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SECURITY CLASSIFICATION POLICY AND EXECUTIVE ORDER 12356

TWENTY-NINTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

AUGUST 12, 1982.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., August 12, 1982.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-ninth report to the 97th Congress. The committee's report is based on a study made by its Government Information and Individual Rights Subcommittee.

JACK BROOKS,
Chairman.

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97TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 97-731

SECURITY CLASSIFICATION POLICY AND EXECUTIVE ORDER 12356

AUGUST 12, 1982.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

TWENTY-NINTH REPORT

BASED ON A STUDY BY THE GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE

On August 10, 1982, the Committee on Government Operations approved and adopted a report entitled "Security Classification Policy and Executive Order 12356." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

For over 25 years, the Committee on Government Operations has held hearings, issued reports, and conducted general oversight on information policies and practices of federal departments and agencies.[1] Much of this work began with the establishment of the Special Subcommittee on Government Information during the 84th Congress. The Subcommittee was asked to "ascertain the trend in the availability

[1] See, e.g., Committee on Government Operations, "Availability of Information from Federal Departments and Agencies," H.R. Rep. No. 2947, 84th Cong., 2d Sess. (1956); Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (Scientific Information and National Defense)," H.R. Rep. No. 1619, 85th Cong., 2d Sess. (1958); Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (Department of Defense)," H.R. Rep. No. 1884, 85th Cong., 2d Sess. (1958); Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (Progress of Study, February 1957–July 1958)"; H.R. Rep. No. 2578, 85th Cong., 2d Sess. (1958); Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (Progress of Study, August 1958–July 1959)," H.R. Rep. No. 1137, 86th Cong., 1st Sess. (1959); Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (The First Five Years and Progress of Study, August 1959–July 1960)," H.R. Rep. No. 2084, 86th Cong., 2d Sess. (1960); Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (Progress of Study, July–December 1960)," H.R. Rep. No. 818, 87th Cong., 1st Sess. (1961); Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (Progress of Study, September 1961–December 1962)," H.R. Rep. No. 918, 88th Cong., 1st Sess. (1963).

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of government information and [to] scrutinize the information practices of executive agencies and officials in light of their propriety, fitness and legality." [2] One of the products of the Committee's efforts was the Freedom of Information Act.[3]

The classification of information by federal agencies in the name of national security has been a regular subject of review by the Government Operations Committee. Many Committee reports discuss aspects of classification policy and practice, and there are two earlier Committee reports that were devoted exclusively to security classification issues. In 1962, the Committee issued a report [4] on the status of Executive Order 10501,[5] the Executive Order on Security Classification that was issued in 1953 by President Eisenhower and updated at various times during the Kennedy Administration.

A second security classification report [6] was issued in 1973, approximately one year after President Nixon issued Executive Order 11652.[7] The report examined the interconnection between the Executive Order on Security Classification and the first exemption of the Freedom of Information Act. The report also reviewed the Nixon security classification order as well as other aspects of classification policy.

In 1977, the Subcommittee on Government Information and Individual Rights held hearings on the security classification exemption to the Freedom of Information Act while the Carter Administration was preparing Executive Order 12065.[8] When the Carter Administration circulated a draft order for comment, the Chairman of the Subcommittee submitted comments.[9]

A revised Executive Order on Security Classification was issued by President Reagan in 1982, and this report reviews the procedures under which that order was adopted as well as the changes made by the Reagan order. Hearings on the Reagan order were held on March 10, 1982, and May 5, 1982.[10]

Throughout all of the oversight on information policy issues conducted by the Government Operations Committee, the need for the protection of some government information from public disclosure has never been questioned. The Committee has only sought to keep government secrecy to the minimum necessary for the operation of a democratic government in the complex world. This report has been prepared with this goal in mind.

While some of the Committee's earlier work on security classification issues has been superseded by improvements or changes in the security classification process, many of the Committee's earlier find-

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[2] Letter from Rep. William L. Dawson, Chairman, House Committee on Government Operations reprinted in Committee on Government Operations, "Replies From Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information," 84th Cong., 1st Sess., p. iii (1955) (Committee Print).

[3] 5 U.S.C. § 552 (1976).

[4] Committee on Government Operations, "Safeguarding Official Information in the Interests of the Defense of the United States (The Status of Executive Order 10501)," H.R. Rep. No. 2456, 87th Cong., 2d Sess. (1962).

[5] See text accompanying notes 37–44.

[6] Committee on Government Operations, "Executive Classification of Information—Security Classification Problems Involving Exemption (b)(1) of the Freedom of Information Act (5 U.S.C. 552)," H.R. Rep. No. 93–221, 93d Cong., 1st Sess. (1973) [hereinafter cited as "1973 Government Operations Security Classification Report"].

[7] See text accompanying notes 45–53.

[8] "Security Classification Exemption to the Freedom of Information Act," Hearing before a Subcommittee of the House Committee on Government Operations, 95th Cong., 1st Sess. (1977).

[9] Id. at appendix 4.

[10] Executive Order on Security Classification," Hearings before a Subcommittee of the House Committee on Government Operations, 97th Cong., 2d Sess. (1982) [hereinafter cited as "Hearings"].

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ings, conclusions, and recommendations are still valid today. This report does not replow old ground. Instead, it focuses on the new Executive Order on Security Classification and the issues raised by its adoption.

The major findings of the report center on the failure of the Reagan Administration to fully inform the Congress and the public about the proposals to change security classification rules or to solicit advice at a meaningful time during the revision process. In addition, the report concludes that the Reagan Administration failed to identify clearly the problems with security classification rules that the new order was intended to solve. The Administration also failed to explain in a satisfactory manner the purpose of the changes that were made. Finally, the report finds that overclassification of information continues to be a serious problem and that the new Executive Order offers nothing that will address the overclassification problem.

The report recommends more openness when security classification rules are adopted or changed by the executive branch. This includes full notice to the Congress and the public, written findings in support of proposed changes, and a timely opportunity for public and congressional comment on proposed rules. The report also recommends that changes in security classification rules be made only when concrete problems with the protection of sensitive information have been identified.

Finally, to deal with the problem of overclassification, the report recommends that the National Security Council, the Information Security Oversight Office, and the Office of Management and Budget work together to develop and apply methods of limiting abuse of classification authority.

The Executive Order on Security Classification sets the basic rules for the classification of information by Government agencies. The order is the central document establishing security classification policy. This is why it has been the subject of review by the Government Operations Committee for so many years.

However, Government classifiers are influenced by other things besides the Executive Order. The report of the Information Security Oversight Office [11] for the years 1980–81 notes that agency classification activity was influenced by the change in government in Iran, the Iranian hostage situation, events in Afghanistan, the Middle East, and other parts of the world. World events can have a direct impact on classification decisions.[12] The overall attitude of government policy makers toward secrecy can also have an impact as can oversight activities of both the executive and legislative branches.

Because of all of these different influences on classification activities, it is difficult to measure directly the effect of a new Executive Order. In addition, classifiers appear to have significantly increased discretion in making classification decisions as a result of the vague language in the new order.

At hearings, Administration spokesmen offered narrow interpretations for much of the broad language contained in the order. Although serious questions about the credibility of these interpretations remain,

[11] The status of the Information Security Oversight Office is discussed at text accompanying notes 201–202.

[12] Information Security Oversight Office, "Annual Report to the President 1980–81" at 12.

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it is nevertheless possible that the new classification rules will be applied narrowly and judiciously. It remains to be seen whether Government classifiers will take their cue from the seemingly broad new authority in the order or from the narrow interpretations offered to this Committee by the Administration.

Given the past abuses of classification authority and the consistent pattern of overclassification by the executive branch, the Committee is not optimistic that classifiers will apply the new classification authority with restraint.

II. HISTORICAL BACKGROUND [13]

A. Early Secrecy Requirements

The practice of assigning a secret status to sensitive government records can be traced back to the early days of the United States.[14] Throughout this country's history, records have occasionally been designated confidential either with or without direct statutory authorization for such an action. However, formal military secrecy procedures or regulations only appeared after the Civil War. The earliest War Department security-secrecy orders are dated 1869.[15]

The initial Army General Order of 1869 on security-secrecy pertained to the physical protection of forts preventing them from being photographed or their layout being depicted without authorization. This limited objective passed through a series of metamorphoses and, shortly after the United States entered World War I, had evolved into a fully developed information security classification system. By then, the Navy also had a directive on this matter. Adherence to these regulations was reinforced not only by armed forces disciplinary penalties, but also by criminal law.

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[13] See generally H. Relyea, "The Evolution of Government Information Security Classification Policy: A Brief Overview (1775–1973)," reprinted in "Security Classification Reform," Hearings on H.R. 12004 before a Subcommittee of the House Committee on Government Operations, 93d Cong., 2d Sess. 505–97 (1974); 1973 Government Operations Security Classification Report, supra note 6, at 3–11.

The Committee wishes to acknowledge the assistance of Dr. Harold Relyea, Congressional Research Service Specialist in American National Government, in the preparation of this part of this report.

[14] Secrecy issues can be traced back at least as far as the Continental Congress. A recent Freedom of Information Act case discussed some early concerns: "Our nation's earliest intelligence activities were carried out by the Committee of Secret Correspondence of the Continental Congress. The Continental Congress created the Committee on 29 November 1775 to 'correspond with our friends in Great Britain, Ireland and other parts of the world,' and Congress resolved to provide for expenses incurred by the Committee in sending 'agents' for this purpose. In carrying out these duties, the Committee placed great importance upon secrecy. In reference to information from its agent Arthur Lee, describing French plans to send arms and ammunition to the Continental Army, the Committee stated: 'Considering the nature and importance of it, we agree in opinion that it is our indispensible duty to keep it a secret, even from Congress. . . . We find by fatal experience, the Congress consists of too many members to keep secrets.'

"The Committee exercised broad discretionary power to conduct intelligence activities independent of the Continental Congress and to safeguard the secrecy of matters pertaining to its agents, though Congress asserted greater direct control following the Declaration of Independence. It is especially remarkable that the Committee was in a position to insist upon secrecy even against Congress, which functioned both as the legislative and the executive power at this time and exercised control over foreign affairs.

"The importance of total secrecy in intelligence matters was appreciated in this era at the highest levels. In a letter of 26 July 1777 issuing orders for an intelligence mission, General Washington wrote to Colonel Elias Dayton: 'The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is that you keep the whole matter as secret as possible. For upon secrecy, success depends in most enterprises of the kind, and for want of it, they are generally defeated . . .'" *Halperin* v. *Central Intelligence Agency*, 629 F.2d 144, 157 (D.C. Cir. 1980) (footnotes omitted).

[15] Relyea, supra, note 13, at 11.

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The Espionage Act of 1917 [16] and a predecessor statute of 1911 [17] prohibiting the unauthorized disclosure of national defense secrets were directed at persons engaging in spying. Neither law specifically sanctioned the information protection practices of the War Department or the armed forces, and the orders and directives of these entities were not promulgated pursuant to these statutes.[18] The markings and controls prescribed for the use of the military were designed for utilization in conjunction with internal communications and documents. However, Navy security regulations of 1916 stated: "Officers resigning are warned of the provision of the national defense secrets act." [19] This suggested that former naval personnel could not publicly reveal information that had been protected under Navy regulations without subjecting themselves to possible prosecution. Such a disclosure might have been pursued under the 1911 secrets law noted above, not the Navy's directives on the matter. This situation illustrates how armed forces regulations pertaining to the protection of information, although not issued in accordance with a "secrets" statute, enjoyed the color of statutory law for their enforcement.

Shortly after the American entry into World War I, Congress provided authority for the Commissioner of Patents [20] or the President [21] to keep patent applications secret if publication of the applications might "be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war." No classification marking arrangement was devised for this action. Quite the contrary, the means provided for maintaining this secrecy was to withhold the grant of a patent until the termination of the war. This appears to be the first direct statutory grant of authority to the Chief Executive to declare a type of information secret.[22]

Armed forces regulations governing the creation and protection of secrets were continued and expanded after World War I. By 1936, Army instructions on the application of secrecy markings seemed to embrace foreign policy material and what might be called "political" data. A "Secret" designation was to be applied to information "of such a nature that its disclosure might endanger the national security, or cause serious injury to the interests or prestige of the Nation, an individual, or any government activity, or be of great advantage to a foreign nation." Similarly, information would be "Confidential" if "of such a nature that its disclosure, although not endangering the national security, might be prejudicial to the interests or prestige of the Nation, an individual, or any government activity, or be of advantage to a foreign nation." The term "Restricted" might be used in instances where information "is for official use only or of such a

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[16] 40 Stat. 217 (1917) (codified at 18 U.S.C. §§ 793–4 (1976)).
[17] 36 Stat. 1084 (1911).
[18] See H. Edgar and B. Schmidt, "The Espionage Statutes and Publication of Defense Information," 73 Columbia Law Review 929–1087 (1973).
[19] Changes in Navy Regulations and Naval Instructions No. 7 (Sept. 15, 1916).
[20] 40 Stat. 394 (1917).
[21] 40 Stat. 422 (1917).
[22] Current patent secrecy provisions may be found at 35 U.S.C. §§ 181–188 (1976) and 50 U.S.C. App. § 10(i) (1976). For a complete discussion of invention secrecy, see House Committee on Government Operations, "The Government's Classification of Private Ideas," H.R. Rep. No. 96–1540, 96th Cong., 2d Sess. 1–62 (1980).

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nature that its disclosure should be limited for reasons of administrative privacy, or should be denied the general public." [23]

The outstanding characteristic of these provisions is the broad discretionary authority they appeared to confer with regard to the scope of application. Initial security-secrecy regulations were designed only to safeguard fort and coastal defense facility information. The extended applicability in 1936 to almost any area of governmental activity was without any stated reason or authority.

Such regulations were promulgated without direct statutory authorization, other than departmental "housekeeping" laws.[24] However, armed forces directives governing information protection during World War I and into the late 1930's often made general reference to criminal law to give them force. For example, Army regulations of 1937 indicated that "to reveal secret, confidential, or restricted matter pertaining to the national defense is a violation of the Espionage Act."

By the time of the arrival of the New Deal, information restriction markings and controls were commonplace in the War and Navy Departments and spilled over into other government entities whenever protected records were shared. Restrictions seemingly could be applied to any type of defense or nondefense information and appeared to carry sanctions which left few with any desire to question their appropriateness or application. "National security," a policy term open to broad definition, was a central concept of the controls.

B. Presidential Actions

The President issued the first Executive Order prescribing security classification policy and procedures in March, 1940, relying on a 1938 statute concerning the security of armed forces installations and equipment and "information relative thereto." [25] The directive, Executive Order 8381 [26] authorized the use of control markings on "all official military or naval books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts, or specifications which are now marked under the authority of the Secretary of War or the Secretary of the Navy as 'secret' 'confidential,' or 'restricted,' and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President." The order made no reference to penalties or the Espionage Act, paralleled armed forces regulations for marking and handling secret records, gave civilian employees of the government authority to classify information, and was confined largely to traditional national defense matters.

