

BIBLIOGRAPHY

The bibliography that follows is intended as a reference for those that may wish to study the subject of the evolution and organization of the Federal intelligence function more completely. The following books are a useful beginning to the subject: George S. Bryan, *The Spy in America* (1943); Allison Ind, *A Short History of Espionage* (1963); David Kahn, *The Codebreakers* (1967), Lyman B. Kirkpatrick, Jr., *The U.S. Intelligence Community* (1973); Victor Marchetti and John D. Marks, *The CIA and the Cult of Intelligence* (1974); Harry Howe Ransom, *The Intelligence Establishment* (1970); R. Harris Smith, *OSS* (1972); David Wise and Thomas B. Ross, *The Invisible Government* (1974). In addition, there are the hearings of the House Select Committee on Intelligence and the Senate Select Committee To Study Governmental Operations With Respect to Intelligence Activities. The latter panel has produced two special studies:

Alleged Assassination Plots Involving Foreign Leaders (Senate Report No. 94-465); and *Covert Action In Chile, 1963-1973* (a Senate Committee print).

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APPENDIX I

THE EVOLUTION AND ORGANIZATION OF FEDERAL INTELLIGENCE INSTITUTIONS 1882-1975

- 1882 Office of Intelligence established within the Bureau of Navigation, Department of the Navy, by administrative directive; first permanent intelligence unit within the Navy.
- 1885 Military Intelligence Division established within the Adjutant General's Office, Department of War, by administrative directive; first permanent intelligence unit within the Army.
- 1901 Philippine Military Information Bureau established within the United States Army by administrative directive; special intelligence unit developed for use in the Philippine Islands relying upon both overt information collection techniques and undercover operatives.
- 1902 Department of the Treasury Secret Service staff increased by appropriation act (32 Stat. 120 at 140) for purposes of providing protection to the President; origin of Secret Service intelligence activities.
- 1903 General Staff of the United States Army created (32 Stat. 830); intelligence section (G-2) organized by administrative directive.
- 1908 Intelligence section (G-2) of the General Staff, United States Army, absorbed by the Army War College at the direction of the Chief of Staff.
Bureau of Investigation established within the Department of Justice by administrative directive; efforts to create such a unit by statute had been rejected by Congress earlier in the year and also during the previous year.
- 1917 War Department Cipher Bureau (MI-8) created by administrative directive; first permanent cryptology, code development and code breaking unit within the armed services.
General John J. Pershing, commander of the American Expeditionary Forces, establishes an intelligence section (G-2) within his General Staff in Europe.
- 1918 Intelligence section (G-2) of the General Staff, United States Army, reconstituted and developed.
- 1919 Code and Cipher Solution Section, Department of War, secretly established, secretly funded, and maintained in New York City; the unit became popularly known as the American Black Chamber and was responsible for developing and breaking a variety of codes, ciphers and cryptological messages for the War and State Departments.
Intelligence Division, Bureau of Revenue, Department of the Treasury established by administrative directive.

- 1920 United States Marine Corps undergoes reorganization of headquarters staff with the result that an Intelligence Section is established within the Operations and Training Division.
- 1929 American Black Chamber is dissolved at the direction of the Secretary of State, Henry Stimson; the Department of State was the principal financier, user, and beneficiary of the services of the unit but Stimson, newly appointed, disapproved of its activities, saying "Gentlemen do not read each other's mail."
- 1936 Intelligence Division, United States Coast Guard, Department of the Treasury, established by administrative directive; while the Coast Guard had maintained a single intelligence officer prior to this time, additional law enforcement duties and prohibition era responsibilities prompted a major intelligence staff increase at this time.
- 1940 Intelligence Staff section (A-2) established within the United States Army Air Corps by administrative directive.
- 1941 Office of the Coordinator of Information established by a presidential directive of July 11, 1941; the authority of the Coordinator was "to collect and analyze all information and data which may bear upon national security," to correlate such data and to make it available in various ways to the President.
- 1942 Office of Strategic Services established by military order of June 13, 1942; the presidential directive of July 11, 1941 was simultaneously cancelled.
Allied Intelligence Bureau established at the direction of General Douglas MacArthur; the Bureau functioned during the war as a coordinating and planning device for allied armed forces in the Pacific Theater.
- 1945 Office of Strategic Services terminated by E.O. 9621 of September 20, 1945; functions transferred to the Departments of War and State.
- 1946 National Intelligence Authority and its staff arm, the Central Intelligence Group, created by a presidential directive of January 22, 1946, for purposes of coordinating intelligence activities and advising the President regarding same.
Atomic Energy Commission established (60 Stat. 755); responsible for atomic energy intelligence regarding detection and assessment of worldwide atomic detonations and assessments of the use of atomic energy.
- 1947 National Security Council, National Security Resources Board (abolished 1953), and Central Intelligence Agency established by National Security Act (61 Stat. 497).
Deputy Chief of Staff for Intelligence established within the newly created Department of the Air Force (61 Stat. 497).
Office of Intelligence Research established within the Department of State by administrative directive; renamed the Bureau of Intelligence and Research in 1957.
- 1948 Office of Policy Coordination established by secret National Security Council directive NSC 10/2; responsible for covert-action programs, the unit was abolished in 1951 and its functions and personnel were transferred to the Central Intelligence Agency.

- Office of Special Operations established by action of the President (possibly by secret directive); responsible for covert intelligence collection, the unit was abolished in 1951 and its functions were transferred to the Central Intelligence Agency.
- 1949 Armed Forces Security Agency established by a Department of Defense directive for purposes of administering strategic communications-intelligence functions, cryptology, code development and code breaking, and coordination of similar activities by other defense agencies; reorganized as the National Security Agency in 1952.
- 1950 Intelligence Advisory Committee established (authority unclear); created at the urging of the Director of the Central Intelligence Agency and functioned as an interdepartmental panel composed of representatives of the major agencies having intelligence responsibilities; absorbed by the United States Intelligence Board in 1960.
- 1952 National Security Agency created by a classified presidential directive of November 4, 1952; largely unacknowledged as a government agency until 1957, NSA functions under the direction, authority and control of the Secretary of Defense and is responsible for coordinating, developing, and advancing cryptological, code breaking, code development, and communications intelligence activities.
- 1956 President's Board of Consultants on Foreign Intelligence Activities established by E.O. 10656 of February 6, 1956, for purposes of a civilian review of the foreign intelligence activities of the Federal government; established in the wake of a Hoover Commission report of 1955 recommending a joint congressional oversight committee on intelligence activities which was being considered by Congress.
- 1960 United States Intelligence Board established by a classified National Security Council directive, assuming the functions of the Intelligence Advisory Committee; the Board makes administrative recommendations concerning the structure of the Federal intelligence organization and prepares National Intelligence Estimates for the National Security Council on specific foreign situations of national security concern or a general international matter.
- 1961 President's Foreign Intelligence Advisory Board established by E.O. 10938 of May 4, 1961; successor to the President's Board of Consultants on Foreign Intelligence Activities, the panel advises the President on the objectives and conduct of foreign intelligence and related activity by the United States.
- Defense Intelligence Agency established by Department of Defense Directive 5105.21 of August 1, 1961; coordinates armed forces intelligence activities and provides direct intelligence assistance to the Secretary of Defense and the Joint Chiefs of Staff.
- 1968 National Intelligence Resources Board created at direction of the Director of the Central Intelligence Agency; interagency committee created to bring about economy within intelligence activities and operations.

- 1971 Intelligence Resources Advisory Committee created by the Director of the Central Intelligence Agency; successor to the National Intelligence Resources Board, the panel advises the CIA Director on the preparation of a consolidated intelligence program budget.
- 1971 Net Assessments Group established by presidential announcement of November 5, 1971; responsible for analyzing United States defense capabilities vis-a-vis those of the Soviet Union and the People's Republic of China.
- Verification Panel established by presidential announcement of November 5, 1971; responsible for intelligence pertaining to the SALT talks.
- Intelligence Committee, National Security Council, established by presidential announcement of November 5, 1971; advises on intelligence needs and provides for a continuing evaluation of intelligence products from the viewpoint of the intelligence user.
- Forty Committee (also called the Special Group, the 54-12 Group, and the 303 Committee) continued (authority uncertain); in existence since the earliest years of the Central Intelligence Agency, the panel's membership varies but its function remains that of reviewing proposals for covert action.
- Central Security Service proposed (established in 1972) in presidential announcement of November 5, 1971; functions under the direction of the head of the National Security Agency who serves concurrently as Chief of the Service.
- Defense Investigative Service proposed (established by DoD 5105.42 of April 18, 1972) in presidential announcement of November 5, 1971; new agency consolidates armed service and Defense Department personnel investigation functions into single entity.
- Defense Mapping Agency proposed (established under the provisions of the National Security Act of 1947, as amended, on January 1, 1972) in presidential announcement of November 5, 1971; new agency consolidates armed service mapping activities and operations.

APPENDIX II

GOVERNMENT INFORMATION SECURITY CLASSIFICATION POLICY

A democratic system of government, based upon popular power and popular trust, may both respect privacy, "the voluntary withholding of information reinforced by a willing indifference," and practice secrecy, "the compulsory withholding of knowledge, reinforced by the prospect of sanctions for disclosure." Qualifications are attached to these two conditions by legislatures, officers of government, and the courts.

Both are enemies, in principle, of publicity. The tradition of liberal, individualistic democracy maintained an equilibrium of publicity, privacy, and secrecy. The equilibrium was enabled to exist as long as the beneficiaries and protagonists of each sector of this tripartite system of barriers respected the legitimacy of the other two and were confident that they would not use their power and opportunities to disrupt the equilibrium. The principles of privacy, secrecy and publicity are not harmonious among themselves. The existence of each rests on a self-restrictive tendency in each of the others. The balance in which they co-exist, although it is elastic, can be severely disrupted; when the pressure for publicity becomes distrustful of privacy, a disequilibrium results. Respect for privacy gives way to an insistence on publicity coupled with secrecy, a fascination which is at once an abhorrence and a dependent clinging.¹

The abuse of secrecy in matters of government can be attributed to no one particular realm. Public servants, beyond the reach of the electorate, however, may tend to misuse secrecy simply because they are immune to any direct citizen reprisal. In this regard, one of the first serious analysts of social organization, the sociologist Max Weber (1864-1920), has commented: "Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret." Perhaps a more important observation for the American democratic experience is provided by Weber when he notes:

The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely functional interests makes for secrecy. The concept of the "official secret" is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude,

¹ Edward A. Shils. *The Torment of Secrecy: The Background and Consequences of American Security Policies*. New York, The Free Press, 1956, pp. 26-27.

which cannot be justified beyond . . . specifically qualified areas. In facing a parliament, the bureaucracy, out of a sheer power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigation is one of the means by which parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interests.²

The extent to which a sovereign legislature allows a bureaucracy to create "state secrets" on its own initiative and authority also contributes to the abuse of government secrecy. In a democracy, the elected representatives of the people must bear the responsibility of fixing the basis for and creation of official secrets. As an extension of its law-making power, the legislature must exercise authority to determine that its information protection statutes are faithfully administered. Under a constitutional arrangement such as that found in the American Federal Government, care must be taken to divorce the use of state secrecy from the separation of powers doctrine. Because information has been designated an official secret, this condition should not necessarily serve to justify the Executive's withholding of the data from Congress. (See *United States vs. Nixon*, 418 U.S. 683, 706 (1974)).

Ideally, all information held by a democratic government belongs to the citizenry. However, for reasons of national defense, foreign relations, commercial advantage, and personal privacy, some information may require protection and, therefore, becomes a secret. Such a limitation is not absolute: Congress, the Executive, and the courts might, when circumstances so require, have access to official secrets and, in time, efforts should be made to remove the secrecy restriction and release the information in question to the public.

In addition, there are certain types of information which, in accordance with the constitutional doctrine of the separation of powers, might justifiably be retained exclusively within one branch of the Federal Government. (See *United States v. Nixon*, 418 U.S. at 706.) Such a class of information should be kept to a minimum and be withheld with a considerate attitude. In brief, there are types of information which may be protected from inspection by other branches of government as well as from general public scrutiny. Again, such a restriction need not be an absolute matter of policy; considerations of accountability, public trust, criminal wrongdoing, or scholarly research needs may prompt occasional exceptions to the rule. A type of information which may be permissively protected is specified at present in the Freedom of Information Act (5 U.S.C. 552).

I. National Defense

Although members of the United States armed forces were, from the time of the Revolution, prohibited from communicating with the enemy and spying during war had similarly been condemned since

² H. H. Gerth and C. Wright Mills, eds. *From Max Weber: Essays in Sociology* New York, Oxford University Press, 1946, pp. 233-234.

that time, no directives regarding the protection of information or guarding against foreign military intelligence were issued until after the Civil War. During the time of the rebellion, President Lincoln placed strict governmental control over communications—the telegraph, the mails, and, to a considerable extent, the press. The military controlled communications and civilians within the shifting war zones.³

A few years after the cessation of hostilities, the War Department turned its attention to security procedures for peacetime. General Orders No. 35, Headquarters of the Army, Adjutant General's Office, issued April 13, 1869 read: "Commanding officers of troops occupying the regular forts built by the Engineer Department will permit no photographic or other views of the same to be taken without the permission of the War Department." Such language thus placed limited information control at the disposal of the War Department. The substance of this order was continued in compiled Army regulations of 1881, 1889, and 1895.⁴

Deteriorating relations with Spain and the possibility of open warfare subsequently prompted more stringent security precautions. A portion of General Orders No. 9, Hdq. Army, A.G.O., issued March 1, 1897, directed:

No persons, except officers of the Army and Navy of the United States, and persons in the service of the United States employed in direct connection with the use, construction or care of these works, will be allowed to visit any portion of the lake and coast defenses of the United States without the written authority of the Commanding Officer in charge.

Neither written nor pictorial descriptions of these works will be made for publication without the authority of the Secretary of War, nor will any information be given concerning them which is not contained in the printed reports and documents of the War Department.

Revised for inclusion in General Orders No. 52, War Department, issued August 24, 1897, "the principal change was insertion of a paragraph indicating that the Secretary of War would grant special permission to visit these defenses only to the United States Senators and Representatives in Congress *who were officially concerned therewith* and to the Governor or Adjutant General of the State where such defenses were located" [emphasis added].⁵ That the War Department did not want to extend special defense facilities visitation permission to any or all Members of Congress is evident. This policy of selective congressional access to secret defense matters has continued, in various forms, into the present period.

In 1898 there was the passage of a statute (30 Stat. 717) "to protect the harbor defenses and fortifications constructed or used by the

³ See James G. Randall. *Constitutional Problems Under Lincoln*, Revised Edition. Urbana: University of Illinois Press, 1951, chapters III, IV, VII and XIX.

⁴ Dallas Irvine. "The Origin of Defense-Information Markings in the Army and former War Department" [typescript.] Washington, National Archives and Records Service, General Services Administration, 1964; under revision 1972, p. 3. All references from revision typescript; military orders, regulations, and directives referred to may be found in the annexes of this study.

⁵ *Ibid.*, p. 4.

United States from malicious injury, and for other purposes." The sanctions of this law provided that "any person who . . . shall knowingly, willfully or wantonly violate any regulation of the War Department that has been made for the protection of such mine, torpedo, fortification or harbor-defense system shall be punished . . . by a fine of not less than one hundred nor more than five thousand dollars, or with imprisonment for a term not exceeding five years, or with both, in the discretion of the court." The effect of this statute was that it not only sanctioned War Department directives regarding the protection of information, but also gave increased force to such orders by providing criminal penalties for violations. The statute was published for the information of the military in General Orders No. 96, War Department, A.G.O., July 13, 1898.

Army regulations of 1901 continued the language of the 1897 order with its provision for granting certain Members of Congress special access to the coastal and lake defenses. New regulations in 1908 omitted specific mention of congressional visitors and said:

Commanding officers of posts at which are located lake or coastal defenses are charged with the responsibility of preventing, as far as practicable, visitors from obtaining information relative to such defenses which would probably be communicated to a foreign power, and to this end may prescribe and enforce appropriate regulations governing visitors to their posts.

American citizens whose loyalty to their Government is unquestioned may be permitted to visit such portions of the defenses as the commanding officer deems proper.

The taking of photographic or other views of permanent works of defense will not be permitted. Neither written nor pictorial descriptions of these works will be made for publication without the authority of the Secretary of War, nor will any information be given concerning them which is not contained in the printed reports and documents of the War Department.

These portions of the 1908 regulations (pars. 355 and 356) were continued in regulations books of 1910 (pars. 358 and 359), (pars. 347 and 348), and 1917 (pars. 347 and 348). The language constitutes the first open admission by the War Department of an effort to protect fixed defenses against foreign military intelligence.⁶

Criminal sanctions for unlawful entry upon military property were extended in a codification statute (35 Stat. 1088-1159 at 1097) of March 4, 1909. While the penalty provisions of the Act of July 7, 1898 (30 Stat. 717) were included in the law, another provision was added, reading:

Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof,

⁶ *Ibid.*, p. 7.

shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

Although supposedly based upon the provisions of the 1898 statute, in the words of one expert in this policy sphere,

this language was so amplified as to amount virtually to new legislation. The new language tends to divert attention to what the earlier act had referred to by means of the word "trespass." Attention therefore needs to be called to the fact that the new language as well as the old effectively gave the force of law, with imposed penalty for violation, to the provisions of current Army regulations about photographs and written or pictorial descriptions of seacoast defenses and about local regulations to prevent visitors from obtaining information for a foreign power.

In view of the pertinent content of current Army regulations [this] section . . . from the Criminal Code of 1909 may be regarded as the first very good approximation of legislation against espionage in time of peace. The act of 1898, even in the light of then current Army regulations, can be argued, from its text, to be directed more against sabotage than against espionage.⁷

The provision was also incorporated, without change, in the United States Code of 1925.

The first complete system for the protection of national defense information, devoid of special markings, was promulgated in General Orders No. 3, War Department, of February 16, 1912. This directive set forth certain classes of records which were to be regarded as "confidential" and, therefore, kept under lock, "accessible only to the officer to whom intrusted." Those materials falling into this category included submarine mine projects and land defense plans. "Trusted employees" of the War Department, as well as "the officer to whom intrusted," might have access to "maps and charts showing locations on the ground of the elements of defense, of the number of guns, and of the character of the armament" and "tables giving data with reference to the number of guns, the character of the armament, and the war supply of ammunition."

Serial numbers were to be issued for all such "confidential" information with the number marked on the document(s) and lists of the records kept at the office from which they emanated. Within one year's time officers responsible for the safekeeping of these materials were to check on their location and existence. While available to all commissioned officers at all times, "confidential" information was not to be copied except at the office of issue.

The language of [these] instructions . . . was incorporated (par. 94, p. 216) in the *Compilation of General Orders, Circulars, and Bulletins of the War Department Issued Between February 15, 1881, and December 31, 1915* (Washington, 1916). The paragraph of this compilation in which the instructions were carried was rescinded by Changes in Com-

⁷ *Ibid.*, p. 8.

pilation of Orders No. 35, October 1, 1922, which referred to superseding pamphlet Army Regulations 90-40. The latter had been issued on May 2, 1922 under the headings "Coast Artillery Corps. Coast Defense Command." The comparable language appeared in Paragraph 17, "Safe-keeping of military records concerning seacoast defenses." It was generally similar to the language previously in effect, but specified that the two major categories of records involved should be classed as SECRET and CONFIDENTIAL, respectively. These markings by that time had special meanings elsewhere prescribed.⁸

Until the turn of the century, policy directives concerned with the protection of national defense information were confined to coastal and lake fortifications material. This should not necessarily indicate that only documents having to do with these matters were protected under such regulations.

On October 3, 1907 the Chief of Artillery invited the attention of The Adjutant General . . . to the fact that the word "confidential" was being used without any prescribed meaning as a marking on communications and printed issuances. He pointed out the ridiculousness of the situation by citing examples, including one issuance marked "Confidential" that contained merely formulas for making whitewash. In his stated opinion there should be some way of indicating degree of confidentiality, some time limit on the effect of a marking whenever practicable, and requirement of an annual return of confidential materials in the possession of particular officers. He proposed the establishment of four degrees of confidentiality that can be approximated by the following expressions:

1. For your eyes only
2. For the information of commissioned officers only
3. For official use only
4. Not for publication⁹

Additional communication on this matter elicited a response from the Chief Signal Officer that printed issuances, such as manuals and instruction books, contained instructions on their dissemination. An example of this type of control prescription was cited from a Signal Corps manual: "This Manual is intended for the sole personal use of the one to whom it is issued, and should not under any circumstances be transferred, loaned, or its contents imparted to unauthorized persons."

The matter was subsequently referred to the Chief of Staff who presented the suggestions to the Acting Secretary of War. In a memorandum of November 12, 1907, Major General William P. Duvall, Assistant to the Chief of Staff

indicated that the idea of setting time limits on the confidentiality of particular items was hardly practicable and that

⁸ *Ibid.*, p. 11.

⁹ *Ibid.*, pp. 11-12; original letter contained in Annex E of *Ibid.*

the idea of having returns made of specially protected material was undesirable because it would be too complicated in application. The memorandum agreed that the marking "Confidential" should have a prescribed meaning equivalent to "For your eyes only" but went along with the remarks to the Chief Signal Officer in proposing that materials intended to be available only to a certain class or classes of individuals should be "marked so as to indicate to whom the contents may be communicated."¹⁰

As a consequence of this memorandum and an attached draft circular on the whole matter, Circular No. 78, War Department, of November 21, 1907, in part, addressed itself to altering policy on this area.

