

25 February 1981

MEMORANDUM FOR: Chief, Legislative Division, OLC  
VIA: Director of Information Services, DDA  
STAT FROM:   
Chief, Classification Review Division  
SUBJECT: H. R. 131  
REFERENCE: OLC 81-0295, 13 February 1981 (same subject)

1. The following are CRD's comments concerning H. R. 131 and the Department of Defense commentary made earlier in connection with H. R. 1837 (not acted upon by the previous Congress) which is identical in wording to H. R. 131.

2. We agree with DOD on the need for derivative classification and the use of classification guides, but do not believe that provision therefor need be made in the law itself. Section 507(a) of this Bill provides that the President "shall prescribe regulations to carry out this title." The use of guides and other forms of derivative classification (nowhere specifically excluded by the Bill) could be authorized through implementing regulations by including provisions similar to those of Executive Order 12065 (sections 2-1 and 2-2).

3. There also seems to be no real need for any separate provision in this law covering information on "cryptologic activities, methods, materials and devices," the unauthorized disclosure of which is already a crime under 18 U.S.C. 798 (as the DOD commentary notes, but then concludes oppositely that a provision in the law is needed). Moreover, such information is clearly classifiable under Sections 504(a)(1), 504(a)(3), and/or 504(a)(5) of the Bill -- as is all information falling within one or more of these and the other specified classification categories.

4. The same applies, in our view, to "special access programs," although the case for including these in the law itself is perhaps somewhat stronger

**On file OSD release instructions apply.**

than for either derivative classification or cryptology. Whether prescribed by law or through implementing regulations, however, the DOD's proposed language should be amended to read as follows (changes underlined):

"Agency heads and officials of the Executive Office of the President authorized to originate the classification of information as 'Top Secret' pursuant to ... may establish special programs to control the distribution of and all forms of access to particularly sensitive information ... Such programs may be established or continued only by written direction of such an agency head or official, the written authorization of the Secretary of Defense being required for special access programs applicable to cryptologic information, and that of the Director of Central Intelligence for those applicable to information concerning foreign intelligence activities, sources, or methods."

5. We agree with the DOD as to the inadequacy of the Bill's provisions (Section 504(a)(2) et seq.) concerning what E.O. 12065 calls "foreign government information," and similarly prefer use of that term in section 504(a)(2) with a definition to be added under section 511. We would, however, prefer the following definition (essentially the one adopted by the Information Security Oversight Office in March 1980, after extensive consultations in which DOD, State Department, CIA, and National Archives and Records Service representatives participated):

"The term 'foreign government information' means: (a) documents or material provided by a foreign government or governments, international organizations of governments, or any element thereof in the expectation, expressed or implied, that the document, material or information contained therein is to be held in confidence; (b) information provided, in any manner, to the United States by foreign governments, international organizations of governments, or any element thereof with the expressed or implied expectation that the information will be held in confidence, or (c) information produced by the United States pursuant to or as a result of a joint arrangement, evidenced by an exchange of letters, memorandum of understanding, or other written record, with a foreign government or organization of governments requiring that the information, the arrangement, or both be kept in confidence."

The DOD's proposed language here might serve the purpose, but is loose and does not adequately provide for intelligence liaison "joint arrangements" of a less formalized nature than is implied by the DOD phrasing. A cable, dispatch, or operational memorandum may in some instances provide the only written record extant; indeed, the "classifiable information" may in some instances be the very fact that such an arrangement exists or has existed between a U.S. agency and a foreign government entity.

6. In keeping with present needs to redress in favor of national security protection the balance now tilted by Executive Order 12065 toward declassification and disclosure, the first sentence of section 506(a) of the Bill should be deleted along with the last sentence of section 506(b). The remainder of both sections could then be amalgamated into a single section to read (with certain changes from the present text) as follows:

"SEC. 506. It is the policy of the Congress that information classified under this title or under a prior Executive Order authorizing the classification of national security information shall be declassified as early as considerations of national security allow. The President shall prescribe regulations for downgrading the classification of such information, or for declassifying, transferring, retiring, or destroying such information, as may be appropriate in each case, at the earliest practicable date."

7. For similar reasons and also to strengthen the Bill's provisions concerning intelligence information, section 504(b) should be amended to read (changes underlined):

"(b) the unauthorized disclosure of information described in subsection (a)(2) or of information leading to the identification of a confidential foreign intelligence activity, source, or method is presumed to cause at least identifiable damage to the national security."

