Order Code RS21895
Updated December 22, 2004

Secrecy Versus Openness: New Proposed Arrangements for Balancing Competing Needs

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Summary

During the latter half of 2004, disputes arose over whether or not to declassify portions of the sensitive content of reports resulting from congressional investigations and national commission inquiries into the terrorist attacks of September 11, 2001, the war in Iraq, and related matters. As a result, some called for Congress to create a special mechanism for the impartial and expeditious resolution of such disputes (S. 2672/H.R. 4855; S. 2845 amendment). The culmination of one such effort at balancing legitimate competing needs for secrecy and openness is reviewed in this report, which will no longer be updated.

Controversy developed during the latter half of 2004 over what some regard to be zealous use of security classification to make segments of investigative reports officially secret. William Leonard, director of the Information Security Oversight Office (ISOO), which oversees the executive branch classification program, took issue with the classification of portions of Major General Antonio M. Taguba's report on his investigation of prisoner interrogation conditions at Abu Ghraib Prison, and called the action a "bureaucratic impulse" to "almost reflexively reach out to the classification system."[1]

More recent problems with security-classifiable information in congressional documents dated from the closing months of 2002, when the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence prepared to publish their report on their joint inquiry into intelligence community activities prior to, and after, the September 11, 2001, terrorist attacks.[2] "It took more than six months of

[1] Shaun Waterman (UPI), "Pentagon Classifying 'Impulse' Criticized," *Washington Times*, July 8, 2004, p. A6.

[2] U.S. Congress, Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After*
(continued...)

wrangling," according to a *Washington Post* editorial, "for the congressional joint committee investigating the Sept. 11 attacks to extract approval to publish its report — and even then it had to black out an entire section involving Saudi Arabia."[3] A similar experience occurred with the July 9, 2004, release of the Senate Intelligence Committee's report on the intelligence community's prewar intelligence assessments on Iraq.[4] According to one account, an estimated 20% of the draft report was deleted at the request of the Central Intelligence Agency (CIA) prior to its publication.[5] "It could have been worse, though," editorialized the *Washington Post*: "If Intelligence officials had their way, nearly half of the 511-page report would have been redacted, rather than the 15 percent or so that was excised in the final version."[6]

These developments prompted calls for the creation of an independent panel for the impartial and expeditious resolution of disputes over whether or not to declassify portions of the sensitive content of official reports prior to their publication. In a July editorial on the matter, the *Washington Post* said:

> No one wants to insist on the release of information that could aid terrorists or other enemies of the United States. Clearly, some information reviewed by lawmakers or other investigators must remain secret. But the way the system is structured, no one can have confidence that the judgments to keep information classified are being made on the basis of national security alone — and there is ample evidence to the contrary. The reports already produced have offered a powerful, even chastening demonstration of the importance of outside oversight and review; it's hard to see what the arguments for classifying parts of those documents would have been. Among other effects, this undermines the credibility of the classifiers when it comes to protecting real secrets.[7]

Security Classification

Since 1940, security classification policy and procedure — the creation of official secrets — has been prescribed in a series of presidential executive orders. Current arrangements are mandated by E.O. 12958, as amended by E.O. 13292.[8] Congress has, on occasion, considered statutorily establishing security classification policy, but has not

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[2] (...continued)
the Terrorist Attacks of September 11, 2001, report, 107th Cong., 2nd sess., S.Rept. 107-351, H.Rept. 107-792 (Washington: GPO, 2002).

[3] Editorial, "Credible Classifications," *Washington Post*, July 13, 2004, p. A14.

[4] U.S. Congress, Senate Select Committee on Intelligence, *Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq*, report, 108th Cong., 2nd sess. (Washington: GPO, 2004).

[5] Neil A. Lewis, "The Committee: C.I.A. Deleted Large Sections, Officials Say," *New York Times*, July 10, 2004, p. A9.

[6] Editorial, "Credible Classifications," *Washington Post*, July 13, 2004, p. A14.

[7] Ibid.

[8] See 3 C.F.R., 1995 Comp., pp. 333-356, 3 C.F.R., 2003 Comp., pp. 196-218.

actively pursued the matter.[9] The presidential orders specify three levels of protection, ranging from "Confidential," to "Secret," to "Top Secret," the last being the highest. They also indicate types of information that may be so protected, such as "military plans" and "intelligence activities"; the duration of such protection; and the manner in which classified information is to be identified and marked. Classification prohibitions and limitations are provided. For instance, information is not to be classified to conceal violations of law, inefficiency, or administrative error.

Security-classified documents may become declassified if a date or event for declassification, prescribed at the time of their classification, is realized; an applicable time frame, such as 10 years or, by extension, 25 years, from the date of original classification, lapses; an authorized holder of the classified documents successfully challenges the continued need for their protected status; or a mandatory review by agency officials, prompted by a request pursuant to the President's security classification executive order or the access procedures of the Freedom of Information (FOI) Act, results in a determination that classification is no longer warranted.

