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CENTRAL SECURITY SERVICE
FORT GEORGE G MEADE MARYLAND 20755-6000

Serial: J-107-88
4 April 1988

MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: CLASSIFIED ANNEX TO DEPARTMENT OF DEFENSE PROCEDURES UNDER EXECUTIVE ORDER 12333 - ACTION MEMORANDUM

1. Attached is a proposed replacement for the Classified Annex to Department of Defense Regulation 5240.1, "Activities of DoD Intelligence Components that Affect U.S. Persons". The Regulation implements Executive Order 12333, "United States Intelligence Activities", which requires that certain collection techniques including electronic surveillance be conducted in accordance with procedures established by the head of the agency concerned and approved by the Attorney General. The attached replacement Classified Annex has been negotiated with and approved by the Department of Justice's Office of Intelligence Policy and Review, and it reflects numerous improvements in form and substance which ensure both efficiency of operations and proper regard for constitutional and other legal rights.

2. I recommend that you sign the attached Annex. I will then forward it to the Attorney General for his approval as required by Executive Order 12333.

WILLIAM E. ODOM
Lieutenant General, USA
Director, NSA/Chief, CSS

Encl:
a/s

PREPARED BY: [redacted]

Declassify Upon Removal of Enclosures and Physical Removal of Caveat Notation.

DEPT. OF JUSTICE
APR 29 2 00 PM '88

COORDINATION

General Counsel

ATSD(IO) 18 April 88

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CLASSIFIED ANNEX TO

DEPARTMENT OF DEFENSE

PROCEDURES UNDER EXECUTIVE ORDER 12333

Sec. 1: Applicability and Scope (U)

~~(S-CCO)~~ These procedures implement sections 2.3, 2.4, and 2.6(c) of Executive Order 12333 and supplement Procedure 5 of DoD Regulation 5240.1-R, previously approved by the Secretary of Defense and the Attorney General. They govern the conduct by the United States Signals Intelligence System of signals intelligence activities that involve the collection, retention and dissemination of communications originated or intended for receipt in the United States, and signals intelligence activities that are directed intentionally against the communications of a United States person who is outside the United States. These procedures also govern the collection, retention and dissemination of information concerning United States persons that is collected by the United States Signals Intelligence System including such activities undertaken by the [redacted] These procedures do not apply to signals intelligence activities that are not required under Executive Order 12333 to be conducted pursuant to procedures approved by the Attorney General. Further, these procedures do not apply to signals intelligence activities directed against the

radio communications [redacted] for the purpose of collecting foreign intelligence regarding international narcotics trafficking or in support of federal law enforcement efforts to interdict such trafficking. Such signals intelligence activities are subject to a separate classified annex approved earlier by the Attorney General (See Annex J to United States Signals Intelligence Directive 18). Except for matters expressly authorized herein, the limitations contained in Department of Defense Regulation 5240.1-R also apply to the United States Signals Intelligence System. Reference should be made to those procedures with respect to matters of applicability and scope, definitions, policy and operational procedures not covered herein.

Sec. 2: Definitions (U)

(U) The following additional definitions or supplements to definitions in DoD Regulation 5240.1-R apply solely to this Classified Annex:

~~(S-CCO)~~ Agent of a Foreign Power. For purposes of signals intelligence activities which are not regulated by the Foreign Intelligence Surveillance Act (FISA), the term "agent of a foreign power" means:

(a) a person who, for or on behalf of a foreign power, is engaged in clandestine intelligence activities, sabotage, or international terrorist activities, or activities in preparation for international terrorist activities, or who conspires with, or knowingly aids and abets such a person engaging in such activities;

(b) a person who is an officer or employee of a foreign power;

(c) a person unlawfully acting for, or pursuant to the direction of, a foreign power. The mere fact that a person's activities may benefit or further the aims of a foreign power is not enough to bring that person under this subsection, absent evidence that the person is taking direction from, or acting in knowing concert with, the foreign power;

(d) a person in contact with or acting in collaboration with an intelligence or security service of a foreign power for the purpose of providing access to information or material classified by the United States to which such person has or has had access; or

(e) a corporation or other entity that is owned or controlled directly or indirectly by a foreign power.

