BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 81-1009

HAROLD WEISBERG,

Plaintiff-Appellant

v.

GENERAL SERVICES ADMINISTRATION,

Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. Aubrey E. Robinson, Jr., Judge

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CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for appellant Harold Weisberg, certifies that the following listed parties and amici (if any) appeared below:

Harold Weisberg

The General Services Administration

The Central Intelligence Agency, an interested nonparty of whom Weisberg sought discovery, appeared at certain conferences and hearings.

These representations are made in order that judges of this court, inter alia, may evaluate possible disqualification or recusal.

JAMES H. LESAR
Attorney of record for
Appellant Harold Weisberg

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Whether district court erroneously ruled that plaintiff had not "substantially prevailed" within the meaning of 5 U.S.C. § 552(a)(4)(E) where:

(a) agency "declassified" two Warren Commission transcripts and released them on day its brief was due in Court of Appeals;

(b) transcripts were not properly classified procedurally or substantively and did not disclose intelligence sources and methods not already known to the public, including through official disclosures;

(c) agency affidavits which sought to justify the withholding of these transcripts were speculative, inconsistent, implausible, contradictory, and false;

(d) agency affidavits failed to show that prior to their "declassification" these transcripts contained no segregable non-exempt portions; and

(e) agency responsible for withholding the transcripts had improper motive for suppressing them and a history of bad faith conduct in litigating access to Warren Commission materials.

2. Whether the district court erred in refusing to allow party seeking award of attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) to undertake discovery regarding agency's claim that transcripts were released because of developments unrelated to pending case.

3. Whether district court abused its discretion in not awarding attorney fees where agency acted in bad faith.

This case has not previously been before this Court, or any other Court (other than the Court below), under this or any other title.

REFERENCES TO PARTIES AND RULINGS

By order dated July 14, 1980, the district court denied appellant Weisberg's motion for an award of attorney fees and other litigation costs. [App. 781] Previously, by order dated October 17, 1979, the court had stayed indefinitely all of Weisberg's pending discovery requests. [App. 497]

Subsequently, by order dated September 3, 1980, the district court granted Weisberg's motion for reconsideration, vacated its orders of October 17, 1979, and July 14, 1980, and ruled that Weisberg could commence discovery proceedings "on the issue of whether the two transcripts released to him while this case was pending on appeal were released for reasons unrelated to this litigation." [App. 793]

The General Services Administration (GSA) then moved the court to reconsider its ruling on Weisberg's motion for reconsideration, and by order dated October 30, 1980, the court granted that motion, vacated its order of September 3, 1980, and reinstated its orders of October 17, 1979, and July 14, 1980. [App. 803]

Remarks of the district court relevant to its rulings are interspersed throughout the transcript of the hearing held on October 17, 1979. [App. 740-779]

STATUTES OR REGULATIONS

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

The FOIA further states:

> (b) 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;
>
> * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that such matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) established particular criteria for withholding or refers to particular types of matters to be withheld;
>
> * * *
>
> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

50 U.S.C. § 403(d)(3) provides:

> [t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

The Attorney General's "Guidelines for Review of Materials Submitted to the President's Commission of the Assassination of President Kennedy," as revised by the Attorney General in 1975, with language added by the revision in italics, read as follows:

> 1. Statutory requirements prohibiting disclosure should be observed.
>
> 2. Security classifications should be respected, but the agency responsible for the classification should carefully re-evaluate the contents of each classified document and determine whether the classification can, consistently with the national security, be eliminated or downgraded. See Attorney General's Memorandum on 1974 Amendments, pp. 1-4.

3. Unclassified material which has not already been disclosed in another form should be made available to the public on a regular basis or upon request under the Freedom of Information Act unless such material is exempt under the Act and its disclosure--

(A) Would be detrimental to the administration and enforcement of the laws and regulations of the United States and its agencies;

(B) Might reveal the identity of confidential sources of information and impede or jeopardize future investigations by precluding or limiting the use of the same or similar sources hereafter;

(C) Would be a source of embarrassment to innocent persons, who are the subject, source, or apparent source of the material in question, because it contains gossip and rumor or details of a personal nature having no significant connection with the assassination of the President.

Whenever one of the above reasons for nondisclosure may apply, your department should, in determining whether or not to authorize disclosure, weigh that reason against the overriding policy of the Executive Branch favoring the fullest possible disclosure.

Unless sooner released to the public, classified and unclassified material which is not now made available to the public shall, as a minimum, be reviewed by the agency concerned five years and ten years after the initial examination has been completed, and in addition must be reviewed whenever necessary to the prompt and proper processing of a Freedom of Information request. The criteria applied in the initial examination, outlined above, should be applied to determine whether changed circumstances will permit further disclosure. Similar reviews should be undertaken at ten-year intervals until all materials are opened for legitimate research purposes. The Archivist of the United States will arrange for such review at the appropriate time. Whenever possible provision should be made for the automatic declassification of classified material which cannot be declassified at this time.

Because of their length Executive orders 10501 and 11652 and the National Security Council Directive implementing Executive Order 11652 are printed as addenda to this brief.

STATEMENT OF THE CASE

I. "The Past Is Prologue"

On November 5, 1973, Congressman Gerald Ford, testifying before the Senate Rules Committee on his nomination to be Vice President, was told that it had been stated that "as a member of the Warren Commission you voluntarily accepted constraints which all members of the Commission accepted, providing that you would not publish or release any proceedings of the Commission." He was then asked whether he felt that in publishing his book, Portrait of the Assassin (Simon & Schuster, 1965), and in providing material for a Life magazine article on the Commission's proceedings, he had violated his "agreement." Mr. Ford replied that he could not recall any such agreement but that

> even if there was, the book that I published in conjunction with a member of my staff who worked with me at the time of the Warren Commission work--we wrote the book, but we did not use in that book any material other than the material that was in the 26 volumes of testimony and exhibits that were subsequently made public and sold to the public generally.

"Nomination of Gerald R. Ford of Michigan to be Vice President of the United States," Hearings Before the Committee on Rules and Administration, United States Senate (93rd. Cong., 1st Sess.), p. 89.

Aware that Mr. Ford's book quoted extensively from the transcript of the executive session of the Warren Commission held on January 27, 1964, Warren Commission critic Harold Weisberg had tried for several years to obtain a copy of this transcript from the National Archives. Although Mr. Ford had published parts of this transcript for profit, the Archives adamantly maintained that it could not make the transcript available to Mr. Weisberg because it was classified Top Secret.

On November 13, 1973, Weisberg filed suit for the January 27 transcript. In responding to that suit, Weisberg v. General Services Administration, Civil Action No. 2052-73, GSA continued to maintain that it was exempt from disclosure under Exemptions 1 and 7 to the Freedom of Information Act (FOIA). Initially argument focused upon the claim that the transcript was properly classified Top Secret pursuant to Executive Order 10501. The government produced an affidavit by Dr. James B. Rhoads, Archivist of the United States, which asserted that. It also procured an affidavit from Mr. J. Lee Rankin, formerly the General Counsel for the Warren Commission, who stated that the Warren Commission had instructed him to security classify Commission records, that the Commission's "authority to classify its records and its decision to delegate that responsibility to me existed pursuant to Executive Order 10501, as amended," and that he ordered that the January 27 transcript be classified Top Secret. [App. 43-44]

Weisberg filed counteraffidavits which branded these representations as false. He attached to his affidavits detailed documentation, such as receipts from Ward & Paul, the Warren Commission's reporter, which supported his assertions. Weisberg's evidence demonstrated that for internal bureaucratic reasons Ward & Paul had routinely classified Warren Commission transcripts (and other Warren Commission records) totally without regard to their content. On the basis of his intimate knowledge of the Commission's records, Weisberg asserted that they did not support Mr. Rankin's claim that he had been ordered to security classify Warren Commission records pursuant to Executive Order 10501. He further pointed out that the Warren Commission had no authority to classify records pursuant to Executive Order 10501, as amended, and that among other violations of security classification procedures, the Warren Commission allowed witnesses and reporters to buy copies of security classified transcripts. [App. 63-77]

The end result of this "battle of the affidavits" was a memorandum and order dated May 3, 1974, in which Judge Gerhard Gesell stated:

> Initially, the Court probed defendant's claim that the transcript had been classified "Top Secret" under Executive Order 10501, 3 C.F.R. 979 (Comp. 1949-53), since such classification would bar furhter judicial inquiry and justify total confidentiality. 5 U.S.C. § 552(b)(1); EPA v. Mink, 410 U.S. 73 (1973). However, defendant's papers and affidavits, supplemented at the Court's request, still fail to demonstrate that the disputed transcript has ever been classified by an individual authorized to make such a designation

> under the strict procedures set forth in Executive Order 10501, 3 C.F.R. 979 (Comp. 1949-53), as amended by Executive Order 10901, 3 C.F.R. 432 (Comp. 1959-63).

[App. 77]

Having rejected GSA's claim that the January 27 transcript was properly classified, Judge Gesell held, however, that it was exempt under 5 U.S.C. § 552(b)(7) as an investigatory file compiled for law enforcement purposes by virtue of the decision in Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 489 F.2d 1195 (en banc 1973). But before Weisberg could appeal this decision the Archives "declassified" what had never been properly classified and released the transcript to Weisberg and the public, all the while ignoring the fact that it had just procured a court decision holding it exempt under Exemption 7.

Once the January 27 transcript was made public it was immediately apparent that there never had been any basis for suppressing it under either exemption. It contained no information even remotely qualifying for consideration as being classifiable for reasons of national defense or foreign policy. The claim that it was properly classified under Executive Order 10501 was a fraud. (The transcript is reprinted in the Appendix at App. 165-252)

Subsequently, during the course of this lawsuit for other Warren Commission executive session transcripts, Weisberg learned that by letter dated December 22, 1972, the Central Intelligence Agency (CIA) had requested that the January 27 transcript remain

classified to protect "sources and methods." [App. 157-160] Yet disclosure of the transcript revealed no CIA "sources and methods" and no "sources and methods" that needed protection in the interest of national security. Affidavit of William G. Florence, ¶17 [App. 137]; March 21, 1977 Affidavit of Harold Weisberg, ¶¶30-32 [App. 153-154]

As will be seen, history repeated itself in this case. Again the CIA claimed the need to protect intelligence "sources and methods"; again the GSA "declassified" the transcripts after procuring a favorable decision in district, then released them to Weisberg while this case was pending on appeal.

II. PROCEDURAL HISTORY OF THE CASE

A. Initial Proceedings in District Court

On September 4, 1975, Weisberg filed suit under FOIA for two entire Warren Commission executive session transcripts, those of May 19 and June 23, 1964, and eleven pages of a third, that of January 21, 1964. Weisberg brought suit only after he had spent several years trying to obtain copies of these documents from their custodian, the National Archives and Records Services ("the Archives").

The reasons given for withholding the transcripts varied over the years. Thus, in its June 21, 1971 letter to Weisberg the Archives claimed that the June 23 transcript and the eleven

withheld pages of the January 21 transcript were immune from disclosure under Exemptions 1 and 7. When Weisberg renewed his request in 1975, the Archives initially added a new claim that both transcripts were protected by Exemption 5 but did not mention the Exemption 7 claim it had made in its 1971 letter. [App. 82] However, when Weisberg appealed, Deputy Archivist James E. O'Neill added Exemption 3 to the list of exemptions said to shield the January 21 and June 23 transcripts. [App. 17] The Exemption 3 statute said to specifically require that these transcripts be withheld is 50 U.S.C. § 403(d)(3).

On March 26, 1976, GSA moved for summary judgment. It submitted two affidavits in support of its motion, one by Dr. James B. Rhoads, the National Archivist, the other by Mr. Charles A. Briggs of the CIA. See App. 43, App. 289, respectively. In response Weisberg filed a lengthy counteraffidavit and numerous exhibits. [App. 63]

The motion for summary judgment and Weisberg's opposition to it dealt in large measure with the Exemption 1 claim. At a status hearing held on May 25, 1976, the district court also focused on this issue, indicating that it was not convinced by GSA's Exemption 1 claim:

> But I don't think that this record as it is now constructed will sustain my hearing the motion for summary judgment. I don't intend to decide the motion for summary judgment because I don't think the plaintiff has had full opportunity to probe, for example, this classi-

> fication question. It's a weird set of circumstances that have been disclosed in the record to date.

[App. 91]

Before the May 25th hearing Weisberg had attempted to undertake discovery in the form of interrogatories. When two months passed without response, Weisberg filed a motion to compel. Only then did the GSA respond. The response indicated, however, that GSA was determined to stonewall discovery to the extent possible. For example, Weisberg's 15th interrogatory inquired whether Yuri Invanovich Nosenko was the subject of the June 23 transcript. GSA, in the person of Dr. Rhoads, objected to this interrogatory on the grounds that "it seeks the disclosure of information which the defendant maintains is security classified and which defendant seeks to protect on this and other bases in the instant action." [App. 28] The truth, as GSA was later forced to admit under oath, was that this information was already public knowledge. In fact, the Archives itself had just recently written a letter to The New Republic in which it identified Nosenko as the subject of the June 23rd transcript. [App. 60]

At the May 25, 1976, hearing the district court authorized Weisberg to file additional interrogatories in lieu of taking the depositions he had noticed. When Weisberg's counsel noted that he needed to obtain information from the CIA, which as a nonparty was not subject to the provisions of Federal Civil Rule 33 for interrogatories on parties, the court brushed this problem aside: "Let me suggest, Mr. Lesar, that Mr. Ryan has enough work to do not to

play games in this case." [App. 97] When Weisberg's counsel continued to express his apprehensions, the court assured him that if the factual issues could not be resolved through interrogatories, he would hold a trial on the issues and fill his jury room with the witnesses. [App. 97]

What followed proved the rightness of Weisberg's apprehensions. On July 28, 1976 Weisberg filed a lengthy set of interrogatories. Some were intended for GSA, others for the CIA. Many were expressly directed to Mr. Charles A. Briggs, Chief of the CIA's Services Staff and the officer directly responsible for "classifying" the January 21 and June 23rd transcripts under Executive Order 11652.

On October 15, 1976, two and a half months after Weisberg filed his third set of interrogatories, there still had been no response to them from either CIA or GSA, so Weisberg filed yet another motion to compel.

On November 12, 1976, the GSA finally filed a response in which it objected to most of the interrogatories. [App. 98-125] The CIA made no response whatsoever.

In the interim Weisberg received notice that his October 15 motion to compel would be heard before a United States Magistrate on November 18, 1976. What ensued was a series of off-the-record conferences in the chambers of the Magistrate which resulted in one delay and obstruction after another. After three such con-

ferences over a two-month period with another conference set for a month later, Weisberg made an effort to halt the stalling and get the case back in front of the district judge who had promised that it would be handled expeditiously. As a result, the court scheduled a hearing on Weisberg's motion to compel for February 28, 1977, which was then postponed until March 4, 1977. At that hearing, however, the court decided to "put the cart before the horse" [App. 257] and have an argument on summary judgment first. As he had at the hearing held the previous year, the court indicated that the focus of his concern was the Exemption 1 claim and expressed doubt that GSA could meet its burden of demonstrating that the transcripts had been properly classified. When the GSA's counsel began to argue that the January 21 and June 23 transcripts were properly classified, the court bluntly stated:

> Well, I don't think we are going to get very far arguing about the Confidential classification because you have some problems about that, don't you?

