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GOVERNMENT SECRECY ACT OF 1997

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 712

TO PROVIDE FOR A SYSTEM TO CLASSIFY INFORMATION IN THE
INTERESTS OF NATIONAL SECURITY AND A SYSTEM TO DECLASSIFY
SUCH INFORMATION

JULY 22, 1998.—Ordered to be printed

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THE GOVERNMENT SECRECY REFORM ACT

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JULY 22, 1998.—Ordered to be printed
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Mr. THOMPSON, from the Committee on Governmental Affairs,
submitted the following

REPORT

[To accompany S. 712]

The Committee on Governmental Affairs, to which was referred the bill (S. 712) to provide for a system to classify information in the interests of national security and a system to declassify such information, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. BACKGROUND

For centuries, governments have been preoccupied with keeping secrets. Information is power, and those that have access to it are powerful. The democracy of the United States is founded, however, on the principle that the people are sovereign and must be entrusted with the power of information if they are to make informed choices and decisions. Historically, the United States Government was perhaps the most open of all governments. For example, even during the Civil War, troop movements were often reported in the newspapers, despite the efforts of military commanders to prevent the publication of such reports.

The 20th century brought change to this historic openness, especially as the United States began to play an increasingly larger role in world affairs. The importance of preserving the secrecy of sensitive information was emphasized by the British interception of the famous Zimmerman telegram, which sealed our nation's entry into the First World War. In 1917, during that war, Congress enacted the Espionage Act. In the aftermath of World War I and the Russian Revolution, fear of international Communism ran deep. A domestic national security apparatus was developed, and the Espionage Act was used to target domestic groups suspected of subversive activity.

The Second World War thrust the United States into the forefront of world nations. The successful conduct of the war depended on preventing the enemy from learning sensitive information and war plans. Unlike the Civil War, elaborate systems were put in place to guard against espionage and other means by which the Axis powers could uncover military plans, industrial production schedules, scientific developments and experiments, cryptographic information, and any other information that could help the enemy. Those in power knew the importance of secrecy, because they also knew how dependent we were on our success in learning sensitive information from our enemies, through cryptographic or human intelligence sources.

Once World War Two ended, however, the secrecy system and the bureaucracy that supported it did not recede. Our democracy remained at war, although it had become a Cold War against the Soviet Union, its allies, and its agents. And the stakes were significantly greater than at any time in history, because we had entered the nuclear age, and the threat of annihilation hung over our nation and the world. A foreign intelligence apparatus needed to be retained, and the government had to continue to protect information, the release of which would legitimately cause harm to the nation's security.

In order to promote the national defense, Congress enacted in 1947 the National Security Act, which not only consolidated our military into the Department of Defense, but established a statutory basis for our nation's foreign intelligence system, which had been developed by the military during the Second World War and was preserved after the war by President Truman. See 11 Fed. Reg. 1337 (February 5, 1946) (creation of National Intelligence Authority). The National Security Act established the Central Intelligence Agency and explicitly authorized its director to protect intelligence sources and methods from unauthorized public disclosure. Act of July 26, 1947, Section 102(d)(3), Pub. L. 80-253, 61 Stat. 495, 498. This responsibility remains to this day. See 50 U.S.C. § 403-3(c)(6).

Acting pursuant to the authority of the National Security Act and to his constitutional authority as Commander-in-Chief, President Truman established the current form of the system for classifying national security information in 1951 by issuing Executive Order 10290. Since that time, except for nuclear secrets, the system for protecting national security information has been based on a series of executive orders. Since President Truman, five successive executive orders have modified the government's secrecy standards, and since 1978, only 20 years ago, there have been three different executive orders issued revising the handling of national security information. The Committee understands that until it began its consideration of S. 712, the Administration was considering making additional changes to the executive order issued by President Clinton just three years ago.

The development and implementation of a sound system for protecting national security information need not depend exclusively on executive orders. As an example, one need only look to the Atomic Energy Act of 1954, 68 Stat. 940 (Aug. 30, 1954), currently codified at 42 U.S.C. § 2161 et seq., in which Congress established

the policy and procedures for the handling of information related to atomic energy. This system attempts to balance the needs of national security with those of scientific and technological development.

The national security apparatus and the system for protecting national security information served the nation well for 50 years. The world today is very different, however, than it was in 1947 or 1951, or even 1989. The Cold War has ended. The Soviet Union, its allies, and its client states collapsed. The principles of democracy, liberty, the recognition of the inalienable rights of man prevailed. In the wake of the Cold War, we have entered a period of rapid globalization. Foreign trade among nations is surging. And from the Atomic Age we have moved to the Information Age. Computers store vast amounts of information and communications systems to make that information immediately available around the world. No longer is information itself the key to political, military, and economic dominance. With the vast amounts of information available, dominance today depends on the ability to analyze information, to determine and separate out what is important from what is not, and to act on it. Improved analysis comes not from suppressing information, but from making it available and subjecting it to broad scrutiny.

While there is a need for greater openness, it would be shortsighted to believe that as a nation we can give up entirely on the need to protect sensitive information from disclosure. The world remains dangerous, even if the source and nature of the threats to our national security are different. Some argue the world is even more dangerous today than it was during the Cold War because of the greater instability. Along with open trade in legitimate goods comes the smuggling of drugs, weapons, including the potential for biological and chemical weapons, and nuclear materials. Terrorist groups link up with transnational criminal organizations and rogue nations to attack our national interests and undermine world stability. Ethnic and religious differences threaten the peace in many parts of the world and local conflicts can always involve the world's dominant power. Some nations continue to engage ours as a potential enemy, economically and politically, if not always militarily.

A strong U.S. presence, political, diplomatic, military, or economic, is needed around the world to combat the forces of international lawlessness. To support these efforts to promote our vital national interests, our nation must continue to rely on military and intelligence services that are second to none. The need to protect sensitive national security information to support these services remains.

To adapt to the changes in the world, the federal government must reinvent the balance that has been in place since the start of the Cold War. A new policy of protecting national security information must recognize the new nature of both the technological environment, with widespread access to hitherto unimagined amounts of information in real time, and the threat. The policy also needs to take account of the costs and benefits of secrecy. While both can be difficult to quantify, the Information Security Oversight Office has estimated the total cost to the taxpayers of efforts to preserve the security of sensitive national security information

to exceed \$5 billion annually. As government struggles to adjust to limited resources, it needs to evaluate what portion of these costs continues to be warranted.

As bureaucracies have a tendency to be self-perpetuating and to attempt to contort the missions and focus of government in such a way as to invariably place themselves in the center of its operations, Congress, the people's body, decided to undertake to review the entire federal secrecy apparatus by establishing the Commission on Protecting and Reducing Government Secrecy (the Commission).

The Commission was authorized by Title IX of the Foreign Relations Authorization Act for Fiscal Years 1994 and 1995, signed into law by President Clinton on April 30, 1994. Pub. L. 103-236. It was charged by Congress with making recommendations "to reduce the volume of information classified and thereby to strengthen the protection of legitimately classified information."

The twelve Commissioners (four Members of Congress, two government officials, and six private citizens) were selected jointly by the President and the congressional leadership. Senator Daniel Patrick Moynihan, a former Vice Chairman of the Senate Select Committee on Intelligence, served as Chairman of the Commission and Representative Larry Combest, then-Chairman of the House Permanent Select Committee on Intelligence in the 104th Congress, served as Vice Chairman. The other congressional Commissioner were Senator Jesse Helms, Chairman of the Senate Committee on Foreign Relations, and Representative Lee Hamilton, Ranking Minority member of the House Committee on International Relations and former Chairman of the House Permanent Select Committee on Intelligence.

The other Commissioners brought a variety of experience and expertise to the work of the Commission. These included former Director of Central Intelligence and former Deputy Secretary of Defense John M. Deutch; Martin C. Faga, former Director of the National Reconnaissance Office and former Assistant Secretary of the Air Force; Alison B. Fortier, former Special Assistant to the President and Senior Director, National Security Council; Ambassador Richard K. Fox, Jr., a retired career Foreign Service Officer and former ambassador; Ellen Hume, a journalist; Professor Samuel P. Huntington of Harvard University; current Deputy Chief of Staff to the President John D. Podesta; and Maurice Sonnenberg, a member of the President's Foreign Intelligence Advisory Board.

The Commission was the first congressionally established body to examine the issue of government secrecy in four decades. The only prior body, the Commission on Government Security, was convened in 1955-57. The recommendations of that Commission did not alter significantly the basic structure and underpinnings of the security system that had developed over the preceding decade. The central finding of the 1957 report of the Commission on Government Security, that there existed a "vast, intricate, confusing and costly complex of temporary, inadequate, uncoordinated programs and measures designed to protect secrets and installations vital to the defense of the Nation against agents of Soviet imperialism," was not markedly different from the conclusions of the 1997 Report of the Commission on Protecting and Reducing Government Secrecy.

The new Commission issued its unanimous final report on March 3, 1997, after studying the issues in detail. The Commission concluded that a new approach to secrecy, one which takes into account the insight that secrecy is a form of regulation, is needed. As the Commission's final report puts it, "Americans are familiar with the tendency to overregulate in other areas. What is different with secrecy is that the public cannot know the extent or the content of the regulation." Overregulation is a continuing theme in American public life. Secrecy would be included in that concern were it not, by its very nature, highly resistant to public scrutiny. Instead, it exists as a parallel regulatory regime with the potential for significant damage if it malfunctions.

The Commission proposed that the system for classifying and declassifying information, which for so long has been governed by executive order, should be given a new statutory framework. A statutory framework would provide for greater congressional oversight and public awareness of the system governing sensitive national security information. The secrecy system would no longer be governed by the views of those charged with implementing regulations.

In addition to recommending a statute to govern the secrecy system outside of the atomic energy context, in which secrecy is already governed by statute, the Commission recommended the following:

Adoption of the concept of a life-cycle for secrets, to enhance the understanding of classification and declassification decisions and promote rational decision-making. Information management practices should take into account that information has a life span and must be treated according to its stages within that life span. Some information may only need to be protected for a few days, such as the travel itinerary of a government official, which only requires protection before the trip. Other information, however, may require protection for generations.

Establishment of a national declassification center to improve declassification procedures and coordinate how information that no longer needs to be secret will be made available to the public. The Commission reasoned that, if secrecy is a form of regulation, declassification should be seen as a form of deregulation. A national declassification center would coordinate declassification throughout the government, using guidelines established by the originating agency. A national center for declassifying information could use economies of scale to reduce the costs of declassification.

