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DECLASSIFICATION OF SENSITIVE INFORMATION: A COMMENT ON EXECUTIVE ORDER 11652

On June 1, 1972 President Nixon implemented Executive Order 11652[1] as an executive response to increased public concern over government secrecy.[2] The Order completely revises the system used to restrict access to sensitive government documents by introducing new classification standards[3] and reducing the number of agencies having classification authority.[4] Moreover, the Order institutes elaborate review procedures,[5] establishes an accelerated schedule for declassification,[6] and places a thirty year limitation on the protection afforded any material.[7] Declassification has therefore become an affirmative goal that is designed to accommodate the executive's duty to withhold information for reasons of national security with the public's right to know.

The significance of Executive Order 11652 must be considered in relation to the doctrine of executive privilege, which, as an incident to the more general concept of separation of powers,[8] serves as the basic authority for Presidential classification and retention of sensitive government documents. The Order appeared in a climate of increasing controversy concerning the scope of executive privilege, caused, in part, by the absence of definitive judicial statement on the subject. While it is clear, for instance, that executive privilege may be effectively invoked to protect information critical to the national defense,[9] the doctrine is of uncertain application when the requested information relates solely to domestic issues. Nevertheless, the privilege has been relied upon to justify non-disclosure of private conversations held and advisory memorandums circulated within executive departments,[10] as well as information whose disclosure might adversely affect the public interest[11] or interfere with the operation

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1. 3 C.F.R. 375 (1973).
2. *See* notes 106-07 *infra* and accompanying text. This pressure was reflected in the subsequent promulgation of Exec. Order No. 11671, 3 C.F.R. 388 (1973), *as amended*, Exec. Order No. 11686, 3 C.F.R. 394 (1973), which opened the meetings and records of advisory committees to public scrutiny.
3. *See* notes 72-79 *infra* and accompanying text.
4. *See* notes 80-81 *infra* and accompanying text.
5. *See* notes 107-22 *infra* and accompanying text.
6. *See* notes 100-02 *infra* and accompanying text.
7. *See* notes 123-27 *infra* and accompanying text.
8. *See generally* Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960* (pts. 1-2), 29 GEO. WASH. L. REV. 623, 827 (1961).
9. *See* United States v. Reynolds, 345 U.S. 1 (1953).
10. Kramer & Marcuse, *Executive Privilege* (pt. 2), *supra* note 8, at 889, 900-02.
11. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 802-03 (1967). *See also* United States v. Reynolds, 345 U.S. 1 (1953).

of the executive branch.[12]

The issue of executive privilege has arisen when information required for evidentiary or discovery purposes has been withheld from the judiciary, when documents have been withheld from private citizens who have requested them pursuant to statutory authority, and when the executive has sought to justify withholding information from Congress although it was requested pursuant to the latter's investigatory function. The scope of the privilege as applied to Congress has been the subject of continuing controversy through virtually every administration,[13] and the extent of the privilege remains largely unsettled.[14]

The problem of non-disclosure has occurred most frequently during litigation with the government,[15] either in the context of the discovery process or through an evidentiary motion.[16] In these situations, while acknowledging that secrecy should attend certain defense and foreign relations matters, the courts retain their control over the evidence by refusing to allow executive discretion alone to determine what information can be legitimately withheld.[17] The trial judge makes an independent determination as to whether there is a reasonable danger that introduction of the evidence will result in the disclosure of secret matters relating to national security.[18] The

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Where military and diplomatic matters are at issue, the greater respect given executive privilege may be explained by viewing non-disclosure as an incident to the primary presidential responsibility for foreign policy, *cf.* United States v. Belmont, 301 U.S. 324 (1937); United States v. Curtiss Wright Corp., 299 U.S. 304 (1936), rather than seeing it as growing out of the more general right of each branch to institutional autonomy as mandated by the separation of powers. *See* United States v. Reynolds, *supra.*

12. Kramer & Marcuse, *Executive Privilege, supra* note 8, at 680-83, 707-17.

13. *See* Bishop, *The Executive's Right of Privacy*, note 8 *supra*; Wolkinson, *Demands of Congressional Committees for Executive Papers* (pts. 1-3), 10 FED. B.J. 103, 223, 319 (1949).

14. *See* Soucie v. David, 448 F.2d 1067, 1071-72 n.9 (D.C. Cir. 1971); Davis, *The Information Act, supra* note 11, at 763.

15. Rarely are private litigants involved. *But see* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam,* 384 F.2d 979 (D.C. Cir.), *cert. denied,* 389 U.S. 952 (1967).

16. In Totten v. United States, 92 U.S. 105 (1875), an administrator sought to recover on a secret government contract entered into by claimant's intestate with President Lincoln whereby the former performed clandestine services in the South during the Civil War. The issue of the right to withhold secret information was never reached, or rather was reached *a fortiori,* because the Court held that no action could even be maintained on such a contract since it was understood by the parties from the nature of the transaction that disclosure of its terms was impossible and that the very existence of such a contract was "itself a fact not to be disclosed." *Id.* at 107; *cf.* Chicago & S. Air Lines v. Waterman S.S. Corp. 333 U.S. 103, 111 (1948).

17. This compromise position found its major expression in United States v. Reynolds, 345 U.S. 1 (1953). Reynolds involved a claim under the Tort Claims Act resulting from a crash of an Air Force plane testing secret equipment. The government resisted discovery of the official accident report claiming it was privileged information containing military secrets.

18. *Id.* at 10. If possible, this determination should be made on the basis of "all the circumstances of the case," and "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.*

judge will not, however, compel the release of classified material.[19] Instead, the question to which the material relates should be decided against the government if the court determines that the information can be released and the government remains recalcitrant.[20]

Subsequent to the issuance of the Nixon Order, the Supreme Court proposed new Federal Rules of Evidence[21] which, if adopted,[22] would extend executive privilege to unclassified information relating to national defense or foreign relations.[23] The rules would also make the evidentiary privilege co-extensive with the exemptions in the Freedom of Information Act,[24] thereby equating the rights of particular litigants with those of the general public.[25] Furthermore, *in camera* inspection of documents relating only to domestic matters would be made possible, as would an in camera hearing on the government's claim of privilege itself.[26] Under the new rules such a claim would virtually always be sustained when the information sought was classified pursuant to an executive order. Since declassification under Executive Order 11652 is intended to result in immediate public disclosure, the declassification provisions of the Order may be an important method of offsetting the effects of the broad governmental privilege introduced by the Rules.