Note that subsection (a)(2) cited here should itself be amended as per paragraph 5 above.

8. The provisions concerning foreign government and intelligence information can be further strengthened, and a major fault of the Bill can be corrected, by amending section 509(d)(1) to read (changes underlined):

"(d) It is a defense to a prosecution under subsection (b) or (c) that --

"(1) before the commission of the offense with which the defendant is charged, the information communicated had been publicly disclosed, except that no such defense may be based upon any unauthorized public or other disclosure of lawfully classified foreign government information or information concerning or derived from foreign intelligence activities, sources, or methods;"

This portion of the Bill could, of course, be strengthened still further by wording it to exclude all lawfully classified information from this provision (not just foreign government or foreign intelligence information), as long as any prior disclosure was unauthorized.

9. Other OIS Divisions and interested Agency components may wish to comment on these and other aspects of this Bill and of the DOD's commentary which are not addressed above, particularly as regards the accountability, identification and marking provisions, and the extent, nature, and validity of the criminal and other penalties which the Bill would impose.



STAT

Attachment:

1. H.R. 131
2. DOD/OGC Letter, 11 Aug 80

Distribution:

- Orig - C/OLC/LD, w/atts.
- 1 - D/IS, w/atts.
- 1 - CRD (Revision of E.O. 12065/Legislation), w/atts.
- 1 - Chrono, w/o atts.

97<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 131

To amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, to provide for declassification, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1981

Mr. BENNETT introduced the following bill; which was referred jointly to the Committee on Armed Services and the Permanent Select Committee on Intelligence

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## A BILL

To amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, to provide for declassification, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 That (a) the National Security Act of 1947 is amended by  
2 adding at the end thereof the following new title:

3 "TITLE V—CLASSIFICATION AND SAFEGUARD-  
4 ING OF NATIONAL SECURITY INFORMATION

5 "PURPOSE

6 "SEC. 501. The purpose of this title is to establish pro-  
7 cedures for the protection against unauthorized disclosure of  
8 information and material relating to the national security that  
9 is of such a nature that the unauthorized disclosure of such  
10 information or material could cause identifiable damage to  
11 the national security and to provide criminal penalties for the  
12 unauthorized disclosure of such information and material.

13 "AUTHORITY FOR CLASSIFICATION OF NATIONAL  
14 SECURITY INFORMATION

15 "SEC. 502. (a) Except as provided in the Atomic  
16 Energy Act of 1954, national security information may be  
17 designated and protected against unauthorized disclosure  
18 only in accordance with this title. The authority to originate  
19 the classification of national security information may be ex-  
20 ercised only by an official designated under section 503 to  
21 have such authority and shall be exercised in accordance with  
22 the provisions of section 504.

23 "(b) There shall be three categories of classification by  
24 which national security information may be designated, and,  
25 except as otherwise expressly provided by law, no other cate-



1 President, as the President may designate by publication in  
2 the Federal Register to have such authority, and by such  
3 officials as may be designated to have such authority in ac-  
4 cordance with subsection (b)(1).

5       “(2) The authority to originate the classification of na-  
6 tional security information as ‘Secret’ may be exercised only  
7 by officials who have authority to originate the classification  
8 of information as ‘Top Secret’, by such other officials in the  
9 executive branch of the Government as the President may  
10 designate by publication in the Federal Register to have such  
11 authority, and by such officials as may be designated to have  
12 such authority in accordance with subsection (b)(2).

13       “(3) The authority to originate the classification of na-  
14 tional security information as ‘Confidential’ may be exercised  
15 only by officials who have authority to originate the classifi-  
16 cation of information as ‘Secret’, by such other officials in the  
17 executive branch of the Government as the President may  
18 designate by publication in the Federal Register to have such  
19 authority, and by such officials as may be designated to have  
20 such authority in accordance with subsection (b)(3).

21       “(b)(1) Any principal subordinate official of an official  
22 designated by the President under subsection (a)(1) to have  
23 authority to originate the classification of information as ‘Top  
24 Secret’ may be designated by such official to have such au-  
25 thority, if such subordinate official has a frequent need to



1 exercise such authority, as determined by the President or by  
2 the official making the designation.