The first paragraph prohibited further indiscriminant use of the marking "Confidential" on communications from the War Department and permitted its use on such communications only "where the subject-matter is intended for the sole information of the person to whom addressed." The second paragraph, dealing with internal issuances, required that they be accompanied by a statement indicating the class or classes of individuals to whom the contents might be disclosed. The third paragraph listed five internal issuances that were not to be considered confidential any longer. The fourth paragraph indicated that internal serial issuance marked "Confidential" in the past were for the use of Army officers and enlisted men and Government employees "when necessary in connection with their work."¹¹

It has been observed that this circular was not actually concerned explicitly with defense information, but rather with internal communications and publications of the military. As the first such directive addressed to these matters, it marks the beginning of a policy of protecting internal documents for reasons of national defense.

"Second, it placed reliance for any necessary protection of the content of internal issuances, not on jargonized stamped words or expressions, but on an accompanying statement of what was intended in the case of a particular issuance." In brief, the authority of a protective label was not acceptable for safeguarding internal documents. The technique of utilizing an explanatory statement on these materials served to maintain a rational and self-evident policy for safeguarding internal information.

Third, the provision pertaining to use of the marking "Confidential" was unclear in that it did not identify any class of information to which the label might be applied. The directive only served notice that this marking could not be used on internal documents. No meaning was prescribed for the term "Confidential" as used in written and/or verbal discourse. And the thrust of the circular with regard to the proper use of the marking related not to the content or origin of the information in question but rather to the intended recipient.¹²

¹⁰ *Ibid.*, p. 13.

¹¹ *Ibid.*, p. 14.

¹² *Ibid.*, p. 17; original memorandum contained in Annex H of *Ibid.*

The provisions of Circular No. 78 were not included in Army regulations of 1908, 1910, 1913, or 1917. It did appear in the *Compilation of General Orders, Circulars, and Bulletins . . .* issued in 1916 (par. 176). This anonymity, together with the confusion already noted with regard to the use of the marking "Confidential", would tend to reflect that the directive had little impact in curtailing the improper use of the "Confidential" label.

On May 19, 1913, the Judge Advocate General sent a communique to the Chief of Staff wherein he proposed additional regulations for the handling of confidential communications, saying:

Telegrams are inherently confidential. Outside of officials of a telegraph company, no one has authority to see a telegram, other than the sender and receiver, except on a subpoena *duces tecum* issued by a proper court.

A commanding officer of a post where the Signal Corps has a station has no right to inspect the files of telegrams, at least files other than those sent at government expense.

The record of the Signal Corps operators is excellent. I consider the enlisted personnel of the Signal Corps superior to that of any other arm. The leaks that occur through the inadvertence or carelessness of enlisted men of the Signal Corps are few in number. Those occurring through intention on the part of these men are fewer still. In my opinion leaks most frequently occur through the fault of officers in leaving confidential matters open on their desks where others may read as they transact other business.¹³

The Judge Advocate General's suggestions resulted in Changes in Army Regulations No. 30, War Department, issued June 6, 1916, and reading:

In order to reduce the possibility of confidential communications falling into the hands of persons other than those for whom they are intended, the sender will enclose them in an inner and an outer cover; the inner cover to be a sealed envelope or wrapper addressed in the usual way, but marked plainly CONFIDENTIAL in such a manner that the notation may be most readily seen when the outer cover is removed. The package thus prepared will then be enclosed in another sealed envelope or wrapper addressed in the ordinary manner with no notation to indicate the confidential nature of the contents.

The foregoing applies not only to confidential communications entrusted to the mails or to telegraph companies, but also to such communications entrusted to messengers passing between different offices of the same headquarters, including the bureaus and offices of the War Department.

Government telegraph operators will be held responsible that all telegrams are carefully guarded. No received telegram will ever leave an office except in a sealed envelope, properly addressed. All files will be carefully guarded and

¹³ *Ibid.*, p. 17; original memorandum contained in Annex H *Ibid.*

access thereto will be denied to all parties except those authorized by law to see the same.

An examination of *The Code of Laws of the United States of America in Force December 6, 1926* (44 Stat. 1-2452) does not readily reveal any specification of officials granted the authority to examine telegraph or telegram files. It is possible that this power is indirectly conferred by some statutory provision or that the last line of the above directive is of a prospective nature.

It has also been suggested that Changes in Army Regulations No. 30 of 1916 was issued in ignorance of Circular No. 78 of 1907 which was discussed earlier.¹⁴ This situation most likely resulted from the somewhat fugitive nature of Circular No. 78.

II. World War I

On April 6, 1917 the United States declared war on Germany, (40 Stat. 1). This action prompted new regulations to protect national defense information. Mobilization was begun immediately and the first American troops arrived in France in late June. It was also at this juncture that the American military, working with their French and British allies, had an opportunity to observe the information security systems of other armies.

November 22, 1917, General Orders No. 64, General Headquarters, American Expeditionary Force, was issued on the matters of the protection of official information. This directive established three markings for information, saying :

“Confidential” matter is restricted for use and knowledge to a necessary minimum of persons, either members of this Expedition or its employees.

The word “Secret” on a communication is intended to limit the use or sight of it to the officer into whose hands it is delivered by proper authority, and, when necessary, a confidential clerk. With such a document no discretion lies with the officer or clerk to whom it is delivered, except to guard it as SECRET in the most complete understanding of that term. There are no degrees of secrecy in the handling of documents so marked. Such documents are completely secret.

Secret matter will be kept under lock and key subject to use only by the officers to whom it has been transmitted. Confidential matter will be similarly cared for unless it be a part of officer records, and necessary to the entirety of such records. Papers of this class will be kept in the office files, and the confidential clerk responsible for the same shall be given definite instructions that they are to be shown to no one but his immediate official superiors, and that the file shall be locked except during office hours.

Orders, pamphlets of instructions, maps, diagrams, intelligence publications, etc., from these headquarters . . . which are for ordinary official circulation and not intended for the public, but the accidental possession of which by the enemy would result in no harm to the Allied cause; these will have

¹⁴ *Ibid.*, p. 19.

printed in the upper left hand corner, "For Official Circulation Only."

. . . Where circulation is to be indicated otherwise than is indicated . . . [above] . . . there will be added limitation in similar type, as:

Not to be taken into Front Line Trenches.

Not to be Reproduced.

Not to go below Division Headquarters.

Not to go below Regimental Headquarters.

Commenting on this prescription, one authority has noted:

This order itself makes clear that the markings "Confidential" and "Secret" were already in use, for it says "There appears to be some carelessness in the indiscriminant use of the terms 'Confidential' and 'Secret'." This previous usage was undoubtedly taken over from the French, who used these two markings, often with added injunctions such as "not to be taken into the first line." The British also had a marking "For official use only."¹⁵

In early December, 1917, a proposal was advanced by the Acting Chief of the War College Division, War Department General Staff, Col. P. D. Lockridge, regarding the use of information markings. The matter prompting this communique to the Chief of Staff was seemingly some concern that markings being utilized by the A.E.F. be officially authorized and supervised within units of War Department jurisdiction outside of the Expeditionary Force command. It would also seem that "Secret," "Confidential," and other protective labels were already in use among other military divisions. Obtaining quick approval from the Acting Chief of Staff, Lockridge's suggestion was next acted upon by the Adjutant General's Office which decided to incorporate it in Changes in Compilation of Orders No. 6, War Department, issued December 14, 1917. "In view of the importance of the matter, unnumbered and undated advance copies of the intended issuance were distributed, and a printed 'extract' of the regular printed issuance was subsequently given wide circulation."¹⁶

The directive outlined the conditions under which "Secret," "Confidential," and "For Official Use Only" markings were to be utilized. Materials designated "Secret" would not have their existence disclosed but those labeled "Confidential" might circulate "to persons known to be authorized to receive them." The third marking was designed to restrict information from communication to the public or the press. In addition, the order contained the following proviso: "Publishing official documents or information, or using them for personal controversy, or for private purpose without due authority, will be treated as a breach of official trust, and may be punished under the Article of War, or under Section I, Title I, of the Espionage Act [40 Stat. 217] approved June 15, 1917."

This reference to both the Articles of War and the Espionage Act thoroughly confuses the purpose of the issuance. While

¹⁵ *Ibid.*, p. 26.

¹⁶ See *Ibid.*, pp. 26-27.

the Articles of War contained provisions against corresponding with the enemy and against spying, the reference here can only be to the provisions of the Articles of War against disobedience of orders and miscellaneous misconduct. Section 1, Title I, of the Espionage Act, on the other hand, was very comprehensive with respect to any mishandling of "information respecting the national defense." If that section alone had been referred to, the implication would have been that the new issuance related entirely to defense information. Inclusion of the reference to the Articles of War makes it possible to argue that the marking "For official use only" was not intended to apply exclusively to defense information and that the intention with respect to the marking "Confidential" is hardly clear.¹⁷

The thrusts of the Espionage Act of 1917, and the Act of 1911 (36 Stat. 1084) prohibiting the disclosure of national defense secrets, were toward the regulation and punishment of espionage. Neither statute specifically sanctioned the information protection practices of the War Department or the armed forces, nor were the orders and directives of these entities promulgated pursuant to these laws. The markings prescribed for the use of the military were designed for utilization on internal communications and documents. With the passage of the Trading with the Enemy Act (40 Stat. 411) provision was made (40 Stat. 422 § 10(i)) for the President to designate patents, the publication of which might "be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war," to be kept secret. No label was devised for this action. Quite the contrary, the means provided for maintaining this secrecy was to "withhold the grant of a patent until the end of the war." This would appear to be the first direct statutory grant of authority to the Executive to declare a type of information secret. Also, although the provision pertained to defense policy, utilization of this authority was placed in civilian, not military hands.

There is speculation that reference to the Espionage Act was made in Compilation of Orders No. 6 to emphasize the precautions for safeguarding defense information upon a wartime army composed of new recruits at all ranks.

There is no indication that there was any realization at this time that difficulties could arise in enforcing the Espionage Act if official information relating to the national defense was not marked as such, insofar as it was intended to be protected from unauthorized dissemination. Violation of the first three subsections of Section I, Title I, of the act depended in the one case on material relating to the national defense having been turned over to someone not entitled to receive it" and in the other case on such material having been lost or compromised through "gross negligence." Since the expression "relating to the national defense" was nowhere defined the possibility of the public being permitted to have any authenticated knowledge whatever about the national defense, even the fact

¹⁷ *Ibid.*, pp. 28-29.

that Congress had passed certain legislation related thereto, depended on application of the expressions "not entitled to receive it" and "gross negligence."

In any prosecution for violation of either of the last two subsections the burden of proving that one or the other key expression had application in the case would rest on the prosecution, and proof would be difficult unless clear evidence could be adduced that authority had communicated its intention that the specific material involved should be protected or unless that material was of such a nature that common sense would indicate that it should be protected. For purposes of administering these two subsections of the Espionage Act the marking of defense information that is to be protected is almost essential, and its marking can also be of great assistance for purposes of administering the preceding three subsections.

It would be logical to suppose that the marking of defense information began out of legal necessities for administering the Espionage Act, but the indications are that such was not the case. The establishment of three grades of official information to be protected by markings was apparently something copied from the A.E.F., which had borrowed the use of such markings from the French and British.¹⁸

III. Peacetime Protection

Changes in military regulations governing the protection of sensitive information did not occur until well after the armistice and return of American troops from Europe. On January 22, 1921 the War Department issued a pamphlet (Army Regulations No. 330-5) entitled "DOCUMENTS: 'Secret,' 'Confidential,' and 'For Official Use Only,'" which, with slight modification, constituted a compilation of the wartime information regulations which were to remain in force during peacetime. Its essential provisions, with regard to the utilization of the classification markings, were that (1) "Secret" was to be used on information "of great importance and when the safeguarding of that information from actual or potential enemies is of prime necessity;" (2) "Confidential" pertained to material "of less importance and of less secret nature than one requiring the mark of 'Secret,' but which must, nevertheless, be guarded from hostile or indiscreet persons;" and (3) "For official use only" had reference to "information which is not to be communicated to the public or to the press, but which may be communicated to any person known to be in the service of the United States whose duty it concerns, or to persons of undoubted loyalty and discretion who are cooperating with Government work."

A basic shortcoming of these regulations would seem to be the inferred unspecific qualitative nature of the instruction pertaining to the use of "Confidential." The presumption is that regulations pertaining to the use of the "Secret" marking are sufficiently clear that material warranting this designation might be easily distinguished from that in the "Confidential" category *and* that the person affixing "Confidential" to a document had some qualitative familiarity with "Secret" information. Another fault of this directive

¹⁸ *Ibid.*, pp. 31-32.

is its failure to relate itself to the Espionage Act of 1917 or to limit itself to defense information. It merely provided for the continuation of a system of markings that had been established in war time. This system was not a product of any thoughtful consideration of the general problem of protecting defense information and other official information. It was a result of reflex response to immediate necessities arising in the prosecution of the war.¹⁹

Two commendable aspects of the instructions, in terms of subsequent policy developments, were the inclusion of the name, authority, and date of the affixing officer classifying a document and provisions for the cancellation of a mark at a later time. These points served to emphasize that responsibility must be personally borne for restricting information, that limitation must be carried out under established authority of some type, and that a time might arise when the protection was no longer warranted, desirable, or needed.

Between 1921 and 1937 the regulation underwent various modifications and changes. Only two major policy shifts appear to have occurred during these revisions. A February 12, 1935 edition of the pamphlet introduced "Restricted," a fourth marking designed to protect "research work or the design, development, test, production, or use of a unit of military equipment or a component thereof which it is desired to keep secret." The provision further noted that the class of information which this new label was designed to safeguard "is considered as affecting the national defense of the United States within the meaning of the Espionage Act (U.S.C. 59:32)." The instructions regarding the other three information markings still contained no reference to the Espionage Act.

The following year, Army regulations of February 11, 1936, omitted "For Official Use Only" and redefined the other markings. Of particular interest is the broadened understandings of the type of information to which these labels might be applied, including foreign policy material and what might be properly called "political" data. "Secret" referred to information "of such nature that its disclosure might endanger the national security, or cause serious injury to the interests or prestige of the Nation, an individual, or any government activity, or be of great advantage to a foreign nation." Similarly, "Confidential" could be applied to material "of such a nature that its disclosure, although not endangering the national security, might be prejudicial to the interests or prestige of the Nation, an individual, or any government activity, or be of advantage to a foreign nation." And "Restricted" might be used in instances where information "is for official use only or of such a nature that its disclosure should be limited for reasons of administrative privacy, or should be denied the general public." The outstanding characteristic of these provisions is their broad discretionary nature with regard to subjects of application. While initial regulations were designed to safeguard coastal defense facility information, 1936 saw the possibility of information restriction policy extending to almost any area of governmental activity. Such regulations were promulgated without any clear statutory au-

¹⁹ *Ibid.*, p. 34.

thority. Even the Espionage Act was designed for wartime use. Yet, under armed forces directives governing information protection during the late 1930s, "to reveal secret, confidential, or restricted matter pertaining to the national defense is a violation of the Espionage Act," according to Army regulations of 1937.

In Changes in Navy Regulations and Naval Instructions No. 7 of September 15, 1916, that service had gone so far as to prescribe that "Officers resigning are warned of the provision of the national defense secrets act," implying that former Naval personnel returned to civilian life could not, without subjecting themselves to prosecution, discuss information which had been protected under Navy regulations. The violation in question would involve the 1911 secrets law (36 Stat. 1084), not the Navy's directives on the matter. The point is an interesting one in that it illustrates armed forces regulations pertaining to the protection of information, though not promulgated in accordance with a statute, enjoyed the color of statutory law for their enforcement.

The omission of "For official use only" from Army regulations in 1936 raises another ponderable: to what extent was this referent used after that date. Habits are difficult to break, perhaps more so in the framework of military regimen. The label had been used since the establishment of the A.E.F. in France. Were the old stamps kept, used, obeyed? To what extent were other markings fabricated and applied: "private," "official," "airmen only." No informative response can be made to this question. The point is that by the late 1930s, restriction labels knew no bounds: they could be applied to virtually any type of defense or non-defense information; they pertained to situations involving "national security," a policy sphere open to definition within many quarters of government and by various authorities; and they carried sanctions which left few with any desire to question their appropriateness or intention.

If, in terms of the multiplicity of policy areas to which they could be applied, the significance of a system of information control markings came to be realized within the higher reaches of government leadership, it is not surprising that the management of these matters should be seized by the very highest level of authority within the Executive Branch. There were, of course, political advantages, but the dictates of good administration also prompted such action. The first presidential directive on the matter (E.O. 8381), issued March 22, 1940, was purportedly promulgated in accordance with a provision of a 1938 law (52 Stat. 3) which read:

Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installation or equipment without first obtaining permission of the commanding officer.

Utilizing the provision regarding "information relative thereto," the President authorized the use of control labels on "all official military or naval books, pamphlets, documents, reports, maps, charts, plans, de-

signs, models, drawings, photographs, contracts or specifications which are now marked under the authority of the Secretary of War or the Secretary of the Navy as 'secret,' 'confidential,' or 'restricted,' and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President." Commenting on this situation, one authority has noted:

Congress, in passing the act of January 12, 1938 [52 Stat. 3], can hardly have expected that it would be interpreted to be applicable to documentary materials as "equipment." . . . The Provisions of the Executive order were probably a substitute for equivalent express provisions of law that Congress could not be expected to enact. Mention may be made in this connection of the refusal of Congress, long after the attack on Pearl Harbor, to pass the proposed War Security Act submitted to Congress by Attorney General Francis Biddle on October 17, 1942 (H.R. 1205, 78th Congress, 1st Session).²⁰

Noteworthy, as well, is the wholesale adoption of the broad definitions, prescribed by the armed forces, of the types of policy to which these markings might be applied. Revision or modification of these jurisdictions or the scope of label applications remained, essentially, with the officers of the War and Navy Department. No civilian control was provided over the frequency or appropriate use of the labels. It was apparently presumed that the markings would be utilized only by the armed services.

IV. World War II

With the advent of the Second World War, more widespread use of an information protection system was required. In addition, large numbers of civilians would be responsible for its administration and operation. Approximately one year after the entry of the United States into the hostilities it became necessary to establish government-wide regulations regarding security classification procedures. The principal instrumentality issuing directives on this matter was the Office of War Information. Established (E.O. 9182) on June 13, 1942 as a unit within the Office for Emergency Management, the War Information panel consisted of the consolidated Office of Facts and Figures, Office of Government Reports, Division of Information of the Office for Emergency Management, and segments of the Foreign Information Service. It operated until its abolition (E.O. 9608) on August 31, 1945, when its peacetime functions were transferred to the Bureau of the Budget and the Department of State.²¹

On September 28, 1942, the Office of War Information issued Regulation No. 4 governing the administration and use of security classification markings on sensitive documents. It is not known how this directive was circulated, but it was not published in the *Federal Register*. The authority under which it was promulgated is also of

²⁰ *Ibid.*, pp. 48-49.

²¹ For general information on the Office of War Information see: Harold Childs, ed. "The Office of War Information. *Public Opinion quarterly*, v. 7, Spring, 1943: entire issue; Elmer Davis and Byron Price. *War Information and Censorship*. Washington, American Council on Public Affairs, 1943.

uncertain origin. Nevertheless, in addition to provisions warning against overclassification and the proper identification, handling, and dissemination of sensitive information, the instrument defined three categories of classification: ²²

Secret Information is information the disclosure of which might endanger national security, or cause serious injury to the Nation or any governmental activity thereof.

Confidential Information is information the disclosure of which although not endangering the national security would impair the effectiveness of government activity in the prosecution of war.

Restricted Information is information the disclosure of which should be limited for reasons of administrative privacy, or is information not classified as confidential because the benefits to be gained by a lower classification, such as permitting wider dissemination where necessary to effect the expedition's accomplishment of a particular project, outweigh the value of the additional security obtainable from the higher classification.

On May 19, 1943, Office of War Information Supplement No. 1 to Regulation No. 4 was issued, prescribing the establishment of the Security Advisory Board.²³ Composed of armed services officers, this unit according to the directive creating it, functioned as "an advisory and coordinating board in all matters relating to carry out the provisions of OWI Regulations No. 4." Again, the authority for promulgating the supplementary instrument and the operating authority of the Board are not clear.

After the end of World War II, the SAB continued to function as a part of the State-War-Navy Coordinating Committee—later the State-Army-Navy-Air Force Coordinating Committee. On March 21, 1947, provisions of Executive Order 9835 directed the SAB to draft rules for the handling and transmission of documents and information that should not be disclosed to the public. A preliminary draft was completed by the SAB but were not issued before the SAB and its parent coordinating committee went out of existence.

After enactment of the National Security Act in 1947 [61 Stat. 495] which created the National Security Council (NSC), the NSC was given responsibility to consider and study security matters, which involve many executive departments and agencies, and to make recommendations to the President in this vital area. The Interdepartmental Committee on Internal Security (ICIS) was subsequently created and the activity of this committee was, according to the Wright Commission [on Government Security established in

²² A copy of the directive is in the files of the House Government Information and Individual Rights Subcommittee.

