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SECURITY CLASSIFICATION AS A PROBLEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY

PREPARED FOR THE USE OF THE
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UNITED STATES SENATE

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PREFACE

The controversy generated by the Pentagon Papers is the most recent manifestation of the subterfuge which has undermined popular confidence in our leaders and in our institutions. The U-2 incident of 1960, the Bay of Pigs affair, the Dominican intervention, and the Executive branch's misrepresentations concerning the war in Southeast Asia have all contributed to the skepticism of the general public towards the actions and policies of our Government. Excessive secrecy tends to perpetuate mistaken policies, and undermines the democratic principles upon which this country was founded. For this reason, I requested a study by the Congressional Research Service of the Library of Congress of the security classification procedure and the problem it presents to Congress in the performance of its Constitutional role. I believe that this memorandum will be of interest to both my colleagues and to the general public.

The memorandum was prepared by the Foreign Affairs Division of the Congressional Research Service, to which I express my appreciation.

J. W. FULBRIGHT, *Chairman.*

(III)

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SECURITY CLASSIFICATION AS A PROBLEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY

I. INTRODUCTION

Security classification in this paper means the formal process in the Executive Branch of limiting access to or restricting distribution of information on the grounds of national security. The purpose of this paper is to survey the security classification process to determine how it affects the work of Congress on foreign policy and to explore proposals for changing the process. It does not deal with the related problems of loyalty or censorship, and it attempts to differentiate the problem of security classification from the problem of executive privilege, that is the withholding of either classified or unclassified information from Congress by the Executive Branch on the grounds that it is the right of the President to do so.¹

First, as background for considering proposed changes, the study outlines the origin of the system, the legislation and regulations on which the Executive Branch bases its process of classification, and present practice. Second, it discusses the access of Congress to classified information and the relationship of classified information to the role of Congress in making foreign policy. Finally, it explores proposals for changing the present classification system.

Secrecy has been a factor in making foreign policy since the first days of the nation's history. At the Constitutional Convention the belief that negotiations with other countries might require secrecy was a major element in vesting the treaty power in the President and the Senate rather than in the entire Congress. Similarly, military secrecy in time of war is a long-standing practice. It is only in the period since the Second World War, however, that the problem of classified information has grown to its present dimensions. More formalized procedures, the greater United States involvement in world affairs, the concept of an all-pervading threat from the Soviet Union and other Communist countries, the growing size of the government, and vastly increasing amounts of information have all contributed to a tremendous increase in the amount of information treated as secret.

Classification practice today is based primarily on Executive Order 10501 and the manner in which it is interpreted and carried out throughout the Executive Branch. Although there is no legislation establishing a classification system, during the first ten post-war years Congress in effect cooperated or at least acquiesced in the Executive Branch's establishment of a classification system through such legislation as the Atomic Energy Act of 1946, the National Security Act of 1947, and the Internal Security Act of 1950. Since 1955, however,

¹ For an examination of the question of executive privilege, see the Congressional Research Service report, "Executive Privilege, a Brief Survey," by Majorie Browne, July 23, 1971. C.R.S. Multilith 71-238F.

Congress has moved in the direction of preventing excessive withholding of information through amendment of some of the statutes which were being used to justify the classification system. Nevertheless the dimension of the problem of classified information does not appear to have been significantly reduced. There is general agreement that the quantity of classified information and documents remains huge and includes many documents which should no longer be classified. Moreover, many observers would say that much information never should have been classified in the first place.

There are two main ways in which the security classification of information affects the work of Congress in the foreign affairs field. First, it limits the kind and amount of information which Congress receives. Second, it circumscribes what Congress can do with information which it does receive, especially what it can pass on to the public to explain its position.

Members of Congress can frequently obtain classified information upon request. If requested information is withheld, it apparently is ultimately done so on the grounds of executive privilege rather than on the grounds that it is classified. However, the classification of information does prevent Congress from making it public. Moreover, it may prevent Congress from knowing that it exists and hence requesting it. Classification leaves the Executive Branch in fuller control over what information it will provide both Congress and the public since it bars journalists and scholars from access unless the Executive Branch wants to make it available (or "leak" it) to them.

Many of the proposals relating to the classification problem aim at cutting down the amount of classified information or making certain that information which would not jeopardize national security is not classified. Action in this direction might reduce the frequency of instances in which information in the foreign affairs field cannot be obtained even when it is unlikely that the information could in any way jeopardize the national security if it were made public. The problem for Congress in the foreign affairs field, however, goes beyond reducing unnecessary classification. It involves finding a way for Congress to make certain that it receives the full information necessary for exercising its war and foreign policy powers, including information which most people would agree should be kept secret from potential enemies. It may also involve finding a way for Congress to share in determining what information is classified and thus kept secret from the American people.

II. THE ORIGIN AND LEGAL BASIS OF PRESENT CLASSIFICATION PROCEDURES

A. ORIGIN

Secrecy has been practiced to some degree in diplomatic and military affairs throughout the nation's history. For example, in 1790 Presented Washington presented to the Senate for its approval a secret article to be inserted in a treaty with the Creek Indians.² A formal and extensive classification system to keep certain information secret

² U.S. Congress, Senate, Executive Journal, vol. I, p. 55 (Aug. 4, 1790).

for purposes of national security did not develop until much later, however. According to one authority,

Measures and practices for the protection of official information in general long served to protect any defense information that needed protection without there having to be any clear distinction between defense information and other official information requiring protection.³

The use of markings such as "Confidential," "Secret," or "Private" on communications from military and naval or other public officials "can be traced back almost continuously into the War of 1812."⁴ However, the roots of the present classification system appear to be found around the time of the First World War. A General Order of the War Department dated February 16, 1912, established a system for the protection of information relating to submarine mine projects, land defense plans, maps and charts showing locations of defense elements and the character of the armament, and data on numbers of guns and the supply of ammunition, although it prescribed no particular markings.⁵ A General Order from the General Headquarters of the American Expeditionary Force dated November 21, 1917, established the classifications of "Confidential," "Secret," and "For Official Circulation Only."⁶

The classification system established during the First World War was continued after the war was over. Army Regulation 330-5 of 1921 stated:

A document will be marked "Secret" only when the information it contains is of great importance and when the safeguarding of that information from actual or potential enemies is of prime necessity.

* * * * *

A document will be marked "Confidential" when it is of less importance and of less secret a nature than one requiring the mark of "Secret" but which must, nevertheless, be guarded from hostile or indiscreet persons.

* * * * *

A document will be marked "For official use only" when it contains information which is not to be communicated to the public or to the press but which may be communicated to any persons known to be in the service of the United States whose duty it concerns, or to persons of undoubted loyalty and discretion who are cooperating with Government work.⁷

In a 1935 revision the term "Restricted" was introduced as a fourth category, to be used when a document contained information regarding research work on the design, test, production, or use of a unit of military equipment or a component thereof which was to be kept secret. It also emerged in 1935 that documents on projects with restricted status were to be marked:

Restricted; Notice—This document contains information affecting the national defense of the United States within the meaning of the Espionage Act (U.S.C. 50:31, 32). The transmission of this document or the revelation of its contents in any manner to any unauthorized person is prohibited.⁸

Executive Order No. 8381 issued March 22, 1940, by President Roosevelt, entitled "Defining Certain Vital Military and Naval In-

³ National Archives, "Origin of Defense-Information Markings in the Army and Former War Department," prepared by Dallas Irvine, Dec. 23, 1964, p. 2.

⁴ Ibid.

⁵ Ibid., p. 7.

⁶ Ibid., p. 16.

⁷ Ibid., p. 21.

⁸ Ibid., p. 24. Change No. 3 in Army Regulation No. 850, Feb. 12, 1935.

installations and Equipment" gave recognition to the military classification system. In this order he cited as authority the act of January 12, 1938 (Sec. 795(a) of Title 18, part of the Espionage laws) which stated:

Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installation or equipment without first obtaining permission of the commanding officer. . . .⁹

In defining the installations or equipment requiring protection against the dissemination of information concerning them, the President named as one criterion the classification as "secret," "confidential," or "restricted" under the direction of either the Secretary of War or the Secretary of the Navy. In addition to military or naval installations, weapons, and equipment so classified or marked, included in the definition were:

All official military or naval books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawing, photographs, contracts, or specifications, which are now marked under the authority or at the direction 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.¹⁰

That Executive Order was superceded by Executive Order 10104 issued by President Truman February 1, 1950. In addition to the three designations previously mentioned, the new Executive Order referred for the first time to "top secret," although this designation had been in use some years earlier. In place of the Secretary of War and the Secretary of the Navy, Executive Order 10104 described the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force as being authorized to classify or direct to be classified the designated information.¹¹

On September 24, 1951, President Truman issued an executive order which officially extended the classification system to non-military agencies and to "security information—" Executive Order 10290, "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." It permitted any department or agency of the Executive Branch to classify and defined "classified security information" to mean "official information the safeguarding of which is necessary in the interest of national security, and which is classified for such purposes by appropriate classifying authority."¹²

President Eisenhower replaced Executive Order 10290 with Executive Order 10501, "Safeguarding Official Information," on November 9, 1953. It narrowed the number of agencies authorized to classify and redefined the usage of the various security labels. Executive Order 10501, which will be described later, and its revisions, form the basis for the present system of classification of information.

⁹ Sec. 795 of title 18, United States Code.

¹⁰ Par. 3, Executive Order 8381, Federal Register, Mar. 26, 1940, vol. 5, p. 1147-1148.

¹¹ Executive Order No. 10104, "Basic Documents," op. cit. p. 14.

¹² Pt. II, par. 4, Executive Order 10290, Federal Register, Sept. 27, 1951, vol. 16, p. 9797.

B. LEGAL BASIS

Executive Order 10501 does not claim to be authorized by a specific statute. Unlike Executive Order 10104, "Definitions of Vital Military and Naval Installations and Equipment," which is linked to a specific provision of the statutes, Executive Order 10501 contains in its preface as to authority only the general statement, "Now, therefore, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows. . . ." The Executive Branch apparently relies primarily on implied constitutional powers of the President and statutes which it claims afford a basis on which to justify the issuance of Executive Order 10501, acknowledging that there is no specific statutory authority for it. In 1970 when the Senate Foreign Relations Committee inquired of the State Department about the legal basis for the President's issuance of Executive Order 10501, the Legal Adviser of the State Department, John R. Stevenson, with the approval of the Department of Justice, referred to the Report of the Commission on Government Security of 1957 for a statement of the legal basis.¹³ That Commission cited provisions of the Constitution and stated: "While there is no specific statutory authority for such an order or Executive Order 10501, various statutes do afford a basis upon which to justify the issuance of the order."¹⁴

1. *Constitutional Provisions*

The three constitutional provisions cited by the Commission are in article II on the Executive Branch: Section 1, "The executive power shall be vested in a President of the United States of America"; section 2, "The President shall be Commander in Chief of the Army and Navy of the United States"; and section 3, ". . . he shall take care that the laws be faithfully executed." The Commission said:

When these provisions are considered in light of the existing Presidential authority to appoint and remove executive officers directly responsible to him, there is demonstrated the broad Presidential supervisory and regulatory authority over the internal operations of the executive branch. By issuing the proper Executive or administrative order he exercises this power of direction and supervision over his subordinates in the discharge of their duties. He thus "takes care" that the laws are being faithfully executed by those acting in his behalf; and in the instant case the pertinent laws would involve espionage, sabotage, and related statutes, should such Presidential authority not be predicated upon statutory authority or direction.¹⁵

The 1957 Commission report did not explicitly spell out the right of Congress to make laws affecting the classification system. However, recognition of this right was implicit in the Commission's conclusion that "in the absence of any law to the contrary, there is an adequate constitutional and statutory basis upon which to predicate the Presidential authority to issue Executive Order 10501,"¹⁶ and in the citation of various statutes as affording a basis upon which to justify the issuance of the order.

¹³ U.S. Congress, Senate, Committee on Foreign Relations, Subcommittee on United States Security Agreements and Commitments Abroad, 91st Cong., hearings, vol. II, pp. 2008-2010, Washington, U.S. Government Printing Office, 1971. Hereinafter cited as "Security Agreements and Commitments Abroad Hearings."

¹⁴ Ibid., p. 2010.

¹⁵ Ibid.

¹⁶ Ibid., p. 2011.

