Employees	Contractors
Top Secret - SCI	112,000	15,000
Top Secret - No SCI	351,000	252,000
Secret	2,055,000	940,000
Confidential	17,000	305,000
Total Clearances	2,535,000	1,512,000

Changes in Classification Activity

	Original Classification	Original Plus Derivative Classification
FY 80 (Carter)	about same	up 10%
FY 81 (transition)	about same	up 8%
FY 82 (Reagan)	about same	up 1%
FY 83 (Reagan)	down 18%	up 3%

Prepublication Review: Development of Policy

For many years CIA employees have signed secrecy agreements requiring them to obtain agency clearance before publishing materials that might contain classified information. A number of court decisions have upheld the enforceability of these agreements, including the Supreme Court's decision in Snepp v. United States (1980).

Civiletti Guidelines. In December 1980, shortly before leaving office, Attorney General Civiletti adopted guidelines to limit the discretion of the Justice Department in enforcing contractual secrecy obligations. These guidelines in effect overruled some of the broader implications of the Supreme Court's opinion in the Snepp case.

Guideline Revocation. In September 1981, Attorney General Smith revoked the Civiletti guidelines because they suggested the United States would not enforce secrecy obligations to the extent permitted by the Snepp decision. The new policy is to "evenhandedly and strenuously" enforce secrecy obligations. The personal approval of the Attorney General is required before initiating any such litigation.

Form 4193. In 1981, DCI Casey promulgated a new secrecy agreement (Form 4193) for all government employees with access to SCI, which contains a prepublication review provision. This agreement was initially drafted during the Carter Administration as part of a broader plan to upgrade information security standards (APEX) which was ultimately abandoned. The language of this agreement has several defects that would make it difficult to enforce. For example, it only authorized deletion of SCI (not Secret or Top Secret information) from manuscripts that are submitted for prepublication review.

NSDD-84. This directive was issued by the President in March 1983. It requires two new standard secrecy agreements, to be approved by the Justice Department as enforceable in civil litigation. The two agreements were developed by an interdepartmental committee under supervision of the NSC staff, approved by the Justice Department, and publicly announced in August 1983.

-- The classified information nondisclosure agreement does not include a provision for prepublication review and has not been very controversial. However, many agencies have refused to implement this agreement because of controversy regarding the SCI nondisclosure agreement.

-- The SCI nondisclosure agreement replaces Form 4193 and includes a prepublication review provision. Because the Mathias amendment (discussed below) was introduced soon after its promulgation, very few officials have signed the new agreement.

The Mathias Amendment. On October 20, 1983, the Senate adopted by a vote of 56-34 this amendment to the State Department authorization bill, which was finally enacted on November 22. The amendment prohibits until April 15, 1984, any prepublication review agreement or policy that was not in effect prior to March 1983. The stated purpose is to delay implementation of the new SCI nondisclosure agreement so that Congress has time to study the issue further. The Mathias amendment does not interfere with the continued use and enforcement of Form 4193.

House Committee Report. On November 22, 1983, a majority of the House Government Operations Committee approved a report recommending appropriate legislation unless the President rescinds the portion of NSDD-84 requiring prepublication review agreements. Six Republicans signed a dissenting statement supporting the President's directive, but recommending that consideration be given to replacing the lifetime prepublication review provision with a commitment limited to a reasonable period of time after leaving government employment.

Congressional Outlook. There is little congressional interest in preventing CIA and NSA from continuing their prepublication review programs. However, there is substantial opposition to requiring prepublication review for other employees with SCI access. This opposition applies to both the new nondisclosure agreement as well as the old Form 4193 (which went unnoticed when originally promulgated).

Some Fiction and Facts About Prepublication Review

Fiction: Secrecy agreements requiring prepublication review violate the First Amendment.

Fact: The Supreme Court upheld the constitutionality of prepublication review for CIA employees in Snepp v. United States (1980).

* * * *

Fiction: The Reagan Administration wants to extend prepublication review to millions of government employees with access to classified information.

Fact: The requirement will only apply to employees with access to Sensitive Compartmented Information (SCI). There are about 112,000 such employees, most in the Department of Defense, who were not previously covered.

* * * *

Fiction: Employees covered by this agreement will have to submit for review anything they ever write for the rest of their lives.

Fact: Only materials that include information relating to specified intelligence matters will have to be submitted.

* * * *

Fiction: This program will allow the Administration in power to censor views of people they disagree with.