²³ *Ibid.*

1955] report, responsible for issuance of Executive Order 10290 in 1951.²⁴

Prior to the appearance of the 1951 directive, President Truman promulgated, pursuant to the opening provision of the 1938 defense installations protection law [52 Stat. 3], E.O. 10104 which replaced E.O. 8381 issued by President Roosevelt in accordance with the same authority. Authorization for the same three security classification markings was continued and the new instrument also "formalized the designation 'Top secret,' which had been added to military regulations during the latter part of World War I to coincide with classification levels of our allies."²⁵ Supervisory authority for carrying out the provisions of the order was vested in the Secretary of Defense and the three armed services secretaries.

It is important to emphasize that through the historical period of the use of classification markings described thus far until 1950, such formal directives, regulations, or Executive orders applied to the protection of military secrets, rarely extending into either those affecting nonmilitary agencies or those involving foreign policy or diplomatic relations. One exception is in the area of communications secrecy, governed by section 798 of the Espionage Act. This law, which protects cryptographic systems, communications intelligence information, and similar matters, applies, of course, to both military and nonmilitary Federal agencies such as the State Department. Aside from more restrictive war-time regulations, nonmilitary agencies had, until 1958, relied generally on the 1789 "housekeeping" statute . . . as the basis for withholding vast amounts of information from public disclosure.²⁶

On September 24, 1951, through the issuance of E.O. 10290, President Truman extended the coverage of the classification system to nonmilitary agencies which had a role in "national security" matters. The directive cited no express constitutional or statutory authority for its promulgation. Instead, the Chief Executive seems to have relied upon implied powers such as the "faithful execution of the laws" clause. Although these postures for the order were generally recognized and accepted as a legitimate basis for issuing such an instrument, the President's role in the matter was felt to have limitations as well.²⁷

Foremost among these is the well settled rule that an Executive order, or any other Executive action, whether by formal order or by regulation, cannot contravene an act of Congress which is constitutional. Thus, when an Executive order collides with a statute which is enacted pursuant to the constitutional authority of the Congress, the statute will prevail

²⁴ U.S. Congress. House. Committee on Government Operations. *Executive Classification of Information—Security Classification Problems Involving Exemption (b) (1) of the Freedom of Information Act (5 U.S.C. 552)*. Washington, U.S. Govt. Print. Off., 1973. (93rd Congress, 1st Session. House. Report No. 221), p. 8.

²⁵ *Ibid.*

²⁶ *Ibid.*, pp. 8-9.

²⁷ See U.S. Congress. House. Committee on Government Operations. *Safeguarding Official Information in the Interests of the Defense of the United States*. Washington, U.S. Govt. Print. Off., 1962. (87th Congress, 2d session. House. Report no. 2456), pp. 29-31.

[*Kendall v. United States*, 12 Peters 524 (1838)]. This rule, in turn, gives rise to a further limitation which finds its source in the power of the Congress to set forth specifically the duties of various officers and employees of the executive branch. Since the President can control only those duties of his subordinates which are discretionary, to the extent that the Congress prescribes these duties in detail, these officials can exercise no discretion and their actions cannot be controlled by the President. In other words, if the Congress enacts a statute which is constitutionally within its authority, the President cannot lawfully, either by Executive order, regulation, or any other means, direct his subordinates to disobey that statute, regardless of whether it affects third persons or whether it is only a directive concerning the management of the executive branch of the Government.²⁸

The legal justification for the program does not appear as barren as the foregoing seems to imply. Not only have Constitutional grounds (Article II) been put forward to justify the power of the President to establish a classification program, but statutory authority has been inferred from a number of laws, notably the Freedom of Information Act (5 U.S.C.A. 552, as amended by Public Law 93-502), the espionage laws (18 U.S.C.A. 792 et seq., notably sections 795 and 798), the Internal Security Act of 1950 (50 U.S.C.A. 783(b)), and the 1947 National Security Act (61 Stat. 495).^{28a}

Congress might attempt to overturn an Executive order by rescinding it or by possibly offering alternative language supplanting or amending the directive (though there would seem to be a constitutional conflict in such a course of action in the case of E.O. 10290). Thus, on September 28, 1951, Senator John W. Bricker (R. Ohio) introduced S. 2190 which provided for the repeal of the directive, but the bill failed to receive any consideration.²⁹ The order thus remained in effect until 1953.

When President Eisenhower took office in January 1953, he took notice of the widespread criticism of Executive Order 10290 and requested Attorney General [Herbert] Brownell for advice concerning its rescission or revision. On June 15, 1953, the Attorney General recommended rescission of the Executive order and the issuance of a new order which would "protect every requirement of national safety and at the same time, honor the basic tenets of freedom of information."

That fall, President Eisenhower replaced the controversial Truman order with Executive Order No. 10501, "Safeguarding Official Information in the Interests of the Defense of the United States." This order, issued on November 5, 1953, became effective on December 15, 1953; it was amended several

²⁸ *Ibid.*, pp. 31-32.

^{28a} "Developments in the Law—the National Security Interest and Civil Liberties," *Harvard Law Review*, v. 85, 1972, pp. 1130-1198. For judicial recognition of these provisions as plausible justification for a documentation classification program, see the concurring opinion of Mr. Justice Marshall in *New York Times Co. vs. United States*, 403 U.S. 713, 740, 741 (1971).

²⁹ See *Ibid.*, pp. 33-35.

times in the succeeding years, but for almost twenty years served as the basis for the security classification system until it was superseded in March 1972.³⁰

It became necessary for the Eisenhower Administration and its successor to issue clarifying directives and new orders relative to E.O. 10501 over the next decade. The additions included:

Memorandum to Executive Order 10501 (24 F.R. 3779) dated November 5, 1953, specified 28 agencies without original classification authority and 17 agencies in which classification authority is limited to the head of the agency.

Executive Order 10816 (24 F.R. 3777), issued May 7, 1959. This order accomplished the following:

Under Executive Order 10290 (September 24, 1951) all Government agencies had authority to classify information. Executive Order 10501 canceled this authorization for those agencies "having no direct responsibility for national defense," but was silent on the problem of declassifying any information which agencies with no direct defense responsibility had classified previously. The new order clarified the hiatus which had existed.

Under section 7 of Executive Order 10501 only persons whose official duties were in the interest of "promoting national defense" had access to classified information. It was discovered that this excluded persons who wished to examine documents while carrying out bone fide historical research. The new order allowed access to classified information to trustworthy persons engaged in such research projects, provided access was "clearly consistent with the interests of national defense."

The new order allowed the transmission of "confidential" defense material within the United States by certified and first-class mail, in addition to the original authorization to use registered mail.

Memorandum to Executive Order 10501 (24 F.R. 3777), dated May 7, 1959, added 2 agencies to the 28 agencies previously designated by the President as having no authority to classify information under Executive Order 10501.

Memorandum to Executive Order 10501 (25 F.R. 2073), dated March 9, 1960, provided that agencies created after November 5, 1953 (date of issuance of Executive Order 10501), shall not have authority to classify information under the Executive order unless specifically authorized to do so. In addition, the memorandum listed eight such agencies which were granted authority to classify defense material.

Executive Order 10901 (26 F.R. 217), dated January 9, 1961, adopted a "positive" approach to the authority to control national defense information. Prior to this revision, all Government agencies except those specifically listed, could stamp "Top secret," "Secret," or "Confidential" on the information they originated. Executive Order 10901 super-

³⁰ See *Ibid.*, pp. 33-35.

seded previous authority and listed by name those agencies granted authority to classify security information. The order lists 32 agencies which have blanket authority to originate classified material because they have "primary responsibility for matters pertaining to national defense," and the authority can be delegated by the agency head as he wishes. The order lists 13 agencies in which the authority to originate classified information can be exercised only by the head of agencies which have "partial but not primary responsibility for matters pertaining to national defense." The order states that Government agencies established after the issuance of Executive Order 10901 do not have authority to classify information unless such authority is specifically granted by the President.

Executive Order 10964 (27 F.R. 8932), dated September 20, 1961, set up an automatic declassification and downgrading system. The four classes of military-security documents created are:

(1) Information originated by foreign governments, restricted by statutes, or requiring special handling, which is excluded from the automatic system;

(2) Extremely sensitive information placed in a special class and downgraded or declassified on an individual basis;

(3) Information or material which warrant some degree of classification for an indefinite period will be downgraded automatically at 12 year intervals until the lowest classification is reached; and

(4) All other information which is automatically downgraded every 3 years until the lowest classification is reached and the material is automatically declassified after 12 years.

The order requires that, to the fullest extent possible, the classifying authority shall indicate the group the material falls into at the time of originating the classification.

Executive Order 10985 (27 F.R. 439), dated January 12, 1962, removes from certain agencies the power to classify information, and adds other agencies to the list of those with the authority to classify.³³

While these changes were being effected, the Executive also established two evaluation commissions to examine the administration and operation of the security classification system and to make recommendations for its improvement. These panels were established at a time when the Special Government Information Subcommittee of the House Government Operations Committee was also undertaking an inquiry into many of the same matters. The activities and recommendations of the Subcommittee will be discussed shortly.

V. *The Coolidge Committee*

Shortly after the Special Government Information Subcommittee began its hearings on the availability of information from Federal departments and agencies, the Secretary of Defense, Charles E. Wilson, created, on August 13, 1956, a five-member Committee on Classified

³³ H. Rept. 87-2456, *op. cit.*, pp. 11-12.

Information with Charles A. Coolidge, a prominent Boston attorney and former Assistant Secretary of Defense, as chairman. Other members of the panel were retired high-ranking officers representative of the four armed services. In his letter establishing the committee, the Secretary indicated he was "seriously concerned over the unauthorized disclosure of classified military information" and urged that the group "undertake an examination of the following matters affecting national security":

1. A review of present laws, executive orders, Department of Defense regulations and directives pertaining to the classification of information and the safeguarding of classified information, to evaluate the adequacy and effectiveness of such documents.
2. An examination of the organizations and procedures followed within the Department of Defense designed to implement the above cited documents, to evaluate the adequacy and effectiveness of such organizations and procedures.
3. An examination of the means available to the Department of Defense to fix responsibility for the unauthorized disclosure of classification information, and to determine the adequacy and effectiveness of such means in preventing future unauthorized disclosures of such information.
4. An examination of the organization and procedures in the Department of Defense designed to prevent the inadvertent disclosure of classified information in any manner.³⁴

Utilizing a small staff, the committee did not hold any formal hearings but, according to the chairman, "we had conferences without a stenographer present, to get the opinions of our conferees." After being charged with their mission by the Secretary, the panel "decided we would hold conferences starting with the Office of the Secretary of Defense organization and running down into the services and in general confer with people throughout the Department of Defense, whom we thought had peculiar knowledge of and interest in security matters."³⁵

The instructions to the Coolidge Committee made no mention of studying overclassification or arbitrary withholding of information from the public and from Congress. In a September 25, 1956, letter to Secretary Wilson, Chairman Moss of the Special Government Information Subcommittee expressed the hope that the Coolidge Committee would also review the withholding aspects of the problem, as had been revealed in the earlier subcommittee hearings. He was assured in an October 9, 1956, response from Assistant Secretary of Defense Ross that since the two subjects are related, "it is probable that the report of the Coolidge Committee will make recommendations bearing on our public information policies

³⁴ U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *Availability of Information from Federal Departments and Agencies (Part 8)*. Hearings, 85th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1957, p. 2010.

³⁵ *Ibid.*, pp. 2011-2012; a complete list of witnesses appears at pp. 2012-2014.

as well as our procedures for preventing the unauthorized disclosure of classified military information.”³⁶

After three months of study, the panel issued a report on November 8, 1956, which contained twenty-eight specific recommendations, ten of which concerned overclassification, and the following general conclusion:

Our examination leads us to conclude that there is no conscious attempt within the Department of Defense to withhold information which under the principles set forth at the beginning of this report the public should have; that the classification system is sound in concept and, while not operating satisfactorily in some respects, it has been and is essential to the security of the nation; and that further efforts should be made to cure the defects in its operation.³⁷

With the publication of the committee's report, Chairman Coolidge and members of the panel went before the House Special Government Information Subcommittee to discuss their findings and recommendation.³⁸ A few months later the Department of Defense implemented portions of the study's recommendations.³⁹

Secretary Wilson issued a new DoD directive covering the procedures for classification of security information under Executive Order 10501. His July 8, 1957, action replaced a dozen previous directives and memorandums and consolidated classification instructions into a single new document—DoD Directive 5200.1—entitled “Safeguarding Official Information in the Interests of the Defense of the United States.” It incorporated a number of the specific recommendations made by the Coolidge Committee.

Despite concern over the problem of overclassification, the Coolidge Committee made no recommendation for penalties or disciplinary action in cases of misuse or abuse of classification. The new DoD directive did mention disciplinary action for overclassification, but there is no evidence of its ever having been used.⁴⁰

VI. The Wright Commission

Paralleling the activities of the Coolidge Committee was the Commission on Government Security, established by law (69 Stat. 595)

³⁶ H. Rept. 93-221, *op. cit.*, p. 16.

³⁷ U.S. Department of Defense. Committee on Classified Information. *Report to the Secretary of Defense by the Committee on Classified Information*. Washington, Department of Defense, 1956, p. 23.

³⁸ U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *Availability of Information From Federal Departments and Agencies (Part 8)*, *op. cit.*, pp. 2011-2095, 2097-2132; the entire report of the Coolidge Committee may be found at pp. 2133-2160.

³⁹ See U.S. Department of Defense. Office of the Secretary of Defense. *Department of Defense Implementation of Recommendations of Coolidge Committee on Classified Information*. Washington, Department of Defense, 1957 (published in two parts).

⁴⁰ H. Rept. 93-221, *op. cit.*, p. 17; DoD Directive 5200.1 may be found in U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *Availability of Information From Federal Departments and Agencies (Part 13)*. Hearings, 85th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1957, pp. 3243-3260.

on August 9, 1955, and taking its popular name from its chairman, prominent Los Angeles attorney and former American Bar Association president, Loyd Wright. Composed of six Republicans and six Democrats, four of whom were selected by the President, four by the Speaker of the House and four by the President of the Senate, the panel's mandate was thus expressed (69 Stat. 596-597) :

The Commission shall study and investigate the entire Government Security Program, including the various statutes, Presidential orders, and administrative regulations and directives under which the Government seeks to protect the national security, national defense secrets, and public and private installations, against loss or injury arising from espionage, disloyalty, subversive activity, sabotage, or unauthorized disclosures, together with the actual manner in which such statutes, Presidential orders, administrative regulations, and directives have been and are being administered and implemented, with a view to determining whether existing requirements, practices, and procedures are in accordance with the policies set forth in the first section of this joint resolution, and to recommending such changes as it may determine are necessary or desirable. The Commission shall also consider and submit reports and recommendations on the adequacy or deficiencies of existing statutes, Presidential orders, administrative regulations, and directives, and the administration of such statutes, orders, regulations, and directives, from the standpoints of internal consistency of the overall security program and effective protection and maintenance of the national security.

Organized in December, 1955, the Commission was sworn on January 9, 1956. Four special subject subcommittees were formed with a panel on Legislation and Classification of Documents composed of James P. McGarnery, chairman, Senator Norris Cotton (R.-N.H.), Senator John Stennis (D.-Miss.), and, ex officio, Chairman Wright.

After acquiring office space in the General Accounting Office building, the Commission began recruiting a staff for its challenging task. The chairman, with the approval of the Commission, selected the supervisory staff, consisting of an administrative director, a director of project surveys, a director of research, a general counsel, a chief consultant and an executive secretary.

The entire staff, carefully selected on a basis of personal integrity, unquestionable loyalty, and discretion, combined with appropriate experience and a record of devotion to duty in responsible positions, worked under the personal direction of the Chairman.

To avoid entanglement in public controversies, to maintain an objective and impartial approach to its work, the Commission held no public hearings and made no press releases or public statements reflecting its view or describing its activities.⁴¹

⁴¹ Commission on Government Security. *Report of the Commission on Government Security*. Washington, U.S. Govt. Print. Off., 1957. (85th Congress, 1st session. Senate. Document No. 64), pp. xiv-xv.

The Commission enlisted the assistance of four private consultants and the loan of two special aides from the Senate Office of Legislative Counsel and Government Printing Office. Expert advice was also recruited through a Citizens Advisory Committee which met with the Commission on three occasions. "During each of the several sessions many aspects of the Commission's conclusions and recommendations were discussed. These conferences provided views that emanated from fresh, new perspectives, and contributed to the solution of many complex and challenging problems."⁴²

On June 23, 1957, the Commission issued a massive 807-page report on various aspects of government security policy and operations. A small portion of the document surveyed the historical evolution of the document classification program, examined the legal basis for the then existing arrangements, and scrutinized the scope and mechanics of the operation. The report also offered suggestions for the improvement of the classification effort, saying, in summary:

The changes recommended by the Commission in the present program for classification of documents and other material are of major importance. The most important change is that the Confidential classification be abolished. The Commission is convinced that retention of this classification serves no useful purpose which could not be covered by the Top Secret or Secret classification. Since the recommendation is not retroactive it eliminates the immediate task of declassifying material now classified Confidential. The Commission also recommends abolition of the requirement for a personal security check for access to documents or material classified Confidential. The danger inherent in such access is not significant and the present clearance requirements afford no real security-clearance check.

The report of the Commission stresses the dangers to national security that arise out of overclassification of information which retards scientific and technological progress, and thus tends to deprive the country of the lead time that results from the free exchange of ideals and information.⁴³

The Commission also addressed the attitude it found that Congress had taken toward rules for classification, and the balance between free speech and national security:

Congressional inaction in this particular area can be traced to the genuine fear of imposing undue censorship upon the bulk of information flowing from various governmental agencies and which the American people, for the most part, have the right to know. Any statute designed to correct this difficulty must necessarily minimize Constitutional objections by maintaining the proper balance between the guarantee of the first Amendment, on the one hand, and required measures to establish a needed safeguard against any real danger to our national security.^{43a}

⁴² *Ibid.*, p. vii; consultants are listed at p. ii and members of the Citizens Advisory Committee may be found at pp. vii-ix.

⁴³ *Ibid.*, pp. xix-xx.

^{43a} *Ibid.*, p. 620.

The Wright Commission also provoked two major controversies. The first of these was an allegation that the press often breached security by utilizing classified information either directly or indirectly in news stories. It was also charged that such information had been purloined by journalists. Challenged by the House Special Subcommittee on Government Information, neither assertion was substantiated.⁴⁴

The most controversial portion of the Wright Commission recommendations was its proposal urging Congress to "enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret' knowing, or having reasonable grounds to believe, such information to have been so classified." The recommended bill would impose a \$10,000 fine and jail term of up to 5 years for those convicted of violating its provisions. The Commission made it clear that its proposal was aimed at persons outside of government, such as newsmen. The recommendation was soundly criticized in articles and editorials from such papers as the New York Times, Baltimore Sun, Chicago Daily Sun-Times, Boston Traveler, Cleveland Plain Dealer, Detroit Free Press, Washington Post and Times Herald, and Editor and Publisher. One article by James Reston of the New York Times pointed out that it would have even resulted in the prosecution of the reporter, Paul Anderson of the St. Louis Post Dispatch, who uncovered and published "secret" documents in the "teapot Dome" scandal during the 1920's.⁴⁵

VII. The Moss Committee

While a number of congressional committees have some aspects of government information policy within their jurisdiction, the House of Representatives devoted concentrated attention to the matter in 1955 with the creation of the Special Government Information Subcommittee of the Government Operations Committee. The establishment of the panel was due to a variety of factors. According to one authority, the event "took place in an atmosphere of press concern about growing post-war secrecy in general and the Eisenhower Administration's information policies in particular. In November 1954, just as the nation was electing a Democratic Congress, the Administration established the controversial Office of Strategic Information."⁴⁶ This particular agency of the Commerce Department was reportedly "responsible for formulating policies and providing advice and guidance to public agencies, industry and business, and other

⁴⁴ See: U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *Availability of Information from Federal Departments and Agencies (Part 10)*. Hearings, 85th Congress 1st session. Washington. U.S. Govt. Print. Off., 1957. p. 2435 *Ibid.* (Part 13), pp. 3305-3316; U.S. Congress. House. Committee on Government Operations. *Availability of Information from Federal Departments and Agencies*. Washington, U.S. Govt. Print. Off., 1958. (85th Congress, 2d session. House. Report No. 1884), pp. 14-19, 31-39.

⁴⁵ H. Rept. 93-221, *op. cit.*, p. 21; the bill appears in Commission on Government Security, *op. cit.*, p. 737.

