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Department of Justice

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STATEMENT OF RALPH E. ERICKSON

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE THE

SPECIAL SUBCOMMITTEE ON INTELLIGENCE
OF THE ARMED SERVICES COMMITTEE, HOUSE OF REPRESENTATIVES

ON

H.R. 9853 and
Classification and Protection of Information

MARCH 13, 1972

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Mr. Chairman:

I am pleased to appear before this Committee to testify on the legal basis for the current classification procedures within the Executive Branch, and on H.R. 9853, a bill to establish a commission for the continuing review of classification procedures in certain executive departments and agencies. First, I will outline the existing classification system and its historical antecedents, and set out the most significant provisions of new Executive Order No. 11652 issued by the President last week. Then I will discuss the legal basis for the issuance of Executive Order No. 11652 and its predecessors, and two related areas of law. Finally, I will speak generally to the appropriateness of and need for Congressional action such as H.R. 9853 in the areas covered by new Executive Order No. 11652. I also have two comments of a technical legal nature on H.R. 9853.

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When we speak of classification and protection of information on the ground that its release would damage the national security, we are necessarily speaking of withholding information from the American public. Moreover, the information withheld is often of the very sort that would most assist the people in performing their indispensible role in a democracy--making informed judgments about the wisdom of their leaders and the policies of their government. It is fundamental to our way of government that our citizens are informed to the maximum extent possible about the activities of government. "Yet," as Justice Stewart pointed out in the New York Times case last term:

> "It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could

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> not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident." 403 U.S. at 728.

It is in the unavoidable tension between the necessity for a fully informed public in a democratic society and the importance of protecting national security information to preserve that society that our current system of security classification has developed.

The existing system is based chiefly on Executive Order 10501 and agency regulations issued pursuant to it. As you know, the President has just issued a new Executive order (E.O. 11652), effective June 1, 1972, to replace Executive Order 10501. Although there are very significant substantive changes in the provisions of the new order, both orders limit access to national security information by requiring it to be classified according to the seriousness of the damage that might result from its release. Access to information so classified is prohibited except by persons with a need to know it in connection with their duties who have been determined to be trustworthy. Administrative and criminal sanctions may attach to the unauthorized release of such information.

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I should point out that I am not talking here about the closely related, but by no means coextensive, doctrine of executive privilege. The doctrine of executive privilege involves the constitutional authority of the President to withhold documents or information in his possession or in the possession of the Executive branch from the compulsory process of the other branches of the Government. It makes no difference whether the information is classified or unclassified. Executive privilege has been invoked in the past in the areas of foreign relations and military affairs, as well as in the areas of pending investigations and intragovernmental discussions, and the justifications given for invoking it are in many instances similar to those advanced for classifying Executive branch information. However, classified information is often supplied to congressional committees authorized to receive it for restricted distribution. The mere fact of classification by itself does not constitute a sufficient basis for withholding information from a committee of Congress. Conversely, documents bearing no relation to the national security may properly be the subject of a claim of executive privilege.

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1. <u>The Existing System</u>

Until the effective date of new Executive Order No. 11652, on June 1, 1972, security classification in the Executive Branch will continue to be governed by Executive Order 10501. Originally issued in 1953 by President Eisenhower, Executive Order 10501 replaced Executive Order 10290 issued in 1951 by President Truman. These Orders were the first efforts to establish a comprehensive Executive Branch system for classification and protection of information relating to the national defense. However, they by no means introduced the practice of marking documents "Confidential," "Secret," and so forth. Such markings date back at least to the War of 1812, although the present marking system appears to date from around the time of the First World War.

Executive Order 10501 has been amended a number of times since its issuance in 1953, but until last week the changes were technical, or altered the list of agencies authorized under section 7 to classify defense information. The Order comprehensively provides what information may be classified, who may classify it, when and by whom information may be declassified, and who may have access to information that has been classified. It also specifies in considerable detail how

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classified material is to be marked, stored, transmitted and disposed of. Finally, it contains review procedures, and directs the imposition of administrative sanctions, or referral to the Justice Department, for unauthorized release of classified information.

The new Order covers the same areas, but in a significantly different manner. Since summaries of the provisions of the old order are generally available, it would be more useful here to turn to the provisions of the new Order, effective June 1, 1972.

Section 1 of E.O. 11652 provides that:

> "Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed 'national security') shall be classified in three categories, which are 'Top Secret,' 'Secret,' and 'Confidential,' depending upon the degree of its significance to national security."