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(U) Communicant. The term "communicant" means a sender or intended recipient of a communication.

(U) Consent. For purposes of signals intelligence activities, an agreement by an organization with the National Security Agency to permit collection of information shall be deemed valid consent if given on behalf of such organization by an official or governing body determined by the General Counsel, National Security Agency, to have actual or apparent authority to make such an agreement.

~~(S-CCO)~~ Foreign Communication. The term "foreign communication" means a communication that involves a sender or an intended recipient who is outside the United States or that is entirely among foreign powers or between a foreign power and officials of a foreign power. [redacted]

[redacted]

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[redacted]

(U) Foreign Intelligence. The term "foreign intelligence" includes both positive foreign intelligence and counterintelligence.

~~(C)~~ Illicit Communication. The term "illicit communication" means a communication transmitted in violation of the Communications Act of 1934 and regulations thereunder or of international agreements which because of its explicit content, message characteristics, or method of transmission is reasonably believed to be a communication to or from an agent or agents of foreign powers, whether or not United States persons.

(U) Interception. The term "interception" means the acquisition by the United States Signals Intelligence System through electronic means of a nonpublic communication to which it is not an intended party, and the processing of the contents of that communication into an intelligence form but not including the display of signals on visual display devices intended to permit the examination of the technical characteristics of the signal without reference to the information content carried by the signal.

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[redacted]

[redacted]

~~(S)~~ Selection. The term "selection," as applied to manual and mechanical processing activities, means the intentional insertion of a [redacted] into a computer

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scan dictionary or manual scan guide for the purpose of identifying messages of interest and isolating them for further processing.

~~(C)~~ Selection Term. The term "selection term" means the composite of individual terms used to effect or defeat selection of particular communications for the purpose of interception. It comprises the entire term or series of terms so used, but not any segregable term contained therein. It applies to both mechanical and manual processing.

(U) Technical Data Base. The term "technical data base" means information retained for cryptanalytic or traffic analytic purposes.

(U) Transiting Communications. The term "transiting communications" includes all communications that neither originate nor terminate in the United States, but which transit the United States during transmission.

~~(C)~~ United States Person. For purposes of intentionally collecting the communications of a particular person, the term "United States person," in addition to the meaning in the Appendix to DoD Regulation 5240.1-R, includes:

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any alien known to be presently in the United States; any unincorporated association of such aliens or American citizens; the United States operations, office, branch, or representative of a corporation incorporated abroad; any corporation or corporate subsidiary incorporated in the United States; and any U.S. flag non-governmental aircraft or vessel: Provided, however, that the term "U.S. person" shall not include [redacted] a foreign power or powers as defined in Section 101(a)(1)-(3) of FISA.

Sec. 3: Policy (U)

(U) The Director, National Security Agency, is assigned responsibility for signals intelligence collection and processing activities and communications security activities. In order to assure that these activities are conducted in accordance with the provisions of Executive Order 12333, the Director, or his designee, will issue appropriate directives and instructions implementing these procedures and governing the conduct of the United States Signals Intelligence System and the activities of communications security entities.

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~~(C)~~ It is the policy of the United States Signals Intelligence System to collect, retain, and disseminate only foreign communications and military tactical communications. It is recognized, however, that the United States Signals Intelligence System may incidentally intercept non-foreign communications, including those of or concerning United States persons, in the course of authorized collection of foreign communications. The United States Signals Intelligence System makes every reasonable effort, through surveys and technical means, to reduce to the maximum extent possible the number of such incidental intercepts acquired in the conduct of its operations. Information derived from these incidentally intercepted non-foreign communications may be disseminated to the Federal Bureau of Investigation when the information is foreign intelligence or counterintelligence or indicates a threat to the physical safety of any person. Dissemination of such information is also governed by these procedures and applicable minimization procedures approved in accordance with FISA. Specific communications sent from or intended for receipt by United States persons are not intercepted deliberately by the United States Signals Intelligence System unless specific authorization for such interception has been obtained in accordance with these procedures.