[App. 258]

At the conclusion of the March 4 hearing, the court took the pending motions under advisement. On March 10, 1977 he issued an order ruling that the May 19 transcript was protected by Exemption 5, and that the January 21 and June 23 transcripts were covered by Exemption 3. [App. 126] After Weisberg filed a motion for reconsideration, clarification, and in camera inspection with aid of plaintiff's security classification expert, the district court amended his March 10 order to state that on the basis of

of the affidavits submitted by GSA, GSA had met its burden of demonstrating that "the release of the information can reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods." Order of June 7, 1977. [App. 253]

B. Proceedings in the Court of Appeals--First Case

Weisberg appealed the district court's decision on all three transcripts. While that case, Weisberg v. General Services Administration, Case No. 77-1831, was pending, Weisberg sought to present evidence to this Court which had not been presented to the district court. By order dated March 31, 1978, this Court directed Weisberg to file a motion for new trial in the district court. [App. 356]

In accordance with this order, on April 18, 1978, Weisberg moved for a new trial pursuant to Rule 60(b)(2) and (3). Weisberg's newly discovered materials raised two points. First, they directly undercut the credibility of the affidavits upon which the district court had relied in making its determination that release of the January 21 and June 23 transcripts could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods. For example, Mr. Charles A. Briggs had sworn that any disclosure of the identity or whereabouts of Yuri Ivanovich Nosenko, the subject of the June 23 transcript, would put him in "mortal jeopardy"; and that therefore, "[e]very precaution

has been and must continued to be taken to avoid revealing his new name and whereabouts." Indeed, Mr. Briggs also swore in this affidavit that "[t]he manner in which Mr. Nosenko's security is being protected is serving as a model to potential future defectors." December 30, 1976 Briggs Affidavit, ¶9. [App. 298]

Weisberg's newly discovered evidence included: (a) an interview in the February 28, 1978 issue of New York Magazine with Edward Jay Epstein, author of Legend, a just-published book which dealt largely with Nosenko [App. 317-325]; (b) an excerpt from Legend [App. 326-327]; and (c) an article in the April 16, 1978 issue of the Washington Post which included a photograph of Nosenko [App. 328]. These materials revealed facts totally at odds with the concern for Nosenko's security alleged by Mr. Briggs. The Epstein interview stated that in 1968 the CIA decided to give Nosenko $30,000 a year as a consultant to the CIA, a new identity, and a new home in North Carolina. Epstein also stated that Nosenko was in Washington, D.C. handling 120 cases for the CIA. Furthermore, he asserted that in exchange for the house in North Carolina, an allowance from the CIA of about $30,000 a year, employment, and United States citizenship, Nosenko had agreed "not to talk to any unauthorized persons about his experiences with the CIA." [App. 327] Yet it was the CIA which Epstein said "sent" Nosenko to him. [App. 321]

Secondly, Weisberg's newly discovered materials showed that he had been discriminated against by government agencies in regard

to his Freedom of Information Act requests, and that government agencies, including GSA, had conspired with one another to unlawfully deny him access to nonexempt government records. For example, a November 15, 1968 memorandum by Dr. James B. Rhoads, the United States Archivist, shows that the National Archives made a decision not to furnish Weisberg with portions of the January 27, 1964 Warren Commission executive session transcript published by Congressman Gerald Ford because doing so "would encourage him to increase his demands for additional material from this transcript and from other withheld records." [App. 335] In addition, these materials also show that the Archives colluded wtih the Secret Service and the Justice Department to withhold from Weisberg a copy of the so-called "Memorandum of Transfer" by transferring it from the Secret Service, which admitted it had no basis for refusing to make it available to Weisberg, to the Archives, which was willing to contrive one. [App. 358, 336]

GSA opposed Weisberg's motion for a new trial, in part on the grounds that the alleged new evidence was of an "unsworn, double hearsay nature." Weisberg sought to counter this objection by taking the depositions of two CIA officials, Mr. Charles A. Briggs and Mr. Gene F. Wilson, who he believed would have personal knowledge of the facts asserted in some of the new evidence materials. However, the district court quashed the depositions and denied the motion for new trial on the grounds that however accurate the information contained in the newly discovered evidence

might be, it "has no bearing on this Court's central inquiry under 5 U.S.C. § 552(b)(3) and 50 U.S.C. §403(d)(3) whether disclosure of the Warren Commission transcripts would compromise CIA sources and methods. The Court is satisfied that the Government has established a threat to intelligence sources and methods, and is not persuaded to the contrary by the 'new evidence' which plaintiff has adduced." [App. 349]

C. Proceedings in the Court of Appeals--Second Case

Weisberg appealed from the May 12, 1978 order denying his motion for new trial. The new case, Weisberg v. General Services Administration, Case No. 78-1731, was then consolidated with its predecessor, Weisberg v. General Services Administration, Case No. 77-1831.

Weisberg filed his brief in the consolidated case on September 12, 1978. On October 16, 1978, the day GSA's brief was due in Court, GSA moved for partial dismissal of Case No. 77-1831 and complete dismissal of Case No. 78-1731 on grounds of mootness due to the "declassification" of the January 21 and June 23 transcripts by the CIA and their imminent release to Weisberg by GSA. By order dated January 12, 1979, this Court granted GSA's motion to dismiss. [App. 353] Oral argument on the remaining issue, the status of the May 19 transcript, was held on February 13, 1979. By order dated March 15, 1979, the Court of Appeals affirmed the district court's decision that it was properly exempt under Exemption 5. [App. 354]

D. Motion for Award of Attorney Fees and Costs

On April 12, 1979, this Court awarded Weisberg the costs of his appeal. [App. 355] Four days later Weisberg moved in district court for an award of attorney fees and other litigation costs. Affidavits by Weisberg [App. 379-423] and his counsel [App. 359-378] were filed in support of the motion.

On August 10, 1979, GSA filed an opposition to Weisberg's motion. The opposition, which was supported by the affidavit of Robert E. Owen [App. 424-444], contended that the January 21 and June 23 transcripts had been declassified as a result of revelations made by the House Select Committee on Assassinations and released independently of any court litigation.

On September 12, 1979, Weisberg filed a reply which was again supported by his own affidavit [App. 445-476] and another by his counsel [App. 477-484]. The following day he filed a request for production of documents [App. 485] and noticed the depositions of Messrs. James B. Rhoads, Charles A. Briggs, Robert E. Owen, and Arthur Dooley. [App. 487-489] He also issued subpoenas duces tecum. [App. 490-496] In response, GSA moved for a protective order and to quash the subpoenas.

On October 17, 1979, the district court heard arguments on the motion for attorney fees and GSA's motion for a protective order and to quash the subpoenas. At the conclusion of the hearing the court issued an order staying Weisberg's discovery indefi-

nitely and granting GSA permission to file a supplemental affidavit as it had requested at the end of the hearing. [App. 497]

On December 3, 1979, GSA filed a Supplemental Affidavit by Robert E. Owen. [App. 498-505] Weisberg responded with a counter-affidavit. [App. 506-594] On January 29, 1980, Weisberg filed a memorandum to the court and another affidavit. [App. 619-739]

On July 14, 1980, the district court issue an order concluding that Weisberg had not "substantially prevailed" within the meaning of 5 U.S.C. § 552(a)(4)(E). [App. 781] Weisberg moved the court to reconsider its ruling in light of two considerations: First, his extensive experience showed that it is necessary for him to file suit in order to obtain information he has requested even if that information has already been officially released to other requesters. Second, the CIA's annual report to the President of the Senate for 1978 shows that the CIA was well aware that the decision of this Court in Ray v. Turner, U.S.App.D.C. , 587 F.2d 473 (1978), which was handed down shortly before the CIA released the two Warren Commission transcripts, would affect its pending cases because it required the CIA to describe "on a deletion-by-deletion basis (as opposed to a document-by-document basis), the nature of the materials being withheld and the legal justification for its denial." [App. 783] Because the CIA had not done that in this case, Ray v. Turner foreshadowed a reversal.

When GSA failed to respond in timely fashion to Weisberg's motion for reconsideration, the district court granted it and authorized Weisberg to proceed with discovery on the issue of "whe-

ther the two transcripts released to [Weisberg] while this case was pending on appeal were released for reasons unrelated to this litigation." [App. 793]

However, GSA then moved the court to reconsider its order granting Weisberg's motion to reconsider. On October 30, 1980, the court granted GSA's motion, vacated its order of September 3, 1980, and reinstated its orders of July 14, 1980, and October 17, 1979.[1/] [App. 803]

On December 29, 1980, Weisberg filed a notice of appeal. [App. 804]

SUMMARY OF ARGUMENT

In this case Weisberg seeks an award of attorney fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) because he obtained, but only after long and bitterly-contested litigation, copies of two Warren Commission executive session transcripts he had sought for more than a decade. In order to qualify for such an award, Weisberg must be held to have "substantially prevailed" in this litigation. Weisberg contends that he did.

In order to "substantially prevail," the party seeking an award of attorney fees must show that the prosecution of the action could reasonably be regarded as necessary, Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir. 1976), and

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1/ The district court's October 30 order incorrectly gives the date of the latter order as October 19, 1979.

that the action had a causative effect on the agency's surrender of the information, Cuneo v. Rumsfeld, 180 U.S.App.D.C. 184, 189, 553 F.2d 1360, 1365 (1977).

Weisberg brought suit some seven years after he first requested these transcripts. See Answer to Interrogatory 83. [App. 109] On March 12, 1975 he made a new request under the amended Freedom of Information Act. After his request was denied, he appealed; after his appeal was also denied, he waited six months before filing suit in district court. Under these circumstances it is clear that prosecution of the action "could reasonably be regarded as necessary."

It is equally clear that there is a casual nexus between the lawsuit and the release of the transcripts. Both the manner and timing of the release show this. After five years of bitterly contested litigation the CIA "declassified" the transcripts, not as part of a general declassification but in direct response to this litigation, and the GSA released them to Weisberg on the day its brief was due in this Court. In addition, GSA failed to carry its burden of demonstrating that the transcripts were properly exempt at all times prior to their actual disclosure, and that they contained no nonexempt segregable portions. Instead, GSA filed a series of affidavits that were by turns vague, speculative, inconsistent, contradictory, and false. The reasons given to justify withholding before the transcripts were released differed from those given after they were disclosed, and in both instances the reasons were neither credible nor true. Moreover,

the attempt to attribute the declassification and release of the transcripts to the proceedings of the House Select Committee on Assassinations is ludicrous because the information allegedly sought to be protected was publicly available years earlier, including through official CIA disclosures. That this is nothing more than a pretext seized upon by the CIA/GSA to avoid attorney fees is shown by the fact that the same justification was advanced for disclosing part of a document after a remand from this Court in another case, Allen v. CIA, Civil Action No. 78-1743, even though the "declassification" and release in that case was more than a year later than the disclosure in this case, and also more than a year after the House Select Committee on Assassinations ceased to exist.

Weisberg also argues that the district court abused its discretion in denying him the opportunity to take discovery regarding GSA's claim that the transcripts were released for reasons unrelated to this lawsuit. One point on which discovery was sought was the impact of this Court's decision in Ray v. Turner, 190 U.S. App.D.C. 290, 587 F.2d 1187 (1978), on the decision to release the transcripts in this case. Ray v. Turner was issued on August 24, 1978, less than two months before the release of the transcripts in this case, and in its 1979 Report to the Senate the CIA acknowledge that it would change CIA procedures and require it to justify withholdings on a deletion-by-deletion rather than a

document-by-document basis. [App. 783]

Finally, Weisberg contends that he is also entitled to an award of attorney fees, and an increase in attorney fees, because of bad faith conduct on the part of the government in this case. Hall v. Cole, U.S. 1, 5 (1973).

ARGUMENT

I. WEISBERG "SUBSTANTIALLY PREVAILED" IN THIS LITIGATION

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), provides that district courts "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." For the reasons set forth below, Weisberg contends that he has "substantially prevailed" in this case.

A. This Action Could Reasonably Be Regarded As Necessary

In construing the attorney fees provision, it has been held that in order to "substantially prevail" the party seeking the award must show that the prosecution of the action could reasonably be regarded as necessary. Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir. 1976). The circumstances surrounding the bringing of this action leave no doubt that it was.

Weisberg first requested these transcripts at least as early as August and September of 1968. See answer to interrogatory 83. [App. 109] On March 12, 1975, he filed a new request for them under the amended Freedom of Information Act. When his request was denied, he appealed. After his appeal was denied, he waited five months before filing suit.

In short, Weisberg's only alternative to filing suit was to wait for their voluntary disclosure at some unspecified date probably beyond his lifetime. In this regard it may be recalled that in 1965, in response to citizen protest over the announced plan of the National Archives to keep certain Warren Commission records secret for 75 years, the White House, noting "the very special nature of the Warren Commission and the desirability of the fullest possible disclosure of all the findings," directed the Justice Department to make a study of the feasability and advisability of changing this procedure insofar as Warren Commission records were concerned. See McGeorge Bundy's "Memorandum for Acting Attorney General Katzenbach." [App. 31] As a result, the views of interested federal agencies were solicited. The CIA's response was to assert that it had "cooperated fully with the President's Commission and made every effort to release material furnished to the Commission for the public record," and that "very little of the material furnished by the Agency is now withheld from the public." The CIA believed that the national security required the continuance of restrictions on withheld documents and

that this interest outweighed all other considerations. Accordingly, it recommended that "at the end of the 75-year period another security appraisal be made before such documents are disclosed." [App. 34-35]

Given this mindset and the CIA's ample motive for withholding materials embarrassing to it and other government agencies, Warren Commission critics have found it necessary repeatedly to file suit under FOIA to obtain materials withheld by the CIA or at its behest. This suit is but one of several that have been filed by different requesters. Although Warren Commission materials are to be reviewed periodically for release to the public, and although the Attorney General's Guidelines specify that the overriding policy of the Executive Branch favors the fullest possible disclosure of Warren Commission materials, such requesters still find it necessary to file suit in order to obtain information. (The Attorney General's 1975 Guidelines are reprinted at pp. 4-5, supra.)

Finally, the necessity of filing suit is further indicated in Weisberg's case by the fact that the CIA has not complied with his requests even though they date back years. For example, he has requests for CIA materials on Nosenko that date back to 1975 and 1976. Although the CIA did declassify and disclose such information for the use of the House Select Committee on Assassinations, it has not yet been divulged to Weisberg. December 22, 1979 Weisberg Affidavit, ¶121. [App. 537]

B. Release of Transcripts Related to Litigation

In Cuneo v. Rumsfeld, 180 U.S.App.D.C. 184, 189, 553 F.2d 1360, 1365 (1977), this Court held that a party seeking an award of attorney fees under FOIA must also show that bringing the action had a causative effect on the agency's release of the information. This does not mean, however, that there can be no award of attorney fees where the government acts to moot the case by providing the materials before judgment. Kaye v. Burns, 411 F. Supp. 897 (D.C.N.Y. 1976). Nor does it mean that there can be no attorney fees where the agency acts to moot an appeal after it has procured a judgment in its favor in the court below.

The very fact that GSA released the transcripts to Weisberg only after four years of bitterly-contested litigation had taken place is prima facie evidence of a causal nexus between this lawsuit and their release. The manner and timing of the release strongly reinforces this conclusion. On September 12, 1978, Weisberg filed his brief in this Court in Case No. 78-1731. On October 16, 1978, the day GSA's brief was due, GSA moved to moot the case and announded the "declassification" and release of the transcripts. Because Weisberg was denied discovery of relevant records, he cannot know all the circumstances surrounding the decision. However, the CIA did put into the record a September 26, 1978 memorandum from Robert E. Owen to Launie M. Ziebell, the CIA's Assistant General Counsel. The subject of that memorandum

is: Warren Commission Transcripts Regarding Yuriy Nosenko in FOIA Litigation." [App. 440] This indicates that the CIA was responding to the pending lawsuit, not to the proceedings of the House Select Committee on Assassinations. This is further confirmed by the memorandum's first sentence, which reads: "The Warren Commission transcripts which accompany your memorandum of 22 September . . . may be released to FOIA requesters, including the litigant in the civil action cited in your memorandum." (Emphasis added) Although CIA/GSA did not provide Weisberg or the court with a copy of the September 22, 1979 Ziebell memorandum, and the court did not allow Weisberg to obtain it through discovery, Owen's response makes it clear that the point of reference was Weisberg's lawsuit. In view of this and the timing of the release, it is obvious that it was the lawsuit which precipitated the release.

C. GSA Failed to Demonstrate Transcripts Were Exempt

Weisberg contends that in order for GSA to succeed in arguing that he did not "substantially prevail" it must demonstrate that the January 21 and June 23 transcripts were exempt at all times prior to their "declassification" and release. This GSA has failed to do.