Establishment of a single, independent Executive Branch office responsible for coordinating classification and declassification practices and enhancing incentives to improve such practices, in order to promote greater accountability. The Commission found that the absence of adequate oversight throughout the Executive Branch and by the Congress has resulted in little accountability for classification decisions and wide variation among different agencies in the application of executive orders governing secrecy. Many of the problems associated with the current system are management problems which can only be addressed by a strong central office. Such an office could ensure that classification and declassification policies are treated as information management issues and not merely extensions of security policy.

Improving the initial classification of information by requiring classifying officials to weigh the costs and benefits of secrecy and to consider additional factors in the decision to make or keep something secret to ensure that classification is used more efficiently. The Commission argued that, in determining whether information should be classified, or should remain classified, an official should weigh the costs associated with keeping information secret. Classification decisions should weight the vulnerability of the information, the threat of damage from its disclosure, the risk of its loss, its value to adversaries, and the cost of protecting it.

Issuance by the Director of Central Intelligence of a directive concerning the appropriate scope of sources and methods protection as a rationale for secrecy to clarify the grounds for classifying information. As was noted above, under the National Security Act of 1947, the Director of Central Intelligence is charged with protecting intelligence "sources and methods." Information is often classified because it is provided by an intelligence source or an intelligence method, and not because of its content. It is usually the content of the information which is the most useful to the public and to historians; therefore, the Commission found that a more thoughtful and discriminating approach to this issue is needed to clarify the scope of and reasons for protecting sources and methods in particular cases.

Standardization of security clearance procedures and reallocating resource to those parts of the personnel security system that have proven most effective in determining who should or should not have access to classified information, in order to promote the use of personnel security resources in a manner that ensures more effective and efficient protection. The current personnel security system is still designed to prevent subversion by Communist agents, even though few people come to work for the federal government with the intent to commit espionage. Instead of focusing resources on extensive initial security clearance investigations, the Commission recommended that resources be allocated more evenly throughout an employee's career, as there are many recent examples of employees who only decided to commit espionage years after they have entered the government. Additionally, many agencies continue to insist on their own personnel investigations, and do not accept those of other agencies. The Commission found that a single system recognized by all agencies would have significant personnel security resources.

Adoption of measures to standardize security practices in special access programs to reduce redundancies and costs. The Commission found that additional security costs imposed by special access programs often fail to yield increased security benefits and that, as a result, there is a need for greater standardization of security practices in special access programs.

Adoption of measures to focus greater attention and promote increased cooperation on the means for protecting such systems to promote greater awareness of the threats to automated information systems. As the United States relies more and more heavily on computer networks, those responsible for the protection of national security information face new and increasingly difficult challenges. The Commission found that there are no standards for protecting

and managing automated information systems in the federal government, which reflects the fact that the subject has not been thoroughly addressed.¹

Shortly after the Commission's final report was issued, Senator Moynihan and Senator Helms introduced legislation to implement the statutory recommendations of the Commission. That bill was referred to the Committee on Governmental Affairs.

II. PURPOSE OF THE LEGISLATION

The purpose of S. 712 is to provide a firm statutory basis for the system of classifying information to preserve the secrecy of information whose publication would be injurious to the national security of the United States and to specify procedures for the classification and declassification of such information. The bill is premised on a simple concept: that the balance of power among the separate branches of the federal government is vital to the proper functioning and the preservation of government of, by, and for the people. Our liberties depend on the balanced structure created by James Madison and the other framers of the Constitution. The national security information system has not had a clear legislative foundation, but, as has been noted above, has been developed through a series of executive orders. It is time to bring this executive monopoly over the issue to an end, and to begin to engage in the same sort of dialogue between Congress and the executive that characterizes the development of government policy in all other means. Only through such a dialogue can the people, through their representatives, evaluate the costs and the benefits of the secrecy system, weight the resources spent on the system, and decide which of the costs are worth bearing, and in what manner to apportion government resources to preserve, restrict, or expand the system.

In addition, the legislation is designed to promote accountability, both by the government and by its officials responsible for various aspects of the secrecy system. Accountability is enhanced by openness, and is necessary to the proper functioning of a democratic state. The bill would also promote stability in the classification and declassification process, which has known repeated changes under the series of executive orders issued by different Presidents.

The legislation reported by the Committee on Government Affairs would supplement the provisions of the National Security Act of 1947, as amended, and the Atomic Energy Act of 1954, as amended, provide greater guidance to the executive branch, and promote accountability, while preserving needed flexibility, and more certainty to the American public. While it might increase costs over the short term, these costs should be minimal, as many of the bill's provisions are already in effect through Executive Order 12958. The long-term impact of the legislation is to reduce costs the government must currently bear in creating secrets and protecting them by reducing the number of secrets created, while

¹The subject of the security of government information systems and computers is a subject of enormous concern to the Committee on Governmental Affairs, which has been holding a series of hearings on the vulnerabilities of such systems in order to promote greater understanding of the nature of the threat and to develop sense of urgency among officials to address the shortcomings.

enhancing the protection afforded these fewer secrets. The bill is also intended to reduce the intangible cost to our society and democracy from the cynicism that may be caused by official secrecy. The legislation is limited to reforming the information security system, and does not address personnel security and related issues in any way.

III. LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION

On May 7, 1997, S. 712 was introduced by Senator Daniel Moynihan (D-NY) and Senator Jesse Helms (R-NC). The legislation reflected the consensus recommendations of the Commission. That same day, the Committee held a hearing to review and consider the final report and recommendations of the Commission, including its legislative recommendations. At this hearing, the Committee received testimony from the congressional members of the Commission, Senator Moynihan, Senator Helms, Representative Larry Combest (R-TX), and Representative Lee Hamilton (D-IN). The Committee also heard testimony from the Honorable Lawrence Eagleburger, former Secretary of State, David Wise, an author and journalist; and Alden V. Munson, Jr., senior vice president and group executive of the Information Systems Group of Litton Industries, Inc., a government contractor involved in classified programs.

On March 25, 1998, the Committee held a second hearing on the classification and declassification system, specifically to consider S. 712. The Committee received testimony from Edmund Cohen, director of information management, Central Intelligence Agency; J. William Leonard, director of security programs, Department of Defense, A. Bryan Siebert, director of the Office of Declassification, Department of Energy; Steven Garfinkel, director of the Information Security Oversight Office, National Archives and Records Administration; T. Jeremy Gunn, executive director of the John F. Kennedy Assassination Records Review Board; and Steven Aftergood, director of the Project on Government Secrecy, Federation of American Scientists, a private organization that promotes openness in government.

At its June 17, 1998, business meeting, the Committee marked up S. 712. With a quorum present, the Committee considered an amendment in the nature of a substitute offered by Chairman Thompson and Senator Collins. The amendment was adopted by voice vote with no Member of the Committee dissenting. After agreeing to the substitute, the Committee favorably reported S. 712, as amended, by voice vote with no Member of the Committee dissenting.

IV. SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

As introduced, S. 712 was entitled the "Government Secrecy Act." The substitute amendment adopted by the Committee alters the short title to the "Government Secrecy Reform Act" to express more accurately the purpose of the law to reform the current secrecy regime operated pursuant to executive order.

SECTION 2. CLASSIFICATION AND DECLASSIFICATION OF INFORMATION

This section is the core of the Act. It provides a clear statutory basis for the classification and declassification of information in order to protect national security.

A. General principle

Section 2(a). As reported, the legislation balances the constitutional duties of the executive and legislative branches of the government by providing a legislative framework for classification and declassification policies, while allowing the President to define the specific categories of information that may be classified and the procedures for doing so. The Committee notes that the Atomic Energy Act of 1954 provides considerably less deference to presidential authority than this bill by specifically defining what information shall be classified as Restricted Data and Formerly Restricted Data.

The bill would establish the general principle that information may be classified only when there is a demonstrable need to do so in order to protect the national security of the United States. Information may not be classified on the basis of a hunch or a whim. Information may only be classified if there is a need to prevent its release and that need can be demonstrated: there must be a reasoned decision. It is to guide this reasoned decision-making that the Act specifies the procedures to be followed and criteria to be applied in making the decision to classify and declassify information. Through the application of the procedures and standards set out in the Act, it is the Committee's expectation that less information will be classified, more information will be declassified in a more timely manner, and better decisions about what information actually needs to be protected will be made.

B. Procedures for classification and declassification of information

Section 2(b). As reported, the legislation adopts the recommendation of the Commission on Protecting and Reducing Government Secrecy to require the President, to the extent necessary, to establish categories of information that may be classified and procedures for classifying and declassifying information. These categories and procedures are similar to the categories of classified information and the procedures for classification and declassification encompassed in the series of Executive Orders that have been issued governing the handling of national security information. The Committee does not expect that the President would have to modify, alter, or amend the categories and procedures currently laid out in Executive Order 12958, except to the extent changes are required by the terms of this legislation. The authority to promulgate categories and procedures reflects the authority the President enjoys through the exercise of his constitutional authority as Commander-in-Chief.

The categories and procedures for classification and declassification must be developed through notice and comment procedures. The Committee recognizes that the Administrative Procedure Act and its notice and comment provisions do not apply to the President. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). The Committee believes, however, that in this area the President

should solicit input from interested persons and organizations with respect to classification categories and classification and declassification procedures. The substitute requires the President to promulgate final categories and procedures no later than 60 days after the proposed categories and procedures are published. The substitute also requires that if the President ever seeks to modify these categories and procedures, he must do so following the same notice and comment procedures. Pursuant to section 6(b) of the substitute, no act or failure to act in accordance with the provisions of the substitute are subject to judicial review.

Once the President promulgates categories and procedures, the head of each agency of the Executive Branch shall establish standards and procedures to implement the presidential categories and procedures to permit each agency to classify and declassify information. The agency standards and procedures will guide each agency's implementation of the Act. Because different agencies handle different types of information with varying security needs, agencies are given the leeway to judge for themselves how to apply the President's categories and implement his procedures. Clearly, the needs of an agency that does not create or handle significant amounts of classified information will differ from agencies like the Central Intelligence Agency or components of the Department of Defense, which produce and handle massive amounts of classified information. Each agency may not however, have its own separate classification and declassification system but must adhere to the system promulgated by the President in implementing this legislation. The Director of the Office of National Classification and Declassification Oversight, created by this legislation, will be responsible for ensuring that agency heads do not overstep—or evade—the intent of this bill's provisions.

Final agency standards and procedures must be published in the Federal Register, but agencies do not need to publish their proposed standards and procedures for comment prior to publication of the final version. Final agency standards and procedures shall be published not later than 60 days after the publication of the President's final categories and procedures. The limited amount of time provided to agencies reflects the Committee's assumption that few significant changes from current agency practices under Executive Order 12958 will be required by the new Act. Pursuant to section 6(b) of the substitute, no act or failure to act in accordance with the provisions of the substitute are subject to judicial review.