Among the provisions of Article I of the Constitution which might be cited as giving Congress powers to legislate in this field would be the following: Section 1, "All legislative powers herein granted shall be vested in a Congress of the United States . . .;" Section 8, "The Congress shall have power to . . . provide for the common defense and general welfare of the United States; . . . to make rules for the government and regulation of the land and naval forces; . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

2. *"Housekeeping" Act Prior to 1958 Amendment*

Prior to 1958, 5 U.S.C. 22, now 5 U.S.C. 301, sometimes called the "Housekeeping" act, was frequently cited as justifying a system for withholding information on the basis of a security classification system. This was the first and earliest statute cited by the 1957 commission as at that time providing a basis for Executive Order 10501. This statute had been enacted in 1789 with the purpose of providing the authority for government officials to set up offices and file documents.¹⁷ As early as 1877 and numerous times since then Section 22 of Title 5 of the U.S. code had been cited as authority to refuse information sought from the government.¹⁸ However, in 1958 the housekeeping statute was amended by P.L. 85-619 to specify that it did "not authorize withholding information from the public or limiting the availability of records to the public." The Department of State 1970 memorandum pointed out that since the 1958 amendment this statute was no longer relevant to the justification of classification. It is mentioned in this report as a matter of historical interest and to note the legislation of 1951 specifying that it should not be used as authority for withholding information.

3. *Espionage Laws*

Perhaps the statutes now most frequently cited for justification of the security classification of information are the espionage laws generally. The 1957 Commission cited the espionage laws second only to the housekeeping statute discussed above. It said:

The espionage laws have imposed upon the President a study to make determinations respecting the dissemination of information having a relationship to the national defense. For example, 18 U.S.C. 795(a) provides that "Whenever in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, . . . , etc." Proceeding under this statute the President issued Executive Order 10104 which covers information classified by the agencies of the military establishments.

In 18 U.S.C. 798 there is specific reference to the unauthorized disclosure of "classified information" pertaining to the cryptographic and communication systems and facilities. Furthermore, the term "classified information" is defined as information which for reasons of national security has been specifically designated by the proper government agency for limited or restrictive dissemination or distribution.¹⁹

¹⁷ U.S. Congress, House, Committee on Government Operations, "Amending Sec. 161 of the Revised Statutes With Respect to the Authority of Federal Officers and Agencies To Withhold Information and Limit the Availability of Records," H. Rept. 1461, 85th Cong., 2d sess., p. 1.

¹⁸ Ibid.

¹⁹ Hearing on U.S. security agreements and commitments abroad, op. cit., p. 2010.

It might be questioned whether the first provision mentioned above is a basis on which to issue an executive order covering classification by non-defense agencies since it relates to information pertaining to vital military and naval installations and has already been used to justify Executive Order 10104 on military information classified by the military departments.

The second provision mentioned, section 798, does refer to classified information, thus acknowledging its existence. However, it provides penalties only for actions relating to communications intelligence and cryptography, specifying four specific categories of classified information: (1) concerning the nature or preparation of codes; (2) concerning the apparatus used for cryptographic or communication intelligence purposes; (3) concerning the communication intelligence activities; or (4) obtained by the process of communication intelligence from the foreign government, with knowledge that it was so obtained. Moreover, this section which was added by Public Law 248 of October 31, 1951, makes it clear that its objective is to prevent the use of classified information relating to communication intelligence activities in a manner prejudicial to the safety of the United States, and not to prevent congressional access to it. Sec. 798(c) states:

Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.²⁰

Executive Order 10501 itself does not refer to Section 795 or 798 but instead refers to Sections 793 and 794 of Title 18 U.S.C., Section 5(j) of Executive Order 10501 states that when classified material affecting defense is furnished to persons outside the executive branch, the material should carry the statement, whenever practicable, "This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Sections 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law."²¹

Section 793, "Gathering, transmitting or losing defense information," provides penalties of a fine or imprisonment for (a) going into defense installations or in other ways obtaining information "respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation"; (b) copying or obtaining sketches, documents, or anything connected with the national defense; (c) receiving or obtaining from any source any document, writing, or anything connected with the national defense, knowing that it has been obtained contrary to the provisions of that chapter of law; (d) willfully transmitting to a person not entitled to receive it a document, etc., which a person either lawfully or without authorization possesses and has reason to believe could be used to the injury of the United States or the advantage of a foreign nation; or (e) when entrusted with any document or information relating to the national defense "through gross negligence" permitting it to be removed from its proper place "or to be lost, stolen, abstracted, or destroyed" or failing to report such loss, theft, abstraction, or destruction.

²⁰ Congressional Research Service, "Basic Documents on Security Classification of Information for National Security Purposes," Multilith 71-172 F, hereinafter cited as "Basic Documents," p. 15.

²¹ "Basic Documents," op. cit. p. 4.

Section 794 provides for imprisonment or the death penalty for (a) communicating or transmitting a document or information relating to the national defense to any foreign government, faction, citizen, etc. "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation"; or (b) "in time of war, with intent that the same shall be communicated to the enemy," collecting, publishing, communicating, or attempting to elicit any information with respect to the movement, numbers, or disposition of armed forces, ships, aircraft, or war materials or military operation plans or defenses "or any other information relating to the public defense, which might be useful to the enemy." In 1953 the provisions of this section in addition to coming into effect in time of war were extended to remain "in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 or such earlier date as may be prescribed by concurrent resolution of the Congress."²²

The espionage laws may make it sensible to have some kind of system for marking information which it would be a crime to transmit, but history does not indicate that the classification system developed directly from the Espionage Act of 1917 or that the Espionage Act was intended to authorize such a system. One student of the history of classification has observed:

There is no indication at this time [in 1917] that difficulties could arise in enforcing the Espionage Act if official information relating to the national defense was not marked as such, insofar as it was intended to be protected from unauthorized dissemination. Violation of the first three subsections of Section I, Title I, of the act depended upon intent, but violation of the other two subsections depended in the one case on material relating to the national defense having been turned over to someone "not entitled to receive it" and in the other case on such material having been lost or compromised through "gross negligence." Since the expression "relating to the national defense" was nowhere defined, the possibility of the public being permitted to have any knowledge whatever relating to the national defense, even the fact that Congress has passed certain legislation relating thereto, depended on application of the expressions "not entitled to receive it" and "gross negligence."

In any prosecution for violation of either of the last two subsections the burden of proving that one or the other key expressions had application in the case would rest on the prosecution, and proof would be difficult unless clear evidence could be adduced that authority had communicated its intention that the specific material involved should be protected or unless that material was of such a nature that common sense would indicate that it should be protected. For purposes of administering these two subsections of the Espionage Act the marking of defense information that is to be protected is almost essential, and its marking can also be of great assistance for purposes of administering the preceding three subsections.

It would be logical to suppose that the markings of defense information began out of the legal necessities for administering the Espionage Act, but the indications are that such was not the case. The establishment of three grades of official information to be protected by markings was apparently something copied from the A.E.F., which had borrowed the use of such markings from the French and British.²³

It apparently was not until 1935 that the link between classification the espionage act was made. Then, under the army regulation of February 12, 1935, it was specified that material on projects with restricted status would be marked: "Restricted: Notice—this docu-

²² Title 18, United States Code, sec. 798, "Basic Documents," op. cit., p. 15.

²³ National Archives, op. cit., p. 20.

ment contains information affecting the national defense of the United States within the meaning of the Espionage Act (U.S.C. 50:31, 32). The transmission of this document or the revelation of its contents in any manner to any unauthorized person is prohibited.”²⁴

4. *National Security Act*

The 1957 Commission on Government Security report, referred to by the State Department in 1970 as citing the legal basis for a classification system, described the National Security Act of 1947 as the “most significant legislation, which set into motion the current document classification programs.” It said:

The most significant legislation, which set into motion the current document classification program, was enacted in 1947, when the Congress passed the National Security Act in order to provide an adequate and comprehensive program designed to protect the future security of our country. To accomplish this avowed purpose the act provided for the creation of a National Security Council within the executive branch subject to Presidential direction. Its job is to consider and to make appropriate recommendations to the President. Within the framework of this program, the Interdepartmental Committee on Internal Security (ICIS) came into being, and the activity of this committee was responsible for the issuance in 1951 of Executive Order 10290, which established the original document classification program. Thus it would appear that a document classification program is within the scope of the activities sought to be coordinated by the National Security Act of 1947, and that the issuance of an appropriate Executive order establishing such a program is consistent with the policy of the act.²⁵

As has been pointed out, the roots of classification systems within individual Departments go back many years before the National Security Act was passed. However, efforts made after the National Security Act appear to have led to the new government-wide directive on classification which was embodied in Executive Order 10290. Coordination of classification systems in the military department had already been provided to some degree in Executive Order 8381 which was superseded by Executive Order 10104.

The Commission on Government Security contended that the National Security Act “set into motion” the current classification program; that the classification program “is within the scope of the activities sought to be coordinated by the National Security Act of 1947”; and that “the issuance of an appropriate Executive order establishing such a program is consistent with the policy of the act.”²⁶ It did not contend that the National Security Act actually authorized the system.

One authorization which was made by the National Security Act is pertinent, however. After establishing the Central Intelligence Agency and giving it the purpose of coordinating intelligence activities, the National Security Act provided that the Director of Central Intelligence “shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.”²⁷ This would appear to provide adequate authorization for a system of protection of certain types of information, namely intelligence sources and methods.

²⁴ Ibid., p. 24.

²⁵ “Security Agreements and Commitments Abroad Hearings,” op. cit., p. 2011.

²⁶ Ibid.

²⁷ Sec. 102(d) (3), Public Law 253, 80th Cong., July 26, 1947, as amended. U.S. Senate, Committee on Armed Services, National Security Act of 1947 as amended through Dec. 31, 1969. Committee print, pp. 4-5.

5. *Internal Security Act*

The final statute cited by the 1957 Commission on Government Security under the assertion that "various statutes do afford a basis upon which to justify the issuance" of Executive Order 10501 was the Internal Security Act of 1950. The Commission report stated:

Prior to issuance of Executive Order 10290, Congress had apparently recognized the existing Presidential authority to classify information within the executive branch when it passed the Internal Security Act of 1950. Contained therein were provisions defining two new criminal offenses involving classified information.

Section 4(b) of the act makes it a crime for any Federal officer or employee to give security information classified by the President, or by the head of any department, agency, or corporation with the approval of the President, to any foreign agent or member of a Communist organization, and section 4(c) makes it a crime for any foreign agent or member of a Communist organization to receive such classified security information from a Federal employee.²⁸

Section 4 (b) of the Internal Security Act states:

It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.²⁹

This provision of the Internal Security Act appears to come the closest to sanctioning a system for the classification of information "as affecting the security of the United States" rather than the narrower concept of "relating to the national defense" or the still narrower categories of cryptographic or intelligence information.

There has been one case in which a foreign service officer convicted under this provision appealed his case and the Court of Appeals, in affirming the verdict, held that under the statute and Executive Order 10501 an Ambassador did have authority to classify foreign service dispatches and the dispatches as classified and certified by him were within the scope of the statute. Moreover, it held that in prosecution of the officer for communication of classified information to a foreign government, the government was not required to prove that the documents involved were properly classified "as affecting the security of the United States."³⁰

6. *Atomic Energy Act*

In addition to the above statutes listed by the 1957 Commission on Government Security, the Department of State memorandum of 1970 said "there are other statutory provisions that contemplate and assume a system of classification of information."³¹ The first example it cites is section 142 of the Atomic Energy Act of 1954 (42 U.S.C.

²⁸ "Security Agreements and Commitments Abroad Hearings," op. cit., p. 2011.

²⁹ Title 50, United States Code, sec. 783.

³⁰ *Scarbeck v. U.S.*, 1962, 317 F. 2d 546.

³¹ "Security Agreements and Commitments Abroad Hearings," op. cit., p. 2008.

section 2162 (c). The entire Chapter 12 of the act (Sections 141 through 146) is on the control of information with section 142 providing for the classification and declassification of "Restricted Data." "Restricted Data" is defined in the Atomic Energy Act as follows:

The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142.³²

Section 142 requires that the Atomic Energy Commission from time to time determine the data within the definition of Restricted Data which can be published "without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data."

With "Restricted Data" so defined as to include all data in certain categories, Sec. 142 proceeds on the assumption that all information in these categories is classified "Restricted Data" and is concerned mainly with setting up procedures for declassifying information in these categories. It requires that the Atomic Energy Commission from time to time determine the data within the definition of Restricted Data which can be published "without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data." It provides that in the case of Restricted Data which the Commission determines jointly with the Department of Defense to be related primarily to the military utilization of atomic weapons, the determination that it could be published is to be made jointly by the Commission and the Department of Defense, with the President deciding in case of disagreement.