3       “(2) Any subordinate official of an official who (A) has  
4 authority to designate information as ‘Top Secret’, or (B) is  
5 designated by the President under subsection (a)(2) to have  
6 authority to designate information as ‘Secret’ may be desig-  
7 nated by such official to have such authority if such subordi-  
8 nate official has a frequent need to exercise such authority, as  
9 determined by the President, by the head of such official’s  
10 agency, or by the official making the designation.

11       “(3) Any subordinate official of an official who (A) has  
12 authority to designate information as ‘Secret’, or (B) is desig-  
13 nated by the President under subsection (a)(3) to have  
14 authority to designate information as ‘Confidential’ may be  
15 designated by such official to have such authority if such sub-  
16 ordinate official has a frequent need to exercise such authori-  
17 ty, as determined by the President, by the head of such offi-  
18 cial’s agency, or by some other official having authority to  
19 originate the classification of information as ‘Top Secret’.

20       “(4) Each designation under this subsection of an official  
21 to have authority to originate the classification of information  
22 shall be made in writing and shall state the name or position  
23 of the official being designated to exercise such authority.

24       “(c) It is the policy of the Congress that the number of  
25 designations under subsection (b) of subordinate officials to

1 have authority to originate the classification of information  
2 should be kept to the smallest number practicable. To carry  
3 out this policy, periodic reviews of such designations shall be  
4 made to determine whether officials so designated have a  
5 continuing need to exercise such authority.

6 “(d) The President shall prescribe regulations to provide  
7 procedures for the handling and classification of national se-  
8 curity information that is originated by an agency that does  
9 not have an official with authority to classify such  
10 information.

11 “STANDARDS FOR CLASSIFICATION

12 “SEC. 504. (a) Information may not be classified unless  
13 unauthorized disclosure of such information reasonably could  
14 be expected to cause at least identifiable damage to the na-  
15 tional security and unless such information concerns—

16 “(1) military plans, weapons, or operations;

17 “(2) information that is furnished to the United  
18 States by a foreign government or international organi-  
19 zation and that has been designated by such foreign  
20 government or international organization as requiring  
21 protection against unauthorized disclosure;

22 “(3) intelligence activities, sources, or methods;

23 “(4) the foreign relations or foreign activities of  
24 the United States;

1           “(5) scientific, technological, or economic matters  
2 relating to the national security;

3           “(6) programs of the United States Government  
4 for safeguarding nuclear materials or facilities; or

5           “(7) some other category of information related to  
6 the national security and requiring protection against  
7 unauthorized disclosure, as determined by the Presi-  
8 dent, by an official designated by the President under  
9 section 503(a)(1), or by an official who is the head of  
10 an agency.

11          “(b) The unauthorized disclosure of information de-  
12 scribed in subsection (a)(2) or of information revealing the  
13 identity of a confidential foreign intelligence source may be  
14 presumed to cause at least identifiable damage to the national  
15 security.

16          “(c)(1) Information may not be classified in order to con-  
17 ceal violations of law, incompetence, inefficiency, wrongdo-  
18 ing, or administrative error, to avoid embarrassment to any  
19 person or agency, to restrain competition or independent ini-  
20 tiative, or to prevent for any other reason the release of infor-  
21 mation that does not require protection in the interest of na-  
22 tional security. Any official who classifies information in vio-  
23 lation of this subsection shall be subject to such administra-  
24 tive disciplinary action, including suspension, as may be or-  
25 dered by such official's superiors.

1       “(2) Basic scientific research information not clearly re-  
2 lated to the national security may not be classified.

3       “(3) Material containing a reference to classified infor-  
4 mation which reference does not itself reveal classified infor-  
5 mation may not be classified by reason of such reference or  
6 be used as a basis for classification.

7       “(d) Whenever there is reasonable doubt as to which  
8 category of classification should be applied, the less restric-  
9 tive category should be used. Whenever there is reasonable  
10 doubt as to whether information should be classified at all,  
11 the information should not be classified.

12       “IDENTIFICATION OF CLASSIFIED MATERIAL

13       “SEC. 505. (a) Each item of classified material shall  
14 show on its face—

15               “(1) the category of classification of such material;

16               “(2) the identity of the official authorizing the  
17 original classification of such material;

18               “(3) the office which originated the classification  
19 of such material;

20               “(4) the dates of the preparation and of the classi-  
21 fication of such material; and

22               “(5) whether such material is subject to declassifi-  
23 cation at a particular time and, if so, when.