⁴⁶ Robert O. Blanchard. Present at the Creation: the Media and the Moss Committee. *Journalism Quarterly*, v. 49, Summer, 1972: 272.

private groups who are concerned with producing and distributing unclassified scientific, technical, industrial, and economic information, the indiscriminate release of which may be inimical to the defense interests of the United States.”⁴⁷ The criticisms leveled against the Office included “adding new classification categories of government, failing to define ‘strategic information’ in a clear-cut way that would limit the operation of the agency, favoring some companies with information withheld from others, and calling for voluntary withholding of publication or broadcast of ‘strategic information.’”⁴⁸ The press community was particularly interested in such a subcommittee given the experience of the Freedom of Information Committee of the American Society of Newspaper Editors. Relying upon a March 29, 1955 directive from the Secretary of Defense regarding the limiting of departmental information activities to matters that would make “a constructive contribution” to the mission of DoD, Deputy Assistant Secretary (Public Affairs) Karl Honaman responded to an information request from the editors’ group, saying:

The public is eager to be informed of the activities of the Defense Department and need to have this information in order to play their part effectively as citizens. There are, nevertheless, many cases where demands for information which take up the time of people with busy schedules do not truly meet the requirement of being useful or valuable, nor yet very interesting to the public. These are tests that should be met. Thus, I would substitute for self-service, public-serving, and I am sure this is a part of the interpretation of constructive.⁴⁹

The Defense Secretary’s directive, the experience and outcry of the American Society of Newspaper Editors, and the mounting penchant for information control within the Executive were of sufficient concern to Government Operations Committee Chairman William L. Dawson (D.-Ill.) and House Majority Leader John McCormack (D.-Mass.) that they agreed to the creation of a government subcommittee and selected Rep. John E. Moss (D.-Calif.) as chairman. Since 1963 the panel has functioned as a standing subcommittee of the Government Operations Committee. In 1971, Rep. Moss relinquished leadership of the unit whereupon Rep. William S. Moorhead (D.-Pa.) became chairman; in 1975 Rep. Bella S. Abzug (D.-N.Y.) assumed direction of the panel.

In its 2-year study of security classification policies that spanned the Coolidge and Wright groups, the House Government Information Subcommittee concentrated heavily on the Department of Defense. The conclusions and recommendations made, in turn, through reports of the full Government Operations Committee are particularly important to recall because they pinpointed major problem areas which

⁴⁷ U.S. General Services Administration. National Archives and Records Service. Federal Register Division. *United States Government Organization 1955-56*. Washington, U.S. Gov’t. Print. Off., 1955, p. 258.

⁴⁸ Blanchard. *loc. cit.*

⁴⁹ Cited in James Russell Wiggin. *Freedom or Secrecy, Revised Edition*. New York, Oxford University Press, 1964, p. 109.

existed over 15 years ago. They also proposed a number of specific recommendations to correct many of these problems . . . —recommendations that were largely ignored by both Republican and Democratic administrations. Had such recommendations been properly implemented by top Pentagon officials, it is possible that the security classification “mess” referred to by President Nixon almost 14 years after the issuance of the first of these committee reports could have long since been corrected.⁵⁰

On the general matter of the administration of information policy and operations by the military, the Subcommittee observed:

Never before in our democratic form of government has the need for candor been so great. The Nation can no longer afford the danger of withholding information merely because the facts fail to fit a predetermined “policy.” Withholding for any reason other than true military security inevitably results in the loss of public confidence—or a greater tragedy. Unfortunately, in no other part of our Government has it been so easy to substitute secrecy for candor and to equate suppression with security.

And further on in the same report:

In a conflict between the right to know and the need to protect true military secrets from a potential enemy, there can be no valid argument against secrecy. The right to know has suffered, however, in the confusion over the demarcation between secrecy for true security reasons and secrecy for “policy” reasons. The proper imposition of secrecy in some situations is a matter of judgment. Although an official faces disciplinary action for the failure to classify information which should be secret, no instance has been found of an official being disciplined for classifying material which should have been made public. The tendency to “play it safe” and use the secrecy stamp, has therefore, been virtually inevitable.⁵¹

When the Subcommittee once again turned its attention to security classification policy in 1972, a study of the administration of E.O. 10501 revealed “that administrative penalties are the only type of action taken in cases involving improper physical protection of information. No criminal charges were ever made by the agencies surveyed. . . .”⁵² No actions were taken against known cases of overclassification.⁵³

With regard to the allegations of Chairman Wright of the Commission on Government Security that newsmen were “purloining” classified documents, the Subcommittee concluded:

⁵⁰ H. Rept. 93-221, *op cit.*, p. 21.

⁵¹ H. Rept. 85-1884, *op. cit.*, p. 152.

⁵² See U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b)(1) of the Freedom of Information Act (Part 7)*. Hearings, 92nd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1972, p. 2932.

⁵³ *Ibid.*, pp. 2926-2937.

No member of the press should be immune from responsibility if sound evidence can be produced to prove that he has in fact deliberately "purloined" and knowingly breached properly classified military secrets. But the press must not be made the whipping boy for weaknesses in the security system caused by overzealous censors who misuse that system to hide controversy and embarrassment.⁵⁴

As a consequence of its first study of the security classification system and the administration of E.O. 10501, the Subcommittee made the following recommendations to improve operations.

1. The President should make effective the classification appeals procedure under section 16 of the Executive Order 10501 and provide for a realistic, independent appraisal of complaints against overclassification and unjustified withholding of information.

2. The President should make mandatory the marking of each classified document with the future date or event after which it will be reviewed or automatically downgraded or declassified.

3. The Secretary of Defense should set a reasonable date for the declassification of the huge backlog of classified information, with a minimum of exceptions.

4. The Secretary of Defense should direct that disciplinary action be taken in cases of overclassification.

5. The Secretary of Defense should completely divorce from the Office of Security Review the function of censorship for policy reasons and should require that all changes made or suggested in speeches, articles and other informational material be in writing and state clearly whether the changes are for security or policy reasons.

6. The Secretary of Defense should establish more adequate procedures for airing differences of opinion among responsible leaders of the military services before a final policy decision is made.

7. The Congress should reaffirm and strengthen provisions in the National Security Act giving positive assurance to the Secretaries and the military leaders of the services that they will not be penalized in any way if, on their own initiative, they inform the Congress of differences of opinion after a policy decision has been made.⁵⁵

Although these suggestions, as previously noted, failed to obtain any response or support for implementation from the Executive, the Subcommittee was not without some successes in its efforts to reduce unnecessary secrecy practices in information management. As the panel later saw the situation,⁵⁶ the Department of Defense responded to its

⁵⁴ H. Rept. 85-1884, *op. cit.*, 154-155.

⁵⁵ *Ibid.*, p. 161.

⁵⁶ See U.S. Congress, House, Committee on Government Operations, *Availability of Information from Federal Departments and Agencies (Progress of Study, February, 1957-July, 1958)*. Washington, U.S. Govt. Print. Off., 1958. (85th Congress, 2d session, House. Report no. 2578), pp. 58-60.

wishes by issuing a new directive dated September 27, 1958 which, according to the Pentagon's press release

. . . establishes a new method by which millions of military documents, originated prior to January 1, 1946, and classified top secret, secret, and confidential will now be downgraded or declassified.

The new directive which becomes effective 60 days after signature, automatically cancels, except within a few limited categories, the security classifications on millions of documents which no longer need protection in the national interest. In addition, the directive will downgrade to secret all top secret documents which are exempted from declassification.⁵⁷

Although the substance of the order was most agreeable to the Subcommittee, the successful implementation of it, in the opinion of the Subcommittee left much to be desired. An April 15, 1959 report to the Moss panel from the DOD Office of Declassification Policy indicated that means to carry out the directive were still under discussion.⁵⁸

Additional efforts were made by the subcommittee to reduce the number of executive agencies authorized to exercise classification authority under Executive Order 10501. Studies on the use of classification authority by a list of agencies surveyed by the subcommittee were made available to the White House and on March 9, 1960, President Eisenhower signed a memorandum having the effect of prohibiting some 33 Federal agencies from classifying information under the Executive order. President Eisenhower later issued Executive Order 10901 on January 9, 1961, prohibiting 30 additional agencies from classifying military information, thus limiting classification authority to 45 specifically named departments and agencies.⁵⁹

The Subcommittee felt that, as constituted a decade before, it had succeeded in prompting another DOD directive regarding the declassification of post-World War II documents.

The . . . directive was originally scheduled to take effect on December 27, 1960, but its effective date was postponed until May 1, 1961. It applied to documents originated on or after January 1, 1946, and established two "time ladders" for automatically downgrading or declassifying documents after specific time levels have elapsed. Non-exempted material would be downgraded at 3-year intervals from top secret to secret to confidential, and automatically declassified after a total of 12 years' existence in a classified status. Exempted material, such as war plans, intelligence documents, and similar

⁵⁷ U.S. Congress. House. Committee on Government Operations. *Availability of Information from Federal Departments and Agencies (Progress of Study, August, 1958-July, 1959)*. Washington. U.S. Govt. Print. Off., 1959. (86th Congress, 1st session. House. Report no. 1137), pp. 81-82; the text of the directive may be found at pp. 87-91.

⁵⁸ *Ibid.*, pp. 93-97; H. Rept. 93-221., *op. cit.*, p. 24.

⁵⁹ H. Rept. 93-221, *op. cit.*, pp. 24-25.

information, would be downgraded from top secret to secret to confidential at 12-year intervals but would not be automatically declassified. The automatic downgrading and declassification provisions of DOD Directive 5200.10 were subsequently incorporated into Executive Order 10964, issued by President Kennedy on September 20, 1961.

Executive Order 10964 also added a new section 19 to Executive Order 10501 directing department heads to "take prompt and stringent administrative action" against Government personnel who knowingly and improperly release classified information. Where appropriate, it directed that such cases be referred to the Justice Department for possible prosecution under applicable criminal statutes.⁶⁰

With the advent of a new administration in 1961, both President Kennedy and Secretary of Defense Robert McNamara were apprised of the Subcommittee's findings and suggestions with regard to the administration of information policy. "Among the major recommendations was a proposal to make effective the classification appeals procedure available under section 16 of Executive Order 10501, so as to provide for a realistic independent appraisal of complaints against overclassification and unjustified withholding of information. While the President did name Mr. Lee C. White, Assistant Special Counsel to the President, as the designated person to receive complaints under section 16, there is no indication that the procedure was utilized."⁶¹

It was also at this time that the Subcommittee began turning its attention to legislation to assist in and otherwise clarify public access to documentary government information. By 1963 a variety of measures began to be introduced and hearings were undertaken on the matter. The result was the Freedom of Information Act (80 Stat. 250) signed into law by President Johnson on July 4, 1966 to go into effect one year later.⁶² In its provision of permissive exemptions of categories of information which might be withheld from the public, the legislation recognized records "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."⁶³

When oversight hearings on the administration and operation of the act were undertaken by the Foreign Operations and Government Information Subcommittee, successor to the Moss panel, in 1972, scrutiny of the Executive's utilization of this exemption to withhold information resulted in a broad re-examination of the security classification program. Relevant major findings were that, according to a survey of the department and agencies regarding four years' administration of the law, the secret information exemption ranked third in

⁶⁰ *Ibid.*, p. 25

⁶¹ *Ibid.*

⁶² For a legislative history of the act see U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act (Part 4)*. Hearings, 92nd Congress, 2d session. Washington, U.S. Gov't Print. Off., 1972, pp. 1367-1373.

⁶³ See 5 U.S.C. 552 (b) (1). 1970 ed: this language was amended in 1974 by P.L. 93-502 which strengthened portions of the FOI law.

a field of nine in terms of being one of the least utilized provisions for withholding documents.⁶⁴

Another revelation resulting from the proceedings concerned the costs of classification operations. One expert witness, a retired Air Force official with many years of experience on the subject, testified:

There is a massive wastage of money and manpower involved in protecting this mountainous volume of material with unwarranted classification markings. Last year, I estimated that about \$50 million was being spent on protective measures for classified documents which were unnecessarily classified. After further observation and inquiry, and including expenditures for the useless clearances granted people for access to classified material, it is my calculation that the annual wastage for safeguarding documents and equipment with counterfeit classification markings is over \$100 million.⁶⁵

Although the Defense Department reported that there was "no available data on the total costs which could be attributed to security classification or to the protection and handling of classified documents and materials,"⁶⁶ the Subcommittee commissioned a General Accounting Office study on the matter.⁶⁷ In remarks on the House floor, Chairman Moorhead compared the results of the GAO analysis with an Office of Management Budget report on public information costs, saying:

The GAO analysis was requested last summer [1971] by the Foreign Operations and Government Information Subcommittee, which is charged with the duty of determining the economy and efficiency of Government information activities. The OMB figures were compiled from reports of Government agencies the year after they were ordered by President Nixon to cut down "self-serving and wasteful public relations activities" outside the White House [1971].

The GAO surveyed the secrecy systems in the Departments of Defense and State, the Atomic Energy Commission, and the National Aeronautics and Space Administration—the four agencies responsible for the huge bulk of documents classified under the secrecy system. Those four agencies, the GAO reported, spend \$126,322,394 annually on various activ-

⁶⁴ See U.S. Congress. House. Committee on Government Operations. *U.S. Government Information on Policies and Practices—Administration and Operation of the Freedom of Information Act (Part 4)*, op. cit., pp. 1342–1343.

⁶⁵ U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b) (1) of the Freedom of Information Act (Part 7)*, op. cit., p. 2532.

⁶⁶ U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices—The Pentagon Papers (Part 2)*. Hearings, 92nd Congress, 1st session. Washington, U.S. Govt. Print. Off., 1971, p. 690.

⁶⁷ For the entire study and accompanying papers see U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b) (1) of the Freedom of Information Act*, op. cit., pp. 2286–2293.

ities related to the security classification system, such as the classification, declassification, storing, and safeguarding of Government documents and the conduct of personnel security investigations.

The OMB listed the annual expenditures of the same four agencies for all of their public information programs as \$64,-029,000.

While the \$126,000,000 annual secrecy expense covers the top four secret-generating agencies in Government, it is only a part of the total cost of hiding information from the public. The GAO admitted that even their experts could not get all of the data necessary to arrive at the total cost of the security classification system. They said they had to use assumptions, extrapolations, and [sic] other cost-estimating techniques and to ignore some costs where estimates could not be readily developed.

One of the biggest blanks in the GAO study of the cost secrecy is the money that defense contractors charge the taxpayers for their role in the Government's secrecy system. None of the big four Government agencies gave the GAO firm figures on this cost, but we are working with the auditors to develop a firm estimate on the cost of secrecy added to defense contracts. It will, I fear, add hundreds of millions of dollars to the secrecy budget.⁶⁸

The third major finding of the Subcommittee was that Executive departments and agencies were variously utilizing some 62 different information control markings to limit the distribution and dissemination of documents upon which they appear. Their number did not include the "Top secret," "Secret," and "Confidential" labels authorized by E.O. 10501 and, in virtually every cause, they were promulgated and used without any statutory authority.⁶⁹ An added note of discomfort derives from the fact that additional such markings might exist and be employed to restrict information. There was no assurance from Executive Branch witnesses that any management or elimination of these document control labels would be undertaken.

VIII. Other Congressional Actors

The House Government Information Subcommittee was not, of course, the only congressional panel involved in security classification policy matters. During a hearing in 1970, a subcommittee of the Senate Foreign Relations Committee challenged the authority of the President to promulgate E.O. 10501. The legal adviser of the State Department, with the approval of the Justice Department, responded by citing justifications for the order which appeared in the 1957 *Report of the Commission on Government Security* which cited the 1789 "housekeeping" statute (1 Stat. 68), portions of the Espionage Act of 1917 (40 Stat. 217), segments of the Internal Security Act of 1950 (64 Stat. 987), and the authority of the National Security Act

⁶⁸ *Congressional Record*, v. 118, May 15, 1972: H4557-H4558.

⁶⁹ See U.S. Congress, House, Committee on Government Operations, *U.S. Government Information Policies and Practices—Security Classification Problems, Involving Subsection (b) (1) of the Freedom of Information Act*, op. cit., p. 2933.

of 1947 (61 Stat. 495.)⁷⁰ No additional action was taken by the subcommittee on the question.

In the spring of 1972 the Special Intelligence Subcommittee of the House Armed Forces Committee held hearings on the Nixon Administration's new classification directive, E.O. 11652, prevailing classification administration, and a bill to create a continuing classification policy study commission. During eight days of testimony the panel heard largely Executive Branch witnesses.⁷¹ The bill did not receive endorsement and no report has yet been issued on the proceedings.

E.O. 11652

Publication of the now famous "Pentagon Papers" prompted congressional inquiry into the collection, unauthorized removal, dissemination, and press reproduction of these documents.⁷²

After the eruption of the controversy over the publication of parts of the "Pentagon Papers" by the New York Times, Washington Post, and other newspapers, it was revealed that President Nixon had, on January 15, 1971, directed that "a review be made of security classification procedures now in effect." He established an "interagency committee to study the existing system, to make recommendations with respect to its operation and to propose steps that might be taken to provide speedier declassification." He later directed that "the scope of the review be expanded to cover all aspects of information security."⁷³

The interagency committee created was headed by William H. Rehnquist, then Assistant Attorney General, Office of Legal Counsel, and included representatives from the National Security Council, the Central Intelligence Agency, the Atomic Energy Commission, and the Departments of State and Defense. With Rehnquist's appointment to the Supreme Court in late 1971 David Young, Special Assistant to the National Security Council assumed the chairmanship of the panel. Simultaneously,

the White House on June 30, 1971, issued an "administratively confidential" memorandum to all Federal agencies signed by Brig. Gen. Alexander M. Haig, Jr., Deputy Assistant to the President for National Security Affairs, ordering each agency to submit lists of the Government employees, outside consultants, and private contractors who hold clearances for access to top secret and secret information.

⁷⁰ See U.S. Congress, Senate, Committee on Foreign Relations, Subcommittee on U.S. Security Agreements and Commitments Abroad, *U.S. Security Agreements and Commitments Abroad: Morocco and Libya (Part 9)*. Hearings, 91st Congress, 2d session. Washington, U.S. Govt. Print. Off., 1970, pp. 1974, 2008-2011.

⁷¹ See U.S. Congress, House, Committee on Armed Services, Special Subcommittee on Intelligence, *Hearings on the Proper Classification and Handling of Government Information Involving the National Security and H.R. 9853, a related Bill*. Hearings 92nd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1972.

⁷² For a view of how the press greeted and reacted to the possibility of publishing the papers see Sanford J. Unger, *The Papers and the Papers*. New York, E. P. Dutton Company, 1972.

⁷³ H. Rept. 93-221, *op. cit.*, p. 31.

Several days later, President Nixon then asked Congress to approve a \$636,000 supplemental appropriation for the General Services Administration to assist the National Archives in the declassification of World War II records, which he estimated to total "nearly 160 million pages of classified documents."⁷⁴

Meeting through summer and autumn of 1971, the interagency committee under Rehnquist's leadership incorporated its recommendations into a draft revision of E.O. 10501. This document was then circulated in January, 1972, to key departments and agencies by the National Security Council. Ultimately, on March 8, 1972, President Nixon released what the Executive Branch felt was an improved instrument, complete with revisions offered during its circulation under NSC sponsorship, as E.O. 11652. For one thing, the new Executive Order reduced substantially the number of staff who reviewed government information for classification. For other justifications, see the Harvard Law Review discussion cited above.

Entitled "Classification and Declassification of National Security Information," certain substantive aspects of the directive have suggested shifts in policy. First, it was promulgated in consonance with the permissive exemption clause of the Freedom of Information Act (5 U.S.C. 552(b)(1)). The thrust of the statute is that all government information should be made available to the public and, with specified exception, nothing should be withheld. The order utilizes the statute's justification for the permissive withholding of records to suggest a more absolute basis for denying access to classified materials.

While E.O. 10501 used the referent "interests of national defense" to specify its policy sphere, the new order utilizes "interest of national defense or foreign relations" which collectively refer to "national security." Not only is this a broadening of the policy sphere, but the phrase in E.O. 11652 is not harmonious with the statutory provision upon which it is allegedly based. The Freedom of Information Act clause uses the term "interest of national defense or foreign *policy*."

In addition to putting the language of the new Executive order at variance with the language of the Freedom of Information Act on which it relies for application of the exemption, the semantic and legal differences between the terms "national defense" and "national security" and the terms "foreign policy" and "foreign relations" weaken the entire foundations of Executive Order 11652, while failing to correct a basic defect in Executive Order 10501—namely, its lack of a definition for the term "national defense." For example, "relations" is a much broader word than "policy" because it includes all operational matters, no matter how insignificant.⁷⁵

Congress seems to have affirmed this view of the Foreign Operations and Government Information Subcommittee in adopting the 1974 amendments to the Freedom of Information Act (P.L. 93-502) which provide the courts with authority to examine classified documents *in*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

camera to determine if the material is properly classified and, accordingly, properly withheld.

Other defects detected in the order which were duly noted by the Foreign Operations and Government Information Subcommittee included:

(1) Totally misconstrues the basic meaning of the Freedom of Information Act (5 U.S.C. 552);

(2) Confuses the sanctions of the Criminal Code that apply to the wrongful disclosure of classified information;

(3) Confuses the legal meaning of the terms "national defense" and "national security" and the terms "foreign policy" and "foreign relations" while failing to provide an adequate definition for any of the terms;

(4) Increases (not reduces) the limitation on the number of persons who can wield classification stamps and restricts public access to lists of persons having such authority;

(5) Provides no specific penalties for overclassification or misclassification of information or material;

(6) Permits executive departments to hide the identity of classifiers of specific documents;

(7) Contains no requirement to depart from the general declassification rules, even when classified information no longer requires protection;

(8) Permits full details of major defense or foreign policy errors of an administration to be cloaked for a minimum of three 4-year Presidential terms, but loopholes could extend this secrecy for 30 years or longer;

(9) Provides no public accountability to Congress for the actions of the newly created Interagency Classification Review Committee.