The legislative history of the 1938 statute, upon which the President relied to issue his directive, provides no indication that Congress anticipated or expected such a security classification arrangement would be created. Indeed, the Executive Order may have been a substitute for statutory authority which Congress could not be expected to grant.

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[23] See 1973 Government Operations Security Classification Report, supra note 6, at 5–6.

[24] When the Revised Statutes were compiled in 1874, numerous separate statutory housekeeping laws were combined in a single provision at section 161 which was continued in editions of the United States Code without alteration until 1958. A 1958 amendment provided that the housekeeping law did not authorize the withholding of information from the public. (72 Stat. 547 (1958)). The housekeeping law is now located at 5 U.S.C. § 301 (1976).

[25] See 52 Stat. 3 (1938).

[26] 5 Fed. Reg. 1145 et seq. (Mar. 26, 1940).

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The case of the War Security Act is illustrative. Prepared at the direction of Attorney General Francis Biddle, the proposal would have given the executive branch broad powers for maintaining internal security, including information matters, within the United States.[27] The measure generated considerable public controversy and was sharply debated in the House during a time when the outcome of the war was uncertain. However, it was not considered by the Senate.[28] Nevertheless, a few years later, Congress did authorize secrecy controls for atomic energy information [29] and intelligence sources and methods.[30]

During World War II, a patchwork of security-secrecy authorities were relied upon to protect sensitive information. These included the President's order, armed forces directives, special agency regulations, and other ad hoc arrangements. In September 1942, the Office of War Information, under authority provided by Executive Order 9103 concerning the control of Federal statistical information and Executive Order 9182 creating the agency, issued a government-wide regulation on creating and administering classified materials.[31]

Elsewhere, personnel who would have access to any official secrets of the Manhattan Project, which was under the supervision of the Army Corps of Engineers, were subject to a background investigation to establish their loyalty, integrity, and discretion. Approved individuals were informed of the penalties for disclosing classified information improperly and "then required to read and sign either the Espionage Act or a special secrecy agreement." [32]

C. Executive Order 10104

Relying on the 1938 statute concerning the security of armed forces installations and equipment, President Truman issued a new security classification directive, superseding Executive Order 8381, in February of 1950.[33] The order was entitled "Definitions of Vital Military and Naval Installations and Equipment." The only change in policy made by Executive Order 10104 was the addition of a fourth designation, "Top Secret," which brought American information security categories into alignment with those used by our allies.

As with most earlier directives, regulations, and orders dealing with use of classification markings, Executive Order 10104 continued to be directed at the protection of military secrets. Only rarely had classification authority extended to nonmilitary agencies or to information related to foreign policy or diplomatic relations. One exception was the protection provided in the Espionage Act for cryptographic systems, communications intelligence information, and similar matters.[34]

At the time Executive Order 10104 was issued, plans were under way within the executive branch to overhaul the classification program completely. The National Security Council had begun pursuing the

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[27] See 88 Cong. Rec. 8311 (Oct. 17, 1942) ; 89 id. 2393–94 (Mar. 23, 1943).

[28] See 89 id. 2390–2408 (Mar. 23, 1943) ; 2780–99 (Mar. 31, 1943) ; 2877, 2878–95 (Apr. 2. 1943). For press comments, see id. A1312, A1688 (Appendix).

[29] 60 Stat. 755, 766 (1946) (codified as amended at 42 U.S.C. §§ 2014(y), 2162 (1976)). For a discussion of the history of atomic energy restricted data, see House Committee on Government Operations, "The Government's Classification of Private Ideas," supra note 22, at 120–72.

[30] 63 Stat. 208, 211 (1949) (codified at 50 U.S.C. § 403g (1976)).

[31] 1973 Government Operations Security Classification Report, supra note 6, at 7–8.

[32] A. Brown and C. MacDonald, "The Secret History of the Atomic Bomb" 201 (1977).

[33] 15 Fed. Reg. 597 et seq. (Feb. 1, 1950).

[34] See 1973 Government Operations Security Classification Report, supra note 6, at 8–9. Cf. 50 U.S.C. § 403g (1976) (protecting intelligence sources and methods) which was enacted in 1949.

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matter of a new policy in 1948. Actual drafting of a new directive establishing minimum standards for the handling and processing of classified records within the government was done by the Interdepartmental Committee on Internal Security.[35] This effort resulted in a new Executive Order.

D. Executive Order 10290

In issuing Executive Order 10290 in September, 1951, President Truman indicated he was relying upon "the authority vested in me by the Constitution and statutes, and as President of the United States." [36] The order was entitled "Prescribing Regulations Establishing Minimum Standards for the Classification, Transmission, and Handling, by Departments and Agencies of the Executive Branch, of Official Information Which Requires Safeguarding in the Interest of the Security of the United States."

Four levels of classification were prescribed, but their use was no longer confined to traditional national defense matters. This policy shift was evident in two ways. First, the classification of information in the interest of "national security" was now sanctioned under a presidential order. Second, classification authority was extended to all agencies and to all information "the safeguarding of which is necessary in the interest of national security."

The order also resorted to citing portions of the Espionage Act to reinforce its requirements. Classified materials furnished to authorized persons "in or out of Federal service, other than the Executive Branch," were to bear a warning statement concerning their improper disclosure and giving reference to two sections of espionage law.

E. Executive Order 10501

Criticism of Executive Order 10290 prompted President Eisenhower to seek a review of the Truman order. The Attorney General conducted the review and recommended that a new order be issued. Executive Order 10501 was signed in November, 1953.[37] The new order was entitled "Safeguarding Official Information in the Interests of the Defense of the United States." [38]

According to a Justice Department spokesman, the order differed from its predecessor in the following major respects:

> (1) It withdrew authority to classify information from 28 agencies of the Government; (2) in 17 other agencies it limited authority to classify to the head of the agency, without power to delegate; (3) it sharply limited the authority to classify only if required in the interest of the national defense of the United States; (4) it completely eliminated one of the most controversial categories of classified information, that is, "restricted"; (5) it explicitly defined, which had not been done before, the three remaining categories of classified information; "Top Secret," "Secret," and "Confidential," in order to prevent indiscriminate use of the power to classify when

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[35] "Report of the Commission on Government Security" 155 (1957).
[36] 16 Fed. Reg. 9795 et seq. (Sept. 27, 1951).
[37] 18 Fed. Reg. 7049 et seq. (Nov. 9, 1953).
[38] See generally House Committee on Government Operations, "Safeguarding Official Information in the Interests of the Defense of the United States (The Status of Executive Order 10501)," H.R. Rep. No. 2456, 87th Cong., 2d Sess. (1962).

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> specific interests of the national defense did not so require; (6) it included provisions for review of classified material, for the purpose of removing the classification or downgrading the classification when the interests of national defense no longer required the original classification; and (7) it made more definite and certain the procedures for handling classified information, so that employees would be more alert to the dangers of unauthorized disclosure.[39]

The new order significantly improved the classification process by limiting classification authority and by defining more precisely the limits and purposes of classification. The elimination of the "restricted" category, which had applied to training manuals and other documents of lesser sensitivity, resulted in the removal of much information from the classification system.[40]

Nevertheless, Executive Order 10501 continued some past practices. A 1973 report of the House Government Operations Committee observed that President Eisenhower, like his predecessor, apparently promulgated the directive "relying primarily on implied constitutional powers of his office and statutes claimed to afford a basis on which to justify the issuance of the Executive order." [41]

In the ten years subsequent to the order's adoption, amendments were made by Presidents Eisenhower and Kennedy that further narrowed classification authority and established procedures for declassifying and downgrading documents.[42] However, no sanctions were provided for overclassification, and congressional recommendations regarding this omission were ignored.[43] Also, although a prestigious national study commission indicated the tripartite classification categories were overly broad and urged, for reasons of efficiency and economy, that the "confidential" level of classification be abolished, this proposal was rejected.[44]

F. Executive Order 11652

In 1971, President Nixon directed that a review be made of the adequacy of classification and declassification arrangements as well as all aspects of information security within the executive branch. An interagency committee was formed to pursue this task. The panel developed a draft revision of Executive Order 10501 during the summer and autumn. This proposal was then circulated to selected departments and agencies for comments during January of 1972. After adjustments were made, it was promulgated in March as Executive Order 11652.[45]

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[39] "Commission on Government Security," Hearings before the Subcommittee on Reorganization of the Senate Committee on Government Operations, 84th Cong., 1st Sess. 30 (1955) (testimony of Assistant Attorney General William F. Tompkins).

[40] 1973 Government Operations Security Classification Report, supra note 6, at 11.

[41] Id.

[42] See House Committee on Government Operations, "Safeguarding Official Information in the Interests of the Defense of the United States (The Status of Executive Order 10501)," supra note 38, at 11–13.

[43] Id. at 25, 26.

[44] See "Report of the Commission on Government Security" 174–76 (1957).

[45] 37 Fed. Reg. 5200 (Mar. 10, 1972). For a detailed section-by-section analysis of E.O. 11652, see "U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b) (1) of the Freedom of Information Act (Part 7)," Hearings before a Subcommittee of the House Committee on Government Operations, 92nd Cong., 2d Sess. 2849–2883 (1972).

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The most significant features of the Nixon order, as characterized by the President at the time of its issuance, were:

> The rules for classifying documents are more restrictive.
>
> The number of departments and people who can originally classify information has been substantially reduced.
>
> Timetables ranging from 6 to 10 years have been set for the automatic declassification of documents. Exceptions will be allowed only for such information as falls within four specifically defined categories.
>
> Any document exempted from automatic declassification will be subject to mandatory review after a 10-year period. Thus, for the first time, a private citizen is given a clear right to have national security information reviewed on the basis of specified criteria to determine if continued classification is warranted so long as the document can be adequately identified and obtained by the Government with a reasonable amount of effort.
>
> If information is still classified 30 years after origination, it will then be automatically declassified unless the head of the originating department determines in writing that its continued protection is still necessary and he sets a time for declassification.
>
> Sanctions may be imposed upon those who abuse the system.
>
> And a continuing monitoring process will be set up under the National Security Council and an interagency classification review committee, whose chairman is to be appointed by the President.[46]

The new order represented an improvement over the previous classification rules. Classification authority was further limited,[47] and classification categories were more specifically defined.[48] Other changes slightly speeded up the process for declassifying and downgrading documents.[49] In addition, the order established the Interagency Classification Review Committee as an oversight body.[50]

However, there were also a number of serious problems with the Nixon order. A critical evaluation of the new order by the House Committee on Government Operations in May, 1973, noted major defects, including:

> (a) the change of basic terminology of the order's application—from "national defense or foreign policy" to "national defense or foreign *relations*", referred to in the new order as "national security";
>
> (b) the lack of sufficiently strong penalties for overclassification;
>
> (c) the lack of assurance to guarantee Congress the full authority to properly exercise its oversight and investigative responsibilities regarding the operation of the new Executive Order;

[46] Statement of President Nixon (Mar. 8, 1972), reprinted in 1973 Government Operations Security Classification Report, supra note 6, at 56.
[47] E.O. 11652 at § 2.
[48] Id. at § 1.
[49] Id. at § 5.
[50] Id. at § 7(A).

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(d) the legitimation of dozens of access or control markings that apply to classified or unclassified data; and

(e) loopholes in the mandatory review provisions affecting the declassification of exempt classified information.[51]

The Government Operations Committee concluded its assessment of security classification policy and practice by recommending strongly "that legislation providing for a statutory security classification system . . . be considered and enacted by the Congress." [52] Subsequently, reports from two other congressional panels addressed the need for legislative action on classification standards.[53]

G. Executive Order 12065

President Carter established a special task force to conduct a comprehensive review of the information security program on June 1, 1977.[54] The memorandum which set up this group directed that a new Executive Order be developed which would simplify the system and provide improved protection for essential national security information.

The Carter Administration Executive Order on Security Classification (Executive Order 12065) was issued on June 28, 1978, and became effective on December 1, 1978.[55] It replaced Executive Order 11652. The Carter order continued the pattern of the previous security classification orders in further restricting classification authority.

The Carter order was the first to list specific categories of information subject to classification. Previous orders had only established standards for classification in terms of the damage that would result from disclosure. The Nixon order had included some examples of the types of information that would be subject to classification, but the examples were not comprehensive. The Carter order required that information fall in one of seven categories in order to be considered for classification.

The classification categories covered information concerning: (a) military plans, weapons, or operations; (b) foreign government information; (c) intelligence activities, sources or methods; (d) foreign relations or foreign activities of the United States; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; or (g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President, or by an agency head.[56]

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[51] 1973 Government Operations Security Classification Report, supra note 6, at 102.
[52] Id. at 104.
[53] House Committee on Standards of Official Conduct, "Report on Investigation Pursuant to H. Res. 1042 Concerning Unauthorized Publication of the Report of the Select Committee on Intelligence,' H.R. Rep. No. 94–1754, 94th Cong., 2d Sess. 43–4 (1976) (recommending that the House leadership initiate research and study leading to establishment of a classification and declassification system for congressional use); Staff of the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, "Agency Implementation of the 1974 Amendments to the Freedom of Information Act," 95th Cong., 2d Sess. 36 (Committee Print) (1980) (recommending that classification standards be legislated).
[54] Letter from Richard M. Neustadt, reprinted in Hearings, appendix 5.
[55] 43 Fed. Reg. 28949 (July 2, 1978), reprinted in 'Security Classification Exemption to the Freedom of Information Act," Hearings before a Subcommittee of the House Committee on Government Operations, 95th Cong., 1st Sess. 104–117 (1977) [hereinafter cited as "1977 Security Classification Hearings"].
[56] E.O. 12065 at § 1–301.

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While the inclusion of classification categories represented a step toward the goal of specificity, the categories in the Carter order—particularly the last one—have been criticized as being too broad.[57]

In addition to providing new classification categories, the Carter order required that information falling within one of the categories could be classified only if its release could reasonably be expected to cause identifiable damage to the national security. The previous order did not require that the damage be identifiable.[58]

The Carter order was also the first to require explicitly a balancing of the public's interest in access to government information against the need to protect certain information for reasons of national security. If, in some cases, the public interest in disclosure outweighed the need to protect information, then the information was to be declassified.[59] This balancing was to take place, however, only when a request for declassification was made.