24       “(b) There shall be clearly indicated on the face of each  
25 item of classified material or by other appropriate means

1 which portions of such material are classified and which por-  
2 tions are not classified, together with the degree of classifica-  
3 tion of those portions which are classified. The President may  
4 waive the requirements of the preceding sentence for speci-  
5 fied classes of material.

6       “(c) Information that is furnished to the United States  
7 by a foreign government or international organization and  
8 that has been designated by such foreign government or in-  
9 ternational organization as requiring protection against unau-  
10 thorized disclosure shall either retain its original designation  
11 or be assigned a category of classification under this title, and  
12 in either case shall be assured a degree of protection equiva-  
13 lent to that required by the foreign government or interna-  
14 tional organization furnishing such information.

15       “(d) A holder of classified information shall observe and  
16 respect the classification assigned to such information by the  
17 originator of such classification. If a holder of classified infor-  
18 mation believes that such information should not be classi-  
19 fied, that the classification which has been assigned to such  
20 information is improper, or that such information is subject to  
21 declassification under applicable regulations, such holder  
22 shall so inform the originator of the classification of such in-  
23 formation, who shall promptly reexamine such classification.

1 "DECLASSIFICATION POLICY AND REGULATIONS

2 "SEC. 506. (a) It is the policy of the Congress that de-  
3 classification of classified information shall be given emphasis  
4 comparable to that accorded classification of national security  
5 information. Information classified under this title or under a  
6 prior Executive order authorizing the classification of nation-  
7 al security information shall be declassified as early as con-  
8 siderations of national security allow.

9 "(b) The President shall prescribe regulations to estab-  
10 lish procedures for the systematic and periodic review of all  
11 classified information for the purpose of downgrading the  
12 classification of such information, or of declassifying, trans-  
13 ferring, retiring, or destroying such information, as may be  
14 appropriate in each case, at the earliest practicable date. In  
15 determining whether information should be declassified, the  
16 public interest in disclosure of the information shall be con-  
17 sidered and weighed against the need for continued classifica-  
18 tion of the information.

19 "IMPLEMENTING REGULATIONS

20 "SEC. 507. (a) The President shall prescribe regulations  
21 to carry out this title. Such regulations shall include provi-  
22 sions to ensure that—

23 "(1) any person given access to classified informa-  
24 tion (A) has been determined to be trustworthy, and

1 (B) requires access to such information in the perform-  
2 ance of official duties;

3 "(2) all classified material is appropriately and  
4 conspicuously marked so as to put any person coming  
5 in contact with such material on clear notice that the  
6 contents of such material are classified;

7 "(3) classified information is used, possessed,  
8 stored, reproduced, and transmitted only under condi-  
9 tions that will prevent access to such information by  
10 persons not specifically authorized to have such access  
11 and that will prevent dissemination of such information  
12 to persons not specifically authorized to receive it;

13 "(4) classified information disseminated outside  
14 the executive branch is given protection equivalent to  
15 that afforded within the executive branch;

16 "(5) appropriate records to assure accountability  
17 for all classified information are established and main-  
18 tained and that classified information is adequately pro-  
19 tected during all transmissions of such information; and

20 "(6) classified information no longer needed in  
21 current working files or for reference or record pur-  
22 poses is destroyed or otherwise disposed of in accord-  
23 ance with chapter 33 of title 44, United States Code  
24 (relating to disposal of records).

1 “(b) The President may waive the requirement in sub-  
2 section (a)(1) that access to classified information be limited  
3 to persons requiring access to such information in the per-  
4 formance of official duties with respect to such persons and  
5 classes of persons as the President may prescribe.

6 “MATERIAL COVERED BY THE ATOMIC ENERGY ACT OF  
7 1954

8 “SEC. 508. Nothing in this title shall supersede any re-  
9 quirement made by or under the Atomic Energy Act of 1954.  
10 Material designated as ‘Restricted Data’ and material desig-  
11 nated as ‘Formerly Restricted Data’ shall be handled, pro-  
12 tected, classified, downgraded, and declassified in conformity  
13 with the provisions of the Atomic Energy Act of 1954.