Material may be classified "Top Secret" only if its "unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security." The definitions of "Secret" and "Confidential" substitute for the language "exceptionally grave damage," the language "serious damage" and "damage," respectively. Classifiers are directed to use the classification "Top Secret" only with the "utmost restraint,"

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and the classification "Secret" only "sparingly." Section 2 governs who may classify information. Only certain high officials of the agencies listed in subsection 2(A) may originally classify information "Top Secret." Authority to originally classify "Secret" may be delegated only by officials who themselves possess original "Top Secret" classification authority, and is also possessed by senior officials in the agencies listed in subsection 2(B). Subsection 2(C) permits further delegation of authority to classify "Confidential." It is expected that the new restrictions will result in a substantial reduction in the number of individuals with classification authority at all levels. Section 3 governs authority to downgrade and declassify. In order to facilitate timely and efficient declassification, there are fewer restrictions on delegation of authority to downgrade and declassify than on delegation of authority to classify. Subsections 3(C)-(E) provide for the declassification of material no longer in the possession of the originating agency. Section 4 contains several rules relating to classification. Subsection 4(A) requires a classified document to be marked to show: (1) whether it is subject to or exempt from automatic declassification; (2) in what office and on what date it was prepared and classified; (3) to the extent practicable, which portions are classified and at what

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level to facilitate excerpting. Subsection 4(B) requires each agency to provide a method of identifying the individual who classified any document, so that persons can be held accountable for classification abuses. This, I believe, is an important factor. Subsection 4(C) concerns information furnished to the United States by other countries. Subsection 4(D) requires a holder to "observe and respect" the classifications assigned by the originator. Section 5 governs downgrading and declassification. Unless information is exempted from automatic declassification under subsection 5(B) it must be downgraded and declassified according to the schedule contained in Section 5(A). Under that schedule, "Top Secret" information is downgraded to "Secret" after two years, to "Confidential" after 4 years and declassified after 10 years. "Secret" information is downgraded to "Confidential" after 2 years and declassified after 8. "Confidential" information is declassified after 6 years. Material may be exempted from automatic declassification under subsection 5(B) only by an official with "Top Secret" classification authority. That official must specify in writing in which of four exemption categories the material falls. He must also indicate a date or event for declassification where possible. These requirements,

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and the injunction to keep use of the exemption to an absolute minimum, are designed to drastically reduce the quantity of material remaining classified for extended periods. Subsection 5(C) requires exempted material to be reviewed for declassification purposes if, 10 or more years after its origination, such review is requested by another agency or a member of the public. Subsection (E) provides that all material is automatically declassified after 30 years unless the head of the originating agency "personally determines in writing at that time" that its "continued protection is essential to the national security or disclosure would place a person in immediate jeopardy." If he makes such a determination, he must also specify a period for continued classification. Section 6 leaves the details of access, marking, safekeeping, accountability and disposal to directives of the President issued through the National Security Council. However, it sets out general policies to which such regulations must conform. Section 7 provides that the National Security Council shall monitor implementation of the order. To assist the Council, Section 7 also establishes an Interagency Classification Review Committee and gives it extensive powers to oversee agency compliance with the order

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and act on complaints from inside and outside the government. It also requires each agency to set up an administrative unit to ensure compliance with the Order. Subsection 7(C) authorizes the Attorney General to render interpretations of the Order. Section 9 authorizes agencies to institute special requirements for access, distribution and protection of classified information. Section 11 provides a system for the declassification of the papers of former presidents. Section 12 permits access to classified material by historians and former government officials. Section 13 directs imposition of administrative sanctions for both unauthorized release of classified information and unnecessary or excessive classification. The latter is designed to counteract what have proved to be overwhelming pressures to classify unnecessarily and to overclassify. Where a violation of criminal statutes may be involved, agencies are directed to refer a case to the Department of Justice.

In addition to Executive Order 11652, several other authorities relating to Executive Branch classification and protection of information should be mentioned. The Atomic Energy Act establishes special requirements for classification and protection of information relating to nuclear technology.

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Section 8 of the new order recognizes this special treatment. Executive Order 10865 deals with personnel security and treatment of classified information and material outside the Executive Branch; Executive Order 10450 establishes a personnel security program for government employees.