Fact: Only classified information can be deleted. Judicial review is provided, and the government must be able to prove in court that every word it wants to delete is properly classified.

* * * *

Fiction: Prepublication review will keep authors from publishing their views in a timely manner.

Fact: The agreement requires review to be conducted in 30 days as a maximum. Last year, CIA conducted 213 such reviews and completed them in an average of 13 days. Reviews have been conducted in a matter of hours for authors working on short deadlines.

* * * *

Fiction: This program will effectively prevent former officials from giving speeches, press interviews or appearing on talk shows, because they cannot submit their answers for review in advance.

Fact: Prepublication review does not apply to extemporaneous oral comments. Only if oral statements are given from a prepared text is there a requirement to submit for review.

* * * *

Fiction: This program is unnecessary because former employees hardly ever disclose classified information in books or speeches.

Fact: Since 1977, some 929 items have been submitted to CIA for prepublication review, of which 241 contained classified information that was protected by the program. A similar opportunity to protect classified information would exist for other employees with access to equally sensitive information.

* * * *

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

Exhibit C

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 known as Sensitive Compartmented Information (SCI). I have been advised and am aware that SCI involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12356 or under 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 that I understand these procedures. I understand that I may be required to sign subsequent agreements as a condition of 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 and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge such information unless I have officially verified that the recipient has been properly authorized by the United States Government to receive it or I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) last granting me either a security clearance or an SCI access approval that such disclosure is permitted.

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

5. 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 and other classified information, I hereby agree to submit for security review by the Department or Agency last granting me either a security clearance or an SCI access approval all materials, including works of fiction, that I contemplate disclosing to any person not authorized to have such information, or that I have prepared for public disclosure, which contain or purport to contain:

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

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 at all times thereafter. However, I am not required to submit for review any such materials that exclusively contain information lawfully obtained by me at a time when I have no employment, contract or other relationship with the United States Government, and which are to be published at such time.

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

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

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

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

10. 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.

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

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

13. 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.

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

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

Signature _____ Date _____

Social Security Number (see notice below) _____ Organization _____

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

WITNESS and ACCEPTANCE:

Signature _____ Date _____

Organization _____

Notice: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security 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 the processing of such certifications or determinations.

C

Four Categories of Polygraph Use

There are two basic ways to use the polygraph: for screening and in particular investigations. Screening examinations are not designed to solve specific cases of suspected misconduct, but instead are preventive in nature. Questions in a screening examination are to determine whether an individual meets security standards for employment or access to classified information.

(1) Polygraph Screening as a Condition of Employment.--

-- CIA and NSA have used the polygraph as part of their security screening program for many years, both prior to employment and periodically thereafter.

(2) Polygraph Screening as a Condition of Access to Information.--

-- In 1982, DOD proposed a new polygraph screening program for certain employees with access to highly classified information.

In addition to its use for screening, the polygraph is also used as a technique to investigate particular cases of suspected wrongdoing, including unauthorized disclosures of classified information.

(3) Criminal Investigations.--

-- In a criminal investigation, the Fifth Amendment requires a subject to consent to the polygraph. Because of undue influence on the jury and for other reasons, DOJ routinely opposes introduction of polygraph evidence in criminal trials. However, DOJ supports its use as an investigative technique. (Hearsay may also be inadmissible evidence but is relied upon in investigations.)

(4) Administrative Investigations.--

-- In administrative investigations, the Fifth Amendment does not preclude the government from requesting or requiring employees to be polygraphed. The polygraph has been used in such investigations for some years. (For example, Attorney General Civiletti approved use of the polygraph in the ABSCAM leak investigation in 1980.)

Use of Polygraph in Leak Investigations

The polygraph has been used for a number of years in investigating unauthorized disclosures of classified information. However, there has been some uncertainty about the extent to which the government could encourage or require employees to be polygraphed in such cases. In NSDD-84 President Reagan ordered agencies to clarify their policies so that "appropriate adverse consequences" could follow an employee's refusal to be polygraphed.

Drafting of regulations to implement this aspect of NSDD-84 was initially delayed so that the Office of Legal Counsel could prepare a memorandum analyzing the impact of the MSPB's 1980 decision in the Meier case. See Memorandum of Theodore B. Olson, August 22, 1983. We have now developed specific legal and policy guidance for implementing this aspect of NSDD-84, which was contained in DOJ testimony before the House Government Operations Committee in October 1983.