14 “UNAUTHORIZED DISCLOSURE OF CLASSIFIED  
15 INFORMATION

16 “SEC. 509. (a) Any individual who knowingly communi-  
17 cates classified information which that individual knows or  
18 has reason to know is classified information to a foreign gov-  
19 ernment or foreign organization or to any officer or agent  
20 thereof not authorized to receive such information shall be  
21 imprisoned for any term of years or for life.

22 “(b) Any individual who (1) is or has been in authorized  
23 possession or control of classified information, or (2) is or has  
24 been an officer or employee of the United States, a member  
25 of the Armed Forces of the United States, a contractor of the



1 United States Government, or an employee of a contractor of  
2 the United States Government, and is or has been in posses-  
3 sion or control of classified information in the course of that  
4 relationship, knowingly communicates such information to a  
5 person not authorized to receive it shall be fined not more  
6 than \$10,000 or imprisoned not more than ten years, or both.

7       “(c) Any individual who knowingly communicates clas-  
8 sified information which that individual knows or has reason  
9 to know is classified information to a person not authorized to  
10 receive it shall be fined not more than \$5,000 or imprisoned  
11 not more than one year, or both. Nothing in this subsection  
12 shall be construed to infringe rights or liberties guaranteed  
13 under the Constitution or laws of the United States.

14       “(d) It is a defense to a prosecution under subsection (b)  
15 or (c) that—

16               “(1) before the commission of the offense with  
17 which the defendant is charged, the information com-  
18 municated had been publicly disclosed;

19               “(2) the information communicated was not law-  
20 fully classified at the time of the offense with which  
21 the defendant is charged; or

22               “(3) the information communicated was communi-  
23 cated only to a regularly constituted subcommittee,  
24 committee, or joint committee of Congress, pursuant to  
25 lawful demand.

1           “(e) In making a determination as to whether the infor-  
2 mation communicated was lawfully classified at the time of  
3 the offense with which the defendant is charged, the court  
4 shall determine the matter and shall examine such informa-  
5 tion in camera. In any such determination, the burden is on  
6 the United States to sustain the classification of such infor-  
7 mation. After any in camera examination under this subsec-  
8 tion, the court shall enter into the record its findings and  
9 determinations with respect to whether the information com-  
10 municated was lawfully classified at the time of the offense  
11 with which the defendant is charged. Any determination by  
12 the court under this subsection shall be a question of law.

13           “(f)(1) Whenever any person is about to engage in con-  
14 duct that would constitute a violation of this section, the At-  
15 torney General, on behalf of the United States, may apply to  
16 the appropriate court for an order enjoining such conduct,  
17 and upon a showing that a person is about to engage in such  
18 conduct, a permanent or temporary injunction, temporary re-  
19 straining order, or other order may be granted.

20           “(2) In making a determination as to whether a viola-  
21 tion of this section is about to occur, the court shall examine  
22 the information that is the subject of the possible violation  
23 and shall not grant relief under this subsection if the informa-  
24 tion is not lawfully classified. Examination of the contents of  
25 such information shall be conducted in camera. In any such

1 determination, the burden is on the United States to sustain  
2 the classification of such information. After an in camera ex-  
3 amination under this subsection, the court shall enter into the  
4 record its findings and determinations with respect to wheth-  
5 er the information is lawfully classified.

6 “(g) For the purposes of this section:

7 “(1) The term ‘classified information’ means infor-  
8 mation that is designated as information that—

9 “(A) has been classified under this title;

10 “(B) was classified before the effective date  
11 of this title under an Executive order; or

12 “(C) was furnished to the United States by a  
13 foreign government or international organization  
14 and was designated by such foreign government  
15 or international organization as requiring protec-  
16 tion against unauthorized disclosure.

17 “(2) The term ‘communicates’ means to impart,  
18 transfer, publish, or otherwise make available.

19 “(3) The term ‘authorized’, when used in relation  
20 to the possession, receipt, or control of classified infor-  
21 mation, means with legal authority to have access to,  
22 to possess, to receive, or to control such information.