2. Authority for the Issuance of E.O.11652 and Other Legal Considerations

Neither Executive Order 10501 nor new Executive Order 11652 is issued pursuant to express statutory authority. They are based instead on the broad executive powers and responsibilities of the President under Article II of the Constitution: article II, section 1, vesting the executive power in the President; article II, section 2, making the President Commander in Chief of the Army and Navy; and article II, section 3, requiring the President to "take care that the laws be faithfully executed."

The Commission on Government Security stated at page 158 of its 1957 report:

> "When these provisions [of article II of the Constitution] are considered in light of existing Presidential authority to appoint and remove executive officers directly responsible to him, there is demonstrated the broad Presidential supervisory and regulatory

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> authority over the internal operations of the executive branch. By issuing the proper Executive or administrative order he exercises this power of direction and supervision over his subordinates in the discharge of their duties. He thus 'takes care' that the laws are being faithfully executed by those acting in his behalf; and in the instant case the pertinent laws would involve espionage, sabotage, and related statutes, should such Presidential authority not be predicated upon statutory authority or direction."

Justice Stewart in last Term's New York Times case recognized both the power and the duty of the Executive under the Constitution to establish and maintain a security system:

> "It is clear to me that it is the constitutional duty of the Executive--as a matter of sovereign prerogative and not as a matter of law as the courts know law--through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and defense." (403 U.S. 729-30).

Additionally, a number of statutes contemplate the existence of a classification system such as provided in Executive Order 10501 and new Executive Order 11652 for material relating to the national security. The espionage laws, 18 U.S.C. §§ 792-798, alternatively refer to classified

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information or make it imperative to establish a classification system in order to enforce them fairly and effectively. See United States v. Heine, 151 F.2d 813 (2 Cir. 1945), cert. denied 328 U.S. 833 (1946). Subsection (b) of the Internal Security Act of 1950, 50 U.S.C. § 783, makes it a crime "for any officer or employee of the United States" to communicate to a foreign agent "any information of a kind which shall have been classified by the President as affecting the security of the United States . . . ." See also 50 U.S.C. § 783(c). As mentioned above, The Atomic Energy Act requires classification of certain information as "Restricted Data." The Freedom of Information Act (P.L. 89-487), which is discussed below is a further recent congressional recognition of the security classification system.

An outline of the legal basis for the classification of documents would not be complete without a discussion of two related areas of law. The first of these concerns the public's statutory right of access to the records of government agencies and departments under the Freedom of Information Act. (5 U.S.C. § 552). Under that Act every

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agency is required to make its records available to any person on request unless the requested records fall under one of the nine exemptions set out in subsection (b). The first of these exemptions from mandatory release if for matters:

> "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."

The House Report accompanying the Act specifically mentions information classified pursuant to Executive Order 10501 as within the exemption of subsection (b)(1). (See. H.Rept. No. 1497, 89th Cong., 2d Sess. 9-10).

A 1970 Ninth Circuit case interpreting the first exemption recognizes only a very limited judicial power to inquire into the propriety of a classification under Executive Order 10501 in determining whether a record is exempt from mandatory disclosure under the Freedom of Information Act. That case held that the courts would review the propriety of a classification assigned by the Executive branch only to determine whether the classification was arbitrary or capricious. The court said it would not attempt to decide for itself whether the documents were

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properly classified. _See_ _Epstein_ v. _Resor_, 421 F.2d 930 (9th Cir. 1970), _cert._ _denied_ 398 U.S. 965. A government petition for certiorari has just been granted in a recently decided District of Columbia case interpreting the first exemption. _See_ _Mink_ v. _E.P.A._, No. 71-1708 (D.C. Cir., filed Oct. 15, 1971). The Court of Appeals in _Mink_ held, among other things, that a District Judge should subject classified documents to an _in camera_ inspection to determine which portions were classifiable and which could be released.

Finally, there is the question to what extent the Executive branch can enlist the aid of the courts in preventing the publication of material where such publication would be dangerous to the national security. By hypothesis we are speaking of the case where the material in question is already in the hands of the potential publisher, so there is no question of the Executive being compelled to furnish it for publication.

