COMMENTS ON H.R. 89 -- PROPOSED STATUTE ON "CLASSIFICATION, DECLASSIFICATION, AND SAFEGUARDING OF NATIONAL SECURITY INFORMATION AND MATERIAL"

This addresses only specific problems of meaning, structure, consistency and purpose in the proposed bill. Justice Oliver Wendell Holmes' comment may be kept in mind: "We do not inquire what the legislature meant, we ask only what the statute means."

1. Section 502(b) -- that portion of this which gives any official with classifying authority power to impose additional requirements on access, distribution and protection from unauthorized disclosure would confer independent authority to set up and maintain compartments or other access-limiting systems. The exercise of such authority by an intelligence agency head would appear not to be reviewable by the DCI. This provision clearly would not give user departments or agencies any lawful basis for challenging the nature or extent of imposed restrictions.

2. Section 502(b)(1, 2 and 3) -- these definitions for Top Secret, Secret and Confidential closely match those provided in Executive Order 11652, but, unlike that Order, are not amplified by examples. Without such, it is unlikely that classifications will be applied uniformly. Further, the courts, if called upon to adjudicate a classification for prosecutive purposes, could substitute their own subjective judgments for those of the classifying authorities.

3. Section 502(c)(1) -- the limitation of classifying authority only to those officials in the Executive Branch who are designated in writing by the President:

   a. Would put an unreasonable burden on senior officials as the apparent only authorized approvers of classifications; or force the President to approve an excessively large list of authorized classifiers, and change the list as lower ranking personnel shift. This provision presumably means that no document may be validly classified unless personally approved by a senior official.

b. Would preclude anyone in the Congress from having lawful authority to originate classifications. Senator Inouye comes to mind as one member who certainly would have need to originate classified documents.

4. Section 502(c)(2) -- limitations on who may downgrade or declassify information, as in the case of Section 502(c)(1), would put a heavy burden on senior officials and could result in a large backlog of material awaiting classification review. It would appear that these same senior officials would be burdened with the initial decisions on classification reviews required by Section 503(d) in the case of public requests on 10-year-old material exempted from the General Declassification Schedule.

5. Section 502(d) -- the grounds stated here for administrative disciplinary action against officials who wrongfully classify information are the same as those cited in Section 508 as the basis for criminal penalties for wrongful classification. Which would prevail?

6. Section 502(e) -- better terminology is needed; the requirement that classified material "show on its face" its classification, etc., does not recognize that some information (e.g., ADP material, sound recordings) does not have a "face."

7. Section 502(e)(3) -- conflict in terminology; this refers to the "office which" originated a classification, while Section 502(c)(1) would permit only designated "officials" to originate classifications.

8. Section 502(e)(4) -- the requirement here that documents show the dates of preparation and classifications means that a time lag between them is expected: What would be the classification status during that interval? If that status is unclear, would there be a statutory obligation to protect the information while it is in staffing enroute to the senior official who must "originate" the classification? Further, what useful purpose is served by having these two dates given on classified documents?

9. Section 502(e)(5) -- the escape clause of "to the extent practicable" on paragraph classification is inconsistent with minimal standards of classification management. The whole cannot be properly

classified without assessment of the sensitivity, and hence classification, of the parts. The proper classification of the parts should always be shown for the benefit of subsequent users who may need to extract the information.

10. Section 502(f) -- the meaning of this is not clear when read in conjunction with Section 502(c)(1). This suggests that a senior official may authorize others, presumably juniors, to show his name on a classified document as the approver of the classification. The earlier section appears to limit authority to apply classifications only to designated senior officials.

11. Section 502(g) -- the provisions here on treatment of foreign classified information provided the US need to be amplified in later sections of this bill. When a foreign government provides the US its own classified information, it normally does so with the understanding that such information will be protected for as long as the foreign government concerned finds necessary. Such information, as opposed to US-generated classified information about foreign countries, should not be subject to US downgrading and declassification schedules unless specifically agreed to beforehand with the foreign government concerned.

12. Section 502(i) -- the blanket provision herein exempting from disclosure under the Freedom of Information Act all information classified under this bill would appear to be bad public policy. Under this bill, no private citizen could challenge the validity of any classification other than for 10-year-old classified material exempted from the General Declassification Schedule. There clearly are circumstances in which the public should be able to appeal to the courts for a judgment weighing the competing merits of official claims for protection of information against the desirability of informing the citizenry of what their government is doing.

13. Section 503 -- the bill does not provide at all for classified material to be designated for early downgrading or declassification at predetermined dates or events. Instead, it would lock the government in to use of either a fixed General Declassification Schedule (i.e., Top Secret to Secret after two years; Secret to Confidential after two years; Confidential to declassified after six years) or exemptions from that schedule to permit longer term classification. Many event-related

items, such as military operational orders, require classification only for brief periods.

14. Section 503(c)(1) -- this exemption from the General Declassification Schedule perpetuates the misunderstanding that the US somehow has the right to maintain the classification only for so long as it chooses of information classified by a foreign government or international organization and provided the US in confidence. Such information should be exempted from US declassification rules, period. The exemption here should be for US material concerning foreign governments, international organizations or specific foreign relations matters the continued protection of which is essential to US security.

15. Section 503(c)(2) -- the language of this exemption needs to be clarified. One, official US practice is to use the term "cryptographic" as pertaining only to security measures to protect our communications; the term "cryptologic" embraces that as well as all communications intelligence activities. The broader area should be covered by this exemption. Two, intelligence sources or methods should not need extended classification protection unless they are sensitive. Such qualifier is absent here.