The order provided for the first time that declassification should be given emphasis equal to that afforded to classification.[60] Documents were to be declassified as early as national security permitted,[61] and a justification was required for the extension of classification beyond six years.[62] Declassification rules were also strengthened.[63]

However, the order maintained some practices that were the subject of criticism. In issuing it, the President continued to rely upon very general and implied powers: "the authority vested in me as President by the Constitution and laws of the United States of America." [64] The order also continued the practice of referring to "national security" considerations, a term not totally consistent with the language of the security classification exemption of the Freedom of Information Act.[65]

The Carter order created the Information Security Oversight Office [66] as a successor to the Interagency Classification Review Committee that had been established under the Nixon order.[67] The new oversight body, which was made a unit of the General Services Administration, received some critical attention. An analysis of the order by the staff of the Government Information and Individual Rights Subcommittee included the following comment: "Given GSA's lack of political or economic leverage over most agencies with classification authority, placing the Oversight Office within GSA does not seem to portend particularly vigorous enforcement of the order." [68]

Further, the activities of the oversight office were limited by the new order which provided that, when "inspection would pose an exceptional national security risk," the director of the Information Security Oversight Office may be denied the opportunity to scrutinize some informa-

[57] See text accompanying notes 89–114.
[58] E.O. 12065 at § 1–104. See also text accompanying notes 74–88.
[59] E.O. 12065 at § 3–303. See also text accompanying notes 168–185.
[60] E.O. 12065 at § 3–301.
[61] Id.
[62] Id. at § 1–402.
[63] Id. at § 3.
[64] Id. at preamble.
[65] The title of the order is "National Security Information".
[66] Id. at § 5–102.
[67] E.O. 11652 at § 7(A).
[68] Staff of the Subcommittee on Government Information and Individual Rights, "Security Classification: The Experience Under Executive Order 11652 From 1973 to 1976", reprinted in 1977 Security Classification Hearings, supra note 55, at 95, 101 (1979).

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tion security systems, thus weakening the role of this administrative accountability monitor.[69]

The Carter order was criticized for eliminating the General Declassification Schedule contained in the previous order in a way that might permit documents to remain classified for longer periods, as well as for failure to provide more accountability in the classification process.[70]

Executive Order 12065 was also criticized for allowing the creation of "special access programs" to control access, distribution, and protection of "particularly sensitive information." [71] Relying upon this authority, the Carter Administration experimented with a new category of highly sensitive intelligence information during 1980. Designated "Royal," materials of this type reportedly were available to only eight Members of Congress who could examine them only within the secure facilities of the House and Senate intelligence committees.[72] Information Security Oversight Office Director Steven Garfinkel told the Subcommittee that, to the best of his knowledge, the "Royal" special access system was never employed, but other special access programs are in existence.[73]

III. ANALYSIS OF MAJOR FEATURES OF EXECUTIVE ORDER 12356

A. What Is Subject to Classification?

Classification Levels.—Both the Carter and Reagan Executive Orders establish three levels of classification: "Top Secret", "Secret", and "Confidential".[74] The Carter order provided that if there is reasonable doubt about which level is appropriate or if information should be classified at all, the less restrictive level should be used or the information should not be classified.[75] This continued a policy embodied in the implementing directive to the Nixon order.[76] The Reagan order omits this rule. It provides instead that if there is reasonable doubt about the need to classify information, the information shall be safeguarded as if it were classified pending a determination within 30 days by an original classification authority. If there is doubt about the appropriate level of classification, the information shall be safeguarded at the higher level pending a determination by an original classification authority.[77] However, the Reagan order provides no guidance for resolving doubts when that final determination is made.

The standards for "Top Secret" and "Secret" are the same in both orders,[78] but there is a difference in the standard for "Confidential"

[69] E.O. 12065 at § 5–202(h). See generally, General Accounting Office. "Improved Executive Branch Oversight Needed for the Government's National Security Information Classification Program" (LCD–78–125) (Mar. 9, 1979) ; General Accounting Office. "Oversight of the Government's Security Classification Program—Some Improvement Still Needed" (LCD–81–13) (Dec. 16, 1980).

[70] Staff of the Subcommittee on Government Information and Individual Rights, supra note 68, at 97–102.

[71] E.O. 12065 at § 4–201.

[72] See J. Taylor, "New System Tightly Curbs Access to Intelligence", *Washington Post*, September 7, 1980, at A7.

[73] Hearings at 194.

[74] E.O. 12065 at §§ 1–102 to 1–104 ; E.O. 12356 at §§ 1.1(a)(1)–(3).

[75] E.O. 12065 at § 1–101.

[76] 37 Fed. Reg. 10053 et seq. (May 19, 1971).

[77] E.O. 12356 at § 1.1(c).

[78] E.O. 12065 at §§ 1–102. –103. E.O. 12356 at §§ 1.1(a)(1) and (2).

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information. The Carter order provided that "Confidential" shall be used for information if its unauthorized disclosure "reasonably could be expected to cause *identifiable* damage to the national security." [79] The Reagan order deletes the word "identifiable." [80] This is a return to the standard in the Nixon order.[81]

The word "identifiable" conveyed the idea that there had to be some specific type of harm that would result from an unauthorized disclosure. It discouraged reliance on generalized or hypothetical fears about the consequences of disclosure as a basis for classification. It was an attempt to combat the tendency of bureaucrats to classify too much information.

The stated reason for the change in the Reagan order is "to avoid litigation problems that may arise if a quantum standard is applied" to the word "identifiable." [82] At the May 5 hearing, Steven Garfinkel, Director of the Information Security Oversight Office (ISOO),[83] said that he would be "very surprised if there were any practical differences" between the Carter and Reagan orders on this point.[84] He explained the reasons for the change:

> We didn't remove the word "identifiable" because we did not want the classifiers to avoid the identification of damage.[85]

Denying that the change would have the effect of permitting classifiers to avoid the identification of damage, Garfinkel elaborated:

> As we review classification decisions, we are still going to require classifiers to justify their assessments about damage and to identify the damage. It was the use of the word in a legal context that created the problems, not the fact that we wanted our classifiers to do other than identify and be conscious of potential damage that would result from unauthorized disclosure of particular information.[86]

Later in the same hearing, Garfinkel once again insisted that the differences between the Carter and Reagan orders were minimal:

> In other words, the requirement in Executive Order 12065 for identifiable damage, the concept of conscious thought, is no different than will exist now. The classifier will still be in a position where he or she must be able to explain the rationale behind the classification, the reason for the classification.[87]

Asked to give some examples of information that qualifies for classification under the Reagan order, but would not qualify under the Carter order, Garfinkel responded that "I doubt I could come up with any examples at all." [88]

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[79] E.O. 12065 at § 1–104 (emphasis supplied).
[80] E.O. 12356 at §1.1(a)(3).
[81] E.O. 11652 at § 1(C).
[82] Information Security Oversight Office, "Comparison of Executive Order 12065 and the [February 4, 1982] Draft Order" 2, reprinted in Hearings, appendix 2.
[83] Rep. Glenn English, Chairman of the Subcommittee on Government Information and Individual Rights, invited National Security Adviser William P. Clark to appear at the May 5, 1982, hearing. Clark declined to appear but designated Mr. Garfinkel to "represent the Administration" at the hearing. Letter from William P. Clark to Glenn English (April 26, 1982) (available in files of Subcommittee on Government Information and Individual Rights).
[84] Hearings at 154.
[85] Id. at 150.
[86] Id.
[87] Id. at 162.
[88] Id. at 150.

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It is not apparent that the deletion of the word "identifiable" will or could have the litigation effect that was intended. If the requirements on classifiers to justify classification decisions will be the same under both orders, then any judicial review of the propriety of a particular classification will also be the same. The government's obligation to justify a classification may, in fact, be no different under the two orders.

Classification Categories.—The Carter order was the first Executive Order to identify specific categories of information that were subject to classification.[89] Previous orders had only established standards for classification in terms of the damage that would result from disclosure. The Reagan order adds three entirely new categories and modifies one of the existing categories.

Conflicting reasons were given for the addition of the new categories. According to an ISOO comparison of the Carter order and the February 4, 1982, draft, the additional categories were "based on litigation experience under the Freedom of Information Act." [90] However, when Mr. Garfinkel was asked if the categories were included because of the FOIA, he said "no." [91] Further, no known FOIA cases have turned on the question of whether or not information fit into one of the enumerated categories.[92]

The first new category in the Reagan order covers information concerning:

> vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security; [93]

Garfinkel explained that this category includes "such information as information relating to the protection of the President, information relating to the protection of our embassies and information relating to civil preparedness." [94] No specific explanation was offered to justify the breadth of the language of the category, although Garfinkel did say that the category was broad just like categories under the Carter order.[95]

The classification categories in the Carter order were not models of specificity. For example, the Carter order included a category covering "scientific, technological, or economic matters relating to the national security." [96] The Reagan order continues this category [97] in addition

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[89] E.O. 12065 at § 1-201(a)(5).

[90] Information Security Oversight Office, "Comparison of Executive Order 12065 and the [February 4, 1982] Draft Order" 5, reprinted in Hearings, appendix 2.

[91] Hearings at 196.

[92] Hearings at 75 (Statement of Allan Adler and Morton Halperin, Center for National Security Studies); Hearings at 196 (Statement of Steven Garfinkel, Director, Information Oversight Security Oversight Office). After the hearing, Garfinkel indicated that the only FOIA case in which the result might have been different under the new Executive Order is *Taylor* v. *Department of the Army*, Civil Action No. 81-2353 (D.D.C. Nov. 20, 1981), *appeal docketed*, No. 81-2280 (D.C. Cir. Dec. 4, 1981). The court's decision turned on an Army regulation that provided that the requested information was unclassified. However, the court went on to say that the information would have failed to qualify for classification anyway because the government was unable to show that disclosure of the information would cause "identifiable damage" to the national security.

At the May 5 hearing, Deputy Attorney General Richard Willard said of the *Taylor* decision: "One of the bases for the Court's decision was that the readiness statistics didn't really concern military plans or operations." Hearings at 196. This is not correct. The judge never determined that the requested information failed to fall within any of the categories. See Letter from Steven Garfinkel to Glenn English (June 22, 1982) (available in files of Subcommittee on Government Information and Individual Rights).

[93] E.O. 12356 at § 1.3(a)(2).

[94] Hearings at 196-97.

[95] Id. at 197.

[96] E.O. 12065 at § 1-301(e).

[97] E.O. 12356 at § 1.3(a)(6).

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to the new "vulnerabilities or capabilities" category. The degree of overlap in these two categories is uncertain, although it is safe to say that it is substantial.[98]

Concern was expressed that the first new category will permit the classification of information concerning data processing, telecommunications, and other technologies which have only a tangential or speculative relationship to national security.[99]

Another witness expressed the fear that the new category would be used to protect basic information about problems with new weapons systems.[100] The explanation of the intended scope of the new category provided by Mr. Garfinkel suggests that these concerns may be misplaced.[101] However, it remains to be seen whether or not classifiers will exercise the restraint that Garfinkel indicated is expected.

The second new category added in the Reagan order covers "cryptology." [102] The need for this new category is uncertain. Cryptological information is already classifiable under the Carter order. The word "cryptology", as added by the Reagan order, is not qualified or defined.[103]

An explanation for this new category was provided by Garfinkel after the hearings in response to a written question from Subcommittee Chairman Glenn English:

> The appearance of "cryptology" as a classifiable category is not new. The classifiability of this type of information was clearly recognized in previous Executive orders, including E.O. 10501 and E.O. 11652. The drafters of E.O. 12065 omitted specific reference to "cryptology" because they believed that it was adequately covered by the other classification categories. However, experience indicated that while the other categories make clear the classifiability of signals intelligence, similar protection for communications security information, the other element of cryptologic information, was not as apparent. The decision was made to clarify this issue by including "cryptology" as a classification category under E.O. 12356.
>
> This addition should not result in an increase in the amount of information classified under the new Order since it covers the same type of information that is currently being classified under E.O. 12065.[104]

The third new category added in the Reagan order covers "confidential sources." [105] No cogent explanation of the purpose of this new category was provided.[106] "Confidential source" is defined to mean:

> Any individual or organization that has provided, or that may reasonably be expected to provide, information to the

[98] Hearings at 197 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).
[99] Id. at 76 (Statement of Allan Adler and Morton Halperin, Center for National Security Studies).
[100] Id. at 98 (Statement of Bob Schieffer, Society of Professional Journalists).
[101] See also text accompanying notes 139, 145.
[102] E.O. 12356 at §1.3(a) (8).
[103] For a discussion of cryptography issues, see House Committee on Government Operations, "The Government's Classification of Private Ideas," supra note 22, at 62–118.
[104] Letter from Steven Garfinkel to Glenn English (June 22, 1982) (available in files of Subcommittee on Government Information and Individual Rights).
[105] E.O. 12356 at § 1.3(a) (9).
[106] See text accompanying notes 265–274.

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United States on matters pertaining to the national security with the expectation, expressed or implied, that the information or relationship, or both, be held in confidence.[107]

In commenting on the February 4, 1982, draft, the Chairman of the House Select Committee on Intelligence called this definition "overly broad" and questioned whether the disclosure of the name of a person who is only a potential source could damage national security.[108]

In response to questioning at the May 5 hearing about the confidential source category, Mr. Garfinkel indicated that anyone who would be in a position to provide information could be a confidential source within the meaning of the order. However, he also pointed out that there are other requirements in the order that would have to be satisfied before information would be subject to classification.[109] The classification of information about potential, but not actual, sources should be an extraordinary event.[110]

In addition to the new categories, the Reagan order modifies an existing category to read: "intelligence activities (including special activities), or intelligence sources or methods." [111] The words in parentheses are new. Mr. Garfinkel indicated that "special activities" will be given the same meaning as in Executive Order 12333 on intelligence activities.[112] The explanation is that the change was made to ensure that special intelligence activities receive protection." [113]

Further, all three new categories have to be interpreted in light of Garfinkel's assurances that the universe of information that can be classified under both orders is "essentially the same." [114] This supports the narrowest possible interpretation of the new categories and of other changes in the Reagan order.

Mandatory Classification.—The classification categories describe the information that can qualify for classification. The standards included in the classification levels (the degree of harm to national security) determine when information that is subject to classification should be classified.

Both orders provide guidance to classifiers on how to apply the classification rules. The major difference between the Reagan and Carter orders in this area is that the Reagan order could be interpreted to *require* that anything meeting the criteria for classification must be classified.[115] This has been referred to as a "mandatory classification" rule. The Carter order merely *permitted* the classification of information that met the minimum criteria.[116] It clearly allowed classifiers the discretion not to classify information.

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[107] E.O. 12356 at § 6.1(f).

[108] Letter from Edward P. Boland to William P. Clark, National Security Adviser (Mar. 9, 1982), reprinted in Hearings, appendix 4.

[109] Hearings at 204.