If the extension of executive privilege is retained when the new Rules are enacted into law, the importance of executive classification may be largely limited to citizen suits brought under the Freedom of Information Act (FOIA).[27] This Act gives private citizens access to information which would otherwise remain unavailable.[28] The general disclosure requirements of the FOIA are limited by nine exemptions, one of which covers those documents classified pursuant to an executive order.[29] This exemption for materials "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy,"[30] superseded similar provisions

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19. *See* Bishop, *The Executive's Right of Privacy, supra* note 8, at 481-83.
20. Support for this is found in Rule 37 of the Federal Rules of Civil Procedure, which the Reynolds Court held applicable to actions under the Tort Claims Act. United States v. Reynolds, 345 U.S. 1, 6 (1953). In criminal prosecutions the government can invoke its privilege only at the expense of dropping its case. *See, e.g.*, Jencks v. United States, 353 U.S. 657 (1957); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).
21. Fed. R. Ev., 93 S. Ct. No. 5, at 1 (1973).
22. Adoption of the proposed rules without alteration seems unlikely. The section on state secrets has been a special target of criticism and the Subcommittee on Criminal Justice of the House Judiciary Committee has recommended its elimination. SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 93 Cong., 1st Sess., DRAFT OF PROPOSED FEDERAL RULES OF EVIDENCE (Comm. Print 1973).
23. Fed. R. Ev. 509(a)(1), 93 S. Ct. No. 5 at 65.
24. *Id.* at 509(a)(2)(C), 93 S. Ct. No. 5 at 65.
25. *Id.* at Advisory Committee's note (a)(2)(C), 93 S. Ct. No. 5 at 67.
26. *Id.* at 509(c), 93 S. Ct. No. 5 at 65.
27. 5 U.S.C. § 552 (1970).
28. The FOIA gave the courts the right to order production of the information and punish for contempt in the case of non-compliance. *Id.* § 552(a)(3).
29. *Id.* § 552(b)(1).
30. *Id.*

under the Administrative Procedure Act (APA),[31] and, until the recent Supreme Court decision in *Environmental Protection Agency v. Mink*,[32] was felt to represent congressional intentions to reduce the possibilities of escape from the disclosure mandate. It had therefore been interpreted as either merely withdrawing congressional support from that branch of the doctrine of executive privilege which concerns domestic matters[33] or further restricting executive discretion to withhold information by requiring greater specificity in classification of documents involving international affairs.[34] In *Mink*, however, the Supreme Court held that this exemption went beyond mere codification of executive privilege and reflected a congressional intent to defer to executive determinations concerning the need for withholding documents.[35] The Court explained the change from the language of the APA to that of the FOIA as merely an attempt to clarify the wide executive discretion contemplated by the exemption.[36]

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31. 60 Stat. 238 (1946), *as amended*, 5 U.S.C. § 552 (1970).
32. 410 U.S. 73 (1973).
33. *See e.g.*, H.R. REP. No. 1497, 89th Cong., 2d Sess. 9-11 (1966); DEP'T OF JUSTICE, ATT'Y. GEN. MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 30 (1967).
34. *See, e.g.*, S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965); Note, 25 VAND. L. REV., 397, 400 (1972). The issue surfaced in Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970). A historian petitioned the Army for release of certain documents classified Top Secret under a provision of Executive Order 10501 mandating that "[t]he classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein." 3 C.F.R. 980 (1949-53 Comp.). After the Eisenhower Order's review procedures proved unsatisfactory, the historian brought court action under the FOIA, 5 U.S.C. § 552(a)(3) (1970). In considering the question of disclosure, the Ninth Circuit limited its role to determining whether the material in question was covered by an appropriate executive order and, if so, whether that classification was arbitrary and capricious. The court, in making this narrow determination, was required to examine the historical origin of the documents rather than conduct an in camera inspection of the documents themselves. Epstein v. Resor, *supra* at 930, 933. While the *Epstein* court found the instant classification justified, it indicated that had not a "paper-by-paper review" been in progress, such classification might have been deemed arbitrary and capricious, thereby permitting greater judicial inquiry. *Id.* at 933.
35. The Court made several references to congressional power to change the procedures under which the executive classifies documents, 410 U.S. 73, 81-83 (1973), subject to any limitations which executive privilege may impose. *Id.* at 83. Since the potential power of Congress to redesign the classification system was cited as a contrast to the actual deference which Congress has shown the executive, the Court seemed to imply that executive privilege need not reach as far as the present exemption. Justice Stewart's concurring opinion, for example, characterized the exemption as allowing "no means to question an Executive decision to stamp a document secret, however cynical, myopic, or even corrupt that decision might have been." *Id.* at 95. Justice Stewart and the majority agreed that congressional reordering of the classification system would be valid within the limits of executive privilege.
The Court held that the exemption had been drafted with awareness of and in conformity with the then outstanding classification order and therefore made "untenable the argument that classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes . . . ." *Id.* at 82-84.
36. *Id.* at 81-82.

In *Mink*, thirty-three members of Congress sued to compel disclosure of certain classified reports relating to a scheduled underground nuclear test explosion. The Supreme Court reversed a District of Columbia Circuit opinion which ordered in camera inspection,[37] noting that the executive order exemption forbids not only "compelled disclosure of documents, such as the six here, which were classified pursuant to this Executive Order," but also "*in camera* inspection of such documents" for the purpose of separating out alleged non-secret components.[38] Accordingly, the role of the District Court was restricted to an inquiry as to whether the executive had determined that the materials in issue merited classification.[39] Since the Supreme Court in *Mink* based its decision on a broad construction of the FOIA exemption,[40] the decision provides little assistance in delineating judicial attitudes concerning executive privilege.[41] The decision in *Mink* may, therefore, divert attention

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37. The District of Columbia Circuit held that the meaning of the "national defense" exemption was sufficiently ambiguous to require that documents independently marked as "secret," but containing non-secret components classified as highly as those sensitive components within the same document, be subjected to an in camera examination. Mink v. Environmental Protection Agency, Civil No. 17-1708 (D.C. Cir., filed Oct. 15, 1971). The court also held that documents classified secret merely because physically connected with other documents specifically and independently so classified fall outside the national security exemption to the FOIA. The government did not challenge this holding on appeal. Although the Nixon Order no longer allows classification on the basis of mere association with other classified documents, it does continue the practice of classifying all component parts of a document at the level of the highest part therein. See note 89 *infra*.

38. 410 U.S. 73, 81 (1973). The requirement of in camera inspection could result in giving the court a role equal to that of the executive in determining the necessity of classification. Such a role was specifically rejected by the Court. *Id.* at 84.

39. *Id.* at 81-82. Justice Brennan dissented, arguing that it was in the Act's requirement that the district courts undertake a de novo review in matters arising under the FOIA, with the burden on the agency to defend withholding, that necessitated in camera inspection of documents in order to separate out non-secret elements. *Id.* at 96-105. Justice Brennan's premise was that Congress intended to treat an executive classification in the same manner as an agency determination. The majority rejected this contention by holding that agency determinations made pursuant to the authority of a classification order were in effect presidential determinations. The Court did recognize that the statute required greater judicial inquiry, including in camera inspection, when the exemption claimed was for "inter-agency or intra-agency memorandums or letters," 5 U.S.C. § 552(b)(5), and the judgment was that of the agency. *Id.* at 85-94.

40. "The case presents no constitutional claims and no issues regarding the nature or scope of 'executive privilege.'" *Id.* at 94 (Stewart, J., concurring).