- -- The unauthorized disclosure must be a serious offense affecting national security or the integrity of the employee's official conduct.
- -- The polygraph can only be used after investigation by other means has produced a substantial objective basis for seeking to examine a particular employee.
- -- The polygraph can only be used if there is no other reasonable means to resolve the matter.
- -- Questions must be limited to the circumstances of the unauthorized disclosure and cannot go into "life style" matters.
- -- The examination results cannot be conclusive and must be considered in the context of all available information.

The consequences of an employee's refusal to take a polygraph examination will depend upon all the facts and circumstances.

-- Employees in the competitive service or uniformed services (the vast majority of federal employees) cannot be fired or demoted solely for refusing to be polygraphed. However, they could be transferred to a less sensitive job at the same level of pay.

-- Political appointees are subject to more rigorous standards and could be fired in an appropriate case for refusing to be polygraphed.

DOD Polygraph Screening Proposal
(The "Random" Polygraph)

The Department of Defense announced this proposal in 1982, but it has not yet been implemented because of a congressional moratorium until April 15, 1984. Administration witnesses testified in support of this policy before the House Government Operations Committee in October 1983.

-- Only employees in "special access programs" could be covered -- a maximum of about 100,000 in DOD and about 10,000 in other agencies if the program were extended outside DOD.

-- The head of each agency has discretion to decide whether, and to what extent to use it. Only DOD has current plans to adopt this program.

-- Questions are limited to "counterintelligence" matters, such as whether the employee has disclosed classified information to a foreign agent or other unauthorized person. "Life style" questions are not permitted.

-- Employees in the competitive service and uniformed services (the vast majority of federal employees) who do not agree to be polygraphed can be transferred to less sensitive jobs. They cannot be fired or demoted.

-- Not even all of these employees will necessarily be polygraphed. A smaller number can be randomly selected for polygraphs each year. Random selection protects these employees from being singled out to be polygraphed for discriminatory reasons.

Note: This program is not primarily designed to counter "leaks." It is to safeguard sensitive classified information that is likely to be of extraordinary interest to hostile intelligence agents. It is part of an effort to upgrade security standards for employees outside of CIA and NSA who have access to the same kind of highly sensitive information.

Statistics on Federal Polygraph Use

	CIA	NSA	DOD (Not NSA)	Other Agencies	Total (Except CIA)
FY 80 (Carter)	NA	5,676	7,374	3,241	16,291
FY 81 (Transition)	NA	7,418	7,007	3,807	18,232
FY 82 (Reagan)	NA	9,672	8,629	4,296	22,597

Notes: CIA and NSA examinations were nearly all for personnel screening. Over 90% of all other examinations were given in criminal investigations (suspects, witnesses, informants, victims).

In 1980-82, a total of about 260 examinations were given in cases of unauthorized disclosure of sensitive or classified information.

Source: OTA Study (Nov. 1983), p. 108.

Statistics on Polygraph Accuracy

	Field Studies	Laboratory Studies	
		Control Question Technique	Guilty Knowledge Technique
Accurate	82.0	60.9	80.5
Inaccurate:			
False Positive	8.2	6.8	2.2
False Negative	5.8	5.4	17.3
Inconclusive	4.1	26.9	0

Note: Percentages reflect mean detection rates of polygraph validity studies reported and analyzed by OTA. All involve single-issue examinations for actual or simulated criminal conduct.

Source: OTA Study (Nov. 1983), pp. 52 and 65.

D

Freedom of Information Act Amendments

An early priority of this Administration was to seek amendments to the Freedom of Information Act. This has evolved into two tracks: general reform and relief for CIA. Each of these tracks has produced bills with wide bipartisan support in the Senate but uncertain prospects in the House.

S.774. This is the general FOIA reform bill, which is supported by Senators Hatch and Leahy. It was unanimously approved by the Senate Judiciary Committee in June 1983 and is awaiting action by the full Senate. Among other things, this bill would improve the protection of law enforcement information in government files.

S. 1324. This is the CIA relief bill. CIA originally sought total exemption from FOIA but earlier this year sought a compromise. S. 1324 is the result. It exempts CIA operational files, which are unlikely to contain any information that is releasable, from the budensome requirement of FOIA searches. However, all other CIA files remain fully subject to FOIA. S. 1324 was unanimously approved in October 1983 by the Senate Intelligence Committee with strong bipartisan support, and by the full Senate in November of 1983.