23 “(4) The term ‘lawfully classified’, when used in  
24 relation to classified information, means—

1           “(A) in the case of information classified on  
2 or after the effective date of this title, that such  
3 information—

4           “(i) is specifically authorized under the  
5 criteria established by section 504 to be clas-  
6 sified;

7           “(ii) is in fact properly classified and  
8 identified in accordance with the criteria es-  
9 tablished by sections 504 and 505 and regu-  
10 lations issued under section 507; and

11           “(iii) was classified by an official author-  
12 ized under section 503 to make such a clas-  
13 sification;

14           “(B) in the case of information classified  
15 before the effective date of this title, that such in-  
16 formation—

17           “(i) is specifically authorized under cri-  
18 teria established by an Executive order to be  
19 protected from unauthorized disclosure in the  
20 interest of the national security;

21           “(ii) is in fact properly classified under  
22 the criteria and procedures established by  
23 such Executive order; and

1                   “(iii) was classified by a person author-  
2                   ized by statute, Executive order, or regula-  
3                   tion to make such a classification; and

4                   “(C) in the case of information designated as  
5                   information which (i) was furnished to the United  
6                   States by a foreign government or international  
7                   organization, and (ii) was designated by such for-  
8                   eign government or international organization as  
9                   requiring protection against unauthorized disclo-  
10                  sure, that such information was in fact furnished  
11                  to the United States by a foreign government or  
12                  international organization and was in fact desig-  
13                  nated by such foreign government or international  
14                  organization as requiring protection from unau-  
15                  thorized disclosure.

16                  “PENALTY FOR IMPROPER CLASSIFICATION

17                  “SEC. 510. Whoever classifies information in order to  
18                  conceal incompetence, inefficiency, wrongdoing, or adminis-  
19                  trative error, to avoid embarrassment to any individual or  
20                  agency, to restrain competition or independent initiative, or  
21                  to prevent or delay for any reason the release of information  
22                  which does not bear directly on the effectiveness of the na-  
23                  tional defense or the conduct of foreign relations shall be  
24                  fined not more than \$1,000 or imprisoned not more than one  
25                  year, or both.

1 "DEFINITIONS

2 "SEC. 511. For purposes of this title:

3 "(1) The term 'national security information'  
4 means information and material that is owned by, pro-  
5 duced for or by, or under the control of the United  
6 States Government and that requires protection against  
7 unauthorized disclosure for reasons of the national se-  
8 curity.

9 "(2) The term 'national security' means the na-  
10 tional defense or foreign relations of the United States.

11 "(3) The term 'information' includes material con-  
12 taining information.

13 "(4) The term 'agency' means any executive de-  
14 partment, military department, Government corpora-  
15 tion, Government-controlled corporation, or other es-  
16 tablishment in the executive branch of the Government  
17 (including the Executive Office of the President), or  
18 any independent regulatory agency."

19 (b) The table of contents at the beginning of the Nation-  
20 al Security Act of 1947 is amended by adding at the end  
21 thereof the following:

"TITLE V--CLASSIFICATION AND SAFEGUARDING OF NATIONAL SECURITY  
INFORMATION

"Sec. 501. Purpose.

"Sec. 502. Authority for classification of national security information.

"Sec. 503. Officials with authority to classify national security information.

"Sec. 504. Standards for classification.

"Sec. 505. Identification of classified material.

"Sec. 507. Implementing regulations; standards.

"Sec. 508. Material covered by the Atomic Energy Act of 1954.

"Sec. 509. Unauthorized disclosure of classified information.

"Sec. 510. Penalty for improper classification.

"Sec. 511. Definitions."

1        SEC. 2. The amendments made by the first section of  
2 this Act shall take effect at the end of the ninety-day period  
3 beginning on the date of the enactment of this Act.

○



DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
WASHINGTON, D.C. 20301

11 August 1980

Honorable James T. McIntyre, Jr.  
Director, Office of Management  
and Budget  
Washington, D. C. 20503

Dear Mr. McIntyre:

The views of the Department of Defense have been requested on H. R. 1837, 96th Congress, a bill "To amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, to provide for declassification, and for other purposes."

Advice is requested as to whether there is objection to the presentation of the attached report to the Committee.

The Committee has requested that this report be expedited.

Sincerely,

Werner Windus  
Director  
Legislative Reference Service

Enclosure



Dear Mr. Chairman:

Reference is made to your request for the views of the Department of Defense on H.R. 1837, 96th Congress, 1st Session, a bill "To amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, to provide for declassification, and for other purposes."