41. See note 35 *supra*. Until the *Mink* decision, the prevailing view was that Congress had recognized in the FOIA a limited executive privilege relating to foreign affairs. *See* notes 29-32 *supra* and accompanying text. The *Mink* Court was the first to suggest that Congress had gone beyond what the doctrine demanded. Accordingly, the few cases where the issue of disclosure has arisen should still be relevant in determining the scope of executive privilege. Also instructive on the subject of executive privilege is the case of New York Times Co. v. United States, 403 U.S. 713 (1971), which concerned a government request to enjoin publication of secret documents allegedly stolen from the Department of Defense. Nine separate opinions were filed in addition to a per curiam statement which held that the government had failed to meet the heavy burden of proof necessary to justify a prior restraint of the press. *Id.* at 714. The decision to deny the injunction was grounded on such diverse considerations as the absolutist nature of the first amendment, the lack of congressional support for the Executive's request, the separation of powers, and the limits of equity jurisdiction. *See* Henkin, *The Right To Know and*

from the constitutional issues raised by Presidential classification and focus it on the disclosure provisions of the Nixon Order itself.[42]

The Eisenhower Order-Government Classification Defined

Executive Order 11652 should be considered against the background of government classification from which it developed. The basic statement of Government classification policy for nearly twenty years was contained in Executive Order 10501,[43] issued by President Eisenhower. Its stated purpose was to balance the need for citizens to "be informed concerning the activities of their government" with the necessity "that certain official information affecting the national defense be protected uniformly against unauthorized disclosure."[44] The Order provided that information requiring protection "in the interests of national defense" be labeled Top Secret, Secret, or Confidential, depending on the degree to which its disclosure would jeopardize national security.[45] The Top Secret label was designated for those

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The Duty To Withhold: The Case Of The Pentagon Papers, 120 U. PA. L. REV. 271, 272 (1971). While only three Justices expressly addressed the issue of executive power to classify, two of them clothed the power in extraordinarily broad garb. Justice Stewart stated that it was "the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law" to promulgate and enforce executive orders to ensure the degree of secrecy necessary to conduct foreign affairs and maintain the national defense. New York Times Co. v. United States, *supra* at 728-30. Justice Harlan argued that the judicial role should be limited to determining whether the subject matter of the disclosure dispute lies "within the proper compass of the President's foreign relations power" and whether a personal finding has been made by the head of the relevant executive department "that disclosure of the subject matter would irreparably impair the national security." *Id.* at 757.

42. The Nixon Order addresses the particular problem at issue in *Mink* by requiring that documents be marked to indicate which portions are classified "in order to facilitate excerpting and other use." Exec. Order No. 11652 § 4(A), 3 C.F.R. 379 (1973). As the Supreme Court observed, this separating procedure is to be performed by the Executive and not the courts. Environmental Protection Agency v. Mink, 410 U.S. 73, 81 (1973). Once the Executive has separated the secret elements from the non-secret ones, however, the question of whether courts may then order disclosure of the non-secret parts remains unsettled. *Compare id.* at 84 n.10 *with id.* at 103-04. It is likely that the provisions mandating more discriminating marking of documents were included in the Nixon Order "to facilitate excerpting and other use" for the executive department and the review committees created by the Executive Order. While it is possible that section 4(A) of the Order contemplates aiding judicial disclosure, it is highly unlikely that the change was meant to encourage judicial participation in executive decision-making.

43. 3 C.F.R. 979 (1949-53 Comp.).

44. *Id.*

45. *Id.* at 979-80. The classifications had meaning for purposes of judging public access to governmental documents only where the fact of lower, less sensitive categorization could have been persuasive in review procedures to free information needlessly protected. *Id.* at 985-86. It is, nevertheless, important to analyze the tests for each classification category since the Nixon Order adopts a declassification schedule whereby the category of a docu-

documents requiring "the highest degree of protection," in that their disclosure "could result in exceptionally grave damage to the Nation."[46] Documents requiring a Secret stamp were those containing information which, if disclosed, would "result in serious damage to the Nation."[47] The Confidential classification was assigned to that material which "could be prejudicial to the defense interests of the nation."[48] The Top Secret and Secret classifications were further defined through the use of appropriate examples.[49]

The right to classify was given to all agencies with some direct responsibility for national defense.[50] In those departments with only partial national security responsibility, the head of the department alone was authorized to classify, while in agencies with primary defense responsibility, the chief administrative officer could delegate the power within stated limits.[51]

Executive Order 10501 emphasized security rather than access to material, and dealt extensively with the details of protection.[52] Con-

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ment's origination determines the speed of its release. Exec. Order No. 11652 § 5(A), 3 C.F.R. 380 (1973). Although the tests for categorization in the Nixon Order are different from those in the Eisenhower Order, they can only be analyzed by reference to the standards promulgated for judging sensitive information in the earlier Order.

46. 3 C.F.R. 979 (1949-53 Comp.).

47. *Id.* at 979-80.

48. *Id.* at 980.

49. Examples of exceptionally grave damage included "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." *Id.* at 979. Among the types of damage contemplated by the Secret classification were the jeopardizing of "the international relations of the United States," the endangering of vital defense policies or programs, or the compromising of "important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations." *Id.* at 979-80.

50. *Id.* at 980.

51. *Id.* The order did not specify those departments having primary responsibility, those which had partial responsibility, and those which lacked any responsibility for national defense. The promulgation of Exec. Order No. 10901, 3 C.F.R. 432 (1959-63 Comp.), in the last days of the Eisenhower Administration evidenced the fact that such non-specification had caused problems. The new Order tried to remedy this apparent oversight by designating the governmental units which could exercise classification authority. *Id.* Thirty-two departments, agencies, and governmental units were categorized as having primary responsibility for national defense, while 13 departments were viewed as having only partial defense responsibilities. Presidents Kennedy and Johnson made only minor changes in this original list. *See* Exec. Order No. 10985, 3 C.F.R. 518 (1959-63 Comp.); Exec. Order No. 11097, 3 C.F.R. 750-51 (1959-63 Comp.); Exec. Order No. 11382, 3 C.F.R. 691 (1966-70 Comp.).

52. Section 5 concerned the marking of classified material. It laid down separate procedures for bound documents, unbound documents, charts, maps and drawings, photographs, products or substances, reproductions, unclassified material, and for changes in the classification status of any of the above. There were also special marking rules for material sent outside the executive branch. 3 C.F.R. 981-82 (1949-53 Comp.).

Section 6 dealt with the custody and safekeeping of classified information, and covered storage of material, changes of lock combinations, custodians responsibility and telephone conversations. *Id.* at 982-3. Section 7 introduced rules for dissemination of sensitive documents and accountability pro-

cern for the public's right to know was evidenced only by general review procedures[53] and admonitions against over-classification.[54] Sanctions for either lax protection of sensitive material or over-cautious guarding of disclosable documents were not provided, thereby encouraging those with classification responsibilities to opt for caution and secrecy rather than thorough review and disclosure when there was doubt as to the need for or the proper classification to be used.