The substitute specifically directs each agency to ensure that its procedures include mechanisms to minimize the risk of the inadvertent or inappropriate declassification of information. Such procedures will be particularly important in light of the balancing test for classifying and declassifying information that this legislation requires of agencies. In order to minimize the risk of improper disclosure, agencies will, in conjunction with the classification guides they will provide to their staff, have to adopt procedures to prevent low-level employees from making unauthorized classification and declassification decisions. The Committee notes in this context that nothing in the legislation amends or limits the effect of federal criminal prohibitions on disclosing national defense information without authorization as provided in the Espionage Act of 1917,

Act of June 15, 1917, Pub. L. 65–24, 40 Stat. 217, now codified at 18 U.S.C. § 793. See also 50 U.S.C. § 421.

The substitute also directs the President to require the head of each agency with original classification authority, as distinguished from derivative classification authority, to produce written guidance on classification and declassification of information for purposes of guiding the derivative classification of information.² Some agencies, like the Central Intelligence Agency, currently produce classification guidance, in the form of a classification guide, to assist its own officials and those of other agencies and contractor personnel in determining whether information must be derivatively classified. A classification guide is “a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.” Executive Order 12958, section 2.1(c). Not all agencies which classify information, however, currently use such guides.

Requiring the preparation of classification guides will help those making classification decisions do so in a consistent manner which more accurately reflects the threats posed by disclosure. Establishing common principles that are applied in a standard fashion throughout each agency will help ensure that classified information is treated appropriately throughout its life cycle. The Committee believes such written guidance from agencies with original classification authority will not only make derivative classification decisions more consistent throughout the government, but may aid in limiting the amount of information derivatively classified. Such guidance will also subsequently assist in making more consistent and appropriate decisions on declassification, especially as agencies implement the balancing test for classifying information required by this legislation.

Detailed written guidance will become even more important in the regime established under the legislation to require a balancing of interests in making classification and declassification decisions. Because such written guidance must, by its very nature, address and discuss classified information, it may itself be treated as classified under the Act. Again, pursuant to section 6(b) of the substitute, no issue related to the issuance of the written guidance or to the substance of the guidance itself is subject to judicial review.

C. Standards for classification of information

Section 2(c). The Federal government has a legitimate interest in maintaining secrets in order to fulfill its Constitutional charge to “provide for the common defense.” At the same time, this interest must be balanced by the public’s right to be informed of government activities in order that the public may intelligently direct the activities of the government through their elected representatives.

The Commission on Protecting and Reducing Government Secrecy found a secrecy system out of balance. Consequently, infor-

²Derivative classification is the act of incorporating, paraphrasing, restating, or generating in new form classified-source information. When government employees or government contractors with appropriate security clearances prepare material based on originally classified information, or by the use of a classification guide, their product becomes derivatively classified.

mation needing protection does not always receive it, while innocuous information often is or remains classified. The Commission found that “[t]he best way to ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall.” Unless the classification system focuses on that which is most genuinely needs protection for disclosure, the fact that information is classified serves as less of a deterrent to its unauthorized release.

The initial decision to classify is in many ways the most important of this process. A failure to protect sensitive information poses great and obvious risks, while a decision to classify something unnecessarily can be costly in several ways. First, there are the costs of storing, handling, reevaluating, and declassifying the information. Then there are the intangible costs. Too much secrecy can erode public faith in the institutions of government and prevents the public from participating in informed debate. It can also have significant consequences for the defense and security of our country when policy makers are not fully informed because secrecy constrains the flow of information.

The system lacks the discipline of a statutory framework to define and enforce the proper uses of secrecy. This legislation is intended to provide such a legislative framework. The bill will enable greater oversight of the classification and declassification system to counter the inherent tendency of individuals in government agencies, like any large organization, to keep secrets. At the same time, the President will retain broad authority and discretion to establish and administer the details of the system, consistent with legal principles embodied in the statute.

As noted above, the most recent report of the Information Security Oversight Office indicates that the number of government secrets is not being reduced. In fact, the report notes a 62 percent increase in classification actions in 1996, and it estimates the direct costs of secrecy at more than \$5.2 billion for that same year. Notably, that figure does not include the presumably substantial secrecy costs incurred by the CIA; those remain classified. Nor does it account for the vast indirect costs of government secrecy—what economists might term “transaction costs” and “opportunity costs”—that cannot be quantified precisely. While the Administration has declassified approximately 400 million pages of previously classified information in the last two years, there remain 1.5 billion pages of documents 25 years or older still classified. To paraphrase Justice Potter Stewart’s opinion in the Pentagon Papers case: when everything is secret, nothing is secret. See *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971). And this aphorism supports the notion that limiting the amount of classified information so that only information truly needing protection from disclosure is classified will promote greater protection for that information than is currently the case.

Classifying officials must also be aware that classification means that resources will be expended throughout the information’s life cycle to protect, distribute, and limit access to information that would be unnecessary if the information were not classified. Resources have been wasted, as Senator Helms testified to the Com-

mittee, when Members of Congress are given classified briefings which reiterate “everything that was in the New York Times and the Washington Post that morning.” Considering sensitive information in terms of its life cycle helps illuminate the inconsistencies between the protection required by various types of government information and the protection it actually receives.

At the beginning of the life cycle of potentially sensitive government information, the classification system is the vehicle which provides protection. The current system, however, is notable for the absence of clear standards to gauge the need for and type of protection required. At the end of that information’s life cycle, declassification procedures currently fail to distinguish between sensitive information and that which no longer requires further protection.

Protection challenges differ as information moves through its normal life cycle. There are times when there is no doubt that secrecy is urgently needed. In those cases, no cost may be too high. There are also many cases in which secrecy creates redundancies, squanders opportunities, and wastes resources. The costs that inevitably come with secrecy require a careful balance in making classification and declassification decisions.

Under Executive Order 12958, as under prior executive orders, the initial decision to classify is based solely on the potential damage to the national security to the exclusion of other factors such as the value of the information to the public, the risks incurred from its unauthorized disclosure, and the cost of its protection. Since the original classification decision is the first and one of the most important steps in the life cycle of a document, more emphasis must be placed on establishing a more thoughtful process to decide whether information should be classified in the first place. This will entail more rigorous oversight by the Office of National Classification and Declassification Oversight, created by this legislation. Additionally, it will entail expanding and improving training for classifying officials.

The bill permits classification only if the harm to national security “outweighs the public interest in disclosure of such information.” This requires an official to perform a “balancing test” in which the need to protect national security is weighed against the public’s interest in open government.

Under Executive Order 12958, decisions to classify new information are made by officials with Original Classification Authority. Currently there are 4,420 officials with Original Classification Authority, the only individuals designated, either by the President or by selected agency heads, to “classify information in the first instance.”

Those with Original Classification Authority determine what information, if disclosed, could reasonably be expected to cause damage to the national security, and must be able to identify and describe the damage. The information must be owned by, produced by, for, or under the control of the United States Government. According to the Information Security Oversight Office, there were 105,163 original classification decisions in 1996 (7 percent Top Secret, 53 percent Secret, and 40 percent Confidential). The Information Security Oversight Office also reports 5,684,463 derivative classification actions in 1996 (7 percent Top Secret, 61 percent Se-

cret, and 32 percent Confidential). Ninety-four percent of all classification actions are derivative classification decisions, but these decisions are less important than the discretionary, original classification decisions, which form the basis for all derivative classification determinations.

While the bill is silent about the number of Original Classification Authorities, it requires that those making original classification decisions continue the directive of Executive Order 12958 of identifying themselves on the information being originally, as distinct from derivatively, classified. The requirement is designed to foster a sense—and the reality—of accountability in officials with original classification authority.

Section 1.7(a)(5) of Executive Order 12958 also requires original classifiers to justify their decisions by providing a “concise reason for classification.” The bill alters the current standard by requiring a “detailed justification” of an original classification decision. The Committee believes that a detailed explanation at the time of original classification decision is warranted by the importance of the decision. Having a detailed explanation at the outset will also enhance the security of the information throughout its life cycle by allowing those with access to it to understand the nature of the threat classification was designed to prevent. Finally, a detailed justification will reduce the costs associated with declassifying the information by enabling later decision-makers to determine with greater ease than at present whether the information continues to require protection from disclosure.

The bill does not address the levels of protection which classified information should receive, leaving this determination to the President, consistent with historic practice. Under Executive Order 12958, the three levels distinguish the amount of potential damage if the information is released. If the unauthorized disclosure of information could potentially cause “damage,” it may be classified Confidential; if “serious damage,” it may be classified Secret; and if “exceptionally grave damage,” it may be classified Top Secret. The Joint Security Commission has recommended that the three traditional levels of classification—Confidential, Secret, and Top Secret—be replaced by a single classification level with two degrees of physical protection. The Commission on Protecting and Reducing Government Secrecy found no evidence that such a change would reduce the amount of classification, though it might simplify the system. The Committee would encourage the Director of the Office of National Classification and Declassification Oversight, which would be created by this legislation, to undertake a systematic study of classification levels to determine whether to adopt the recommendation of the Joint Security Commission.

As with original classification decisions, the legislation would impose similar requirements on agency officials or contractor personnel who make derivative classification decisions. Anyone derivatively classifying information would have to identify himself or herself. The purpose again is to foster a sense of accountability. Because derivative classification determinations ought not require any significant analysis of the need to classify the information, the Act would require only that a “concise explanation” of the decision to classify information derivatively be provided. The requirement

for a concise explanation will generally be satisfied by simple reference to the original classification decision or classification guidance, or by reference to the appropriate national security criteria of the Act's balancing test that outweigh the interests of the public in disclosure of the information. Nothing in this provision is intended to give a recipient of classified information independent authority to declassify that information.

The most significant change from historical and current practice that the legislation would promote in the classification process is the implementation of a balancing test to determine the propriety of classifying particular information. Under each of the executive orders under which the classification system operated, the sole factor that classifiers had to take into consideration was the potential harm to national security from the disclosure of the information. There was no balancing test; only one side of the equation was ever considered. The Committee believes that it is appropriate for officials making classification decisions to consider not only the potential harm to national security from disclosure, but the public interest in disclosure as well.

To this end, the bill would impose an explicit requirement that information not be classified unless "the harm to national security that might reasonably be expected from disclosure of such information outweigh the public interest in disclosure of such information." The bill also makes it clear that if agency officials have "significant doubt" about whether the harm to national security outweighs the public interest in disclosure, the information should not be classified. The Committee believes that in many cases there will be little doubt in the application of the balancing test: either the need for secrecy is evident and compelling and clearly outweighs any public interest in disclosure or the public interest in disclosure clearly outweighs the need for secrecy. In many other cases, however, there will be many shades of gray in the application of the balancing test. The bill does not direct any particular outcome in any specific case. If there is doubt, the agency official may still exercise reasoned discretion. Only the existence of "significant doubt" in the application of the balancing test will preclude the classifying official from classifying the information.