(10) Legitimizes and broadens authority for the use of special categories of "classification" governing access and distribution of classified information and material beyond the three specified categories—top secret, secret, and confidential; and

(11) Creates a "special privilege" for former Presidential appointees for access to certain papers that could serve as the basis for their private profit through the sale of articles, books, memoirs to publishing houses.⁷⁶

Turning to actual operations under E.O. 11652, the Subcommittee (1) reiterated certain defects within the directive which its analysis of the instrument had revealed, (2) lamented that "appropriate committees of the Congress having extensive experience and expertise in the oversight of the security classification system were not given the opportunity by the Executive Branch to comment on the design of the new Executive order;" (3) chastised the Executive for releasing the new classification order without giving the agencies ample oppor-

⁷⁶ *Ibid.*, pp. 58-59; for a detailed section-by-section analysis of E.O. 11652 see U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b) (1) of the Freedom of Information Act (Part 7)*, op. cit., pp. 2849-2883.

tunity to prepare implementing regulations and otherwise "provide for the orderly transition from the old system to the new;" (4) criticized the conflicting statements by Executive Branch witnesses and demonstrated lack of clarity regarding "the extent to which 'domestic surveillance' activities by Federal agencies involving American citizens are subject to classification under the new Executive order;" (5) disapproved of the limitations the new order placed on classified data of the World War II era which "fall far short of the policies necessary to permit the Congress or the public to benefit from historical insights into defense and foreign policy decisions of this crucial period of U.S. involvement in global crises;" and (6) praised the statutorily based information administration program of the Atomic Energy Commission.⁷⁷

The committee therefore strongly recommends that legislation providing for a statutory security classification system should be considered and enacted by the Congress. It should apply to all executive departments and agencies responsible for the classification, protection, and ultimate declassification of sensitive information vital to our Nation's defense and foreign policy interests. Such a law should clearly reaffirm the right of committees of Congress to obtain all classified information held by the executive branch when, in the judgment of the committee, such information is relevant to its legislative or investigative jurisdiction. The law should also make certain that committees of Congress will not be impeded in the full exercise of their oversight responsibilities over the administration and operation of the classification system.⁷⁸

Hearings on such a statutorily based classification arrangement were held during the 93rd Congress and the matter remains one of high interest on Capitol Hill.⁷⁹

Of relevance as well is the mandate of the Energy Research and Development Administration derived from the now defunct Atomic Energy Commission, which conveys a statutory (42 U.S.C. 2161-2166) responsibility for protecting so-called "Restricted data" pertaining to atomic energy production and use, and that of the Director of the Central Intelligence Agency who bears an obligation (50 U.S.C. 403(d)(3) "for protecting intelligence sources and methods from unauthorized disclosure." Both of these mandates have fostered information protection systems partially governed by E.O. 11652 but also constitute authority for the maintenance of official secrets by these agencies in their own right.

IX. Overview

The continuing debate and unresolved issues of government information security classification policy serve to indicate that this is a

⁷⁷ H. Rept. 93-221, *op. cit.*, pp. 102-103.

⁷⁸ *Ibid.*, p. 104.

⁷⁹ See: U.S. Congress. House. Committee on Government Operations. *Security Classification Reform*. Hearings, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974: ———. Senate. Committee on Government Operations. *Government Secrecy*. Hearings, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974.

subject whose controversial nature transcends partisanship, ideology, and public profession. How is sensitive information to be defined, identified, isolated, maintained, utilized, and evaluated for possible release? Should Congress have access to such restricted material? Should accessibility be general or selective? Might judges examine classified documents where their releasability is in question? To what extent is secret information admissible as evidence in a trial? Who is to be punished for the unauthorized release of such data? Is espionage the only charge which might be brought against offenders?

All of these questions were recently much under public discussion due to the proposed recodification of Title 18, the criminal law portion, of the U.S. Code. In 1966 legislation was enacted (80 Stat. 1516) establishing a National Commission on Reform of Federal Criminal Law. Operating under the leadership of former California Governor Edmund G. Brown, the panel made its final report on January 7, 1971.⁸⁰ All aspects of the criminal law were considered and evaluated. Segments regarding espionage, management of classified information, and trafficking in restricted data constituted only a small portion of the total product. With the convening of the 93rd Congress, modified versions of the Commission's recommended model criminal code were offered by the Senate Judiciary Subcommittee on Criminal Laws and Procedures (S. 1) and by the Justice Department for the Administration (S. 1400, H.R. 6046).⁸¹ Hearings were held on the measures and consideration is still being given to a revised version of the recodification bills in the present Congress. Efforts are currently underway to delete certain objectionable portions from the bill, including the so-called "official secrets act" section, to enable adoption of the revised criminal code.

The current government information classification program owes its origins to armed services regulations, promulgated prior to the turn of the century regarding the protection of national defense documents. The criminal enforcement authority of the Espionage Act of 1917 colors the management directives of the order with sanctions against the unauthorized disclosure of restricted documents. As a dynamic area of public policy, the classification program continues to receive attention within various arenas of the governmental system. To the extent that official secrecy is of vital concern to any functioning democracy, these matters will undoubtedly continue to be discussed by policymakers.

⁸⁰ See U.S. National Commission on Reform of Federal Criminal Laws. *Final Report of the National Commission on Reform of Federal Criminal Laws*. Washington, U.S. Govt. Print. Off., 1971; see especially pp. 86-94.

⁸¹ Certain differences between the Subcommittee and Administration proposals were explained by Sen. Roman L. Hruska (R.-Neb.) in *Congressional Record*, v. 119, March 27, 1973: S5777-S5791.

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EXECUTIVE AGREEMENTS: A SURVEY OF RECENT CONGRESSIONAL INTEREST AND ACTION¹

During the past five years the Congress has become more and more concerned about the increasing number of significant commitments entered into by the executive branch through executive agreements. Three resolutions have been passed by the Senate expressing its sense that agreements which provide for the commitment of U.S. forces and of financial resources should be approved by the Senate as treaties or otherwise submitted to the Congress for its approval before entering into force. In addition, the Congress, in 1972, enacted a law requiring the Secretary of State to transmit to it the text of all international agreements other than treaties as they enter into force.

Moreover, between 1972 and 1974, several attempts have been made to limit the spending authority for implementation of executive agreements relative to military bases. During this time, the focus of congressional action has shifted from the cutting off of funds for the implementation of agreements already concluded to the setting up of a procedure to be followed for future agreements which relate to military bases and national commitments. In 1973 House and Senate conferees agreed to work together toward a "legislative remedy" for the executive branch practice of making commitments through executive agreements without congressional consideration and approval.

This paper examines the extent of congressional concern over executive agreements and identifies recent congressional actions aimed at clarifying or limiting the making of executive agreements without adequate congressional participation. While a certain amount of background information is included, this paper is not intended as an in-depth study on executive agreements.^{1a}

¹ This study was prepared by Marjorie Ann Brown of the Library of Congress, Congressional Research Service, Foreign Affairs Division.

^{1a} For information on executive agreements see Byrd, Elbert M., Jr. *Treaties and Executive Agreements in the United States: their Separate Roles and Limitations*. The Hague, Martinus Nijhoff, 1960. 276 p. [Bibliography, p. 254-267]; Henkin, Louis. *Foreign Affairs and the Constitution*. Mineola, New York, Foundation Press, 1972. 553 p. See chapters 5 and 6, p. 129-188, notes on p. 372-434; McClure, Wallace M. *International Executive Agreements; Democratic Procedure under the Constitution of the United States*. New York, Columbia University Press, 1941. 449 p. [Bibliography, p. 409-423]; Plischke, Elmer. *Conduct of American Diplomacy*. 3d ed. Princeton, New Jersey, D. Van Nostrand, 1967. 677 p. See p. 370-468; U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *Congressional Oversight of Executive Agreements*. Hearings, 92d Congress, 2d session, on S. 3475, April 24 and 25; May 12, 18, and 19, 1972. Washington, U.S. Govt. Printing Off., 1972, 668 p.; White-man, Marjorie M. *Digest of International Law*, v. 14. Washington, U.S. Govt. Print. Off., 1970. See p. 193-255.

I. THE MAKING OF EXECUTIVE AGREEMENTS

Executive agreements, like treaties, are international agreements. Most authorities agree that these two forms of international agreement have no differences which would make them unequal under international law.²

The Vienna Convention on the Law of Treaties, adopted by the U.N. Conference on the Law of Treaties in 1969, defines "treaty" in such a way as to include agreements of even the simplest form. This Convention, signed by the United States in 1970, is not in force and is currently pending before the Senate Foreign Relations Committee.³

The distinguishing feature of executive agreements occurs, as reflected by U.S. practice, in their enactment. Under Article 2, section 2, paragraph 2, of the Constitution, the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; . . ." The Constitution does not formally and specifically refer to executive agreements, and the practice has developed that the President may enter into these agreements, which often go into force upon signature and which of course are not submitted to the Senate under the treaty clause.

A treaty and an executive agreement have identical effect in U.S. domestic law in a number of ways: they can overrule conflicting state law; they can be superseded by a more recent Act of Congress. There is disagreement, however, on whether an executive agreement can, like a treaty, supersede a prior statutory act. Certainly the nature of the agreement and of its originating authority plays a part in its effect in U.S. internal law.⁴

However, the President does not always enter into these agreements on his own authority. According to Department of State tabulations of international agreements other than treaties entered into by the United States between 1946 and April 1972, only 64 of the 5,589 agreements were entered into solely on the President's constitutional authority under Article 2, section 1 ("Executive Power") and section 2 ("Commander in Chief").⁵ In many instances executive agreements (called legislative-executive agreements by some authorities)⁶ are entered into

² See Whiteman, v. 14, p. 211 which quotes from Harvard Research in International Law, Draft Convention on the Law of Treaties, Comment, American Journal of International Law Supplement v. 29, 1935: 653, 697; and Sayre. The Constitutionality of the Trade Agreements Act. Columbia Law Review v. 39, 1939: 751, 755. See also Whiteman, v. 14, p. 212.

³ According to this Convention, and for the purposes of the Convention, "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Article 2).

⁴ See American Law Institute. Restatement of the Law, Second; Foreign Relations Law of the United States. St. Paul, Minnesota, American Law Institute Publishers, 1965. p. 440-446; Henkin, p. 184-187, p. 432-433; Plischke, p. 421-422; Whiteman, v. 14, p. 253-254.

⁵ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. Congressional Oversight of Executive Agreements. Hearing . . . 92d Congress, 2d Session, on S. 3475 . . . April 24 and 25; May 12, 18, and 19, 1972. Washington, U.S. Govt. Print. Off., 1972. p. 409. Hereafter cited as Separation of Powers Subcommittee hearings.

⁶ Whiteman, v. 14, p. 210-211

pursuant to legislation enacted by the Congress or to treaties approved by the Senate. In other instances the agreement is authorized and/or implemented in subsequent legislation. Frequently the executive agreement is entered into pursuant to a combination of these authorities. The Secretary of State has set forth guidelines and procedures to be followed in determining whether an international agreement should lead to an executive agreement or to a treaty (Circular 175 Procedure-11 Foreign Affairs Manual 700). These guidelines are currently being revised (See Federal Register in Appendix B, below).⁷

A comparison of statistics on the numbers of executive agreements and of treaties entered into by the United States at different times illustrates the overwhelming use now being made of executive agreements. In 1930, 25 treaties and nine executive agreements were concluded by the United States. In 1968 more than 200 executive agreements were made and only 16 treaties.⁸ A table at the end of this report provides statistics on the number of treaties and executive agreements entered into annually between 1930 and 1973.

II. CONGRESSIONAL INTEREST AND ACTIONS BEFORE 1967

The Bricker Amendment initiative in the 1950's represents the major period of congressional debate and action on the making of executive agreements prior to 1967.⁹ However, the debate—which opened with the introduction in September 1951 of a Constitutional amendment by Senator John W. Bricker and developed into an extensive controversy by 1953 and 1954, when hearings were held and the resolution voted on in the Senate—did not focus exclusively on the use of executive agreements. Legislative interest and concern encompassed both treaties and executive agreements. The Bricker-Judiciary Committee amendment, which resulted from the hearings, contained two paragraphs on treaties and a third paragraph on executive agreements which gave Congress the “power to regulate all executive and other agreements with any foreign power or international organization” and subjected all such agreements to the same limitations imposed on treaties in the amendment. By these limitations executive agreements would not be valid if they conflicted with the Constitution. In addition, an executive agreement would be effective in internal law only through legislation enacted by Congress.

Two other significant amendments were offered during this period. In January 1954, Senator Walter George introduced an amendment which, provided that no treaty or executive agreement could contravene the Constitution and required that an international agreement other than a treaty should become effective as internal law only

⁷ These guidelines were originally based on a policy statement made by Secretary of State John Foster Dulles before the Senate Committee on the Judiciary in April 1953. The first form was set down on December 13, 1955; the procedures were revised on June 6, 1969. See Separation of Powers Subcommittee Hearings, p. 289-306, for texts of the 1955 and 1969 circulars.

⁸ U.S. Congress. Senate. Committee on Foreign Relations. Transmittal of Executive Agreements to Congress. Hearings . . . , 92d Congress, 1st session on S. 596 . . . , October 20 and 21, 1971. Washington, U.S. Govt. Print. Off., 1971. p. 16.

⁹ For discussion of earlier Senate debates over excessive use of executive agreements instead of treaties, see: Henkin, p. 426 footnote 16.

by Act of Congress. On February 2, 1954, Senators William Knowland and Homer Ferguson introduced an amendment which declared only that no treaty or other international agreement could violate the Constitution. There was no mention of congressional control of executive agreements.

After the Judiciary Committee-Bricker Amendment failed by one vote to pass the Senate on February 25, 1954, the major thrust of support for the Bricker Amendment movement disappeared. Several versions of Senator Bricker's amendment were introduced by him through 1957, but no floor action was taken on them. Bills of similar import have continued to be introduced up until the present day.¹⁰

III. SENATE RESOLUTIONS: 1969, 1970, AND 1972

A. National Commitment Resolution, 1969

In 1969, after two years of hearings, reports, and debates, the Senate passed S. Res. 85, which defined national commitments and indicated that a U.S. national commitment should result "only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment." According to the resolution, which was passed on June 25, 1969, a national commitment was "the use of U.S. armed forces on foreign territory or a promise to assist a foreign country, government, or people by the use of U.S. armed forces or financial resources."

Concern over excessive use of executive agreements had been expressed in the 1969 report of the Senate Committee on Foreign Relations on the national commitments resolution:

The traditional distinction between the treaty as the appropriate means of making significant political commitments and the executive agreement as the appropriate instrument for routine, nonpolitical arrangements has substantially broken down.¹¹

B. Resolution on Spanish Bases Agreement

During 1970 this concern was crystalized within the Senate when the Administration entered into an executive agreement with Spain extending the original 1953 agreement covering American use of bases in Spain (the agreement had already been extended in 1963). Despite some Senatorial expressions that the agreement be submitted as a treaty, it was concluded as an executive agreement.¹² In December

¹⁰ For additional information on the Bricker amendment, see Price, Hugh P. *The Bricker Amendment and Similar Proposals for Amending the Treaty Provisions of the Constitution, including a Selected Bibliography*. December 2, 1964. 34 p. (Congressional Research Service, American Law Division, Multilith, JX235A); Garrett, Stephen A. *Foreign Policy and the American Constitution: the Bricker Amendment in Contemporary Perspective*. *International Studies Quarterly* v. 16, no. 2, June 1972: 187-220.

¹¹ U.S. Congress. Senate. Committee on Foreign Relations. *National Commitments. Report . . . to Accompany S. Res. 83* Washington, U.S. Govt. Print. Off. 1969. (91st Congress, 1st Session. Senate, Report No. 91-129) p. 26.

¹² T.I.A.S. [Treaties and Other International Acts Series] 6924; 21 UST [U.S. Treaties and Other International Agreements] 1677.

1970 the Senate adopted S. Res. 469, expressing the sense of the Senate that nothing in the agreement with Spain should be deemed to be a national commitment by the United States. According to the Foreign Relations Committee report on this resolution, "the majority of committee members still adhere to the opinion that the administration should have submitted the agreement as a treaty."¹³

C. Symington Subcommittee Hearings and Report

On December 21, 1970, a Senate Foreign Relations Committee special Subcommittee on Security Agreements and Commitments Abroad issued a report following two years of investigations and hearings. The Subcommittee had been created January 23, 1969, under the chairmanship of Senator Stuart Symington. As a result of the hearings, a great deal of information was disclosed for the public record on U.S. military forces, facilities, and security programs in 13 countries, plus NATO (North Atlantic Treaty Organization).

The Subcommittee recommended that committees of Congress request and receive full information on "all understandings and agreements of a security nature" between the United States and other countries. In addition:

Congress should take a realistic look at the authority of the President to station troops abroad and establish bases in foreign countries. Notwithstanding the general authority which is contained in treaties and in Congressionally authorized programs, no U.S. forces should be stationed abroad or bases established abroad without specific prior authority of the Congress in each case.¹⁴

This recommendation flowed naturally from the subcommittee's observation that:

Overseas bases, the presence of elements of United States armed forces, joint planning, joint exercises, or extensive military assistance programs represent to host governments more valid assurances of United States commitment than any treaty or agreement.¹⁵

These hearings and report did not result in any specific legislation, but have formed the general framework within which continuing concern and legislative proposals have been formulated.

D. Resolution on Agreements with Portugal and Bahrain

In March 1972 the Senate, by a vote of 50 to 6, passed S. Res. 214, resolving that "any agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent." The previous month, the Senate Foreign Relations Committee in reporting out this resolution recalled

¹³ U.S. Congress. Senate. Committee on Foreign Relations. Agreement Between the United States and Spain. Report to Accompany S. Res. 469. Washington, U.S. Govt. Print. Off., 1970. (91st Congress, 2d Session. Senate. Report No. 91-1425) p. 4.

¹⁴ U.S. Congress. Senate. Committee on Foreign Relations. Subcommittee on U.S. Security Agreements and Commitments Abroad. Security Agreements and Commitments Abroad, Report. . . December 21, 1970. Washington, U.S. Govt. Print. Off., 1970 (91st Congress, 2d Session Committee Print) p. 28.

¹⁵ *Ibid.*, p. 20.

that “no lesson” had been learned from the experience with the Spanish base agreement. The Committee stated that these two executive agreements raised “important foreign policy questions” and that the “submission of these agreements as treaties . . . is the best and most appropriate way” of scrutinizing these questions.¹⁶

IV. THE CASE ACT, PUBLIC LAW 92-403

During 1972 the Senate also had before it S. 596, introduced by Senator Clifford Case the preceding year. This bill provided for the transmittal by the Secretary of State to the Congress of the text of any international agreement other than a treaty no later than 60 days after that agreement entered into force. The Act did not provide for congressional action on the agreements but simply established a mechanism for the transmittal of such information to Congress. Special procedures were outlined for agreements which were not intended to be made public. S. 596 was approved on August 22, 1972, becoming Public Law 92-403. The White House issued a notice for the press shortly after the signing of the bill quoting the report of the House Foreign Affairs Committee that:

the right of the President to conclude executive agreements is not in question here, or in any way affected by S. 596. Thus the bill in no way transgresses on the independent authority of the Executive in the area of foreign affairs.¹⁷

This law is being implemented, and the agreements are monitored within the Senate Foreign Relations Committee.¹⁸

V. ATTEMPTS TO LIMIT SPENDING REQUIRED BY EXECUTIVE AGREEMENTS

A. *Naval Vessel Loans*

In another initiative taken during 1972, the Senate and House attempted to restrict the spending authority required to implement the agreements with Spain, Portugal, and Bahrain. The Senate Armed Services Committee, in reporting out legislation authorizing certain naval vessel loans, including loans implementing the Spanish Base Rights Agreement, pointed out that “in the future the Congress will not be bound by any commitment entered into by Executive Agreement in advance of Congressional approval.” The Committee also agreed with its House counterpart that “Congressional approval should be obtained for the retention of loaned vessels beyond the loan period.”¹⁹ As finally enacted and approved in April 1972, the legislation also included a stipulation that: “Any loan made to a country

¹⁶ U.S. Congress. Senate. Committee on Foreign Relations. *Agreements with Portugal and Bahrain. Report to Accompany S. Res. 214.* Washington, U.S. Govt. Print. Off., 1972 (92d Congress, 2d Session. Senate. Report No. 92-632) p. 5, 8. The agreement with Portugal relates to base rights in the Azores.

¹⁷ President Signs Bill on Transmittal to Congress of Executive Agreements. Department of State Bulletin v. 67, October 23, 1972: 480-481.

¹⁸ Case, Clifford P. Cooperation of Department of State under Public Law 92-403. Congressional Record [daily ed.] v. 119, June 18, 1973: S11315-S11316.

