Approved For Release 2006/10/14 : CIA-RDP82M00591R000500040004-0

OGC 76-1150
9 March 1976

MEMORANDUM FOR: NSSM-229 Members

SUBJECT : Issues and Problems with Executive Order 11652

Herewith a memorandum from me to the interagency NSSM-229 subgroup which derives from the meeting of that group on 23 February and, I believe, is self-explanatory. We are arranging a meeting as soon as possible of the Agency NSSM-229 group at which I will report on the 23 February meeting, including the attached paper.

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Associate General Counsel
Chief, General Law Division

Attachment

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CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

OGC 76-1148
9 March 1976

MEMORANDUM FOR: Mrs. Jeanne W. Davis, NSC Staff
Mr. Mark Grunewald, Department of Justice
Mr. Barry Roth, White House
Mr. Don Gessaman, Office of Management and Budget
Mr. Mark B. Feldman, Department of State
Mr. Jack Griffin, Energy Research and Development Administration
Mr. James E. O'Neill, National Archives and Records Service
Mr. Arthur F. Van Cook, Department of Defense

SUBJECT: Issues and problems with Executive Order 11652

In response to the action of the Davis group under NSSM-229 at its meeting of 23 February, we are forwarding herewith a memorandum listing problems and issues under Executive Order 11652. It was suggested at that meeting that the list forwarded by members of the group need not and indeed perhaps should not represent the coordinated formal positions of the agencies represented. The CIA paper is within that guideline. Our list represents the serious and thoughtful views of various CIA officials and components with background, experience and responsibilities in areas affected by Executive Order 11652. I have no doubt that not all of these items and comments would be agreed to by all responsible components of CIA, and I am sure that other issues and problems could be suggested and indeed we may forward an additional list at a later date. This is however our effort to suggest for Davis group consideration a number of problems and issues as seen by responsible CIA officials.

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Associate General Counsel

Attachment

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

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OGC 76-1149
9 March 1976

MEMORANDUM

SUBJECT: Issues and Problems in Executive Order 11652

1. As a preliminary, we agree with the consensus at the NSSM-229 meeting of 23 February that the objectives and purposes of E.O. 11652 are sound. Those are (a) to protect that information which, if disclosed, would damage national security, but (b) also to avoid protecting information for any other reason or for any period of time greater than that needed in order to avoid damage to national security.

2. We agree also that the Order is not working satisfactorily for various reasons, some of which may be beyond the control of the executive branch and the agencies. For example, several statutory requirements of the FOI Act, as applicable in the area of national security information (as well as other areas), realistically cannot be complied with. Other reasons are inherent in the nature and complexity of the subject matter and undoubtedly are not susceptible to ready or simple solution. Others are unnecessarily self-imposed, i.e., the Order creates administrative, managerial and other problems and burdens which are costly or otherwise undesirable.

3. As a specific item, we believe the Order does not adequately provide for the intelligence functions and needs of the Government. The potential for both duplicative and contradictory protection and controls, and therefore decontrols, stemming from the Executive Order, on the one hand, and the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods information, on the other, is an example. The "mosaic" nature of intelligence information is another. This goes to the matter of definitions and concepts. Quite possibly information in a given document or information indicating that a document is in CIA or intelligence channels alone would not damage national security, but when pieced together with other information would be highly informative in ways which would damage national security. Still another, perhaps the most important, is that the authority and ability of the intelligence agencies to protect information, in particular, the identity of sources, as perceived by foreign intelligence sources and by sources (and potential sources), both foreign and domestic.

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4. It is recognized also that legislation in the area of national security information could be enacted. Such legislation of course could create additional or different administrative problems. Alternatively, legislation might provide so little or such inadequate protection that it would be necessary to continue a classification system by Executive order, based on the constitutional powers of the President, which would be additional to, and to some degree duplicative of, the statutory system.

5. Some specific items:

a. Every piece of paper created by the departments involved requires an individual classification decision. Thus numerous decisions are made every day, undoubtedly many are inconsistent with others, are not known to other persons and are modified, supported or abandoned without reference to other decisions.

b. The Order requires that classification decisions (including exemption decisions) be made only by higher level people. Given the importance and volume of the work of high level people, they simply cannot, on an informed basis, make these decisions. The result is a fairly apparent pattern of unavoidable non-compliance (i.e., those who decide simply accept whatever is recommended or put before them, and many documents originating with such people are not in compliance). The integrity of the classification system therefore is highly suspect.

c. Related to the foregoing, undue significance is given to the matter of the number of employees who are authorized to classify. With millions of pieces of paper being created throughout the Government and at installations around the world which require a classification decision, the few thousand people authorized to classify obviously cannot and do not make all the decisions which in fact are made. The result is that a system of de facto derivative authority is used, a practice which the Order seeks to prevent. Again this is a forced pattern of non-compliance.

d. ICRC is charged with duties it cannot perform, given the size of the staff and the volume of non-ICRC duties of its

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members. Realistically, it is not possible to allocate sufficient resources (money and people) to provide the necessary expertise and support services. Further conceptually a Committee of departmental employees cannot monitor and regulate the policies and practices of the heads of their own departments.

e. The data index system has almost no value for the purposes of the Executive Order and in any event far less value than the millions of dollars required to establish and operate them.

f. Is it defensible to put one in jeopardy because the jeopardy is not immediate? Is jeopardy a matter of jeopardy to life, or to economic well-being or career or reputation? Whether disclosure would place in "immediate jeopardy" in almost all cases can only be a guess, particularly if the decision is made in Washington and without inquiry to field personnel. And inquiries are expensive and time-consuming and create still more classified paper.

g. Contrary to section 6 of the Order, the implementing directive required by that section was issued not "by the President acting through the National Security Council" but by the Assistant to the President for National Security Affairs. Moreover, the directive is far broader than section 6 or indeed of Executive Order 11652.

h. The Order and directive require such specific markings and processing of documents and other administrative details that non-compliance effectively cannot be avoided.

i. Information and reports of little or no value are required.

j. The protection afforded "classified information furnished by a foreign government" by sections 4(c) and 5(B)(1) may be inadequate as to information furnished by a foreign intelligence service or by a representative of a foreign government or a foreign intelligence service.

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Some furnished information may not have been classified by the source or the foreign government. A court might hold that a representative of the Government is not the Government.

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Associate General Counsel

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ROUTING AND RECORD SHEET

SUBJECT: (Optional)
Issues and Problems with Executive Order 11652

FROM: [redacted]
Associate General Counsel
7D-07 Hqs.

EXTENSION: [redacted]

NO.

DATE: 9 March 1976

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TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
[redacted]				
6. [redacted]				

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