The introduction to classification and declassification processing of a balancing test is vital. As the Commission on Protecting and Reducing Government Secrecy cogently argued, classification is a type of government regulation. As with all regulation, it imposes costs and achieves benefits. By looking only at the benefit side, secrecy policy has skewed the equation and resulted in over-classification, which means the system is too costly. Decision-makers in agencies must be required to consider and address the costs of their decisions if they are to make better, more informed judgments, both in each particular case and at the macro-level as well. Confronted with the explicit requirement that classifying officials consider the costs as well as the benefits of each decision should lead to better decisions, so long as the balancing test is actually applied in good faith.

As introduced, S. 712 contained a balancing test, specifying simply that "the agency official making the determination shall weigh the benefit from public disclosure of the information against the

need for initial or continued protection of the information.” No indication was given as to what criteria should be considered.

The Committee concluded that any effort to put the system for protecting our national security information on a statutory footing should incorporate an enumeration of the general factors to be considered in making classification and declassification decisions. Specifically, the Committee believes that requiring agency officials to consider “costs” and “benefits” without providing them with any standards to govern the exercise of such judgment would be unfair, would shirk the responsibility of Congress to specify the national policy of the United States, and would risk opening the door to capricious and even dangerous decision-making in this important arena. Accordingly, the Committee carefully spelled out the various factors that must be considered with regard both to the “costs” and to the “benefits” of disclosing information. This articulation of discrete “cost” and “benefit” criteria was an integral part of the amendment in the nature of the substitute amendment adopted by the Committee.

The Committee believes that this enumeration strikes an appropriate balance. By spelling out what factors must be considered in classification and declassification decisions, the Committee substitute does not predispose any particular outcome in any particular classification or declassification determination. The statutory criteria make clear what potential “costs” and “benefits” must be considered, but no effort has been made to define how much weight any one factors should have vis-à-vis another. (Such weights, the Committee anticipates, will depend heavily upon the specific nature of the information in question and the security environment at the time of decision.) The core responsibilities for such decision-making remain, in other words, firmly lodged in the executive branch: agency officials may apply the full benefit of their knowledge and experience to classification and declassification decisions, and the last word in adjudicating disputes over such initial classification determinations is left firmly in the hands of the Commander-in-Chief.

This general approach has ample precedent in U.S. national security law and regulation, with analogous—indeed, in some respects, even more specific—enumerations having been employed in establishing the Restricted Data classification under the Atomic Energy Act, in setting declassification guidelines for the John F. Kennedy Assassination Review Board, and in articulating non-statutory executive branch policy for declassification determinations under Executive Order 12958. As befits an effort to provide a statutory framework for the entire national security information control system, the Committee substitute for the original language of S. 712 is more specific with regard to discrete “cost” and “benefit” considerations than are these analogues, but its underlying insight is no different.

In sum, these enumerated criteria perform the invaluable function of clearly setting forth Congress’ determination as to what criteria may appropriately be considered in classification and declassification decisions—and, implicitly, what criteria may not. The Committee substitute leaves to agency expertise, insulated from judicial review, the particular weighing of one factor against another

in each case, but it provides very clear guidance with regard to what factors must be considered in such a calculus.

The American system of governance is predicated upon the existence and maintenance of a system of elaborate checks and balances intended to harness the ambitions of one branch of government in checking the ambitions of another. Particularly given the executive branch's continuing responsibility for exercising judgment in particular classification and declassification decisions, it is necessary and appropriate that Congress establish broad national guidelines to ensure that agency officials remain clearly focused upon legitimate criteria. This should improve both the quality and the consistency of classification and declassification decisions over time.

Additionally, the Committee anticipates that in providing such statutory standards, S. 712 will function as a public document, a national statement of principles about how a free country should attempt to balance the requirements of security against the imperatives of democracy and accountability. It is not sufficient that our national security information control system be rational and effective in this regard: it must also be understood to be so.

By definition and design, the system within our government that manages classified information is highly resistant to outside inspection and public accountability. Precisely because classification and declassification determinations are reviewable only within the executive branch, it is important that the law mandate that these decisions be structured around a clear framework of principle visible to all. By writing specific classification and declassification criteria into statutory form, the Committee hopes to help reassure Americans that the national security information system is indeed a legitimate one worthy of their trust and continued support.

The criteria set out in the substitute that are to be employed in evaluating the potential harm to national security that might reasonably be expected from disclosure are taken directly from section 3.4(b) of Executive Order 12958. These criteria are generally consistent with the standards that have been employed in the series of executive orders that have governed the classification system. The Committee is of the view that the implementation of the bill's provisions will be readily facilitated by taking the national security criteria directly from the current Executive Order, as agency officials will have an understanding, based on past practice, of the content of the criteria and how to apply them.

The bill would enable classifying officials to consider whether disclosure of the information in question would:

Reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States. This criterion would protect intelligence sources and methods, whose protection is guaranteed by 50 U.S.C. § 403-3(c)(6). This factor focuses on whether the information reveals a human source, irrespective of whether that source's life or family would be endangered, as the mere disclosure of a human source might chill the ability of the government to find human sources in the future. This chilling effect could exist whether or not there is any potential

harm or threat to the source or the source's family. The Committee assumes that the human intelligence sources protected by this provision are those who provide information directly to the United States government. Human intelligence sources who provide information to foreign governments that is made available to the United States by that government would be protected by a separate provision of the bill. With respect to non-human intelligence sources and methods, the provision would only allow consideration of the application of this factor to the specific information at hand, rather than, for example, consideration on a source-by-source or method-by-method basis. This limitation is consistent with the bill's goal of limiting classification decisions only to those cases in which secrecy is warranted by the individual facts relevant to that decision. Accordingly, the Committee does not believe that this limitation will impinge on the executive in such a way as to prevent or discourage the protection of genuinely sensitive information.

Reveal information that would assist in the development or use of weapons of mass destruction. The threat posed by nuclear, chemical, or biological weapons has been of the utmost concern to the United States for many years. Threats from such weapons may actually be increasing today, as more and more countries develop such weapons and the means to deliver them. The Secretary Committee assumes that the development or use of such weapons anywhere is a threat to the national security of the United States and expects that this provision will be interrupted broadly.

Reveal information that would impair cryptologic systems or activities by preventing the effective use of such systems or activities in the future. There are few matters more sensitive than these. The United States needs to be able to detect, intercept, and interpret communications from around the world. It is essential that such capabilities be preserved. The Committee notes that this provision seeks to protect not any particular method or activity, but rather to protect the ability to employ particular systems or activities in the future.

Reveal information that would impair the application of state-of-the-art technology within a United States weapon system. This provision protects primarily military technological secrets. The United States spends billions of dollars to develop cutting-edge technology to give our military personnel the best possible prospect of accomplishing their missions safely and effectively. Our military dominance depends more and more on high technology, especially as the size of our military forces shrinks. Foreign nations could save billions in their own development costs and learn how to defeat weapons systems if this factor were not considered. Unlike the provision protecting intelligence sources and methods, this one applies only to "state-of-the-art technology."

Reveal actual United States military war plans that remain in effect. This provision is limited to "actual" war plans that remain in effect. This provision will cover contingency plans and alternative planning that are in effect.

Reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States. This provision is designed to allow the

executive branch maximum flexibility in conducting the international relations of the United States. The Committee does not believe it possible to enumerate the scope of potential threats to U.S. relations with foreign governments. The provision does not, however, give unlimited discretion to agency officials to protect information from disclosure simply because it may involve a foreign government. The information must seriously impair U.S. foreign relations in order for this factor to weigh against disclosure. In addition, the impairment must be demonstrable, but reasonable speculation would satisfy this standard (indeed, it would have to, for nothing can be demonstrated unless it has already occurred). The Committee believes that this provision may be read broadly enough to protect from disclosure any information received by the United States from a foreign government, if its disclosure would seriously impair U.S. relations with that or another foreign government. This criterion also provides, in the disjunctive, that the government may protect from disclosure information whose disclosure would adversely affect ongoing diplomatic activities of the United States. Here, the crucial limitation is that the activities must be ongoing. Because the provision does not define "diplomatic activities," this limitation may be read broadly to sweep within its gambit a wide range of activities that implicate the foreign relations of the United States, so long as those activities are "ongoing."

Reveal information that would clearly and demonstrably impair the current ability of the United States to protect the President, Vice President, and other officials for whom official protection services are authorized. This provision is limited to preserving the current ability of the Secret Service, the Bureau of Diplomatic Security, and other federal entities to protect designated federal officials or others for whom protection services are, in the interests of the United States, authorized. The Committee intends again that the limitation to "current ability" be read in a common sense, functional way so as not to require that particular means of protection be disclosed if those means may be reemployed in the future.

Reveal information that would seriously and demonstrably impair current national security emergency preparedness plans. This provision is designed to ensure that potential enemies, either foreign or domestic, are not provided with information that would permit them to avoid or evade emergency preparedness plans so as to inflict damage or harm as a result of the disclosure of the information.

Reveal information whose disclosure would violate a statute, treaty, or international agreement. The Committee intends that in this instance the term "international agreement" is intended to cover a formal agreement, not rising to the level of a treaty, entered into by the United States and a foreign government or several foreign governments or between the United States and a multilateral organization, and not simply an informal agreement between an official of the United States and an official or one or more foreign governments or entities.

The Committee expects that these criteria will be applied in a flexible and functional manner in weighing whether information must be protected from disclosure. If disclosure would impair the ability of the United States and its officials to protect national se-

curity by accomplishing the particularized goals recognized by each criterion, that harm must be given appropriate weight when balanced against the public interest in disclosure.

Those national security criteria that only protect information of "current" usefulness are also to be read in this light to protect the ability of the government to carry out those functions. The Committee intends that historical information not be covered by these national security criteria, if that historical information is no longer needed to fulfill the recognized function. Consider the following example. The President of France visits New York and stays at a hotel. Federal agencies are responsible for ensuring his security and make a wide variety of plans for security, including a number of contingency plans to evacuate him from the hotel. When the President of France departs safely, those contingency evacuation plans may still be classified even though the plans are no longer "current," because they remain functionally useful because the following year the Prime Minister of Great Britain may visit New York and stay at the same hotel. Agency officials will have to decide whether these plans remain "current." The decision is left to their reasoned discretion. On the other hand, the travel itinerary of a high government official may be sensitive at the time of the trip but no longer need classification after the trip is complete.