Congressional Outlook--It is expected that the full Senate will approve S. 774 in the next few weeks. It will then be referred to the Subcommittee on Government Information of the House Government Operations Committee, chaired by Congressman Glenn English (D-Okla.). While it is expected that English will hold hearings, he generally opposes FOIA reform and House action is unlikely.

Prospects for S. 1324 are considerably better however. The bill has been referred jointly to the House Intelligence Committee, which has scheduled a hearing for February 8, and the Government Operations Committee. Although Congressman English could block this legislation as well, it has fairly strong support in the House and a fair chance of passage.

Executive Order 12356 (Classified Information)

President Reagan signed Executive Order 12356, "National Security Information" on April 2, 1982. The new Order includes a number of changes that are based on litigative and administrative experience under its predecessor order, which was issued by President Carter in 1978. These changes are designed to enhance the Executive branch's ability to protect national security information from unauthorized disclosure and are not intended to increase the quantity of classified information.

The two most controversial changes are:

-- The minimum standard for classification requires a determination that unauthorized disclosure "reasonably could be expected to cause damage to the national security." The Carter order required "identifiable damage."

-- The Reagan order eliminates the "balancing test," in which classifying officials were required to balance the public interest in disclosure against the need for secrecy.

Both of these changes were made to avoid problems in protecting classified information in litigation, primarily under FOIA.

Statistics recently compiled by the Information Security Oversight Office (ISOO) show that the new order has not produced an increase in the amount of classified information. During the first year that the new order was in effect (FY 1983), original classification activity declined by 18%, which was the first significant decline in four years. Total classification activity (including derivative classification) increased by only 3%, which is much lower than the 8-10% annual increases during the last two years of the Carter Administration.

Congressional Outlook.--Legislation has been introduced in the House and Senate to provide statutory standards for classification. If enacted, this legislation would effectively repeal the Reagan order and replace it with the Carter order. Hearings have been held on the general subject, but passage of legislation seems unlikely.

FBI Domestic Security/Terrorism Guidelines

The new Domestic Security/Terrorism Guidelines became effective March 21, 1983, replacing guidelines previously issued by Attorney General Levi in 1976 (the "Levi Guidelines").

The new guidelines incorporate instructions for domestic security cases in the existing General Crimes and Racketeering Enterprise Guidelines, thus giving the FBI a single set of procedures for all criminal and criminal intelligence investigations. This provides a consistency which did not exist in the past. In addition, the guidelines:

-- Eliminate the three-tiered approach to domestic security cases,

-- Use a criminal enterprise approach which emphasizes the intelligence nature of these cases,

-- Encourage the continued monitoring of criminal enterprises even when they may be temporarily inactive,

-- Make clear that the FBI may take into account statements made by enterprise members which indicate an apparent intent to engage in crime.

On April 18, 1983, Judge Getzendanner of the Northern District of Illinois permanently enjoined in the City of Chicago the provision of the guidelines permitting the FBI to initiate inquiries or investigations on the basis of statements advocating criminal conduct. Alliance to End Repression v. City of Chicago, No. 74C3268. The government is appealing this ruling. The court denied preliminary injunctions directed to certain other sections of the guidelines.

Congressional Outlook.--Congressman Don Edwards has introduced legislation that would block implementation of the new guidelines, with the apparent intent of requiring a return to the Levi Guidelines. Hearings have been held on the new guidelines, but passage of blocking legislation seems unlikely.

THE WHITE HOUSE

WASHINGTON

January 24, 1984

MEMORANDUM FOR: EDWIN MEESE, III
JAMES A. BAKER III
MICHAEL K. DEAVER

FROM: FRED F. FIELDING

SUBJECT: Fred W. Phelps v. Ronald Reagan and William Wilson, U.S.D.C. for the District of Kansas, Civil Action No. 84-4015

For your information, the referenced action, in which the President has just been served, seeks declaratory judgment that his nomination of William Wilson as Ambassador to the Holy See, and his intention to establish full diplomatic relations with same, are in violation of the establishment clause of the First Amendment. Plaintiff, a Baptist preacher, also seeks an injunction against such action. Plaintiff has noticed depositions of the President and Mr. Wilson for March 20 and 21, respectively.

The documentation has been referred to the Department of Justice for handling. We have advised them of our continued interest in this case and I, of course, will keep you advised of all significant developments in this action.