As part of a general program to curtail the use of executive privilege,[55] President Kennedy amended the Eisenhower classification order by supplying a general schedule for downgrading and declassification.[56] Under this system, classified information was to be downgraded at three-year intervals until it reached confidential status; complete declassification was to be achieved twelve years after the date of original classification. There were, however, a number of exceptions to this relatively liberal procedure,[57] the broadest of which encompassed information warranting "some degree of classification for an indefinite period." Such information was not subject to automatic declassification.[58]

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cedures to ensure compliance therewith. *Id.* at 983-84. Section 8 outlined measures for transmission of classified material, *id.* at 984, and Section 9 contained instructions on the disposal and destruction of secret papers. *Id.* at 984-5. While many of these provisions are retained in the present classification system they do not appear in the Nixon Order but are relegated to the supportive NSC Directive. 37 Fed. Reg. 10053, 10056-61 (1971).

53. Section 16 designated a Presidential staff member to hear and act upon complaints from private citizens and organizations as to the operation of the Order. 3 C.F.R. 985 (1949-53 Comp.). Section 17 implemented a continuing review by the National Security Council. *Id.* This review, however, was directed toward ensuring the proper safeguarding of information. Finally, Section 18 directed the head of each department or agency to designate a staff member to conduct a continuing review for the purpose of insuring "that no information is withheld hereunder which the people of the United States have a right to know, and . . . that classified defense information is properly safeguarded." *Id.* at 986.

54. In Section 3, the Order cautioned against "unnecessary and over-classification", *id.* at 980, and Section 4 ordered department heads to inaugurate procedures for "prompt review" of requests for disclosure "in order to preserve the effectiveness and integrity of the classification system and to eliminate accumulation of classified material which no longer requires protection in the defense interest." *Id.* at 980-81.

55. *See* Berger, *Executive Privilege v. Congressional Inquiry (pt. I)*, 12 U.C.L.A.L. REV. 1044, 1045 (1965).

56. Exec. Order No. 10964, 3 C.F.R. 486 (1959-63 Comp.). As in the Eisenhower directive, *see* note 45 *supra*, the classification which a document was originally assigned had no effect upon degree of access, nor did it accelerate the rate of release; regardless of the initial classification, it took 12 years until protection was withdrawn.

57. Materials received from foreign governments, those concerned with intelligence and cryptographic information, and those whose care was provided for by statute were exempted from the automatic schedule of down grading and declassification. Material designated by the head of an agency or his designee as "extremely sensitive" was similarly exempt. Exec. Order No. 10964, 3 C.F.R. 486 (1959-63 Comp.).

58. *Id.*

The trend toward curbing government secrecy, reflected in the liberalizing amendments to the original Eisenhower classification order,[59] accelerated with the passage of the Freedom of Information Act[60] and the public release of the Pentagon Papers.[61] Executive Order 11652[62] can be seen as a response to these events.[63] The Order's disclosure mechanisms can be broadly grouped into two categories. The first of these include provisions which attempt to erase the effects of past unnecessary classification by current review procedures and, ultimately, by bulk declassification. The second category focuses on provisions to ensure only legitimate classification in the future through restrictive classification rules, sanctions for violations, agency reporting requirements and, ultimately, automatic declassification. To effectuate these mechanisms, the order assigns rule-making and enforcement powers to regulatory bodies and provides for their guidance by general rules and statements of policy. Central to this scheme are the National Security Council (NSC), which has responsibility for implementing and monitoring the Nixon Order,[64] and the Interagency Classification Review Committee, which was established to assist the NSC.[65] The Review Committee considers complaints from all sources and has the power to command information from departments to aid it in performing its functions.[66] Pursuant to the authority given by the Order, the NSC issued a major directive implementing the Order and enlarging upon its provisions.[67]

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59. *See* notes 55-58 *supra*.
60. 5 U.S.C. § 552 (1970).
61. The Pentagon Papers were classified under the authority of Executive Order 10501. They consist of a 47 volume, 2.5 million word study entitled "The History of United States Decision-Making Process on Vietnam Policy" and a single document entitled "The Command and Control Study of the Tonkin Gulf Incident Done by the Defense Department's Weapons System Evaluation Group in 1965." *See* Note, *Constitutional Law—Freedom of the Press Versus Presidential Power*, 18 LOYOLA L. REV. 151 (1971-72). *See also* note 41 *supra*.
62. 3 C.F.R. 375 (1973).
63. In January of 1971, President Nixon established an interagency review group, headed by then Assistant Attorney General William Rehnquist and later by David Young, then a National Security Council staff member. to review government policy on the handling of top secret documents. *See* Fact Sheet on Executive Order 11652; 7 WEEKLY COMP. OF PRESIDENTIAL DOCS. 1019 (1971). It does not seem, however. that this project was given high priority by the administration. Only when the Pentagon Papers were released did any meaningful action occur. On July 1, 1971, the President met for the first time with his advisory group, *id.*, and in August, John D. Erlichman, then White House Assistant for Domestic Affairs, held a press conference to outline administration policy in the area. *Id.* at 1157. During that month the President also requested a supplemental appropriation to aid in the declassification and review of protected documents from World War II. *Id.* at 1117. *See* note 106 *infra*. The result of this activity was Executive Order 11652, signed by the President on March 8. 1972.
64. Exec. Order No. 11652, § 7 (A), 3 C.F.R. 383-84 (1973).
65. *Id.*
66. *Id.* Its review responsibilities are facilitated by requirements in the Order that documents be clearly and specifically marked to show all relevant information as to classification. *Id.* §§ 4(A)-(B), 3 C.F.R. 379 (1973).
67. Directive of May 17, 1972, 37 Fed. Reg. 10053 (1972) [hereinafter cited as NSC Directive]. The Executive Order and the Directive must be read together for a full understanding of the regulatory scheme.

The language of the Order clearly establishes that the discretionary power to classify material should be carefully exercised:

> Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, [or] to restrain competition or independent initiative . . . .[68]

This policy of limited classification is repeated in the Presidential statement accompanying the release of the Order,[69] and strengthened by the NSC directive which requires that any doubts are to be resolved in favor of disclosure.[70] While the theme of these provisions indicate that limiting government secrecy is a sincere objective, this intention alone may not overcome the inherent reluctance of the classifier to err on the side of disclosure.[71] Accordingly, the effectiveness of the Order in promoting access to information will depend on the operating procedures it establishes.

