

**The original documents are located in Box 4, folder “Classification of Documents, Legal Authority for” of the Ron Nessen Papers at the Gerald R. Ford Presidential Library.**

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## Legal Authority for Classification System

Executive Order No. 11652 established procedures for the classification and declassification of national security information and material. It was signed by President Nixon on April 24, 1973. This order followed a series of regulations dealing with classification which date back to the First World War. It represents an effort to minimize overclassification by limiting the number of officials with authority to classify documents and requiring that most documents be automatically declassified after specified periods of time.

This order, like most of its predecessors, does not purport to be based on any particular statute. To support the classification system, the Executive Branch has generally relied on the implied constitutional powers of the President and a series of statutes which, on their face, would appear to contemplate the existence of a classification system.



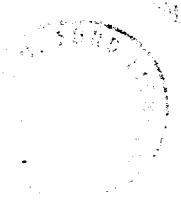
The constitutional provisions most often cited for this purpose are:

(i) Article II, Section 1: "The executive power shall be vested in a President of the United States of America."

(ii) Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States."

(iii) Article II, Section 3: "...he shall take care that the laws be faithfully executed."

Sections 1 and 2 imply a broad Presidential supervisory and regulatory authority over the internal operations of the executive branch. Furthermore, Section 3, when coupled with the statutes discussed below (which seem to contemplate a classification system), authorizes the President to classify information in order to take care that these statutes "be faithfully executed."



The relevant statutes <sup>(which imply existence of classification system)</sup> are:

(a) The Espionage Laws (18 U.S.C. 793-798).

In general, these statutes prohibit the transmission of national defense information to a foreign government with reason to believe that this will damage the United States. This prohibition applies to any information "relating to the national defense." (e.g., 18 U.S.C. 794(a)) One section prohibits the disclosure to any unauthorized persons of certain special types of classified information (cryptographic and communications intelligence). (18 U.S.C. 798) It defines "classified information" as:

"information which ... is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution." 18 U.S.C. 798(b).

(b) National Security Act of 1947 (50 U.S.C. § 401 et. seq.): This statute established the Department of Defense, the National Security Council, and the Central Intelligence Agency. It assigned to the Director of Central Intelligence the responsibility of protecting intelligence sources and methods from unauthorized disclosure.

(c) Internal Security Act (50 U.S.C. § 783 (b)): This Act prohibits a Federal employee from passing to a foreign agent "any information of



a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States."

(d) Atomic Energy Act of 1954 (42 U.S.C. § 2162 2163, 2165):

This statute deals with control of a type of information related to Atomic Energy. This information is termed "Restricted Data" and is defined as:

"all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title." 42 U.S.C. § 2014(y).

(e) Freedom of Information Act (5 U.S.C. § 552): One exception in this Act covers information "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."

(f) Miscellaneous Statutes dealing with Foreign Relations: Certain statutes requiring reports to the public by the President on foreign aid and activities contain exceptions for information whose release would be incompatible with the security of the United States. (E.g., 22 U.S.C. § 2394(b))



(g) Arms Control and Disarmament Act (22 U.S. § 2585): This statute, establishing the Arms Control and Disarmament Agency, establishes security requirements and procedures for employees. It requires that procedural and substantive security clearance requirements for ACDA employees be at least as stringent as those of the government agency whose corresponding standards are the most stringent. It refers to, but does not define, the term "classified information."

No court decision has ever dealt directly with the question of the President's authority to establish a comprehensive classification system. In 1957, the Commission on Government Security (established by P.L. 84-304), relying on the above statutes and constitutional provisions, concluded in its report to Congress and the President that "in the absence of any law to the contrary, there is an adequate constitutional and statutory basis upon which to predicate the Presidential authority to issue the predecessor to Executive Order 11642."

Courts have dealt tangentially with the issue of the classification system's overall validity. Appellate courts have sustained convictions of persons under the Internal Security Act for passing classified information to foreign powers. (E.g., Scarbeck v. U.S., 317 F. 2d 546 (D.C. Cir. 1962.)) Cases dealing with denial of security clearances have appeared to assume the validity of the classification system

itself. (E.g., Adams v. Laird, 420 F. 2d 230 (D.C. Cir. 1969; but cf. Greene v. McElroy, 360 U.S. 474 (1959).