1. Classification--Procedural

GSA resisted disclosure of the January 21 and June 23 transcripts by claiming that their release would endanger the national

security. The FOIA provides that in order to qualify for nondisclosure under Exemption 1 the withheld material must be classified in accordance with both the substance and procedure of the applicable executive order. 5 U.S.C. § 552(b)(1). The Conference Report on the 1974 amendments explicitly states that material withheld under Exemption 1 must be properly classified "pursuant to both procedural and substantive criteria contained in such Executive order." H.Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974). (Emphasis added)

GSA initially asserted that the transcripts were classified by the Warren Commission under the provisions of Executive order 10501, as amended by Executive order 10901. However, Section 2(c) of the order required original classification authority to be specifically conferred upon any agency or unit exercising it. Original classification authority was never conferred upon the Warren Commission. This determination was made by Judge Gerhard Gesell in Weisberg v. General Services Administration, Civil Action No. 2052-73. [App. 78] In November, 1975, a House of Representatives Subcommittee held a hearing on security classification problems involving Warren Commission records in the custody of the National Archives and reached the same conclusion. The Subcommittee found that the Warren Commission did not have original classification authority, and that in the absence of evidence that the President had delegated classification authority to the Commission any clas-

sification marking assigned by the Commission to information which it originated was not a valid classification. The Subcommittee also concluded that "any information originated by the Warren Commission which was not properly classified by an authorized classifier while the Commission was in existence should be viewed as having been nonclassifiable since the date the Commission ceased to exist." See "Subcommittee Findings Regarding Validity of Classification Markings on Original Commission Records," reprinted in Hearing, National Archives--Security Classification Problems Involving Warren Commission Files and Other Records, Government Information and Individual Rights Subcommittee, Committee on Government Operations, House of Representatives, 94th Cong., 1st sess. (1975), p. 61. [App. 596.] See also Affidavit of William G. Florence, ¶15, Attachment 3. [App. 136, 143]

In addition to the lack of classification authority on the part of the Warren Commission, the purported classification of the January 21 and June 23 transcripts was flawed in other ways as well. Although Section 3(a) of E.O. 10501 provided that [d]ocuments shall be classified according to their own content and not necessarily according to their relationship to other documents," all Warren Commission executive session transcripts were routinely classified Top Secret by the reporter, Ward & Paul, without regard to content or considerations of national security. May 5, 1976 Weisberg Affidavit, ¶¶10-18. [App. 65-68]

Thus, at the time of Weisberg's 1975 FOIA request, these transcripts had lain unclassified for eleven years after the Warren

Commission ceased to exist. As the House Subcommittee on Government Information and Individual Rights concluded, the information had become nonclassifiable as of the date the Warren Commission ceased to exist.

Nevertheless, after the CIA was notified of Weisberg's March 12, 1975 request for the transcripts, it instructed GSA to classify them pursuant to E.O. 11652. However, this was not authorized by E.O. 11652, since the directive implementing it provided that: "At the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule." National Security Council Directive of 17 May 1972 Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information IV(A), 37 Fed. Reg. 10053, 10056-10075 (1972).

Moreover, other classification procedures required by Executive Order 11652 were not followed. In Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 284, 505 F.2d 389, 391 (1974), a case involving a claim that not all copies of the Red Cross reports sought by plaintiff were stamped Confidential and that the classification was made in order to avoid disclosure and only after plaintiff had requested the documents, this Court held that the timing of the alleged classification under E.O. 11652 and whether the Red Cross reports were in fact classified "Confidential" were facts that the district court must determine in order to decide whether the agency

had complied with the requirements of the executive order.

Even assuming that the January 21 and June 23 transcripts could have been validly classified under Executive Order 11652, the timing of the classification was highly irregular. On July 26, 1972 the National Archives asked the CIA to review the security classification of Warren Commission documents, including these transcripts, under the provisions of E.O. 11652. [App. 598] However, the cover sheets of the transcripts which were obtained on discovery show that they were not marked classified as a result of the 1972 review. Nor were they marked classified pursuant to E.O. 11652 as a result of another classification review which culminated in October, 1974. See Attachments 5-7 to Plaintiff's Response to Supplemental Affidavit of Robert E. Owen, filed January 11, 1980.

On March 12, 1975, plaintiff requested the transcripts under the amended FOIA. Nine days later the National Archives sent the transcripts to the CIA for yet another classification review. See Answers to Interrogatories 10 and 20. [App. 28, 29] Although both transcripts were purportedly classified "Confidential" by Mr. Charles A. Briggs of the Central Intelligence Agency on May 1, 1975, neither transcript was so marked until after Weisberg filed this suit on September 4, 1975. Even then, only the file copies of these transcripts were initially marked "Confidential." All extra copies in the possession of the Archives, of which there were sev-

eral of each transcript, were not marked "Confidential" until "the date of receipt" of Weisberg's interrogatories inquiring about this. Answer to interrogatory 57. [App. 52] Moreover, since the originals and several copies of each transcript were "missing," they could not be so marked. See answers to interrogatories 81 and 89. [App. 99-100, 113]

Without question these facts establish a violation of Section 6(B) of Executive Order 11652, which required that: "All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified content."

In view of the facts set forth above it is apparent that the procedural requirements of Executive Orders 10501 and 11652 were violated. Because proper classification procedures were not followed, the transcripts could only have been properly withheld if GSA had been able to show that disclosure would cause grave damage to the national security. But since the transcripts were allegedly reclassified "Confidential" prior to Weisberg's lawsuit, GSA could not show this.

2. Exemption 1--Substantive

Under Executive Order 11652 the test for substantive classification was whether unauthorized disclosure of the information "could reasonably be expected to cause damage to the national security." Weisberg contends that this standard could not have been

met at any time during the pendency of his lawsuit.

The first CIA affidavit submitted to justify the withholding of the transcripts was brief. With respect to the substance of the June 23 transcript it asserted:

> The matters discussed concern intelligence methods used by the CIA to determine the accuracy of information held by the Commission. Disclosure of this material would destroy the current and future usefulness of an extremely important foreign intelligence source and would compromise ongoing foreign intelligence analysis and collection programs.

November 5, 1975 Affidavit of Charles A. Briggs, ¶5. [App. 290]

In a subsequent affidavit, Briggs swore that the June 23rd transcript was properly classified for the following reasons:

A. When Nosenko defected to the U.S. in February, 1964, he agreed to provide the CIA with information but did so "with the clear understanding that this information would be properly safeguarded so as not to endanger his personal security and safety. December 30, 1976 Briggs Affidavit, ¶7. [App. 296-297]

B. After his defection, Nosenko was tried in abstentia by the Soviet Union and condemned to death; consequently, "[a]ny disclosure of his identity or whereabouts would put him in mortal jeopardy." Because of this, "[e]very precaution has been and must continue to be taken to avoid revealing his new name and whereabouts." December 30, 1976 Briggs Affidavit, ¶7. [App. 297]

C. There is "no way the Soviet Union can determine exactly what information has been provided by Mr. Nosenko." However, "[r]evealing the exact information which Mr. Nosenko--or any

defector--has provided can materially assist the KGB in validating their damage assessment and in assisting them in the task of limiting future potential damage." It could also "only interfere with American counterintelligence efforts since the KGB would take control measures to negate the value of the data." Moreover, "any information officially released may be exploited by the KGB as propaganda or deception." December 30, 1976 Briggs Affidavit, ¶8. [App. 297]

D. Potential defectors will be dissuaded from defecting if the security of prior defectors is compromised. Therefore, "[e]very precaution must continue to be taken to protect the personal security of Mr. Nosenko." Finally, "[t]he manner in which Mr. Nosenko's security is being protected is serving as a model to potential future defectors." December 30, 1976 Briggs Affidavit, ¶9. [App. 298]

The Briggs Affidavits affidavits attempted to frighten and intimidate the district court into believing that release of the transcripts would endanger national security, even jeopardize the life of an intelligence sources. But the affidavits contained misrepresentations, falsehoods. The release of the June 23rd transcript in no way endangered Nösenko's personal safety and security. His defection was public knowledge as of the time of the Warren Commission's June 23, 1964 executive session, as the transcript of that meeting itself shows. Not only was his identity known, but the uncontradicted evidence in the record of this case shows that the CIA itself made Nosenko available to writers who

published details about his identity, employment and whereabouts. See March 21, 1977 Weisberg Affidavit, ¶¶24-29 [App. 152-153]; April 17, 1978 Weisberg Affidavit, ¶¶21-25 [App. 284-286].

That there "is no way the Soviet Union can determine exactly what information has been provided by Mr. Nosenko," Mr. Briggs' justification for suppressing the June 23 transcript, is shown by the text of the transcript to have been a deliberate canard, since the transcript does not reveal any such information.

Mr. Briggs' most outrageous statement was his pious declaration that "[t]he manner in which Mr. Nosenko's security is being protected is serving as a model to potential future defectors." The testimony of CIA official John Hart before the House Select Committee on Assassinations revealed in detail the way in which the CIA subjected Nosenko to torture. This included depositing him in a specially constructed steel vault for three years and depriving him of all amenities. Indeed, one CIA official toyed with the choices of driving Nosenko permanently insane and killing him without leaving a trace. See December 22, 1979 Weisberg Affidavit, ¶¶86, 98-99 [App. 526-530]; August 20, 1979 Weisberg Affidavit, ¶¶15, 26-28 [App. 447-449]

After the transcripts were released to Weisberg and he moved for an award of attorney fees, the justification for withholding the transcripts changed. The new claims were set forth at length in the Supplemental Affidavit of Robert E. Owen. With respect to the June 23 transcript, the key part of is claim that it had to be withheld because the discussion it contains "is primarily concerned

with expressions of concern about the inability of the government agencies, principally the CIA, to establish the bona fides of Nosenko as a credible Soviet defector and the negative consequences of this uncertainty for the Commission's hope to use Nosenko's information." Supplemental Owen Affidavit, ¶8. [App. 503]

If this was the real reason for refusing to release the June 23 transcript, it disappeared at least as long ago as the disclosure of CIA Document 498, which states at the bottom of page three that: "This agency has no information that would specifically corroborate or disprove NOSENKO's statements regarding Lee Harvey OSWALD." See December 22, 1979 Weisberg Affidavit, ¶48, Exhibit 5. [App. 518, 551] That this information was public knowledge soon after this lawsuit was filed is shown by the fact that a San Francisco newspaper carried a story in its March 23, 1976 issue which stated that:

> A recently released CIA memo shows that James Angleton, then head of CIA counterintelligence, to the [Warren] Commission that the CIA had no information that would either prove or disprove Nosenko's story.

See December 22, 1979 Weisberg Affidavit, ¶93. [App. 528-529]

On May 9, 1975, four months before this lawsuit was filed, CBS-TV carried an interview with former CIA Director John McCone in which he stated of Nosenko:

> It is traditional in the intelligence business that we do not accept a defector's statements until we have proven beyond any doubt that the man is legitimate and the information is correct. It took some time to prove the bona fides of the

man, which were subsequently proven.

See December 22, 1979 Weisberg Affidavit, ¶94; Exh. 13. [App. 529, 584]

With respect to the January 21 transcript, Owen claims that it had to be withheld because it made clear that the CIA had briefed the Warren Commission staff on its capabilities and "proposed to use the services of two Soviet KGB defectors in drafting questions to be put to the Soviet government and in reviewing the documents written by Oswald . . . ." This had to be withheld in the interest of national security because "the status of their relationship with the CIA and the manner in which they were proposed for use in support of the Warren Commission suggested a great deal about the level of confidence the CIA had in these defectors." Supplemental Owen Affidavit, ¶6. [App. 735]

As Weisberg pointed out,

> This, obviously, is not true. The CIA, the State Department and/or the Commission could have ignored any and all suggestions made by the defectors in their "support," recommending questions to be asked of the Soviet Government.

December 22, 1979 Weisberg Affidavit, ¶61. [App. 521] Moreover, the KGB had ample evidence of the "level of confidence which the CIA reposed in the defectors. As Weisberg states regarding one of the two defectors, Petr Derjabin:

> It cannot be claimed in late 1979 that there had to be withholding to keep secret the "level of confidence" or lack of it that was reposed in Derjabin when the CIA

> had already disclosed this by having him translate the published Penkovsky Papers, about which, over his name, Derjabin boasted in a letter to the editor of the Washington Post of November 19, 1965. *** Other ways in which his identification and career were public, including by Congressional testimony, are set forth in my earlier affidavits in this instant cause. That the CIA used Derjabin to translate the Penkovsky papers and permitted him to testify to a Congressional committee reflects the CIA's "level of confidence" in him.

December 22, 1979 Weisberg Affidavit, ¶69. [App. 523] Similarly, the fact that the January 21 transcript reveals "a discussion of the problems of how to verify information concerning the activities in the Soviet Union related to Lee Harvey Oswald's personal experiences as a defector," another Owen justification for withholding the transcript, was disclosed long ago when GSA released copies of the agendas of the Warren Commission executive sessions to Weisberg and others. December 22, 1979 Weisberg Affidavit, ¶57. [App. 520-521]

While these are only some of the examples provided by Weisberg in his December 22, 1979 affidavit, they make it quite clear that what the CIA says it was trying to protect was already in the public domain and hence not substantively classifiable. If, as Owen swears in his Supplemental Affidavit, "[t]he declassification and release of the study and testimony provided in [the House Select Committee on Assassinations'] Volume II made the continued classification of the transcripts untenable," (Supplemental Owen Affidavit, ¶11), then the far earlier revelations cited by Weisberg did also.

3. Exemption 3

Although the district court ruled that the transcripts were exempt under Exemption 3 rather than Exemption 1, it is clear that the two claims are interdependent. The Exemption 3 statute relied upon by the CIA, 50 U.S.C. § 403(d)(3) provides:

> [t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

(Emphasis added)

Whether disclosure of intelligence sources and methods constitutes "unauthorized" disclosure is determined by reference to the applicable Executive order governing disclosure of classified information. In addition, the legislative history of the 1974 Amendments to the FOIA makes it clear that Congress intended that records for which an Exemption 3 claim is made based on $ 403(d)(3) must be properly classified. Thus the Conference Report which accompanied the bill which amended Exemption 1 stated:

> Restricted Data (43 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law. (Emphasis added)

(Conference Report No. 93-1380, 93rd Cong., 2d Sess., p. 12)

Therefore, the applicability of Exemption 3 to the tran-

scripts hinged upon their classified status. GSA in effect conceded this in response to an interrogatory which inquired whether the CIA had ever informed GSA that the transcripts were being withheld pursuant to 50 U.S.C. § 403(d)(3), stating: "Presumably, upon declassification of these transcripts at a future date, this statute would not be involved to prevent public access." Answer to interrogatory 100. [App. 115-116] This is in fact what happened in this case. Upon "declassification" of the transcripts, CIA/GSA dropped the Exemption 3 claim and released them to Weisberg.

As Weisberg noted above when discussing the failure of the transcripts to qualify for Exemption 1 status on substantive grounds, all the information which the CIA allegedly wished to keep secret under Exemption 1 was in fact already publicly known long before the transcripts were released. For precisely the same reason, namely, that the intelligence sources and methods sought to be protected had already been disclosed, the information in the transcripts also was not protectible under Exemption 3.

D. Segregable Nonexempt Portions

The Freedom of Information Act provides that "[a]ny reaonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. 5 U.S.C. § 552(b). The burden is on the agency to demonstrate that no segregable, nonexempt portions remain with-

held. Allen v. Central Intelligence Agency, ___ U.S.App.D.C. ___, 636 F.2d 1287, fn. 32 (1980), citing, Ray v. Turner, 587 F. 2d 11987, 1214 (D.C.Cir. 1978)(Wright, C.J., concurring).

In this case GSA did not meet its burden. None of the affidavits submitted by GSA attests that there were no nonexempt, segregable portions in the transcripts. The May 1, 1975 letter of Mr. Robert S. Young of the CIA to Dr. James B. Rhoads in effect acknowledges that there were segregable portions, stating: "We have investigated the possibility of releasing segregable portions of the transcripts, but have concluded that the extensive deletions required would result in an incoherent text." [App. 46]

II. DISTRICT COURT ABUSED DISCRETION IN DENYING WEISBERG DISCOVERY

Confronted with GSA's claim that he had not "substantially prevailed," Weisberg sought to take discovery on four issues: (1) whether the January 21, January 27, and June 23, 1964 Warren Commission executive session transcripts were ever properly classified; (2) whether the hearings held by the House Select Committee on Assassinations caused the declassification and public release of the January 21 and June 23 transcripts; (3) whether the decision of the United States Court of Appeals in Ray v. Turner influenced the decision to "declassify" and release the January 21 and June 23 transcripts; and (4) whether the affidavits submitted by Messrs. Rhoads, Briggs, and Owen were made in good faith.