The leading case in this area, the _New York Times_ case, was handed down last June. _New York Times Co._ v. _United States_, 403 U.S. 714 (1971). While the Justices applied a

number of different standards, it seems clear that injunctive relief against publication of classified material already in the hands of the press will be granted only in the most extreme circumstances, at least in the absence of specific legislation. Mr. Justice White's opening statement in his concurring opinion in the New York Times case suggests the very great difference seen by the Court between the case where the Government is attempting to resist mandatory disclosure of material still in its own hands and the case where the Government is asking the courts to prevent publication of material already in the hands of others:

> "I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interest. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express

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> and appropriately limited congressional authorization for prior restraints in circumstances such as these."

Although the foregoing quote from Justice White's concurring opinion indicates the possibility of effective congressional authorization for prior restraint on publication of classified material, we are making no suggestion that such legislation be enacted at this time.

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3. Congressional Action, H.R. 9853

It is generally agreed that the security system established by Executive Order 10501 and related authorities has failed to strike the proper balance between the necessity for informing the public and the necessity for maintaining the confidentiality of certain information. Earlier witnesses at these hearings have testified at length about the problems with the existing system. Witnesses for the Departments of Defense and State have explained in great detail the provisions of the new order, and why they are expected to be effective in eliminating those problems. At least as important as the new order's extensive revision of the substantive rules governing classification and declassification, is the powerful administrative machinery it creates to ensure that those revised rules will be more than empty exhortations.

I would like to address myself to the important question whether congressional action, in addition to the executive action already taken, is desirable at this time, with particular reference to H.R. 9853. It should be noted at the outset that Congress can, if it wishes, legislate in much of the area now occupied by the new Executive order. While meaningful discussion of the limits on congressional power in this area can

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be conducted only in the context of particular legislative proposals, it can be noted as a general matter that the constitutional doctrine of executive privilege is one limit on the power of Congress to legislatively determine the extent of protection of information by the Executive branch of our government.

For a number of reasons it is my belief that executive action is preferable to congressional action in this area, except in the extreme circumstance where executive action has proved unsatisfactory and the Executive is unwilling or unable to undertake necessary corrective measures. Whatever the wisdom of the assignment, our Constitution largely confides the conduct of the nation's foreign affairs and the maintenance of the national defense to the Executive. Because it is the Executive who must usually act for the nation in these areas, it is also the Executive who is in the best position to judge when such action requires secrecy in order to succeed. From the very beginning of this nation, it has been recognized that the President must sometimes decide to act in secrecy in order to promote the national interest.

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This is true even though it may impede the flow in information to the public. Justice Stewart, in the New York Times case, made the following remarks about who must resolve this conflict:

> "I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive--as a matter of sovereign prerogative and not as a matter of law as the courts know law--through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."

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Executive Order No. 11652 demonstrates the advantages of executive action in this area. Its provisions reflect the best judgment of the agencies in the Executive branch most concerned with the national defense and foreign affairs on how to solve the problems everyone agrees exist. If the new rules governing classification and declassification prove inadequate in any respect, amendments can readily be made. Administrative problems have proved troublesome in the past. The National Security Council and the new Interagency Classification Review Committee established by Section 7 of the new order are in an excellent position to study and assess the effectiveness of the security programs instituted pursuant to the provisions of the new order. If the Council or the Committee finds failings in these programs, immediate corrective action can be taken.

Unless the bodies charged with administering the new order fail in their assigned tasks, a commission such as that established by H.R. 9853 would be duplicative and unnecessary. Before such legislation is passed, clearly the administrators of Executive Order 11652 should be given the unfettered opportunity to establish that it will prove effective.

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Finally, I have two comments of a technical legal nature on H.R. 9853. First, we note that Section 506(f) authorizes the granting of a broad transactional immunity to witnesses. This is in conflict with the policy established by title II of the Organized Crime Control Act of 1970, codified at 18 U.S.C. §§ 6001-6005. Title II substituted a uniform narrower use immunity provision for the various immunity provisions previously in the United States Code. Second, we note that since the bill would establish the Commission on a permanent basis, there should as a technical matter be a provision authorizing appropriations.

1 Who represented Justice on committee to write the new order. Rehnquist

X 2 - Any recommendation made by DJ which were not included. no, substantive

3. Anything included which you have objections? none

4. Is the list of IS agencies satisfactory - yes.

5. Any objection to AID - no

6- What are limits of Executive Privilege? is it limited to Natl Sec & Foreign Affairs

7. What is role of congress in class & declassification.

(1) Power to legislate sanctions for violations

(2) Power to review & oversight

8- Should Congress serve on commission with the ~~[illegible]~~ exec. br. - why [illegible]

9. Why not drafts to this committee.

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