The bill establishes a security classification system for national security information, designates officials who may classify such information, sets standards for classification and marking of documents, promotes declassification measures, authorizes implementing regulations, and establishes penalties for unauthorized disclosures and improper classification.

The bill provides a legislative base for the security classification system of the Executive Branch which heretofore has operated under Presidential orders. Although

the bill adopts a number of security classification principles of E.O. 12065, "National Security Information," it departs significantly from its provisions in a number of respects. Before the Department of Defense can support its enactment, substantial revision of the legislation is necessary as indicated below.

Section 503 is deficient in that it does not make provision for the use of derivative classification authority as provided by Section 2-1 of E.O. 12065. Without a provision authorizing information to be classified because it incorporates classified information from other documents or material, it will be necessary to expand greatly the number of officials exercising original classification authority. Also, it makes no provision for classification guides as provided in Section 2-201 of E.O. 12065. These guides enable information regarding each classified system, program, plan or project to be identified and marked in a systematic and consistent manner.

Section 504(a) fails to include in its definition of classified information "cryptologic activities, methods, materials and devices." As the unauthorized disclosure of such information is a crime under 18 U.S.C. §798, it should be included in the coverage of the proposed legislation.

Section 504(a)(2) refers to information furnished by a foreign government that has been "designated" as requiring protection. Foreign government information is often furnished in confidence without being physically marked or designated "classified." To avoid any misinterpretation as to the intended meaning of "foreign government information", the following definition should be added to Section 511(5):

"(5) The term 'foreign government information' means information that has been provided to the United States in confidence by, or produced by the United States pursuant to a written joint arrangement requiring confidentiality with, a foreign government or international organization of governments."

This definition would permit Section 504(a)(2) to be revised to read, "foreign government information." It would also lead to a revision of Section 505(c) as follows:

"(c) Foreign government information shall either retain its original classification or be assigned a United

States classification that shall ensure a degree of protection equivalent to that required by the entity that furnished the information."

Comparable changes should also be made in Sections 509(g)(1)(C) and 509(g)(4)(C) if the section prescribing criminal penalties is retained in the bill.

Section 504(c) provides that any official who classifies information in violation of the section shall be considered for disciplinary action. There is no objection to such a provision provided that it is limited to wilfull violations. The word "wilfully" should be added after the word "official" on line 22 of p. 7. On the other hand, Section 510 provides for a criminal penalty for virtually the same offenses. The relationship of the two provisions is unclear. In any event, the Department believes that its system of administrative sanctions is sufficient and that express statutory penalties for improperly classifying a document are unnecessary.

Section 505(a) provides that "each item of classified material" shall be identified by prescribed classification markings. The marking requirements should be limited to

documents and to markings at the time of original classification. Further, the markings should designate the original classification authority (not the name of the official) originating the classification and simply the date the document is originated. In its revised form, Section 505(a) would read:

"Sec. 505(a) Each classified document shall be marked at the time of its original classification to show on its face:

- (1) one of the three classification designations specified in Section 502;
- (2) the identity of the original classification authority;
- (3) the office that originated the classification;
- (4) the date of the document; and
- (5) the date or event for declassification of information that is subject to declassification at a particular time or for review."

Section 505(b) requires that "each item of classified material" indicate on its face or by other means those

portions that are classified and those that are not. "Portion marking" should be required on documents, not hardware. The section should be revised to read:

"(b) Each classified document shall, by marking or other means, indicate clearly those portions that are classified, with the applicable classification designation, and those portions that are not classified: The President may waive the requirements of the preceding sentence for specified classes of documents or information."

In order to make it clear that classified information may be expressed in some form other than a document such as hardware, tape recordings, computer data, or oral communication, a new Section 505(c) should be added to read as follows:

"All other forms of classified information may be identified in accordance with regulations established pursuant to Section 507."

Section 507(a)(2) should, in turn, be revised to read:

"person coming in contact with classified information have notice of the need to protect such information from unauthorized disclosure."