Each of these issues represents a valid avenue of inquiry into matters which could have a significant bearing on a contested issue of material fact: viz., whether the transcripts were in fact released "for reasons unrelated to this litigation."

There are many questions which must be asked concerning the proceedings of the House Select Committee on Assassinations (HSCA) and the release of allegedly classified information by the CIA. How did HSCA and the CIA work out problems concerning the classification and release of information pertaining to the assassination of President Kennedy? If there were disagreements over disclosure of classified information, how were they resolved? If HSCA wanted to use classified information in connection with its hearings, did the CIA always consent to its use and declassify it? If, as Mr. Owen says, the transcripts were declassified out of "political necessity," why was other classified information not release? How did HSCA and CIA, or the CIA by itself, determine when such information should be "declassified" and released to the public? Did HSCA ever request that the January 21 and June 23 transcripts be declassified? When? If "political necessity" required the release of the transcripts in October, 1978, why did it not require their release in 1976 and 1977, when HSCA's investigation was proceeding in full vigor amidst intense publicity? When did the CIA first know that John Hart would testify regarding Nosenko? When did it first determine that it would have to declassify information as a result of his testimony?

That such questions are not academic and do have an important bearing on GSA's claim that the transcripts were released independently of this litigation may be seen by recounting developments in the Allen case. (Allen v. CIA, Civil Action No. 78-1743) In that case the plaintiff, Allen, sought a 15 page CIA document on Lee Harvey Oswald's pre-assassination activities in Mexico City. On January 9, 1979, the same Robert E. Owen who appears in this case executed an affidavit in which he affirmed that the document being sought by Allen was still properly classified "SECRET." This was three months after he had filed an affidavit in this case declaring that the transcripts sought by Weisberg had been declassified because of HSCA proceedings. Subsequently, however, this Court remanded the Allen (for the first time), and Owen then executed a new affidavit on January 11, 1980, declaring that because of HSCA proceedings half of the document could be "declassified" and released. See January 23, 1980 Weisberg Affidavit. [App. 619-637] Since HSCA had gone out of existence at the time Owen filed his January 9, 1979 affidavit declaring that the document sought by Allen was still classified Secret, and since HSCA had been out of existence more than a year at the time he executed his second affidavit, dated January 11, 1980, it is obvious that the CIA is simply seizing upon HSCA as a convenient cover for explaining disclosures that in fact must be made because of court litigation. However, in order to demonstrate that in this case, discovery was needed.

It is important to note that just prior to the release of the transcripts in this case, this Court handed down an important

decision, Ray v. Turner (decided August 24, 1978), which Weisberg contends foreshadowed a remand in his pending appeal, Weisberg v. General Services Administration, Case No. 77-1831 (consolidated). If it was that development which nudged the CIA to declassify the transcripts in October, 1978, then their release cannot be said to have been "unrelated" to this litigation. Weisberg was entitled to explore this area on discovery. That it might well have proved fruitful is indicated by the fact that in its 1979 report to the Senate on the administration of FOIA, the CIA acknowledged that the Ray v. Turner decision would force it to justify its claims of exemption on a deletion-by-deletion rather than a document-by-document basis, as it had been doing. [782]

In Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 828 (1973), this Court noted FOIA's "overwhelming emphasis upon disclosure," and commented that:

> In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information.

Id., 157 U.S.App.D.C. at 353, 484 F.2d at 831. In the unique circumstances of this case, Weisberg, the party with the greatest interest in enforcing FOIA polciy through use the attorney fees provision, is similarly disadvantaged. He has been afforded no opportunity to cross-examine the CIA affiant who alleges that the transcripts were released for reasons unrelated to this litigation, nor

has he been allowed to undertake discovery of records relevant to the CIA's claim. For the district court to have decided the attorney fees issue against Weisberg without affording him any opportunity to cross-examine Mr. Owen or to engage in discovery was an abuse of discretion.

III. GSA'S BAD FAITH CONDUCT JUSTIFIES AND AWARD OF, AND INCREASE IN, ATTORNEY FEES

When a losing party has engaged in bad faith conduct, the district court may exercise its equitable powers to make an award of attorney fees, even where such an award is not expressly provided for by statute:

> . . . it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in "bad faith, vexatiously, wantonly, and for oppressive reasons."

Hall v. Cole, 412 U.S. 1, 5 (1973). (Citations omitted)

This is the second lawsuit which Weisberg has filed against GSA for Warren Commission exective session transcripts. In the first, Weisberg v. General Services Administration, Civil Action No. 2052-73, GSA contended that the January 27, 1964 transcript was protected from disclosure because it had been classified on grounds of national security. It took this position even though Gerald Ford had published parts of the transcript in his book. Although the district court ruled against GSA's exemption 1 claim, it went on to find that the transcript was protected under Exemption 7.

Having just procured a favorable decision on Exemption 7 grounds, GSA then "declassified" the transcript, which contained no classifiable information to start with, and released it.

In this case GSA was again unable to make its Exemption 1 claim stick but succeeded in obtaining a favorable verdict under Exemption 3. When it was faced with appellate review, however, it abandoned this claim of exemption, "declassified" the two transcripts, and then hoked up an explanation that the release was due to the proceedings of the House Select Committee on Assassinations.

In the process GSA submitted false and highly misleading affidavits to the district court. These affidavits declared, for example, that release of the June 23 transcript would disclose the identity and whereabouts of a Soviet defector, Yuri Ivanovich Nosenko, and thus "put him in mortal jeopardy," when in fact the transcript could and did disclose no such thing and it became a matter of public knowledge that the CIA itself had sent Nosenko to authors who wrote books and magazine articles about him, revealing in the process important details about where he had resided, what he did, how much he earned, etc.

In addition, the entire course of litigation was characterized by "obdurate behavior" on the part of GSA. Thus it repeatedly delayed responding to interrogatories until Weisberg had moved to compel answers. When the interrogatories were finally responded to, most were objected to. And when Weisberg asked whether Nosenko was the subject of the June 23 transcript, GSA objected to this

interrogatory on the grounds that this information was security classified, when in fact the National Archives had itself recently disclosed this information to The New Republic.

The CIA, which was responsible for the withholding of these transcripts, had ample motive to supress them and to delay their release for as long as possible. Weisberg addressed this motive in his October 26, 1978 affidavit:

> 74. If it had been public knowledge at the time of the investigation of the assassination of the President that the CIA had, by the devices normally employed by such agencies against enemies, arranged for the Presidential Commission not to conduct a full investigation, there would have been considerable turmoil in the country. If, in addition, it had been known publicly that there was basis for inquiring into a CIA connection with the accused assassin and that the CIA also had frustrated this, the commotion would have been even greater.
>
> 75. At the time of my initial requests for these withheld transcripts, there was great public interest in and media attention to the subject of political assassinations. If the CIA had not succeeded in suppressing these transcripts by misuse of the Act throughout that period, public and media knowledge of the meaning of the contents now disclosed would have directed embarrassing attention to the CIA. There is continuing doubt about the actual motive in suppressing any investigation of any possible CIA connection with the accused assassin. If such questions had been raised at or before the time of the Watergate scandal and disclosure of the CIA's illegal and improper involvement in it, the reaction would have been strong and furious. This reaction would have been magnified because not long thereafter the CIA could no longer hide its actual involvement in planning and trying to arrange for a series of political assassinations.

> 76. One current purpose was accomplished by withholding these transcripts from me until after the House Committee held its Nosenko hearings to ignore what the Commission ignored. With any prior public attention to the content of these transcripts, ignoring what Nosenko could have testified to, especially suspicion the accused assassin was an agent of American intelligence, would have been impossible. A public investigation would have been difficult to avoid.

October 26, 1978 Weisberg Affidavit. [App. 427-428]

Given these circumstances, this case would be an appropriate one in which to award attorney fees on the basis of the bad faith conduct of a party, if even the Court agrees with the district court that Weisberg did not "substantially prevail." And if the Court concludes that Weisberg did "substantially prevail," then it should instruct the district court to consider this bad faith conduct as grounds for increasing the award of attorney fees.

CONCLUSION

For the reasons set forth above the holding of the district court that Weisberg did not "substantially prevail" should be overruled. Alternatively, the case should be remanded to district court to allow Weisberg to cross-examine GSA's affiants and to engage in discovery on the issue of whether release of the January 21 and June 23 transcripts was unrelated to this litigation.

Respectfully submitted

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A D D E N D A

ADDENDUM 1

National Security Council
Directive of May 17, 1972

DIRECTIVE OF MAY 17, 1972

National Security Council Directive Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information

The President has directed that Executive Order 11652, "Classification and Declassification of National Security Information and Material," approved March 8, 1972 (37 F.R. 5209, March 10, 1972) be implemented in accordance with the following:

I AUTHORITY TO CLASSIFY

A. *Personal and Non-delegable.* Classification authority may be exercised only by those officials who are designated by, or in writing pursuant to, Section 2 of Executive Order 11652 (hereinafter the "Order"). Such officials may classify information or material only at the level authorized or below. This authority vests only to the official designated under the Order, and may not be delegated.

B. *Observance of Classification.* Whenever information or material classified by an official designated under A above is incorporated in another document or other material by any person other than the classifier, the previously assigned security classification category shall be reflected thereon together with the identity of the classifier.

C. *Identification of Classifier.* The person at the highest level authorizing the classification must be identified on the face of the information or material classified, unless the identity of such person might disclose sensitive intelligence information. In the latter instance the Department shall establish some other record by which the classifier can readily be identified.

D. *Record Requirement.* Each Department listed in Section 2(A) of the Order shall maintain a listing by name of the officials who have been designated in writing to have Top Secret classification authority. Each Department listed in Section 2 (A) and (B) of the Order shall also maintain separate listings by name of the persons designated in writing to have Secret authority and persons designated in writing to have Confidential authority. In cases where listing of the names of officials having classification authority might disclose sensitive intelligence information, the Department shall establish some other record by which such officials can readily be identified. The foregoing listings and records shall be compiled beginning July 1, 1972 and updated at least on a quarterly basis.

E. *Resolution of Doubts.* If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether

the material should be classified at all, he should designate the less restrictive treatment.

II Downgrading and Declassification

A. *General Declassification Schedule and Exemptions.* Classified information and material shall be declassified as soon as there are no longer any grounds for continued classification within the classification category definitions set forth in Section 1 of the Order. At the time of origination the classifier shall, whenever possible, clearly mark on the information or material a specific date or event upon which downgrading or declassification shall occur. Such dates or events shall be as early as is permissible without causing damage to the national security as defined in Section 1 of the Order. Whenever earlier dates or events cannot be determined, the General Declassification Schedule set forth in Section 5(A) of the Order shall apply. If the information or material is exempted under Section 5(B) of the Order from the General Declassification Schedule, the classifier shall clearly mark the material to show that it is exempt and indicate the applicable exemption category. Unless impossible, the exempted information or material shall be assigned and clearly marked by the classifier with a specific date or event upon which declassification shall occur. Downgrading and declassification dates or events established in acordance with the foregoing, whether scheduled or non-scheduled, shall to the extent possible be carried forward and applied whenever the classified information or material is incorporated in other documents or material.

B. *Extracts and Compilations.* When classified information or material from more than one source is incorporated into a new document or other material, the document or other material shall be classified, downgraded or declassified in accordance with the provisions of the Order and Directives thereunder applicable to the information requiring the greatest protection.

C. *Material Not Officially Transferred.* When a Department holding classified information or material under the circumstances described in Section 3(D) of the Order notifies another Department of its intention to downgrade or declassify, it shall allow the notified Department 30 days in which to express its objections before taking action.

D. *Declassification of Material 30 Years Old.* The head of each Department shall assign experienced personnel to assist the Archivist of the United States in the exercise of his responsibility under Section 5(E) of the Order to systematically review for declassification all materials classified before June 1, 1972 and more than 30 years old. Such personnel will: (1) provide guidance and assistance to archival employees in identifying and separating those materials originated in their Departments which are deemed to require continued classification; and (2) develop a list for submission to the head of the Department which identifies the materials so separated, with recommendations concerning continued classification. The head of the originating Department will then make the determination required under Section 5(E) of the Order and cause a list to be created which identifies the documentation included

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in the determination, indicates the reason for continued classification and specifies the date on which such material shall be declassified.

E. *Notification of Expedited Downgrading or Declassification.* When classified information or material is downgraded or declassified in a manner other than originally specified, whether scheduled or exempted, the classifier shall, to the extent practicable, promptly notify all addressees to whom the information or material was originally officially transmitted. In turn, the addressees shall notify any other known recipient of the classified information or material.

III Review of Classified Material for Declassification Purposes

A. *Systematic Reviews.* All information and material classified after the effective date of the Order and determined in accordance with Chapter 21, 44 U.S.C. (82 Stat. 1287) to be of sufficient historical or other value to warrant preservation shall be systematically reviewed on a timely basis by each Department for the purpose of making such information and material publicly available in accordance with the determination regarding declassification made by the classifier under Section 5 of the Order. During each calendar year each Department shall segregate to the maximum extent possible all such information and material warranting preservation and becoming declassified at or prior to the end of such year. Promptly after the end of such year the Department responsible, or the Archives of the United States if transferred thereto, shall make the declassified information and material available to the public to the extent permitted by law.

B. *Review for Declassification of Classified Material Over 10 Years Old.* Each Department shall designate in its implementing regulations an office to which members of the public or Departments may direct requests for mandatory review for declassification under Section 5 (C) and (D) of the Order. This office shall in turn assign the request to the appropriate office for action. In addition, this office or the office which has been assigned action shall immediately acknowledge receipt of the request in writing. If the request requires the rendering of services for which fair and equitable fees should be charged pursuant to Title 5 of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a the requester shall be so notified. The office which has been assigned action shall thereafter make a determination within 30 days of receipt or shall explain the reasons why further time is necessary. If at the end of 60 days from receipt of the request for review no determination has been made, the requester may apply to the Departmental Committee established by Section 7(B) of the Order for a determination. Should the office assigned action on a request for review determine that under the criteria set forth in Section 5(B) of the Order continued classification is required, the requester shall promptly be notified, and whenever possible, provided with a brief statement as to why the requested information or material cannot be declassified. The requester may appeal any such determination to the Departmental Committee and the notice of determination shall advise him of this right.

C. *Departmental Committee Review for Declassification.* The Departmental Committee shall establish procedures to review and act within

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30 days upon all applications and appeals regarding requests for declassification. The Department head, acting through the Departmental Committee shall be authorized to over-rule previous determinations in whole or in part when, in its judgment, continued protection is no longer required. If the Departmental Committee determines that continued classification is required under the criteria of Section 5(B) of the Order it shall promptly so notify the requester and advise him that he may appeal the denial to the Interagency Classification Review Committee.

D. *Review of Classified Material Over 30 Years Old.* A request by a member of the public or by a Department under Section 5 (C) or (D) of the Order to review for declassification documents more than 30 years old shall be referred directly to the Archivist of the United States, and he shall have the requested documents reviewed for declassification in accordance with Part II.D. hereof. If the information or material requested has not been transferred to the General Services Administration for accession into the Archives, the Archivist shall, together with the head of the Department having custody, have the requested documents reviewed for declassification. Classification shall be continued in either case only where the head of the Department concerned makes at that time the personal determination required by Section 5(E)(1) of the Order. The Archivist shall promptly notify the requester of such determination and of his right to appeal the denial to the Interagency Classification Review Committee.

E. *Burden of Proof for Administrative Determinations.* For purposes of administrative determinations under B., C., or D. above, the burden of proof is on the originating Department to show that continued classification is warranted within the terms of the Order.

F. *Availability of Declassified Material.* Upon a determination under B., C., or D. above that the requested material no longer warrants classification it shall be declassified and made promptly available to the requester, if not otherwise exempt from disclosure under Section 552(b) of Title 5 U.S.C. (Freedom of Information Act) or other provision of law.