JAB
MUST READ
REQUIRES A DECISION

THE WHITE HOUSE

WASHINGTON

January 24, 1984

MEMORANDUM FOR EDWIN MEESE III
COUNSELLOR TO THE PRESIDENT

✓JAMES A. BAKER, III
ASSISTANT TO THE PRESIDENT
CHIEF OF STAFF

MICHAEL K. DEAVER
ASSISTANT TO THE PRESIDENT
DEPUTY CHIEF OF STAFF

RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT
DEPUTY TO THE CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Portal to Portal Transportation

Last summer the General Accounting Office issued an opinion adopting an interpretation of the statute governing use of Government vehicles for transportation between home and work far more stringent than that prevailing in most Federal agencies. The so-called Portal to Portal statute, 31 U.S.C. § 1344, specifies that Government vehicles may be used only for official purposes and that an official purpose "does not include transporting officers or employees of the Government between their domiciles and places of employment." The statute does not apply to vehicles for the official use of the President, the heads of Executive departments listed in 5 U.S.C. § 101 (the twelve Cabinet departments), or principal diplomatic and consular officials. The GAO analysis rejected arguments advanced over time by various Federal agencies permitting portal to portal service for officials other than the President and the twelve Cabinet department heads. For example, under the GAO interpretation, no one in the Executive Office of the President would be permitted portal to portal service.

GAO recognized that its interpretation of the statute was a departure not only from earlier GAO opinions but also from the established practice apparently acquiesced in by Congress. Accordingly, GAO announced that it would not seek reimbursement based on its new reading of the statute for past misuse of Government vehicles for portal to portal

service, and would apply its new interpretation only after the close of the current session of Congress. GAO noted that existing law, as interpreted by it, may be too restrictive, and urged Congress to consider meliorative legislation during the "grace period." That period ends when Congress adjourns, probably by early October.

We need to consider whether to seek legislation overriding the GAO view, which GAO itself has indicated may be desirable. If no legislation is passed and we continue current portal to portal practices, there is the danger that GAO may seek reimbursement from prominent Administration officials on the eve of the election. Seeking legislation also raises concerns, since it will likely be perceived and attacked as an effort by the Administration to expand the availability of portal to portal service. If no legislation is passed, we will either have to alter existing portal to portal practices by the time Congress adjourns, or commit to a challenge to GAO's reading of the law at a very sensitive time.

I recommend that this matter be discussed in a legislative strategy meeting at the earliest opportunity.

cc: M.B. Oglesby, Jr.
Assistant to the President
for Legislative Affairs

THE WHITE HOUSE

WASHINGTON

January 13, 1984

MEMORANDUM FOR JAMES A. BAKER III
ASSISTANT TO THE PRESIDENT AND
CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Dellums, et al. v. Smith, et al.

As you know, the referenced action was filed last year against the Attorney General and Assistant Attorney General, Criminal Division, by Congressman Dellums and others seeking judicial enforcement of the Ethics in Government Act ("Ethics Act"). Plaintiffs claim that the President and several Cabinet officers have violated the Neutrality Act of 1794 (18 U.S.C. § 960), by providing covert assistance to insurgents in Nicaragua. On November 3, 1983, the district court (Weigel, J) entered judgment ordering the Attorney General to conduct a 90-day "preliminary investigation" of the Nicaragua matter, and by February 1, 1984, to report his findings to the special court established by the Ethics Act.

The district court's opinion concludes that private citizens have standing to seek judicial enforcement of the Ethics Act, and that the Attorney General's decision under the Act not to conduct a preliminary investigation is reviewable in court. The district court also concluded that the provision of government assistance to the insurgents in Nicaragua "may" constitute a violation of the Neutrality Act. That Act provides in pertinent part: "Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for * * * any military or naval expedition * * * against the territory of any foreign * * * state * * * with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both." The court rejected the government's contention that the political question doctrine barred judicial consideration of the Neutrality Act issue.