¹⁹ U.S. Congress. Senate. Committee on Armed Services. *Authorizing Certain Naval Vessel Loans. Report to Accompany H.R. 9526.* Washington, U.S. Govt. Print. Off., 1972. (92d Congress, 2d Session. Senate. Report No. 92-644) p. 3.

under this Act shall not be construed as a commitment by the United States to the defense of that country.”²⁰

B. Portugal and Bahrain: Foreign Assistance Act

The Senate Foreign Relations and House Foreign Affairs Committees in 1972 both addressed the spending issue in their reports on the Foreign Assistance Act authorization. In reporting S. 3390 in May, the Senate Foreign Relations Committee included a section, initiated by Senator Case, providing that “no funds shall be obligated or expended to carry out the agreements with Portugal and Bahrain . . . until the agreements have been submitted to the Senate as treaties for its advice and consent.”²¹ The next section of the bill, also initiated by Senator Case, applied this principle in a general way to all future executive agreements relating to military bases. The specific nature of the agreements to be included is set forth in the legislation.²² On the Senate floor Bahrain was deleted from the first section; otherwise the committee bill on this issue was retained. However, the entire Foreign Assistance bill was defeated in the Senate.²³

The House Foreign Affairs Committee, reporting out H.R. 16029, included a section providing “that no funds shall be obligated or expended to carry out the agreement with Portugal . . . until the agreement either (1) has been submitted to the Senate as a treaty . . . , or (2) has been submitted to both Houses of Congress for their approval through a resolution.”²⁴ The Committee declared: “When Congress is asked to provide foreign assistance under an executive agreement, it should have the right to approve the agreement itself.”²⁵ This provision was stricken from the bill on the House floor.²⁶ The Senate Foreign Relations Committee, reporting on this bill, put back the two sections recommended in its earlier bill as amended by the Senate (in which the Bahrain agreement was deleted),²⁷ but the 92d Congress adjourned without a final Foreign Assistance Act. After the 93rd Congress convened, the Foreign Relations Committee again reported a bill with these two sections intact.²⁸ The bill was not acted upon and for-

²⁰ Public Law 92-270; 86 Stat. 118.

²¹ U.S. Congress. Senate. Committee on Foreign Relations. Foreign Assistance Act of 1972. Report . . . to Accompany S. 3390. Washington, U.S. Govt. Print. Off., 1972. (92d Congress, 2d Session. Senate. Report No. 92-823) ; p. 24. The agreement with Portugal relates to U.S. base rights in the Azores.

²² *Ibid.*, p. 29-31.

²³ On June 19, 1972, the Senate agreed to the retention of the first section, by a vote of 36 yeas, 41 nays (Congressional Record [daily ed.] v. 118, June 19, 1972: S9653). On June 28, 1972, the Senate agreed to deletion of the Bahrain agreement from the first section (Congressional Record [daily ed.] v. 118, June 28, 1972: S10579). S. 3390 was rejected in the Senate on July 24, 1972.

²⁴ U.S. Congress. House. Committee on Foreign Affairs. Foreign Assistance Act of 1972. Report . . . on H.R. 16029 . . . Washington, U.S. Govt. Print. Off., 1972. (92d Congress, 2d Session. House. Report No. 92-1273) p. 8-9.

²⁵ *Ibid.*

²⁶ Congressional Record [daily ed.] v. 118, August 9, 1972: H7440.

²⁷ U.S. Congress. Senate. Committee on Foreign Relations. Foreign Assistance Act of 1972. Report to Accompany H.R. 16029. Washington, U.S. Govt. Print. Off., 1972. (92d Congress, 2d Session. Report No. 92-1182) p. 23-29.

²⁸ U.S. Congress. Senate. Committee on Foreign Relations. Foreign Assistance Act of 1973. Report . . . to Accompany S. 837. Washington, U.S. Govt. Print. Off., 1973. (93d Congress, 1st Session. Senate. Report No. 93-62) p. 23-27.

eign assistance funds were authorized through the end of the fiscal year by a continuing resolution.²⁹

C. Portugal and Future Base Agreements: State Department Authorization

In 1973 the Senate Foreign Relations Committee also included in the Department of State Authorization Act of 1973 the two sections previously agreed to by the Senate in the Foreign Assistance Act authorization bills.³⁰ The two sections were retained by the Senate in floor action as part of the State Department authorization bill.³¹ In the conference report, which was filed in the House in July, the Senate receded on the section prohibiting the obligation or expenditure of funds to carry out the agreement with Portugal on bases in the Azores until the agreement was submitted to the Senate as a treaty for its advice and consent. The House conferees receded on the second section, with an amendment under which foreign military base agreements must be approved either by passage of a concurrent resolution by both Houses or by the Senate giving its advice and consent to a treaty.³² This amendment was similar to the amendment to the Foreign Assistance Act adopted by the House Foreign Affairs Committee in 1972.³³

Two sections of the conference report, including this one, were rejected by the House as being non-germane.³⁴ After further consideration in both Houses another Conference was agreed to.³⁵ In the second conference report the Senate receded on the remaining provisions relating to executive agreements, the report was agreed to by both Houses, and the bill was approved by the President on October 18, 1973. According to the report:

The managers of both the Senate and the House are concerned with the problem sought to be corrected by the Senate provisions and strongly support the principle at stake. Both agree to pursue a legislative remedy to the problem in the next session.³⁶

D. State Department Authorization Act, 1974

On May 20, 1974, the Senate passed, without debate, the Department of State/USIA Authorization Act, Fiscal Year 1975 (S. 3473).

²⁹ H.J. Res. 345 was passed by the House and Senate on February 28, 1973, and approved by the President on May 8, 1973 (Public Law 92-9).

³⁰ U.S. Congress. Senate. Committee on Foreign Relations. Department of State Authorization Act of 1973. Report . . . on S. 1248 . . . Washington, U.S. Govt. Print. Off., 1973. (93d Congress, 1st Session. Senate. Report No. 93-176) p. 32-35.

³¹ An amendment to strike the first section from the bill was rejected on June 12, 1973 (Congressional Record [daily ed.] v. 119, June 12, 1973: S10988). An amendment to strike the second section from the bill was rejected on June 14, 1973 (Congressional Record [daily ed.] v. 119, June 14, 1973: S11182-S11183).

³² Congressional Record [daily ed.] v. 119, July 10, 1973: H5818, H5820-H5821 (93d Congress, 1st Session. House. Report No. 93-387).

³³ See page 361.

³⁴ Congressional Record [daily ed.] v. 119, September 11, 1973: H7726, H7727.

³⁵ Congressional Record [daily ed.] v. 119, September 26, 1973: S17689. The Senate amended the House amendment of the conference report, reinserting the deleted sections and insisting on its amendments.

³⁶ Congressional Record [daily ed.] v. 119, October 9, 1973: H8762 (93d Congress, 1st Session. House. Report 93-563).

This bill carried two sections which had been initiated by Senator Case and approved by the Senate Foreign Relations Committee: section 10, on military base agreements, and section 11, on the Diego Garcia agreement.

According to section 10, no funds may be obligated or expended to carry out specified types of agreements unless the Congress approves the agreement by law or the Senate exercises its advice and consent prerogative with respect to such a treaty. Section 10 identifies the agreement as one which (1) provides for the establishment of a military installation with an assigned, authorized, or detailed personnel strength of more than 500, at which U.S. armed forces units are to be assigned; (2) renews or extends the duration of any such agreement; or (3) makes changes which "significantly" alter the terms of such an agreement. According to its report, the Foreign Relations Committee rejects the argument that the appropriations bills are the proper mechanism for congressional consideration of such foreign policy questions. In the Committee's view, these issues must be addressed explicitly by the Foreign Affairs and Foreign Relations Committees.

Section 11 of the Senate-passed legislation requires that no steps be taken to implement any agreement signed on or after January 1, 1974, by the United States and the United Kingdom relating to the establishment or maintenance by the United States of any military base on Diego Garcia until the agreement is submitted to Congress and approved by law. The report notes that the Senate Foreign Relations Committee is "united in the view that Congress should approve whatever policy is to be pursued." Furthermore, "Congress should be integrally involved in the process by which U.S. policy is established in this important area of the world."³⁷

VI. DISAPPROVAL PROCEDURE FOR EXECUTIVE AGREEMENTS

In April 1972 Senator Ervin had introduced S. 3475, a bill providing for the transmittal to the Congress by the Secretary of State of all executive agreements—international agreements other than treaties. Any such agreement would come into force at the end of 60 days unless both Houses passed a concurrent resolution stating in substance that both Houses did not approve the executive agreement. The Separation of Powers Subcommittee of the Senate Judiciary Committee held extensive hearings in April and May 1972, but no action was taken in the 92nd Congress.³⁸ The bill was re-introduced in the 93rd Congress (S. 1472) and is pending before the Judiciary Committee as S. 3830 (it was amended by the subcommittee). This bill would take the Public Law 92-403 procedure one step further, invoking a disapproval procedure similar to that provided in the Atomic Energy Act (as amended in 1958 by Public Law 83-479) for

³⁷ U.S. Congress. Senate. Committee on Foreign Relations. Department of State/USIA Authorization Act, Fiscal Year 1975. Report . . . together with Supplemental Views on S. 3473 . . . , May 9, 1974. Washington, U.S. Govt. Print. Off., 1974. (93d Congress, 2d Session. Senate Report No. 93-838) p. 19.

³⁸ See above page 2, footnote 1 for full citation to these hearings which total 668 pages.

disapproval of agreements of cooperation relative to military application of atomic energy material or information.³⁹

This report has not discussed any of the legislation introduced but not in some way acted upon by Congress. A listing of legislation pending in the 93rd Congress as of August 23, 1974 on the making of international agreements other than treaties is contained in Appendix C.

VII. FUTURE CONGRESSIONAL CONCERNS

The debate within the legislative branch over the proper role of the Congress in the making of international agreements is but one phase of Congress' activities as it seeks to restore a better balance of powers between the legislative and executive branches of government as envisioned by the Constitutional framers. The current level of congressional participation in the making of executive agreements occurs primarily after the agreement enters into force, with the receipt of the texts of all international agreements other than treaties within 60 days after they enter into force. Expanded procedures may be devised, such as those envisioned in the Senate version of the State Department Authorization Act of 1974 for agreements dealing with military installations abroad or in the Ervin bill mechanism for disapproval of executive agreements before they enter into force. Nonetheless, the committees of Congress may, as the Symington Subcommittee recommended, want to remain vigilant as well as persistent in their pursuit of information and in their oversight of the executive branch in the broad field of foreign policy and international relations.

³⁹ Section 123d of Atomic Energy Act as amended (42 USC 2153d): The proposed agreement for cooperation, together with the approval and determination of the President, if arranged pursuant to section 2121(c), 2164(b), or 2164(c) of this title, has been submitted to the Congress and referred to the Joint Committee and a period of sixty days has elapsed while Congress is in session, but any such proposed agreement for cooperation shall not become effective if during such sixty-day period the Congress passes a concurrent resolution stating in substance that it does not favor the proposed agreement for cooperation. . . .

Pending in Congress, as of August 23, 1974, is legislation which would institute a similar procedure for certain international agreements for civil uses of nuclear energy (S. 3698, Conference report: H. Rept. 93-1299).

APPENDIX A

STATISTICS ON EXECUTIVE AGREEMENTS AND TREATIES
ENTERED INTO BY THE UNITED STATES, 1930-1945; 1946-
1973

Year of Official Printing	1930-1945		Year Concluded	1946-1973	
	Treaties	Executive Agreements		Treaties	Executive Agreements
1930	25	11	1946	19	139
1931	13	14	1947	15	144
1932	11	16	1948	16	178
1933	9	11	1949	22	148
1934	14	16	1950	11	157
1935	25	10	1951	21	213
1936	8	16	1952	22	291
1937	15	10	1953	14	163
1938	12	24	1954	17	206
1939	10	26	1955	7	297
1940	12	20	1956	15	233
1941	15	39	1957	9	222
1942	6	52	1958	10	197
1943	4	71	1959	12	250
1944	1	74	1960	5	266
1945	6*	54	1961	9	260
			1962	10	319
			1963	17	234
			1964	3	222
			1965	14	204
			1966	14	237
			1967	18	223
			1968	18	197
			1969	6	162
			1970	20	183
			1971	17	214
			1972	20	287
			1973	17	241

*This includes the still unpublished water treaty with Mexico, in force since November 8, 1945. Dept. of State Bull., Dec. 2, 1945, p. 901.

Source: Borchard, Edwin M. Treaties and executive agreements. American political science review v. 40, no. 4, August 1946: 735.

Source: Department of State, Office of the Assistant Legal Adviser for Treaty Affairs. August 1974.

APPENDIX B

DEPARTMENT OF STATE REVISION OF CIRCULAR 175 PROCEDURE

DEPARTMENT OF STATE

[Public Notice 395]

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

Notice of Proposed Rulemaking

Consideration is being given by the Department of State to the revision of Chapter 700 of Volume 11 of the Foreign Affairs Manual.

The proposed revision is a codification of Department of State Circular 175 dated December 22, 1955, as amended and issued in Chapter 700 of Volume 11 of the Foreign Affairs Manual. The Foreign Affairs Manual (FAM) is an internal instruction for Department of State personnel. Chapter 700 of Volume 11 has heretofore been available for public inspection and copying in accordance with 5 U.S.C. 552(a) (2). However, revisions thereto have not previously been published for the information of the public and with an opportunity for public comment thereon. The proposed revision is being published because of the public interest in the manner in which treaties and other international agreements are entered into by the United States.

The current revision is a substantive one with respect to the sections regarding the constitutional bases on which treaties and other international agreements are entered into by the United States, the sections regarding consultation with the Congress, and with respect to sections calling upon all officers to cooperate in the application of the Case Act (1 U.S.C. 112(b)) which requires that all international agreements other than treaties be transmitted to the Congress within 60 days after they enter into force. Otherwise, the revision is merely a rearrangement of other existing sections with some editorial improvement.

The purpose of the revised procedures is to ensure (1) that orderly and uniform procedures are followed in the negotiation and signature of treaties and other international agreements; (2) that constitutional bases of authority are followed in the making of treaties and other international agreements by the United States; (3) that timely and otherwise appropriate consultation with the Congress is had with respect to the negotiation of international agreements and the procedure by which they are brought into force; and (4) that the laws regarding the transmission of international agreements other than treaties to the Congress and the publication of treaties and other international agreements are faithfully observed.

Interested persons are invited to submit written comments, or suggestions regarding the proposed revision to the Assistant Legal Adviser for Treaty Affairs, Office of the Legal Adviser, Room 5420, Department of State, Washington, D.C. 20520, not later than September 21, 1973.

700—TREATIES AND OTHER INTERNATIONAL AGREEMENTS

710 Purpose. a. The purpose of this chapter is to ensure that orderly and uniform procedures are followed in the negotiation, signature, publication and registration of treaties and other international agreements of the United States. It is also designed to ensure the maintenance of complete and accurate records on treaties and agreements and the publication of authoritative information concerning them.

b. The chapter is not a catalog of all the essential rules or information pertaining to the making and application of international agreements. It is limited to regulations necessary for general guidance.

720 NEGOTIATION AND SIGNATURE

720.1 Circular 175 Procedure. This subchapter is a codification of the substance of Department Circular No. 175, December 13, 1955, as amended, on the negotiation and signature of treaties and executive agreements. It may be referred to for convenience and continuity as the "Circular 175 Procedure."

720.2 General Objectives. The objectives are to ensure:

a. That the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits;

b. That the objectives to be sought in the negotiation of particular treaties and other international agreements are approved by the Secretary or an officer specifically authorized by him for that purpose;

c. That timely and appropriate consultation is had with congressional leaders and Committees on treaties and other international agreements;

d. That firm positions departing from authorized positions are not undertaken in negotiations without the approval of the Legal Adviser and the interested assistant secretaries or their deputies;

e. That the final texts developed are approved by the Legal Adviser and the interested assistant secretaries or their deputies and, when required, brought a reasonable time before signature to the attention of the Secretary or an officer specifically designated by him for that purpose;

f. That authorization to sign the final text is obtained and appropriate arrangements for signature are made;

g. That there is compliance with the requirements of the Case Act on the transmission of the texts of international agreements other than treaties to the Congress (see section 724); the law on the publication of treaties and other international agreements (see section 725) and treaty provisions on registration (see section 750.2-3).

721 EXERCISE OF THE INTERNATIONAL AGREEMENT POWER

721.1 Determination of Type of Agreement. The following principles, considerations, and procedures will be observed in determining whether an international agreement shall be dealt with by the United States as a treaty to be brought into force with the advice and consent of the Senate, or as an executive agreement to be brought into force on some other constitutional basis.

721.2 Constitutional Requirements. There are two procedures under the Constitution through which the United States becomes a party to international agreements. Those procedures and the constitutional parameters of each are:

(a) *Treaties*: International agreements (regardless of their title, designation or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent are "treaties". The President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject genuinely of concern in foreign relations so long as the agreement does not contravene the United States Constitution; and

(b) *Executive agreements*: International agreements brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate are "executive agreements" (international agreements other than treaties). There

are three constitutional bases for executive agreements as set forth below. An international agreement may be concluded pursuant to one or more of these constitutional bases:

(i) *Executive agreements pursuant to treaty:* The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, whose provisions constitute authorization for the agreement by the Executive without subsequent action by the Congress;

(ii) *Executive agreements pursuant to legislation:* The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress; and

(iii) *Executive agreements pursuant to the constitutional authority of the President:* The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional sources of authority for the President to conclude international agreements include:

(1) The President's authority as Chief Executive to represent the nation in foreign affairs;

(2) The President's authority to receive Ambassadors and other public ministers;

(3) The President's authority as "Commander-in-Chief";

(4) The President's authority to "take care that the laws be faithfully executed".

721.3 Criteria for Selecting Among Constitutionally Authorized Procedures. In determining a question as to the procedure which should be followed for any particular international agreement due consideration is given to the following factors along with those in section 721.2.

(a) *Domestic factors:* (i) Whether the agreement involves important interests, commitments or risks affecting the nation as a whole;

(ii) Whether the agreement would affect State laws or the powers reserved to the States under the Constitution;

(iii) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

(iv) Past United States practice with respect to similar agreements;

(v) The preference of the Congress with respect to a particular type of agreement.

(b) *International factors:* (i) The degree of formality desired for an agreement;

(ii) The proposed duration of the agreement, the need for prompt conclusion of an agreement and the desirability of concluding a routine or short term agreement;

(iii) The general international practice with respect to similar agreements.

In determining whether any international agreement should be brought into force as a treaty or as an executive agreement the utmost care shall be exercised to avoid any invasion or compromise of

the constitutional powers of the Senate, the Congress as a whole, or the President.

721.4 Questions as to Type of Agreement to be Used; Consultation with Congress. (a) All legal memorandums accompanying Circular 175 requests (see section 722.3(c)(iii)) will discuss thoroughly the bases for the type of agreement recommended.

(b) When there is any question whether an international agreement should be concluded as a treaty or as an executive agreement, the matter is brought to the attention of the Legal Adviser of the Department. If the Legal Adviser considers the question to be a serious one, he will transmit a memorandum thereon to the Assistant Secretary for Congressional Relations and other officers concerned. Upon receiving their views on the subject he shall, if the matter has not been resolved, transmit a memorandum thereon to the Secretary for his decision. Every practicable effort will be made to identify such questions at the earliest possible date so that consultations may be completed in sufficient time to avoid last-minute consideration.

(c) Consultations on such questions will be held with congressional leaders and committees as may be appropriate. Arrangements for such consultations shall be made by the Assistant Secretary for Congressional Relations and shall be held with the assistance of the Office of the Legal Adviser and such other offices as may be determined. Nothing in this section shall be taken as derogating from the requirement of appropriate consultations with the Congress in accordance with section 723.1e in connection with the initiation of, and developments during, negotiations for international agreements, particularly where the agreements are of special interest to the Congress.

722 ACTION REQUIRED IN NEGOTIATION AND/OR SIGNATURE OF TREATIES AND AGREEMENTS

722.1 Authorization Required to Undertake Negotiations. Negotiations of treaties, or executive agreements, or for their extension or revision are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government, until authorized in writing by the Secretary or an officer specifically authorized by him for that purpose. Notification of termination of any treaty or executive agreement requires similar authorization.

722.2 Scope of Authorization. Approval of a request for authorization to negotiate a treaty or other international agreement does not constitute advance approval of the text nor authorization to agree upon a date for signature or to sign the treaty or agreement. Authorization to agree upon a given date for, and to proceed with, signature must be specifically requested in writing, as provided in section 722.3. This applies to treaties and other agreements to be signed abroad as well as those to be signed at Washington. Special instructions may be required, because of the special circumstances involved, with respect to multilateral conventions or agreements to be signed at international conferences.

722.3 Request for Authorization to Negotiate and/or Sign; Action Memorandum. (a) A request for authorization to negotiate and/or sign a treaty or other international agreement takes the form of an Action Memorandum addressed to the Secretary and cleared with the Office of the Legal Adviser, the Office of the Assistant Secretary for Congressional Relations, other appropriate bureaus, and any other agency (such as Defense, Commerce, etc.) which has primary responsibility or a substantial interest in the subject matter. It is submitted through the Executive Secretariat.

(b) The Action Memorandum may request one of the following: (i) authority to negotiate, (ii) authority to sign, or (iii) authority to negotiate and sign. The request in each instance states that any substantive changes in the draft text will be cleared with the Office of the Legal Adviser and other specified regional and/or functional bureaus before definitive agreement is reached. Drafting offices consult closely with the Office of the Legal Adviser to ensure that all legal requirements are met.

(c) The Action Memorandum is accompanied by (i) the draft, if available, of any agreement or other instrument intended to be negotiated, (ii) the text of any agreement and related exchange of notes, agreed minutes or other document to be signed, and (iii) a memorandum of law prepared in the Office of the Legal Adviser.