[110] The Freedom of Information Act allows the protection of information provided by confidential sources in law enforcement investigations through Exemption 7(D), 5 U.S.C. § 552(b)(7)(D) (1976). Although the Reagan Administration has proposed amendments to the Freedom of Information Act, none of the amendments indicates any need for protection of an expanded category of confidential sources. See H.R. 4805, 97th Cong.

[111] E.O. 12356 at § 1.3(a)(4).

[112] 46 Fed. Reg. 59941 et seq. (Dec. 8, 1981).

[113] Hearings at 202–03. See text accompanying notes 261–264.

[114] Id. at 184.

[115] E.O. 12365 at § 1.3(b).

[116] E.O. 12065 at § 1–302.

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One witness expressed concern that, if taken literally, no official short of the President would have any authority under the Reagan order to release classified information no matter how important it might be to public debate or understanding of major policy issues.[117]

Garfinkel denied that there would be any practical differences between the two orders on this point. The change in language was "a conscious effort to change the tone of the order, to make the order a little more positive about the requirements of security."[118]

Garfinkel also stated that individuals who have the authority to classify information have the authority to declassify it if the public interest requires disclosure, and that the authority to classify inherently includes the authority to disclose information if it is in the public interest.[119] If such authority is inherent in the classification process, then the only difference between the two orders in this area is that the Carter order is explicit whereas the Reagan order is not.[120]

In addition, the Reagan order includes a presumption that unauthorized disclosure of foreign government information, the identity of a confidential foreign source, and intelligence sources and methods could reasonably be expected to cause damage to the national security.[121] A similar presumption in the Carter order only includes foreign government information and the identity of confidential foreign sources.[122]

No justification was presented for the expansion of a presumption of classifiability to sources and methods, and there is reason to question the need for the expansion. As one witness pointed out, the CIA has voluntarily disclosed information about sources and methods in the past.[123] The large number of known past disclosures or methods casts doubt on the reliability or utility of the presumption in this area. The Chairman of the House Select Committee on Intelligence expressed similar doubts: "It is difficult to accept as the basis for a presumption that all sources and methods would damage the national security if disclosed . . ."[124]

The limited use of such presumptions for narrow categories of information that tend to be uniformly sensitive may be unobjectionable as a guide for classifiers. However, the expansion of presumptions to areas where significant quantities of data do not meet the minimum damage standard of the Executive Order threatens the advantages of the use of presumptions, permits overclassification of information, and invites close judicial scrutiny if exclusively relied on in FOIA litigation.[125]

Limitations on Classification.—Both orders contain similar provisions prohibiting the use of classification to conceal violations of law, inefficiency, administrative error; to prevent embarrassment; or to restrain competition.[126]

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[117] Hearing at 71 (Statement of Allan Adler and Morton Halperin, Center for National Security Studies).
[118] Hearings at 154.
[119] Id. at 205–06.
[120] See text accompanying notes 180–185.
[121] E.O. 12356 at § 1.3(c).
[122] E.O. 12065 at §1–303.
[123] Hearings at 77–78 (Statement of Allan Adler and Morton Halperin, Center for National Security Studies).
[124] Letter from Edward P. Boland to William P. Clark, National Security Adviser (Mar. 9, 1982), reprinted in Hearings, appendix 4.
[125] Id.
[126] E.O. 12065 at § 1–601; E.O. 12356 at §1.6(a).

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The Carter order included a number of additional specific limitations on classification that are not repeated in the Reagan order. These limitations prohibit the classification of:

> a product of non-governmental research and development that does not incorporate or reveal classified information to which the producer or developer was given prior access . . . until and unless the government acquires a proprietary interest in the product; [127]
> references to classified documents that do not disclose classified information.[128]

The February 4 draft proposed to eliminate another of the Carter limitations, but the limitation was reinstated in the final order. This limitation prevented classification of:

> basic scientific research information not clearly related to the national security.[129]

The explanation for the original deletion of all three limitations was that they are "self-evident," [130] and that the information covered by the limitations is not subject to classification under existing tests.[131] The limitation for basic scientific research was restored in the final order because "its absence had caused such a concern among the scientific community . . ." [132]

The importance of the limitations in the Carter order was that they allayed fears about the scope of the government's classification authority for private technology and basic scientific research. The limitations made it clear that both categories of information were not subject to classification.[133]

The proposed deletion of these two limitations—especially the limitation against classifying private technology—gave these questions renewed importance. Witnesses at the March 10 hearing expressed concern about the significance of the deletions. At the center of the controversy was the definition of "information" in the Reagan order. Information is defined to mean:

> Any information or material, regardless of its physical form or characteristics, that is owned by, produced by, produced for, or is under the control of the United States Government.[134]

The Carter order contains substantially the same definition,[135] but the presence of the limitations made the ambiguities of the definition less important.

Professor Mary Cheh of George Washington University's National Law Center found the February 4 draft "equivocal with respect to whether or not it applies to privately-generated information." [136] She

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[127] E.O. 12065 at § 1–603.
[128] Id. at § 1–604.
[129] Id. at § 1–602; E.O. 12356 at § 1.6(b).
[130] Information Security Oversight Office, "Comparison of Executive Order 12065 and the [February 4, 1982] Draft Order" 8, reprinted in Hearings, appendix 2.
[131] Hearings at 172 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).
[132] Id. See text accompanying notes 252–260.
[133] See Hearings at 21–22 (Statement of Professor Mary Cheh).
[134] E.O. 12356 at § 6.1(b).
[135] E.O. 12065 at § 6–102.
[136] Hearing at 8.

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suggested that "you could take the same definition [of "information"] in the new order, given the new classification categories, and potentially extend it to privately developed information." [137] She also questioned whether the concept of "control" in the definition of "information" would extend to information submitted when applying for a patent or a license to export information.[138]

Garfinkel denied that the deletion of the limitation on classification of private technology increased the scope of classifiable information.[139] He also clarified when data qualified as "information" within the meaning of the order. On the question of when information is "produced for" the Government, Garfinkel explained that information produced for the general market does not qualify.[140]

With respect to the meaning of the word "control" in the definition of information, Garfinkel said that "the idea there is that the Government is in a position to require its production, to retain the information or to have the information destroyed." [141] He also explained that "control means that some statute or legal instrument or some sort of legal commitment between the holder of that information and the Government enables the Government to prevent its dissemination." [142]

Information submitted in connection with patent applications is not controlled by the Government, according to Garfinkel, because the submitter is not bound by the Government's control over the information and because there is no agreement between the patent seeker and the Government concerning control.[143] Where information is submitted to the Government under export reporting or licensing laws, that information is not controlled by the Government because the submitter retains a copy and has entered into no agreement with the Government to control dissemination.[144]

As with the interpretation of the classification categories and other features of the Reagan order, the deletion of the limitations must be interpreted in light of Garfinkel's assurances that the universe of information classifiable under both orders is essentially the same.[145]

B. Classification Authority and Procedure

Original Classification Authority.—The Carter order included a list of agencies whose officials are given original classification authority for the Top Secret, Secret, and Confidential levels.[146] The total number of officials with original classification authority under the Carter order was 7,229. This was a significant reduction from the Nixon order (17,626 classifiers), which was in turn a significant reduction from the Eisenhower order (59,316 classifiers).[147] Garfinkel predicted

[137] Id. at 17.
[138] Id.
[139] Id. at 171.
[140] Id. at 175.
[141] Id.
[142] Id. at 177.
[143] Id. at 176. On the issue of invention secrecy laws, see House Committee on Government Operations, "The Governments Classification of Private Ideas," supra note 22, at 1–62.
[144] Hearings at 177.
[145] See text accompanying note 114.
[146] E.O. 12065 at § 1–201.
[147] Information Security Oversight Office, "Comparison of Major Features of Executive Orders Governing The Information Security Program," reprinted in Hearings, appendix 2. See also Hearings 164–65 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).

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that there would be no significant increase or decrease under the Reagan order.[148]

Unlike the Carter order,[149] the Reagan order did not include a list of the agencies with classification authority.[150] The list is contained in a separate Presidential order that appeared in the Federal Register a month after the order was signed.[151] The stated explanation for this change is because it is more practical from an administrative standpoint.[152]

The most notable change in the list of agencies with classification authority is the addition of the Environmental Protection Agency as an agency with authority to classify information as "Confidential."[153]

Delegation of Classification Authority.—Both the Carter and Reagan orders contain rules for the delegation of original classification authority. Separate rules are stated for the delegation of each classification level. As an example of how the delegation rules work, the rules for delegation of "Top Secret" will be explained. For both the Carter and Reagan orders, the rules for "Top Secret" are similar to those for the other levels.

The Carter order provided that "Top Secret" classification authority may be delegated only to "principal subordinate officials who have a frequent need to exercise such authority as determined by the President or by agency heads" who have original "Top Secret" classification authority.[154] The Carter order specifically prohibited the redelegation of any delegated original classification authority.[155]

The Reagan order permits delegation of original "Top Secret" classification authority by the President, by an agency head or official who has been granted original "Top Secret" classification authority under the Presidential order, or by the senior agency official with responsibility for the agency information security program, provided that the senior agency official has been delegated original "Top Secret" classification authority by the agency head.[156]

Reclassification.—The Carter order provided that documents that have been declassified and publicly released may not be reclassified.[157]

The Reagan order permits reclassification of information that has been declassified and released if it is determined in writing that (1) the information requires protection in the interest of national security and (2) the information "may reasonably be recovered."[158] This is one of the few changes in the Reagan order that is specifically identified as a change in policy.[159]

In addition, the Reagan order makes it easier to classify or reclassify a document after an agency has received a request for it under the FOIA, Privacy Act, or under the Executive Order itself. The Carter order prohibited such classifications unless authorized by the agency

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[148] Hearings at 165.
[149] E.O. 12065 at § 1–2.
[150] E.O. 12065 at § 1.2.
[151] 47 Fed. Reg. 20105–6 (May 11, 1982), reprinted in Hearings, appendix 1.
[152] Information Security Oversight Office, "Comparison of Executive Order 12065 and the [February 4, 1982] Draft Order 3, reprinted in Hearings, appendix 2.
[153] Hearings at 153 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).
[154] E.O. 12065 at § 1–204(a).
[155] Id. at § 204(d).
[156] E.O. 12356 at § 1.2(d)(2). The senior agency official is designated under § 5.3(a)(1).
[157] E.O. 12065 at § 1–607.
[158] E.O. 12356 at § 1.6(b).
[159] Hearings at 182 (Statement of Richard Willard, Deputy Assistant Attorney General).

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head or deputy.[160] The Reagan order permits lower level officials to classify documents after a request for the documents is received.[161]

Mr. Garfinkel explained the origin of the reclassification authority:

> During the course of our consideration of the new Executive Order, it came to our attention that there were several instances in a couple of agencies where information had been erroneously declassified and released and was in the hands of one person. This person was quite willing to have the information retrieved by the originating agency and reclassified, but the originating agency felt by the terms of the language of the existing order, it could not do so.
>
> So it was viewed by us in our drafting procedure that there needed to be some degree of flexibility on this issue, that we could not always say that that information could not be reclassified.[162]

The reclassification provision generated as much controversy as any other feature of the new order. Allan Adler and Morton Halperin of the Center for National Security Studies found it—

> particularly troubling because it is not limited to cases where sensitive information has been declassified by some gross error on the part of processing officials and would appear to permit the Government to compel the return of such information by lawsuit, if necessary.
>
> Consider, for example, the situation where an FOIA requester could be asked to return a previously-released document on the basis of the Government's claim that the information has been classified and cannot be disseminated without official authorization and clearance. If the requester refuses to voluntarily give up the document, is a lawsuit one means by which the document "may reasonably be recovered"? Would the requester, who sought no access to classified information in the first place, now find himself in possession (i.e., knowledge) of information that he cannot further disseminate without penalty? [163]

There have been a number of recent instances where, notwithstanding the prohibition in the Carter order against reclassification, the Government has threatened or attempted to reclassify information that was either declassified or otherwise in the public domain. In one incident, a researcher who obtained declassified documents from the National Archives was asked to return them to the Archives to be reproduced. The documents were then reviewed for possible reclassification, although in the end the documents were returned to the researcher in their entirety.[164]

In a second case reported in the press, the Justice Department demanded the return of documents from an individual who had received them from the Department in response to a Freedom of Information Act request. The Department contended that the information had been

[160] E.O. 12065 at § 1-606.
[161] E.O. 12356 at § 1.6(c).
[162] Hearings at 179.
[163] Hearings at 79.
[164] This incident is discussed in Hearings at 180-81.

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released "in error" and threatened legal action if the information were published.[165]

Another similar instance involved the seizure of documents from American journalists returning from abroad. The documents were part of a 13 volume archives of secret United States documents on American relations with Iran purportedly taken from the U.S. embassy in Teheran when it was seized in 1979. The documents were reportedly for sale in the bazaars of Tehran, and highlights were later published in the Washington Post.[166]

Some surprising recovery authority was claimed by Government representatives at the May 5 hearing. Representative Weiss asked a series of questions about what constitutes reasonable recovery action within the meaning of the draft order:

> Mr. WEISS. Is deception a reasonable course of action?
> Mr. GARFINKEL. I think ordinarily it is not reasonable.
> Mr. WEISS. Is force a reasonable course of action?
> Mr. GARFINKEL. Physical force?
> Mr. WEISS. You go up to somebody and say, "OK, buddy, hand it back or else."
> Mr. GARFINKEL. No. Ordinarily, that would not be reasonable.
> Mr. WEISS. What do you mean by "ordinarily?"
> Mr. GARFINKEL. I would say under all but the most unbelievable circumstances. I am not in a position to even describe them.
> Mr. KINDNESS. Suppose the guy had just stolen it out of the file. He tried to make away with it. What about that?
> Mr. WEISS. This is where the agency declassified it and the Government now changes its mind. Can the Government agent walk up with a gun and say, "Hand it back?"
> Mr. GARFINKEL. I don't want to be on the record to say that could never happen. What I am saying is that I cannot conceive of a situation when that would happen.
> Mr. WEISS. Is an illegal entry, a reasonable course of action by way of recovery?
> Mr. GARFINKEL. My answer would be the same.
> Mr. WEISS. Would you like to comment on this?
> Mr. WILLARD. My answer would be, no. An illegal entry would not be reasonable in my opinion. As to force, unauthorized force would not be reasonable. Obviously at some point, if people resist a court order, United States Marshals are authorized to enforce the court order. If that requires force, it might occur, but certainly not ad hoc or the kind of force that you describe. That would not be reasonable.
> Mr. WEISS. What about deception?
> Mr. WILLARD. It would depend on the circumstances and who was involved. Obviously, in the case you describe [involving the researcher who was misled into returning documents to the Archives], the Government determined that it was not reasonable to engage in misleading the researcher, and the documents were returned.[167]

[165] See New York Times, March 14, 1982.
[166] Washington Post, January 31, 1982.
[167] Hearings at 181.