16. Section 503(c)(3) -- this exemption, word for word the same as in Executive Order 11652, is written in such a subjective manner as to preclude reasonable uniformity in its application. The courts would assuredly have difficulty in adjudicating the validity of its application in prosecutions where its use was at issue.

17. Section 503(e) -- whether inadvertent or otherwise, this section plainly states that all information classified under Executive Order 11652--whether or not exempted from scheduled downgrading and declassification--shall be subject to the General Declassification Schedule set up by this bill. Thus, highly sensitive cryptologic or sources and methods information would be subject to scheduled automatic declassification. The language of this section also appears to preclude the option of declassifying information earlier than 10 years from its date of origin.

18. Section 503(f)(1) -- this section would perpetuate the administratively burdensome and functionally unnecessary requirement for statutory appointees (i.e., heads of agencies) to certify personally in writing that individual items of information need to remain classified beyond a specified period (25 years in this bill). Further, this section appears to permit continued classification beyond the 25-year period only for information falling within the third and fourth exemptions (i.e., Sections 503(c)(3) and (4)); presumably, cryptologic and intelligence sources and methods information would have to be declassified after 25 years.

19. Section 504(1) -- this section does not specify who is authorized to grant access to classified information; nor is this specified elsewhere in the bill. Since the principal purpose of the bill seems to be to criminalize disclosure of classified information to a person not authorized access, it is critical to that purpose that the authority to grant access be clearly stated.

20. Section 504(5) -- this requirement to keep records to "assure accountability for all classified information" would require receipts and log entries for even Confidential material. This would be an administratively impossible burden for departments and agencies which work with large quantities of classified information.

21. Section 504(7) -- this requirement to downgrade and declassify "at the earliest practicable date" is inconsistent with Section 503, which would lock the government in to the General Declassification Schedule as the earliest permissible time frame for such actions.

22. Section 506(a)(3)(C) -- the qualification "senior" before representatives from the Departments of State and Defense, etc., could mean that an appointive official would have to represent the stated departments and agencies. Such officials do not have the time to perform the functions specified.

23. Section 506(b)(2)(D) -- unless the proposed Interagency Classification Review Committee (ICRC) is to interfere in the day-to-day management of departments and agencies, one wonders how they are to go about "eliminating unauthorized disclosure of classified information."

24. Section 506(b)(3) -- tasking the ICRC to act on all complaints from and appeals by those aggrieved by agency declassification reviews would impose an extremely heavy burden on the "senior" representatives making up the committee. Since the bill does not specify how the ICRC is to decide appeals, it is possible that a majority vote of committee members could override a DCI determination on classification of a sensitive source or method.

25. Section 506(b)(4) -- the annual reporting requirements on the ICRC could not be fulfilled without imposing onerous requirements on the several departments and agencies. Since no practical benefit would seem to accrue to the President or Congress from knowing the numbers of documents classified and declassified in the preceding year, one may well question the need for this reporting system. Further, subsection (d) speaks to investigations "in each agency into suspected violations of this title" or of Presidentially issued regulations. The bill's silence on who shall conduct such investigations suggests that the ICRC may assert authority to come into a department or agency and investigate any actions it believes may be contrary to law or policy. Since no threshold for such investigations is stated, they could be for very insubstantial administrative infractions.

26. Section 506(c) -- the mandatory language of this Section would require the ICRC to notify the Attorney General of even trivial infractions of the proposed statute.

27. Section 506(d) -- the authority this would grant the ICRC chairman (an FES-IV appointive official per Section 506(a)(2)) to employ a staff whose size is not limited by this bill, would appear to be inconsistent with the President's stated intent to reduce the size of the Federal bureaucracy.

28. Section 507(a) -- this punitive Section appears to suffer from some of the defects which characterize the existing Espionage Statutes (e.g., 17 USC 794). Thus, would this language subject to possible life imprisonment the private communication to a foreign friend of information classified at a low level?

29. Section 507(c) -- this punitive Section appears on its face to be designed to reach private citizens, including journalists, who

knowingly communicate classified information to unauthorized persons. But what is the meaning of the qualifying sentence that "nothing in this subsection shall be construed to infringe rights or liberties guaranteed under the Constitution or laws of the United States"?

30. Section 507(d)(1) -- this defense to a prosecution would not cover the situation where the communication was to a foreigner and the information had been publicly disclosed before the offense was committed. Thus, prosecution could be brought under Section 507(a) against someone for telling a foreign friend something the defendant believes to be in the public domain but which the government contends is still officially classified.

31. Section 507(d)(2) -- this defense to a prosecution would apparently not permit a defendant to argue that the classification of the information at issue was substantively improper without regard to the administrative propriety of its application. The possibility that the court may question the substantive basis for a classification is inadequate safeguard for a defendant.

32. Section 507(e) -- the procedure herein for in camera judicial review of the lawful basis for classifying information at issue would be a meaningful safeguard only if the bill provided clear standards for the application of classifications and exemptions from declassification, and was also clear as to who was authorized access. Since the bill falls short of necessary clarity in these and other respects, judicial determinations which would issue from this process would be anything but uniform and would likely tie up the whole process in appeals.

33. Section 507(f)(3) -- these definitions for prosecutive purposes do not specify what is meant by "legal authority" when used to define who has authorized access.