In Section 142 the Atomic Energy Act also recognizes the existence of "defense information" and intelligence information. Giving recognition to "defense information" Section 142d states:

The Commission shall remove from the Restricted Data category such data as the Commission and the Department of Defense jointly determine relates primarily to the military utilization of atomic weapons and which the Commission and Department of Defense jointly determine can be adequately safeguarded as defense information: *Provided, however,* That no such data so removed from the Restricted Data category shall be transmitted or otherwise made available to any nation or regional defense organization, while such data remains defense information, except pursuant to an agreement for cooperation entered into in accordance with subsection 144b.³³

Giving recognition to intelligence information and its treatment as "defense information" Section 142e. states:

The Commission shall remove from the Restricted Data category such information concerning the atomic energy programs of other nations as the Commission and the Director of Central Intelligence jointly determine to be necessary to carry out the provisions of section 102 (d) of the National Security Act of 1947, as amended, and can be adequately safeguarded as defense information.³⁴

The act provided a channel for transmitting information to Congress rather than a barrier, however. It established the Joint Committee on Atomic Energy (sec. 201), required that the Atomic Energy

³² Atomic Energy Act of 1954, Public Law 83-703, as amended, sec. 11y.

³³ U.S. Congress, Joint Committee on Atomic Energy, "Atomic Energy Legislation Through 90th Cong., 2d sess.," December 1968, p. 42.

³⁴ Ibid., p. 43.

Commission and the Department of Defense keep the Joint Committee fully and currently informed on matters relating to development and application of atomic energy and required that any government agency furnish any information requested by the Joint Committee relating to its responsibilities in the field of atomic energy (sec. 202), and authorized the Joint Committee to "classify information originating within the committee in accordance with standards used generally by the executive branch for classifying Restricted Data or defense information" (sec. 206).

7. Freedom of Information Act Amending the Administrative Procedure Act

The second example the 1970 State Department memorandum cited of a statutory provision which assumed a system of classification was the Freedom of Information Act (P.L. 89-487, approved July 4, 1966). The Freedom of Information Act was an amendment and re-writing of Section 3 of the Administrative Procedure Act which had been passed in 1946. Both the original act and the amendment dealt with disclosure of information by Federal agencies, requiring them to publish procedures in the Federal Register and make available to the public final opinions, staff manuals and instructions, and statements of policy.

However the 1946 provisions had permitted material "required for good cause to be held confidential" to be withheld from disclosure. This had provided a loophole which Congress attempted to close in the 1966 Freedom of Information by exempting from its provision only nine specific kinds of information. The first of these exceptions was for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Accordingly, although the Freedom of Information Act was designed to make more government information available, it did not apply to classified information and even could be used, as it was by the State Department in 1970, as an example of a statutory provision that contemplated and assumed a system of security classification.

While the exceptions in the Freedom of Information Act may permit withholding information from the public on grounds that it needs to be held secret in the interest of national defense and foreign policy, however, they clearly do not apply to Congress. Section 3 (f) states:

(f) Limitation of Exemptions—

Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.³⁵

8. Legislation on Foreign Relations

The Department of State 1970 memorandum did not mention any other legislation on foreign relations. However, there are some provisions in legislation directly relating to foreign affairs which also might be said to assume a system of classification or in effect sanction the withholding of some information on the grounds of national security.

One example is the Foreign Assistance Act of 1961, as amended. Section 634 (b) provides that in the annual report on operations required and in response to requests from Members of Congress or the

³⁵ Public Law 89-487, sec. 3(f), "Basic Documents," op. cit., p. 25.

public the President shall "make public all information concerning operations under this Act not deemed by him to be incompatible with the security of the United States." This section would provide a basis for the President not to make public certain information concerning aid operations. The next section, 634 (c), in effect limits any material which might be withheld from Congress to that which the President certifies he has forbidden furnishing with his reasons for doing so. Otherwise, funds are to be cut off if information or documents are not furnished by thirty-five days after a written request has been made by the General Accounting Office or by a congressional committee considering legislation or appropriations for the program.

Section 414 on munitions control of the Mutual Security Act of 1954, as amended, authorized the President to control the export and import of arms and technical data relating thereto. It also authorized him "to designate those articles which shall be considered as arms, ammunition, and implements of war, including technical data relating thereto, for the purposes of this section."³⁶

The Arms Control and Disarmament Act of 1961, as amended, assumes a system of classification in Sec. 45 on Security Requirements. Section 45(a) provides for investigations of all employees and states:

No person shall be permitted to enter on duty as such as officer, employee, consultant, or member of advisory committee or board, or pursuant to any such detail, and no contractor or subcontractor, or officer or employee thereof shall be permitted to have access to any classified information, until he shall have been investigated in accordance with this subsection. . . .

Section 45(b) states:

. . . The Director may also grant access for information classified no higher than "confidential" to contractors or subcontractors and their officers and employees, actual or prospective, on the basis of reports on less than full-field investigations: Provided, That such investigations shall each include a current national agency check.

Section 45(c) discusses access to Restricted Data under the Atomic Energy Commission.

Through legislation such as this Congress has on occasion given recognition to the classification system although it has made no overall attempt to regulate it. To this extent it has sanctioned keeping information secret in the interest of national defense or foreign policy. At the same time, however, on a number of occasions (particularly the "disclosure of classified information" legislation relating to cryptographic intelligence passed in 1951, and the Freedom of Information Act of 1966), Congress has made clear its intention that provisions to keep security information secret were not to constitute authority to withhold information from Congress.

III. THE CLASSIFICATION SYSTEM IN PRACTICE—EXECUTIVE ORDER 10501 AND AGENCY REGULATIONS

A. HANDLING DEFENSE INFORMATION

Executive Order 10501 of December 15, 1953, "Safeguarding Official Information in the Interests of the Defense of the United States," is

³⁶ U.S. Congress, Senate, Committee on Foreign Relations, House, Committee on Foreign Affairs, "Legislation on Foreign Relations With Explanatory Notes," 92d Cong., 1st sess. Joint committee print, April 1971, p. 137.

the basic regulation describing the security classification system to be applied to information bearing on the defense of the United States. The order, as subsequently amended, is quite comprehensive, setting forth guidelines for such matters as (1) material to be classified and categories of classification (i.e., Top Secret, Secret, etc.), (2) agencies and officials authorized to classify, (3) use of classification, (4) handling, marking, transmittal and destruction of classified material, (5) downgrading and declassifying, (6) access to classified material for historical research, and (7) enforcement procedures. For the purposes of this paper, it may be useful to look into some of these points more closely.

1. *Categories of Classified Material*

Section 1 of the order provides that "official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute."

These three categories are defined as follows:

(a) *Top Secret*.—Material the defense aspect of which is paramount and requiring the highest degree of protection. Unauthorized disclosure could result in "exceptionally grave damage to the Nation, such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense."

(b) *Secret*.—"Material the unauthorized disclosure of which could result in serious damage to the Nation, such as jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense or information revealing important intelligence operations."

(c) *Confidential*.—"Material the unauthorized disclosure of which could be prejudicial to the defense interests of the Nation."

2. *Authority to Classify*

The order specifies over thirty federal departments and agencies, such as State,³⁷ Defense, CIA, etc., "having primary responsibility for matters pertaining to national defense" in which the authority to classify may be delegated to such responsible officers or employees as the principal officer may designate. However, "such authority to classify shall be limited as severely as is consistent with the orderly and expeditious transaction of government business."

The order also names several other departments, such as Interior, Agriculture, and HEW, whose concern with national defense matters is "partial" rather than primary. In these cases, "the authority

³⁷ For an explanation of the relationship of defense information to diplomacy and foreign policy, see p. 18.

for original classification of information or material . . . shall be exercised only by the head of the department or agency . . .” Government agencies or units not specifically named do not have the authority to originate classified material. (Section 2)

3. Guidelines for Classification

Those authorized to classify material are responsible for adhering to the definitions of the three categories listed above. “Unnecessary classification and over-classification shall be scrupulously avoided”, and the classification of documents is to be based upon their content, not their relationship to other papers or the fact that they contain references to highly classified material. (Section 3)

4. Declassification and Downgrading

Classified material is to be downgraded or declassified when it “no longer requires its present level of protection in the defense interest. . . . Heads of departments or agencies . . . shall designate persons to be responsible for continuing review of such classified information or material on a document-by-document, category, project, program or other systematic basis, for the purpose of declassifying or downgrading whenever national defense considerations permit, and for receiving requests for such review from all sources.”

To give greater effect to this provision, a system was instituted in 1961 which provided for automatic downgrading of certain material at 3-year intervals. The system called for drafting officers to categorize classified material into groups as follows:

Group 1.—Information or material originated by foreign governments or international organizations and over which the United States Government has no jurisdiction, information or material provided for by statutes such as the Atomic Energy Act . . . and information or material requiring special handling, such as intelligence and cryptography. This information and material is excluded from automatic downgrading and declassification.

Group 2.—Extremely sensitive information or material which the head of the agency or his designees exempt, on an individual basis, from automatic downgrading and declassification.

Group 3.—Information or material which warrants some degree of classification for an indefinite period. Such information or material shall become automatically downgraded at 12-year intervals until the lowest classification is reached, but shall not become automatically declassified.

Group 4.—Information or material which does not qualify for, or is not assigned to, one of the first three groups. Such information or material shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified twelve years after date of issuance.

There is, of course, no bar to downgrading or declassifying more rapidly if circumstances warrant, but each such action requires the approval of the “appropriate classifying authority,” i.e., the person or office originating the document in question. The downgrading of extracts from or paraphrases of documents also requires the consent of the appropriate classifying authority “unless the agency making such

extracts knows positively that they warrant a classification lower than that of the document from which extracted. . . ." (Section 4)

5. *Limitations on Dissemination*

There are two basic requirements for access to classified information: the need-to-know and personal security clearance or proof of trustworthiness. The Executive Order covers both points in a single sentence:

Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy.

Distribution of classified material is strictly controlled, and rigid accountability is required, especially for the more highly classified documents and materials. Furthermore, each agency retains ultimate control over the dissemination of all such material originating in that agency. Thus, the State Department cannot release to other agencies or to the Congress material originating in the Defense Department without prior approval by the latter. This is the so-called third agency rule, which has on occasion contributed to difficulties and delays in providing classified materials to the Congress.³⁸

6. *Special Classifications for Atomic Energy, Intelligence, and Cryptographic Information*

The Atomic Energy Act of 1954, as amended, established special requirements for the classification of information on nuclear weapons and their technology. Such information is classified as "Restricted Data" and, more recently, "Former Restricted Data," and a special clearance, known as a "Q" clearance, is required by the AEC for access to this information. The intelligence community likewise has special designations and special clearances for certain intelligence information in order to protect sensitive sources, and communications people protect their codes by extra security precautions (COMSEC) as well.³⁹ These special categories are acknowledged by the terms of Executive Order 10501. (Section 13)

7. *Historical Research*

Access to classified material by persons outside the Executive Branch for historical research projects may be permitted if the researcher is trustworthy and if such access is "clearly consistent with the interests of national defense." But the material must not be published or otherwise compromised. (Section 15)

8. *Review*

The order requires various types of review to ensure (a) that information is not improperly withheld which the people have a right to know, (b) that proper safeguards are employed to protect classified information, and (c) that agencies are in full compliance with the order. The President is charged with designating "a member of his staff who shall receive, consider and take action upon suggestions or complaints from non-Governmental sources relating to the operation of this Order." (Sections 16-18)

³⁸ See U.S. Congress. House, Committee on Government Operations, 25th report, "Executive Branch Practices in Withholding Information From Congressional Committees," 86th Cong., 2d sess. H. Rept. No. 2207. Washington, U.S. Government Printing Office, 1960, 14 pages.

³⁹ See 18 U.S.C. 798.