While these national security criteria are taken directly from Executive Order 12958, the public interest criteria have been developed by the Committee after careful consideration. These criteria are also intended to be read with flexibility to promote disclosure and openness and with recognition of their functional impact.

The factors that the bill would allow to be considered in gauging the public interest in disclosure of information, either at that time of its proposed initial classification or at the time of its proposed declassification, are broader and less clearly defined than the national security factors because they do not enjoy a lengthy history of development and practice. Because of their breadth, however, agencies will have wide discretion in their interpretation. The Committee expects that agencies will interpret these factors in ways consistent with the spirit of openness that generated them.

The criteria agencies will have to consider in evaluating the public interest in disclosure of information and balancing these criteria with the national security criteria are:

Whether or not disclosure would better enable citizens of the United States to hold government officials accountable for their actions and policies. The primary purpose of this criterion is accountability. Officials and agencies today can too easily hide an embarrassment or failed policy by classifying information surrounding it on the basis of some trivial national security interest. Accountability of government officials is the core of democracy. Requiring agency officials to consider this democratic interest will make them more mindful of the basic purposes of the government: to carry out the will of the majority, consistent with the Constitution and laws of the United States.

Whether or not disclosure would assist the criminal justice system in holding persons responsible for criminal acts or acts contrary to the Constitution. The rule of law demands that those who break the law be punished for it. This criterion is already accom-

modated to some extent by the Classified Information Procedures Act (CIPA), which permits criminal prosecutions to go forward against defendants even when information relevant to the prosecution is classified. As a result of the CIPA, agencies have already had some experience and familiarity in balancing the need to protect information from disclosure against the need to proceed with criminal prosecution, so this criterion should be readily integrated into agency classification practice.

Whether or not disclosure would assist Congress or its committees in conducting oversight of the executive branch or in informing itself of executive branch policies and activities in order to carry out its legislative responsibilities. This criterion should not be interpreted in any way to limit or restrict the ability of any committee or subcommittee of either House of Congress, or any Member of Congress or United States Senator to gain access to classified information. See also section 6(a) of S. 712 and the relevant discussion in this report. There are statutory requirements that certain classified intelligence information be provided to relevant committees of both Houses of Congress. See, e.g., 50 U.S.C. § 413 et seq. This criterion is not designed to affect the ability of Congress to have such access. Rather, it is designed to allow Congress to discuss certain information openly by getting executive agencies to consider the legislative responsibilities of Congress and the need for an informed and open debate to carry out those responsibilities in determining whether to classify or declassify information.

Whether or not disclosure of the information would bring about any other significant benefit, including an increase in public awareness or understanding of the activities of the federal government or an enhancement of government efficiency. This criterion is intended to allow the President, executive agencies, the Office of National Classification and Declassification Oversight, and the Classification and Declassification Review Board broad latitude to decline to classify information or to declassify information if there is a public interest in disclosure not otherwise covered by the other public interest specified in the Government Secrecy Reform Act.

None of these criteria, either alone or in conjunction with another, will trump the applicable national security criterion or criteria in any particular case. The legislation does not dictate any particular classification or declassification decision in any specific instance. The appropriate weight to be accorded each criterion in any specific case is left to the head of the agency with classification authority over the information, as is the outcome of the balancing process. The legislation seeks to focus agency discretion on the most relevant factors, but no bill can dictate the proper outcome in any particular situation, and this bill does not attempt to do so. Agencies will be left with broad discretion, free from judicial scrutiny, to classify and declassify information. The Committee expects and assumes that agency officials will act in good faith to implement the provisions of this legislation, subject only to review by other executive branch officials, also acting on behalf of the President, the Director of the new Office of National Classification and Declassification Oversight, and the members of the Classification and Declassification Review Board.

D. Standards and procedures for declassification of information classified under the act

Section 2(d). In addition to establishing new procedures and standards for classifying information, the legislation provides procedures and a time table for declassification of information or categories of information classified pursuant to the Government Secrecy Reform Act. The declassification procedures set out in detail in section 2(d) of the legislation do not apply to information classified pursuant to executive order or other authority. The time-table established by this legislation is largely based on, and tracks to a significant extent, the time-table established under Executive Order 12958. Because agencies are already implementing similar time tables for review and declassification of information, the legislation will impose few additional costs and burdens not already required of agencies.

Section 2(d) sets out the generally applicable time-table for declassifying information or categories of information. Any information classified pursuant to the Government Secrecy Reform Act may not remain classified ten years after the date of the original classification of the information. Subsequent derivative classifications of the same information do not start the ten-year clock running anew. Therefore, information must be declassified ten years after its original classification. There are three exceptions provided to this general rule.

The first exception to the ten-year rule provides that information or categories of information may be declassified less than ten years from the date of the original classification. For information to be declassified earlier than ten years, the classifying official must provide for declassification as of a specific date or event earlier than ten years after the original classification. This exception is designed to cover information that is classified for a specific purpose, or in anticipation of a specific event that is known at the time of the original classification.

To facilitate the determination of presumption classification dates, paragraph 7 of this subsection of the bill requires that every classification decision be accompanied on the document by a specification of the date or event on which the information may be declassified.

The second exception to the ten-year presumptive declassification rule in the bill would permit the classifying official to delay the declassification of information or categories of information at the time the information is classified until 25 years from the date of classification. Thus, like the first exception, this one is to be invoked at the time of the classification decision, and not at the time the information or category of information is reviewed or considered for declassification. This provision is intended to cover certain discrete types of information that, at the time it is classified, the classifying official is certain will not be ready for declassification in ten years. The Committee expects that this exception will cover only a narrow category of classification decisions. This provision is the exception to the ten-year rule; it should not become the rule. In order to limit the use of this exception to those circumstances in which it is warranted, the bill requires that any decision at the time of classification to postpone declassification to 25 years must be made by the

head of the agency, and not by a subordinate agency official. In doing so, the head of the agency must determine that there is no likely set of circumstances that would permit the declassification within ten years. Having made that determination, the head of the agency must obtain the concurrence of the Director of the Office of National Classification and Declassification Oversight, subject to an appeal to the Classification and Declassification Review Board. Finally, if the Director of Oversight Office concurs in the determination of the head of the agency, a certification of that determination must be submitted to the President.

The third and final exception to the ten-year presumptive declassification period rule is the only one that can be invoked after the information has already been classified. At any time prior to the declassification of the information at either the ten-year point or some date provided for in the first exceptions to the ten-year rule, an official of the agency with original classification authority over that information or category of information may determine that the information should remain classified beyond the presumptive declassification date. In order to stress to agencies that this postponement should not become the rule, the legislation imposes a set of procedural requirements: first, the concurrence of the Director of the Oversight Office must be obtained; and, second, a certification must be submitted to the President. The bill limits the extension to no more than 15 years. Thus, the maximum amount of time that information classified pursuant to the Government Secrecy Reform Act may remain classified is 25 years.

There will be circumstances, however, in which even 25 years is insufficient to protect important national security interests. By imposing steep hurdles on preserving the classification of information beyond 25 years, the Committee intends that agencies rely on this option in only the most compelling cases. The bill makes clear that this option is to be used only if an agency official determines that extraordinary circumstances exist. The Committee expects that this test will be satisfied only if the disclosure would cause grave harm to a person or to the national security of the nation. Having made a determination that extraordinary circumstances exist and require the continued protection of the information from disclosure, the agency official must then convince the Director of the Oversight Office of the existence of these extraordinary circumstances and secure the Director's concurrence. The agency must, if it secures the concurrence of the Director of the Oversight Office, notify the President of the decision to postpone disclosure beyond 25 years. In such cases, which the Committee expects to be few, the President must then establish a schedule for the periodic review of the information to determine whether protection from disclosure remains warranted. The information will have to be declassified at the earliest possible time after the termination of the extraordinary circumstances.

The requirement that the Director of the Oversight Office concur in determinations to delay the declassification of information beyond ten years and 25 years is an important safeguard against agency abuse of the process. Agencies will have to explain the rationale for continuing the classification of the information under review. The need for the concurrence of an outside official within the

executive branch will promote better decision-making and help prevent the agencies from using simply boiler-plate language to justify decisions to postpone declassification. Agencies are protected in cases in which they can not obtain the concurrence of the Director of the Oversight Office, because they can appeal to the Classification and Declassification Review Board, and, ultimately, to the President himself, who retains the ultimate authority to make classification and declassification decisions as Commander-in-Chief.

The Committee substitute also adds a provision to the underlying bill that will protect the equities of agencies that originate classified information. The substitute makes it clear that no information may be declassified without the concurrence of the agency that originated that information, except as otherwise provided in the Government Secrecy Reform Act. Thus, for example, if the Department of State has in its records a report of the Central Intelligence Agency or information derivatively classified on the basis of a Central Intelligence Agency report that is due for declassification at ten years, the State Department may not declassify the information on its own. It must, instead, obtain the concurrence of the Central Intelligence Agency, which originated the information. This provision is designed to protect the equities of originating agencies, because they will generally have a better sense of the entire picture into which the classified information fits. The substitute makes clear, however, that this limitation is subject to the other provisions of the Government Secrecy Reform Act, so originating agencies will not be allowed to use this provision to trump the authority provided to the Director of the Oversight Office or the Classification Review Board.

The substitute requires that agencies apply the same balancing test to declassification determinations as they do to classification decisions. The criteria that will guide agency decisions are identical in both instances. The fact that the criteria are identical does not mean that their application will result in the same conclusion with respect to the same information over time. indeed, one of the core concepts underlying the report of the Commission on Protecting and Reducing Government Secrecy is the concept that secrets have a life cycle. This concept underlies the substitute as well. The bill specifically provides that in evaluating the criteria in making declassification determinations, agency officials must apply the criteria which are "current as of the determination." Factors that once led ineluctably to require that information be classified may change over time; the environment in which the information may be used will also change. As the circumstances change, the relative weight to be accorded the relevant, applicable criteria will also change. The substitute requires that any such changes be taken into account when evaluating whether to declassify previously classified information.

E. Declassification of information classified prior to adoption of the act

Section 2(e). The declassification time-tables, standards, and procedures laid out in detail by the legislation are intended to apply prospectively, only affecting information classified pursuant to the Government Secrecy Reform Act. They are not intended to cover

the billions of pages containing classified information that executive branch agencies currently have in their possession. The Committee believes that it would be too disruptive to superimpose the new statutory scheme on agencies with such a huge backlog of classified information.

Executive Order 12958, however, addresses itself to the current backlog of classified information and, as noted above, sets out a schedule for the review and presumptive declassification of this information. The Committee heard testimony from Mr. Cohen of the CIA, Mr. Leonard of the Defense Department, and Mr. Siebert of the Energy Department to the effect that many agencies with large collections of classified documents will not be able to meet the Executive Order's deadlines for reviewing such documents and declassifying them in bulk. Still, the Executive Order has successfully initiated a process within executive branch agencies of reviewing their classified documents and will standardize that process.