G. *Classification Review Requests.* As required by Section 5(C) of the Order, a request for classification review must describe the document with sufficient particularity to enable the Department to identify it and obtain it with a reasonable amount of effort. Whenever a request is deficient in its description of the record sought, the requester should be asked to provide additional identifying information whenever possible. Before denying a request on the ground that it is unduly burdensome, the requester should be asked to limit his request to records that are reasonably obtainable. If none-the-less the requester does not describe the records sought with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why no action will be taken and of his right to appeal such decision.

IV Marking Requirements

A. *When Document or Other Material is Prepared.* At the time of origination, each document or other material containing classified in-

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formation shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule.

(1) For marking documents which are subject to the General Declassification Schedule, the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED
BY _____
SUBJECT TO GENERAL DECLASSIFICATION SCHEDULE OF EXECUTIVE ORDER 11652 AUTOMATICALLY DOWNGRADED AT TWO YEAR INTERVALS AND DECLASSIFIED ON DEC. 31 (insert year)

(2) For marking documents which are to be automatically declassified on a given event or date earlier than the General Declassification Schedule the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED
BY _____
AUTOMATICALLY DECLASSIFIED ON (effective date or event)

(3) For marking documents which are exempt from the General Declassification Schedule the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED
BY _____
EXEMPT FROM GENERAL DECLASSIFICATION SCHEDULE OF EXECUTIVE ORDER 11652 EXEMPTION CATEGORY (§ 5B (1), (2), (3), or (4)) AUTOMATICALLY DECLASSIFIED ON (effective date or event, if any)

Should the classifier inadvertently fail to mark a document with one of the foregoing stamps the document shall be deemed to be subject to the General Declassification Schedule. The person who signs or finally approves a document or other material containing classified information shall be deemed to be the classifier. If the classifier is other than such person he shall be identified on the stamp as indicated.

The "Restricted Data" and "Formerly Restricted Data" stamps (H. below) are, in themselves, evidence of exemption from the General Declassification Schedule.

B. *Overall and Page Marking of Documents.* The overall classification of a document, whether or not permanently bound, or any copy or reproduction thereof, shall be conspicuously marked or stamped at the top and bottom of the outside of the front cover (if any), on the title page (if any), on the first page, on the back page and on the outside of the back cover (if any). To the extent practicable each interior page of a document which is not permanently bound shall be conspicuously marked or stamped at the top and bottom according to its own content, including the designation "Unclassified" when appropriate.

C. *Paragraph Marking.* Whenever a classified document contains either more than one security classification category or unclassified information, each section, part or paragraph should be marked to the extent practicable to show its classification category or that it is unclassified.

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D. *Material Other Than Documents.* If classified material cannot be marked, written notification of the information otherwise required in markings shall accompany such material.

E. *Transmittal Documents.* A transmittal document shall carry on it a prominent notation as to the highest classification of the information which is carried with it, and a legend showing the classification, if any, of the transmittal document standing alone.

F. *Wholly Unclassified Material Not Usually Marked.* Normally, unclassified material shall not be marked or stamped "Unclassified" unless the purpose of the marking is to indicate that a decision has been made not to classify it.

G. *Downgrading, Declassification and Upgrading Markings.* Whenever a change is made in the original classification or in the dates of downgrading or declassification of any classified information or material it shall be promptly and conspicuously marked to indicate the change, the authority for the action, the date of the action, and the identity of the person taking the action. In addition, all earlier classification markings shall be cancelled, if practicable, but in any event on the first page.

(1) *Limited Use of Posted Notice for Large Quantities of Material.* When the volume of information or material is such that prompt remarking of each classified item could not be accomplished without unduly interfering with operations, the custodian may attach downgrading, declassification or upgrading notices to the storage unit in lieu of the remarking otherwise required. Each notice shall indicate the change, the authority for the action, the date of the action, the identity of the person taking the action and the storage units to which it applies. When individual documents or other materials are withdrawn from such storage units they shall be promptly remarked in accordance with the change, or if the documents have been declassified, the old markings shall be cancelled.

(2) *Transfer of Stored Quantities Covered by Posted Notice.* When information or material subject to a posted downgrading, upgrading or declassification notice are withdrawn from one storage unit solely for transfer to another, or a storage unit containing such documents or other materials is transferred from one place to another, the transfer may be made without remarking if the notice is attached to or remains with each shipment.

H. *Additional Warning Notices.* In addition to the foregoing marking requirements, warning notices shall be prominently displayed on classified documents or materials as prescribed below. When display of these warning notices on the documents or other materials is not feasible, the warnings shall be included in the written notification of the assigned classification.

(1) *Restricted Data.* For classified information or material containing Restricted Data as defined in the Atomic Energy Act of 1954, as amended:

"RESTRICTED DATA"

This document contains Restricted Data as defined in the Atomic Energy Act of 1954. Its dissemination or disclosure to any unauthorized person is prohibited.

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(2) *Formerly Restricted Data.* For classified information or material containing solely Formerly Restricted Data, as defined in Section 142.d., Atomic Energy Act of 1954, as amended:

"FORMERLY RESTRICTED DATA"

Unauthorized disclosure subject to Administrative and Criminal Sanctions. Handle as Restricted Data in Foreign Dissemination. Section 144.b., Atomic Energy Act, 1954.

(3) *Information Other Than Restricted Data or Formerly Restricted Data.* For classified information or material furnished to persons outside the Executive Branch of Government other than as described in (1) and (2) above:

"NATIONAL SECURITY INFORMATION"

Unauthorized Disclosure Subject to Criminal Sanctions.

(4) *Sensitive Intelligence Information.* For classified information or material relating to sensitive intelligence sources and methods, the following warning notice shall be used, in addition to and in conjunction with those prescribed in (1), (2), or (3), above, as appropriate:

"WARNING NOTICE—SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED"

V Protection and Transmission of Classified Information

A. *General.* Classified information or material may be used, held, or stored only where there are facilities or under conditions adequate to prevent unauthorized persons from gaining access to it. Whenever such information or material is not under the personal supervision of an authorized person, the methods set forth in *Appendix A* hereto shall be used to protect it. Whenever such information or material is transmitted outside the originating Department the requirements of *Appendix B* hereto shall be observed.

B. *Loss or Possible Compromise.* Any person who has knowledge of the loss or possible compromise of classified information shall immediately report the circumstances to a designated official of his Department or organization. In turn, the originating Department and any other interested Department shall be notified about the loss or possible compromise in order that a damage assessment may be conducted. An immediate inquiry shall be initiated by the Department in which the loss or compromise occurred for the purpose of taking corrective measures and appropriate administrative, disciplinary, or legal action.

VI Access and Accountability

A. *General Access Requirements.* Except as provided in B. and C. below, access to classified information shall be granted in accordance with the following:

(1) *Determination of Trustworthiness.* No person shall be given access to classified information or material unless a favorable determination has been made as to his trustworthiness. The determination of eligibility, referred to as a security clearance, shall be based on such investigations as the Department may require in accordance with the standards and criteria of E.O. 10450 and E.O. 10865 as appropriate.

(2) *Determination of Need-to-Know.* In addition to a security clearance, a person must have a need for access to the particular classified information or material sought in connection with the performance of his official duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information or material.

(3) *Administrative Withdrawal of Security Clearance.* Each Department shall make provision for administratively withdrawing the security clearance of any person who no longer requires access to classified information or material in connection with the performance of his official duties or contractural obligations. Likewise, when a person no longer needs access to a particular security classification category, the security clearance shall be adjusted to the classification category still required for the performance of his duties and obligations. In both instances, such action shall be without prejudice to the person's eligibility for a security clearance should the need again arise.

B. *Access by Historical Researchers.* Persons outside the Executive Branch engaged in historical research projects may be authorized access to classified information or material provided that the head of the originating Department determines that:

(1) The project and access sought conform to the requirements of Section 12 of the Order.

(2) The information or material requested is reasonably accessible and can be located and compiled with a reasonable amount of effort.

(3) The historical researcher agrees to safeguard the information or material in a manner consistent with the Order and Directives thereunder.

(4) The historical researcher agrees to authorize a review of his notes and manuscript for the sole purpose of determining that no classified information or material is contained therein.

An authorization for access shall be valid for the period required but no longer than two years from the date of issuance unless renewed under regulations of the originating Department.

C. *Access by Former Presidential Appointees.* Persons who previously occupied policy making positions to which they were appointed by the President, other than those referred to in Section 11 of the Order, may be authorized access to classified information or material which they originated, reviewed, signed or received while in public office. Upon the request of any such former official, such information and material as he may identify shall be reviewed for declassification in accordance with the provisions of Section 5 of the Order.

D. *Consent of Originating Department to Dissemination by Recipient.* Except as otherwise provided by Section 102 of the National Security Act of 1947, 61 Stat. 495, 50 U.S.C. 403, classified information or material originating in one Department shall not be disseminated outside any other Department to which it has been made available without the consent of the originating Department.

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E. *Dissemination of Sensitive Intelligence Information.* Information or material bearing the notation "WARNING NOTICE—SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED" shall not be disseminated in any manner outside authorized channels without the permission of the originating Department and an assessment by the senior intelligence official in the disseminating Department as to the potential risk to the national security and to the intelligence sources and methods involved.

F. *Restraint on Special Access Requirements.* The establishment of special rules limiting access to, distribution and protection of classified information and material under Section 9 of the Order requires the specific prior approval of the head of a Department or his designee.

G. *Accountability Procedures.* Each Department shall prescribe such accountability procedures as are necessary to control effectively the dissemintaion of classified information or material. Particularly stringent controls shall be placed on information and material classified Top Secret.

(1) *Top Secret Control Officers.* Top Secret Control Officers shall be designated, as required, to receive, maintain current accountability records of, and dispatch Top Secret material.

(2) *Physical Inventory.* A physical inventory of all Top Secret material shall be made at least annually. As an exception, repositories storing large volumes of classified material, shall develop inventory lists or other finding aids.

(3) *Current Accountability.* Top Secret and Secret information and material shall be subject to such controls including current accountability records as the head of the Department may prescribe.

(4) *Restraint on Reproduction.* Documents or portions of documents containing Top Secret information shall not be reproduced without the consent of the originating office. All other classified material shall be reproduced sparingly and any stated prohibition against reproduction shall be strictly adhered to.

(5) *Restraint on Number of Copies.* The number of copies of documents containing classified information shall be kept to a minimum to decrease the risk of compromise and reduce storage costs.

VII Data Index System

Each Department originating classified information or material shall undertake to establish a data index system for Top Secret, Secret and Confidential information in selected categories approved by the Interagency Classification Review Committee as having sufficient historical or other value appropriate for preservation. The index system shall contain the following data for each document indexed: (a) Identity of classifier, (b) Department of origin, (c) Addressees, (d) Date of classification, (e) Subject/Area, (f) Classification category and whether subject to or exempt from the General Declassification Schedule, (g) If exempt, which exemption category is applicable, (h) Date or event set for declassification, and (i) File designation. Information and material shall be indexed into the system at the earliest practicable date during the course

of the calendar year in which it is produced and classified, or in any event no later than March 31st of the succeeding year. Each Department shall undertake to establish such a data index system no later than July 1, 1973, which shall index the selected categories of information and material produced and classified after December 31, 1972.

VIII Combat Operations

The provisions of the Order and this Directive with regard to dissemination, transmission, or safekeeping of classified information or material may be so modified in connection with combat or combat-related operations as the Secretary of Defense may by regulations prescribe.

IX Interagency Classification Review Committee

A. *Composition of Interagency Committee.* In accordance with Section 7 of the Order, an Interagency Classification Review Committee is established to assist the National Security Council in monitoring implementation of the Order. Its membership is comprised of senior representatives of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency, the National Security Council staff, and a Chairman designated by the President.

B. *Meetings and Staff.* The Interagency Committee shall meet regularly, but no less frequently than on a monthly basis, and take such actions as are deemed necessary to insure uniform compliance with the Order and this Directive. The Chairman is authorized to appoint an Executive Director, and to maintain a permanent administrative staff.

C. *Interagency Committee's Functions.* The Interagency Committee shall carry out the duties assigned it by Section 7(A) of the Order. It shall place particular emphasis on overseeing compliance with and implementation of the Order and programs established thereunder by each Department. It shall seek to develop means to (a) prevent overclassification, (b) ensure prompt declassification in accord with the provision of the Order, (c) facilitate access to declassified material and (d) eliminate unauthorized disclosure of classified information.

D. *Classification Complaints.* Under such procedures as the Interagency Committee may prescribe, it shall consider and take action on complaints from persons within or without the government with respect to the general administration of the Order including appeals from denials by Departmental Committees or the Archivist of declassification requests.

X Departmental Implementation and Enforcement

A. *Action Programs.* Those Departments listed in Section 2 (A) and (B) of the Order shall insure that adequate personnel and funding are provided for the purpose of carrying out the Order and Directives thereunder.

B. *Departmental Committee.* All suggestions and complaints, including those regarding overclassification, failure to declassify, or delay in declassifying not otherwise resolved, shall be referred to the Departmental Committee for resolution. In addition, the Departmental Committee shall review all appeals of requests for records under Section 522 of Title 5

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U.S.C. (Freedom of Information Act) when the proposed denial is based on their continued classification under the Order.

C. *Regulations and Reports.* Each Department shall submit its proposed implementing regulations of the Order and Directives thereunder to the Chairman of the Interagency Classification Review Committee for approval by the Committee. Upon approval such regulations shall be published in the FEDERAL REGISTER to the extent they affect the general public. Each Department shall also submit to the said Chairman (1) copies of the record lists required under Part I.D. hereof by July 1, 1972 and thereafter quarterly, (2) quarterly reports of Departmental Committee actions on classification review requests, classification abuses and unauthorized disclosures, and (3) provide progress reports on information accumulated in the data index system established under Part VII hereof and such other reports as said Chairman may find necessary for the Interagency Classification Review Committee to carry out its responsibilities.

D. *Administrative Enforcement.* The Departmental Committees shall have responsibility for recommending to the head of the respective Departments appropriate administrative action to correct abuse or violation of any provision of the Order or Directives thereunder, including notifications by warning letter, formal reprimand, and to the extent permitted by law, suspension without pay and removal. Upon receipt of such a recommendation the head of the Department concerned shall act promptly and advise the Departmental Committee of his action.

Publication and Effective Date: This Directive shall be published in the FEDERAL REGISTER and become effective June 1, 1972.

HENRY A. KISSINGER,
Assistant to the President for National Security Affairs.

MAY 17, 1972.

APPENDIX A

PROTECTION OF CLASSIFIED INFORMATION

A. *Storage of Top Secret.* Top Secret information and material shall be stored in a safe or safe-type steel file container having a built in three-position dial-type combination lock, vault, or vault-type room, or other storage facility which meets the standards for Top Secret established under the provisions of (C) below, and which minimizes the possibility of unauthorized access to, or the physical theft of, such information or material.

B. *Storage of Secret or Confidential.* Secret and Confidential material may be stored in a manner authorized for Top Secret information and material, or in a container or vault which meets the standards for Secret or Confidential, as the case may be, established under the provisions of (C) below.

C. *Standards for Security Equipment.* The General Services Administration shall, in coordination with Departments originating classified information or material, establish and publish uniform standards, specifications and supply schedules for containers, vaults, alarm systems and associated security devices suitable for the storage and protection of all categories of classified information and material. Any Department may establish for use within such Department more stringent standards. Whenever new security equipment is procured, it shall be in conformance with the foregoing standards and specifications and shall, to the maximum extent practicable, be of the type designated on the Federal Supply Schedule, General Services Administration.

D. *Exception to Standards for Security Equipment.* As an exception to (C) above, Secret and Confidential material may also be stored in a steel filing cabinet having a built in, three-position, dial-type combination lock; or a steel filing cabinet equipped with a steel lock bar, provided it is secured by a GSA approved changeable combination padlock.

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E. *Combinations.* Combinations to security equipment and devices shall be changed only by persons having appropriate security clearance, and shall be changed whenever such equipment is placed in use, whenever a person knowing the combination is transferred from the office to which the equipment is assigned, whenever a combination has been subjected to possible compromise, and at least once every year. Knowledge of combinations shall be limited to the minimum number of persons necessary for operating purposes. Records of combinations shall be classified no lower than the highest category of classified information or material authorized for storage in the security equipment concerned.