Classification Standards

The Nixon Order, while retaining the classification categories of Top Secret, Secret, and Confidential,[72] requires that the appropriate findings of grave damage, serious damage, or damage to the national security, necessary to activate the classification process, be subjected to a "reasonable expectation" test.[73] The tests for each particular category reflect the trend toward stricter classification standards. For example, the Secret category, while retaining the "serious damage" test, is illustrated by specific examples that differ from those which defined such damage in the Eisenhower Order.[74] The examples offered by Executive Order 11652 include:

> [D]isruption of foreign relations significantly affecting the national security; significant impairment of a program or policy

68. Exec. Order No. 11652, § 4, 3 C.F.R. 379 (1973).
69. "The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations." 8 WEEKLY COMP. OF PRESIDENTIAL DOCS. 543 (1972).
70. "If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether the material should be classified at all, he should designate the less restrictive treatment." NSC Directive, *supra* note 67, at 10053-54.
71. For this reason, the limitations on what can be classified and who has classification authority assume primary importance. Interview with Richard Tufaro, Staff Assistant to the Chairman of the Interagency Classification Review Committee, in Washington, D.C., April 13, 1972 [hereinafter Tufaro Interview].
72. Exec. Order No. 11652 § 1, 3 C.F.R. 375-76 (1973).
73. *Id.*, 3 C.F.R. at 376.
74. *See* note 49 *supra*.

directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security.[75]

The "disruption of foreign relations" criterion appears to be more restrictive than the former test of "jeopardizing the international relations of the United States,"[76] since it seems to require actual rather than potential impairment of such relations.[77] The Confidential category has also been markedly narrowed. This classification may be conferred only when a document's unauthorized disclosure "could reasonably be expected to cause damage to the national security."[78] In contrast, the classification standards for Top Secret appear to have been made less demanding, and might increase the scope of the protection.[79] Finally, the new Order restricts the power to classify to those executive units "concerned with matters of national security,"[80] and gives a relatively limited interpretation to this qualification by reducing the number of departments with general classification authority and restricting still further the number with power to label documents Top Secret.[81]

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75. Exec. Order No. 11652 § 1 (B), 3 C.F.R. 376 (1973).
76. Exec. Order No. 10501 § 1(b), 3 C.F.R. 979-80 (1949-53 Comp.).
77. The remaining standards for the Secret rank fluctuate between greater restriction and broader liberality. For instance, there now must be a reasonable expectation that a program or policy will be significantly impaired if information is released for a document to be given a Secret stamp. Exec. Order No. 11652 § 1(B), 3 C.F.R. 376 (1973). Previously, the same protection was available on the mere showing that the effectiveness of such a program or policy was endangered. Exec. Order No. 10501 § 1(b), 3 C.F.R. 979-80 (1949-53 Comp.). Under the old Order, however, that program or policy was required to be of "vital importance to the national defense", *id.*, 3 C.F.R. 979-80 (1973), while the Nixon Order requires only that it be "directly related." Exec. Order No. 11562 § 1(B), 3 C.F.R. 376 (1973).
78. Exec. Order No. 11652 § 1 (C), 3 C.F.R. 376 (1973). *See* note 48 *supra* and accompanying text.
79. The examples of "exceptionally grave damage" sufficient to merit a Top Secret stamp are similar to those of the Eisenhower Order, *see* note 49, but there are certain subtle changes which could minimize the effect of the reasonable expectation requirement. For example, while the Eisenhower Order cites "armed attack against the United States or its allies" as an illustration of exceptionally grave damage, Exec. Order No. 10501 § 1, 3 C.F.R. 979 (1949-53 Comp.), the Nixon Order substitutes the term "armed hostilities." Exec. Order No. 11652 § 1, 3 C.F.R. 376 (1973). Although attack seems to confine itself by its terms to the classical war experience, hostilities might be interpreted to include such actions as guerrila raids or threatening demonstrations at foreign military bases. The other examples of "grave damage" also suggest a broadening of classification prerequisites. The Eisenhower Order specifies "a definite break in diplomatic relations affecting the defense of the United States," Exec. Order No. 10501 § 1, 3 C.F.R. 979 (1949-53 Comp.), while the new Order refers only to a "disruption of foreign relations." Although such a "disruption" must "vitally [affect] the national security," the change is toward a significantly looser standard. Exec. Order No. 11652 § 1, 3 C.F.R. 376 (1973).
80. Exec. Order No. 11652 § 2, 3 C.F.R. 376-77 (1973). The "primary-partial" distinction of previous orders has been discarded; now authority to classify parallels the classification categories. Authority to classify material Top Secret, Secret and Confidential extends to twelve specific agencies or departments in addition to such offices in the Executive Office of the President as the President shall designate in writing. *Id.* § 2(A), 3 C.F.R. 377 (1973). Thirteen additional governmental units have authority to classify documents Secret and Confidential. *Id.* § 2(B), 3 C.F.R. 377-78 (1973).
81. When President Nixon took office the heads of thirty-three departments, agencies and government bureaus had delegable authority to classify material at all grades. Twelve other government units possess non-delegable

Sanctions and Reporting Requirements

A significant problem associated with any restricted classification scheme involves the selection of an appropriate method of enforcement. The Order expressly provides sanctions for misuse of the classification privilege.[82] While the sanctions contemplated by the Order were previously available, the threat of their use is now made explicit. The Order should be of considerable influence in the largely subjective area of classification, since it establishes that repeated abuse *shall* be grounds for reprimand[83] and precludes escape by anonymous classification.[84] Exclusive reliance on the sanction process itself, however, might prove unrealistic in view of the traditional reluctance of the bureaucracy to invoke such administrative remedies.[85] The Interagency Classification Review Committee, which has primary responsibility for overseeing departmental actions and ensuring compliance with both the Executive Order and the NSC Directives,[86] has recognized this difficulty and has emphasized departmental adherence to the Order's restrictions on classification authority by requiring detailed reporting to demonstrate departmental compliance.[87]

The reporting requirements that are outlined in the NSC Directive[88] have been defined by the Review Committee and have a major role in the regulatory scheme.[89] The Directive requires that each

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power to classify. *See* note 51 *supra*. Of some 25 departments with classification authority under Executive Order 11652, only 12 can classify documents Top Secret. Moreover, the heads of departments with classification authority are allowed only limited capacity to delegate their powers. Exec. Order No. 11652 § 2, 3 C.F.R. 377-78 (1973).

82. Any officer or employee of the United States who unnecessarily classifies or over-classifies information or material shall be notified that his actions are in violation of the terms of this order . . . . Repeated abuse of the classification process shall be grounds for an administrative reprimand. . . .

Exec. Order No. 11652 § 13, 3 C.F.R. 386 (1973).

83. *Id.*

84. *Id.* § 4(B), 3 C.F.R. 379 (1973).

85. Tufaro Interview, *supra* note 71.

86. Exec. Order No. 11652 § 7 (A), 3 C.F.R. 383-84 (1973).

87. The Order gives the Review Committee the power to command information, *id.*, and the NSC Directive requires detailed marking of documents which aids the Review Committee in its review and rule-making responsibilities. NSC Directive, *supra* note 67, at 10056-59. The Directive also requires the Review Committee to establish a data bank containing information on selected categories of documents having preservative value. *Id.* at 10061-62. *See* notes 187-90 *infra* and accompanying text.