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Thus, while one government spokesman refused to rule out either physical force or illegal entries as a reasonable means to recover and reclassify documents, a second spokesman determined that this type of activity would be unreasonable. Neither would rule out the use of deception as a recovery technique.

The reclassification of information by the Government is not unreasonable if the information meets the standards for continued classification and if the recovery can be accomplished through voluntary cooperation. However, it is far from certain that a change in an Executive Order can give the Government new authority to recover declassified documents. Nor is it apparent that the President of the United States could or would determine that deception, force, illegal entries, or similar unsavory techniques are reasonable actions to be undertaken by the Government.

C. Declassification

Duration of Classification.—The Carter order required that each classified document include a date or event for declassification or review.[168] Any document classified for more than six years must contain additional information, including the name of the classifier and the reasons why longer classification is required.[169]

The basic declassification requirement of the Reagan order is simply that documents shall continue to be classified as long as required by national security considerations.[170] The Carter order contained similar language [171] and enforced it with the six year declassification period. The Reagan order omits all references to the six year period or other periods of time for declassification. It permits a document to be marked with a date or event for declassification [172] or with a notation "originating agency's determination required." [173]

At the March 10 hearing, Dr. Anna Nelson, who represented the American Historical Association, the Organization of American Historians, and the Society for Historians of American Foreign Relations was particularly troubled by this change:

> I would like to point out to the committee that section 1.4 (a), the section that eliminates the current time limitation on the classification of most information, is the most disturbing section in this entire draft. This section represents a significant change in the classification policies of the last three decades. It eliminates the concept that at some date, all classified information should be reviewed for declassification and reverts back to policies in effect before President Eisenhower's Executive Order first addressed the massive accumulation of classified information.[174]

Dr. Nelson went on to explain why orderly declassification is important to the process of historical research:

> To understand the relationships between the individuals, institutions and ideas which encompass political, diplomatic or military history, the historian needs not one document or

[168] E.O. 12065 at § 1–401.
[169] Id. at § 1–502.
[170] E.O. 12356 at § 1.4(a).
[171] E.O. 12065 at § 3–301.
[172] E.O. 12356 at § 1.4(a).
[173] Id. at § 1.5(a)(3).
[174] Hearings at 110–11.

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> even 10 documents, but an array of information from a broad spectrum of sources. Therefore, the ideal declassification process for historical research is the very kind of orderly declassification which this draft Executive Order will now eliminate.[175]

It is not clear if the Carter order's six-year default declassification date for most documents has been successful. It has not been in effect for six years, and the Reagan order will eliminate it before it is tested.

Mr. Garfinkel indicated that many documents that were supposed to be declassified after six years have been marked "review before declassification." This is a term that is not recognized under the Carter order. The widespread use of this marking suggests that agencies are reluctant to allow the automatic declassification of documents after six years.[176] According to Garfinkel, anybody marking documents "review before declassification" had to be "well aware that there was going to be no such review at the six-year mark."[177]

Declassification Policy.—The Carter order states that declassification shall be given emphasis comparable to that accorded classification.[178] There is no similar policy statement in the Reagan order. Garfinkel told the Subcommittee that the statement was dropped "simply as an economy measure."[179]

The Carter order also included a provision generally referred to as "the balancing test":

> It is presumed that information which continues to meet the classification requirements in Section 1–3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified.[180]

If questions arise about the disclosure of information on grounds of the public interest, the agency head, a senior agency official, or an official with "Top Secret" classification authority will make the final determination.[181]

The balancing test is dropped in the Reagan order. Deputy Assistant Attorney General Richard Willard explained why:

> The balancing provision produced unsatisfactory results and is properly eliminated from the new executive order. While the provision was never intended to introduce a mandatory requirement for proper classification, plaintiffs have been able to argue, not without some success, that it was so intended, and that the courts could properly review and even overrule the agency's decision whether to balance. There has been a corresponding erosion in the certainty and the appearance of certainty in classification decisions. The agencies have had to edge closer to disclosure of classified information to support their decisions on the public record, and classified affidavits have necessarily grown in complexity and detail in

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[175] Id. at 111.
[176] Id. at 218.
[177] Id.
[178] E.O. 12065 at § 3–301.
[179] Hearings at 216.
[180] E.O. 12065 at § 3–303.
[181] Id.

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> order to overcome arguments of opposing counsel and satisfy inquiries of reviewing courts. Moreover, the balancing provision adds another necessarily judgmental requirement courts nevertheless view as subject to judicial review. It further complicates the ability of the government to defend classification decisions and the ability of the agency to get on with its primary job of protecting national security rather than defending itself in court.[182]

Willard's concern over the degree of interference with an agency's ability to carry out its work is notable. Steven Garfinkel said that only an infinitesimal amount of classified data is ever the subject of FOIA litigation.[183] It is not apparent how this limited amount of litigation could be the cause of interference of the magnitude suggested in Willard's statement.

In response to questioning at the May 5 hearing, Willard continually returned to the point that the public interest is not always served by the disclosure of information.[184] The truth of this statement has never been in dispute, and the Carter order specifically recognized that the public interest will outweigh the need for protection only "in some cases."

The ultimate significance of the deletion of the balancing test is uncertain, since Garfinkel stated that the authority to classify "inherently includes the authority to make the determination that the public interest requires disclosure." [185] Misapplication of this inherent authority may be the subject of judicial review even if the order does not contain an explicit reference.

Systematic Review for Declassification.—The Carter order instituted a new procedure for the systematic review for declassification of most classified documents as they become 20 years old. The National Archives and Records Service (NARS) was given the primary responsibility for the review of these documents.[186] The Carter procedure replaced general declassification schedules established under the Nixon order.

The Reagan order includes a much less specific procedure for the systematic review of documents for declassification. NARS would still have the primary function of reviewing documents, but no period is specified for the conduct of declassification reviews.[187]

This part of the Carter order has been controversial. In October, 1980, the General Accounting Office issued a report recommending that the program of systematic review be eliminated and that all declassification be done only when specifically requested by the public.[188]

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[182] Hearings at 141.
[183] Id. at 210. The Information Security Oversight Office estimates that between 800,000 and 1 million documents are classified each year. In addition, another 16 million documents are derivatively classified. There are approximately 621 million pages of classified documents at the National Archieves, and the number of classified documents throughout the government is much larger. See Letter from Steven Garfinkel to Glenn English (June 22, 1982) (available in files of the Subcommittee on Government Information and Individual Rights).
[184] Hearings at 160, 161.
[185] Id. at 205–06.
[186] E.O. 12065 at § 3–4.
[187] E.O. 12356 at § 3.3.
[188] General Accounting Office, "Systematic Review for Declassification of National Security Information—Do Benefits Exceed Costs" (LCD–81–3) (Oct. 15, 1980).

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GAO felt that the review was not cost effective and that NARS did not have the resources to conduct the mandated review.[189]

Steven Garfinkel described the systematic review under Executive Order 12356 as a compromise between the recommendation made by GAO and the Carter procedure. [190] He also indicated that although no period is set in the order, a thirty year systematic review period would be set administratively.[191]

Requests for Declassification.—The Carter order included a mandatory review procedure for the handling of requests from the public or from agencies for the declassification of information. If, after a request and review, it is determined that information no longer requires protection under the Executive Order, the information is to be released.[192] Although the procedure was described as "slow and often frustrating",[193] a significant proportion of requests for declassification have resulted in the release of information.

The Reagan order continues the mandatory review program with some significant changes. First, it limits requests to citizens, permanent resident aliens, federal agencies, and state and local governments.[194] This change is similar to proposed Reagan Administration FOIA amendments.[195]

The Reagan order requires that the request for declassification describe "the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort.[196] Although similar to the Carter requirement that the request "reasonably describe the information," [197] there is a difference. The Reagan order adds the requirement that a requester identify the document to be reviewed for declassification. How this will be interpreted remains to be seen.

IV. DISCUSSION, FINDINGS, AND RECOMMENDATIONS

A. Adoption of Executive Order 12356

The process used by the Reagan Administration for consideration and adoption of the new Executive Order on Security Classification has been a significant source of controversy. When he signed Executive Order 12356, President Reagan said that it "reflects a coordinated effort involving officials of the executive branch, Members of Congress, and representatives of concerned private organizations." [198] However, the record demonstrates that, with very few exceptions, the entire revision effort was carried on in isolation within the executive branch.

[189] See "Oversight of the National Archives and Records Service," Hearings before a Subcommittee of the House Committee on Government Operations, 97th Cong., 2d Sess. (Mar. 1982) (to be printed). See also Information Security Oversight Office, "Annual Report to the President 1980–1981" 12.

[190] Hearings at 188–89.

[191] Id. See also § 2001.31(c)(iii) of the Implementing Directive for E.O. 12356, 47 Fed. Reg. 27836 et seq. (June 25, 1982) (to be codified at 32 C.F.R. § 2001.31(c)(iii)).

[192] E.O. 12065 at § 3–501.

[193] Hearings at 119 (Statement of Dr. Anna Nelson, American Historical Association, Organization of American Historians, and the Society for Historians of American Foreign Relations).

[194] E.O. 12356 at § 3.4(a)(1).

[195] See H.R. 4805 and S. 1751, 97th Cong. See also S. 1730, 97th Cong.

[196] E.O. 12356 at § 3.4(a)(2).

[197] E.O. 12065 at § 3–501.

[198] 18 Weekly Comp. Pres. Doc. 431 (Apr. 2, 1982), reprinted in Hearings, appendix 1.

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This is in sharp contrast to the process for adoption of the Carter Executive Order on Security Classification, a process that included public notice, comment, and participation.

The effort to revise Executive Order 12065 began in February, 1981. Presidential Counselor Edwin Meese asked agencies of the intelligence communities for prospective amendments to Executive Orders 12036 and 12065 "that would enhance the United States' intelligence capabilities." [199] An intelligence community task force chaired by the Central Intelligence Agency was established in response and eventually determined to draft a complete rewrite of Executive Order 12065. A draft was submitted on August 28, 1981, to Richard Allen, Assistant to the President for National Security Affairs. On September 2, 1981, Allen submitted this draft to the Information Security Oversight Office (ISOO) with instructions to coordinate the development of a replacement for Executive Order 12065 with other executive branch agencies.[200] ISOO was created under Executive Order 12065 as a successor to the Interagency Classification Review Committee.[201] Administratively, ISOO is part of the General Services Administration, but it takes its policy direction from the National Security Council.[202]

The draft prepared by the intelligence community task force "served as framework for ISOO in its development of a draft Order to be circulated for further agency comment." [203] An ISOO draft was circulated to agencies on October 16, 1981, and agencies were given 30 days to comment. A revised draft was submitted to the Acting Assistant to the President for National Security Affairs on December 4. 1981. This draft was forwarded to the Office of the Vice President and ten of the major classifying agencies for comment on December 23, 1981. The next draft, dated February 2, 1982, was the one that was circulated on Capitol Hill.[204]

Although the revision effort was not classified, no formal public announcement was ever made about it,[205] and the first notification to the Government Operations Committee came on February 4, 1982, when ISOO Director Steven Garfinkel sent a copy of the February 4 draft to the General Counsel of the Government Operations Committee. Copies of the draft order were provided at the same time to several other congressional committees. The routing slip that accompanied the draft sent to the Government Operations Committee stated that the proposed draft was provided for the Committee's review and comment. The only restriction noted on the routing slip was the following: "The materials are being provided with the understanding that access to them will be limited to Committeee members and necessary staff personnel."

Although the routing slip did not indicate that there was a deadline for congressional comments, Committee staff was advised by Mr. Garfinkel that the deadline was February 22, 1982. The House was in recess for a majority of the period allowed for congressional comments.

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[199] Letter from Steven Garfinkel to Glenn English (June 22. 1982) (available in files of Subcommittee on Government Information and Individual Rights).
[200] Id.
[201] E.O. 12065 at § 5–102.
[202] Hearings at 195 (Statement of Steven Garfinkel, Director, Security Oversight Office); E.O. 12065 at § 5–101; E.O. 12356 at § 5.1(a).
[203] Letter from Steven Garfinkel to Glenn English (June 22. 1982) (available in files of Subcommittee on Government Information and Individual Rights).
[204] Id.
[205] Id.

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On February 10, 1982, Rep. Glenn English, Chairman of the Subcomittee on Government Information and Individual Rights, sent a letter to William Clark (who had succeeded Richard Allen as National Security Adviser) asking that the deadline for comments on the draft be put off "in order to allow an adequate opportunity for review by the Congress." [206] The letter was cosigned by Rep. Jonathan Bingham, Chairman of the Subcommittee on International Economic Policy and Trade of the Committee on Foreign Affairs; Rep. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary; Rep. George Brown, Chairman of the Subcommittee on Department Operations, Research, and Foreign Agriculture of the Committee on Agriculture; Rep. Doug Walgren, Chairman of the Subcommittee on Science, Research, and Technology of the Committee on Science and Technology; Rep. Peter Rodino, Chairman of the Committee on the Judiciary; Rep. Edward Boland, Chairman of the Select Committee on Intelligence; and Rep. Robert Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary.

National Security Adviser Clark responded to the letter by telephone on February 22, 1982, telling Rep. English that more time would be allowed for congressional review, but setting no new deadline. The next day, Rep. English announced that hearings would be held on the proposed draft by the Subcommittee on Government Information and Individual Rights on March 10 and 11, 1982.[207] Late in the day on February 23, a letter dated February 22 from Mr. Clark was hand delivered to Rep. English. The letter suggested that any comments should be referred to Edwin Meese, Counsellor to the President, and to Steven Garfinkel, Information Security Oversight Office, prior to March 5.[208]

Letters dated February 25, 1982, were sent to National Security Adviser Clark and Attorney General William French Smith inviting them to appear or to send representatives to the hearings scheduled on March 11.[209]

Assistant Attorney General Robert A. McConnell responded on behalf of the Attorney General by letter dated March 4, 1982.[210] The Attorney General declined the invitation because it would be "inappropriate" to send a witness since the process of revising the Executive Order had not been completed and the matter had not yet been presented to the President for decision.

Michael O. Wheeler, Staff Secretary of the National Security Council, responded on behalf of William Clark in a letter dated March 8 that was not received until March 9. The invitation to testify was declined:

> Copies of the revised Order were provided to selected Congressional committees on the explicit understanding that Administration witnesses would not appear at hearings while the internal deliberative process was underway. Since that

[206] The letter is reprinted in Hearings, appendix 3.
[207] 128 Cong. Rec. H465 (daily ed. Feb. 23, 1982).
[208] This letter is reprinted in Hearings, appendix 3.
[209] These letters are reprinted in Hearings, appendix 3.
[210] This letter is reprinted in Hearings, appendix 3.