The government promptly sought to alter the district court's judgment on the ground that the Neutrality Act cannot conceivably apply to official governmental activities authorized by the President and funded by Congress. The government also asked that if the court did not alter its judgment that it issue a stay pending appeal. The district court, on January 10, 1984, denied both motions. The court rejected the motion for reconsideration on the ground that plaintiffs' allegations "reasonably" may be

THE WHITE HOUSE

WASHINGTON

January 12, 1984

MEMORANDUM FOR ATTORNEY GENERAL WILLIAM FRENCH SMITH
EDWIN MEESE III
DEPUTY ATTORNEY GENERAL EDWARD SCHMULTS
JAMES A. BAKER, III ←
JOHN S. HERRINGTON
M.B. OGLESBY
ASSISTANT ATTORNEY GENERAL JONATHAN ROSE
MARGARET TUTWILER

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Agenda -- President's Federal Judicial Selection Committee -- January 13, 1984

Attached are the agenda and briefing materials for the President's Federal Judicial Selections Committee meeting on Friday, January 13, 1984. That meeting is scheduled for 3:00 p.m. in the Roosevelt Room.

AGENDA

I. U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON

II. U.S. DISTRICT COURT FOR THE DISTRICT OF VERMONT

III. U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IV. STATUS OF BANKRUPTCY LEGISLATION

V. INFORMATIONAL - SPECIAL COURTS

I. U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON

In December, the Justice Department had recommended that the background investigations be initiated on Malcolm F. Marsh as the candidate for appointment to the U.S. District Court for the District of Oregon. Marsh was one of 5 candidates recommended for this position by Senators Hatfield and Packwood, and was recommended strongly by Senator Hatfield as his preferred candidate. A recommendation to initiate the clearances on Marsh was circulated; however, an objection was made to that recommendation and the matter was placed on today's agenda.

Set forth below are descriptions of the qualifications of Marsh and U.S. Magistrate Edward Leavy, the apparent contending candidates for this position.

Marsh, 55, is an experienced trial lawyer with the firm of Clark, Marsh, Lindauer, McClinton & Vollmar in Salem, Oregon. He has practiced law in Salem for 30 years. Marsh has served as the West Coast counsel for Volkswagen of America and has had extensive experience in products liability litigation. Justice states that members of the bench and bar of Oregon characterized him as "the most prominent lawyer in the Willamette Valley area" and one of the best lawyers in the state. Marsh was named Salem, Oregon's "First Citizen" for 1982. Marsh would appear to be against "judicial activism", as Justice reports that he has stated he strongly believes the judiciary should not intrude upon the legislature's proper sphere of authority.

U.S. Magistrate Edward Leavy, 54, has served as a U.S. Magistrate for the District of Oregon since 1976. Prior to that time, he was a Circuit Judge in Lane County, Oregon and previously served as a Deputy District Attorney in that county. Justice states that Leavy has substantial Federal judicial experience, as magistrates in Oregon are given the fullest possible range of responsibilities. Leavy is recommended by some as the "best trial judge" in the state and his judicial temperament is said to be "perfect." He is known both for his fairness and for his firmness on criminal law issues. Leavy is strongly recommended by the incumbent U.S. Attorney and the Reagan-Bush Chairman and would also be supported by Senator Packwood.

Although the Justice Department believes that Marsh and Leavy are almost equally qualified in both their experience and philosophical compatibility with the President, Justice has recommended Marsh for this appointment because of Senator Hatfield's strong, personal recommendation of him.

Issue: Should Marsh or Leavy be the selected candidate for this position?

II. U.S. DISTRICT COURT FOR THE DISTRICT OF VERMONT

Last year, we had initiated the background clearances on Arthur Crowley as the selected candidate for the current vacancy on the U.S. District Court for the District of Vermont. Crowley was one of four candidates recommended for this position by Senator Stafford and was Stafford's preferred candidate. The other candidates recommended by Stafford were Lawrence A. Wright, David A. Gibson and R. Allen Paul.

On December 22, 1983, Senator Stafford informed the Justice Department that, due to personal considerations, Crowley had asked that his name be withdrawn from consideration for this position. Stafford then recommended the Chief Justice of the Vermont State Supreme Court, Franklin Swift Billings, Jr., for appointment to this position.

Since this turn of events, former Vermont Governor Deane C. Davis (a long-time supporter of the President) has written and telephoned his support for Larry Wright as the best candidate for this position. Davis describes Wright as articulate, well-qualified and conservative. Davis considers Billings to be a liberal. (A copy of Davis' letter to the President on this matter is attached.)

Justice should advise us of their preliminary views on the comparative qualifications of Judge Billings and Wright.

Issue: Should we accede to Senator Stafford's recommendation of Billings or should we consider selecting Larry Wright as the candidate for this vacancy?