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## Managing Secrecy: Security Classification Reform—The Government Secrecy Act Proposal

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Harold C. Relyea  
Specialist in American National Government  
Government Division

## **ABSTRACT**

The end of the Cold War, heightened interest in effecting greater economy and better management in security classification operations, and the considered recommendations of a national study commission on official secrecy have all contributed to the proposed Government Secrecy Act (H.R. 1546/S. 712), introduced on a bicameral, bipartisan basis to establish, for the first time, a statutory mandate for security classification and declassification. This report follows the development and progress of this legislation and will be updated as events warrant.

# Managing Secrecy: Security Classification Reform—The Government Secrecy Act Proposal

## Summary

The end of the Cold War, heightened interest in effecting greater economy and better management in government operations, and the considered recommendations of a national study commission on official secrecy have all contributed to legislation reforming the security classification program and giving it a statutory foundation. Largely prescribed in a series of successive presidential executive orders issued over the past 50 years, security classification policy and procedure provide the rationale and arrangements for designating information officially secret for reasons of protecting the security of the nation.

Legislating a statutory security classification system was first recommended in 1973 by the House Committee on Government Operations in its third report to the 93rd Congress. Proponents of such a proposal view it as the mandating of a program in accordance with constitutionally prescribed legislative procedure. The resulting statute would also afford Congress a stronger role in oversight of the program, including its efficiency and economy of operation. Prior to the 105th Congress, the prospect of legislating a statutory basis for classifying information was most recently considered by a House committee in 1994.

Current bipartisan and bicameral reform efforts concentrating on the proposed Government Secrecy Act (S. 712/H.R. 1546) evidence renewed congressional interest in establishing a statutory mandate for security classification and declassification.

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# Managing Secrecy: Security Classification Reform—The Government Secrecy Act Proposal

The end of the Cold War, heightened interest in effecting greater economy and better management in government operations, and the considered recommendations of a national study commission on official secrecy have all contributed to legislation reforming the security classification program and giving it a statutory foundation. The current reform proposal, the Government Secrecy Act (S. 712/H.R. 1546), has been introduced in the 105th Congress on a bipartisan, bicameral basis by the congressional members of the Commission on Protecting and Reducing Government Secrecy. The background context of this legislation, the issues attending it, and its progress in the present Congress constitute the content of this report.

## Introduction

The protection of government information vital to the defense and security of the nation has long been a matter of federal policy and practice. Several arrangements have been developed in this regard, including encryption, document registry, and security classification. The last of these is the practice of designating information officially secret in accordance with policy criteria and, usually, at one of three levels of sensitivity—*Top Secret*, *Secret*, or *Confidential*. Consequently, such information may be available to authorized individuals, that is, those who have been granted a security clearance for the level of information sensitivity involved *and* who have a “need to know” or, in other words, require access in order to perform their duties.

As the history of security classification policy indicates, Congress long deferred to armed forces regulations as a basis for establishing the principles and practices of official secrecy. In 1857, the President was statutorily empowered

to prescribe such regulations, and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular offices, the transaction of their business ..., the safekeeping of the archives, the public property in the hands of all such officers [and] the communication of information ... from time to time, as he may think conducive to the public interest.<sup>1</sup>

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<sup>1</sup> 11 Stat. 52, at 60.

With the arrival of the 20th century, Congress enacted criminal punishments for the improper disclosure of national defense secrets in 1911<sup>2</sup> and, again, in 1917.<sup>3</sup> It was also in 1917 that both the Commissioner of Patents<sup>4</sup> and the President<sup>5</sup> were statutorily authorized to make secret those patent applications which, if disclosed, might be “detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war.”

In 1946<sup>6</sup> and in 1954,<sup>7</sup> Congress legislated the required protection of certain atomic energy information, denominated *Restricted Data*, from the moment of its creation. Generally speaking, *Restricted Data* was understood to have military or weapons production value. Because such information is “born secret,” an affirmative determination of the government is necessary for it to be removed from its privileged status.

In 1947<sup>8</sup> and, again, in 1949,<sup>9</sup> Congress required the Director of Central Intelligence to protect “intelligence sources and methods from unauthorized disclosure.”