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> process continues, we must respectfully decline your invitation to appear on March 11.[211]

The "explicit understanding" referred to by Wheeler in this letter was not mentioned in the routing slip attached to the draft order provided to this Committee. During the hearing on March 10, Chairman English stated: "If any such condition was imposed, it is news to me. No one on this committee had ever heard of such an understanding until it was mentioned in the letter." [212]

All three Members who attended the Subcommittee hearings on March 10 expressed frustration that no Administration witness was willing to appear to explain the purpose of the changes in the draft order. At the suggestion of Rep. Ted Weiss, a letter was sent on March 11 asking the President to designate a spokesman to appear before the Subcommittee prior to the issuance of the revised Executive Order.[213]

On April 2, 1982, President Reagan signed the new Executive Order on Security Classification (E.O. 12356).[214] The effective date of the new order is August 1, 1982.[215]

It was not until two weeks after the order was signed by the President and one month after the March 11 letter was sent to the President, that a response to that letter was received. On April 15, 1982, Kenneth M. Duberstein, Assistant to the President, wrote to Chairman English:

> This is just to assure you that your March 11 letter, regarding the Executive Order on Security Classification, was brought to the President's immediate attention. I have also taken the liberty of sharing a copy with the national security staff so that they may provide you with a full response. Please be assured that we appreciated receiving your views, and those of Congressman Kindness and Congressman Weiss, on this very important issue.[216]

No response from the national security staff was ever received.

The Administration showed even less interest in public comments on the draft order than it showed in congressional comments. It was never announced publicly that a revision of the security classification rules was being considered, and none of the drafts that circulated within the executive branch was ever released for public review or comment. However, unofficial copies of the last several drafts were in circulation among some interested groups outside the executive branch. Since no drafts were ever formally released by the Administration, some or all of the reactions from interested groups must have been based on the unofficial copies.

At the May 5 hearing, Garfinkel was asked about contacts by his office with interested private organizations. Mr. Garfinkel listed seven groups that were "consulted": American Bar Association Task Force of Government Information and National Security; American Council on Education; American Historical Association; Association of Former Intelligence Officers; Center for National Security Studies; Institute

[211] This letter is reprinted in Hearings, appendix 3.
[212] Hearings at 61.
[213] This letter is reprinted in Hearings, appendix 3.
[214] 47 Fed. Reg. 14874 et seq. (Apr. 6, 1982), reprinted in Hearings, appendix 1.
[215] E.O. 12356 at § 6.2(d).
[216] This letter is reprinted in Hearings, appendix 3.

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of Electrical and Electronics Engineers; and International Classification Management Society.[217]

Garfinkel indicated that no consultations with private organizations took place before the February 4 draft had already been prepared. Also, consultations were mostly limited to those groups which had previously contacted ISOO and expressed interest.[218] Other groups that might have had an interest, but that did not contact ISOO, were not consulted.[219]

The Reagan Administration apparently felt that this comment process for the draft Executive Order was extraordinarily open and that a broad degree of outside input was solicited. Steven Garfinkel wrote to Subcommittee Chairman Glenn English:

> By soliciting comment from interested congressional committees and non-government interest groups representing a spectrum of opinion, the Administration took extraordinary steps to seek a wide range of comment in an exercise that is ordinarily closed to anyone outside the executive branch. The scope of comments received and considered certainly reflects the broad degree of input solicited from outside the executive branch.[220]

The approach taken by the Reagan Administration to the solicitation and consideration of public and congressional comments is in sharp contrast to that of the Carter Administration when it drafted and issued Executive Order 12065. The Carter Administration revision effort was characterized by a significant degree of openness and public participation.

Shortly after taking office, President Carter directed the Domestic Policy Staff and National Security Council staff to study the security classification process and make recommendations for change. An interagency task force was established to draft the new order.[221]

Richard M. Neustadt, Associate Director of the White House Domestic Policy Staff, was co-chairman of the Carter task force. It was recognized at the start that the limited perspectives of a task force composed solely of civil servants prevented a fully balanced presentation of security classification issues:

> The problem, however, is that a group of this kind has a limited perspective. The people who represented the agencies generally argued for making the classification system highly inclusive, against any mandate to declassify documents, and against any oversight of agency classification procedures. These viewpoints were the natural perspectives of those whose careers are tied to classification bureaucracies. For example, mandatory declassification requires review of the affected documents, which imposes a burden on those people. Oversight threatens the autonomy of the classification offices within each agency.

[217] Hearings at 191.

[218] Id. See also letter from Steven Garfinkel to Glenn English (June 22, 1982) (available in files of Subcommittee on Government Information and Individual Rights.

[219] See, e.g., letter from Bruce W. Sanford, Counsel, Society of Professional Journalists, to Glenn English (Apr. 5, 1982) reprinted in Hearings at 221.

[220] Letter from Steven Garfinkel to Glenn English (June 22, 1982) (available in files of Subcommittee on Government Information and Individual Rights).

[221] Letter from Richard M. Neustadt, reprinted in Hearings, appendix 5.

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> This perspective, however, could not produce a fully balanced view of the security classification system or an executive order that served [President Carter's] objectives. There was no way to bring balance to the process from within the Government because there are no institutional advocates for reform of a classification process within the agencies.[222]

Since the Carter White House staff was aware that it did not have the time or expertise to ensure that all alternatives were considered, a decision was made to open the drafting process to congressional and public comment. This was felt to be the "only way to bring a full range of expert viewpoints into the process and thereby give the decisionmakers a full range of options."[223]

Objections were raised within the Carter Administration to the proposal to seek public comments, but the objections were overruled on the grounds that the quality of the work would be improved:

> The decision to circulate drafts in spite of that objection was based on the judgment that the quality of the work was certain to be improved through a comment procedure that would give us additional ideas and viewpoints. Moreover, we felt that a President should be informed about knowing the problems of a proposed course of action—both substantive and political—before he takes that action, not afterwards.[224]

There was a tremendous amount of public and congressional interest in the security classification issue, and the Carter Administration received over 500 comments on the draft that was circulated.[225] Neustadt had no doubts that the public comment process was helpful in the preparations of the final draft of what became Executive Order 12065:

> I can tell you unequivocally that this public comment process improved both the range of options we were able to present to the President and his senior advisors for their final decisions and the quality of the final order.[226]

The time that it took for compiling and reviewing the public comments was about three weeks. Neustadt did not find this to be a significant delaying factor in a revision process that took a year.[227] The total time spent on the revision effort by the Reagan Administration was also about a year.[228]

There was some recognition by Reagan officials of the limited perspectives and interests of agency classification officials. Presidential counselor Edwin Meese reportedly said in a mid-March speech before the National Newspaper Association that the controversy over the executive order actually was the fault of an overzealous bureaucracy trying to have its own way. Meese said "that early on, as they always do, the bureaucracy tested us and they tried to expand classification. And so I think you 'll find that that is being corrected in the current drafts of the classification executive order that is now being studied

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[222] Id.
[223] Id.
[224] Id.
[225] Information Security Oversight Office, "Annual Report to the President" 2 (1979). Letter from Richard M. Neustadt, reprinted in Hearings, appendix 5.
[226] Letter from Richard M. Neustadt, reprinted in Hearings, appendix 5.
[227] Id.
[228] The revision process started in February, 1981, and the final order was signed on April 2, 1982. See text accompanying notes 75–94.

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by us."[229] It has never been clear which drafts Meese was referring to in his statement.

Despite this statement by Meese, the Reagan Administration made minimal efforts to broaden its perspective on classification issues by seeking outside advice. Nevertheless, Garfinkel claimed that those few unsolicited comments that were received were in fact relied upon as a basis for change. He indicated that at least one provision was included in the final order because its omission in the February 4, 1982, draft caused significant concern in the scientific community.[230] Citation of public concern as a explanation for a change in the Executive Order is recognition on the part of the Reagan Administration that public comments can be helpful. Nevertheless, no organized effort was made to seek public comments.

It is impossible to assess how many other interested parties might have expressed sufficient concern to warrant other changes had public comments been solicited. Garfinkel indicated that he did eventually meet with representatives of seven interested organizations. Since the Carter Administration received over 500 comments on its draft order, it is reasonable to conclude that there were individuals or organizations who might have been willing to offer additional points of view.

The consequences of the Reagan Administration's failure to seek counsel from outside its own ranks were recognized shortly after the order was signed by the President. Senator David Durenberger, in introducing a bill to overturn portions of Executive Order 12356, made the following comments about the role played by Administration bureaucrats in the drafting of the new order:

> This is an order that only a bureaucrat could write. It was drafted by security bureaucrats, who think only of how to keep everything secret, and legal bureaucrats who think only of how to get away with filing fewer affidavits.
>
> Nobody gave much thought to the public's right to know what big government is doing. Nobody worried about maintaining public support for the governmental security system, which is essential if we are ever to stem the flow of leaks that is the real security problem. Nobody thought to buttress public support for judges who have almost always followed the Government to withhold information that it says should be kept secret.
>
> Ed Meese, the Counselor to the President, was right when he described the draft executive order as "the fault of an overzealous bureaucracy trying to have its own way." Alas, the bureaucracy got its way. It got an order that will increase secrecy far beyond what experience has taught us is needed to protect the security of our country, even though that is not the administration's intent.[231]

Another contrast between Carter and Reagan Administration approaches comes from the response of the two Administrations to congressional requests for testimony. The Carter Administration sent a Justice Department official to a hearing on the security classification

[229] Washington Post, March 15, 1982 at A11.
[230] Hearings at 172. See also text accompanying notes 255–260.
[231] 128 Cong. Rec. S4211 (Apr. 28, 1982) (statement upon introduction of S. 2452, a bill to provide certain standards for the application of the Freedom of Information Act exemption for classified information).

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exemption of the Freedom of Information Act in which that official testified about the proposed revision to the Executive Order on Security Classification.[232] The hearing took place while the order was being revised. However, the Reagan Administration refused a similar request for testimony during the period when it was considering revisions.[233]

At the hearings on May 5, Deputy Assistant Attorney General Richard Willard said that such an appearance would have been inappropriate.[234] Exactly what dangers would have resulted were not explained. There is no evidence that the Carter revision process was disturbed or delayed by the appearance of an Administration witness at a congressional hearing.[235]

Each branch of Government has its own constitutional responsibilities, but nothing in the Constitution precludes cooperation, open discussion, and public consultation. Indeed, public hearings with participation by executive branch officials are a standard feature of the legislative process. It would certainly be unusual for a congressional committee to refuse to accept testimony from an executive agency on the grounds that participation by such an agency in the legislative process would be "inappropriate."

Further, like many pieces of legislation, the Executive Order on Security Classification establishes guidelines of general applicability throughout the Government. The rules have an effect on the Congress, Government contractors, scientists, researchers, the press, and others.

In addition, the order has a direct and immediate impact on the availability of information under the Freedom of Information Act. Any information that is properly classified under Executive Order is exempt from disclosure under FOIA.[236] Therefore, an expansion of the security classification rules means that agencies will be able to withhold more information from the public under FOIA.

There is no reason why an appearance at a congressional hearing prior to issuance of an executive order would restrict the President's ability to act or would create a dangerous precedent. Such an appearance would not necessarily bind the president or future presidents. This is amply demonstrated by the fact that the Reagan Administration had no difficulty ignoring the "precedent" established by the Carter Administration when it permitted testimony on a draft security classification Executive Order.

1. Findings

The Committee finds that the security classification rules established under Executive Order are guidelines of general applicability that affect not only the executive branch, but the Congress, Government contractors, Government grantees, and others as well.

The Committee finds that executive branch bureaucrats who participate in the drafting of security classification rules have very narrow interests that almost uniformly favor increased secrecy.

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[232] See "Security Classification Exemption to the Freedom of Information Act": Hearings before a Subcommittee of the House Committee on Government Operations, 95th Cong., 1st Sess. (1977) (testimony of Assistant Attorney General John Harmon).

[233] See text accompanying notes 209–216.

[234] Hearings at 157. On the same day that Willard made this statement, the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service held a hearing on a proposed Executive Order at which representatives of two cabinet department testified. The proposed order would have suspended certain labor negotiation rights of overseas Defense Department civilian employees.

[235] Letter from Richard M. Neustadt, reprinted in Hearings, appendix 5.

[236] 5 U.S.C. § 552(b)(1) (1976).

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The Committee finds that consultation by the executive branch with the Congress and the public during the decisionmaking process for security classification rules will help to define and clarify secrecy issues, identify problems with the operations of the classification system, and improve the quality of the final product.

The Committee finds that failure to fully inform the Congress and the public about proposals to change security classification rules increases mistrust for necessary government secrecy rules.

The Committee finds that the Reagan Administration made only minimal efforts to seek advice from congressional committees prior to issuance of the new security classification rules. Although the revision effort had been ongoing for over a year, selected congressional committees were formally notified only toward the end of the process and were originally allotted less than three weeks for comment. The comment period was extended upon request, but the short additional period of time allowed was insufficient to enable committees to solicit public comments or to conduct public hearings. Also, the Administration refused to explain on the record what problems the draft order was designed to solve or what the proposed changes were intended to accomplish.

The Committee finds that the Reagan Administration made no effort to inform the public of its plans to revise the security classification rules or to solicit public comments at a meaningful time during the revision process.

The Committee finds that virtually all of the controversial provisions of Executive Order 12356 were already in place before a draft was released for review by anyone outside the executive branch. In essence, the consultation period was so limited and so late that most of the decisionmaking had already been completed.

2. Recommendations

The Committee recommends that any future plans to revise security classification rules, whether by executive order or other executive action, be announced publicly.

The Committee recommends that any proposals to change security classification rules be circulated publicly for a period of at least sixty days and that public comments be accepted and considered by the President.

The Committee recommends that any proposals to revise security classification rules be provided to the Congress with sufficient time to permit interested congressional committees to consider the proposals, to hold hearings, and to prepare comments.

The Committee recommends that the National Security Adviser or other official charged with policy responsibility for presidential security classification rules provide written findings detailing the problems that any proposed security classification rules changes are intended to solve, and written explanations to the Congress and to the public of the purpose and scope of any proposed changes. If the findings or explanations are classified, then a classified version should be provided to congressional committees and an unclassified version should be made public.