Accelerated Declassification

Beginning in 1992, Congress has legislated special arrangements for the impartial and expeditious review of certain kinds of officially secret records, with a view to making them available to the public. The first of these involved records pertaining to the November 22, 1963, assassination of President John F. Kennedy in Dallas, TX. Efforts by the public to gain access to records deriving from federal investigations and examinations of the assassination of President Kennedy and surrounding events were frustrated by several complications. Operative since July 1967, the FOI Act provides any person — individual or corporate, regardless of citizenship — with access to identifiable, unpublished, existing records of the federal departments and agencies without having to demonstrate a need or even a reason for such a request.[10] The burden of proof for withholding material sought by the public is placed upon the government. The statute, however, specifies nine categories of information that may be withheld from disclosure. Among these stated exemptions to the rule of disclosure are protections for (1) information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order; (2) data specifically excepted from disclosure by a statute which requires that matters be withheld in a non-discretionary manner or which establishes particular criteria for withholding, or refers to particular types of matters to be withheld; (3) personnel, medical, and similar files the disclosure of which would constitute an unwarranted invasion of personal privacy; and (4) certain kinds of investigatory records compiled for law enforcement purposes.[11] These four exemptions tended to be the ones most often invoked in support of the withholding of assassination

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[9] See, for example, 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. Commission on Protecting and Reducing Government Secrecy, *Secrecy* (Washington: GPO, 1997); U.S. Congress, Senate Committee on Governmental Affairs, *S. 712 — Government Secrecy Act of 1997*, hearing, 105th Cong., 2nd sess., Mar. 25, 1998 (Washington: GPO, 1998).

[10] See 5 U.S.C. § 552.

[11] The full list of exemptions may be found at 5 U.S.C. § 552(b)(1)-(9).

materials sought pursuant to the FOI Act. Congressional records were not subject to the FOI Act, nor were state or local government records, and law enforcement records of these jurisdictions were exemptible under comparable state FOI laws.

JFK, a 1991 film dramatization of President Kennedy's assassination and surrounding circumstances, heightened public interest in the tragedy and explanations of its occurrence. Subsequently, former President Gerald Ford, the only surviving member of the President's Commission on the Assassination of President Kennedy, chaired by Chief Justice Earl Warren, publicly appealed to the leaders of the House of Representatives to seek release of all records concerning the assassination.[12] Furthermore, various conspiracy theories, contentions, and unsubstantiated stories about the event and those allegedly involved in its perpetration were troubling to many Americans. In response, Congress legislated procedures and conditions for the independent review and expeditious disclosure of previously unreleased official records relevant to the assassination of President Kennedy. The vehicle for these arrangements was the President John F. Kennedy Assassination Records Collection Act of 1992.[13]

The statute created a temporary, independent, five-member board to manage the gathering of relevant records for inclusion in the Kennedy Assassination Records Collection, and to review those records with a view to their immediate or later public disclosure in whole or in part. Appointed by the President from private life with the advice and consent of the Senate, board members received security clearances to perform their duties. Among the records examined by the board members were approximately 250,000 to 300,000 pages of relevant CIA material, and another 23 linear feet of records, 2,500 pages of which related to the portion of the investigation conducted by the Commission to Investigate CIA Activities Within the United States concerning the Kennedy assassination.[14] The review board completed its work and expired in the closing months of 1998.[15] The resulting President John F. Kennedy Assassination Records Collection is managed by the National Archives and Records Administration.[16] The review board received a total appropriation of $3,750,000 for its operations.[17] In December 2003, National Archives management generally estimated that 98%-99% of the collection is open in part for public examination, and indicated that national security is the principal reason why some materials remained undisclosed at that time.

As the JFK assassination records review board was completing its work, Congress enacted the Nazi War Crimes Disclosure Act, which created an interagency group to

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[12] George Lardner, Jr., "Ford Urges House Leaders to Seek Release of All Records on Kennedy Assassination," *Washington Post*, Jan. 30, 1992, p. A12.

[13] 106 Stat. 3443.

[14] U.S. Congress, Senate Committee on Governmental Affairs, *The Assassination Materials Disclosure Act of 1992*, hearing, 102nd Cong., 2nd sess., May 12, 1992 (Washington: GPO, 1992), pp. 51, 357-361, 384-412, 419-427.

[15] See U.S. Assassination Records Review Board, *Final Report of the Assassination Records Review Board* (Washington: GPO, 1998).

[16] For Internet access to the Web homepage for the collection, visit [http://www.archives.gov/research_room/jfk].

[17] See 110 Stat. 3009-340, 111 Stat. 1300.

"locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Nazi war criminal records held by the United States," among other functions.[18] The President was given broad discretion to appoint to the interagency group such government officials as he deemed appropriate, including, specifically, the director of the Holocaust Museum, the historian of the Department of State, the Archivist of the United States, and at least three members from private life. Two years later, this mandate was supplemented by adding classified Japanese Imperial Government records held by the United States to the efforts of the interagency group to organize, recommend for declassification, and make available to the public certain sensitive captured records of the World War II era.[19] The National Archives provides ongoing information concerning the activities and operations of the interagency group on its website, including copies of *Disclosure*, the newsletter of the group, and related research papers.[20]

New Arrangements

In furtherance of revising classification arrangements, Senator Ron Wyden, with bipartisan support, introduced S. 2672, the Independent National Security Classification Board Act, on July 15, 2004. The legislation would have established within the executive branch a board of three members, appointed by the President with Senate approval, "to review and make recommendations on overhauling the standards and processes used in the classification system for national security information," according to Senator Wyden. The new panel would have been very similar to the Public Interest Declassification Board established in 2000 by provisions of Title VII of the Intelligence Authorization Act for Fiscal Year 2001.[21] Referred to the Select Committee on Intelligence, the Wyden bill sought to improve security classification arrangements generally, and, through requested reviews of classification decisions, address the disputes over declassifying portions of the sensitive content of an official report prior to its publication.[22] A companion bill, H.R. 4855, was introduced in the House on July 19 by Representative Robert Cramer, Jr., and was referred to the Permanent Select Committee on Intelligence. No further action was taken on either bill.

On September 27, 2004, Senator Wyden proposed amending (S.Amdt. 3704) the proposed National Intelligence Reform Act (S. 2845) with the language of his bill (S. 2672).[23] The Wyden amendment was among the first to be considered during Senate debate on the intelligence reform legislation, which sought to implement many of the recommendations of the 9/11 Commission. The floor manager for the intelligence reform bill, Senator Susan Collins, noted that "the administration has expressed grave reservations about the amendment as it is now drafted," and suggested that some

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[18] 112 Stat. 1859, 1860.

[19] 114 Stat. 2864.

[20] Available at [http://www.archives.gov/iwg/].

[21] 114 Stat. 2856.

[22] *Congressional Record*, daily edition, vol. 150, July 15, 2004, pp. S8234-S8237.

[23] *Ibid*., Sept. 27, 2004, pp. S9726-S9728).

reconciliation of it with other points in the bill might be in order. She proposed some staff-level adjustment of the amendment.[24]

On September 29, Senator Wyden offered a revised version of his original amendment, which (1) renamed the Public Interest Declassification Board (PIDB) as the Independent National Security Classification Board; (2) empowered it to review, upon the request of the leaders of congressional armed services, foreign policy, and intelligence committees, existing or proposed classifications; and (3) authorized it to make recommendations to the President regarding the continued need for such classifications as it reviewed. Not later than 60 days after receiving such recommendations, the President, if he did not accept and implement them, would be required to transmit to Congress a written justification for his decision. The previous responsibilities of the PIDB remained unchanged by the amendment. The Wyden amendment, as modified, was agreed to by the Senate,[25] and remained in the Senate intelligence reform bill (S. 2845), which was approved on a 96-2 vote on October 6, and was subsequently sent to conference.[26] The conferees further modified the amendment, rewriting it to indicate (1) that the PIDB — no name change — reports directly to the President or, upon his designation, to the Vice President, Attorney General, or other designee, the last of whom "may not be an agency head or official authorized to classify information"; (2) that the board is authorized to "review and make recommendations to the President in a timely manner with respect to any congressional request, made by the committee of jurisdiction, to declassify certain records or to reconsider a declination to declassify specific records"; and (3) that, "[i]f requested by the President, the Board shall review in a timely manner certain records or declinations to declassify specific records, the declassification of which has been the subject of specific congressional request." While the board is obligated to advise a requesting congressional committee as to whether or not it intends to conduct a declassification review, it is not required to inform the committee of the results of such a review, which is left to the President's discretion.[27] These modifications appear to strengthen the President's control over the board's conduct of declassification reviews requested by congressional committees and the findings resulting from such reviews as are conducted. On December 7, the House, on a 336-75 vote, agreed to the conference committee report; the Senate gave its approval the following day on an 89-2 vote, clearing the intelligence reform legislation for the President's signature. On December 17, President George W. Bush signed the legislation into law.[28]

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[24] Ibid., pp. S9714-S9719.

[25] Ibid., Sept. 29, 2004, pp. S9911-S9914.

[26] Ibid., Oct. 6, 2004, p. S10543.

[27] U.S. Congress, House, Committee of conference, *Intelligence Reform and Terrorism Prevention Act of 2004*, H.Rept. 108-796, a report to accompany S. 2845, 108th Cong., 2nd sess. (Washington: GPO, 2004), p. 64.

[28] P.L. 108-458; 118 Stat. 3638.