B. INFORMATION PROVIDED TO CONTRACTORS AND INDUSTRY

Executive Order 10501 applies also to information given to the Congress or to private persons outside the Executive Branch. In such cases, the material must be marked with the following notation in addition to its security classification:

This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Sections 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law.⁴⁰

Such release cannot be made to persons who have not been cleared and briefed following security investigation. In this connection, President Eisenhower in February 1960 issued Executive Order No. 10865, "Safeguarding Classified Information within Industry." The latter, in effect, defines Executive Order 10501 in terms of non-governmental application. It establishes the rules for granting security clearances to civilians and the means of redress should clearance be denied. Once granted clearance, a person outside of government is required to observe the same rules for the protection of classified material as his military or federally-employed counterpart, and this includes individuals working with classified material in both the "hardware" and "software" organizations. An example of the former would be information provided to such government contractors as General Electric and Westinghouse by the Atomic Energy Commission. An example of the latter would be government documents provided to RAND or other contractors doing research for the government. This has led to a substantial diffusion of classified information. One commentator on government classification practices noted that:

The inexorable advance of the technology of war generates classified documents by the millions. One expert made the estimate four years ago that there were, in the defense industry, something like 100 million documents classified Top Secret and Secret.⁴¹

But it has also led to some difficulties. Scientific developments that emanate from classified data may sometimes be classified if bearing directly on important defense programs. Furthermore, certain developments that have their origins in unclassified data may be classified as well. For example, the AEC proposed that all new developments in the purification of weapons grade radioactive materials be subject to review by the Commission, no matter what the source of these developments. The Commission justified its actions on grounds of national security.

Unless there are controls on the dissemination of classified information concerning atomic weapons, and concerning centrifuges and gaseous diffusion plants (which can be used for the production of the special nuclear material used in weapons), the efficacy of all non-proliferation efforts is seriously weakened. In this light, the question of whether that data are developed for private commercial purposes or pursuant to a Government contract is irrelevant—it is the content of the data which necessitates the control.⁴²

This type of control, however, is difficult to administer. Assuming that American scientists recognize and abide by these requirements,

⁴⁰ Executive Order 10501, sec. 5(j).

⁴¹ Ikenberry, Kenneth, "U.S. Security Classification a Maze of Rules," The Sunday Star, Washington, Nov. 9, 1969.

⁴² 32 Federal Register 250, Dec. 28, 1967.

the writ of the United States does not extend to other scientifically modern nations. Indeed, three European nations (England, Germany and the Netherlands) have formed subsequently a consortium to develop gas centrifuge technology.⁴³

The State Department usually does not deal in scientific hardware. Rather its classified materials are concerned with the conduct of foreign policy.⁴⁴ As in the case of other government agencies, studies performed by outside contractors are reviewed by relevant desk officers to ensure that all classified information is so marked. Often specifically "sanitized" versions are prepared for dissemination on an unclassified basis.

C. FOREIGN POLICY INFORMATION

The security regulations issued by the Department of State and other agencies concerned with foreign policy (e.g., USIA, AID, and ACDA) take a somewhat broader view of "defense information," extending it to include international operations and programs as well. According to the State Department regulations:

The Attorney General of the United States on April 17, 1954, advised that defense classification may be interpreted, in proper instances, to include the safeguarding of information and material developed in the course of conduct of foreign relations of the United States whenever it appears that the effect of the unauthorized disclosure of such information or material upon international relations or upon policies being pursued through diplomatic channels could result in serious damage to the Nation. The Attorney General further noted that it is a fact that there exists an interrelation between the foreign relations of the United States and the national defense of the United States, which fact is recognized in section 1.⁴⁵

State's regulation goes on to cite examples, including the following:

Political and economic reports containing information the unauthorized disclosure of which may jeopardize the international relations of the United States or may otherwise affect the national defense.

Information received in confidence from officials of a foreign government whenever it appears that the breach of such confidence might have serious consequences affecting the national defense or foreign relations.

The rules and regulations applicable to defense information acknowledge the need to establish a balance between the protection of such material and freedom of information. The State Department's security regulations in implementation of Executive Order 10501 include the following caveat:

The requirement to safeguard information in the national defense interest and in order to protect sources of privileged information in no way implies an indiscriminate license to restrict information from the public. It is important that the citizens of the United States have the fullest possible access, consistent with security and integrity, to information concerning the policies and programs of their Government.⁴⁶

⁴³ Nuclear Industry, March 1970, pp. 59-61.

⁴⁴ The Arms Control and Disarmament Agency (ACDA) is probably a major exception to this rule in its concern over hardware as well as policy.

⁴⁵ U.S. Department of State, "Uniform State/AID/USIA Security Regulations, Physical and Procedural," Washington, U.S. Government Printing Office, 1969. Sec. 911.2.

⁴⁶ Ibid., sec. 901.4.

D. HANDLING OF CONTROLLED INFORMATION BY EXECUTIVE BRANCH

1. *Limiting the Distribution of Sensitive Material*

The application of a security classification to papers and materials is not the only method by which government agencies safeguard sensitive information. In some respects an even more effective method is to limit drastically the distribution of a particular document. Distribution of telegrams concerning the arrangements for Dr. Kissinger's secret visit to Communist China, for example, must have been so limited in number that only a few Cabinet members and a very select group of key officials in State, Defense, and CIA were privy to the operation.

A government-wide system governs the distribution of telegrams, staff studies, and memoranda of conversation. Those papers deemed to require something less than standard distribution are marked "LIMDIS" (limited distribution) by the drafting officers. In such cases, the number of copies circulated is reduced by perhaps 50 percent, with all interested bureau offices taking a proportionate reduction.

In the case of exceptionally sensitive matters, the material is designated "EXDIS" (exclusive distribution), and the number of copies is curtailed much more drastically to, say, one or two copies for each assistant secretary of State and Defense with a legitimate need to know. Key staff members are allowed to read but not retain EXDIS messages, which are kept in a central registry within each geographic or functional bureau.

But the Kissinger trip must have received even more restricted treatment. In this case the documents would have been "NODIS," meaning, of course, no distribution beyond the principal officer of an agency or department with a need to know.

Highly classified documents are generally given rather limited distribution, but many NODIS and EXDIS papers are classified no higher than SECRET. The most sensitive documents, including all TOP SECRET and all NODIS and EXDIS material, are serialized, i.e., each copy is numbered and must be registered and accounted for at all times, including when destroyed. The very process of serializing requires the originating office to exercise care and restraint in drawing up a list of those to whom the material is to be sent.

2. *Administratively Controlled Information*

Some types of information are controlled not in the interests of national defense but for administrative reasons. Thus, personnel records, medical reports, commercial and investigative data are considered privileged information and treated as confidential. In the Defense Department this type of material is marked "For Official Use Only"; in State it is designated "Limited Official Use." In either case, although the material is "non-classified," i.e., not related to the national defense, it is protected from indiscriminate disclosure.

E. COMPLIANCE WITH REGULATIONS

1. *Overprotection*

In actual practice, however, there is wide agreement that the great bulk of defense material is usually over protected—too highly classi-

fied for too long a time. Arthur Goldberg, former Ambassador to the U.N., recently had this to say to the House Foreign Operations and Government Information Subcommittee:

I do not mean to suggest to this Committee, which has given thoughtful consideration to this entire subject, that the government does not require secrecy in the conduct of its vital operations, that each day's collection of confidential messages with foreign governments should be broadcast on the six o'clock news, or that the engineering details of advanced weapons systems must be published in the Congressional Record.

* * * * *

Anyone who has ever served our government has struggled with the problem of classifying documents to protect national security and delicate diplomatic confidence. I would be less than candid if I did not say that our present classification system does not deal adequately with this problem despite the significant advances made under the leadership of the Committee and Congress in the Freedom of Information Act of 1966. I have read and prepared countless thousands of classified documents and participated in classifying some of them. In my experience, 75 percent of these never should have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about ten percent genuinely required restricted access over any significant period of time.⁴⁷

For obvious reasons there are strong incentives for staff officers to err on the side of over-classifying material on which they are working. There are no penalties for this, whereas the penalties for violating security regulations, even inadvertently, can be severe and costly in terms of career prospects, especially if one has a series of such offenses. Very often material is classified or over-classified largely through inadvertence or failure to apply critical judgment. Mr. William G. Florence, formerly with Headquarters, U.S. Air Force, had this to say to the House Subcommittee:

The majority of people with whom I worked in the past few years reflected the belief that information is born classified and that declassification would be permitted only if someone could show that the information would not be of interest to a foreign nation.⁴⁸

Florence also referred to the practice of assigning a classification to material merely on the basis of association or reference to other classified material:

Some time ago, one of the service chiefs of staff wrote a note to the other chiefs of staff stating briefly that too many papers were being circulated with the TOP SECRET classification. He suggested that use of the classification should be reduced. Believe it or not, that note was marked TOP SECRET.⁴⁹

According to a recent editorial in the Christian Science Monitor:

The classic case of overclassification of government documents was Queen Frederika's menu. The former Queen of Greece was given a moderately elaborate dinner at an American military base during her official tour of the United States. A thoughtful officer stamped "classified" on the menu to avoid the comments which some reporter might otherwise have made on what might have been called a non-democratic event.⁵⁰

⁴⁷ Testimony of Arthur J. Goldberg before the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations of the House of Representatives, June 23, 1971. Mimeographed statement.

⁴⁸ Statement by Mr. William G. Florence, retired civilian security classification policy expert, submitted to the Foreign Operations and Government Information Subcommittee of the U.S. House of Representatives Committee on Government Operations, June 24, 1971. Mimeographed prepared statement.

⁴⁹ *Ibid.*

⁵⁰ "The Duty to Print," Christian Science Monitor, June 23, 1971.

The purpose of the classifying officer in this case was no doubt to avoid any potential embarrassment to the United States. There are many occasions when the avoidance of embarrassment is more closely related to activities potentially affecting the national defense. One example, related to military security demands that certain aspects of weapons capabilities be classified, follows:

In Vietnam, the Army stamped "secret" on reports of field malfunctions of the controversial M16 rifle, which was jamming, until corrective action was taken. "The evaluation reports were bad," says a man who found out what was in them. He asserts the Army simply wanted to avoid embarrassment, since the enemy was obviously aware of the rifle's weaknesses.⁵¹

Individuals may overclassify a document hoping to augment the importance of the contents or to appear more important themselves:

There's what a former federal official calls the "ego-building angle." Some bureaucrats, he says, classify a document confidential or secret to indicate that "the stuff is important—that it should be moved up the chain of command promptly instead of getting stuck in someone's 'in' basket."⁵²

Such individuals evidently consider that the power to classify increases the personal prestige of the classifier. William Florence testified that:

... numerous individuals in the Department of Defense, including myself, have attempted to the best of our ability to limit the use of defense classifications to the purpose for which they were intended. Various officials from the Secretary of Defense down have initiated measures designed to restrict the use of defense classifications. But hundreds of thousands of individuals at all echelons in the Department of Defense practice classification as a way of life.⁵³

Once a paper has been classified SECRET or TOP SECRET, bureaucratic inertia adds to the already strong propensity to "protect" the national security by maintaining that classification for an unnecessarily long period of time. Richard J. Levine, writing in the Wall Street Journal of June 25, 1971, pointed out that:

Today almost 26 years after the end of World War II, U.S. archives still hold some 100 million pages of classified war records. . . . The government process of declassification is haphazard and cumbersome. . . .

According to Levine, the "group" system for automatic downgrading and ultimate declassification of defense information has not provided an answer to the problem. The turnover in personnel within State and Defense, with career officers moving on to new assignments and with many top policy makers taking other jobs after a year or two, militates against the continuous review of classified material called for by the executive order. Even more important, perhaps, is the fact that the officers who originate classified material continue to be involved in substantive matters and feel that they have more important things to do than review their work of yesteryear to see if it can now be downgraded or declassified. Thus, quite apart from the legitimate concern of the Executive to protect sensitive information, there are a number of factors in the present situation which reinforce the tendency to maintain secrecy to a higher degree and for a longer period than is necessary.

⁵¹ The Wall Street Journal, June 25, 1971.

⁵² Ibid.

⁵³ Florence, op. cit.

Among the World War II documents which are still classified TOP SECRET are those on Operation Keelhaul, which was the U.S.-U.K. name for the forcible repatriation to the Soviet Union of displaced Soviet citizens after the war. An American historian, Julius Epstein, has attempted without success to obtain access to these files in connection with his studies on forced repatriation of anti-communist prisoners of war and displaced persons during and after World War II. Epstein went to court under the Freedom of Information Act but lost the case on the grounds that the Act does not apply to documents classified "in the interest of the national defense or foreign policy."⁵⁴ Writing in the New York Times, Epstein related his continuing efforts to have the file declassified:

. . . On October 22, 1970, the White House informed me that President Nixon has removed the main obstacle for declassification of the Keelhaul files. The letter states: "The U.S. Government has absolutely no objections (based on the contents of the files) to the declassification and release of the 'Operation Keelhaul' files. However, given the joint origin of the documents, British concurrence is necessary before they can be released and this concurrence has not been received. Thus, we have no alternative but to deny your request." . . .⁵⁵

2. Leaks by Government Officials

On the other hand, Levine points out that government agencies permit "deliberate leaks which tend to make a mockery of the system," and he cites several instances of newsmen who were given classified information by high-level government officials as a matter of public policy. Both the New York Times and the Washington Post filed affidavits to this effect in their legal fight against the government's injunction which sought to stop publication of the Pentagon papers.