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~~(S CCO)~~ The President has authorized, and the Attorney General hereby specifically approves, interception by the United States Signals Intelligence System of:

[redacted]

° Illicit Communications;

° United States and Allied Military exercise communications;

° Signals collected during the search of the signals environment for foreign communications that may be developed into sources of signals intelligence;

° Signals collected during the monitoring of foreign electronic surveillance activities directed at United States communications consistent with the Foreign Intelligence Surveillance Act of 1978; and

° Signals collected during the testing and training of personnel in the use of signals intelligence collection equipment in the United States consistent with the Foreign Intelligence Surveillance Act of 1978.

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Sec. 4: Procedures (U)

A. ~~(C)~~ Signals Intelligence: Communications of, or concerning, United States persons. The United States Signals Intelligence System may collect, process, retain and disseminate foreign communications that are also communications of, or concerning, United States persons. Communications of, or concerning, United States persons will be treated in the following manner.

1. Collection

(a) ~~(S-CCO)~~ Communications of or concerning a United States person may be intercepted intentionally or selected deliberately through use of a selection term or otherwise only:

(1) with the consent of such United States person. Where a United States person has consented, by completion of the appropriate Consent Agreement appended hereto, to the use of a selection term intended to intercept communications originated by or referencing that person, the National Security Agency may use such a selection term to select foreign communications; or

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(2) with specific prior court order pursuant to the Foreign Intelligence Surveillance Act of 1978 where applicable. All United States Signals Intelligence System requests for such court orders or approvals shall be forwarded by the Director, National Security Agency for certification by the Secretary of Defense or the Deputy Secretary of Defense (in case of the unavailability of both of these officials and in emergency situations, certification may be granted by another official authorized by executive order to certify such requests), and thence to the Attorney General; or

(3) with the specific prior approval of the Director, National Security Agency, in any case in which the United States person is reasonably believed to be held captive by a foreign power or by a group engaged in international terrorist activities. The Attorney General will be notified when the Director authorizes selection of communications concerning a United States person pursuant to this provision; or

(4) with specific prior approval by the Attorney General based on a finding by the Attorney General that there is probable cause to believe the United States person is an agent of a foreign power and that the purpose of the interception or selection is to collect significant foreign

intelligence. Such approvals shall be limited to a period of time not to exceed ninety days for individuals and one year for entities.

(b) ~~(S-CCO)~~ Communications of, or concerning [redacted] any corporation, corporate subsidiary, or other business entity in the United States that is openly acknowledged by a foreign government, or governments, to be directed and controlled by such foreign government, or governments, may be intercepted intentionally, or selected deliberately (through the use of a selection term or otherwise), upon certification in writing by the Director, NSA, to the Attorney General. Such certification shall take the form of the Certification Notice appended hereto. An information copy shall be forwarded to the Deputy Secretary of Defense. Collection may commence upon the Director, NSA's certification. In addition, the Director, NSA shall advise the Attorney General and the Deputy Secretary of Defense on an annual basis of all such collection.

(c) ~~(S)~~ For purposes of the application of Parts 1, 2 and 3 of Procedure 5 (and subsection 4.A.1(a) of this annex) to the activities of the United States Signals Intelligence System, any deliberate interception, selection or use of a

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selection term shall be deemed to constitute electronic surveillance; and, "significant foreign intelligence" shall mean not only those items of information that are in themselves significant, but also items that are reasonably believed, based on the experience of the United States Signals Intelligence System, when analyzed together with other items, to make a contribution to the discovery of "significant foreign intelligence."

(d) ~~(S-CCO)~~ Emergencies:

(1) The emergency provision in Section D of Part 2, Procedure 5, of DoD 5240.1-R, may be employed to authorize deliberate selection of communications of, or concerning, a United States person as defined in the Appendix to DoD Regulation 5240.1-R, when that person is outside the United States.

