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The Balance of Power in our American Democracy

- Separation of Powers
- The Executive, Legislative and Judicial Branches
- Deliberate Tension in the System
 - Who Owns Our Records?
- Transparency Keeps the American Public in Charge
- National Security Also Protects the American Public
- The Tug-of-War Between Transparency & National Security
- The Importance of Public Trust

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EXEMPTION 1 OF THE FOIA

Exemption 1 exempts from disclosure national defense or foreign policy information that has been properly classified pursuant to an appropriate Executive Order.

- The President's special role in national defense.
- The Congressional role in transparency policy.
- The Judicial role in enforcing the balance.
- Two primary elements in applying Exemption 1.
 - Does the information warrant classification?
 - Is it currently and properly classified?

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A Very Brief History of Classification

- The Pre-History – President Roosevelt’s Early Order
- President Truman and Executive Order 10290
- President Eisenhower and Executive Order 10500
- President Kennedy and Executive Order 10985
- President Nixon and Executive Order 11652
- President Ford and Executive Order 11862
- President Carter and Executive Order 12065
- President Reagan and Executive Order 12356
- President Clinton and Executive Order 12958
- President Bush and Executive Order 12958, as amended
- President Obama and Executive Order 13526

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EXECUTIVE ORDER 13526

Our democratic principles require that the American people be informed of the activities of their Government...Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation’s security and demonstrating our commitment to open Government through *accurate* and *accountable application of classification standards* and routine, secure, and effective declassification are equally important priorities.

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Practice Notes on Balancing National Security and Transparency

- Respect and Understand the Tension
- Remember that the FOIA is a Disclosure Statute
 - Make FOIA and Equally Important Mission
- Learn the Current Executive Order
 - Be an Advocate on “Both Sides of Right”
- Have Your Tug-of-War Presentation Prepared
 - Train Your Agency to Understand the Balance
 - Find a Senior Transparency Champion
 - Keep Your Agency from Focusing on “Who”
- Know the Classification Machinery in Your Agency
 - Original Classification Authorities
 - Security Classification Guides
 - Know the Subject Matter Experts

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Understanding Executive Order 13526

Section 1- Original Classification

- Section 1.1 – Classification Standards
- Section 1.2 – Classification Levels
- Section 1.3 – Classification Authority
- Section 1.4 – Classification Categories
- Section 1.5 – Duration of Classification
- Section 1.7 – Classification Prohibitions & Limitations

Section 2 – Derivative Classification

- Section 2.2 – Classification Guides

Section 3 – Declassification

- Section 3.3 – Automatic Declassification
- Section 3.4 – Systematic Declassification Review
- Section 3.5 – Mandatory Declassification Review

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Understanding Executive Order 13526

Some Key Changes from previous orders -

Sections 1.1(b) and 1.2(a)(3) – If there is **significant doubt** about the need to classify information it shall not be classified...If there is significant doubt about the level of classification it shall be classified at the lower level.

Section 1.5(d)-No information may remain classified indefinitely.

Section 3.1(d) - “In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified.”

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Understanding Executive Order 13526

More Key Changes from previous EO

Section 1.7(c) - Prohibits the reclassification of information after its declassification and release under proper authority except when agencies can comply with significantly tightened restrictions, particularly regarding records that have been accessioned into the National Archives.

Section 1.9(a)-Fundamental Classification Guidance Review-periodic review of classification guidance, particularly classification guides...

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1.1(a) – Classification Standards – classification conditions

- An OCA is classifying
- Under the ownership/control of the United States Government
- Falls within a classification category
- OCA makes harm determination

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1.1(b) – If there is doubt, it shall not be classified.

Section 1.1(c) – Unauthorized disclosures do not waive classification of identical or similar information.

Section 1.1(d) – Release of foreign government information is presumed to cause damage.

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1.2 – Classification Levels

Top Secret – “exceptionally grave damage” to national security

Secret – “serious damage” to national security

Confidential – “damage” to national security

*When in doubt, classify at the lower level.

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1.3 – Classification Authority

Original Classification Authority Exercised by –

- The President or Vice President
- Agency heads and officials designated by the President
- Government officials delegated this authority

Other rules and restrictions on delegations

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1.4 – Classification Categories

- a. Military plans, weapons systems, or operations
- b. Foreign government information
- c. Intelligence activities, sources or methods, or cryptology
- d. Foreign relations or foreign activities
- e. Safeguarding of nuclear facilities/material
- f. Vulnerabilities or capabilities of systems, installations, infrastructure, projects, plans or protection services
- g. Development, production or use of weapons of mass destruction

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1.5 – Duration of Classification

- a. OCA “shall establish a specific date or event for declassification” that triggers automatic declassification
- b. If no date or event can be determined, the default is 10 years, but some cases may warrant 25 years
- c. OCA can set 25 year declassification
- d. Nothing may remain classified forever!

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- If there is no earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original.
 - Determined that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision.
- May extend the duration of classification up to 25 years from the date of origin of the document, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1. 6 – Identification and Markings

- Level, Classifier, Agency, Declassification, Reason

Section 1.7 – Classification Prohibitions & Limitations – Classification can not be used to –

- Conceal violations of law, inefficiency or administrative error
- Restrain competition
- Prevent or delay release of unprotected information

Can something be reclassified?

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Classification after the receipt of a FOIA or MDR request

Records will be protected from disclosure under Exemption 1, if:

- Properly classified
- Proper markings have been applied to the classified documents
- Information has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the FOIA, the Presidential Records Act, the Privacy Act, or the mandatory review provisions.