88. NSC Directive, *supra* note 67, at 10063.

89. The Order does not, however, specifically envision a continuous system of compiling and disseminating information. Section 4 requires detailed marking of protected documents so as to show a document's classification status, exemption, if any, from the General Declassification Schedule, office of origin, date of preparation and classification, and highest official classifier. 3 C.F.R. 379 (1973). The Order also encourages agencies to separately mark portions of documents according to their individual level of classification to facilitate excerpting and other use. *Id.* The NSC Directive interprets this provision as continuing the early practice of classifying a document as high as its

department with classification responsibilities submit proposed procedures for implementing the Order for Review Committee approval,[90] and thereafter provide the Review Committee with several quarterly reports.[91] The Report of Authorized Classifiers[92] is intended to ascertain the extent of actual classification, while a second report, outlined on Review Committee Form 322, is designed to discover classification abuses.[93] The types of abuse subject to the reporting requirement[94] include unnecessary classifications; over or under-classifications; failure to assign the proper downgrading and declassification schedule to a document; and the categorizing of a document as exempt from the declassification schedule in a manner other than that provided either in the Order or the NSC Directive.[95]

Disclosure of classified materials has been recognized as a serious problem, and has appeared in a particularly dramatic guise in cases involving the news media. While massive releases such as that of the Pentagon Papers command the greatest attention, the practice of selectively releasing classified information to recipients who publicize a partisan position, while denying opponents access to the same information for purposes of verification or rebuttal appears equally troublesome.[96] Such unauthorized disclosures are included in a third report[97] if they are of sufficient importance to merit a formal investi-

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highest component part. NSC Directive, *supra* note 67, at 10054. This practice is somewhat mitigated by the requirement for paragraph marking, *id.* at 10057, which allows not only excerpting but permits incorporation of the component portion at its actual classification level, thereby avoiding the classification of the document into which the portion is incorporated at the same overall level as the document from which the portion originated. *See* note 37 *supra*.

90. NSC Directive, *supra* note 67, at 10063. Upon approval the regulations are to be published in the Federal Register "to the extent they affect the general public." *Id.*

91. *Id.* Apart from the categories outlined in the Directive, the Review Committee can request "such other reports as said Chairman may find necessary for the Interagency Classification Review Committee to carry out its responsibilities." *Id.* Departmental Committees, established in each department with classification responsibilities pursuant to section 7(B) of the Order, are primarily responsible for ensuring compliance with the reporting requirements. *See id.* at 10062-63; Letter of Instructions from Interagency Review Committee, Feb. 27, 1973.

92. This report requires the name and job title of each person authorized to classify, the amount of classifying done by that person at each level of secrecy, and the overall total of classifying done by the department. *See* NSC Directive, *supra* note 67, at 10053. The Directive allows an exception to the requirement of identifying classifiers by name where such identification might result in the disclosure of sensitive intelligence information. *Id.* The official instructions for the Report of Authorized Classifiers provide for use, in such a case, of a position title or code number.

93. *See* Letter of Instruction, *supra* note 91.

94. Form 322 requires as a minimum the reporting of the details of the classification abuse, the name and title of the classifier, corrective measures being taken to prevent recurrence, and additional sheets or exhibits as necessary.

95. A classification abuse is also defined as "any classification action by an individual not authorized in writing to exercise appropriate classification or exemption authority, or the improper delegation of such." Instructions for Report of Classification Abuses, Feb. 27, 1973.

96. For an example of the problems created by this practice see Draper, *The Classifiers of Classified Documents are Breaking Their Own Classification Rules*, N.Y. Times, Feb. 4, 1973, § 6 (Magazine) at 10.

97. *See* NSC Directive, *supra* note 67, at 10059; Letter of Instruction, *supra* note 91. The release of the Pentagon Papers was a wholesale and direct re-

gation, the results of which confirm that such disclosure did occur.[98] A fourth report, outlined on Review Committee Standard Form 321, requires the agency to describe its progress in complying with requests for mandatory declassification review, thereby allowing the Review Committee to maintain a consistent and prompt review of such requests by quickly ascertaining the nature and status of any specific request during any particular quarter. Finally, each department must also submit a quarterly Summary Report detailing every classification action resulting in the origination of a classified document, regardless of whether an original determination was made as to the need for classification.[99] Although the problem of bureaucratic secrecy for its own sake remains significant, it appears reduced by the presence of this affirmative reporting system.

Declassification

The Order introduces an accelerated schedule for downgrading and declassification as the ultimate check on classification discretion.[100] Documents are to be downgraded every two years and complete declassification is to be achieved no later than ten years from a document's date of original classification.[101] As measured from the date of original classification, information designated Top Secret will be declassified after a ten year period; Secret documents after an eight year period; and Confidential materials after a six year period.[102]

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lease of classified information. Yet the problem of applying existing criminal laws there illustrates the difficulty in curbing the indirect and subtle exchange of information to favored recipients. Turning a continuous spotlight on violators through use of the reporting system appears to be a feasible remedy.

98. Among the information required by Standard Form 323 are a description of the subject matter and security classification of the compromised information, and whether it can be declassified; the name of the person furnishing the material; whether the material has been obtained by an unauthorized recipient; the impact of the disclosure on national security; the measures taken to prevent similar disclosures; and whether the violation has been referred to the Justice Department for prosecution. An agency decision that a document impermissibly disclosed could be fully declassified would help mitigate the unfairness of the selective disclosure and erase any false impressions left by selective excerpting.

99. This requirement applies even to those cases in which the classification was made either in accordance with an authorized guide or on the basis of an extract or compilation from previously classified material. The Quarterly Summary Report should also detail departmental efforts to increase public access to declassified documents and improve management of classified materials.

100. Exec. Order No. 11652 § 5, 3 C.F.R. 380-81 (1973).

101. Unlike previous classification orders, a document's stamp affects the length of its protection. *See* notes 45 and 56 *supra* and accompanying text.

102. Exec. Order No. 11652 § 5, 3 C.F.R. 380 (1973). The NSC Directive requires that documents be marked as to the earliest possible date of downgrading or declassification. Only when earlier dates for release cannot be de-

The failure of the Kennedy Order to significantly reduce the amount of classified material[103] resulted in a severe restriction of exemptions from the established schedule. The most comprehensive exemption,[104] for example, which covers information classified before the effective date of the Nixon Order and not subject to the downgrading and declassification schedule of President Kennedy's Executive Order 10964, was compelled by the massive amount of data still classified and unreviewed, and the impossibility of reviewing it for purposes of release through the new General Declassification schedule.[105] Classified information from foreign sources, however, is given unlimited protection only if it held on the specific understanding that it be kept confidential.[106]

The Nixon Order creates elaborate review procedures to mitigate the effects of past unnecessary classifications and ensure reevaluations of the exemptions from the new declassification schedule. These procedures culminate in an automatic declassification schedule embracing all documents over thirty years old. After ten years from the date of classification,[107] all exempt material is subject to mandatory review under section 5(C) of the Order[108] if a request for such review is initiated by either a government department or a private citizen.[109] The initiating request, however, must describe the material to be reviewed with "sufficient particularity," and the designated

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termined will materials be run through the General Declassification Schedule. NSC Directive, *supra* note 67, at 10054.

103. The exemptions to the Kennedy declassification schedule, when read in conjunction with the entire Order, appear fairly narrow and restrictive. *See* notes 57-58 *supra* and accompanying text. The Nixon Order, however, is forced to exclude most material previously classified because "[a]side from a small amount of documents which are subject to declassification after a 12 year period as specified by existing regulations, *i.e.* subject to the Kennedy declassification schedule], the vast majority of documents classified since World War II have never been given a rigorous declassification review and they remain classified to this day." 8 WEEKLY COMP. OF PRESIDENTIAL DOCS. 544 (1972).