(2) If the United States Signals Intelligence System is intentionally collecting the communications of or concerning a non-resident alien abroad who enters the United States in circumstances that suggest that the alien is an agent of a foreign power, collection of the communications of that alien may continue for a period not to exceed seventy-two hours after it is learned that the alien is in the United States

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while the United States Signals Intelligence System seeks authority to continue the surveillance from the Attorney General pursuant to these procedures. In the case of [redacted] efforts will be made to determine [redacted] If [redacted] is not obtained within seventy-two hours, collection of the international communications of [redacted] must be terminated until [redacted] appropriate Attorney General approval is obtained, or [redacted] leaves the United States. Communications acquired after the target is known to be in the United States, and that are not solely of, or concerning, U.S. citizens or permanent resident aliens, may be disseminated for foreign intelligence purposes until [redacted] Attorney General approval is obtained. In those instances in which [redacted] Attorney General approval for continued surveillance is obtained, communications of, or concerning, [redacted] may be disseminated in accordance with subsection 4.A.4 of these procedures.

(3) If the United States Signals Intelligence System is intentionally collecting communications of, or concerning, a United States citizen or permanent resident alien abroad, it must terminate the surveillance promptly upon learning that person is in the United States. Electronic

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surveillance may be reinstituted only in accordance with FISA. In the event communications of, or concerning, the target continue to be collected before termination can be effected, processing and use of information derived from such communications shall be restricted to the greatest extent possible and special care shall be taken to ensure that such information is not disseminated for any purpose unless authorized in accordance with the provisions of FISA.

(f) ~~(S-CCO)~~ Provided the proposed monitoring is not otherwise regulated by Section 4.A.1(a)-(e), voice and facsimile

communications with one communicant in the United States may be targeted for intercept only with the prior approval of the Attorney General or the Director, National Security Agency, as set forth below, unless [redacted] The Director, National Security Agency, may approve the targeting of such communications if technical devices (e.g., [redacted] are employed that limit acquisition by the National Security Agency to communications where the target is a non-U.S. person located abroad or to specific forms of communications used by those targets, i.e., [redacted] In those cases in which it is not possible to use such technical devices, the Attorney General must approve the targeting. Approvals granted by the Director, NSA under this provision shall be available for review by the Attorney General.

[redacted]

(h) ~~(S-CCO)~~ Use of direction finding solely to determine the location of a transmitter does not constitute electronic surveillance or collection even if directed at transmitters believed to be used by United States persons. Unless collection of the communications is otherwise authorized

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pursuant to this annex, the contents of communications to which a United States person is a party monitored in the course of direction finding shall be used solely to identify the transmitter.

2. Retention (U)

~~(S-CCO)~~ Foreign communications of, or concerning, United States persons that are intercepted by the United States Signals Intelligence System may be retained in their original form or as transcribed only:

(a) if processed so as to eliminate any reference to United States persons;

(b) if necessary to the maintenance of technical data bases. Retention for this purpose is permitted for a period sufficient to allow a thorough exploitation and to permit access to data that are, or are reasonably believed likely to become, relevant to a current or future intelligence requirement. Sufficient duration may vary with the nature of the exploitation. In the context of a cryptanalytic effort, sufficient duration may consist of any period of time during which encrypted material is subject to, or of use in, cryptanalysis. In the case of international commercial communications that may contain

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the identity of United States persons and that are not enciphered or otherwise thought to contain secret meaning, sufficient duration is one year unless the Deputy Director for Operations, National Security Agency, determines in writing that retention for a longer period is required to respond to authorized foreign intelligence or counterintelligence requirements; or

(c) if dissemination of such communications without elimination of references to such United States persons would be permitted under subsection 4.A.4. below.

3. Processing (U)

(a) ~~(S-CCO)~~ Foreign communications of, or concerning, United States persons must be processed in accordance with the following limitations:

(1) When a selection term is intended to intercept a communication on the basis of encipherment or some other aspect of the content of the communication, rather than the identity of a communicant or the fact that the communication mentions a particular individual:

(a) No selection term may be used that is based on content and that is reasonably likely to result

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in the interception of communications to or from a United States person, or which has in the past resulted in the interception of a significant number of such communications, unless there is reasonable cause to believe that foreign intelligence or counter-intelligence will be obtained by use of such a selection term.