F. *Telecommunications Conversations.* Classified information shall not be revealed in telecommunications conversations, except as may be authorized under Appendix B with respect to the transmission of classified information over approved communications circuits or systems.

G. *Responsibilities of Custodians.* Custodians of classified material shall be responsible for providing protection and accountability for such material at all times and particularly for locking classified material in approved security equipment whenever it is not in use or under direct supervision of authorized persons. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

APPENDIX B

TRANSMISSION OF CLASSIFIED INFORMATION

A. *Preparation and Receipting.* Classified information and material shall be enclosed in opaque inner and outer covers before transmitting. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and address. The outer cover shall be sealed and addressed with no indication of the classification of its contents. A receipt shall be attached to or enclosed in the inner cover, except that Confidential material shall require a receipt only if the sender deems it necessary. The receipt shall identify the sender, addressee, and the document, but shall contain no classified information. It shall be signed by the recipient and returned to the sender.

B. *Transmission of Top Secret.* The transmission of Top Secret information and material shall be effected preferably by oral discussions in person between the officials concerned. Otherwise the transmission of Top Secret information and material shall be by specifically designated personnel, by State Department diplomatic pouch, by a messenger-courier system especially created for that purpose, over authorized communications circuits in encrypted form or by other means authorized by the National Security Council; except that in the case of information transmitted by the Federal Bureau of Investigation, such means of transmission may be used as are approved by the Director, Federal Bureau of Investigation, unless express reservation to the contrary is made in exceptional cases by the originating Department.

C. *Transmission of Secret.* The transmission of Secret material shall be effected in the following manner.

(1) *The Fifty States, District of Columbia, Puerto Rico.* Secret information and material may be transmitted within and between the forty-eight contiguous states and District of Columbia, or wholly within the State of Hawaii, the State of Alaska, or the Commonwealth of Puerto Rico by one of the means authorized for Top Secret information and material, the United States Postal Service registered mail and protective services provided by the United States air or surface commercial carriers under such conditions as may be prescribed by the head of the Department concerned.

(2) *Other Areas, Vessels, Military Postal Services, Aircraft.* Secret information and material may be transmitted from or to or within areas other than those specified in (1) above, by one of the means established for Top Secret information and material, captains or masters of vessels of United States registry under contract to a Department of the Executive Branch, United States registered mail through Army, Navy or Air Force Postal Service facilities provided that material does not at any time pass out of United States citizen control and does not pass through a foreign postal system, and commercial aircraft under charter to the United States and military or other government aircraft.

(3) *Canadian Government Installations.* Secret information and material may be transmitted between United States Government or Canadian Government installations, or both, in the forty-eight contiguous states, Alaska, the District of Columbia and Canada by United States and Canadian registered mail with registered mail receipt.

(4) *Special Cases.* Each Department may authorize the use of the United States Postal Service registered mail outside the forty-eight contiguous states, the District of Columbia, the State of Hawaii, the State of Alaska, and the Commonwealth of Puerto Rico if warranted by security conditions and essential operational requirements provided that the material does not at any time pass out of United States Government and United States citizen control and does not pass through a foreign postal system.

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D. *Transmittal of Confidential.* Confidential information and material shall be transmitted within the forty-eight contiguous states and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for higher classifications, or by certified or first class mail. Outside these areas, Confidential information and material shall be transmitted in the same manner as authorized for higher classifications.

E. *Alternative Transmission of Confidential.* Each Department having authority to classify information or material as "Confidential" may issue regulations authorizing alternative or additional methods for the transmission of material classified "Confidential" outside of the Department. In the case of material originated by another agency, the method of transmission must be at least as secure as the transmission procedures imposed by the originator.

F. *Transmission Within a Department.* Department regulations governing the preparation and transmission of classified information within a Department shall ensure a degree of security equivalent to that prescribed above for transmission outside the Department.

[FR Doc.72-7713 Filed 5-17-72;5:04 pm]

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ADDENDUM 2

Executive Order 11652

Title 3—The President

EXECUTIVE ORDER 11652

Classification and Declassification of National Security Information and Material

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Within the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

This official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by Section 552(b)(1) of Title 5, United States Code. Wrongful disclosure of such information or material is recognized in the Federal Criminal Code as providing a basis for prosecution.

To ensure that such information and material is protected, but only to the extent and for such period as is necessary, this order identifies the information to be protected, prescribes classification, downgrading, declassification and safeguarding procedures to be followed, and establishes a monitoring system to ensure its effectiveness.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, it is hereby ordered:

SECTION 1. *Security Classification Categories.* Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:

(A) *"Top Secret."* "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the

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national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) *"Secret."* "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) *"Confidential."* "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

SEC. 2. *Authority to Classify.* The authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administration. Except as the context may otherwise indicate, the term "Department" as used in this order shall include agency or other governmental unit.

(A) The authority to originally classify information or material under this order as "Top Secret" shall be exercised only by such officials as the President may designate in writing and by:

(1) The heads of the Departments listed below;

(2) Such of their senior principal deputies and assistants as the heads of such Departments may designate in writing; and

(3) Such heads and senior principal deputies and assistants of major elements of such Departments, as the heads of such Departments may designate in writing.

Such offices in the Executive Office of the President as the President may designate in writing
Central Intelligence Agency
Atomic Energy Commission
Department of State
Department of the Treasury
Department of Defense
Department of the Army
Department of the Navy
Department of the Air Force
United States Arms Control and Disarmament Agency

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Department of Justice
National Aeronautics and Space Administration
Agency for International Development

(B) The authority to originally classify information or material under this order as "Secret" shall be exercised only by:

(1) Officials who have "Top Secret" classification authority;

(2) Such subordinates as officials with "Top Secret" classification authority under (A) (1) and (2) above may designate in writing; and

(3) The heads of the following named Departments and such senior principal deputies or assistants as they may designate in writing.

Department of Transportation
Federal Communications Commission
Export-Import Bank of the United States
Department of Commerce
United States Civil Service Commission
United States Information Agency
General Services Administration
Department of Health, Education, and Welfare
Civil Aeronautics Board
Federal Maritime Commission
Federal Power Commission
National Science Foundation
Overseas Private Investment Corporation

(C) The authority to originally classify information or material under this order as "Confidential" may be exercised by officials who have "Top Secret" or "Secret" classification authority and such officials as they may designate in writing.

(D) Any Department not referred to herein and any Department or unit established hereafter shall not have authority to originally classify information or material under this order, unless specifically authorized hereafter by an Executive order.

SEC. 3. *Authority to Downgrade and Declassify.* The authority to downgrade and declassify national security information or material shall be exercised as follows:

(A) Information or material may be downgraded or declassified by the official authorizing the original classification, by a successor in capacity or by a supervisory official of either.

(B) Downgrading and declassification authority may also be exercised by an official specifically authorized under regulations issued by the head of the Department listed in Sections 2(A) or (B) hereof.

(C) In the case of classified information or material officially transferred by or pursuant to statute or Executive order in conjunction with a transfer of function and not merely for storage purposes, the receiving Department shall be deemed to be the originating Department for all purposes under this order including downgrading and declassification.

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(D) In the case of classified information or material not officially transferred within (C) above, but originated in a Department which has since ceased to exist, each Department in possession shall be deemed to be the originating Department for all purposes under this order. Such information or material may be downgraded and declassified by the Department in possession after consulting with any other Departments having an interest in the subject matter.

(E) Classified information or material transferred to the General Services Administration for accession into the Archives of the United States shall be downgraded and declassified by the Archivist of the United States in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments.

(F) Classified information or material with special markings, as described in Section 8, shall be downgraded and declassified as required by law and governing regulations.

SEC. 4. *Classification.* Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security. The following rules shall apply to classification of information under this order:

(A) *Documents in General.* Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing references to classified materials, which references do not reveal classified information, shall not be classified.

(B) *Identification of Classifying Authority.* Unless the Department involved shall have provided some other method of identifying the individual at the highest level that authorized classification in each case, material classified under this order shall indicate on its face the identity of the highest authority authorizing the classification. Where the individual who signs or otherwise authenticates a document or item has also authorized the classification, no further annotation as to his identity is required.

(C) *Information or Material Furnished by a Foreign Government or International Organization.* Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material.

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(D) *Classification Responsibilities.* A holder of classified information or material shall observe and respect the classification assigned by the originator. If a holder believes that there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon re-examine the classification.

SEC. 5. *Declassification and Downgrading.* Classified information and material, unless declassified earlier by the original classifying authority, shall be declassified and downgraded in accordance with the following rules:

(A) *General Declassification Schedule.* (1) *"Top Secret."* Information or material originally classified "Top Secret" shall become automatically downgraded to "Secret" at the end of the second full calendar year following the year in which it was originated, downgraded to "Confidential" at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the tenth full calendar year following the year in which it was originated.

(2) *"Secret."* Information and material originally classified "Secret" shall become automatically downgraded to "Confidential" at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(3) *"Confidential."* Information and material originally classified "Confidential" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(B) *Exemptions from General Declassification Schedule.* Certain classified information or material may warrant some degree of protection for a period exceeding that provided in the General Declassification Schedule. An official authorized to originally classify information or material "Top Secret" may exempt from the General Declassification Schedule any level of classified information or material originated by him or under his supervision if it falls within one of the categories described below. In each case such official shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification. The use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(C) *Mandatory Review of Exempted Material.* All classified information and material originated after the effective date of this order which is exempted under (B) above from the General Declassification Schedule shall be subject to a classification review by the originating Department at any time after the expiration of ten years from the date of origin provided:

(1) A Department or member of the public requests a review;

(2) The request describes the record with sufficient particularity to enable the Department to identify it; and

(3) The record can be obtained with only a reasonable amount of effort.

Information or material which no longer qualifies for exemption under (B) above shall be declassified. Information or material continuing to qualify under (B) shall be so marked and, unless impossible, a date for automatic declassification shall be set.

(D) *Applicability of the General Declassification Schedule to Previously Classified Material.* Information or material classified before the effective date of this order and which is assigned to Group 4 under Executive Order No. 10501, as amended by Executive Order No. 10964, shall be subject to the General Declassification Schedule. All other information or material classified before the effective date of this order, whether or not assigned to Groups 1, 2, or 3 of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of ten years from the date of origin it shall be subject to a mandatory classification review and disposition under the same conditions and criteria that apply to classified information and material created after the effective date of this order as set forth in (B) and (C) above.

(E) *Declassification of Classified Information or Material After Thirty Years.* All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(1) All information and material classified after the effective date of this order shall, whether or not declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

(2) All information and material classified before the effective date of this order and more than thirty years old shall be systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was

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originated. In his review, the Archivist will separate and keep protected only such information or material as is specifically identified by the head of the Department in accordance with (E)(1) above. In such case, the head of the Department shall also specify the period of continued classification.

(F) *Departments Which Do Not Have Authority For Original Classification.* The provisions of this section relating to the declassification of national security information or material shall apply to Departments which, under the terms of this order, do not have current authority to originally classify information or material, but which formerly had such authority under previous Executive orders.

SEC. 6. *Policy Directives on Access, Marking, Safekeeping, Accountability, Transmission, Disposition and Destruction of Classified Information and Material.* The President acting through the National Security Council shall issue directives which shall be binding on all Departments to protect classified information from loss or compromise. Such directives shall conform to the following policies:

(A) No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties.

(B) All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified contents.

(C) Classified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons.

(D) All classified information and material disseminated outside the executive branch under Executive Order No. 10865 or otherwise shall be properly protected.

(E) Appropriate accountability records for classified information shall be established and maintained and such information and material shall be protected adequately during all transmissions.

(F) Classified information and material no longer needed in current working files or for reference or record purposes shall be destroyed or disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code and other applicable statutes.

(G) Classified information or material shall be reviewed on a systematic basis for the purpose of accomplishing downgrading, declassification, transfer, retirement and destruction at the earliest practicable date.

SEC. 7. *Implementation and Review Responnbilities.* (A) The National Security Council shall monitor the implementation of this order. To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of representatives of the Departments of State, Defense and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National

Security Council Staff and a Chairman designated by the President. Representatives of other Departments in the executive branch may be invited to meet with the Committee on matters of particular interest to those Departments. This Committee shall meet regularly and on a continuing basis shall review and take action to ensure compliance with this order, and in particular:

(1) The Committee shall oversee Department actions to ensure compliance with the provisions of this order and implementing directives issued by the President through the National Security Council.

(2) The Committee shall, subject to procedures to be established by it, receive, consider and take action on suggestions and complaints from persons within or without the government with respect to the administration of this order, and in consultation with the affected Department or Departments assure that appropriate action is taken on such suggestions and complaints.

(3) Upon request of the Committee Chairman, any Department shall furnish to the Committee any particular information or material needed by the Committee in carrying out its functions.

(B) To promote the basic purposes of this order, the head of each Department originating or handling classified information or material shall:

(1) Prior to the effective date of this order submit to the Interagency Classification Review Committee for approval a copy of the regulations it proposes to adopt pursuant to this order.

(2) Designate a senior member of his staff who shall ensure effective compliance with and implementation of this order and shall also chair a Departmental committee which shall have authority to act on all suggestions and complaints with respect to the Department's administration of this order.

(3) Undertake an initial program to familiarize the employees of his Department with the provisions of this order. He shall also establish and maintain active training and orientation programs for employees concerned with classified information or material. Such programs shall include, as a minimum, the briefing of new employees and periodic reorientation during employment to impress upon each individual his responsibility for exercising vigilance and care in complying with the provisions of this order. Additionally, upon termination of employment or contemplated temporary separation for a sixty-day period or more, employees shall be debriefed and each reminded of the provisions of the Criminal Code and other applicable provisions of law relating to penalties for unauthorized disclosure.

(C) The Attorney General, upon request of the head of a Department, his duly designated representative, or the Chairman of the above described Committee, shall personally or through authorized representatives of the Department of Justice render an interpretation of this order with respect to any question arising in the course of its administration.

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SEC. 8. *Material Covered by the Atomic Energy Act.* Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. "Restricted Data," and material designated as "Formerly Restricted Data," shall be handled, protected, classified, downgraded and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

SEC. 9. *Special Departmental Arrangements.* The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography.

SEC. 10. *Exceptional Cases.* In an exceptional case when a person or Department not authorized to classify information originates information which is believed to require classification, such person or Department shall protect that information in the manner prescribed by this order. Such persons or Department shall transmit the information forthwith, under appropriate safeguards, to the Department having primary interest in the subject matter with a request that a determination be made as to classification.

SEC. 11. *Declassification of Presidential Papers.* The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential Library. Such declassification shall only be undertaken in accord with: (i) the terms of the donor's deed of gift, (ii) consultations with the Departments having a primary subject-matter interest, and (iii) the provisions of Section 5.

SEC. 12. *Historical Research and Access by Former Government Officials.* The requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch who are engaged in historical research projects or who have previously occupied policy-making positions to which they were appointed by the President; *Provided,* however, that in each case the head of the originating Department shall:

(i) determine that access is clearly consistent with the interests of national security; and

(ii) take appropriate steps to assure that classified information or material is not published or otherwise compromised.

Access granted a person by reason of his having previously occupied a policy-making position shall be limited to those papers which the former official originated, reviewed, signed or received while in public office.

SEC. 13. *Administrative and Judicial Action.* (A) Any officer or employee of the United States who unnecessarily classifies or over-

classifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case where the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or overclassification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

(B) The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council. Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice.

SEC. 14. *Revocation of Executive Order No. 10501.* Executive Order No. 10501 of November 5, 1953, as amended by Executive Orders No. 10816 of May 8, 1959, No. 10901 of January 11, 1961, No. 10964 of September 20, 1961, No. 10985 of January 15, 1962, No. 11097 of March 6, 1963 and by Section 1(a) of No. 11382 of November 28, 1967, is superseded as of the effective date of this order.

SEC. 15. *Effective date.* This order shall become effective on June 1, 1972.

Richard Nixon

THE WHITE HOUSE,
March 8, 1972.

[FR Doc.72-3782 Filed 3-9-72; 11:01 am]

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ADDENDUM 3

Executive Order 10501 as Amended

of the Government of the United States of America for the construction of the works referred to in the Order of Approval of the International Joint Commission of October 29, 1952.