(d) Where it appears that there may be obstacles to the immediate public disclosure of the text upon its entry into force, the Action Memorandum shall include an explanation thereof (see sections 723.2 and 723.3).

722.4 Separate Authorizations. When authorization is sought with respect to a particular treaty or other agreement, either multilateral or bilateral, the Action Memorandum for this purpose outlines briefly and clearly the principal features of the proposed treaty or other agreement, indicates any special problems which may be encountered, and, if possible, the contemplated solutions of those problems.

722.5 Blanket Authorizations. In general, blanket authorizations are appropriate only in those instances where, in carrying out or giving effect to provisions of law or policy decisions, a series of agreements of the same general type is contemplated; that is, a number of agreements to be negotiated according to a more or less standard formula (e.g., P.L. 480 Agricultural Commodities Agreements; Educational Exchange Agreements; Investment Guaranty Agreements; Weather Station Agreements, etc.) or a number of treaties to be negotiated according to a more or less standard formula (e.g., consular conventions; extradition treaties, etc.). Each request for blanket authorization shall specify the officer or officers to whom the authority is to be delegated. The basic precepts under section 722.3 apply equally to requests for blanket authorizations.

722.6 Certificate on Foreign-Language Text. (a) Before any treaty or other

agreement containing a foreign-language text is laid before the Secretary (or any person authorized by him) for signature, either in the Department or at a post, a signed memorandum must be obtained from a responsible language officer of the Department certifying that the foreign-language text and the English-language text are in conformity with each other and that both texts have the same meaning in all substantive respects. A similar certification must be obtained for exchanges of notes that set forth the terms of an agreement in two languages.

(b) In exceptional circumstances the Department can authorize the certification to be made at a post.

722.7 Transmission of Texts to Secretary. The texts of treaties and other international agreements must be completed and approved in writing by all responsible officers concerned sufficiently in advance to give the Secretary, or the person to whom authority to approve the text has been delegated, adequate time before the date of signing to examine the text and dispose of any questions that arise. Posts must transmit the texts to the Department as expeditiously as feasible to assure adequate time for such consideration. Except as otherwise specifically authorized by the Secretary, a complete text of a treaty or other international agreement must be delivered to the Secretary or the Acting Secretary, or other person authorized to approve the text, before any such text is agreed upon as final or any date is agreed upon for its signature.

723 RESPONSIBILITY OF OFFICE OR OFFICER CONDUCTING NEGOTIATIONS

723.1 Conduct of Negotiations. The office or officer responsible for any negotiations must ensure:

a. That during the negotiations no position is communicated to a foreign government or to an international organization as a United States position that goes beyond any existing authorization or instructions;

b. That no proposal is made or position is agreed to beyond the original authorization without approval by the appropriate assistant secretaries or their deputies, the Legal Adviser's Office, and also, in the case of the treaties or other international agreements which concern responsibilities of AID, the Director of AID, or his Deputy;

c. That all significant policy-determining memorandums and instructions to the field on the subject of the negotiations are submitted to and cleared by the Office of the Legal Adviser, all assistant secretaries concerned or their deputies, and also, in the case of treaties or other international agreements which concern responsibilities of AID, the Director of AID, or his Deputy;

d. That the Secretary is kept informed in writing of important policy decisions and developments, including any particularly significant departures from substantially standard drafts that have been evolved;

e. That with the advice and assistance of the Assistant Secretary for Congressional Relations, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement. Where the proposal for any especially important treaty or other international agreement is contemplated, the Office of the Assistant Secretary for Congressional Relations will be informed as early as possible by the office responsible for the subject;

f. That in no case, after accord has been reached on the substance and wording of the texts to be signed, do the negotiators sign an agreement or exchange notes constituting an agreement until a request under section 723.3 for authorization to sign has been approved and, if at a post abroad, until finally instructed by the Department to do so as stated in section 730.3. If an agreement is to be signed in two languages, each language text must be cleared in full with the Language Services Division or, if at a post abroad, with the Department before signature, as required by section 722.6;

g. That due consideration is given also to the provisions of sections 723.2-723.9, 730.3, and 731 of this Chapter; and

h. That, in any case where any other department or agency is to play a primary or significant role or has a major interest in negotiation of an international agreement, the appropriate official or officials in such department or agency are informed of the necessity of complying with the requirements of this subchapter.

723.2 Avoiding Obstacles to Publication and Registration. The necessity of avoiding any commitment incompatible with the law requiring publication (see section 725) and with the treaty provisions requiring registration (see section 760.2-3) should be borne in mind by U.S. negotiators. Although negotiations may be conducted on a confidential basis, every practicable effort must be made to assure that any definitive agreement or commitment entered into will be devoid of any aspect which would prevent the publication and registration of the agreement.

723.3 Questions on Immediate Public Disclosure. In any instance where it appears to the U.S. representatives that the immediate public disclosure upon its entry into force of an agreement under negotiation would be prejudicial to the national security of the United States, the pertinent circumstances shall be reported to the Secretary of State and his decision awaited before any further action is taken. Where such circumstances are known before authorization to negotiate or to sign is requested, they shall be included in the request for authorization. All such reports and requests are to be

cleared with the Office of the Legal Adviser.

723.4 Public Statements. No public statement is to be made indicating that agreement on a text has been reached, or that negotiations have been successfully completed, before authorization is granted to sign the treaty or other agreement. If such authorization has been granted subject to a condition that no substantive change in the proposed text is made without concurrence of the Office of the Legal Adviser and other specified offices, no such public statement is to be made until definitive agreement on the text has been reached with the concurrence of the Office of the Legal Adviser and the other specified offices. Normally, such a public statement is made only at the time a treaty or other agreement is actually signed, inasmuch as it remains possible that last-minute changes will be made in the text. Any such statement prior to that time must have the concurrence of the Office of the Legal Adviser, the Office of the Assistant Secretary for Congressional Relations, and the other specified offices, and the approval of the Secretary or the Department principal who originally approved the Action Memorandum request under "Circular 175 Procedure."

723.5 English-Language Text. Negotiators will assure that every bilateral treaty or other international agreement to be signed for the United States contains an English-language text. If the language of the other country concerned is one other than English the text shall be done in English and, if desired by the other country, in the language of that country. A United States note that constitutes part of an international agreement effected by exchange of notes shall always be in the English language. If it quotes in full a foreign office note the quotation shall be rendered in English translation. A U.S. note shall not be in any language in addition to English unless specifically authorized. The note of the other government concerned may be in whatever language that government desires.

723.6 Transmission of Signed Texts to Assistant Legal Adviser for Treaty Affairs. a. The officer responsible for the negotiation of a treaty or other agreement as any post is responsible for ensuring the most expeditious transmission of the signed original text, together with all accompanying papers such as agreed minutes, exchanges of notes, agreed interpretations, plans, etc., to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs. Provided, That where originals are not available accurate certified copies are obtained and transmitted as in the case of the original. (See sections 723.7, 723.8 and 723.9.) The transmittal is by airmail, not by transmittal slip or Operations Memorandum.

b. Any officer in the Department having in his possession or receiving from any source a signed original or certified copy of a treaty or agreement or of a note or other document constituting a part of

a treaty or agreement must forward such documents immediately to the Assistant Legal Adviser for Treaty Affairs.

723.7 Transmission of Certified Copies to the Department. When an exchange of diplomatic notes between the mission and a foreign government constitutes an agreement or has the effect of extending, modifying, or terminating an agreement to which the United States is a party, a properly certified copy of the note from the mission to the foreign government, and the signed original of the note from the foreign government, are sent, as soon as practicable, to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs. The transmittal is by airmail, not by transmittal slip or Operations Memorandum.

Likewise, if, in addition to the treaty or other agreement signed, notes related thereto are exchanged (either at the same time, before hand or thereafter), a properly certified copy (copies) of the note(s) from the mission to the foreign government are transmitted with the signed original(s) of the note(s) from the foreign government.

In each instance, the mission retains for its files certified copies of the note exchanged. The United States note is prepared in accordance with the rules prescribed in the Correspondence Handbook. The note of the foreign government is prepared in accordance with the style of the foreign office and usually in the language of that country. Whenever practicable, arrangements are made for the notes to bear the same date.

723.8 Certification of Copies. If a copy of a note is a part of an international agreement, such copy is certified by a duly commissioned and qualified Foreign Service officer either (a) by a certification on the document itself, or (b) by a separate certification attached to the document. A certification on the document itself is placed at the end of the document. It indicates, either typed or rubber stamped, that the document is a true copy of the original signed (or initialed) by (insert full name of signing officer), and it is signed by the certifying officer. If a certification is typed on a separate sheet of paper, it briefly describes the document certified and states that it is a true copy of the original signed (or initialed by) (full name) and it is signed by the certifying officer. The certification may be stapled to the copy of the note.

723.9 Preparation of Copies for Certification. For purposes of accuracy of the Department's records and publication and registration, a certified copy must be an exact copy of the signed original. It must be made either by typewriter (ribbon or carbon copy) or by facsimile reproduction on white durable paper (not by the dupliplast method) and must be clearly legible. In the case of notes, the copy shows the letterhead, the date and, if signed, an indication of the signature or, if merely initialed, the initials which appear on the original. It is suggested that, in the case of a note from the mission to the foreign government, the copy for certification and transmission to the

Department be made at the same time the original is prepared. If the copy is made at the same time, the certificate prescribed in section 723.8 may state that the document is a true and correct copy of the signed original. If it is not possible to make a copy at the same time, the original is prepared, the certificate indicates that the document is a true and correct copy of the copy on file in the mission. The word "(Copy)" is not placed on the document which is being certified; the word "(Signed)" is not placed before the indication of signatures. Moreover, a reference to the transmitting airmail, such as "Enclosure 1 to Airmail No. 18 (etc.)" is not placed on the certified document. The identification of such a document as an enclosure to an airmail may be typed on a separate slip of paper and attached to the document, but in such a manner that it may be easily removed without defacing the document.

724 TRANSMISSION OF INTERNATIONAL AGREEMENTS OTHER THAN TREATIES TO THE CONGRESS: COMPLIANCE WITH THE CASE ACT

All officers will be especially diligent in cooperating to assure compliance with the Case Act, "An Act to require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof." That Act, approved August 22, 1972 (86 Stat. 619; 1 U.S.C. 112b), provides as follows:

"The Secretary of State shall transmit to the Congress the text of any international agreement other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President."

725 PUBLICATION OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES

The attention of all officers is directed to the requirements of the Act of September 23, 1950 (64 Stat. 979; 1 U.S.C. 112(a)) which provides as follows:

The Secretary of State shall cause to be compiled, edited, indexed, and published, beginning as of January 1, 1950, a compilation entitled "United States Treaties and Other International Agreements", which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to

which any other final formality has been executed, during each calendar year. The said United States Treaties and Other International Agreements shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

730 PROCEDURES FOR CONCLUDING INTERNATIONAL AGREEMENTS

730.1 Method of Concluding Bilateral and Multilateral Agreements. An agreement may be concluded (entered into) by the process of bilateral negotiations which result either in the signing of a single instrument in duplicate or in exchange of diplomatic notes, or by the process of multilateral negotiations, usually at an international conference to which the governments concerned send official delegations for the purpose of formulating and signing an agreement.

730.2 Bilateral Treaties and Agreements. **730.2-1 Negotiation and Background Assistance.** Whenever the negotiation of a new international agreement is under consideration, the post or the Department office having primary responsibility informs the Legal Adviser of the agreement. If considered necessary, request background material and advice regarding relevant provisions in existing treaties and agreements, the general treaty relations of this Government with the government or governments concerned, and other pertinent information.

730.2-2 Office of the Legal Adviser. A *Legal Review of Draft Agreements*. As soon as tentative provisions for an agreement are considered or drafted, the Office of the Legal Adviser is requested to make available the services of an attorney-adviser to ensure that the agreement is properly drafted and agreed policy is expressed clearly and fully. The Office of the Legal Adviser prepares a *draft* in the first instance upon the request of another office.

b. Legal Clearance Required. Any draft of a proposed treaty or agreement, or any outgoing correspondence regarding the negotiation, signature, and ratification or approval, as well as the existence, status, and application, of any international agreement to which the United States is or may become a party, is cleared with the Office of the Legal Adviser and with other appropriate bureaus or offices.

730.3 Instructions to Negotiators. When an agreement is to be concluded at a foreign capital, the Department designates the American negotiator or negotiators, and he or they are given appropriate instructions. If the agreement to be negotiated is a treaty which will be referred to the Senate, the Secretary of State may at some time prior to or during the negotiations issue or request the President to issue a "full power" (see section 732) constituting formal authorization for the American negotiators to sign the agreement. Such

a "full power" is not customary with respect to an executive agreement. The receipt or possession of a "full power" is never to be considered as a final authorization to sign. That authorization is given by the Department by a written or telegraphic instruction, and no signature is affixed in the absence of such instruction. If the proposal for an agreement originates with the United States, the American negotiators as a rule furnish a tentative draft of the proposed agreement for submission to the other government for its consideration. The negotiators submit to the Department any modification of the draft or any counter-proposal made by the other government and await instructions from the Department. If the original proposal emanates from a foreign government, the mission forwards the proposal to the Department and awaits its instructions.

730.47 Preparation of Texts for Signature. If an agreement is to be signed at a post abroad as a single instrument (in duplicate), the engrossing is customarily done in the foreign office on paper supplied by it, along with a binding and ribbons to tie the pages in place. However, the mission may lend assistance if the foreign office so desires. There is no universal standard as to the kind or size of paper which must be used (each foreign office has its own "treaty paper"), and the texts may be engrossed either by typing or by printing. For every bilateral agreement there must be two originals, one for each government. Each original must embody the full text of the agreement in all the languages in which the agreement is to be signed, subject only to the principle of the "alternate."

In the case of an agreement effected by exchange of notes, the United States note is prepared in accordance with 5 FAM 220-224 and the rules prescribed in the Correspondence Handbook. The note of the foreign government is prepared in accordance with the style of the foreign office and usually in the language of that country. Whenever practicable, arrangements are made for the notes to bear the same date.

730.5 Principle of the Alternate. 730.5-1 *Arrangement of Texts.* When English and a language other than English are both used, the texts in the two languages are placed (a) in parallel, vertical columns on the same page, the columns being approximately of equal width, or (b) on opposite facing pages of the document the entire width of the typed or printed space on the page, or (c) in "tandem" fashion, that is, with one text following the other. The tandem procedure is the most widely used as it is the most expeditious.

If the first-mentioned style is used, the English text is placed in the left column of each page in the original to be retained by the United States, and the foreign text appears in the right column. In the other original, to be retained by the foreign government, the foreign text appears in the left column, and the English text in the right column.

If the two languages are placed on opposite facing pages of the document, the English text occupies the left-hand page and the foreign text the right-hand page in the United States original, and conversely in the foreign government's original.

If the two languages are placed "tandem" fashion, the English text is placed first in the United States original, and conversely in the foreign government's original.

If the parallel column style is used, each representative will sign once in the center of the page of each of two originals. If either the "opposite facing page" or "tandem" style is used, the concluding part (usually beginning "In Faith Whereof," "In Witness Whereof," "Done," etc.) should appear engrossed in parallel columns on the page on which the signature will appear, so that only one set of signatures is required for each separately bound document. If parallel columns are not feasible, the concluding paragraphs can be placed "tandem" fashion on the page on which the signatures appear.

If an oriental text is one which, from the occidental viewpoint, reads from back to front, it may be possible to join the two texts in a single document so that the signatures appear, roughly speaking, in the center of the document. Separate documents for the two languages are not desirable if any of the methods first mentioned is feasible, although extraordinary circumstances may justify exceptions. In the event of exceptional circumstances affecting the engrossing, it would be well for the negotiators to seek instructions from the Department.

730.5-2 Arrangement of Names and Signatures; Use of Titles. In the original to be retained by the United States, the United States and the plenipotentiary of the United States are named first in both the English and foreign texts, wherever the names of the countries or of the plenipotentiaries occur together conjunctively or disjunctively, and the signature of the plenipotentiary of the United States appears above the signature of the foreign plenipotentiary. Conversely, throughout both of the language texts of the original to be retained by the foreign government, that government and its plenipotentiary are named first and his signature appears above the signature of the U.S. plenipotentiary. Some countries prefer that the signatures be side by side. Where that procedure is followed, the signature of the United States plenipotentiary appears on the left and that of the foreign plenipotentiary on the right of the original to be retained by the United States; on the original to be retained by the foreign government the signature of the foreign plenipotentiary will appear on the left and the signature of the United States plenipotentiary on the right. The position of full sentences or paragraphs in the text is never transposed in the alternate procedure.

The general practice and preference of the Department of State is not to use

titles along with signatures, especially where the President or the Secretary of State signs. However, if preferred by the other party or parties concerned, titles may be typed below the place where each signer will affix his signature.

731 CONFORMITY OF TEXTS

After the documents have been engrossed on the basis of agreed texts, and before the signing of the agreement, the negotiators or other responsible officers on each side make sure that the texts in both originals of the engrossed agreement are in exact conformity with the texts in the drafts agreed to, and especially that where a foreign language text is included it is in conformity in all substantive respects with the English text. Prior to engrossing it should have been determined that the foreign-language text is essentially (i.e., as a matter of substance) in accord with the English text, and that it has received the clearance of the Department as required in section 722.6.

732 EXCHANGE OR EXHIBITION OF FULL POWERS

Each representative who is to sign a treaty is furnished a full power signed by the Head of State, Head of Government, or Minister for Foreign Affairs. More than one representative may be named in a single full power. Formal full powers may be (but customarily are not) issued also for the signing of certain executive agreements. When issued, the full power is formal evidence of the authority of the representative to sign on behalf of his government. It names the representative and shows his title and a clear indication of the particular agreement which he is entitled to sign. If the agreement itself requires the exchange of full powers, they are exchanged. If not, they may be either exchanged or exhibited by the representatives on the occasion of signing the agreement, as may be preferred by the foreign representative. If exchanged, the original full power of the foreign representative is forwarded to the Department with the United States original of the signed agreement. If the representatives retain the original of their respective full powers, the foreign representative is requested to furnish a xerox, other offset copy or a certified copy of his full power.

733 SIGNATURE AND SEALING

When the engrossing of a treaty or other international agreement which is to be signed as a single instrument has been completed, mutually convenient arrangements for its signature are made by the host government. In the case of treaties, the signatures of the representatives may be accompanied by their respective seals, ribbons being fastened in the seals and binding the document. The same procedure may be followed for other agreements signed as single instruments. It is not essential that seals be affixed unless the agreement specifically so requires. The representative's personal seal, if available, is used when seals ac-

company the signatures, except that if the other government concerned prefers official seals, the seal of the mission may be used.

(NOTE: A personal seal may consist of a signet ring with initial(s) or family crest, written initials, etc.)

734 Exchange of Ratifications. 734.1 *Time and Place for Exchange.* It is customary for a treaty to contain a simple provision to the effect that the instruments of ratification shall be exchanged at a designated capital, and that the treaty shall enter into force on the date of such exchange or at the expiration of a specified number of days or months following the date of exchange. As all treaties signed on the part of the United States are subject to ratification by and with the advice and consent of the Senate, and as the time required for action on any particular treaty cannot be foreseen, it is preferable that provision is made in the treaty that the instruments of ratification are to be exchanged "as soon as possible" rather than within a specified period.

734.2 Effecting and Exchange. In exchanging instruments of ratification the representative of the United States hands to the representative of the foreign government a duplicate original of the President's instrument of ratification. In return, the representative of the foreign government hands to the representative of the United States the instrument of ratification executed by the head or the chief executive of the foreign government. A protocol, sometimes called "process-verbal" or "Protocol of Exchange of Ratifications" attesting the exchange is signed by the two representatives when the exchange is made. No full power is required for this purpose. The protocol of exchange is signed in duplicate originals, one for each government, and the principle of the alternat is observed as in the treaty. Before making the exchange and signing the protocol of exchange, the diplomatic representative of the United States satisfies himself that the ratification of the foreign government is an unqualified ratification, or subject only to such reservations or understandings as have been agreed to by the two governments.

734.3 Notification of Date of Exchange. In all cases, but particularly in those in which the treaty enters into force on the day of the exchange, it is essential that the mission notify the Department by telegram when arrangements have been completed for the exchange, and also when the exchange actually takes place. By the first pouch after the exchange takes place, if possible, the mission forwards to the Department the instrument of ratification of the foreign government and the United States Government's original of the signed protocol of exchange. The Department then will take such steps as may be necessary to have the proclamation of the treaty executed by the President.

740 MULTILATERAL TREATIES AND AGREEMENTS

740.1 General. The procedures for the making of multilateral agreements are in

many respects the same as those for the making of bilateral agreements, e.g., the general requirements in regard to full powers, ratification, proclamation and publication. This subchapter covers those procedures which are at variance with bilateral procedure.

740.2 Negotiation. 740.2-1 *Function of International Conference.* The international conference is the device usually employed for the negotiation of multilateral agreements. The greater the number of countries involved, the greater the necessity for such a conference. If only three or four countries are involved, it may be convenient to carry on the preliminary negotiations through correspondence and have a joint meeting of plenipotentiaries to complete the negotiations and to sign the document.

740.2-2 Invitation. Traditionally, the international conference was convened by one government extending to other interested governments an invitation (acceptance usually assured beforehand) to participate, the host government bearing most, if not all, of the expense incident to the physical aspects of the conference. This is still often the practice, but increasing numbers of conferences have been convened under the auspices of the call of international organizations.

