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Procedures for Declassifying Intelligence of Public Interest

The classification regime exists as a means of safeguarding sensitive intelligence sources and methods, or other kinds of sensitive information that is relevant to the national security of the United States. On occasion, Congress may consider declassifying intelligence, or other types of national security information, when the public interest may outweigh the national interest in keeping it classified. Such intelligence, for example, may provide evidence of war crimes, insight into diplomatic initiatives, or transparency into government activities. While some Members of Congress may disagree over the types of intelligence information that warrant declassification, Members may also view existing executive branch policy governing the routine declassification of information as inadequate in the face of a more pressing need to inform the public.

Procedures established in both the executive and legislative branches provide for initiating action to declassify intelligence. Each involves a deliberate process for evaluating the need to serve the public interest alongside the requirement to protect intelligence sources and methods.

In 2015, the Director of National Intelligence (DNI) issued *Principles of Intelligence Transparency of the Intelligence Community* "to facilitate IC decisions on making information publicly available" to increase the public's understanding of the Intelligence Community's mission and activities while continuing to protect national security. These principles included "provid[ing] timely transparency on matters of public interest," or explaining why, in particular circumstances, information cannot be made public.

This product provides an overview of common legislative and executive branch procedures for declassifying intelligence. For some procedures, Congress retains the final authority on whether or not to declassify information. For other procedures, the President makes the final determination. In still others any U.S. person can request declassification of an originating agency, which makes the final determination.

Automatic Declassification

Executive Order (E.O.) 13526, *Classified National Security Information*, signed by President Barack Obama on December 29, 2009, provides guidance to federal agencies on classification and declassification of information. The originating agency that classifies particular intelligence information also has the authority to declassify it, consistent with the guidelines provided in E.O. 13526, which references but does not define the term *public interest*. The original classification authority establishes a date for declassification, which can be up to 25 years from the date the information was initially classified. If the original classification authority does not specify a date for declassification, the information would be automatically declassified after 10 years. The original classification authority may decide to declassify information earlier than the established date if it determines the information no longer meets the standards for classification. In addition to the original classification authority, the DNI, or—if the DNI directs—the Principal Deputy DNI, may declassify or direct the declassification of intelligence information after consulting with the originating agency head.

Exemptions from Automatic Declassification

E.O. 13526 provides for exempting information from automatic declassification in two situations:

(1) in particular circumstances where continued classification is necessary if the original classification authority can show, for example, that declassification would reveal the identity of a human source, or the relationship with the intelligence service of a foreign government, or facilitate the development of weapons of mass destruction; or

(2) where declassification is appropriate "in some exceptional cases [where] the need to protect such information may be outweighed by the public interest."

Declassification by Congress

Section 8 of Senate Resolution 400 §8, 94th Congress, 2nd Sess. (1976)

Standing rules of the Senate Select Committee on Intelligence (SSCI) give the committee the authority to declassify and publicly disclose information in its possession, after a vote affirming that the disclosure would serve the public interest. Rules require the SSCI to notify and consult with the Senate Majority and Minority Leaders prior to notifying the President. This procedure gives the President an opportunity to object in writing to the disclosure within a five-day window of being notified of the SSCI vote. In the statement, the President is to explain what national security interests outweigh the public interest and justify keeping the information classified. In such instances, the question of disclosure is referred to the entire Senate in closed session for consideration. The Senate can approve or disapprove the disclosure of all or part of the information in question, or refer all or part of the information back to the SSCI for a final decision.

Clause 11(g)(1) of House Rule X

Standing rules of the House of Representatives allow the House Permanent Select Committee on Intelligence (HPSCI) to disclose classified information after a vote by the committee that it would be in the public interest to do so. The HPSCI is to notify the President, who then has an opportunity to object in writing within five days of notification, providing reasons that national security interests outweigh the public interest. The HPSCI may then, by majority vote, refer the matter to the House with a recommendation. If the House does not approve the HPSCI

recommendation, the matter is referred back to the HPSCI for further review.