On behalf of the Times, Mr. Max Frankel, Washington bureau chief, argued that without the use of classified material:

. . . There could be no adequate diplomatic, military, and political reporting of the kind our people take for granted, either abroad or in Washington, and there could be no mature system of communication between the government and the people. . . .

Presidents make "secret" decisions only to reveal them for the purposes of frightening an adversary nation, wooing a friendly electorate, protecting their reputations. The military services conduct "secret" research in weaponry only to reveal it for the purpose of enhancing their budgets, appearing superior or inferior to a foreign army, gaining the vote of a Congressman or the favor of a contractor

In the field of foreign affairs, only rarely does our government give full public information to the press for the direct purpose of simply informing the people. For the most part, the press obtains significant information . . . only because it has managed to make itself a party to confidential materials, and of value in transmitting these materials . . . to other branches and offices of government as well as to the public at large. This is why the press has been wisely and correctly called the Fourth Branch of Government.⁵⁶

Mr. Benjamin C. Bradlee, executive editor of the Washington Post, stressed in his affidavit that:

The executive branch . . . normally, regularly, routinely, and purposefully makes classified information available to reporters and editors in Washington.

⁵⁴ Harvard Law Review, Cambridge, Mass., February 1970, p. 928.

⁵⁵ Epstein, Julius, "A Case for Suppression," New York Times, Dec. 18, 1970, p. 39.

⁵⁶ Affidavit by Frankel, New York Times, June 19, 1971, p. 10.

This is [done] in private conversations . . . and in the infamous backgrounders normally, but not exclusively, originated by the government.⁵⁷

It may be done to "test the climate of public opinion on certain options under deliberation by the government" or "to influence the reporter's story in a manner which the government official believes is in the best interest of his country, his particular branch of government, or his particular point of view."

Mr. Bradlee cited specific instances when he had been given highly classified information by President Kennedy (concerning his 1961 encounter with Khrushchev in Vienna) and by President Johnson (on the Vietnam war in 1968). He also pointed out that Congress sometimes follows the same practice:

. . . Legislators request and obtain classified information from the executive branch of the government for the purpose of helping them draft legislation. They do not always use it for that purpose. They often use it to defeat legislation they don't like, and they often try to enlist the assistance of the press in their private battle. . . .⁵⁸

The agency most frequently charged with leaking classified information is the Department of Defense. This fact is scarcely surprising. It is due in part to the sheer size of the department and the vast amount of defense material in its custody. However, some contend that the incidence of deliberate leaks tends to be related to the national budget cycle as defense officials seek to persuade Congress and the public of the validity of their budget requests. But as was pointed out two years ago by George Ashworth of the Christian Science Monitor, perhaps the most important factor is the man at the top:

Government secrets come in many sizes and styles. At one end of the spectrum are piddling little secrets, and at the other there are secrets that are so secret their security classifications are secret. And there are critically important secrets as well as ones that are embarrassing and nothing more.

Secretary of Defense Melvin R. Laird loosed a few secrets of middling size upon the Senate and the public recently. Before the secret-telling was over, everybody knew a great deal more about the strategic strengths of the superpowers. Sen. Stuart Symington (D) of Missouri and Mr. Laird had reached the I-know-what-you-know-and-you-know-what-I-know-and-neither-of-us-can-tell stage of discussion.

Telling a great deal without telling all is nothing new for high defense officials. A secret told at the right time can shock, arouse, surprise, stymie opposition, and gain advantage. Or it can be a dreadful mistake. A secretary has to know the difference and act accordingly. If a secret is not properly handled, it can accomplish little through the telling and do incomparable damage.

The Defense Department has been much freer with its secrets in recent times. Former Secretary of Defense Robert S. McNamara was not averse to dropping secrets from time to time. The only time the secretary showed an avid interest in keeping a specific matter completely under wraps was the case of the so-called McNamara line.

During his 11-month tenure, former Secretary of Defense Clark M. Clifford generally stayed away from heavy public involvement in strategic armaments affairs, preferring to devote his energies to efforts to bring about successful negotiations on Vietnam. Many of the Pentagon's deepest secrets are in specifics on the strategic arsenals of both nations, and Mr. Clifford spent little effort on the learning of specifics. Thus, in a sense, he was somewhat limited as to juicy secrets to tell.

⁵⁷ Affidavit submitted by Washington Post Executive Editor Benjamin C. Bradlee to the U.S. District Court for the District of Columbia, Boston Globe, June 27, 1971, p. 5.

⁵⁸ Ibid.

Mr. Clifford's periodic frankness on the subject of relations with South Vietnam were, however, often spellbinding. Although many secrets probably were not divulged as the former Secretary discussed the maneuvering prior to the complete halt, the material he gave forth was obviously of the sort normally considered privileged.

Now, with the stage set by Mr. Laird's revelations about specifics of missiles and megatonnage in the Soviet nuclear arsenal, chances are good that the administration will be releasing still more information of a nature that would have been considered classified at earlier times.⁵⁹

Obviously, the Secretary of Defense is concerned with the state of the country's defenses and the overall threat as he sees it. Secretary Laird assumed office at a time when the U.S.S.R. was overtaking the United States in the number of land-based ICBM's deployed, and he foresaw the prospect of their catching up also in the number of anti-submarine-based launchers in a few years. Still another cause for concern was the megatonnage of the biggest Soviet ICBM, the SS-9, and the possibility that it would be fitted with multiple war heads capable of destroying the U.S. Minuteman missile in a preemptive strike. These and other considerations led him to make public a great deal more information about Soviet strategic programs, actual and anticipated, than had either of his predecessors.

As Ashworth remarked:

The approach to strategic secrecy has indeed changed since 1960, when the Republican managers of the Defense Department refused to declassify information to refute Democratic charges of a "missile gap." Upon taking office, Mr. McNamara himself refuted the charges made by his party.

The 1968 election failed to feature any real controversy over strategic strength. Consequently, it was marked by few Pentagon revelations. The same was not true in 1964 when Republican charges caused the Pentagon to declassify profuse quantities of classified information.

In 1967, when the Republican challenge was brewing, Deputy Secretary of Defense Paul H. Nitze was most forthright on warhead sizes, yields and effects, as well as reliability, when the nation's deterrent was questioned by Rep. Craig Hosmer (R) of California.

Slightly earlier, Mr. McNamara had mentioned multiple independently targetable warheads for the first time publicly. He used the medium of an article in *Life* magazine to discuss the antiballistic missile defense system and multiple warheads. Earlier, the warheads, MIRVs, had been so tightly classified that the Pentagon would say nothing about them. Mr. McNamara wanted, however, to reaffirm public faith in a U.S. lead.⁶⁰

Still another current practice in declassification is that of former government officials who take advantage of personal files to write their memoirs, recollecting in tranquillity the bureaucratic battles of the past. Commenting on this, Herbert Feis, who spent many years in the State Department, has drawn ironic attention to the contrast between public policy (to keep official papers classified for years) and private practice:

If we turn to the problem of writing the history of the crucial events in our foreign relations during the short term of office of the gallant John F. Kennedy, the divergence of the restrictions becomes glaring. There is, I presume, no chance that the historian would at present be able to consult the pertinent official records or memos of conferences, instructions to our embassies, and correspondence with foreign statesmen during the period of his presidency. But what an admirable series of privileged and candid narratives and memoirs tell us what

⁵⁹ Ashworth, George W., "U.S. Secrets and How They Grow," *Christian Science Monitor*, Mar. 31, 1969, p. 1.

⁶⁰ *Ibid.*, p. 6.

may be found in them! What elaborately detailed accounts have appeared in the weekly magazines of how the rout of the Bay of Pigs came about, and what happened in the critical crisis when President Kennedy challenged the Russian installations of missiles in Cuba!

Can the historian be blamed if he is struck by the contrast between the scope and contents of the published official records and the disclosures of participants, confidants or a few favored journalists? This places a very high premium on securing and diffusing information before anyone else, and perhaps exclusively. Men may be drawn into office as the corridor to future careers as historians. Warm the Boswells inside the gates, envious the Boswells left outside!⁶¹

The high incidence of leaks of classified information which appear to be approved by some one in authority serves to conceal the fact that many disclosures occur which are completely unauthorized. In most cases, it is difficult if not impossible to track down the guilty party because the information is so widely disseminated within the government and because reporters are unwilling to reveal the sources of their information.

IV. THE EFFECT OF THE CLASSIFICATION SYSTEM ON THE CONGRESSIONAL ROLE IN FOREIGN POLICY

A. THE CONGRESSIONAL NEED TO KNOW

Under the Constitution both the foreign policy powers and the war powers are shared by the President and the Congress. The need of Congress for information on defense and foreign relations stems primarily from specific responsibilities of Congress which are enumerated in the Constitution.

Aside from the general mandate provided by Article I, Section 1, "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." the Constitution provides that Congress shall have power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. . . ." [Article I, Section 8(1)]; "to regulate commerce with foreign nations. . . ." [Article I, Section 8(3)]; "to define and punish . . . offenses against the law of nations." [Article I, Section 8(10)]; "to declare war" [Article I, Section 8(11)]; "to raise and support armies" [Article I, Section 8(12)]; "to provide and maintain a navy;" [Article I, Section 8(13)]; "to make rules for the government and regulation of the land and naval Forces;" [Article I, Section 8(14)]; and finally, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" [Article I, Section 8(15)]. Article II, Section 2(2) provides the Senate with two additional responsibilities, stating that the President "shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . ." In addition to these specific responsibilities, the Constitution provides further that the Congress "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitu-

⁶¹ Feis, Herbert, "The Shackled Historian," *Foreign Affairs*, January 1967, p. 337.

tion in the Government of the United States, or in any department or officer thereof." [Article I, Section 8(18)].

Congress frequently needs to have information which is classified in order to carry out specific defense and foreign policy responsibilities assigned to it under the Constitution. For example, Congress needs to know what are the threats to the country's security and what are current military capabilities if it is to provide for the common defense. It needs to know the precise facts involving hostilities when there is a question of whether or not war should be declared. The Senate needs to know the history of negotiations leading to a treaty before it decides whether to advise and consent to the ratification of that treaty.

Because of the congressional "need to know," the first aspect of the problem of classified information is how classification affects the efforts of Congress to get the information necessary to carry out its duties in the foreign and defense policy fields. A comprehensive survey of individual Members of Congress and committees would be necessary to ascertain the extent to which the information they need is classified and the extent to which they are given the classified information which they seek. Similarly, access to the classified information would be necessary to determine if the information given out to Congress was the whole truth. Nevertheless the outlines of the situation can be traced without such comprehensive information.

B. ACCESS OF CONGRESS TO CLASSIFIED INFORMATION

The classification of information does not automatically mean that Members of Congress cannot obtain it. Long ago, before the classification system, President Washington recognized the right of the Senate to access to secret information when he placed before that body information which he had kept from the public and the House of Representatives regarding the Jay Treaty in 1796. Similarly today the Executive Branch appears to recognize the general right of Congress to be given classified information. Although there is nothing in Executive Order 10501 covering the specific subject of providing classified information to Congress, a Department of Defense directive makes it clear that classified information may be given upon request from Members of Congress and that it may be discussed with congressional committees in closed hearings. The directive states as policy that information not available to the public because of classification "will be made available to Congress, in confidence" in accordance with certain procedures.⁶²

The Department of State regulations contain a recognition that classified information may be sent to Members of Congress in the statement "Classified or administratively controlled material may be sent to other Federal departments or agencies or to officials and committees of Congress or to individuals therein only through established liaison or distribution channels."⁶³ Further policy on this matter apparently does not appear in writing. However, according to one State Department official, by virtue of their office Members of Congress may be shown classified information even though they have not

⁶² Department of Defense Directive No. 5400.4, "Provision of Information to Congress," Feb. 20, 1971, sec. III.B.