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Mechanics of Reclassification

Information may not be reclassified after declassification and release to the public under proper authority unless:

- Approved in writing by the agency head based on a document-by-document;
- Information may be reasonably recovered without bringing undue attention to the information;
- Reclassification action is reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office; and
- NARA is notified of documents in its physical and legal custody and an agency requests suspension of public access.

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Understanding Executive Order 13526

Section 1- Original Classification

Section 1.8 – Classification Challenges

- a. Holders who, “in good faith,” believe that classification is wrong are “encouraged and expected” to challenge it.
- b. Agencies must have procedures for challenging.
 1. Individuals may not be subject to retribution.
 2. Review must be by an impartial official/panel.

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Understanding Executive Order 13526

Section 2 – Derivative Classification

Section 2.1 – Use of Derivative Classification

- a. Don't need original classification authority to use the information and mark it as classified.
- b. Users must be identified and respect original decision

Section 2.2 – Classification Guides

- a. OCAs must prepare security classification guides
- b. Must be approved by the OCA
- c. 25 year limit on derivative classification

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Understanding Executive Order 13526

Section 3 – Declassification & Downgrading

Section 3.1 – Authority for Declassification

Section 3.3 – Automatic Declassification

- a. Information more than 25 years old and of permanent historical value shall automatically declassify.
- b. Agency head may exempt certain information –
 - a. Human intelligence source/methods or relationship with foreign intelligence services.
 - b. Information that would reveal weapons of mass destruction, cryptologic systems, state-of-the-art weapons systems, military war plans, certain foreign government information, the protection of the President/Vice President, emergency plans, installation protection, or would violate a treaty or international agreement.

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Section 3 – Declassification

Section 3.4 – Systematic Declassification Review –

Each agency must review permanent classified holdings for declassification.

Section 3.5 – Mandatory Declassification Review –

- Individuals may request mandatory declassification review, but they must adequately describe the information and it must not be within an exempt operational file or involved in litigation.
- Declassified information will be released, unless other authorities require further withholding.
- Agencies must develop procedures for MDR.

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Understanding Executive Order 13526

Section 3 – Declassification

Section 3.6 – Processing Reviews & Requests

- a. References GLOMAR
- b. Classified referrals to equity holders
- c. Classification and temporary records

Section 3.7 – National Declassification Center

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Understanding Executive Order 13526

The Problem of the Compilation and Mosaic

- Protection of records containing unclassified information, the unauthorized release of which reasonably could be expected to cause damage to the national security.
- Classification Based on Compilation Theory
 - Applies when a Government Agency compiles selected unclassified information into a single record or portion thereof that in its totality is classified: Document Creation – beginning of document lifecycle.
 - **EXAMPLE:** A listing of titles by date or control number of all intelligence studies done for a particular period of time

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COMPILATION/MOSAIC THEORY Understanding Executive Order 13526

The Compilation and Mosaic Theory

- Classification Based on Mosaic Theory
 - Applies when a Government Agency determines that release of all unclassified records on a particular subject would enable a knowledgeable person to analyze the material and determine information which is classified.
 - **EXAMPLE:** Release of all records concerning arm sales to a friendly nation (e.g., Israel) for a significant period of time.

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~~SECRET~~

5. (U) C3 for North American Air Defense

a. (S)

b. (U) Capability

(1) (S)

(2) (S)

(3) (S)

c. (U) Rationale

(1) (S)

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UNCLASSIFIED

Proprietary Rights. According to the NAVAIR program manager, the reason for not breaking out the gearboxes for direct purchase [redacted] proprietary rights on special tooling for the gearboxes.

[redacted] competitively on an Air Force contract (F41608-82-R-2618) for the gearboxes in the mid-1982. Our review of available documentation indicated that the special tooling in question had been paid for by the Government [redacted] no objection to its use on a noninterference [redacted]. We also noted that contract -0013 contains a

special tooling clause which appears to us to give the Government full rights to usage (Defense Acquisition Regulation 7-104.25). Even if a legal claim for proprietary rights could be established by [redacted] [redacted] [redacted] substantial savings can be achieved by purchasing the

gearboxes

For example, the Navy's Aviation Supply Office in Philadelphia, Pennsylvania, purchased the identical speed decenter gearbox directly from General Electric. General Electric's price to Navy's Aviation Supply Office under a basic ordering agreement (F34601-79-G-0213-GBMT) for 46 gearboxes ordered in August 1981 was \$79,968 each, for a total of \$3,678,528. This unit price is substantially lower than the \$124,880 price negotiated by NAVAIR with Kaman in June 1982 on contract -0113 (\$4,495,698 divided by 36). The following section shows potential savings by breaking out these items.

Potential Savings by Breakout. DCAS files showed that DCAA, DCAS, and the Navy Procurement Contracting Officer (PCO) recommended the gearboxes for breakout. Also, DCAS officials have stated that the overhead and profit charged by General Electric and Kaman were excessive and the PCO was so informed. The final decision on price and whether to break out the buy, however, was made by NAVAIR. In a January 11, 1983 memorandum the NAVAIR program manager indicated that although breakout could save costs, the contractor furnished equipment method was being used [redacted] problems and the time lag since it last manufactured this part. We were told that [redacted] however, no reason was given by the program manager for not buying the [redacted].

We also found no evidence [redacted] had adversely affected delivery of helicopters to the Government on the Navy contracts cited previously. Current [redacted] are ahead of Schedule. We therefore believe the Navy should avail itself of the substantial savings that can be achieved by breaking out these items as follows.

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PAGE CONTAINS PROPRIETARY CONTRACTOR INFORMATION