Section 507(a)(5) would seem to require accountability records for "all classified information." Because of the volume of classified documents, only certain categories of highly classified information should be subject to a register and receipt system. In its revised form, Section 507 (a)(5) would read:

"(5) appropriate records to assure control or accountability for all classified information are established and maintained and that classified information is adequately protected during all transmissions of such information, and"

Section 508 provides that the bill shall not apply to material covered by the Atomic Energy Act. The section should be amended to read:

"Sec. 508. Nothing in this title shall supersede any requirement in the Atomic Energy Act of 1954, as amended, or the regulations issued

thereunder, relating to the handling, protection, classification, downgrading and declassification of 'Restricted Data' or 'Formerly Restricted Data.'"

The Atomic Energy Act does not itself prescribe classification, downgrading and declassification procedures, only the implementing regulations.

Section 509 would make it a crime to knowingly communicate classified information to persons not authorized to receive it. The gradations of the crime would depend upon whether the unauthorized disclosure was to a foreign government, whether the unauthorized disclosure was by a military or civilian employee or a contractor employee, or whether it was simply passed to an unauthorized person by one having no civilian, military or contractual relationship with the U.S. Government. The bill prescribes the defenses to prosecution, the right of the Attorney General to seek an injunction, and provision requiring an in camera inspection by the courts.

While the Department of Defense supports legislation that would broaden the Government's authority to prosecute unauthorized disclosure cases, it recommends that Section



509 be dropped from the bill and considered as separate legislation.

Section 509 raises a number of issues separate and apart from the provisions establishing a security classification system. The following are some of the principal considerations that should be addressed.

- ° There is a serious question whether criminal sanctions should be applied to all unauthorized disclosures, or whether criminal penalties should be confined to particular sensitive categories of information. A review of the Government's prosecutive history suggests that only the most serious breaches of national security are presented to a grand jury.

- ° Although Section 509(c) plainly extends to reporters who knowingly publish classified information, it also provides that the bill is not intended to violate Constitutional rights (free press). The resulting confusion as to the scope of the statute needs to be addressed.

- ° It is a defense to prosecution if the classified information has been publicly disclosed. Such a provision leads to an ever widening body of

unauthorized disclosures, with each public disclosure leading to more detailed disclosures, all of which would go unpunished due to the public nature of the disclosure.

° There is no provision to resolve problems associated with the discovery and use of classified information during the prosecution of the case. An explanation of those problems, and possible legislative solutions, were addressed in the House Intelligence Committee Hearings on "gray mail legislation", H.R. 4736 and H.R. 4745, on August 7, 1979.

Finally, H.R. 1837 makes no provisions for special access programs to control access, distribution, and protection of particularly sensitive information, such as is provided for in Section 4-201 of E.O. 12065. Therefore, the following section should be added as a new Section 504.

"SPECIAL ACCESS PROGRAMS

"Sec. 504. Agency heads authorized to originate the classification of information as 'Top Secret' pursuant to Section 503(a)(1) of this title may create special access programs to control access to and distribution and safe-

guarding of particularly sensitive information classified pursuant to this title or prior Executive Orders governing the classification of information in the interest of national security. Such programs may be created or continued only by written direction of such an Agency head, except that for cryptologic information, such programs may be created or continued only by the Secretary of Defense and for foreign intelligence sources and methods, only by the Director of Central Intelligence."

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report concerning H.R. 1837 for the consideration of the Committee.

Sincerely,

UNCLASSIFIED

INTERNAL USE ONLY

CONFIDENTIAL

SECRET

### ROUTING AND RECORD SHEET

SUBJECT: (Optional)

H. R. 131

STAT

FROM:   
Chief, Classification Review  
Division, Room 322 Ames

EXTENSION

NO.

DATE

25 February 1981

STAT

TO: (Officer designation, room number, and building)

DATE	
RECEIVED	FORWARDED
2/27/81	
27 FEB 1981	

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. DDIS

2/27/81

Y/A

Please note that OLC has asked for our comments by COB 27 February.

2. DIS

27 FEB 1981

JW

*For [redacted] reduction of classification would eliminate a lot of flexibility we may have. It should not be done by statute.*

STAT

3.

4.

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6.

Chief, LD/OLC 6 D 15

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8.

9.

STAT

10. DDIS:  mes (27 Feb 1981)

P.S. Regarding paragraph 9 of  memorandum (attached), none of the other OIS Divisions have any comments regarding the proposed H.R. 131.

STAT

11. Distribution:  
 Orig. PRS - Addressee w/att  
 1 - OIS Subject w/att

12. 1 - C/CRD (FYI)

13.

14.

15.

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