⁶³ Uniform State/AID/USIA Regulations, sec. 943.1.

received formal clearances as individuals. Classified information is not ordinarily left with individual members, however, because of the lack of approved storage facilities for security material.⁶⁴

Committees often do have facilities and procedures for safeguarding classified material, and the congressional committees chiefly concerned with foreign and defense policy have been given sizeable amounts of classified information, usually through closed hearings. When the transcripts of the closed hearings are printed, the classified information is deleted unless the executive branch officials concerned declassify the information so that it can be made public.

The fact that Congress obtains a considerable amount of classified information does not mean that members of committees get all the classified information they request or need, however. The Department of Defense directive acknowledges that there may be "rare" instances in which there is a question whether information should be shown to a Member of Congress even in confidence. The directive specifies that a final refusal of information to a Member should be made only with the approval of the Head of the Department of Defense component concerned or the Secretary of Defense, and that a final refusal to a committee of Congress should be made only with the concurrence of the Assistant to the Secretary of Defense for Legislative Affairs. The latter is responsible for insuring compliance with any procedural requirements imposed by the President:

In the rare case where there is a question as to whether particular information may be furnished to a Member or Committee of Congress, even in confidence, it will normally be possible to satisfy the request through some alternate means acceptable to both the requester and the DOD. In the event that an alternate reply is not acceptable, no final refusal to furnish such information to a Member of Congress shall be made, except with the express approval of the Head of the DOD Component concerned, or of the Secretary of Defense. The Assistant to the Secretary of Defense (Legislative Affairs) shall be informed of any such submissions to the Head of a DOD Component or to the Secretary of Defense. A final refusal to a Committee of Congress may be made only with the concurrence of the Assistant to the Secretary of Defense (Legislative Affairs), who shall be responsible for insuring compliance with all procedural requirements imposed by the President or pursuant to his direction.⁶⁵

Instances in which members were not given information they believed they needed date back for many years. A survey conducted by the Subcommittee on Constitutional Rights of the Committee on the Judiciary in 1960 revealed several cases relating to foreign policy in which specific information or documents being sought were not transmitted or were transmitted only in part to members of Congress.

One case in that record involved Senator Humphrey in his capacity as Chairman of the Disarmament Subcommittee in 1960. In 1959, President Eisenhower announced a full review of United States disarmament policy under the chairmanship of Charles Coolidge. In January of 1960, Coolidge reported to the Secretaries of State and Defense and Senator Humphrey subsequently attempted to obtain the report. In response to a letter from Senator Humphrey, the Secretary of State said that the report was in the form of a working paper and was not being made public. The State Department also answered

⁶⁴ Based on telephone conversation with Alexander Schnee, legislative officer, Bureau of Congressional Relations, Department of State, July 30, 1971.

⁶⁵ Department of Defense Directive 5400.4, Sec. IV.B.2.

negatively the Senator's second letter requesting that the report be made available on an executive basis. When Senator Humphrey's third letter asked on what ground and under what authority the information was being denied, the Secretary replied that the study was prepared for internal use of the Secretaries of State and Defense only.

Similarly, Senator Fulbright, in response to the survey, related that he was denied a complete copy of the report of General Carroll on black market activities in Turkey in 1959. After exchanges of correspondence with the Secretary of Defense and the General Counsel of the Department of Defense, the Senator was given the first 15 pages but the General's conclusions were withheld and never made available.⁶⁶

When a Member or committee of Congress attempts to obtain a specific piece of classified information and is denied it, the problem merges with that of executive privilege. For though the information sought may be classified, withholding it from Congress apparently is more likely to be based on executive privilege than on the basis of classification. To deny it on the grounds of classification might imply either that the member of Congress seeking it did not have a need to know or that he was not trustworthy. The Committee on Government Operations reported in 1960:

It should be borne in mind that none of the information withheld from this subcommittee has been withheld on the basis that it is classified; that is, that its release to a congressional committee would imperil the national security. . . .

On a number of occasions, when the question was raised, the subcommittee has been directly told by executive branch officials that particular documents withheld were not being withheld on grounds of security, but on the grounds of "executive privilege."⁶⁷

Although the doctrine of executive privilege is controversial, as a practical matter when information is in the hands of the executive branch the President is physically or administratively able to withhold it if he deems it advisable.

More recently, the work of the Subcommittee on Security Agreements and Commitments Abroad demonstrates that committees can obtain a great deal of, but not all, classified information on a subject if they know it exists and are persistent.

The Subcommittee on Security Agreements and Commitments Abroad stated in its final report of December 21, 1979:

The record of the Subcommittee is replete with a variety of instances in which we failed to obtain information without which the Congress cannot deal seriously, and as an equal, with the Executive Branch on matters of foreign policy.

One of the more important of these was an understanding of the relationship which exists between the United States and the Royal Government in Laos. . . .

When our initial Congressional effort was made to get the truth about Laos, we were either blocked, or the responses were misleading. . . .

⁶⁶ U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, "Withholding of Information From the Congress," 86th Cong., 2d sess., Washington, Government Printing Office, 1961, pp. 18-19.

⁶⁷ U.S. Congress, House, Committee on Government Operations, 25th report, "Executive Branch Practices in Withholding Information From Congressional Committees," 86th Cong. 2d sess., H. Rept. No. 2207, Aug. 30, 1960, p. 6.

The details of agreements with Thailand, Korea, the Philippines, Ethiopia, Spain and other countries, which details remain classified, have been obtained during the Subcommittee investigation and discussed during country-by-country hearings. Few facts were volunteered in the first instance.⁶⁸

Classification of information appears to present more of a problem to Congress when it prevents Congress from knowing enough about policies to raise questions about them or to ask to see the classified information which exists, and thus from participating in formulating policies. This is not a new problem. In the 1960 survey conducted by the Subcommittee on Constitutional Rights Senator Anderson, Chairman of the Joint Committee on Atomic Energy, responded with a list of instances in which the Joint Committee on Atomic Energy was not kept fully and currently informed by the Department of Defense as required by the Atomic Energy Act of 1954. One of the Senator's examples related that the Committee was informed of a proposed arrangement with an allied nation for the use and custody of an American air-to-air nuclear weapon by a special assistant to the Secretary of Defense in November of 1959, only after the planned arrangements had been discussed with the allied nation some time earlier in 1958 and the recommendation for the arrangement made by the Joint Chiefs of Staff in April 1959. The Defense Department in June of 1959 proposed that such an arrangement be entered into by the State Department. None of these dealings had been brought to the attention of the Joint Committee until November.⁶⁹

The Symington Subcommittee report, discussing the growth of the United States commitments involving defense of other countries, said:

... one secret agreement or activity [regarding Southeast Asia] led to another, until the involvement of the United States was raised to a level of magnitude far greater than originally intended.

All of this occurred, not only without the knowledge of the American people, but without the full knowledge of their representatives or the proper committees of the Congress.

Whether or not each of these expensive and at times clearly unnecessary adventures would have run its course if the Congress and/or the people had been informed, there would have been greater subsequent national unity, often a vital prerequisite to any truly successful outcome.⁷⁰

The Senate Foreign Relations Committee hearings on Laos released in October 1969, six months after they were held, revealed that for five years the United States had been waging a secret war in northern Laos. In his testimony, the United States Ambassador to Laos told the committee that the United States had no military training and advisory organization in Laos; that there were no U.S. advisors with the Laotians; and that Air America carried equipment only for the AID program and was not involved in combat operations. The Ambassador neglected to acknowledge the significant role of the U.S. Air Force which had been bombing northern Laos for years. When confronted at later hearings by the committee, the former ambassador said that he did not discuss the bombing because he was not asked any direct

⁶⁸ U.S. Congress, Senate, Committee on Foreign Relations, Subcommittee on Security Agreements and Commitments Abroad, "Security Agreements and Commitments Abroad," report, 91st Cong., 2d sess., Dec. 21, 1970, p. 26.

⁶⁹ U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, op. cit., p. 2.

⁷⁰ U.S. Congress, Senate, Committee on Foreign Relations, Subcommittee on U.S. Security Agreements and Commitments Abroad, op. cit., p. 3.

questions about United States operations in northern Laos. Senator Fulbright went to the heart of the problem when he answered:

We do not know enough to ask you these questions unless you are willing to volunteer the information. There is no way for us to ask you questions about things we don't know you are doing.⁷¹

Senator Symington pointed out that the secrecy imposed by the executive "prevented any objective review by the Congress of our policy. . . .," but that when details of the heavily stepped-up bombing were finally disclosed to the Members, Congress took action by adopting an amendment which prohibited the sending of ground combat troops into Laos.⁷²

C. CONGRESS, CLASSIFIED INFORMATION, AND PUBLIC OPINION

In addition to the foreign policy functions of Congress set by the Constitution, Congress plays a role as a link with public opinion. Its hearings and debates help keep the public informed of the various sides of foreign policy issues and reflect the diverse views of the American people. President Nixon recognized this role for Congress when he wrote in the conclusion of his Second Annual Review of United States Foreign Policy:

Charged with constitutional responsibilities in foreign policy, the Congress can give perspective to the national debate and serve as a bridge between the Executive and the people.⁷³

A number of Members of Congress have also seen the informing and reflecting of public opinion as one of the most important current roles of Congress in the foreign policy field. Senator Javits in an article in *Foreign Affairs* last year wrote:

A major function of the Congress with respect to the great issues of foreign policy and national security is that of shaping as well as articulating public opinion. In a democracy such as ours, governmental action is possible only within parameters defined by public attitudes and opinions. In the major Senate foreign policy debates of the very recent past—Viet Nam and ABM—we have learned that the development and public presentation of new information and interpretations bearing on the great issues is a vital Congressional function as well as a potent instrumentality in asserting legislative prerogatives and responsibilities.⁷⁴

Senator Fulbright in *The Arrogance of Power* expressed the view that:

. . . Congress has a traditional responsibility, in keeping with the spirit if not the precise words of the Constitution, to serve as a forum of diverse opinions and as a channel of communication between the American people and their government.⁷⁵

Classification of information has been a major problem to Congress in fulfilling this role. As long as the information remains classified, Congress cannot publicly debate it to inform the people or to inform other Members voting on legislation. The frustrations inherent in this

⁷¹ Symington, Stuart, "Congress's Right To Know," *New York Times Magazine*, Aug. 9, 1970, p. 62.

⁷² *Ibid.*, p. 63.

⁷³ Message from the President of the United States transmitting his Second Annual Review of U.S. Foreign Policy, H. Doc. 92-53, 92d Cong., 1st sess., Feb. 25, 1971, p. 179.

⁷⁴ Javits, Jacob K., "The Congressional Presence in Foreign Relations," *Foreign Affairs*, January 1970, p. 244.

⁷⁵ Fulbright, James W., *The Arrogance of Power*, New York, Random House, 1966, pp. 44-45.

were expressed by Senator Fulbright in hearings on United States commitments in Morocco. Senator Fulbright contended that it was Congress' responsibility to be concerned with the funding of United States installations in Spain and Morocco and told executive branch officers, "But then you say, it is classified, it would not do to talk about it. Therefore, we cannot even discuss it on the Senate floor."⁷⁶

To meet this problem, Congress has played an important part in getting information declassified to make it available to all. A process of negotiation has been used by congressional committees to make testimony given in secret or in closed hearings by executive branch representatives a matter of public record. The transcripts of the hearings given in executive session are submitted to the executive agency involved for review. The agency marks those portions of the testimony which, in its opinion, should remain classified. When the agency gives reasons for classifying a certain portion other than security, the committee attempts to persuade the officials to declassify more information. Walter Pincus, former chief consultant to the Symington Subcommittee on United States Security Agreements and Commitments Abroad of the Senate Foreign Relations Committee, discovered that "the declassification of some security information and almost all the political material—at any level of classification, even top secret—was negotiable."⁷⁷ In one particular hearing, Pincus relates, the Administration deleted 60 to 70 percent for reasons of "security." After negotiation with the subcommittee, almost 80 percent of the hearings were made public. Pincus concluded that the amount of "secret" material was sharply reduced, not for any reason other than it probably did not deserve to be classified in the first instance.⁷⁸

One problem associated with this declassification through negotiation procedure is that various committees may have different practices on classified information. One committee might be treating information as secret which another committee published with the agreement of the Executive Branch that it could be declassified.