Rather than create an entirely new declassification system, or impose new statutory requirements on a system that has been initiated and is succeeding in establishing a routine process for declassifying large numbers of documents that no longer require protection, the bill simply directs the President to establish procedures for declassifying information that was classified on or after the effective date of the Government Secrecy Reform Act. These procedures must be, to the maximum extent practicable, consistent with the declassification procedures and standards established under Section 2(d) of the Act. The Committee anticipates that the executive will have little difficulty in conforming to these requirements, because, as noted above, the procedures and standards of Section 2(d) are taken largely from Executive Order 12958, which is currently in place. The legislation specifically directs that the new procedures provide for automatic, or bulk, declassification of information of classified for more than 25 years on the effective date of the Act. This requirement, too, is consistent with the provisions of section 3.4 of Executive Order 12958.

One difference with the current Executive Order provided for in the legislation is the method of promulgation of the new procedures. As with the procedures for classifying and declassifying information under the Act, these procedures for declassifying previously classified information must be promulgated pursuant to notice and comment procedures, to allow for public input into and knowledge of their development.

The Committee anticipates that, after receiving public comment on the development of new declassification procedures, the President will issue rules that substantially resemble those provided for in Executive Order 12958, as modified by worthwhile public suggestions and to the extent required to conform to this legislation, particularly the imposition of the new balancing test, and that succeeding will follow suit.

F. Amendment to the Freedom of Information Act

Section 2(f). The only avenue currently available for seeking judicial review of the decision to classify information is under the Freedom of Information Act. The Freedom of Information Act generally provides that any person has a right of access to federal agency

records, except to the extent that such records (or portions thereof) are protected from disclosure from one of the Act's exemptions or exclusions.

The Freedom of Information Act currently provides an exemption from disclosure for records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [] are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (Exemption 1). The legislation would make a technical amendment to Exemption 1. As amended, the provision would exempt from disclosure under the Freedom of Information Act records that are "specifically authorized to be classified under the Government Secrecy Reform Act of 1998, or specifically authorized under criteria established by an Executive order to be kept secret in the interest of national security and [] are in fact properly classified pursuant to that Act or Executive order."

The Committee believes that this change is simply technical; it merely clarifies that, in the future, records properly classified pursuant to the Government Secrecy Reform Act will also be exempt from disclosure under the Freedom of Information Act. This change is therefore needed to clarify the scope of protection the executive will have in refusing to disclose information properly classified not only in the past under executive orders, but in the future under the Government Secrecy Reform Act.

In clarifying that records properly classified pursuant to the Government Secrecy Reform Act will be exempt from disclosure under the Freedom of Information Act, the legislation necessarily imports into its new secrecy regime the judicial review available under the Freedom of Information Act. For example, proper application of the public interest/national security balancing test would be within the scope of judicial review for Freedom of Information Act requests for classified information, under the second clause of Exemption 1. Judicial review is otherwise unavailable to review any actions or failures to act under the Government Secrecy Reform Act.

The Government Secrecy Reform Act amendment to Exemption 1 of the Freedom of Information Act, 5 U.S.C. § 552(b)(1), is not intended to alter in any way the applicable standard of review, e.g., *Halperin v. Central Intelligence Agency*, 629 F.2d 144, 148 (D.C. Cir. 1980); the significant deference currently afforded to agency classification decisions, e.g., *Maynard v. Central Intelligence Agency*, 986 F.2d 547, 556 n. 9 (1st Cir. 1993); *Krikorian v. Department of State*, 984 F.2d 461, 464–65 (D.C. Cir. 1993); *Young v. Central Intelligence Agency*, 972 F.2d 536, 538–39 (4th Cir. 1993); *Stein v. Department of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981); *Canning v. United States Department of Justice*, 848 F.Supp. 1037, 1042 (D.D.C. 1994); *Willens v. National Security Council*, 726 F.Supp. 325, 326–27 (D.D.C. 1989); or the special in camera and ex parte procedures developed by the courts to handle Exemption 1 cases that are currently the hallmarks of judicial review of Exemption 1 claims in Freedom of Information Act litigation. E.g., *Patterson v. Federal Bureau of Investigation*, 893 F.2d 595, 599–600 (3d Cir. 1990); *Simmons v. United States Department of Justice*, 796 F.2d 709, 711 (4th Cir. 1986); *Salisbury v. United States*, 690 F.2d 966, 973 n. 3 (D.C. Cir. 1982).

The amendment to the Freedom of Information Act is intended by the Committee simply to be a conforming amendment. The current legislation is not intended to work any change whatever. Even the additional requirement of the new balancing test required of agencies by the Government Secrecy Reform Act before they can classify declassify information should not lead the courts to conduct a more searching inquiry than is currently permitted under the Freedom of Information Act. The rationale for deference to agency determinations under past and current executive orders retains its vitality under the new law. Agency officials will continue to have the unique insights into these matters by virtue of their expertise and experience and their access to the information that allows them to consider the complete context of national security and foreign relations matters in which classification and declassification issues arise. Because the Government Secrecy Reform Act makes no substantive change to the Freedom of Information Act, the Committee expects that the courts will continue to give significant deference to the judgment of responsible agency officials entrusted under this law to determine the proper outcome of the balancing test established by this legislation. Indeed, the Committee believes that with the enhancement of independent internal review mechanisms in the executive branch through the Office of National Classification and Declassification Oversight and the Classification and Declassification Review Board, the need for judicial review may, over time, actually decrease.

Because of the prospective nature of the legislation, the traditional handling of Exemption 1 cases under the Freedom of Information Act in the event of changed executive orders should continue to be followed. In the past, as executive orders have changed, the courts have assessed the propriety of an Exemption 1 withholding under the executive order in effect when “the agency’s ultimate classification decision is actually made.” *King v. Department of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). That rule should continue. Information classified under an executive order should continue to be reviewed for the propriety of the classification decision under the relevant executive order. Information classified prospectively pursuant to the Government Secrecy Reform Act will be reviewed pursuant to its newly imposed standards. Current decisions require, however, that when an Exemption 1 case is remanded to the agency, it must apply the standards of the executive order in place at the time of the remand. The Committee believes that that practice too should continue and that Exemption 1 cases remanded to agencies after the effective date of the Government Secrecy Reform Act should be evaluated pursuant to its provisions.

No other changes to the Freedom of Information Act, as amended, are made by this legislation, and none is intended by the Committee. The Committee therefore believes that even after the adoption of this legislation, agencies and litigants will find the territory of Exemption 1 litigation familiar.

SECTION 3. OFFICE OF NATIONAL CLASSIFICATION AND DECLASSIFICATION OVERSIGHT

Section 3(a). In the legislation, the Committee substitute creates two entities to oversee the classification and declassification proc-

ess, as well as to report to Congress and the President on the implementation of the Act. Establishment of these entities is important to a balanced and accountable functioning of the classification and declassification systems established herein. Given the preclusion of judicial review included in this legislation, little new accountability would be injected into the system without the establishment of these entities. The first new entity created in the Act is the Office of National Classification and Declassification Oversight (the Oversight Office).

Section 3(b) and (c). Rather than establishing an entirely new bureaucratic structure to serve as the Oversight Office, the Committee intends that the current Information Security Oversight Office (ISOO) be transformed into the Oversight Office. This will require that ISOO be strengthened and made more independent, be placed directly in the Executive Office of the President, and report directly to the President and to Congress. The Director of the Oversight Office is to be appointed by the President with the advice and consent of the Senate. The Committee expects that nominees to the Director will have broad experience in classification and declassification procedures, in records management, and in information technology. Indeed, one area of significant contribution by the Oversight Office should be developing and implementing new technologies to assist in the management and declassification of classified information.

Section 3(d). The Oversight Office is to be an independent authority to review and coordinate agencies' implementation of the Act, review agencies' classification and declassification procedures and budgets, consider agency requests to maintain classified information beyond the time schedules set forth in the Act, assist agencies in complying with the Government Secrecy Reform Act by providing advice and technical expertise on classification and declassification processes, and to keep Congress and the President fully informed of agencies' successes and failures in meeting the requirements of the Act. To improve government-wide consistency in the application of the provisions of this legislation, the Committee expects that the Oversight Office will conduct periodic surveys of agency practices and determinations to ensure proper and consistent compliance with the Government Secrecy Reform Act.

Furthermore, the Committee has attempted to outline declassification schedules which agencies are expected to meet, while at the same time allowing flexibility so that truly sensitive information can continue to be protected. Allowing such flexibility is essential to the protection of national security, but the Committee believes that an independent review authority is necessary to ensure such flexibility is not abused by agencies. The Oversight Office is intended to provide that independent authority. Indeed, without the establishment and vigorous activity of such an authority, it is unlikely the goals of this Act could ever be met.

The Oversight Office, therefore, is to review all requests by agencies to maintain classified information for periods longer than prescribed in this Act. Should disputes arise between agency heads and the Director of the Oversight Office regarding such requests, the matter is to be referred to the Classification and Declassification Review Board.

Section 3(e). The Committee believes that individual agencies can not be expected to meet all of the obligations and requirements of the Act by themselves. Moreover, when acting independently to implement the Act, agencies are likely to generate redundancies and inefficiencies. A central coordinating authority is necessary to reduce the creation of overlapping, or incompatible, information management procedures and systems. The Oversight Office is expected to act as that central coordinating body and to reduce inefficiencies in agency efforts to implement the Act. In order to facilitate the operation of the Oversight Office, agencies are required to provide information as requested to the Oversight Office.

Section 3(f). Consistent with his mandate to protect national security information effectively, the Director of the Oversight Office is required to implement information security procedures within the Oversight Office and among Oversight Office personnel.

Section 3(g). Unclassified reports on compliance with this Act are to be made by March 31 of each year. Classified versions may also be prepared if necessary.

SECTION 4. CLASSIFICATION AND DECLASSIFICATION REVIEW BOARD

Sections 4(a) and (b). The Classification and Declassification Review Board (the Board) is the second entity created to oversee the implementation of the Act. The Board is to consist of five members to be appointed by the President with the advice and consent of the Senate.

The Committee believes it is very important that Board members reflect a wide range of views on classification and declassification issues, and that the Board includes individuals with experience in the protection of national security as well as individuals with an appreciation for the historical importance of releasing classified information to the public and a commitment to open government. The Committee expects each of these qualities to be a factor in choosing nominees to the Board. In order to ensure such a balance is achieved on the Board, the Committee considered requiring that the President nominate individuals from different lists prepared by the Director of Central Intelligence, the National Security Advisor, the Archivist of the United States, and the Office of Management and Budget. In the end, the Committee decided the better approach is to allow more flexibility for the President and require only consultation with the agencies identified in this Act. Should representation of a wide variety of views not be present among Board members, the nomination process should be reviewed and stricter nomination requirements considered. In order to ensure the independence of the Board, no currently serving official of the United States may be nominated to serve on the Board.