## Classification History

Security classification principles and procedures, as noted above, were initially expressed in armed forces regulations, the first such directive creating a prototype security classification system appearing in early 1912. Security classification policy assumed a presidential character in 1940. The reasons for this late development are not entirely clear, but it probably was prompted by desires to clarify the authority of civilian personnel in the national defense community to create official secrets, to establish a broader basis for protecting military information in view of growing global hostilities, and to manage better a discretionary power of increasing importance to the entire executive branch.

Relying upon a 1938 statute concerning the security of armed forces installations and equipment and “information relative thereto,”<sup>10</sup> Franklin D. Roosevelt issued the first presidential security classification directive, E.O. 8381, in March 1940. However, the legislative history of the statute which the President relied upon to issue his order provided no indication that Congress anticipated that such a security classification arrangement would be created.

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<sup>2</sup> 36 Stat. 1084.

<sup>3</sup> 40 Stat. 217.

<sup>4</sup> 40 Stat. 394.

<sup>5</sup> 40 Stat. 411, at 422.

<sup>6</sup> 60 Stat. 755, at 766.

<sup>7</sup> 68 Stat. 919, at 940.

<sup>8</sup> 61 Stat. 495, at 498.

<sup>9</sup> 63 Stat. 208, at 211.

<sup>10</sup> 52 Stat. 3.

Other executive orders followed. E.O. 10104, adding a fourth level of classified information, aligned U.S. information security categories with those of our allies in 1950. A 1951 directive, E.O. 10290, completely overhauled the security classification program. Information was now classified in the interest of “national security,” and classification authority was extended to non-military agencies which presumably had a role in “national security” policy.

Criticism of the 1951 order prompted President Dwight D. Eisenhower to issue a replacement, E.O. 10501, in November 1953. This directive and later amendments to it, as well as E.O. 11652 of March 8, 1972, and E.O. 12065 of June 28, 1978, successively narrowed the bases and limited discretion for assigning official secrecy to agency records.

Shortly after President Ronald Reagan issued E.O. 12356 on April 2, 1982, it was criticized for reversing the limiting trend set by prior security classification orders of the previous 30 years by expanding the categories of classifiable information, mandating that information falling within these categories be classified, making reclassification authority available, admonishing classifiers to err on the side of classification, and eliminating automatic declassification arrangements.

With the democratization of many eastern European countries, the demise of the Soviet Union, and the end of the Cold War, President William Clinton ordered a sweeping review of Cold War rules on security classification in general and of E.O. 12356 in particular with a view to reform.<sup>11</sup>

Many began to suspect that the security classification program could be improved when the Department of Defense Security Review Commission, chaired by retired General Richard G. Stilwell, declared late in 1985 that there were “no verifiable figures as to the amount of classified material produced in DoD and in [the] defense industry each year.” Nonetheless, it was concluded that “too much information appears to be classified and much at higher levels than is warranted.”<sup>12</sup>

The cost of the security classification program became clearer when the General Accounting Office reported in October 1993 that it was “able to identify governmentwide costs directly applicable to national security information totaling over \$350 million for 1992.” After breaking this figure down—it included only \$6 million for declassification work—the report added that “the U.S. government also spends additional billions of dollars annually to safeguard information, personnel, and property.”<sup>13</sup>

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<sup>11</sup> Tim Weiner, “President Moves to Release Classified U.S. Documents,” *New York Times*, May 5, 1993, p. A18.

<sup>12</sup> U.S. Department of Defense, Department of Defense Security Review Commission, *Keeping The Nation’s Secrets* (Washington: DOD, 1985), pp. 48-49.

<sup>13</sup> U.S. General Accounting Office, *Classified Information: Costs of Protection Are Integrated With Other Security Costs*, GAO report GAO/NSIAD-94-55 (Washington: October 1993), p. 1.

Established in April 1993, President Clinton's security classification task force transmitted its initial draft order to the White House seven months later. Circulated among the departments and agencies for comment, the proposal reportedly encountered strong opposition from officials within the intelligence and defense communities.<sup>14</sup> More revision of the draft directive followed.