104. Exec. Order No. 11652 § 5(d), 3 C.F.R. 381-82 (1973).

105. *See* note 103 *supra*. The logistics involved in massive declassification were assessed by President Nixon in a letter to Speaker of the House Carl Albert wherein the President requested a supplemental appropriation to aid in a "systematic effort to declassify the documents of World War II." 7 WEEKLY COMP. OF PRESIDENTIAL DOCS. 1117 (1971): "The task ahead is mammoth, as it involves nearly 160 million pages of classified documents contained in 49,000 cubic feet of paper records and over 18,500 rolls of microfilm held by the National Archives alone." *Id.*

106. Exec. Order No. 11652 § 5 (B), 3 C.F.R. 380-81 (1973). Such a construction appears to change the emphasis from that of a comparable exemption in the Kennedy Order by placing the burden on the foreign source to request protection. Material "disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security" is also given an exemption. *Id.* The actual scope of this exemption may depend on whether the phrase "specific foreign relations matter" is construed as being confined to information of purely military logistics or whether the words will be held to embrace diplomatic or military policy objectives. The few remaining exemptions are limited to cryptography and material pertaining to intelligence sources and methods, material covered by statute, and information "the disclosure of which would place a person in immediate jeopardy." *Id.*

107. No obligation to review any material exists before 10 years have passed, though some departments have procedures for doing so outside of those required by the Executive Order.

108. Exec. Order No. 11652 § 5(C), 3 C.F.R. 381 (1973).

109. *Id.*

material must be obtainable "with only a reasonable amount of effort."[110] Information which requires no further exemption will be immediately declassified, and a future date for automatic declassification of other information will be set.[111]

The ten year review is made within the originating department.[112] If no action is taken on a request for activation of the review procedure within a specified time period,[113] or if the request is denied, the party requesting review may apply to a Departmental Committee.[114] If the Departmental Committee also refuses to release the information, a final appeal may be taken to the Interagency Classification Review Committee,[115] which is assigned broad responsibilities by the Order,[116] including authority to "assure that appropriate action is taken" on complaints concerning its administration.[117] Although the Re-

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110. *Id.* This provision has been criticized as too restrictive in that it precludes scholars from making general surveys of the Archives in the hopes of discovering an important, but still classified, document. *See, e.g.*, Wall St. J., Sept. 6, 1972, at 22, col. 2. The Review Committee takes a different position. It considers that the review procedures are designed to mitigate some of the consequences of undue classification, rather than to provide an answer to the problem of roomfuls of classified but unreviewed ancient documents. Tufaro Interview, *supra* note 71.

111. Exec. Order No. 11652 § 5 (C), 3 C.F.R. 381 (1973).

112. Under NSC regulations, each department must designate an office to coordinate requests for activation of the review procedure. NSC Directive, *supra* note 67, at 10055. Where classified materials are transferred (a) pursuant to a statute or Executive Order and (b) in conjunction with a transfer of function and not merely a change of storage location, the receiving department will be deemed the originating department for all purposes including declassification. Exec. Order No. 11652 § 3(C), 3 C.F.R. 378 (1973). Where these requirements are not met but where the originating department has ceased to exist, each department having present possession is to be deemed the originating departments. *Id.* § 3(D), 3 C.F.R. 378 (1973).

113. Receipt of the request is to be immediately acknowledged in writing and a determination made within 30 days. NSC Directive, *supra* note 67, at 10055.

114. *Id.* The Departmental Committee is vested with authority to take action on all matters concerning the implementation of the Order within its department. Exec. Order No. 11652 § 7(B), 3 C.F.R. 384 (1973).

115. NSC Directive, *supra* note 67, at 10056.

116. Exec. Order No. 11652 § 7(A), 3 C.F.R. 383-84 (1973).

117. *Id.* § 7 (A) (2), 3 C.F.R. 384 (1973). The Review Committee is the final authority when requests for disclosure are denied either by Deparmental Committees under the 10 year review provision for exempted material or by the Archivist of the United States in those cases where 30 years have passed since the requested document's original classification. NSC Directive, *supra* note 67, at 10062. The Review Committee requires departments to submit quarterly reports on the status of mandatory declassification review requests on Form 321, which contemplates the possibility that unilateral action by the receiving department may be impossible and therefore allows space for that department to record outside coordination and referrals. If the request is denied on procedural grounds, such as premature request, a document description of insufficient particularity or a request that is unduly burdensome, the reason is to be marked on the approved form. Where the merits of the request have been reached, the action taken and the date the requesting party was notified thereof shall be specified. Where a document remains classified, a number corresponding to the number of an exemption category in the Order must be entered to show the basis for continued protection. Finally, Form 321 provides a checkoff column where the information requested is, or can be, de-

view Committee, as a body, is not expressly given authority to declassify, its decisions are meant to have significant, if not compulsory, force.[118]

Only three cases have reached the stage of Committee review since the promulgation of the Order. The first of these involved a request by the New York Times to the National Security Council for declassification of the Gaither Report.[119] The National Security Council denied the request, but the Review Committee recommended declassification. The second case also concerned documents classified by the NSC. A historian requested the release of documents pertaining to the loss of the Chinese mainland and the start of the Korean War. Although the NSC again denied disclosure, the Review Committee recommended granting the request. In both these cases the Review Committee did not order declassification and forwarded its recommendations to Presidential Advisor Henry Kissinger for final decision.[120] The exclusively advisory role which the Review Committee adopted for itself may have been compelled by the dual function of the NSC under the Order. While it is given final responsibility for overseeing the implementation of the Order, it also has authority to classify documents and is therefore subject to the review procedures of the Order and the authority of the Review Committee. The ambiguous situation created by this reversal of roles may explain the cautious approach of the Review Committee.[121] The question of whether the Review Committee would independently order declassification when the material requested is classified by another agency was presented in a third case involving a request by the Associated Press to the Central Intelligence Agency (CIA) for documents relating to the overthrow of President Arbenz of Guatamala.[122] Be-

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classified, but is withheld under an exemption of the Freedom of Information Act.

118. The scope of the Review Committee's power remains unclear at this early date in its operation. Certain provisions of the Order, however, appear to accord great authority to the Review Committee's decisions. Section 7(A) provides the Review Committee with power to "oversee Department actions to ensure compliance . . . ." 3 C.F.R. 383-84 (1973). Also, part B of that section requires Review Committee approval of departmental regulations adopted pursuant to the Order. *Id.* at 384. Finally, section 13 of the Order provides that, where unnecessary or over-classification has been found by the Review Committee, "it shall make a report to the head of the Department concerned in order that corrective steps may be taken." *Id.* at 386.

119. *See* Chalmers Roberts, *Fifteen Years Later: Reflections on a Top Secret Report*, Washington Post, Feb. 24, 1973, § A, at 16, col. 3.

120. The Gaither Report was declassified; the request for Korean War material is still under advisement. The Review Committee distributed a notice of declassification reporting that:

> Said Gaither Report was declassified in full subject to the deletion in the first full paragraph of subsection C on page 29 of the statements on lines 4-6 starting with "but the probability . . ." and ending with ". . . the missile load," which portion shall continue to be classified Top Secret.