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B. Reagan Administration Justification for the Changes in the Executive Order on Security Classification

On its face, the Reagan Executive Order on Security Classification significantly changes or modifies many of the basic classification policies established by President Carter and previous presidents. Public witnesses who testified before the Committee pointed out that the order represented a major change in a thirty year trend toward narrowing and refining classification guidelines and procedures.[237]

However, statements by Reagan Administration officials about Executive Order 12356 do not indicate that the changes made by the new order are as sweeping as others have contended. In fact, there are important conflicts between the language of the order and the explanations offered by Administration officials. The gap between the order and the explanations is wide, and it casts serious doubts on the credibility of Reagan Administration spokesmen who have attempted to minimize the substantive differences between Executive Order 12356 and previous orders.

For example, the Reagan order adds three completed new categories of information that are subject to classification and modifies one of the existing categories. In addition, several prohibitions against the classification of categories of information that appeared in the Carter order are eliminated. The Reagan order also drops provisions requiring the balancing of the public interest in disclosure against the national security need for secrecy when deciding whether classified information should be declassified.

Reagan Administration officials who testified before the Subcommittee denied that these changes would have a significant effect on the amount of information that will be subject to classification. Steven Garfinkel of the Information Security Oversight Office stated that the universe of information that could be classified was essentially the same under both the Carter and Reagan orders.[238]

These assurances that the intent and scope of the new order are narrow are difficult to reconcile with the sweeping language of the order. All of the changes mentioned above appear to expand the authority of Government officials to classify information. It is, of course, possible that the new authority will be used sparingly and that, as asserted by Administration spokesmen, no additional information will be classified as a result of the new order. However, it is well established that existing classification authority has been regularly abused in the past.[239] Also, the order establishes no new controls that would be necessary to prevent abuse of classification authority in the future. Thus, it is reasonable to conclude that, whether or not it was intended, the new order will lead to the classification of additional information.

Why were the changes made? During the course of the May 5 hearing before the Subcommittee on Government and Individual Rights, many different reasons were cited. Some of the reasons were general, and some were specific justifications of specific provisions. There was

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[237] Hearings at 50 (statement of Morton Halperin, Director, Center for National Security Studies); Hearings at 87 (statement of Charles Rowe, American Newspaper Publishers Association); Hearings at 97 (statement of Bob Schieffer, Society of Professional Journalists).

[238] Hearings at 184. See also text accompanying notes 82–84, 114, and 145.

[239] See text accompanying notes 277–283.

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In response to a followup question after the hearing, Garfinkel confirmed that while other types of information may fall within this category, "no other general subject areas were involved in formulating the new 'vulnerabilities and capabilities' category." [248]

This new classification category was the source of a great deal of concern on the part of some observers because the scope of the new category appears to be overly broad. Allan Adler and Morton Halperin of the Center for National Security Studies testified that the new category—

> would also appear to permit classification of information concerning data processing, telecommunications and other "systems, installations, projects or plans" in which the primary current applications of technological research and development have only a tangential or speculative relationship to national security.[249]

CBS News correspondent Bob Schieffer, representing the Society of Professional Journalists, expressed similar fears that a vast quantity of information could be classified under the new category:

> I fear that anything open to criticism—any vulnerability—in a proposed new plane or tank or bullet would be shielded from scrutiny under the new Order, and that our ability to learn how well our money is being spent to arm America would virtually cease.[250]

If the Administration intended to provide protection only for the three narrow categories of data that were described by Mr. Garfinkel, then the new order should have identified the categories much more specifically. The broad language used in the order increased the concerns of those outside the Administration that sweeping new classification authority was being claimed. The problem was exacerbated by the failure of any responsible Administration official to provide, at an early stage of the revision process, a complete public explanation of the purpose of the change. Also, the discrepancy between the actual language of the order and the eventual explanation did little to increase the credibility of Administration spokesmen.

However, even if a narrow explanation had been provided in a timely fashion, the broad language of the provision still raises valid questions. It is reasonable to assume that the Administration has draftsmen capable of writing a more specific provision. Thus, one might conclude that that the language was intentionally broad and that the explanation provided to the Committee does not fully reflect the purpose of the changes.

The language used in the new classification category may continue to present problems in the future. Classifiers may read the new classification category and be encouraged by its breadth, as well as by other changes in the order, to classify documents that do not require protection. This may increase overclassification [251] and the attendant expense of protecting, maintaining, and storing the classified information.

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[248] Letter from Steven Garfinkel to Glenn English (June 22, 1982) (available in files of Subcommittee on Government Information and Individual Rights).
[249] Hearings at 76.
[250] Hearings at 98.
[251] See generally text accompanying notes 275–291.

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The credibility of the Administration on classification issues was also diminished by the use of inconsistent justifications for some of the changes in the order. For example, some provisions were deleted from the Carter order on grounds of economy or redundancy. But this principle was not applied consistently. Some admittedly redundant provisions were not removed and other provisions were added even though there was little question that the existing language was adequate.

The clearest instance of the inconsistent application of the redundancy principle comes from several provisions of the Carter order that limited classification authority.[252] The February 4, 1982 draft order proposed to remove all three limitations because they were "self-evident." [253] In response to a question, Garfinkel indicated that the provisions were redundant and that they had been removed from early drafts because of "a conscious effort to keep the order as short as possible and as simple as possible." [254]

The final order retained one of the limitations, [255] the one prohibiting the classification of basic scientific research not clearly related to the national security, and left out the limitations prohibiting classification of private technology and references to classified documents. The explanation for the difference in treatment was "the provision regarding basic scientific research raised such concern within the scientific community that we thought it was better to be redundant." [256] Garfinkel stated that there wasn't much concern expressed about the other two limitations.

This explanation confirms the inconsistent application of the redundancy principle but suggests that it was sacrificed in this instance, to a higher principle. This would be admirable if it could be accepted as offered. But it is not apparent that the expression of concern from the scientific community was limited to the basic scientific research limitation. For example, a February 26. 1982, letter from Frank Press, President of the National Academy of Sciences to National Security Adviser William Clark complained about the deletion of all three limitations.[257] Similarly, witnesses at the March 10 hearing (who were not scientists) who complained about the deletion of limitations did not limit their comments to the scientific research limitation.[258]

Further, it is difficult to understand why the Administration relied on expressions of concern by outsiders as a reason for change. The draft order was never circulated publicly by the Administration. No attempt was made to collect comments from a range of interested parties.[259] Other concerns of the few groups that were able to obtain information about the revision process were ignored. What it was about this single comment from this single interest group that made it more compelling

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[252] E.O. 12065 at § 1-6.

[253] Information Security Oversight Office, "Comparison of Executive Order 12065 and the [February 4, 1982] Draft Order" 3, reprinted in Hearings, appendix 2.

[254] Hearings at 172.

[255] E.O. 12356 at § 1.6(b).

[256] Hearings at 172.

[257] A very similar letter from Frank Press to Glenn English is reprinted in Hearings, appendix 6. A copy of the letter from Frank Press to William Clark is available in the files of the Subcommittee on Government Information and Individual Rights.

[258] See, e.g., Hearings at 81–82 (Statement of Allan Adler and Morton Halperin, Center for National Security Studies).

[259] See text accompanying notes 217–221.

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than all of the other comments from this and from other interest groups is a mystery.[260]

At the same time that some classification limitations were removed as redundant, other apparently redundant language was added elsewhere. The classification category covering intelligence activities was modified to include a parenthetical reference to "special activities." [261] Yet neither Garfinkel nor Willard expressed any serious doubt that special intelligence activities were classifiable under the Carter order. The only explanation for the addition was because the issue was questioned once by a person seeking information from the CIA.[262]

Subcommittee Chairman English, noting that neither Garfinkel nor Willard had any problem with the classification of special intelligence activities, pressed to learn "where did the ambiguity come from?" The response from Garfinkel was "I do not know what gave rise to the particular concerns of the Agency." When asked if he had pursued the issue with the CIA, Garfinkel responded: "It didn't seem to be such a big deal that it was necessary to pursue any further." [263]

The savings resulting from the deletion of a few words from the order were admittedly insignificant.[264] But these savings were apparently enough to justify the elimination of words in those instances where the words imposed restrictions on classification authority. Where words increased the ability of the government to classify data, however, the cost of those extra words was truly insignificant, and the words were added.

A final example of the difficulties arising from the explanations provided comes from the new classification category covering "confidential sources." [265] In this case, the explanation offered to the Committee was devoid of any apparent logic.

Under the new order, "confidential source" is defined to include:

> any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation, expressed or implied, that the information or relationship, or both, be held in confidence.[266]

In explaining the new classification category, Mr. Garfinkel stated that it would not give the government authority to classify information that was not classifiable under the Carter order. The new category was added because "it was expressed to me and others that some

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[260] One part of the February 4, 1982, draft that was criticized and was changed in the final order involved the portion marking requirements. The February 4 draft proposed to delete the Carter order's strict rules for portion marking. The Carter order required that each portion of a classified document be marked so that classified portions could be distinguished from unclassified portions. E.O. 12065 at § 1-504. The draft Reagan order weakened the portion marking rules by requiring marking only when a classified document was transmitted outside the originating agency. See § 1.5(b) of the February 4, 1982, draft, reprinted in Hearings, appendix 2. The proposed change to the portion marking rules was criticized by Allan Adler and Morton Halperin of the Center for National Security Studies, and by Bob Schieffer, Society of Professional Journalists. See Hearings at 78 and 97–98. No detailed explanation was provided for the delegation or restoration of the portion marking rule. The restoration of the Carter order portion marking rule was one of the few substantive differences between the February 4 draft and the final order as signed by the President.

[261] E.O. 12356 at § 1.3(a)(4). See text accompanying notes 111–113.

[262] Hearings at 203 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).

[263] Id.

[264] Id. at 216 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).

[265] E.O. 12356 at § 1.3(a)(9). See also text accompanying notes 105–110.

[266] E.O. 12356 at § 6.1(f).

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agencies have severe problems with the idea of identifying some of its sources as intelligence sources. It creates problems in their relationships with these sources." [267]

This explanation is not believable. How would a source know how its identity was classified by an agency? When information is classified, the applicable classification category is not identified on the document. The document is simply marked as containing classified information of a particular level. There is no practical way for a source to know on what basis its identity was kept secret.[268] Further, it is not apparent why a source would care what bureaucratic reasoning was employed as a justification for that secrecy as long as secrecy was assured.

Further, the possibility that the identity of a source might be requested under the FOIA fails to provide an adequate explanation. First, the identity of sources is protected by statute,[269] and identifying information is not available under the FOIA. Second, even if the question of disclosure were seriously contested in an FOIA case, the identity of the source would not be revealed during the course of the case. Thus, there is no way that the classification category could be publicly linked with the identity of the source. Lastly, in the extraordinarily unlikely event that a source were identified, surely it would be the fact of identification rather than the category of classification that would be most disconcerting to all parties involved.

Finally, the vagueness of the Carter order classification categories would have permitted sources to be classified without treating them as intelligence sources. The final classification category in the Carter order allowed the classification of "other categories of information which are related to national security".[270] If the classification of some sources as intelligence sources were a significant problem, then the classification could have been easily justified under this category on other grounds. However, it appears that the problem was not significant enough to warrant this simple step.[271]

In an attempt to clarify the new category, Subcommittee Chairman Glenn English wrote to Steven Garfinkel after the hearing asking him to explain how sources know on what basis their identity is classified. Garfinkel responded:

> The Department of State has reported to ISOO the following scenario in which a source may determine the manner in which his or her identity is being protected. There may be a press briefing in which the Department of State releases certain information and indicates that the information was received from a "confidential" source, rather than an "intelligence" source. The source can recognize himself or herself from the information released and reported in the press. Usually, the source does not want to be identified, even indirectly, as an "intelligence" source, a label that may cause uneasiness or worse in some parts of the world. Even though the likeli-

[267] Hearings at 204.

[268] If the confidential source requested his own records under the Freedom of Information Act, the request could be denied on the grounds that the records were classified. See 5 U.S.C. § 552(b)(1) (1976).

[269] See 50 U.S.C. § 403g (1976); 5 U.S.C. § 552(b)(7)(D) (1976).

[270] E.O. 12065 at § 1–301(g).

[271] The authority to establish additional categories was only used once. See Hearings at 205 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).

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hood of his or her name surfacing is remote, it is still deemed preferable to be identified as a "confidential" source.[272]

This explanation sheds no more light on the subject than the explanations at the hearings. What the State Department discloses at press briefings is totally within the control of the State Department. It may use any labels it wishes to categorize sources referred to at those briefings. This additional explanation is no more credible than the earlier explanations.

In the same letter, Garfinkel was asked what type of problems were reported to ISOO with respect to the classification of sources as intelligence sources. The answer:

> The Department of State has also reported that it is concerned lest a court consider that sources of, for example, clearly political or economic information are not, in fact, intelligence sources within the generally accepted meaning of the term, and that they cannot therefore, be validly protected under the category "intelligence sources and methods." Specific provision is required to protect these non-intelligence sources of information.[273]

Garfinkel cited no actual instances of problems that have arisen in this area. No cases were cited for the proposition that sources of political or economic data are not "intelligence sources" within the generally accepted meaning of the term. In fact, no court cases were cited in connection with the alleged problems with the protection of confidential sources. The "problems" that Garfinkel referred to appear to be hypothetical at best and non-existent at worst.

It is more likely that the addition of "confidential sources" as a classification category was done in order to allow a definition to be included. The new definition covers not only actual sources of information but "potential" sources as well. Although Administration officials denied that the new definition would permit the classification of any information that was not classifiable under the Carter order,[274] it is not certain that potential sources could have been classified under the Carter order. No information was provided explaining why authority to classify "potential sources" was needed.

1. Finding

The Committee finds that the Reagan Administration failed to provide the Congress and the public with a full and complete explanation of the changes that were made in the Executive Order on Security Classification. Many of the explanations offered after the order was signed by the President were inadequate, inconsistent, incomplete, or not credible. It remains uncertain why many of the changes were made, and there is substantial doubt that the changes could be justified.

2. Recommendation

The Committee recommends that changes in the Executive Order on Security Classification that increase classification authority be made only when a concrete problem with the protection of sensitive information has been clearly identified. Amendments to the text of

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[272] The letter is dated June 22, 1982, and is available in the files of the Subcommittee on Government Information and Individual Rights.
[273] Id.
[274] Hearings at 184 (Statement of Steven Garfinkel, Director, Information Security Oversight Office).

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the order should be precisely and narrowly drafted to address the problems that have been identified. In making changes, the President should give careful consideration to the interpretation likely to be given to new provisions by those with classification authority who have a known predilection to overclassify information and to abuse existing classification authority.