SEC. 2. *Establishment of United States Section of St. Lawrence River Joint Board of Engineers.* There is hereby established the United States Section of the St. Lawrence River Joint Board of Engineers, composed of two members and hereinafter referred to as the United States Section. The Secretary of the Army and the Chairman of the Federal Power Commission are hereby designated members. Each may designate an alternate to act for him as member of the United States Section.

SEC. 3. *Duties of the United States Section.* The United States Section shall represent the Government of the United States on the Joint Board of Engineers in the performance of the duties specified in condition (g) of the Order of Approval, and is authorized to act with the Canadian Section in the approval of the plans and specifications of the works and the programs of construction thereof, submitted for approval of the respective Governments as required by the Order of Approval, and to assure the construction of the works in accordance with such approval.

SEC. 4. *Assistance to the United States Section.* The Department of the Army and the Federal Power Commission are authorized to furnish such assistance, including facilities, supplies and personnel, to the United States Section as may be consonant with law and necessary for the purpose of effectuating this order.

SEC. 5. *Reports to the President.* The United States Section shall submit its final report to the President upon the completion of construction and shall submit such interim reports as may appear to be desirable.

SEC. 6. *Effective date.* This order shall be effective upon the date that the License becomes final.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
November 4, 1953.

EXECUTIVE ORDER 10501

SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows

SECTION 1. *Classification Categories.* Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

(a) *Top Secret.* Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) *Secret.* Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could

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result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

(c) *Confidential.* Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

SEC. 2. *Limitation of Authority to Classify.* The authority to classify defense information or material under this order shall be limited in the departments and agencies of the executive branch as hereinafter specified. Departments and agencies subject to the specified limitations shall be designated by the President:

(a) In those departments and agencies having no direct responsibility for national defense there shall be no authority for original classification of information or material under this order.

(b) In those departments and agencies having partial but not primary responsibility for matters pertaining to national defense the authority for original classification of information or material under this order shall be exercised only by the head of the department or agency, without delegation.

(c) In those departments and agencies not affected by the provisions of subsection (a) and (b), above, the authority for original classification of information or material under this order shall be exercised only by responsible officers or employees, who shall be specifically designated for this purpose. Heads of such departments and agencies shall limit the delegation of authority to classify as severely as is consistent with the orderly and expeditious transaction of Government business.

SEC. 3. *Classification.* Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) *Documents in General.* Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) *Transmittal Letters.* A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

(e) *Information Originated by a Foreign Government or Organization.* Defense information of a classified nature furnished to the United States by a foreign government or international organization shall be assigned a classification which will assure a degree of protection equivalent to or greater than that required by the government or international organization which furnished the information.

SEC. 4. *Declassification, Downgrading, or Upgrading.* Heads of departments or agencies originating classified material shall designate persons to be responsible for continuing review of such classified material for the purpose of declassifying or downgrading it whenever national defense considerations permit, and for receiving requests for such review from all sources. Formal procedures shall be established to provide specific means for prompt review of classified material and its declassification or downgrading in order to preserve the effectiveness and integrity of the classification system and

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to eliminate accumulation of classified material which no longer requires protection in the defense interest. The following special rules shall be observed with respect to changes of classification of defense material:

(a) *Automatic Changes.* To the fullest extent practicable, the classifying authority shall indicate on the material (except telegrams) at the time of original classification that after a specified event or date, or upon removal of classified enclosures, the material will be downgraded or declassified.

(b) *Non-Automatic Changes.* The persons designated to receive requests for review of classified material may downgrade or declassify such material when circumstances no longer warrant its retention in its original classification provided the consent of the appropriate classifying authority has been obtained. The downgrading or declassification of extracts from or paraphrases of classified documents shall also require the consent of the appropriate classifying authority unless the agency making such extracts knows positively that they warrant a classification lower than that of the document from which extracted, or that they are not classified.

(c) *Material Officially Transferred.* In the case of material transferred by or pursuant to statute or Executive order from one department or agency to another for the latter's use and as part of its official files or property, as distinguished from transfers merely for purposes of storage, the receiving department or agency shall be deemed to be the classifying authority for all purposes under this order, including declassification and downgrading.

(d) *Material Not Officially Transferred.* When any department or agency has in its possession any classified material which has become five years old, and it appears (1) that such material originated in an agency which has since become defunct and whose files and other property have not been officially transferred to another department or agency within the meaning of subsection (c), above, or (2) that it is impossible for the possessing department or agency to identify the originating agency, and (3) a review of the material indicates that it should be downgraded or declassified, the said possessing department or agency shall have power to declassify or downgrade such material. If it appears probable that another department or agency may have a substantial interest in whether the classification of any particular information should be maintained, the possessing department or agency shall not exercise the power conferred upon it by this subsection, except with the consent of the other department or agency, until thirty days after it has notified such other department or agency of the nature of the material and of its intention to declassify or downgrade the same. During such thirty-day period the other department or agency may, if it so desires, express its objections to declassifying or downgrading the particular material, but the power to make the ultimate decision shall reside in the possessing department or agency.

(e) *Classified Telegrams.* Such telegrams shall not be referred to, extracted from, paraphrased, downgraded, declassified, or disseminated, except in accordance with special regulations issued by the head of the originating department or agency. Classified telegrams transmitted over cryptographic systems shall be handled in accordance with the regulations of the transmitting department or agency.

(f) *Downgrading.* If the recipient of classified material believes that it has been classified too highly, he may make a request to the reviewing official who may downgrade or declassify the material after obtaining the consent of the appropriate classifying authority.

(g) *Upgrading.* If the recipient of unclassified material believes that it should be classified, or if the recipient of classified material believes that its classification is not sufficiently protective, it shall be safeguarded in accordance with the classification deemed appropriate and a request made to the reviewing official, who may classify the material or upgrade the classification after obtaining the consent of the appropriate classifying authority.

(h) *Notification of Change in Classification.* The reviewing official taking action to declassify, downgrade, or upgrade classified material shall notify all addressees to whom the material was originally transmitted.

SEC. 5. *Marking of Classified Material.* After a determination of the proper defense classification to be assigned has been made in accordance with the

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provisions of this order, the classified material shall be marked as follows:

(a) *Bound Documents.* The assigned defense classification on bound documents, such as books or pamphlets, the pages of which are permanently and securely fastened together, shall be conspicuously marked or stamped on the outside of the front cover, on the title page, on the first page, on the back page and on the outside of the back cover. In each case the markings shall be applied to the top and bottom of the page or cover.

(b) *Unbound Documents.* The assigned defense classification on unbound documents, such as letters, memoranda, reports, telegrams, and other similar documents, the pages of which are not permanently and securely fastened together, shall be conspicuously marked or stamped at the top and bottom of each page, in such manner that the marking will be clearly visible when the pages are clipped or stapled together.

(c) *Charts, Maps, and Drawings.* Classified charts, maps, and drawings shall carry the defense classification marking under the legend, title block, or scale in such manner that it will be reproduced on all copies made therefrom. Such classification shall also be marked at the top and bottom in each instance.

(d) *Photographs, Films and Recordings.* Classified photographs, films, and recordings, and their containers, shall be conspicuously and appropriately marked with the assigned defense classification.

(e) *Products or Substances.* The assigned defense classification shall be conspicuously marked on classified products or substances, if possible, and on their containers, if possible, or, if the article or container cannot be marked, written notification of such classification shall be furnished to recipients of such products or substances.

(f) *Reproductions.* All copies or reproductions of classified material shall be appropriately marked or stamped in the same manner as the original thereof.

(g) *Unclassified Material.* Normally, unclassified material shall not be marked or stamped *Unclassified* unless it is essential to convey to a recipient of such material that it has been examined specifically with a view to imposing a defense classification and has been determined not to require such classification.

(h) *Change or Removal of Classification.* Whenever classified material is declassified, downgraded, or upgraded, the material shall be marked or stamped in a prominent place to reflect the change in classification, the authority for the action, the date of action, and the identity of the person or unit taking the action. In addition, the old classification marking shall be cancelled and the new classification (if any) substituted therefor. *Automatic* change in classification shall be indicated by the appropriate classifying authority through marking or stamping in a prominent place to reflect information specified in subsection 4 (a) hereof.

(i) *Material Furnished Persons not in the Executive Branch of the Government.* When classified material affecting the national defense is furnished authorized persons, in or out of Federal service, other than those in the executive branch, the following notation, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:

> This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U. S. C., Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law.

Use of alternative marking concerning "Restricted Data" as defined by the Atomic Energy Act is authorized when appropriate.

SEC. 6. *Custody and Safekeeping.* The possession or use of classified defense information or material shall be limited to locations where facilities for secure storage or protection thereof are available by means of which unauthorized persons are prevented from gaining access thereto. Whenever such information or material is not under the personal supervision of its custodian, whether during or outside of working hours, the following physical or mechanical means shall be taken to protect it:

(a) *Storage of Top Secret Material.* Top Secret defense material shall be protected in storage by the most secure facilities possible. Normally it will be stored in a safe or a safe-type steel file container having a three-position, dial-type, combination lock, and being of such weight, size, construction, or installation as to minimize the possibility of surreptitious entry, physical theft, damage by fire, or tampering. The head

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of a department or agency may approve other storage facilities for this material which offer comparable or better protection, such as an alarmed area, a vault, a secure vault-type room, or an area under close surveillance of an armed guard.

(b) *Secret and Confidential Material.* These categories of defense material may be stored in a manner authorized for Top Secret material, or in metal file cabinets equipped with steel lockbar and an approved three combination dial-type padlock from which the manufacturer's identification numbers have been obliterated, or in comparably secure facilities approved by the head of the department or agency.

(c) *Other Classified Material.* Heads of departments and agencies shall prescribe such protective facilities as may be necessary in their departments or agencies for material originating under statutory provisions requiring protection of certain information.

(d) *Changes of Lock Combinations.* Combinations on locks of safekeeping equipment shall be changed, only by persons having appropriate security clearance, whenever such equipment is placed in use after procurement from the manufacturer or other sources, whenever a person knowing the combination is transferred from the office to which the equipment is assigned, or whenever the combination has been subjected to compromise, and at least once every year. Knowledge of combinations shall be limited to the minimum number of persons necessary for operating purposes. Records of combinations shall be classified no lower than the highest category of classified defense material authorized for storage in the safekeeping equipment concerned.

(e) *Custodian's Responsibilities.* Custodians of classified defense material shall be responsible for providing the best possible protection and accountability for such material at all times and particularly for securely locking classified material in approved safekeeping equipment whenever it is not in use or under direct supervision of authorized employees. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified defense information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

(f) *Telephone Conversations.* Defense information classified in the three categories under the provisions of this order shall not be revealed in telephone conversations, except as may be authorized under section 8 hereof with respect to the transmission of Secret and Confidential material over certain military communications circuits.

(g) *Loss or Subjection to Compromise.* Any person in the executive branch who has knowledge of the loss or possible subjection to compromise of classified defense information shall promptly report the circumstances to a designated official of his agency, and the latter shall take appropriate action forthwith, including advice to the originating department or agency.

SEC. 7. *Accountability and Dissemination.* Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classified defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

(a) *Accountability Procedures.* Heads of departments and agencies shall prescribe such accountability procedures as are necessary to control effectively the dissemination of classified defense information, with particularly severe control on material classified Top Secret under this order. Top Secret Control Officers shall be designated, as required, to receive, maintain accountability registers of, and dispatch Top Secret material.

(b) *Dissemination Outside the Executive Branch.* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person

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or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

(c) *Information Originating in Another Department or Agency.* Except as otherwise provided by section 102 of the National Security Act of July 26, 1947, c. 343, 61 Stat. 498, as amended, 50 U. S. C. sec. 403, classified defense information originating in another department or agency shall not be disseminated outside the receiving department or agency without the consent of the originating department or agency. Documents and material containing defense information which are classified Top Secret or Secret shall not be reproduced without the consent of the originating department or agency.

SEC. 8. *Transmission.* For transmission outside of a department or agency, classified defense material of the three categories originated under the provisions of this order shall be prepared and transmitted as follows:

(a) *Preparation for Transmission.* Such material shall be enclosed in opaque inner and outer covers. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and address. The outer cover shall be sealed and addressed with no indication of the classification of its contents. A receipt form shall be attached to or enclosed in the inner cover, except that Confidential material shall require a receipt only if the sender deems it necessary. The receipt form shall identify the addressor, addressee, and the document, but shall contain no classified information. It shall be signed by the proper recipient and returned to the sender.

(b) *Transmitting Top Secret Material.* The transmission of Top Secret material shall be effected preferably by direct contact of officials concerned, or, alternatively, by specifically designated personnel, by State Department diplomatic pouch, by a messenger-courier system especially created for that purpose, or by electric means in encrypted form; or in the case of information transmitted by the Federal Bureau of Investigation, such means of transmission may be used as are currently approved by the Director, Federal Bureau of Investigation, unless express reservation to the contrary is made in exceptional cases by the originating agency.

(c) *Transmitting Secret Material.* Secret material shall be transmitted within the continental United States by one of the means established for Top Secret material, by an authorized courier, by United States registered mail, or by protected commercial express, air or surface. Secret material may be transmitted outside the continental limits of the United States by one of the means established for Top Secret material, by commanders or masters of vessels of United States registry, or by United States Post Office registered mail through Army, Navy, or Air Force postal facilities, provided that the material does not at any time pass out of United States Government control and does not pass through a foreign postal system. Secret material may, however, be transmitted between United States Government and/or Canadian Government installations in continental United States, Canada, and Alaska by United States and Canadian registered mail with registered mail receipt. In an emergency, Secret material may also be transmitted over military communications circuits in accordance with regulations promulgated for such purpose by the Secretary of Defense.

(d) *Transmitting Confidential Material.* Confidential defense material shall be transmitted within the United States by one of the means established for higher classifications, by registered mail, or by express or freight under such specific conditions as may be prescribed by the head of the department or agency concerned. Outside the continental United States, Confidential defense material shall be transmitted in the same manner as authorized for higher classifications.

(e) *Within an Agency.* Preparation of classified defense material for transmission, and transmission of it, within a department or agency shall be governed by regulations, issued by the head of the department or agency, insuring a degree of security equivalent to that outlined above for transmission outside a department or agency.

SEC. 9. *Disposal and Destruction.* Documentary record material made or received by a department or agency in connection with transaction of public business and preserved as evidence of the organization, functions, policies, operations, decisions, procedures or other activities of any department or agency

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of the Government, or because of the informational value of the data contained therein, may be destroyed only in accordance with the act of July 7, 1943, c. 192, 57 Stat. 380, as amended, 44 U. S. C. 366–380. Non-record classified material, consisting of extra copies and duplicates including shorthand notes, preliminary drafts, used carbon paper, and other material of similar temporary nature, may be destroyed, under procedures established by the head of the department or agency which meet the following requirements, as soon as it has served its purpose:

(a) *Methods of Destruction.* Classified defense material shall be destroyed by burning in the presence of an appropriate official or by other methods authorized by the head of an agency provided the resulting destruction is equally complete.

(b) *Records of Destruction.* Appropriate accountability records maintained in the department or agency shall reflect the destruction of classified defense material.

SEC. 10. *Orientation and Inspection.* To promote the basic purposes of this order, heads of those departments and agencies originating or handling classified defense information shall designate experienced persons to coordinate and supervise the activities applicable to their departments or agencies under this order. Persons so designated shall maintain active training and orientation programs for employees concerned with classified defense information to impress each such employee with his individual responsibility for exercising vigilance and care in complying with the provisions of this order. Such persons shall be authorized on behalf of the heads of the departments and agencies to establish adequate and active inspection programs to the end that the provisions of this order are administered effectively.

SEC. 11. *Interpretation of Regulations by the Attorney General.* The Attorney General, upon request of the head of a department or agency or his duly designated representative, shall personally or through authorized representatives of the Department of Justice render an interpretation of these regulations in connection with any problems arising out of their administration.

SEC. 12. *Statutory Requirements.* Nothing in this order shall be construed to authorize the dissemination, handling or transmission of classified information contrary to the provisions of any statute.

SEC. 13. *"Restricted Data" as Defined in the Atomic Energy Act.* Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 1, 1946, as amended. "Restricted Data" as defined by the said act shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1946, as amended, and the regulations of the Atomic Energy Commission.