As delay in issuing the new order continued, some in Congress considered legislating a statutory basis for classifying information in the spring of 1994.<sup>15</sup> In the fall, the President issued an order declassifying selected retired records at the National Archives.<sup>16</sup> Then, after months of unresolved conflict over designating an oversight and policy direction agency, a compromise version of the order was given presidential approval on April 17, 1995.<sup>17</sup>

## Congressional Interest

Only in the past quarter century has Congress evidenced interest in supplementing or displacing presidential executive orders prescribing security classification policy and procedure. Legislating a statutory security classification system was first recommended in 1973 by the House Committee on Government Operations in its third report to the 93rd Congress.<sup>18</sup> The following year, various bills to effect this proposal were introduced in both houses of Congress, and several days of hearings on them were held by committees of jurisdiction.<sup>19</sup> Proponents of such bills view them as mandating a program in accordance with constitutionally prescribed legislative procedure. The resulting statute would also afford Congress a stronger role in oversight of the program, including its efficiency and economy of operation. Prior to the 105th Congress, the prospect of legislating a statutory basis

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<sup>14</sup> See David C. Morrison, "For Whose Eyes Only?" *National Journal*, vol. 26, Feb. 26, 1994, pp. 472-476; Tim Weiner, "U.S. Plans Overhaul on Secrecy, Seeking to Open Millions of Files," *New York Times*, Mar. 18, 1994, pp. A1, B6; R. Jeffrey Smith, "CIA, Others Opposing White House Move to Bare Decades-Old Secrets," *Washington Post*, Mar. 30, 1994, p. A14.

<sup>15</sup> See U.S. Congress, House Permanent Select Committee on Intelligence, *A Statutory Basis for Classifying Information*, hearing, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington: GPO, 1995).

<sup>16</sup> See E.O. 12937, in *Federal Register*, vol. 59, Nov. 15, 1994, pp. 59097-59098.

<sup>17</sup> See E.O. 12958, in *Federal Register*, vol. 60, Apr. 20, 1995, pp. 19825-19843.

<sup>18</sup> U.S. Congress, House Committee on Government Operations, *Executive Classification of Information—Security Classification Problems Involving Exemption (b)(1) of the Freedom of Information Act (5 U.S.C. 552)*, 93rd Cong., 1st sess., H. Rept. 93-221 (Washington: GPO, 1973), p. 104.

<sup>19</sup> See U.S. Congress, Senate Committee on Government Operations, *Legislation on Government Secrecy*, committee print, 93rd Cong., 2nd sess. (Washington: GPO, 1974); U.S. Congress, Senate Committee on Government Operations, *Government Secrecy*, hearings, 93rd Cong., 2nd sess., May 22, 23, 29, 30, 31, and June 10, 1974 (Washington: GPO, 1974). Also see U.S. Congress, House Committee on Government Operations, *Security Classification Reform*, hearings, 93rd Cong., 2nd sess., July 11, 25, and Aug. 1, 1974 (Washington: GPO, 1974).



for classifying information was most recently considered by a House committee in 1994.<sup>20</sup>

That Congress might legislate in this area had been suggested in a 1973 majority opinion of the Supreme Court.<sup>21</sup> Earlier, in a 1952 concurring opinion in the *Youngstown* case, Associate Justice Robert H. Jackson had observed that there is a “zone of twilight” in which the President and Congress “may have concurrent authority, or in which its distribution is uncertain.”<sup>22</sup> Security classification policy and procedure would appear to occupy such a “zone of twilight.”

## Reform Proposals

The security classification system modifications—including a statutory mandate for the program—embodied in the proposed Government Secrecy Act (S. 712/H.R. 1546), the reform bill offered in the 105th Congress, derive from the recommendations of the Commission on Protecting and Reducing Government Secrecy. This temporary study panel was mandated in Title IX of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995. The provision establishing the commission was included in a version of the authorization legislation developed by the Senate Committee on Foreign Relations which was introduced as an original bill (S. 1281) on July 23, 1993, the same day the committee report on the measure was submitted.<sup>23</sup> The commission’s mandate cleared the conference committee, was approved by both Houses, and became law when the President signed the authorization legislation on April 30, 1994.<sup>24</sup>

Established for a two-year period, the commission was charged:

- (1) to examine the implications of the extensive classification of information and to make recommendations to reduce the volume of information classified and thereby to strengthen the protection of legitimately classified information; and
- (2) to examine and make recommendations concerning current procedures relating to the granting of security clearances.