(b) All such selection terms shall be reviewed annually by the Deputy Director for Operations, National Security Agency, or his designee to determine whether there is reasonable cause to believe that foreign intelligence or counter-intelligence will be obtained by the use of these selection terms. The review of such selection terms shall include an examination of whether such selection terms have in the past resulted in the acquisition of foreign intelligence.

(c) Selection terms based on content that have resulted or that are reasonably likely to result in the interception of communications to or from a United States person shall be designed so as to defeat, to the extent practicable under the circumstances, the interception of such communications not containing foreign intelligence.

(2) Foreign communications collected by the United States Signals Intelligence System or other authorized entities may be forwarded to the National Security

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Agency as intercepted. This applies to forwarding to intermediate processing facilities, including those of authorized collaborating centers pursuant to written agreements, provided such forwarding does not result in the production by the United States Signals Intelligence System of information in violation of these procedures.

(b) ~~(S-CCO)~~ Except as provided in (b)(1), radio communications that pass over channels with a terminal within the United States must be processed by use of selection terms, unless those communications occur over channels used exclusively by a foreign power.

(1) Radio communications that pass over channels with a terminal in the United States may be processed without the use of selection terms only when necessary to determine whether a channel contains communications of foreign intelligence interest which the National Security Agency wishes to collect. Processing under this section may not exceed two hours without approval of the Deputy Director for Operations, National Security Agency, and shall in any event be limited to the minimum amount of time necessary to determine the nature of communications on the channel and the amount of such communications that include foreign intelligence. Once it is determined that the channel contains a sufficient amount of communi-

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cations of foreign intelligence interest to warrant collection and exploitation to produce foreign intelligence, additional processing of the channel must utilize selection terms.

4. Dissemination (U)

~~(C-CCO)~~ Dissemination of signals intelligence derived from foreign communications of, or concerning, United States persons is governed generally by Procedure 4 of DoD Regulation 5240.1-R. Dissemination of signals intelligence shall be limited to authorized signals intelligence consumers in accordance with requirements and tasking established pursuant to Executive Order 12333. Dissemination of information that is not pursuant to such requirements or tasking that constitutes foreign intelligence or counterintelligence or that is otherwise authorized under Procedure 4 shall be limited to those departments or agencies that have subject matter responsibility. Dissemination of the identity of a United States person is authorized if it meets one of the following criteria, each of which is also deemed to meet the standard of "necessary to understand or assess" the importance of foreign intelligence information (otherwise, the identity of the United States person must be replaced by a generic term, e.g., United States citizen or United States corporation):

(a) the United States person has consented to the use of communications of or concerning him or her and has executed the applicable consent form;

(b) the information is available publicly;

(c) the identity of the United States person is that of a senior official in the Executive Branch. When this exemption is applied, the Deputy Director for Operations, National Security Agency, will ensure that domestic political or personal information is not retained or disseminated;

(d) the communication or information indicates that the United States person may be an agent of a foreign power;

(e) the communication or information indicates that the United States person may be:

(1) a foreign power as defined in Section 101(a)(4) or (6) of FISA;

(2) residing outside the United States and holding an official position in the government or military forces of a foreign power such that information about his or her activities would constitute foreign intelligence;

(3) a corporation or other entity that is owned or controlled directly or indirectly by a foreign power; or

(4) acting in collaboration with an intelligence or security service of a foreign power and the United States person has, or has had, access to information or material classified by the United States;

(f) the communication or information indicates that the United States person may be the target of intelligence activities of a foreign power;

(g) the communication or information indicates that the United States person is engaged in the unauthorized disclosure of classified national security information;

(h) the communication or information indicates that the United States person may be engaging in international terrorist activities;

(i) the interception of the United States person's communication was authorized by a court order issued pursuant to Section 105 of FISA or by Attorney General approval

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issued pursuant to Section 4.A.1 of this annex and the communication may relate to the foreign intelligence or counterintelligence purpose of the surveillance;

(j) the communication or information indicates a possible threat to the safety of any person or organization, including those who are targets, victims, or hostages of international terrorist organizations;

(k) the communication or information indicates that the United States person may be engaged in international narcotics trafficking activities;

(l) the communication or information is evidence that a crime has been, is being, or is about to be committed, provided that dissemination is for law enforcement purposes; or

(m) the identity of the United States person is otherwise necessary to understand foreign intelligence or counterintelligence or assess its importance. Access to technical data bases will be restricted to signals intelligence collection and analytic personnel. Requests for access from other personnel or entities shall be referred to the Deputy Director for Operations, National Security Agency.