Statutory Action

Congress has the ability to direct a declassification review and release of classified intelligence through statutory action. Section 310 of the Intelligence Authorization Act for Fiscal Year 2022 (Division X of P.L. 117-103), for example, directed the DNI, in coordination with elements of the Intelligence Community, to "appropriately" declassify and share with the public information relating to the September 11, 2001 terrorist attacks.

Declassification by the President

Public Interest Declassification Board

Requests for declassification can also be made to the Public Interest Declassification Board (PIDB). The Public Interest Declassification Act of 2000 (Title VII of P.L. 106-567) established the PIDB to provide advice to the President and other senior national security officials "on the systematic, thorough, coordinated, and comprehensive identification, collection, review for declassification, and release to Congress, interested agencies, and the public of declassified records and materials ... that are of archival value, including records and materials of extraordinary public interest." The PIDB meets monthly to make recommendations on declassification of records to the President, who makes a final decision. In 2021, for example, the PIDB recommended the President declassify and release particular records related to the September 11 terrorist attacks. In making its recommendations, the PIDB included input from Congress "made by the committee of jurisdiction or by a member of the committee of jurisdiction, to declassify certain records, to evaluate the proper classification of certain records, or to reconsider a declination to declassify specific records" (50 U.S.C. §3355a(b)(5)).

Executive Order

The President has the authority under the Constitution to declassify, in the public interest, documents that originated in any department or agency of the executive branch. One example is E.O. 14040, *Declassification Reviews of Certain Documents Concerning the Terrorist Attacks of September 11, 2001*, signed by President Biden on September 3, 2021. This executive order directed government departments and agencies that originated records pertaining to September 11 to conduct declassification reviews to disclose as much of this material as possible in the public interest.

Declassification by an Agency

Mandatory Declassification Review

Declassification in the public interest may result from a favorable decision by an originating agency following a Mandatory Declassification Review. Any U.S. citizen, permanent resident alien, or U.S. organization can request a Mandatory Declassification Review under the provisions of Section 3.5 of E.O. 13526. If requested, an originating agency "shall" conduct the review (thus, it would be "mandatory"). A request is to describe the documents requested in sufficient detail to enable the agency to locate them with reasonable effort. According to E.O. 13526, cases involving declassification in the public interest must be: "referred to the [originating] agency head or the senior agency official. That official will determine ... whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure."

Agencies develop their own procedures for handling requests. If a request for mandatory declassification review is denied, agencies have their own processes for handling appeals. In the event an appeal within the originating agency is denied, further appeals can be made to the Interagency Security Classification Appeals Panel (ISCAP).

Freedom of Information Act Request

Any U.S. citizen or permanent resident alien can also file a request under the Freedom of Information Act (FOIA) (5 U.S.C. §552) to make available records and information of any agency of the executive branch of government public. This measure may be of limited use as a means of declassifying information, since "properly classified" national security information is exempted from release under the FOIA. However, a FOIA request could be made concerning information that is believed to no longer meet classification standards under E.O. 13526. It might include, for example, information that is largely of historical value, the release of which would no longer compromise intelligence sources and methods or pose a risk to national security. If denied, a requestor can sue via the courts.

Issues for Congress

- A working assumption in declassification decisions is that the need to serve the public interest be balanced by a thorough review of the risk of exposing sources and methods. Are congressional rules for declassification effective in assessing risk while ensuring the public interest is well served?
- Documenting declassification decisions with appropriate markings can avoid confusion as to how documents should be handled. Do each of the existing authorities adequately prescribe requirements for adhering to a process for documenting declassification decisions?

Relevant Legislation

5 U.S.C. §552, *Freedom of Information Act*

50 U.S.C. §3355, *Public Interest Declassification Act*

Other Resources

National Security Strategy of the United States, October 2022

E.O. 13526, *Classified National Security Information*

32 CFR 2001.33, *Mandatory Review for Declassification*

32 CFR 2003, *Interagency Security Classification Appeals Panel (ISCAP) Bylaws, Rules, and Appeal Procedures*

Michael E. DeVine, Analyst in Intelligence and National Security

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