Popularly known as the Commission on Government Secrecy, its 12 members included:

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<sup>20</sup> U.S. Congress, House Permanent Select Committee on Intelligence, *A Statutory Basis for Classifying Information*, hearing, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington: GPO, 1995).

<sup>21</sup> *Environmental Protection Agency v. Mink*, 410 U.S. 73, at 83 (1973).

<sup>22</sup> *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579, at 637 (1952).

<sup>23</sup> *Congressional Record*, daily edition, vol. 139, July 23, 1993, pp. S9367, S9372.

<sup>24</sup> 108 Stat. 382; the commission’s charter appears at 108 Stat. 525 and is reproduced in U.S. Commission on Protecting and Reducing Government Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy* (Washington: GPO, 1997), Appendix B.

- Four members appointed by President Clinton—John M. Deutch, then Director of Central Intelligence and previously Deputy Secretary of Defense; John D. Podesta, Assistant to the President at the White House Office; Richard K. Fox, Jr., a career foreign service officer and former Senior Deputy Inspector General of the Foreign Service; and Ellen Hume, a veteran national journalist and executive director of the Public Broadcast System’s Democracy Project;
- Two members appointed by Senate Majority Leader George Mitchell—Senator Daniel P. Moynihan and Harvard University national security and international affairs professor Samuel P. Huntington;
- Two members appointed by Senate Minority Leader Robert Dole—Senator Jesse Helms, Ranking Minority Member and later chairman of the Committee on Foreign Relations, and Alison B. Fortier, a Lockheed Martin Corporation missile defense program director and former senior director of the National Security Council staff under President George Bush;
- Two members appointed by Speaker of the House Tom Foley—Representative Lee Hamilton, long a member and then chairman of the Committee on Foreign Affairs, and Maurice Sonnenberg, an investment banker with expertise in foreign policy, international trade, and foreign investment, and an adviser to government officials on matters in these areas; and
- Two members appointed by House Minority Leader Robert Michel—Representative Larry Combest, a member and then chairman of the Permanent Select Committee on Intelligence, and Martin C. Faga, a senior vice president and general manager at the MITRE Corporation and former director of the National Reconnaissance Office and Assistant Secretary of the Air Force for Space.<sup>25</sup>

The statutory charter of the Commission on Government Secrecy provided that the panel’s leaders be elected by its members from among themselves. This was done at the commission’s initial meeting on January 10, 1995. Senator Moynihan was chosen to be chairman and Representative Combest was elected vice chairman.

The commission held 13 *en banc* meetings, the first of which occurred on January 10, 1995, when leaders were elected and commissioners were formally introduced to one another. At the next meeting, on March 30, the commissioners were officially sworn in and initial witnesses were heard. In May, June, and July, the commission received the views of additional witnesses and its senior staff. A meeting in October was devoted to staff presentations; an expert witness was heard at a December session. In March and April 1996, the commission held a monthly

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<sup>25</sup> Profiles of the members of the commission appear in U.S. Commission on Protecting and Reducing Government Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy*, Appendix D.

meeting with industry representatives. These industry deliberations were the panel's first hearings outside Washington, D.C.

The commission conducted a "Public Access Roundtable" at the National Archives and Records Administration in May 1996. In July, November, and December, the panel held monthly meetings to discuss, draft, and revise its final report.<sup>26</sup> On March 3, 1997, the commission's final report was transmitted to President Clinton and to the leadership of the House and the Senate.

In meeting the objectives of its charge, the commission, as stated in its final report, sought "to promote both the effective protection of information where warranted and the disclosure of information where there is not a well-founded basis for protection or where the costs of maintaining a secret outweigh the benefits."<sup>27</sup> The panel expressed concern that the security classification system had become so vast, so complex, and so burdensome that its ability to secure properly information which should be protected had suffered.