SEC. 14. *Combat Operations.* The provisions of this order with regard to dissemination, transmission, or safekeeping of classified defense information or material may be so modified in connection with combat or combat-related operations as the Secretary of Defense may by regulations prescribe.

SEC. 15. *Exceptional Cases.* When, in an exceptional case, a person or agency not authorized to classify defense information originates information which is believed to require classification, such person or agency shall protect that information in the manner prescribed by this order for that category of classified defense information into which it is believed to fall, and shall transmit the information forthwith, under appropriate safeguards, to the department, agency, or person having both the authority to classify information and a direct official interest in the information (preferably, that department, agency, or person to which the information would be transmitted in the ordinary course of business), with a request that such department, agency, or person classify the information.

SEC. 16. *Review to Insure That Information is Not Improperly Withheld Hereunder.* The President shall designate a member of his staff who shall receive, consider, and take action upon, suggestions or complaints from non-Governmental sources relating to the operation of this order.

SEC. 17. *Review to Insure Safeguarding of Classified Defense Information.* The National Security Council shall conduct a continuing review of the implementation of this order to insure that classified defense information is properly safeguarded, in conformity herewith.

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SEC. 18. *Review Within Departments and Agencies.* The head of each department and agency shall designate a member or members of his staff who shall conduct a continuing review of the implementation of this order within the department or agency concerned to insure that no information is withheld hereunder which the people of the United States have a right to know, and to insure that classified defense information is properly safeguarded in conformity herewith.

SEC. 19. *Revocation of Executive Order No. 10290.* Executive Order No. 10290 of September 24, 1951 is revoked as of the effective date of this order.

SEC. 20. *Effective Date.* This order shall become effective on December 15, 1953.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
November 5, 1953.

EXECUTIVE ORDER 10502

SUSPENDING CERTAIN STATUTORY PROVISIONS RELATING TO EMPLOYMENT IN THE CANAL ZONE

By virtue of the authority vested in me by section 103 of the Civil Functions Appropriations Act, 1954 (Public Law 153, 83d Congress), and section 615 of the Department of Defense Appropriation Act, 1954 (Public Law 179, 83d Congress), relating to certain kinds of employment in the Canal Zone, and deeming such course to be in the public interest, I hereby suspend, from and including the effective date of the said acts, compliance with the provisions of the said sections: *Provided,* that this suspension shall not be construed to affect the provisions of the said sections relating to the amount of compensation that may be received by persons employed in skilled, technical, clerical, administrative, executive or supervisory positions on the Canal Zone directly or indirectly by any branch of the United States Government or by any corporation or company the stock of which is owned wholly or in part by the United States Government.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
December 1, 1953.

EXECUTIVE ORDER 10503

AMENDMENT OF EXECUTIVE ORDER NO. 10011,[1] AS AMENDED, AUTHORIZING THE SECRETARY OF STATE TO EXERCISE CERTAIN POWERS OF THE PRESIDENT WITH RESPECT TO THE GRANTING OF ALLOWANCES AND ALLOTMENTS TO GOVERNMENT PERSONNEL ON FOREIGN DUTY

By virtue of the authority vested in me by section 301 of title 3 of the United States Code (65 Stat. 713), it is ordered that section 1(d) of Executive Order No. 10011 as last amended by Executive Order No. 10391[2] of September 3, 1952, authorizing the Secretary of State to exercise certain powers of the President with respect to the granting of allowances and allotments to Government personnel on foreign duty, be, and it is hereby, amended to read as follows:

"(d) The authority vested in the President by section 1303 of the Supplemental Appropriation Act, 1954 (Public Law 207, 83rd Congress), or by any reenactment of the provisions of such section, and by section 302 of the United States Information and Educational Exchange Act of 1948 (62 Stat. 8) to prescribe, with respect to civilian officers and employees of the Government, regulations governing living-quarters allowances, cost-of-living allowances, and representation allowances in accordance with, or similar to, such allowances authorized by the said act of June 26, 1930, or the said section 901 of the Foreign Service Act of 1946.

This order shall be effective as of July 1, 1953.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
December 1, 1953.

EXECUTIVE ORDER 10504

TRANSFERRING CERTAIN FUNCTIONS, POWERS, AND DUTIES TO THE SMALL BUSINESS ADMINISTRATION

By virtue of the authority vested in me by section 218 of the Small Business Act of 1953 (Title II, Public Law 163, 83rd Congress; 67 Stat. 232, 239), and as President of the United States, it is ordered as follows:

SECTION 1. There are hereby transferred and assigned to the Small Business Administrator all functions, powers,

[1] 3 CFR 1948 Supp., p. 244; 13 F. R. 6263.
[2] 3 CFR 1952 Supp., p. 100.

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U.S.C. 6103(a), 6106), it is hereby ordered that returns made in respect of taxes imposed by chapter 1, subchapters A, B, D, and E of chapter 2, subchapter B of chapter 3, chapters 4, 6, and 7, subchapter C of chapter 9, chapters 12 and 21, subchapter A of chapter 29, and chapter 30 of the Internal Revenue Code of 1939 and returns made in respect of taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, 23, and 32, subchapters B, C, and D of chapter 33, and subchapter B of chapter 37 of the Internal Revenue Code of 1954 shall be open to inspection by the Advisory Commission on Intergovernmental Relations for the purpose of making studies and investigations in connection with the performance of its function of recommending methods of coordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the levels of government and to reduce the burden of compliance for taxpayers. Such inspection shall be in accordance and upon compliance with the rules prescribed by the Secretary of the Treasury in the Treasury decision approved by me this date,[1] relating to the inspection of such returns by the Advisory Commission on Intergovernmental Relations.

This Executive order shall be effective upon its filing for publication in the FEDERAL REGISTER.

JOHN F. KENNEDY

THE WHITE HOUSE,
August 23, 1961.

Executive Order 10963

CREATING AN EMERGENCY BOARD TO INVESTIGATE DISPUTES BETWEEN THE PULLMAN COMPANY AND THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND CERTAIN OF THEIR EMPLOYEES

WHEREAS disputes exist between the Pullman Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, carriers, and certain of their employees represented by the Order of Railway Conductors and Brakemen, a labor organization; and

WHEREAS these disputes have not heretofore been adjusted under the provisions of the Railway Labor Act, as amended; and

WHEREAS these disputes, in the judgment of the National Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service:

NOW, THEREFORE, by virtue of the authority vested in me by section 10 of the Railway Labor Act, as amended (45 U.S.C. 160), I hereby create a board of three members, to be appointed by me, to investigate these disputes. No member of the board shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier.

The board shall report its findings to the President with respect to these disputes within thirty days from the date of this order.

As provided by section 10 of the Railway Labor Act, as amended, from this date and for thirty days after the board has made its report to the President, no change, except by agreement, shall be made by the Pullman Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, or by their employees, in the conditions out of which these disputes arose.

JOHN F. KENNEDY

THE WHITE HOUSE,
September 1, 1961.

Executive Order 10964

AMENDMENT OF EXECUTIVE ORDER NO. 10501,[2] ENTITLED "SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES"

By virtue of the authority vested in me by the Constitution and statutes of the United States, and deeming such action necessary in the best interest of the national security, it is ordered that Executive Order No. 10501 of November 5, 1953, as amended, be, and it is hereby, further amended as follows:

1. Section 4 is amended—

(A) By substituting for the first paragraph thereof the following:

"SEC. 4. *Declassification, Downgrading, or Upgrading.* When classified information or material no longer requires its

[1] 26 F.R. 8009; 26 CFR, 301.6103(a)-103.

[2] 18 F.R. 7049; 3 CFR 1949-1953 Comp., p. 979.

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present level of protection in the defense interest, it shall be downgraded or declassified in order to preserve the effectiveness and integrity of the classification system and to eliminate classifications of information or material which no longer require classification protection. Heads of departments or agencies originating classified information or material shall designate persons to be responsible for continuing review of such classified information or material on a document-by-document, category, project, program, or other systematic basis, for the purpose of declassifying or downgrading whenever national defense considerations permit, and for receiving requests for such review from all sources. However, Restricted Data and material formerly designated as Restricted Data shall be handled only in accordance with subparagraph 4(a)(1) below and section 13 of this order. The following special rules shall be observed with respect to changes of classification of defense information or material, including information or material heretofore classified:"

(B) By deleting paragraphs (a), (e), (g), (h), and (i) and inserting in lieu thereof the following:

"(a) *Automatic Changes.* In order to insure uniform procedures for automatic changes, heads of departments and agencies having authority for original classification of information or material, as set forth in section 2, shall categorize such classified information or material into the following groups:

"(1) *Group 1.* Information or material originated by foreign governments or international organizations and over which the United States Government has no jurisdiction, information or material provided for by statutes such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography. This information and material is excluded from automatic downgrading or declassification.

"(2) *Group 2.* Extremely sensitive information or material which the head of the agency or his designees exempt, on an individual basis, from automatic downgrading and declassification.

"(3) *Group 3.* Information or material which warrants some degree of classification for an indefinite period. Such information or material shall become automatically downgraded at 12-year intervals until the lowest classification is reached, but shall not become automatically declassified.

"(4) *Group 4.* Information or material which does not qualify for, or is not assigned to, one of the first three groups. Such information or material shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified twelve years after date of issuance.

"To the fullest extent practicable, the classifying authority shall indicate on the information or material at the time of original classification if it can be downgraded or declassified at an earlier date, or if it can be downgraded or declassified after a specified event, or upon the removal of classified attachments or enclosures. The heads, or their designees, of departments and agencies in possession of defense information or material classified pursuant to this order, but not bearing markings for automatic downgrading or declassification, are hereby authorized to mark or designate for automatic downgrading or declassification such information or material in accordance with the rules or regulations established by the department or agency that originally classified such information or material."

"(e) *Information or Material Transmitted by Electrical Means.* The downgrading or declassification of classified information or material transmitted by electrical means shall be accomplished in accordance with the procedures described above unless specifically prohibited by the originating department or agency. Unclassified information or material which is transmitted in encrypted form shall be safeguarded and handled in accordance with the regulations of the originating department or agency."

"(g) *Upgrading.* If the recipient of unclassified information or material believes that it should be classified, or if the recipient of classified information or material believes that its classification is not sufficiently protective, it shall be safeguarded in accordance with the classification deemed appropriate and a request made to the reviewing official, who may classify the information or material or upgrade the classification after obtaining the consent of the appropriate classifying authority. The date of this action shall constitute a new date of

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origin insofar as the downgrading or declassification schedule (paragraph (a) above) is concerned."

"(h) *Departments and Agencies Which Do Not Have Authority for Original Classification.* The provisions of this section relating to the declassification of defense information or material shall apply to departments or agencies which do not, under the terms of this order, have authority for original classification of information or material, but which have formerly classified information or material pursuant to Executive Order No. 10290 of September 24, 1951."

"(i) *Notification of Change in Classification.* In all cases in which action is taken by the reviewing official to downgrade or declassify earlier than called for by the automatic downgrading-declassification stamp, the reviewing official shall promptly notify all addressees to whom the information or material was originally transmitted. Recipients of original information or material, upon receipt of notification of change in classification, shall notify addressees to whom they have transmitted the classified information or material."

2. Section 5 is amended—

(A) By adding a new paragraph (a) thereto, as follows:

"(a) *Downgrading-Declassification Markings.* At the time of origination, all classified information or material shall be marked to indicate the downgrading-declassification schedule to be followed in accordance with paragraph (a) of section 4 of this order."

(B) By relettering the present paragraphs (a) through (i) as (b) through (j), respectively.

3. Section 6 is amended—

(A) By deleting from the second sentence of the first paragraph the words "physical or mechanical."

(B) By deleting paragraphs (a) and (b) and by inserting in lieu thereof the following:

"(a) *Storage of Top Secret Information and Material.* As a minimum, Top Secret defense information and material shall be stored in a safe or safe-type steel file container having a three-position dial-type combination lock, and being of such weight, size, construction, or installation as to minimize the possibility of unauthorized access to, or the physical theft of, such information and material. The head of a department or agency may approve other storage facilities which afford equal protection, such as an alarmed area, a vault, a vault-type room, or an area under continuous surveillance.

"(b) *Storage of Secret and Confidential Information and Material.* As a minimum, Secret and Confidential defense information and material may be stored in a manner authorized for Top Secret information and material, or in steel file cabinets equipped with steel lockbar and a changeable three-combination dial-type padlock or in other storage facilities which afford equal protection and which are authorized by the head of the department or agency.

"(c) *Storage or Protection Equipment.* Whenever new security storage equipment is procured, it should, to the maximum extent practicable, be of the type designated as security filing cabinets on the Federal Supply Schedule of the General Services Administration."

(C) By relettering the paragraphs (c) through (g) as (d) through (h), respectively.

4. Paragraphs (c) and (d) of section 8 are amended to read as follows:

"(c) *Transmitting Secret Information and Material.* Secret information and material shall be transmitted within and between the forty-eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for Top Secret information and material, by authorized courier, by United States registered mail, or by the use of protective services provided by commercial carriers, air or surface, under such conditions as may be prescribed by the head of the department or agency concerned. Secret information and material may be transmitted outside those areas by one of the means established for Top Secret information and material, by commanders or masters of vessels of United States registry, or by the United States registered mail through Army, Navy, Air Force, or United States civil postal facilities: provided, that the information or material does not at any time pass out of United States Government control and does not pass through a foreign postal system. For the purposes of this section registered mail in the custody of a transporting agency of the United States Post Office is considered within United States Government control unless the transporting agent is

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foreign controlled or operated. Secret information and material may, however, be transmitted between United States Government or Canadian Government installations, or both, in the forty-eight contiguous States, the District of Columbia, Alaska, and Canada by United States and Canadian registered mail with registered mail receipt. Secret information and material may also be transmitted over communications circuits in accordance with regulations promulgated for such purpose by the Secretary of Defense.

"(d) *Transmitting Confidential Information and Material.* Confidential information and material shall be transmitted within the forty-eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for higher classifications, or by certified or first-class mail. Outside those areas Confidential information and material shall be transmitted in the same manner as authorized for higher classifications."

5. Section 13 is amended to read as follows:

"SEC. 13. *'Restricted Data,' Material Formerly Designated as 'Restricted Data,' Communications Intelligence and Cryptography.* (a) Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. 'Restricted Data,' and material formerly designated as 'Restricted Data,' shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

"(b) Nothing in this order shall prohibit any special requirements that the originating agency or other appropriate authority may impose as to communications intelligence, cryptography, and matters related thereto."

6. A new section 19 is added reading as follows:

"SEC. 19. *Unauthorized Disclosure by Government Personnel.* The head of each department and agency is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been knowingly responsible for any release or disclosure of classified defense information or material except in the manner authorized by this order, and where a violation of criminal statutes may be involved, to refer promptly to the Department of Justice any such case."

7. Sections 19 and 20 are renumbered as sections 20 and 21, respectively.

JOHN F. KENNEDY

THE WHITE HOUSE,
September 20, 1961.

Executive Order 10965

CREATING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE BETWEEN THE TRANS WORLD AIRLINES, INC., AND CERTAIN OF ITS EMPLOYEES

WHEREAS a dispute exists between the Trans World Airlines, Inc., a carrier, and certain of its employees represented by the Transport Workers Union of America, AFL–CIO, a labor organization; and

WHEREAS this dispute has not heretofore been adjusted under the provisions of the Railway Labor Act, as amended; and

WHEREAS this dispute, in the judgment of the National Mediation Board, threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service:

NOW, THEREFORE, by virtue of the authority vested in me by section 10 of the Railway Labor Act, as amended (45 U.S.C. 160), I hereby create a board of three members, to be appointed by me, to investigate this dispute. No member of the board shall be pecuniarily or otherwise interested in any organization of airline employees or any carrier.

The board shall report its findings to the President with respect to the dispute within thirty days from the date of this order.

As provided by section 10 of the Railway Labor Act, as amended, from this date and for thirty days after the board has made its report to the President, no change, except by agreement, shall be made by the Trans World Airlines, Inc. or by its employees, in the condition out of which the dispute arose.

JOHN F. KENNEDY

THE WHITE HOUSE,
October 5, 1961.