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Domestic communications in which all communicants are United States persons shall be disposed of upon recognition, provided that technical data concerning frequency and channel usage may be retained for collection avoidance purposes.

B. [redacted]

C. ~~(C)~~ Signals Intelligence: Illicit Communications. The United States Signals Intelligence System may collect, retain, process, and disseminate illicit communications without reference to the requirements concerning United States persons.

D. ~~(C)~~ Signals Intelligence: Search and Development. The United States Signals Intelligence System may conduct search and development activities with respect to signals throughout the radio spectrum under the following limitations:

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1. Collection. Signals may be collected only for the purpose of identifying those signals that:

(a) may contain information related to the production of foreign intelligence or counterintelligence;

(b) are enciphered or appear to contain secret meaning;

(c) are necessary to ensure efficient signals intelligence collection or to avoid the collection of unwanted signals; or

(d) reveal vulnerability of United States communications security.

2. (C) Retention and Processing. Communications originated or intended for receipt in the United States, or originated or intended for receipt by United States persons, shall be processed in accordance with Section 4.A.3., provided that information necessary for cataloging the constituent elements of the signal environment may be produced and retained if such information does not identify a United States person. Information revealing a United States communications security vulnerability may be retained.

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3. ~~(C)~~ Dissemination. Information necessary for cataloging the constituent elements of the signal environment may be disseminated to the extent such information does not identify United States persons, except that communications equipment nomenclature may be disseminated. Information that reveals a vulnerability of United States communications security may be disseminated to the appropriate communications security authorities.

E. [redacted]

[redacted]

F. (U) Assistance to the Federal Bureau of Investigation.

1. In accordance with the provisions of Section 2.6(c) of E.O. 12333, the National Security Agency may provide special-

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ized equipment and technical knowledge to the Federal Bureau of Investigation to assist the Bureau in the conduct of its lawful functions. When requesting such assistance, the Federal Bureau of Investigation shall certify to the General Counsel, National Security Agency, that such equipment or technical knowledge is necessary to the accomplishment of one or more of the Bureau's lawful functions...

2. The National Security Agency may also provide expert personnel to assist Bureau personnel in the operation or installation of specialized equipment when that equipment is to be employed to collect foreign intelligence or counterintelligence. When requesting the assistance of expert personnel, the Federal Bureau of Investigation shall certify to the General Counsel, National Security Agency, that such assistance is necessary to collect foreign intelligence or counterintelligence and that the approval of the Attorney General (and when necessary an order from a court of competent jurisdiction) has been obtained.

DEPUTY SECRETARY OF DEFENSE

26 APR 1988
DATE

ATTORNEY GENERAL

27 MAY 1988
DATE

~~HANDLE VIA COMINT CHANNELS ONLY~~

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EXECUTIVE ORDER 12333

CONSENT AGREEMENT

SIGNALS INTELLIGENCE COVERAGE

I, \\\\\\\\(full name)\\\\\\\\\, \\\\\\\(title)\\\\\\\\\, hereby consent to the National Security Agency undertaking to seek and disseminate references to me in foreign communications for the purpose of _____

_____.

This consent applies to administrative messages alerting elements of the United States Signals Intelligence System to this consent as well as to any signals intelligence reports which may relate to the purpose stated above.

Except as otherwise provided by Executive Order 12333 procedures, this consent covers only references to me in foreign communications and information derived therefrom which relates to the purpose stated above. This consent is effective for the period: _____.

Signals intelligence reports containing information derived from communications referencing me and related to the purpose stated above may only be disseminated to me and to [names of departments and agencies, e.g., DoD, CIA, etc.] except as otherwise permitted by procedures under Executive Order 12333.

[UNCLASSIFIED until completed.
Classify completed form based
(SIGNATURE) on information added, but not
(TITLE) lower than CONFIDENTIAL.]