The commission did not appear to believe that the reforms effected by E.O. 12958, issued by President Clinton in April 1995, produced the proper policy balance, saying, "although the current executive order on classification places a greater burden on those who seek to classify information, existing incentives still tend to promote secrecy over openness." What the panel found was "a system which neither protects nor releases national security information particularly well."<sup>28</sup>

In making its investigation, however, the commission admittedly "did not try to examine every facet of the security system." Some areas, such as "the myriad of physical and technical security measures used to safeguard information," had been recently and thoroughly scrutinized, in its view, by other study panels. The maintenance of secrecy in the legislative and judicial branches was also disregarded, "except in areas that relate to the classification, declassification, personnel security and information systems security criteria and procedures developed by the Executive Branch." Similarly, the panel did not probe "the impact of various government security requirements on the private sector—including patent, trade secret, and other invention secrecy rules and export control laws and regulations—except where they relate directly to the protection of *government* secrets."<sup>29</sup>

In addition, the commission did not address certain issues "best considered in the context of a broader examination of intelligence roles and missions," such as "the appropriate status of the U.S. intelligence budget, role and conduct of covert actions, procedures for intelligence sharing with allies and international organizations, and

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<sup>26</sup> Formal meetings of the commission, the activities and presentations of individual commissioners and of commission staff, and the sources consulted by commission staff are outlined in U.S. Commission on Protecting and Reducing Government Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy*, Appendix F.

<sup>27</sup> *Ibid.*, p. 1.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, p. 3.

relationships between intelligence and law enforcement objectives.” Again, these matters, in the panel’s view, had been recently and thoroughly scrutinized by other study bodies.<sup>30</sup>

The commission’s final report, transmitted to the President and the congressional leadership and released to the public in early March 1997, offered 16 recommendations, unanimously approved by the commission.<sup>31</sup>

- Statutorily establish the basic principles of security classification and declassification programs.
- Implement within one year a single set of security standards for special access programs.
- Take certain specific actions to enhance the proficiency of classifiers and improve their accountability by requiring additional information on the rationale for classification, by improving classification guidance, and by strengthening training and evaluation programs.
- Base classification decisions, including the establishment of special action programs, on a range of factors in addition to damage to the national security, such as the cost of protection, vulnerability, threat, risk, value of the information, and public benefit from release.
- Assign responsibility for classification and declassification policy development and oversight to a single executive branch body, designated by the President and independent of the agencies that classify.
- Statutorily mandate a central office—a National Declassification Center—at an existing agency to coordinate federal declassification policy and activities.
- Clarify, through the issuance of an intelligence community directive by the Director of Central Intelligence, the appropriate scope of sources and methods protection as a basis for the continuing classification of intelligence information.
- Restructure agencies’ records management programs and systematic declassification programs to maximize access to records that are likely to be the subject of significant public interest.
- Establish, by statute or regulation, five specified guiding principles as the essential elements of an effective personnel security system.

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<sup>30</sup> *Ibid.*

<sup>31</sup> The report was made available electronically at the Government Printing Office website, <http://www.access.gpo.gov/int>.

- Allow individuals in both government and industry holding valid security clearances to move from one agency or special program to another without further investigation or adjudication.
- Eliminate current requirements for neighborhood interviews and for interviewing educational references in every security background investigation.
- Achieve greater balance between the initial security clearance process and programs for continuing evaluation of cleared employees.
- Congress and the executive branch should reevaluate the requirement to utilize a new financial disclosure form and consider staying its implementation until there is further evaluation concerning how it would be used and whether its benefits exceed its cost.
- Certain specified actions should be taken to encourage research on the polygraph, to assess the credibility of the polygraph, and to identify potential technological advances that could make the polygraph more effective in the future.
- Revise the Computer Security Act of 1987 in certain specified ways to reflect the realities of information systems security in the Information Age.
- Develop an information systems security career path across the federal government.