Related to the problem of congressional efforts to get classified material declassified is the issue regarding the type of material which finds itself labeled with a security classification and therefore generally withheld from Congress. Reference has already been made to Walter Pincus, former consultant to the Symington subcommittee, who stated that much of the information should not have been classified from the start. Much credence must be given also to the former chief civilian classification officer in the Department of Defense, William G. Florence, who in testimony before the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations in June 1971 stated that, "... the disclosure of information in at least 99½ percent of those classified documents could not be prejudicial to the defense interests of the nation."⁷⁹

Some time earlier, Senator Humphrey made a statement entitled, "The Experience of the Senate Subcommittee on Disarmament on the

⁷⁶ U.S. Congress, Senate, Committee on Foreign Relations, "Hearings on U.S. Security Agreements and Commitments Abroad," pt. 9, "Morocco and Libya," July 20, 1970, p. 1972.

⁷⁷ Pincus, Walter, "Congress Negotiates with the Executive Branch," Washington Post, June 30, 1971, p. B6.

⁷⁸ Ibid.

⁷⁹ Florence, William G., op. cit.

Declassification of Government Documents and Testimony" before the Moss Subcommittee on Government Operations in 1959 to illustrate that "information is withheld for reasons that cannot be justified in the name of national security. . . ." Humphrey gave as his example the Department of the Army's restoring over 90 percent of the testimony of then Army Chief of Staff, General Maxwell Taylor, when challenged on the classification of the officer's testimony.⁸⁰

One of the factors in this case as in many others involving classified information is that much of the data is classified mainly to keep policy decisions from being made public. Walter Pincus wrote that in the Symington subcommittee hearings on the Philippines, the Administration's deletions, amounting to from 60 to 70 percent of the transcript, fell into two categories: security and political. The subcommittee was able to enter into negotiations with the Administration to declassify the political testimony only after a threat of public subcommittee hearings on the subject.⁸¹ Without such efforts, declassification decisions would be entirely in the hands of the Executive Branch and the knowledge made available to the public would depend on what the Executive Branch alone wanted the public to know.

V. PROPOSALS FOR CHANGING THE CLASSIFICATION SYSTEM

A. PAST EFFORTS

Many of the problems involved in the classification system have long been recognized and there have been many proposals for changing the system. Some of these proposals have resulted in changes but others have not. A brief survey of some of the major studies of the classification system in the past and their recommendations demonstrates that such problems as overclassification are not new. A few examples follow.

1. Coolidge Committee

A Committee on Classified Information was appointed by Secretary of Defense Charles E. Wilson on August 13, 1956, because of the latter's concern about unauthorized disclosures of information. Headed by Charles A. Coolidge, the committee reported on November 8, 1956, that while the classification system under Executive Order 10501 seemed "beyond reasonable criticism as a matter or theory", the system in practice could justifiably be criticized both for withholding too much information and for harmful leaks of information.⁸² The recommendations of this Committee included (1) making a determined attack on overclassification; (2) cutting down the number of persons authorized to classify documents as top secret; (3) making clear that classification was not to be used for information not affecting the national security and specifically not for administrative matters; (4) establishing within the Office of the Secretary of Defense an official responsible for establishing, directing, and monitoring an active declassification program, the official to be separated from the direct influence

⁸⁰ U.S. Congress, Senate, Committee on the Judiciary, "Withholding of Information From the Congress," committee print, 1961, p. 35.

⁸¹ Pincus, *op. cit.*

⁸² Report to the Secretary of Defense by the Committee on Classified Information, Nov. 8, 1956, U.S. Congress, House, Committee on Government Operations, "Availability of Information From Federal Departments and Agencies," hearings, pt. 7, Washington, U.S. Government Printing Office, 1957, p. 2134.

of both security and public information officials in order to bring an unbiased judgment to the field of classification; and (6) supplying more specific guidelines on classification criteria.

2. Commission on Government Security

Another group which concerned itself with the defense classification system was the Commission on Government Security established pursuant to P.L. 84-304, approved August 9, 1955. The Commission consisted of several Members of Congress as well as private citizens with Loyd Wright as chairman and Senator Stennis as Vice Chairman. The Commission, which also examined other aspects of the effort to protect national security including the Federal Civilian Loyalty Program, the Atomic Energy Program, and the immigration and nationality program, expressed its conviction that "an adequate and realistic program for control over information or material of concern to national defense or security is vitally important to the objectives of our national security program."⁸³ The reason behind document classification, the Commission stated, was the necessity for balancing the need to insure that hostile eyes did not gain access to information the country wished to safeguard against the need to make certain that the American people and friends had access to all information which would help in the achievement of peace and security. The problem was how best to achieve this balance.

The Commission recommended the establishment of a "Central Security Office having review and advisory functions with respect to the Federal document classification program and to make recommendations for its improvement as needed."⁸⁴ The Central Security Office was also to have other functions such as hearing cases on government employees whose loyalty was questioned. The Commission concluded that the problem of the classification program was not a matter of the criteria established by Executive Order 10501. However, it recommended a few modifications, particularly the abolition of the "confidential" classification on defense information in the future. It expressed the belief that the document classification program should be embodied in an executive order, with the exception of the review and advisory functions of the proposed Central Security Office which it stated required legislation.⁸⁵

3. Special Government Information Subcommittee Proposals

The House Committee on Government Operations has recommended various changes in Executive Order 10501 since its Special Government Information Subcommittee (Moss Subcommittee) was formed in 1955. It reported in 1962 in a study on the status of that executive order that as the committee had made various recommendations there had been gradual progress toward resolving the conflict between the necessity for an informed public and the necessity for protecting defense information. Its 1962 report stated:

There has been a gradual recognition of the fact that the ideal information security system is one which defines very carefully those secrets which are imperative to the Nation's defense and then protects them as carefully as possible. Thus, Executive Order 10501 has evolved from a sort of catchall system

⁸³ Commission on Government Security, Loyd Wright, Chairman, report pursuant to Public Law 304, 84th Cong., as amended, June 21, 1957, p. 172.

⁸⁴ Ibid., p. 181.

⁸⁵ Ibid., p. 183-184.

permitting scores of Government agencies and more than a million Government employees to stamp permanent security designations on all kinds of documents, to a system permitting only those officials directly involved in security problems to place on limited numbers of documents security classifications which are to be removed with the passage of time.⁸⁶

Nevertheless, the committee reported, two of the most important problems remained to be solved. One of these problems was the lack of penalties for abuse of the classification system by withholding all kinds of administrative documents in the name of security. The report stated:

A security system which carries no penalties for using secrecy stamps to hide errors in judgment, waste, inefficiency, or worse, is a perversion of true security. The praiseworthy slogan of Defense Secretary McNamara—"when in doubt, underclassify"—has little effect when there is absolutely no penalty to prevent secrecy from being used to insure individual job security rather than national military security.⁸⁷

To meet this problem, the committee urged the Defense Department to establish administrative penalties for misuse of the security system until set penalties could be established.

The other problem it noted on which progress had not been made was the lack of an effective procedure for appeals against abuse of the classification system. To meet this problem, the committee urged that the appeals section of Executive Order 10501 be implemented in an effective manner. It stated that "until a responsible individual in the White House is charged with the primary duty of receiving and acting upon complaints against abuse of the classification system—until a full operating appeals system is set up and widely publicized—the most important safety valve in the information security system is completely useless."⁸⁸

B. CURRENT STUDY IN EXECUTIVE BRANCH

The Administration has launched two new efforts this year relating to the classification problem. On August 3, 1971, President Nixon asked Congress to approve a supplemental appropriation for fiscal 1972 of \$636,000 for the General Services Administration to begin an immediate and systematic effort to declassify the documents of World War II. In his message he stated that representatives of the National Archives, the General Services Administration, and the Departments of State and Defense had agreed that 90 to 95 percent of the classified documents of World War II, involving 160 million pages, 49,000 cubic feet of record storage space, and 18,500 rolls of microfilm, could be declassified if funds were available.⁸⁹

In addition, on January 15, 1971, President Nixon directed that a study be made of the classification procedure. William H. Rehnquist, an Assistant Attorney General and Director of the Office of Legal Counsel in the Department of Justice, was named chairman of the working group comprised of representatives from the executive departments affected. The study has not yet been completed. However,

⁸⁶ U.S. Congress, House, Committee on Government Operations, 25th report, "Safeguarding Official Information in the Interests of the Defense of the United States (The Status of Executive Order 10501)." H. Rept. No. 2456. 87th Cong., 2d sess., Washington, Government Printing Office, 1962, p. 13.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Weekly Compilation of Presidential Documents, p. 1117.

on August 12, 1971, John D. Ehrlichman, Assistant to the President for Domestic Affairs, and John Dean, Counsel to the President, gave a progress report on the study in a press conference.

Mr. Ehrlichman said the final recommendations are expected to cover both the classification and declassification systems, proceeding on the "basic principle that we are going to be classifying fewer documents in the future, but classifying them better," and that there should be limits on distribution to persons with clearance on a strict need-to-know basis. The direction thus far indicated, he said, that there would be new limits on the right to duplicate and disseminate documents.

Mr. Ehrlichman said the President had decided he would expand his request for appropriations to speed the declassification process and has asked for a special study of methods by which first priority could be given to declassifying information relating to events of special historical incidents, particularly the Korean War, the action in Lebanon under President Eisenhower, and the Cuban action under President Kennedy. The criteria for declassification would be (1) that the release of the documents would not jeopardize current intelligence sources and (2) that release could not imperil current relations with other governments or seriously and unnecessarily embarrass foreign citizens. Finally, Mr. Ehrlichman said:

The recommendations of the committee will undoubtedly be in the direction of a system which will impose a presumption, after passage of a certain period of time, that a document should be declassified, which presumption could be rebutted by a showing that it would be contrary to the national interest to declassify it at that time.

The presumption now runs in the other direction; that a document will remain classified unless someone can come forward and sustain the burden that it should be declassified.⁹⁰

C. OTHER RECENT PROPOSALS

Several proposals for legislation have been made in the 92nd Congress to deal with the problem of classification of materials by the executive branch. Some of these deal only with information from a single agency, such as the proposal by Senator Cooper in S. 2224 to make it the duty of the Central Intelligence Agency to keep fully and currently informed the Committees on Foreign Relations and Armed Services, with the intelligence information thus acquired to be made available to any Member of Congress under rules prescribed by the committees. This study will discuss only proposals dealing with the problem of classified information throughout the Executive Branch. While most have been introduced since the release of the Pentagon papers, some have a history which goes back several Congresses.

1. Temporary Study Commission or Committee

One approach which has been suggested is the establishment of a temporary commission or joint congressional committee to make a study of the specific problem of classification of information and to make recommendations for legislation or other governmental action. For example, S. J. Res. 119 introduced by Senator Roth and others on June 24, 1971, would set up a commission of seven members (two

⁹⁰ White House press release, Aug. 12, 1971.

Senators, two Representatives, and three private citizens including one representative of the press). The commission would be called upon to study all laws, regulations, and procedures relating to classification and make recommendations and a report by February 1, 1972.

A similar proposal would establish a select joint committee of Congress known as the "Committee on Freedom of Information" to make a study of the problem. This has been proposed by Rep. Harrington and others in H. Con. Res. 348 introduced June 24, 1971. The select committee would "conduct a full and complete investigation and study as to whether the policies and procedures followed by the agencies, departments, and instrumentalities of the Federal Government, with respect to the classification and dissemination of information, are adequate to insure the free flow of information that is necessary for the intelligent and responsible exercise of constitutional rights, duties, and powers by Members of the Congress, the Congress, and the people of the United States."

The establishment of a temporary study commission or committee would have the advantage of assuring a thorough preliminary study prior to making changes in the existing system. Whether it would have meaningful results would depend upon the degree to which further action were taken upon the basis of its study and recommendation.

2. An Independent Review Board or Commission

Another suggestion which has been made is for a permanent commission or independent review board to review classification policies or decisions or to declassify documents at its discretion. Senator Muskie, for example, has said he intended to propose legislation for the creation by Congress and the President of an independent board which would be responsible for declassifying documents.⁹¹ It would be enabled to make a document public after a two year waiting period or to send relevant documents at any time to the appropriate committee of Congress.

Senator Muskie has stated that the establishment of an independent review board would give the President and the Departments a strong incentive to be frank about the facts since they would be revealed soon anyway. His view is that such a board would protect national security without allowing security classification to hide blunders or launch covert actions.⁹² The board would be bipartisan and composed of one member from the Government, one from the press, and five from the public, with non-renewable terms.

Representative Hébert introduced an amendment to the National Security Act of 1947 on July 15, 1971, which would establish a Commission on the Classification and Protection of Information (H.R. 9853). The Commission would have a total of twelve members, two from the Senate, two from the House of Representatives, and four each appointed by the President and the Chief Justice. Its purpose would be to make a continuing study and review of the classification rules and practices. Similarly, one of the possibilities to be explored by the proposed study commission under S.J. Res. 119 introduced by Senator Roth would be the feasibility of establishing an independent agency to

⁹¹ Remarks by Senator Edmund S. Muskie, Garden City, N.Y., June 20, 1971, Congressional Record, July 19, 1971, p. E7889.