Section 4(c). The purpose of the Board is to review cases in which disagreements develop between the Director of the Office of National Classification and Declassification Oversight and individual agencies regarding maintaining classified information beyond the time schedules provided for in this Act, as well as to hear appeals by individuals who have filed requests for mandatory declassification review. The Board is modeled on the declassification review procedures adopted for the John F. Kennedy Assassination Records Review Board and is intended to function in a similar manner.

Section 4(d). All decisions of the Board may be appealed directly to the President within 60 days so that no classification or declassification decision need be taken without the President's approval. This requirement ensures that the President's constitutional responsibility to protect national security as Commander-in-Chief is not undermined.

Section 4(e). Again, consistent with its responsibility to effectively protect national security information, the Board will implement information security procedures as part of its operations. The bill requires that Board members and staff have appropriate security clearances.

Section 4(f). Board members are to receive only per diem and travel expenses for the periods during which the Board meets. It is the committee's expectation that relatively few disputes will have to be heard by the Board each year. Numerous disputes being taken to the Board requiring lengthy periods of work for Board members should be seen as an indication that the reforms required in this Act are not functioning as envisioned.

The Committee recognizes the need for a limited executive staff to conduct the day-to-day business of the Board. Therefore, the substitute provides the Director of the Board with authority to appoint staff. In order to reduce the need for unnecessarily increasing government bureaucracy however, the Committee expects that the Board's executive staff will be limited, and the legislation authorizes the detail of staff to the Board from other federal agencies.

SECTION 5. APPEAL OF DETERMINATIONS OF CLASSIFICATION AND DECLASSIFICATION REVIEW BOARD

The provisions of Section 5 of the Committee substitute preserve the President's constitutional authority as Commander-in-Chief by making explicit that under the Government Secrecy Reform Act, he remains the ultimate decision-maker with respect to all classification or declassification decisions.

The substitute provides that if the Classification and Declassification Review Board rejects an agency's appeal of a decision of the Director of the Office of National Classification and Declassification Oversight, the agency may appeal the adverse Review Board decision directly to the President. In addition, an individual or entity whose appeal to the Review Board on mandatory declassification review is rejected may also appeal to the President. The substitute makes clear that the President's determination is final and not subject to review. In order to protect the President's interest in the orderly management of his affairs, the Committee believes a limitation on the timeliness of appeals to the President is warranted. Accordingly, the substitute requires an agency, individual, or entity seeking presidential review of a decision of the Review Board to file the appeal with the President not later than 60 days after the date of the decision which is being appealed.

SECTION 6. PROHIBITIONS

Section 6(a). This provision is directed to the Executive Branch and makes clear that nothing in the Act shall be construed to authorize the withholding of any information from Congress. As the branch of the national government vested with the responsibility of

passing laws and formulating national policy, Members of Congress must be accorded access to classified information in accordance with recognized procedures to ensure its safe handling. The procedures and standards for protecting information outlined in the bill are in no way intended to restrict and may not be relied upon to deny Members of Congress access to information.

Section 6(b). This provision was added to the bill by the substitute amendment. Its inclusion was requested by Mr. Cohen and Mr. Leonard in response to questioning at the Committee's March 25, 1998 hearing. National Security Advisor Samuel Berger's May 11, 1998 letter expressing the Administration's views of S. 712 reiterated the Administration's position that in order to be acceptable to the Administration, any bill must "[e]xplicitly prohibit conferring any *new* substantive or procedural rights enforceable in the courts." Letter from Samuel R. Berger to Senator Fred Thompson, May 11, 1998, page 2 (emphasis supplied). As introduced, S. 712 was silent on whether it created new substantive or procedural rights subject to judicial review. The courts have held that unless Congress evinces clear and convincing evidence that judicial review is prohibited, the courts will presume it was intended. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670–73 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Accordingly, the substitute adopted by the Committee explicitly preserves the status quo with respect to judicial review: the Act will create no new right of judicial review, either substantive or procedural. Instead, the bill would set up an appeals system that is entirely within the Executive Branch and subject to supervision by the President, who will be the ultimate decision-maker on questions of classification and declassification. There would be no judicial review of classification or declassification decisions under this Act.

The only judicial review permissible under the substitute will be that available under the Freedom of Information Act, 5 U.S.C. § 552. See also 50 U.S.C. § 431(f). Judicial review of classification decisions under the Freedom of Information Act is already provided by law. This Act would neither expand nor limit the scope of judicial review currently available under the Freedom of Information Act. The intended impact of this Act on judicial review under the Freedom of Information Act is addressed in greater detail in the discussion of section 2(f) above.

SECTION 7. DEFINITIONS

The definition section is limited. It defines "agency" broadly to include any executive branch agency as defined in title 5, United States Code, any military department as defined in title 5, United States Code, and any other entity in the executive branch that comes into possession of classified information. This latter provision, which is intended to be read broadly, is an important addition, as it will cover components of the Executive Office of the President, which are otherwise not covered within the traditional definition of "agency" under title 5, United States Code.

The bill also defines "classify," "classified," and "classification," as well as "declassify," "declassified," and "declassification." "Classified" information, including its cognate terms, is simply that which is determined, pursuant to the balancing test imposed by the Gov-

ernment Secrecy Reform Act, and the procedures provided by the Act, to require protection from unauthorized disclosure in order to protect the national security of the United States. "Declassification," including its cognate terms, simply covers the process by which information that is or has been classified is determined, pursuant to the time-tables or standards imposed by the legislation, to no longer require protection from unauthorized disclosure in order to protect the national security of the United States.

SECTION 8. EFFECTIVE DATE

The Government Secrecy Reform Act would take effect 180 days after its enactment. The Committee understands this to mean that the Administration would have six months to prepare to implement its provisions, and that the promulgation by the President of the categories and procedures required by Section 26(b)(1) and the issuance of agency standards and procedures required by Section 2(b)(4) must occur within the 180-day period between enactment of the legislation and its effective date, so that by the conclusion of that period, the executive branch will be able to implement fully the provisions of the Act.

The change to the Freedom of Information Act made by the Government Secrecy Reform Act would also take effect 180 days after enactment and would apply to pending cases, although not to any cases in which a final judgment had been entered prior to the effective date. Because no pending case would involve information classified pursuant to the legislation, however, this change to the Freedom of Information Act should have no bearing on any pending Freedom of Information Act case.

V. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 712 will not have a significant regulatory impact upon individuals or businesses or any significant economic impact upon them.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 13, 1998.

Hon. FRED THOMPSON,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 712, the Government Secrecy and Reform Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dawn Sauter.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

S. 712—Government Secrecy and Reform Act of 1998

Summary: S. 712, the Government Secrecy and Reform Act of 1998, would establish new rules and organizations related to classifying and declassifying information. CBO estimates that the annual costs of S. 712 would range from about \$10 million to about \$130 million, depending on how the bill would be interpreted and assuming appropriation of the necessary amounts. The bill would not affect direct spending or receipts; thus pay-as-you-go procedures would not apply.

The Unfunded Mandates Reform Act (UMRA) excludes from application of the act legislative provisions that are necessary for the national security. CBO has determined that all of the provisions of this bill fit within that exclusion.

Description of the bill: The rules governing information classification and declassification are currently established by executive order. S. 712 would provide a statutory foundation for the classification process established in Executive Order 12958. It could also change current practices in at least two respects. First, S. 712 would preclude the original classification of a document unless the agency first determines that national security concerns outweigh the public benefit of keeping information unclassified. S. 712 would establish specific criteria for making this determination, including whether disclosure of information would better enable individuals to hold government officials accountable for their actions and whether disclosure would increase public awareness or understanding of government activities.

Second, S. 712 might affect the protection of certain information under existing laws. As under E.O. 12958, S. 712 would set a 10-year maximum for the initial period of classification and would authorize extensions beyond 10 years if declassifying the information would harm national security. Also, like the current executive order, S. 712 would limit most classification periods to 25 years. However, unlike E.O. 12958, S. 712 would not specifically exclude information protected under the Atomic Energy Act of 1954 or the National Security Act of 1947 from operation of its provisions. This aspect of the bill could nullify exemptions that some agencies are permitted. Thus, the possible repeal of current exemptions could dramatically increase the number of documents that agencies must review to comply with mandatory classification periods.

The bill would also establish two organizations—the Office of National Classification and Declassification Oversight (ONCDO) and the Classification and Declassification Review Board. ONCDO would standardize the policies and procedures used by all federal agencies for classifying and declassifying information. The Classification and Declassification Review Board would decide appeals by agencies over the classification decisions of ONCDO and appeals lodged by individuals over agencies' decisions.

Estimated cost to the Federal Government: CBO estimates that the annual costs of S. 712 would range from about \$10 million to about \$130 million, depending on how the bill would be interpreted and assuming appropriation of the necessary amounts. The budgetary impact of S. 712 over the 1999–2003 period would depend primarily on if and how fast agencies would be required to review certain documents, including a backlog from several years. If the bill

were interpreted so as to deny the exemptions from review that are currently granted, costs would total about \$130 million annually. If the current exemptions were continued, the costs of the bill would total about \$10 million a year due to the costs of establishing the two new organizations and handling a slight increase in requests for information under the Freedom of Information Act (FOIA).

Mandatory classification periods

Based on the report of the Commission on Protecting and Reducing Government Secrecy, about 300 million pages of classified information are exempt from mandatory review under current law. Other data suggest that the cost to review each page amounts to \$2 for most agencies, \$3 for the Central Intelligence Agency (CIA), and about \$4 for the National Security Agency. Thus, if the bill would repeal current exemptions, the number of documents that agencies must review and the costs they would incur would increase significantly.

Assuming that S. 712 would effectively nullify current exemptions and that agencies would have between 10 and 15 years to work off the current backlog of documents, CBO estimates that discretionary costs would rise by about \$75 million a year. Reviewing the documents that would come up for review each year would add another estimated \$45 million to agencies' annual costs.

Legal challenges to classification decisions

Enacting S. 712 could raise administrative and legal costs for various agencies in response to additional requests for information under FOIA and challenges to classification decisions under the new test. The new requests could stem from heightened awareness of the test an agency would be required to apply, and the challenges could arise over disagreements on how public benefits and national security concerns were measured and balanced.