Legislation to further the commission's first, third, fourth, fifth, and sixth recommendations was introduced in both houses of Congress on May 7, 1997. The House legislation (H.R. 1546) was offered by Representative Hamilton for himself and Representative Combest; the Senate proposal (S. 712) was introduced by Senator Moynihan for himself and Senator Helms.<sup>32</sup> The bills, denominated the Government Secrecy Act of 1997, are identical.

## Legislation Summary

- Section 1: provides the short title, the Government Secrecy Act of 1997.
- Section 2: states that the purpose of the act is to promote the effective protection of classified information and the disclosure of information where there is not a well-founded basis for protection, or where the costs of maintaining a secret outweigh the benefits.
- Section 3: expresses seven congressional findings, including the issuance of the report of the Commission on Government, recommending

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<sup>32</sup> See *Congressional Record*, daily edition, vol. 143, May 7, 1997, pp. H2350, S4110-S4114.

that the volume of information classified be reduced and the protection of classified information be strengthened; states that the absence of a statutory framework has resulted in unstable and inconsistent classification and declassification policies, excessive costs, and inadequate implementation; states that American taxpayers incur substantial costs—more than \$5.2 billion in 1996—as several million documents are classified each year; and states that the prospect that a statutory foundation for the classification and declassification of information is likely to result in a more stable and cost-effective set of policies, a more consistent application of rules and procedures, and an opportunity for greater oversight by Congress of classification and declassification activities.

- Section 4: authorizes the President, in accordance with the act, to protect from unauthorized disclosure, information in the possession and control of the executive branch, when there is a demonstrable need to do so in order to protect the national security of the United States; directs the President to ensure that the amount of information classified is the minimum necessary to protect the national security; provides requirements for the establishment of standards and procedures for classifying and declassifying information; and requires each head of an agency that is responsible for the classification and declassification of information to submit to Congress each year a report describing the application of the classification and declassification standards and procedures of that agency during the preceding fiscal year.
- Section 5: directs the President to establish within an existing agency a National Declassification Center to (1) coordinate and oversee the declassification policies and practices of the federal government and (2) provide technical assistance to agencies in implementing such policies and practices, in accordance with the act; establishes the National Declassification Advisory Committee to provide advice to the center and to make recommendations concerning declassification priorities and activities; and mandates annual reports by the center to the President and Congress on its activities during the preceding fiscal year, and on the implementation of agency declassification practices and its efforts to coordinate those practices.
- Section 6: states that nothing in the act shall be construed to authorize the withholding of information from Congress.
- Section 7: provides definitions of several terms used in the act.
- Section 8: states that the act shall take effect 180 days after the date of its enactment.

## Constitutionality

The major threshold consideration concerning the enactment of a statutory security classification-declassification program is the question of whether or not such legislation breaches the separation of powers doctrine of the Constitution. Some may contend that the President has long set security classification policy and practice through executive orders, their issuance being an exercise of both Chief Executive and Commander in Chief authority. Congressionally adopted legislation in these matters not only creates a policy clash, but also encroaches upon the President's authority to determine such information protection arrangements.

Proponents of legislation establishing basic security classification-declassification policy and practice contend that such a proposal recognizes that information protection arrangements fall in Justice Jackson's "zone of twilight" noted earlier. It is, in brief, a shared power. Moreover, Congress has previously legislated in these matters, in regard to atomic energy information and intelligence sources and methods, without constitutional question. Also, the Supreme Court seems to have recognized congressional authority to legislate in this area.<sup>33</sup> Finally, the statutory classification-declassification program proposed in the Government Secrecy Act was directly and unanimously recommended by a national study commission which counted a high level intelligence and defense official of the Clinton Administration and a senior Clinton White House staff assistant as members.

## Pro/Con Considerations

### Pros

**Responsible Information Protection.** The legislation makes the application of security classification to official records on a standard of "demonstrable need to ... protect the national security of the United States" by requiring that classifying officials identify themselves on documents marked for secrecy protection, and by authorizing challenges to the need for secrecy protection.

**Balanced Perspective.** The legislation encourages a balanced perspective in classification actions with a balancing test: classifiers shall "weigh the benefit from public disclosure of the information against the need for initial or continued protection of the information under the classification system." It also institutionalizes expert views and assessments of classification/declassification operations in an advisory committee with members selected on a bipartisan, bicameral basis with presidential involvement.