⁹² Ibid., p. E7890.

ensure the full disclosure of information while protecting the security of the United States. A number of other bills have been introduced which would have the effect of creating an independent board or commission on classification.

As has been noted, a Central Security Office was suggested by the Commission on Government Security in 1957. However, the recent proposals for an independent board or commission appear to differ from the earlier proposal in several ways. First, the Central Security Office would have had several other functions; any relating to classification would have been only a segment of its responsibilities. Second, the Central Security Office would have been part of the Executive Branch although independent of any department. Third, the Central Security Office would not have had power to review individual documents for the purpose of determining whether or not they were properly classified. It would have been limited to considering policies and procedures, expediting declassification, and suggesting recommendations to make the security programs of various agencies uniform, consistent, and effective.⁹³

The feasibility and effectiveness of an independent commission or board could vary according to the purpose sought and the functions assigned to such a group.

If it had the confidence of both the Congress and the Executive, an independent board or commission might be able to arbitrate differences of opinion between the two branches as to whether specific data should be made public. At the present time the Executive Branch is usually permitted the final decision by Congress and only rarely does a Member defy the classification stamp and make public a classified document without the consent of the Executive Branch. Under some proposals for a Joint Congressional Committee on classified information, however, apparently the final decision on a dispute over the classification of a document in dispute might be made by the Joint Committee, an arm of Congress.

If one of the functions of the commission was to oversee the classification process and review classified documents in general, one problem would be to ensure that it was given or had access to all classified documents so that it could review them. In view of the time necessary to read and understand the significance of documents and the large number of documents which would apparently be involved, any comprehensive review of classified information could be extremely time consuming. President Nixon has estimated that it will require 100 people five years to review the 160 million pages of documents from World War II which are still secret.⁹⁴ General review functions, therefore, might require a commission or board with a rather large staff.

In establishing the duties of the commission, however, methods might be found by which the review commission did not attempt to review all classified documents but only certain ones. For example, if it were provided that all documents would be automatically declassified within a certain period unless the review board determined that they should not be, the burden of initiating an exception and proving the need of continued classification would rest on the agency desiring to keep a document secret. Or, as has been suggested in one proposal,

⁹³ Commission on Government Security, op. cit., pp. 89 and 182.

⁹⁴ Washington Post, Aug. 4, 1971.

documents would be reviewed at the time they were first classified and each classification would have to be justified at that point.⁹⁵ The problem would remain, however, of whether the board would know if any agency had withheld documents from the review process.

3. *Permanent Joint Congressional Committee on Security Information*

Another approach is the establishment of a permanent joint congressional committee to serve as a watchdog on classification policies. This offers a direct way to give Congress a more active role in determining classification policy. In addition, since the membership of Congress reflects a wide range of opinion on how much and what kind of information should be kept secret and how much should be made public, it might offer a way to find a good balance between that information which should be available to all and that which should be kept secret in the interests of national security.

Several bills have been introduced in the 92nd Congress calling for the establishment of a Joint Congressional Committee on Classified Information. These are quite similar in the functions they provide for the committee but vary in the size and composition of the membership. The joint committee would be responsible for continuing investigation of practices and methods used in the executive branch to classify information for defense and security purposes, and of suspected misuse of such classification for purposes contrary to the public welfare. Upon findings of such misuse the committee could initiate such action as it deemed necessary to prohibit such misuse, sometimes including making any classified information which it considered ought not to be classified available to the public. The joint committee would also be responsible for assuring that classified information was available to Congress unless it agreed otherwise.

As an example of the way the joint committee might be composed, H.J. Res. 745, introduced by Congressman Addabbo on June 24, 1971, and in the 91st Congress as H.J. Res. 1131, would create a committee of 18 members to be composed of the chairman and ranking minority members of the House and Senate Armed Services Committee, the Foreign Relations and Foreign Affairs Committees, the Defense Appropriations Committees of the House and Senate, three other members of the Senate appointed by the President of the Senate, and three other members of the House appointed by the Speaker of the House.

S. 2290, introduced by Senator Humphrey on July 15, 1971 would establish a joint committee of 25 members, including the Speaker of the House; Majority and Minority leaders of the Senate and the House; Chairman and ranking minority members of the following committees of both houses, Appropriations, Armed Services, Foreign Affairs/Foreign Relations; three additional members of the House and Senate; and two members of the Joint Committee on Atomic Energy.

4. *Legislation Revising Classification Procedures*

Another approach is to establish through legislation the regulations and procedure for classification as Executive Order 10501 now does or to supplement that order to remedy the weaknesses which have appeared in its implementation. Rep. Gibbons has recommended that Congress pass legislation which, in addition to establishing a congres-

⁹⁵ Hudson, Richard, "Let's Declassify," New York Times, July 1, 1971, p. C47.

sional oversight committee, would provide a clear definition of national security matters which could be classified and the circumstances under which such classification could be imposed. He proposed that each agency be required to number classified documents chronologically and provide to Congress annually a list of its classified documents identified by number. The list would be required to contain also an indication of the number of classified documents from the preceding year, a listing of the documents which had been declassified, and an indication of how long the remaining documents had been classified. The departments and agencies, under his proposal, would be required to review classification annually and the continued classification of any document for three or more years would require the authorization of the head of the agency or department.⁹⁶

Senator Mansfield has said:

Perhaps the need is for a 20th Century Stamp Act, which would define more precisely who has the right to stamp the various classifications, and under what circumstances, and to require a justification by originator of the classification as to his selection and how public dissemination would compromise national security.⁹⁷

The proposal has also been made that Executive Order 10501 should be rescinded so that there would be no authority for a large number of people throughout government to classify information. Mr. William Florence, a retired civilian official of the Air Force who had extensive experience with the classification system, has suggested the rescinding of Executive Order 10501 (as necessary to root out the classification habits which have developed) and its replacement with legislation controlling defense information. He stated in testimony before the Government Operations Committee on June 24, 1971:

I respectfully suggest the enactment of legislation for controlling "defense information" or "defense data" similar to that which covers "restricted data" under the Atomic Energy Act of 1954. The Congress could decide upon appropriate language, sufficiently precise, that would include only those elements of military information which warrant and must be accorded effective protection against disclosure. We could easily amend the existing order, but we cannot amend people. The use of so-called classifications or other similar labels should be avoided. Any proposed disclosure not authorized by the statute could be stopped, and any unlawful disclosure could be the basis for penalty. The degree of punishment should be made commensurate with the seriousness of the violation, not necessarily a severe penalty.⁹⁸

5. Legislation Providing for Automatic Declassification

As an alternative approach, instead of addressing itself to classification procedures legislation might be directed toward facilitating declassification. For example, a law might be passed that after a certain period of time all documents would be automatically declassified unless some positive determination were made that a document should remain classified, thus making it easier to declassify documents than to keep them classified. The time period might be set as low as one year or as high as fifty years. Dr. Edward Teller, for example, has suggested that the United States declassify all secret documents after a year because "That is the period of time during which we can keep

⁹⁶ Testimony of Representative Sam Gibbons before the House Government Operations Committee, June 24, 1971.

⁹⁷ Congressional Record, June 28, 1971, p. S9984.

⁹⁸ Congressional Record, June 28, 1971, p. E6653.

secrets. In a longer period, we cannot.”⁹⁹ At the other extreme, a fifty-year limit, which the British Official Secrets Act sets, after which all official documents must be made public, has been criticized as being too long and as inhibiting the publication of documents before that time.¹⁰⁰ However, even a long time-limit assures that all documents would eventually be declassified without a time-consuming and expensive review. Apparently the Administration is considering this general approach, although not necessarily through legislation.¹⁰¹

6. *Study by Qualified Historians*

The recent controversy over the unauthorized publication of a classified Department of Defense history of the Vietnam war, the “Pentagon Papers,” focused attention on the importance to historians of declassifying documents relating to past events. In addition to arguing that there is a need for the data to make wise foreign policy decisions on current problems, some historians have attempted to gain recognition of the needs of historians in compiling accurate factual histories of U.S. foreign policy. Currently the time lag between the occurrence of an event and its publication in the “Foreign Relations of the United States. Diplomatic Papers” volume is 25 years, and the delay continues to grow longer. Some historians have gone so far as the judicial system to force the release of specific information, as in Operation Keelhaul mentioned earlier, without success.

An editorial in the Washington Post of July 7, 1971, by Henry Owen outlines a proposal suggested in recent years by historians. This would call for the opening up of all historical records, with a few exceptions, to qualified, professional historians after a specified amount of time. These historians would then compile histories of U.S. foreign policy under the sponsorship of University or Foundation grants. This was done by the government in the late 1940's for two historians whose work on the Second World War has become an important historical source.

7. *Congressional Vigilance*

Whether or not new laws relating to classified information are enacted or new machinery for classification and declassification is established, there may be a considerable amount that can be done to minimize the impediments which classified information places on the work of Congress in the field of foreign affairs. For example, reporting provisions in legislation can require that certain information be transmitted to Congress. Resolutions can be passed requesting the release of specified information if enough members believe that the information should be released. New legislation can be reviewed to ascertain whether it sanctions classification of information by such means as requiring clearances for access to certain information, and if so whether the legislation also provides safeguards against withholding information from Congress. Congressional review and oversight activities can be intensified over the areas and agencies in which large amounts of classified information render inadequate the amount of information available to the general public.

⁹⁹ Dallas Morning News, Aug. 20, 1971, p. 9F.

¹⁰⁰ Worsnop, Richard L., “Secrecy in Government,” Editorial Research Reports, 1971, vol. II, Aug. 18, No. 7, p. 641.

¹⁰¹ See above sec. B., “Current Study in Executive Branch.”

The power of the purse can be utilized by specific provisions such as Sections 624(d) (7) and 634(c) of the Foreign Assistance Act of 1961 as amended, and Section 502 of the Foreign Assistance and Related Programs Appropriation Act, 1971, relating the release of funds to the provision of information requested by a committee or subcommittee of Congress. These particular provisions permit information to be withheld upon a personal certification by the President that he has forbidden the furnishing of the specified information. Such a personal certification was made by the President on August 30, 1971, to prevent a suspension of Military Assistance Program funds after the Secretary of Defense had refused to supply the Senate Foreign Relations Committee with a requested five-year plan for military assistance. This withholding of information was done on the grounds of executive privilege and the need for "privacy of preliminary exchange of views between personnel of the Executive Branch" rather than security classification. It appears to have been facilitated, however, by the provision of the law permitting a waiver upon the President's personal certification. In its 1960 report, "Executive Branch Practices in Withholding Information From Congressional Committees," The House Committee on Government Operations endorsed the use of the power of the purse for the purpose of obtaining information necessary for Congress to perform its functions, stating as its concluding paragraph:

Utilizing the power of the purse, the Congress can and should provide in authorizing and appropriating legislation, that the continued availability of appropriated funds is contingent upon the furnishing of complete and accurate information relating to the expenditure of such funds to the General Accounting Office and to the appropriate committees, if any, at their request.¹⁰²

Congress can survey its own policies and practices in handling classified information and revise them if they seem to be either a barrier to the declassification of information or a barrier to obtaining or debating secret information. For example, if the lack of proper storage facilities has been used as a reason for not leaving classified material with Members of Congress, consideration could be given to providing the necessary facilities. Similarly, Congress could survey its own sources of information in the foreign affairs field and, if the Executive Branch does not cooperate in supplying the information it gathers, consider expanding or utilizing its own investigative resources more fully. For information which remains classified, it could make more frequent use of closed sessions of the Senate, as in the debate on Laos on June 7, 1971.

In any event, the many proposals which have been introduced in Congress indicate that a new attitude toward classified information is developing. A greater awareness of the hazards in Executive Branch secrecy is leading to a greater vigilance on the part of Congress against misuse of the classification system. A new determination by Congress to play its full constitutional role in the making of foreign policy may be bringing an end to an era in which persons without access to classified information were often made to feel that they could not debate foreign policy issues on a par with officials in the Executive Branch.

¹⁰² U.S. Congress, House, Committee on Government Operations, 25th report, "Executive Branch Practices in Withholding Information From Congressional Committees," 86th Cong., 2d sess., H. Rept. No. 2207, Aug. 30, 1960, p. 14.