Notice of Declassification, David R. Young, Executive Director Interagency Classification Review Committee, January 10, 1973.

121. Tufaro Interview, note 71 *supra*.

122. This case also serves to illustrate the particularity requirement attending a request for document disclosure. The initial request asked for documents concerning CIA involvement in Guatamala. This was held not specific enough identification. Later, the Associated Press revised its application to a

fore any action was taken, however, the CIA initiated a second review of the requested information and the Review Committee deemed it appropriate to remand to the agency until such review was completed. Accordingly, the issue of the Review Committee's capacity to order unilateral declassification remains unsettled.

In most instances, a document will lose all classification protection thirty years from the date of its original classification.[123] If such classification occurred after the effective date of the Nixon Order, declassification will be automatic.[124] The declassification can be prevented only if the head of the originating department affirmatively certifies that specifically identifiable information requires continued protection, after personally determining that such protection "is essential to the national security or disclosure would place a person in immediate jeopardy."[125] If the original classification occurred before the effective date of the Nixon Order declassification will not be immediate, but the eligible documents will be transferred to the Archivist of the United States and systematically reviewed for declassification.[126] Material deemed to merit continued protection will be separated and submitted to the head of the originating department for the same personal determination as that required for a document classified after the effective date of the Nixon Order.[127]

A data index system required by the NSC Directive[128] will eventually eclipse the 5(C) mandatory review as the primary method for reevaluating exempt material and identifying and disseminating declassified material. The major function of the material filed in the

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request for situation reports and CIA bulletins on Arbenz' overthrow in Guatamala. This request focused on a specific time period and the specification of situation reports and CIA bulletins served to particularize the nature of the information sought.

123. Exec. Order No. 11652 § 5(E), 3 C.F.R. 382 (1973).

124. *Id.*

125. *Id.* In such a case the Department head must also specify a date or event when protection can be withdrawn. *Id.*

126. *Id.*

127. *Id.* The procedure for departmental review of documents exempted from the General Declassification Schedule, as set out in sections 5(C) and (D) of the Order, is made expressly applicable to those documents exempted from the 30 year declassification process. The NSC directive reroutes requests for 5(C) review to the Archivist in those cases where the documents have been transferred to him as well as where they remain in the custody of the originating department. NSC Directive, *supra* note 67, at 10056. In the latter instance, the review will be a joint one. The only issue will be whether the proper personal determination has been made or is currently being undertaken by the head of the originating department. Since an adverse decision on this point may be appealed to the Review Committee, the personal discretion of the department head in exempting documents from the 30 year disclosure provision is somewhat limited. Moreover, although the "essential to the national security" test appears to be a broad one, its use as a means to improperly perpetuate government secrecy should be diminished by the affirmative obligation of the department head to certify the necessity of continued classification.

128. NSC Directive, *supra* note 67, at 10061-62.

data index[129] will be to aid in drafting two mandatory periodic reports. The first report, the Annual Review List, demands a systematic review of classified documents which are over ten years old and exempt from declassification, as well as information indicating declassification upon the happening of a specified event.[130] The purpose of this review is to ensure disclosure "as soon as there are no longer any grounds for continued classification."[131] The second report, the Annual Declassification Lists, includes documents which are declassified through the normal workings of the classification system, as well as those documents listed in the Annual Review List which have been determined to require declassification.[132] This report is intended to describe information which is no longer protected to ensure public access to it. Since this goal can be achieved by continuous reporting, the need for bulk review and declassification in the future may be avoided.[133]

Conclusion: the Nixon Order Reviewed

Executive Order 11652 is the culmination of a long process of liberalization and rationalization of government classification systems. Its greatest promise lies in its ability to check classification abuses at their source by requiring regular departmental reports. The Order also limits the number of departments as well as personnel who have authority to classify, and circumscribes the period during which classification will remain effective. Nevertheless, the order does not solve all the problems which initial non-disclosure creates. For instance, the thirty year Declassification Schedule appears to be the most distinctive aspect of the Order, yet its significance would seem limited to historians. Similarly, while the material included in the General Declassification Schedule is usually recent enough to provide assistance in the public decision-making process and thereby exert some influence on current issues, its release will be of limited utility since a document may still be accorded a maximum protection of ten years. Furthermore, the great bulk of unclassified documents are necessarily exempt from the General Declassification Schedule and therefore will not be automatically disclosed. Instead, a review must be requested, after ten years from their date of origin, and the tests of

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129. The information required by the data index is limited to selected categories of material produced and classified after December 31, 1972. The requirement demands as a minimum that all Top Secret documents and all Secret and Confidential documents exempted from the General Declassification Schedule must be indexed. Letter of Instructions on Data Index System, Memorandum from David R. Young, Jan. 23, 1973.

130. *Id.*

131. *Id.* This review is more complete than anything contemplated by the review procedures of 5(C). No request is necessary to activate this review and therefore none of the procedural requirements that attach to such a request apply. The Annual Review List would not be exclusive, however, and the 5(C) route would still be appropriate in those cases where either the material desired was not covered by the indexing requirement or the data index review did not result in declassification.

132. *Id.*

133. *See* note 106 *supra.*

particularity and reasonable effort must be met. For example, documents relating to the war in Vietnam which were classified Top Secret in 1967, not unlike the material included in the Pentagon Papers, would not have been eligible for review until 1977, and a citizen who wanted such review would have been required to describe them with "sufficient particularity." It is probable that a request for "papers on the Vietnam War" would fail to meet such a test. If the papers could not be identified with the requisite particularity, or if they were intermingled among offices and departments so that they could not be obtained without unreasonable effort, they would not be released until 1997. Regardless of the need for extended classification of such potentially influential material, this example demonstrates that the practical effect of the Nixon Order may often be to give such information a ten year presumption of required protection and then to further insulate it from public view through the implementation of a cumbersome review procedure. While the annual review requirement of the data index system might advance disclosure to some extent, this requirement does not attach until ten years after the classification date and even then disclosure is not assured. Nor does it seem that documents on a controversial topic such as the Vietnam War would be prime candidates for unilateral and voluntary departmental declassification.

A greater problem arises where a document is misclassified. The Order makes no distinction between review procedures for documents validly classified, but for which declassification is sought, and documents for which classification was never proper. In such a situation, where a complaint charges misclassification, it would comport with both the letter and spirit of the Order to allow the Review Committee to act as an independent channel of redress, thereby circumventing the cumbersome procedural requirements of 5(C) review. The purpose of these requirements is to ensure that departmental personnel are not over-burdened by searches through massive files for poorly identified documents, or occupied by immediate review responsibilities following each classification. Neither purpose seems frustrated by allowing the Review Committee, which is charged with continuing review of the classification system, to consider allegations that a document has been misclassified. Finally, it might be appropriate to permit the Review Committee to correct misclassification by offering an independent route to those who are willing to do a minimal amount of research to substantiate a charge of abuse of classification but would otherwise be discouraged by the procedural requirements of departmental review.

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