**Automatic Declassification.** The legislation seeks to foster the efficiency, economy, and integrity of the classification system by establishing automatic

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<sup>33</sup> See the discussion and citations in footnotes 6-9, 21, and 22 of this report.

declassification schedules of 10- and 30-year maximums, while still permitting the continued protection of a very limited quantity of records for a period longer than 30 years.

## Cons

**Nebulous Standard.** The legislation specifies that classification may occur “in order to protect the national security of the United States.” The “national security” term is defined in the legislation to mean “the national defense or foreign relations of the United States.” These terms, on their face and without further specificity, are both ambiguous and overly broad. Their use would appear to be contrary to the expectations of the Commission on Protecting and Reducing Government Secrecy, which urged “that classification actions ... no longer be based solely on damage to the national security” and encouraged that consideration, in this regard, be given to factors such as “the cost of protection, vulnerability, threat, risk, value of the information, and public benefit from release.”<sup>34</sup>

**Stronger Congressional Role.** The legislation authorizes the President to establish unilaterally a National Declassification Center “within an existing agency.” Congress is not provided any role in this action, even in the event the President places the center in a seemingly inappropriate agency, such as one heavily engaged in classification operations. Moreover, there is no allowance for a congressional authorization of appropriations for the center, or Senate confirmation of the official directing the center

**Managerial Uncertainty.** The legislation authorizes the establishment of a National Declassification Center “to coordinate and oversee the declassification policies and practices of the Federal Government” and to provide “technical assistance,” but does not indicate where in the federal government similar responsibilities for coordinating and overseeing classification policy and practice are vested. If the legislation assumes that the Information Security Oversight Office (ISOO), created by E.O. 12958 mandating the existing classification program, will continue, inefficiencies and managerial conflicts seem likely to result. If the legislation assumes the demise of ISOO, then responsibility for coordinating and overseeing classification policy and practice is uncertain.

## Legislative Action

Introduced in the Senate on May 7, 1997, as S. 712, the legislation was read twice and referred to the Committee on Governmental Affairs. That same day, the committee held a hearing on the report of the Commission on Government Secrecy.<sup>35</sup>

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<sup>34</sup> U.S. Commission on Protecting and Reducing Government Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy*, p. C-1.

<sup>35</sup> See U.S. Congress, Senate Committee on Governmental Affairs, *Report of the Commission on Protecting and Reducing Government Secrecy*, hearing, 105th Cong., 1st (continued...)



Introduced in the House on May 7, 1997, as H.R. 1546, the legislation was referred to the Committee on Government Reform and Oversight, with some portions also referred to the Permanent Select Committee on Intelligence and the Committee on National Security for a period to be subsequently determined by the Speaker. Within the Committee on Government Reform and Oversight, the bill was referred to its Subcommittee on National Security, International Affairs, and Criminal Justice on May 13. Executive comment on the legislation was requested from the Department of Defense, the agency responsible for the largest number of classification actions annually, on May 20.

In a March 3, 1998, colloquy on the Senate floor, both the Majority Leader and the Minority Leader announced they were cosponsoring the legislation.<sup>36</sup> The Senate Committee on Governmental Affairs held a hearing on S. 712 on March 25. Witnesses included Edmund Cohen, director of information management, Central Intelligence Agency; Bill Leonard, director of security programs, Department of Defense; Bryan Siebert, director of the Office of Declassification, Department of Energy; Steven Garfinkel, director of the Information Security Oversight Office, National Archives and Records Administration; Jeremy Gunn, executive director and general counsel, President John F. Kennedy Assassination Records Review Board; and Steven Aftergood, director of the Project on Government Secrecy, Federation of American Scientists.