C. Overclassification

There is no doubt whatsoever that classification authority is used to protect information that does not require protection in the interest of national defense or foreign policy. This has been a consistent finding of presidents, congressional committees, commissions, and other observers.[275] Presidents Eisenhower, Nixon, and Carter each revised the rules for security classification in order to restrict and control the use of classification authority.[276]

Recent studies by the General Accounting Office provide additional evidence that overclassification continues to be a significant problem. A 1979 GAO report on classification problems at the Department of Defense, the agency that classifies more information than any other government agency, found that about 24 percent of the classified documents reviewed contained one or more examples of overclassification.

> Both Executive orders [E.O. 11652 and E.O. 12065] and the various implementing instructions describe the types of information that should be classified for national security reasons—to preclude overclassification and underclassification and to make information about the Government available to the maximum extent possible. Nevertheless, we identified examples of improperly classified information at each DOD installation and office visited. *Of the 556 documents reviewed, 133, or about 24 percent, contained one or more examples of improper classification. None of these cases involved classified information which was incorrectly treated as unclassified.*
>
> The following are some of the more significant problems noted:
>
> Information not related to national security was classified.
>
> References to classified documents were classified.
>
> The same information was classified inconsistently.
>
> Information that lost some of its sensitivity was not downgraded.
>
> When there was doubt about the level of classification, a higher classification level was assigned.[277] [Italic supplied.]

A later GAO report on the classification practices of Defense Department contractors with derivative classification authority found similar problems of overclassification. There are over ten thousand contractor facilities which have been cleared to handle classified infor-

[275] See, e.g., the discussion of previous studies of security classification systems in 1973 Government Operations Security Classification Report, supra note 6 at 15–27. See also Committee on Government Operations, "Availability of Information from Federal Departments and Agencies (Department of Defense)," H.R. Rep. No. 1884, 85th Cong., 2d Sess (1958).

[276] See generally text accompanying notes 37–73.

[277] General Accounting Office, "Continuing Problems in DOD's Classification of National Security Information" 12 (LCD–80–16) (October 26, 1979).

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mation, and the GAO estimated that contractors were holding approximately 16 million classified documents.[278]

The GAO auditors found that over 50 percent of the documents they reviewed were overclassified:

> We reviewed 235 classified documents to determine if various portions of the documents were classified correctly. We discussed the documents with the contractor employees who had derivatively classified the information and verified the basis for classification—classification guides or documents already classified. Of the 235 documents, 119, or about 51 percent, contained one or more examples of improper classification. Of the 119 documents, 109 had portions that were overclassified, and 10 had portions that were both underclassified and overclassified.[279]

The problem of overclassification was recognized early in the Reagan Administration by top officials. In an interview with Meg Greenfield, editorial page editor of the Washington Post, Presidential Counselor Edwin Meese III responded to a question about overclassification:

> Question. But haven't you found since you have been here that there is too much classification?
>
> Answer. Oh, yes, I think there is way too much classification, and I think that's one of the things that has given rise to the relative freedom with which some of the reporters use this material, and I think that's one of the problems of government—that is, the overclassification of documents. You really should only classify something if its revelation would actually harm the national security. Not that it would embarrass someone or make someone look bad.[280]

At the May 5 hearing before the Subcommittee on Government Information and Individual Rights, Steven Garfinkel, the Director of the Information Security Oversight Office was asked if he agreed with Mr. Meese's statement that "there is way too much classification." Garfinkel responded:

> I would agree. There are many documents that were originally classified that didn't merit that classification. Now, as to oversight experience, on our reviews, about 5 percent of the documents that we review clearly don't merit classification and we request that the agency review it for purposes of declassifying it.[281]

Later in the hearing, Garfinkel elaborated:

> You could say any overclassification is way too much, but I think that a 5-percent figure, or perhaps even a 10-percent figure, is not to be unexpected. Bureaucrats, like most people, are naturally very cautious. If the situation ordinarily arises where they have information that they believe is sensitive and they have to make a decision about it, whether it has been under the present order or not, generally the people are classify-

[278] General Accounting Office, "DOD Should Give Better Guidance and Training to Contractors Who Classify National Security Information" 2 (PLRD-81-3) (March 23, 1981).
[279] Id. at 14.
[280] Washington Post, July 7, 1981.
[281] Hearings at 146.

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> ing this information. So there is a tendency to classify the information when you are in doubt. Sometimes that results in overclassification.[282]

Garfinkel's estimate of five or ten percent government-wide is considerably less than the amount of overclassification found by GAO at the Department of Defense. The Department of Defense originally classifies more documents than any other government agency.[283]

The fact that overclassification exists is undisputed. However, the serious consequences of overclassifiction are only rarely considered. Not only does the overclassification of information interfere with the public right to know about the operations of government, but it interferes with the security that classification system is designed to protect. In the Pentagon Papers case, Justice Stewart made the point this way:

> For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.[284]

In its report on classification problems at the Department of Defense, the General Accounting Office pointed out that the consequences of overclassification include reduced public confidence, weakened protection of truly sensitive information, and increased cost:

> Even though the Executive order [E.O. 12065] and implementing instructions clearly describe the types of information that should be classified and even specify other types that should not be classified, our review indicated that a sizable percentage of the information classified was not classified properly. Improper classification causes less information to be made available to the public, reduces public confidence in the system, weakens protection for truly sensitive information, and increases administrative costs.[285]

At the March 10, 1982, hearing, Glenn English, Chairman of the Government Information and Individual Rights Subcommitttee, compared classification and money:

> [C]lassification is like money. It cheapens as you expand it. The more money you print, the cheaper it is. The more you print, the more inflation you get. The more classification you use, the cheaper the classification mark itself becomes.[286]

President Carter personally noticed that overclassification was a serious problem. In a letter to the Committee, former White House

[282] Hearing at 151–52.
[283] General Accounting Office, supra note 277, at 2. See also General Accounting Office, "Improved Executive Branch Oversight Needed For the Government's National Security Information Classification Program", supra note 69 at 6–7; Information Security Oversight Office, "Annual Report to the President (Fiscal Year 1979)" 36.
[284] *New York Times Co.* v. *United States*, 403 U.S. 713, 729 (1971) (concurring opinion).
[285] General Accounting Office, supra note 277, at 17.
[286] Hearings at 15.

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staffer Richard M. Neustadt told of Carter's experiences and provided an example of the consequences of classification "grade escalation":

> [President Carter] recalled that during his period of military service the classification "Confidential" was reserved for documents of extraordinary sensitivity. Since then, overuse has downgraded these classification levels, and routine rubberstamping has undermined respect for the whole system. Everyone who participated in the process of writing E.O. 12065 agreed that vast amounts of routine paperwork containing no real national security information had been classified at the "Confidential" level. As a result, genuine national security material required a higher classification level. This problem of "grade escalation" had reached the point that in the White House it was widely assumed that any document classified below the "Top Secret" level was not worth reading. This escalation forced the creation of extra classification levels above "Top Secret," such as the eleborate "codeword" classification schemes administered by the intelligence community.[287]

The Reagan Administration does not dispute the negative consequences of overclassification. Steven Garfinkel of the Information Security Oversight Office said that the "most critical problem concerning overclassification is its impact on public disclosure." [288] He went on to described other results:

> There are other reasons that ISOO does not condone overclassification, and gives priority to preventing it through its oversight activities. Overclassification results in far greater costs to the government and taxpayer to create, store, transmit, maintain and destroy information. It also lessens intra-agency or inter-agency accessibility, which may impact adversely on the decision-making process. (These problems are also a product of overgrading, but to a lesser extent.) Finally, and most importantly save for public access, a pattern of overclassification tends to subvert the entire information security system, jeopardizing the respect necessary to protect information that truly warrants classification.[289]

Overclassification also interferes with the functioning of the Congress. Rep. Lee Hamilton, Chairman of the Subcommittee on Europe and the Middle East of the House Foreign Affairs Committee and a member of the Permanent Select Committee on Intelligence, described this aspect of overclassification in a statement on the House floor made shortly after President Reagan signed Executive Order 12356:

> Overclassification has more of an effect on the proper functioning of Congress than one might imagine. In principle, Members of Congress are supposed to have access to classified material, and constitutionally they are allowed to discuss sensitive material in public if it pertains to valid legislative duties. In practice, however, overclassification makes quite

[287] Letter from Richard M. Neustadt, reprinted in Hearings, appendix 5.
[288] Letter from Steven Garfinkel to Glenn English (June 22, 1982) (available in files of Subcommittee on Government Information and Individual Rights).
[289] Id.

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> a difference. Many legislators hesitate to discuss secret documents even if they think the classification is unjustified. Given the tight schedules on Capitol Hill, most lawmakers are unwilling to spend time getting such documents declassified. Also, the level of classified information presented in closed briefings varies with the Members of Congres who attend, and Members who have direct access to most classified material, such as those who serve on the Intelligence Committees, are restricted by internal rules in what they may discuss with their colleagues. Overclassification breeds mistrust between Congress and the administration, friction grows when legislators can find out more from the newspaper than they can from the administration. Overclassification also increases the likelihood that claims of executive privilege will lead to a constitutional clash.
>
> As a member of the House Intelligence Commitee, I appreciate the fact that access to certain information must be restricted. But as a member of the House Foreign Affairs Committee, I know how difficult it is to formulate and explain foreign policy when the administration acts on undisclosed information, when the access to sources is overly restricted, or when the release of information is unnecessarily delayed. My impression is that Congress' current access is not what it should be. The President's proposal will impair it further.[290]

GAO has identified some of the causes of overclassification. They include lack of knowledge of classification requirements and a lack of incentive against excessive classification:

> We believe that the examples described in this chapter demonstrate that a serious problem exists within DOD in that individuals who originally or derivatively classify information either are not fully knowledgeable of the requirements of the order and implementing instruction or prefer to follow a course of action that would result in a lesser penalty to them if they incorrectly classify information.[291]

There is little reason to think that Executive Order 12356 will reduce the unnecessary classification of government information. All of the major changes made by the new order loosen the restrictions on classification. These changes will have the effect of—

Increasing the amount of information subject to classification by the addition of broad, new classification categories;

Weakening the minimum standard for determining whether information qualifies for classification by dropping the requirement that damage to the national security be "identifiable";

Dropping the balancing test that required classifiers to consider the public interest in disclosure against the need to protect information;

Removing limitations on abuse of classification authority that appeared in the previous order; and

Permitting the reclassification of information that was declassified and publicly released.

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[290] 128 Cong. Rec. E1564–65 (Apr. 6, 1982).
[291] General Accounting Office, supra note 277, at 17.

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In fact, there is virtually nothing new in Executive Order 12356 to inhibit the overclassification of information. This is not surprising. Although Administration officials readily acknowledged that overclassification of information was a problem under previous classification rules, the solution of this problem was never identified as a major, or even minor, goal of the new order. No Administration spokesman claimed that the order was designed to restrict classification authority for the purpose of preventing overclassification.

Perhaps the best that can be said for Executive Order 12356 on the issue of overclassification is that as more and more documents qualify for classification, there will necessarily be fewer documents that can be improperly classified. The Reagan Administration has changed the rules in a way that will define away the problem. This is akin to responding to a prison escape by expanding the boundaries of the prison so that it can be claimed that the escaped prisoners are no longer technically outside of prison facilities.

There is an apparent need for some new administrative control to prevent the overclassification of information in the name of "national security." Previous Executive Orders were not successful in limiting overclassification, and it is unlikely that Executive Order 12356 will do anything to improve the situation.

Great progress has been made in recent years in the management, control, and use of information. Some of the progress has been the result of new technology,[292] and some has been the result of better understanding of the importance of information as a resource.[293] A number of recent federal laws have addressed the maintenance and use of information by the federal government,[294] the credit reporting industry,[295] and schools and universities.[296] States have also been active in passing laws affecting information.[297]

The new understanding of information and information policy may provide some useful ideas for controlling classified information and for preventing overclassification. One of the most interesting recent federal laws that may provide a model for a classification control system is the Paperwork Reduction Act of 1980.[298] The objectives of that Act include reducing the cost of collecting, managing, and disseminating information by federal agencies; ensuring that agencies collect only as much information as they need and can use effectively, and reducing the information burden imposed on the public by the government.[299] The Office of Management and Budget, which overseas the operation of the Act, claims that the information collection budgeting system has allowed a 17 percent reduction in federal paperwork burden during fiscal years 1981–1982.[300]

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[292] See, e.g., "The Information Science and Technology Act," Hearings on H.R. 3137 before the Subcommittee on Science, Research and Technology of the House Committee on Science and Technology, 97th Cong., 1st Sess. (1981); Office of Technology Assessment, "Computer-Based National Information Systems" (1981).

[293] See, e.g., R. V. Head, "Federal Information Systems Management: Issues and New Directions" (1982) (Brookings Institution); National Telecommunications and Information, U.S. Department of Commerce, "Issues in Information Policy" (1981).

[294] See, e.g., Privacy Act of 1974, Pub. Law No. 93–579, 88 Stat. 1896 et seq. (1974) (codified in part at 5 U.S.C. § 552a (1976)).

[295] See, e.g., The Fair Credit Reporing Act, Pub. Law No. 91–508, 84 Stat. 1127 et seq. (codified at 15 U.S.C. § 1681 et seq. (1976)).

[296] Family Educational Rights and Privacy Act, Pub. Law No. 93–568, 88 Stat. 1858 (1974) (codified at 20 U.S.C. 1232g (1976)).

[297] See, e.g., R. E. Smith, "Compilation of State and Federal Privacy Laws" (1981).

[298] Public Law 96–511, 94 Stat. 2812, 44 U.S.C. § 3501 et seq. (Supp. IV 1980).

[299] See Office of Management and Budget, "Managing Federal Information Resources, First Annual Report Under the Paperwork Reduction Act of 1980" 1 (April 1, 1982).

[300] Id. at 11.

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Information that is classified in the interests of national defense or foreign policy differs in many respects from information maintained in the private sector or maintained elsewhere in the federal government. Nevertheless, the principles of information management that have been recognized in recent years may still be applicable to the control of classified information and the prevention of overclassification. Given the high costs of overclassification, further study is needed.

1. Findings

The Committee finds that abuse of classification authority and overclassification of government information continues to be a serious problem. Overclassification results in unnecessary restrictions on the public availability of information, a reduction in public confidence in the classification system, a weakening of the protection for information that is truly sensitive, and an increase in the cost of government.

The Committee finds that Executive Order 12356 offers nothing that will address the problems of overclassification. Unless new action is taken to control overclassification, the new order is likely to make matters worse because it gives classifiers vaguer guidelines, fewer restrictions, and unnecessary additional classification authority.

2. Recommendation

The Committee recommends that the National Security Council, the Information Security Oversight Office, and the Office of Information and Regulatory Affairs of the Office of Management and Budget work together to develop and apply new methods of preventing overclassification and of limiting abuse of the classification authority contained in Executive Order 12356. These agencies should report to the Congress on their efforts no later than September 30, 1983.

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