The most recent statistics show that in 1992 agencies received \$75,000 FOIA requests and spent \$100 million to implement FOIA. The costs to implement FOIA include both administrative expenses—the cost of employees and office equipment used to process FOIA requests—and legal expenses, which may include attorney fees and other litigation costs incurred in defending challenges to the denial of a FOIA request. Assuming agency costs to implement FOIA have remained relatively constant except for inflation, CBO estimates that agencies now spend around \$120 million annually to respond to FOIA requests. CBO estimates that S. 712 would increase FOIA requests by around 5 percent and consequently raise discretionary spending by \$6 million a year, assuming appropriation of the necessary amounts.

Courts have shown deference to agency decisions concerning the classification of information. CBO has no reason to believe that challenges under S. 712 would be more successful than those under existing law. If courts would continue to defer to agency classification decisions, the number of legal challenges would rise initially but then diminish.

New Organizations

CBO assumes that ONCDO would grow out of the Information Security Oversight Office, which performs many of the functions that ONCDO would perform. CBO estimates that the additional costs of the new organization would total \$3 million a year.

Under the bill, the Classification and Declassification Review Board would consist of a chairman and four other members from the private sector who are distinguished historians or archivists and experts in national security matters. The chairman would have the authority to hire an executive secretary and other staff. CBO estimates that the Board would cost about \$1 million a year.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: Section 4 of UMRA excludes from application of the act legislative provisions that are necessary for the national security. CBO has determined that all of the provisions of this bill fit within that exclusion.

Estimate prepared by: Federal Costs: Dawn Sauter. Impact on State, Local, and Tribal Governments: Pepper Santalucia. Impact on the Private Sector: David Mosher.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 712 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

Part I—The Agencies Generally

CHAPTER 5—ADMINISTRATIVE PROCEDURE

Subchapter II—Administrative Procedure

§ 552. (b)(1) Public information; agency rules, opinions, orders, records and proceedings

* * * * *

[This section does not apply to matters that are—

[(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;]

* * * * *

§ 552. * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized to be classified under the Government Secrecy Reform Act of 1998, or specifically authorized under criteria established by an Executive order to be kept se-

cret in the interest of national security and (B) are in fact properly classified pursuant of that Act of Executive order;

* * * * *

Part III—Employees

Subpart D—Pay and Allowances

CHAPTER 53—PAY RATES AND SYSTEMS

Subchapter II—Executive Schedule Pay Rates

[§ 5314. Position at level III

[Level III of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:

[Solicitor General of the United States

[Under Secretary of Commerce, Under Secretary of Commerce for Economic Affairs, Under Secretary of Commerce for Export Administration and Under Secretary of Commerce for Travel and Tourism.

[Under Secretary of State (5).

[Under Secretary of Treasury (3).

[Administrator of General Services.

[Administrator of the Small Business Administration.

[Deputy Administrator, Agency for International Development.

[Chairman of the Merit Systems Protection Board.

[Chairman, Federal Communications Commission.

[Chairman, Board of Directors, Federal Deposit Insurance Corporation.

[Chairman, Federal Energy Regulatory Commission.

[Chairman, Surface Transportation Board.

[Chairman, National Labor Relations Board.

[Chairman, Securities, and Exchange Commission.

[Chairman, Board of Directors of the Tennessee Valley Authority.

[Chairman, National Mediation Board.

[Chairman, Railroad Retirement Board.

[Chairman, Federal Maritime Commission.

[Comptroller of the Currency.

[Commissioner of the Internal Revenue Service.

[Under Secretary of Defense for Policy.

[Under Secretary of Defense (Comptroller).

[Under Secretary of Defense for Personnel and Readiness.

[Deputy Administrator of the National Aeronautics and Space Administration.

[Deputy Directors of Central Intelligence (2).

[Director of the Office of Emergency Planning.

[Director of the Peace Corps.

[Deputy Director, National Science Foundation.

[President of the Export-Import Bank of Washington.

[Members, Nuclear Regulatory Commission.

[Members, Defense Nuclear Facilities Safety Board.

[Members, Board of Governors of the Federal Reserve System.
 [Director of the Federal Bureau of Investigation, Department of Justice.
 [Administrator of the National Highway Traffic Safety Administration.
 [Administrator, Federal Railroad Administration.
 [Chairman, National Transportation Safety Board.
 [Chairman of the National Endowment for the Arts the incumbent of which serves as Chairman of the National Council of Arts.
 [Chairman of the National Endowment for the Humanities.
 [Director of the Federal Mediation and Conciliation Service.
 [Federal Transit Administrator.
 [President, Overseas Private Investment Corporation.
 [Chairman, Occupational Safety and Health Review Commission.
 [Governor of the Farm Credit Administration.
 [Chairman, Equal Employment Administration.
 [Chairman, Consumer Product Safety Commission.
 [Under Secretary, Department of Energy.
 [Chairman, Commodity Futures Trading Commission.
 [Deputy United States Trade Representatives (3).
 [Chairman, United States International Trade Commission.
 [Under Secretary of Commerce for Oceans and Atmosphere, the incumbent of which also serves as Administrator of the National Oceanic and Atmospheric Administration.
 [Associate Attorney General.
 [Chairman, Federal Mine Safety and Health Review Commission.
 [Chairman, National Credit Union Administration Board.
 [Deputy Director of the Office of Personnel Management.
 [Under Secretary of Agriculture for Food, Nutrition, and Consumer Services.
 [Under Secretary of Agriculture for Natural Resources and Environment.
 [Under Secretary of Agriculture for Research, Education, Economics.
 [Under Secretary of Agriculture for Food Safety.
 [Director, Institute for Scientific and Technological Cooperation.
 [Under Secretary of Agriculture for Rural Development.
 [Administrator, Maritime Administration.
 [Executive Director, Property Review Board.
 [Deputy Administrator of the Environmental Protection Agency.
 [Archivist of the United States.
 [Deputy Director of the United States Arms Control and Disarmament Agency.
 [Executive Director, Federal Retirement Thrift Investment Board.
 [Deputy Under Secretary of Defense for Acquisition and Technology.
 [Director, Trade and Development Agency.
 [Under Secretary of Commerce for Technology.
 [Under Secretary for Health, Department of Veterans Affairs.
 [Under Secretary of Benefits, Department of Veterans Affairs.
 [Director of the Office of Government Ethics.
 [Administrator for Federal Procurement Policy.

【Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

【Deputy Director for Demand Reduction, Office of National Drug Control Policy.

【Director of the Office of Thrift Supervision.

【Chairperson of the Federal Housing Finance Board.

【Executive Secretary, National Space Council.

【Controller, Office of Federal Financial Management, Office of Management and Budget.

【Under Secretary of Education.

【Chief Executive Officer, Resolution Trust Corporation.

【Administrator, Research and Special Programs Administration.】

§5314. Position at Level III

Level III of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title: Solicitor General of the United States

Under Secretary of Commerce, Under Secretary of Commerce for Economic Affairs, Under Secretary of Commerce for Export Administration and Under Secretary of Commerce for Travel and Tourism.

Under Secretary of State (5).

Under Secretary of Treasury (3).

Administrator of General Services.

Administrator of the Small Business Administration.

Deputy Administrator, Agency for International Development.

Chairman of the Merit Systems Protection Board.

Chairman, Federal Communications Commission.

Chairman, Board of Directors, Federal Deposit Insurance Corporation.

Chairman, Federal Energy Regulatory Commission.

Chairman, Surface Transportation Board.

Chairman, National Labor Relations Board.

Chairman, Securities and Exchange Commission.

Chairman, Board of Directors of the Tennessee Valley Authority.

Chairman, National Mediation Board.

Chairman, Railroad Retirement Board.

Chairman, Federal Maritime Commission.

Comptroller of the Currency.

Commissioner of the Internal Revenue Service.

Under Secretary of Defense for Policy.

Under Secretary of Defense (Comptroller).

Under Secretary of Defense for Personnel and Readiness.

Deputy Administrator of the National Aeronautics and Space Administration.

Deputy Directors of Central Intelligence (2).

Director of the Office of Emergency Planning.

Director of the Peace Corps.

Deputy Director, National Science Foundation.

President of the Export-Import Bank of Washington.

Members, Nuclear Regulatory Commission.

Members, Defense Nuclear Facilities Safety Board.
Members, Board of Governors of the Federal Reserve System.
Director of the Federal Bureau of Investigation, Department of Justice.
Administrator of the National Highway Traffic Safety Administration.
Administrator, Federal Railroad Administration.
Chairman, National Transportation Safety Board.
Chairman of the National Endowment for the Arts the incumbent of which serves as Chairman of the National Council of Arts.
Chairman of the National Endowment for the Humanities.
Director of the Federal Mediation and Conciliation Service.
Federal Transit Administrator.
President, Overseas Private Investment Corporation.
Chairman, Occupational Safety and Health Review Commission.
Governor of the Farm Credit Administration.
Chairman, Equal Employment Administration.
Chairman, Consumer Product Safety Commission.
Under Secretary, Department of Energy.
Chairman, Commodity Futures Trading Commission.
Deputy United States Trade Representatives (3).
Chairman, United States International Trade Commission.
Under Secretary of Commerce for Oceans and Atmosphere, the incumbent of which also serves as Administrator of the National Oceanic and Atmospheric Administration.
Associate Attorney General.
Chairman, Federal Mine Safety and Health Review Commission.
Chairman, National Credit Union Administration Board.
Deputy Director of the Office of Personnel Management.
Under Secretary of Agriculture for Food, Nutrition, and Consumer Services.
Under Secretary of Agriculture for Natural Resources and Environment.
Under Secretary of Agriculture for Research, Education, Economics.
Under Secretary of Agriculture for Food Safety.
Director, Institute for Scientific and Technological Cooperation.
Under Secretary of Agriculture for Rural Development.
Administrator, Maritime Administration.
Executive Director, Property Review Board.
Deputy Administrator of the Environmental Protection Agency.
Archivist of the United States.
Deputy Director of the United States Arms Control and Disarmament Agency.
Executive Director, Federal Retirement Thrift Investment Board.
Deputy Under Secretary of Defense for Acquisition and Technology.
Director, Trade and Development Agency.
Under Secretary of Commerce for Technology.
Under Secretary for Health, Department of Veterans Affairs.
Under Secretary of Benefits, Department of Veterans Affairs.
Director of the Office of Government Ethics.
Administrator for Federal Procurement Policy.

Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

Deputy Director for Demand Reduction, Office of National Drug Control Policy.

Director of the Office of Thrift Supervision.

Chairperson of the Federal Housing Finance Board.

Executive Secretary, National Space Council.

Controller, Office of Federal Financial Management, Office of Management and Budget.

Under Secretary of Education.

Chief Executive Officer, Resolution Trust Corporation.

Administrator, Research and Special Programs Administration.

Director, Office of National Classification and Declassification Oversight.

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