On June 17, the Committee on Governmental Affairs met to consider S. 712 and adopted substitute language for the original text. The committee then ordered the bill to be reported favorably with the amending language. The reported legislation, according to a committee summary of the substitute text:

- Provides a statutory basis for [a] national security information classification system by specifically authorizing the President to protect information from disclosure when there is a demonstrable need to do so in order to protect U.S. national security (similar to underlying bill);
- Authorizes the President to establish categories of information that may be classified; categories must be developed by notice and comment (similar to underlying bill);
- Authorizes agencies to implement the Act and the President's categories by establishing standards and procedures for classifying and declassifying information (similar to underlying bill);
- Limits classification only to cases in which the harm to national security reasonably expected from disclosure of the information outweighs the public interest in the disclosure of the information (similar to underlying bill);
- Establishes criteria to guide agency classification decisions for conducting their balancing test between the harm to national security and the public interest in

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<sup>35</sup> (...continued)  
sess., May 7, 1997 (Washington: GPO, 1997).

<sup>36</sup> See *Congressional Record*, daily edition, vol. 144, Mar. 3, 1998, pp. S1249-S1253.

disclosure; the national security criteria are taken directly from the Clinton Executive Order [E.O. 12958] and have been applied by agencies since 1995; the public interest criteria are newly developed for the substitute (these criteria are not in the underlying bill);

- Mandates written justification for original and derivative classification decisions (similar to underlying bill);
- Establishes procedures similar to those of the current Clinton Executive Order on declassification of information classified under the Act: the general rule is that information will be subject to declassification review 10 years after classification; at that time, information will either be declassified or it can be protected for another 15 years. At 25 years, it will be subject to another declassification review and must be declassified at that time unless “extraordinary circumstances” require that it remain classified. Information that remains classified beyond 25 years will be subject to periodic review for declassification on a schedule established by the President. The bill also provides a procedure in which agencies can, at the time of classification, exempt information from the initial 10-year review if “there is no likely set of circumstances under which declassification would occur” at the 10-year review; such information would receive its initial declassification review at 25 years (this process is derived from the current Executive Order and builds on the provisions of the underlying bill, but is significantly more detailed);
- Makes a conforming amendment to exemption 1 of the Freedom of Information Act [5 U.S.C. 552(b)(1)] (similar to underlying bill);
- Transfers the Information Security Oversight Office from the [National] Archives to the Executive Office of the President, changes its name to the Office of National Classification and Declassification Oversight, and beefs up its functions and oversight responsibilities (not in underlying bill);
- Establishes a Classification and Declassification Review Board similar to the current interagency review panel established by the Clinton Executive Order to hear agency appeals from decisions of the Director of the Oversight Office (entirely new provision not in underlying bill);
- Provides for appeal of Review Board decisions to the President and precludes judicial review of agency classification and declassification decisions (entirely new provision); [and]
- Clarifies that nothing in the bill shall be construed as authorizing the withholding of information from Congress (similar to underlying bill).<sup>37</sup>

The bill now awaits Senate floor consideration.

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<sup>37</sup> U.S. Congress, Senate Committee on Governmental Affairs, “Summary of Committee Substitute to S. 712,” undated.

## Additional Reading

- U.S. Commission on Protecting and Reducing Government Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy* (Washington: GPO, 1997).
- U.S. Congress, House Permanent Select Committee on Intelligence, *A Statutory Basis for Classifying Information*, hearing, 103rd Cong., 2nd sess., Mar. 16, 1994 (Washington: GPO, 1995).
- U.S. Congress, Senate Committee on Governmental Affairs, *Report of the Commission on Protecting and Reducing Government Secrecy*, hearing, 105th Cong., 1st sess., May 7, 1997 (Washington: GPO, 1997).
- U.S. General Accounting Office, *Classified Information: Costs of Protection Are Integrated With Other Security Costs*, GAO report GAO/NSIAD-94-55 (Washington: October 1993).
- U.S. Library of Congress, Congressional Research Service, *Commission on Protecting and Reducing Government Secrecy: A Brief Overview*, by Harold C. Relyea, CRS report 97-770 GOV (Washington: Aug. 11, 1997).
- U.S. Library of Congress, Congressional Research Service, *Security Classification Policy and Procedure—E.O. 12958: The Clinton Administration Directive*, by Harold C. Relyea, CRS report 97-771 GOV (Washington: Aug. 12, 1997).