740.2-3 Statement of Purpose. When a call is made or invitations are extended for a conference for the formulation of a multilateral agreement, it is customary for a precise statement of purpose to accompany the call or the invitations. Sometimes, the invitation is also accompanied by a draft agreement to be used as a basis for negotiations. If the conference is called under the auspices of an international organization, the precise statement of purpose or the draft agreement may be prepared in preliminary sessions of the organization or by the secretariat of the organization.

740.2-4 Instructions to Negotiators. The U.S. delegation to a conference may be comprised of one or more representatives. As a rule, the U.S. delegation is furnished written instructions by the Department prior to the conference in the form of a position paper for the U.S. delegation cleared with the Secretary or an officer specifically authorized by him and with other appropriate Department officers, under the procedures described in section 723.3. The Office of the Legal Adviser in all instances reviews drafts of international conventions to be considered in meetings of an international organization of which the United States is a member; when necessary, it also provides legal assistance at international conferences and meetings.

740.2-5 Final Act of Conference. The "Final Act" of a conference must not contain international commitments. A Final Act must be limited to such matters as a statement or summary of the proceedings of the conference, the names of the states that participated, the organization of the conference and the committees established, resolutions adopted, the drafts of international agreements formulated for consideration by governments concerned, and the like.

If an international agreement is to be opened for signature at the close of the conference, a text thereof may be annexed to the Final Act but must not be incorporated in the body thereof; the text to be signed must be prepared and bound separately for that purpose. Where a Final Act appears to embody international commitments, the United States representative reports the same to the Department and awaits specific instructions before taking any further action.

741 Official and Working Languages. a. *General.* The working languages of the conference and the official languages of the conference documents are determined by the conference. A conference does not necessarily adopt all of the same languages for both purposes. It is customary and preferable for all the official languages in which the final document is prepared for signature to be designated as having equal authenticity. It is possible, however, for the conference to determine, because of special circumstances, that in the event of dispute one of the languages is to prevail and to include in the text of the agreement a provision to that effect. Before a United States delegation concurs in any such proposal, it must request instructions from the Department.

b. *English-Language Text.* Negotiators will use every practicable effort to assure that an English-language text is part of the authentic text of any multilateral treaty negotiated for the United States. Where any question exists on this subject the negotiators should seek further instructions.

742 ENROSSING

742.1 Language or Languages Used in Texts. The multilateral agreement drawn up at an international conference is engrossed for signature in the official language or languages adopted by the conference. (See section 741.) The engrossing ordinarily will be done by the conference secretariat.

742.2 The Principle of the Alternat. The principle of the alternat (see section 730.5) does not apply in the case of a multilateral agreement, except in the remote case when an agreement between three or four governments is prepared for signature in the language of all the signatories and each of those governments is to receive a signed original of the agreement. Customarily, a multilateral agreement is prepared for signature in a single original, comprising all the official languages. That original is placed in the custody of a depositary (either a government or an international organization) which furnishes certified copies to all governments concerned.

742.2-1 Arrangement of Texts. The arrangement of multilateral agreement texts varies, depending largely on the number of languages used. As in the case of bilateral agreements, however, the basic alternatives in the case of multilateral agreements are parallel-columns, facing-pages, or "tandem," as follows: a. *Parallel Columns.* If an agreement is to be signed in only two languages, the preferred method of arrangement of the texts is in parallel, vertical columns. This

method may be used also if only three languages are used, but the three columns are necessarily so narrow that the method has been rarely used in such cases. When there are four official languages, however, it is possible to use the parallel-column method by placing two of the language texts on a left-hand page and the other two language texts on the facing right-hand page; this method has been used often and to good advantage in various inter-American agreements with English, Spanish, French, and Portuguese. If any of the languages is oriental, the parallel-column method may be inexpedient and one of the other methods may be necessary.

b. *Facing Pages.* If an agreement is to be signed in only two languages, and circumstances make it necessary or desirable, the facing-page method may be used for engrossing the texts for signature, so that one of the language texts will be on a left-hand page and the other will be on the facing right-hand page. When this method is used, it is desirable that at least the concluding part (usually beginning "In Faith Whereof," "In Witness Whereof," "Done," etc.) be engrossed in parallel columns on the page at the end of the texts in both languages so that only one set of signatures is required. If parallel columns are not feasible, the concluding paragraphs can be placed tandem-fashion (one language text after another) on the page at the end of the texts in both languages.

c. *Tandem.* If neither the parallel-column nor the facing-page arrangement is feasible for an agreement to be signed in two languages, and especially if signed in three or more languages, the texts may be arranged in tandem-style, i.e., one complete text following the other. This allows readily for any number of official texts; the tandem-style precedent of the Charter of the United Nations is followed for the preparation of agreements formulated under the auspices of the United Nations. It is desirable, whenever practicable, that the concluding part of each text be placed with the concluding part of each of the other texts in parallel columns on the page on which the first of the signatures appears, although the tandem arrangement described at the end of section 742.2-1b can be used.

742.2-2 *Arrangement of Names and Signatures.* The arrangement of names and signatures, although it may seem a minor matter, sometimes presents difficulties in the case of multilateral agreements. There may be variations of arrangements, depending on particular factors, but the arrangement most generally used is alphabetical according to the names of the countries concerned. An alphabetical listing, however, presents the further question, even when there are only two languages, of what language is to be used in determining the arrangement. It is a common practice to use the language of the host government or for an agreement formulated under the auspices of an international organization, to follow the precedents established by

that organization. It is possible, in the event that agreement could not be reached regarding the arrangement of names of countries and signatures of plenipotentiaries, to have a drawing of lots, a device seldom used. In any event, the question is one to be determined by the conference.

742.3 *Conformity of Texts.* It is the primary responsibility of the delegations, acting in conference, to determine the conformity of the agreement texts which are to be signed. However, the conference secretariat has a responsibility for checking the texts carefully to ensure that, when put in final form for signature, the texts are in essential conformity.

743 FULL POWERS

In the case of a multilateral agreement drawn up at an international conference, this Government customarily (almost invariably, in the case of a treaty) issues to one or more of its representatives at the conference an instrument of full power authorizing signature of the agreement on behalf of the United States. In some instances, issuance of the full power is deferred until it is relatively certain that the agreement formulated is to be signed for the United States (see section 732). Ordinarily, that full power is presented by the representatives to the secretary general of the conference upon arrival of the delegation at the conference site. It may be submitted in advance of arrival, but usually that is not necessary. When the conference has formally convened, it usually appoints a credentials committee, to which all full powers and other evidence of authorization are submitted for examination. The full powers and related documents are retained by the credentials committee or the secretary general until the close of the conference. At the close of the conference, the full powers, related documents, and the signed original of the agreement are turned over to the government or the international organization designated in the agreement as the depositary authority, to be placed in its archives.

744 SIGNATURE AND SEALING (SEE ALSO SECTION 733)

744.1 *Signature.* Most multilateral agreements are signed. Some, however, are adopted by a conference or organization after which governments become parties by adherence, accession, acceptance or some other method not requiring signature (e.g., conventions drawn up and adopted at sessions of the International Labor Organization). Procedures for the deposit of an instrument of adherence, accession, or acceptance are similar to procedures for the deposit of instruments of ratification. In some cases, accession or approval can be accomplished by formal notice through diplomatic channels.

744.2 *Seals.* Multilateral treaties do not usually provide for the use of seals along with the signatures of representatives. The large number of signatures would make the use of seals difficult and cumbersome.

745 DISPOSITION OF FINAL DOCUMENTS OF CONFERENCE

At the close of a conference, the remaining supply of working documents (e.g., records of committee meetings, verbatim minutes, etc.) usually is placed in the custody of the host government or the organization which called the conference for appropriate disposition. It is not proper for definitive commitments constituting part of the agreement to be embodied in such working documents. Definitive commitments must be incorporated only in a final document to be signed or adopted as an international agreement. The final documents of the conference may include a Final Act (see section 740.2-5) and, separately the text(s) of agreement(s). The practice of signing a Final Act is still followed in many cases. In any event, any agreement formulated at the conference must be engrossed as a separate document and signed or adopted. The signed or adopted originals of the final documents of the conference are turned over to the government or international organization designated in such documents as depositary. If the conference is not held under the auspices of an organization, it is customary for the host government to be designated depositary, but it might be appropriate, even in such case, to name an organization or international organization, as depositary. The decision is made by the conference, with the concurrence of the government or international organization concerned.

746 PROCEDURE FOLLOWING SIGNATURE

746.1 *Understandings or Reservations.* If it is necessary to inform other governments concerned, and perhaps obtain their consent, with respect to an understanding or reservation imposed by the Senate in its advice and consent, this Government communicates with the depositary, which then carries on the necessary correspondence with the other governments concerned.

746.2 *Deposit of Ratification.* When the depositary for a multilateral agreement is a foreign government or an international organization, the United States instrument of ratification (or adherence, accession, acceptance, etc.) is sent by the Department to the appropriate Foreign Service mission or to the United States representative to the organization if there is a permanent representative. The mission or the representative deposits it with the depositary authority in accordance with the terms of the accompanying instruction from the Department concerning the time of deposit. When this Government is depositary for a multilateral agreement, posts are not authorized to accept instruments of ratification of foreign governments, i.e., the foreign government cannot deposit its instrument with the post. If a post is requested to transmit an instrument of ratification to the Department, it must make clear to the foreign government that the post is acting only as a transmitting agent and that the ratification

cannot be considered as accepted for deposit until received and examined by the Department.

746.3 Registration. (See also section 750.2-3.) It is generally recognized that the depositary for a multilateral agreement has a primary responsibility for such registration. Normally, the depositary has custody not only of the original document of agreement but also of instruments of ratification and other formal documents. Consequently, the depositary is the most authoritative source of information and documentation.

750 PROCEDURAL RESPONSIBILITIES

Carrying out and providing advice and assistance respecting the provisions of this chapter are the responsibility of the Assistant Legal Adviser for Treaty Affairs, who:

a. Makes all arrangements and supervises ceremonies at Washington for the signature of treaties or other international agreements; and prepares or arranges for the preparation of texts of treaties and other agreements to be signed in Washington;

b. Prepares or arranges for preparation of the Secretary of State's reports to the President, and the President's messages to the Senate for transmission of treaties for advice and consent to ratification;

c. Prepares instruments of ratification or adherence, instruments or notifications of acceptance or approval, termination notices, and proclamations with respect to treaties or other international agreements;

d. Makes arrangements for the exchange or deposit of instruments of ratification, the deposit of instruments of adherence, the receipt or deposit of instruments or notifications of acceptance or approval, and termination notices, with respect to treaties or other international agreements;

e. Prepares instructions to posts abroad and notes to foreign diplomatic missions at Washington respecting matters in d;

f. Takes all measures required for the transmission to the Congress of all international agreements other than treaties, as required by the Case Act (see Section 724), and the publication and registration of treaties and other international agreements to which the United States is a party (see sections 725 and 750.2-3).

g. Reviews all drafts of international agreements, proposals by other Governments or international organizations, instructions and position papers, all Circular 175 requests and accompanying Memorandums of Law.

750.1 Engrossing Documents for Signature. After the text of a treaty or other agreement is approved in writing in accordance with section 722.7, the document is engrossed for signature in the Department.

Adequate time (normally 7 business days) is allowed for the engrossing (typing on treaty paper), comparing, etc., of the treaty or other agreement to be signed in order to assure sufficient time for the preparation of accurate texts in duplicate for signature, including, in

the case of documents to be signed in a foreign language sufficient time for the Language Services Division to prepare any translations required, check any existing foreign-language draft, and check the engrossed foreign-language text. The determination of the amount of time required in each instance to complete the engrossing is the responsibility of the Assistant Legal Adviser for Treaty Affairs.

750.2 Publication and Registration.

750.2-1 Publication of Texts. After the necessary action has been taken to bring into force the treaty or other international agreement concluded by the United States, it is published promptly in the *Treaties and Other International Act Series* issued by the Department. After publication in that series, the text of the treaty or other agreement is printed in the annual volume (which may consist of two or more bindings) of *United States Treaties and Other International Agreements* as required by law (see section 725). Treaties and other agreements concluded prior to January 1, 1950, were published in the *United States Statutes at Large*.

750.2-2 Responsibility for Other Treaty Publications. The Office of the Assistant Legal Adviser for Treaty Affairs maintains the annual publication *Treaties in Force*, an authoritative guide to the text and status of treaties and other international agreements currently in force for the United States. It also compiles and has published, in addition to the publication referred to in section 750.2-1, other volumes containing texts of treaties and other agreements as required or authorized by law. The "Treaty Information" part of the Department of State BULLETIN is compiled by that office.

750.2-3 Registration.

Article 102 of the United Nations Charter requires that every treaty and every international agreement entered into by a member of the United Nations be registered, as soon as possible, with the Secretariat and published by it. Article 83 of the Chicago Aviation Convention of 1944 requires registration of aviation agreements with the Council of the International Civil Aviation Organization.

750.3 United States as Depositary. a. Inquiries from foreign diplomatic missions at Washington and from American diplomatic missions abroad with respect to the preparation or deposit of instruments relating to any multilateral agreement of which the United States is depositary are referred to the Assistant Legal Adviser for Treaty Affairs. That officer is to be notified immediately of the receipt of any such document anywhere in the Department, inasmuch as a depositary is required to ascertain whether those documents are properly executed before accepting them for deposit, to keep accurate records regarding them, and to inform other governments concerned of the order and date of receipt of such documents.

b. Before any arrangements are proposed or agreed to for the United States to serve as depositary for any international agreement the views of the Assis-

tant Legal Adviser for Treaty Affairs will be obtained.

750.4 Records and Correspondence Custody. a. The Assistant Legal Adviser for Treaty Affairs compiles and maintains authoritative records regarding the negotiation, signature, transmission to the Senate, and ratification or approval, as well as the existence, status, and application, of all international agreements to which the United States is or may become a party and, so far as information is available, of agreements between other countries to which the United States is not a party. Inquiries on these subjects are addressed to, and outgoing communications cleared with, the Office of the Legal Adviser.

b. To ensure that the records regarding the matters described in this section are complete and up to date, it is important that all relevant papers be referred to the Office of the Legal Adviser.

c. The Assistant Legal Adviser for Treaty Affairs is responsible for the custody of originals of bilateral agreements and certified copies of multilateral agreements pending entry into force and completion of manuscripts for publication. Following publication, such originals and certified copies are transferred to the National Archives. The Assistant Legal Adviser for Treaty Affairs retains custody of signed originals of multilateral agreements for which the United States is depositary, together with relevant instruments of ratification, adherence, acceptance, or approval, as long as those agreements remain active.

[SEAL] CHARLES N. BROWER,
Acting Legal Adviser
Department of State.

July 23, 1973.

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APPENDIX C

LEGISLATION PENDING IN THE 93D CONGRESS RELATING TO
THE MAKING OF INTERNATIONAL AGREEMENTSH. Con. Res. 426Mr. Aspin

DIGEST:

4/4/74

Foreign Affairs

Expresses the sense of Congress concerning the President not signing any agreement with a foreign country or international organization during the period from his impeachment by the House of Representatives until the Senate votes on such impeachment.

ACTIONS:

4/4/74 Referred to House Committee on Foreign Affairs

H. J. Res. 147Mr. Rarick

DIGEST:

1/9/73

Judiciary

Constitutional Amendment - Provides that the President shall have the power, by and with the advice and consent of the Senate and House of Representatives, to make treaties. Requires for approval that for each treaty two-thirds of the Senate and the House of Representatives must concur.

ACTIONS:

1/9/73 Referred to House Committee on Judiciary

H. J. Res. 455Mr. Bingham

DIGEST:

3/22/73

Foreign Affairs

Requires any executive agreement made on or after the date of enactment of this joint resolution to be transmitted to the Secretary of State, who shall then transmit that agreement (bearing an identification number) to the Congress. Provides that any such agreement the immediate disclosure of which would, in the opinion of the President, be prejudicial to the security of the United States shall instead be transmitted by the Secretary to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate written injunction of secrecy to be removed only upon due notice from the President. Requires each committee to personally notify the Members of its House that the Secretary has transmitted such an agreement with an injunction of secrecy, and such agreement shall thereafter be available for inspection only by such Members.

Provides that any such executive agreement shall come into force with respect to the United States at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the executive agreement is transmitted to Congress or such committees, as the case may be, unless, between the date of transmittal and the end of the sixty-day period, both Houses pass a concurrent resolution stating in substance that both Houses do not approve the executive agreement.

ACTIONS:

3/22/73 Referred to House Committee on Foreign Affairs

H. J. Res. 584

5/30/73

Mr. Ashbrook

Judiciary

DIGEST:

Constitutional Amendment - States that any provision of a foreign treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect. Provides that no treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States. States that all executive or other agreements between the President or any international organization shall be made only in the manner prescribed by law, and shall be subject to the limitations imposed on treaties.

ACTIONS:

5/30/73 Referred to House Committee on the Judiciary

H. J. Res. 977

4/10/74

Mr. Kemp

Judiciary

DIGEST:

Constitutional Amendment - States that any provision of a foreign treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect. Provides that no treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States. States that all executive or other agreements between the President or any international organization shall be made only in the manner prescribed by law, and shall be subject to the limitations imposed on treaties.

ACTIONS:

4/10/74 Referred to House Committee on the Judiciary

H. J. Res. 1021

5/20/74

Mr. Pepper

Judiciary

DIGEST:

Constitutional Amendment - Provides that the President shall have power, by and with the advice and consent of the Senate and the House of Representatives, to make treaties; provided a majority of the Members of each House present concur in giving such advice and consent, and provided that each House by a majority of its Members present shall determine the rules by which it shall be governed in giving its advice and consent to the making of treaties and executive agreements requiring the concurrence of the Congress.

ACTIONS:

5/20/74 Referred to House Committee on the Judiciary

S. 445

Mr. Case

DIGEST:

Prohibits funds to be obligated for the implementation of the Azores base agreement with Portugal until that agreement is submitted to the Senate as a treaty for its advice and consent.

ACTIONS:

1/18/73 Referred to Senate Committee on Foreign Relations

1/18/73

Foreign Relations

S. 446

Mr. Case

DIGEST:

Prohibits any funds from being obligated or expended to carry out any agreement entered into between the United States Government and the government of any foreign country providing for the establishment of a military installation in that country at which units of the Armed Forces of the United States are to be assigned to duty, or revising or extending the provisions of any such agreement, unless such agreement is submitted to the Senate and receives its advice and consent.

ACTIONS:

1/18/73 Referred to Senate Committee on Foreign Relations

1/18/73

Foreign Relations

S. 1472

Mr. Ervin

DIGEST:

Provides that any executive agreement made on or after the date of enactment of this Act shall be transmitted to the Secretary of State who shall then transmit such agreement to the Congress. States that if, in the opinion of the President, the immediate disclosure of such an agreement would be prejudicial to the security of the United States the agreement shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House under an appropriate written injunction of secrecy to be removed only upon due notice from the President.

Provides that any such agreement shall come into force with respect to the United States at the end of the first period of 60 calendar days after the date on which the executive agreement is transmitted to the Congress or such committees, as the case may be, unless both Houses pass a concurrent resolution stating in substance that both Houses do not approve the executive agreement.

Sets forth the procedure to be followed by the Congress in the case of concurrent resolutions described above.

4/5/73

Judiciary

ACTIONS:

4/5/73 Referred to Senate Committee on Judiciary, then to the Committee on Foreign Relations, if and when reported.
 4/10, 11, 12/73 Public hearings by Judiciary. Printed.
 6/13/73 Reported by Separation of Powers Subcommittee to the full committee. (See S. 3830.)

S. 3830Mr. Ervin

7/30/74

Foreign Relations

DIGEST:

Requires that any international executive agreement made by the executive branch shall be transmitted to the Congress, which may act within 60 days to disapprove it.

Sets forth procedures for such consideration by the Congress.

ACTIONS:

7/30/74 Referred to Senate Committee on Foreign Relations
 8/19/74 Rereferred to Senate Committee on the Judiciary

S. J. Res. 106

5/8/73

Mr. Hathaway

Judiciary

DIGEST:

Constitutional Amendment - Requires the advice and consent of both Houses of Congress before any treaty or agreement providing for the commitment of United States armed forces to a foreign nation may be made.

ACTIONS:

5/8/73 Referred to Senate Committee on Judiciary

S. Res. 99

4/12/73

Mr. Hartke

Foreign Relations

DIGEST:

Makes it the sense of the Senate that the President is required to consider the Senate as a Council of Advice with respect to the negotiation of treaties and other agreements with any foreign government.

Makes it the sense of the Senate that any persons appointed to represent the United States or the President in negotiations with foreign governments are "public ministers" of the United States within the language of the Constitution, and, therefore, no person may be constitutionally appointed to conduct such negotiations unless such person is first nominated to an office to conduct such negotiations, and the Senate advises and consents to his nomination.

Declares that the President should submit to the Senate, for its advice and consent all agreements of national importance previously concluded with foreign governments that have not been submitted to the Senate for its advice and consent and should submit a report on all negotiations presently being conducted with respect to possible agreements.

Enumerates those appointments and negotiations which are excluded from the provisions of this resolution.

ACTIONS:

4/12/73 Referred to Senate Committee on Foreign Relations