

Executive Branch Classified National Security Information and Congress

Prepared by the staff of the Information Security Oversight Office for the Public Interest
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Summary:

The United States Senate and the House of Representatives, as part of the Legislative branch of the U.S. government, are not subject to the provisions of Executive Order 12958, as amended, which governs the classification of national security information within the Executive branch. Nonetheless, Congress, as part of its role in the oversight and appropriation of funds for intelligence and military affairs, possesses both classified records forwarded to it by Executive branch agencies and classified transcripts of closed hearings concerning military, foreign relations, and intelligence matters. How these classified records are handled varies between the two chambers, and individual committees within each chamber establish their own procedures for control of classified material. As Legislative branch records, committee and general records of Congress are not accessioned into the National Archives and Records Administration (NARA) as permanent Federal records. Instead, inactive records are transferred to the Center for Legislative Archives at NARA for preservation and access purposes, but they remain under the legal control of Congress. Declassification actions on records transferred to the Center for Legislative Archives have been done on a limited basis in response to individual requests submitted by researchers or as special projects initiated by Congress itself, such as actions to release records of the Senate Select Committee for POW/MIA Affairs in the mid-1990s.

1. Classified Records of Congress: Legislation and Authority

The business of Congress gets done in its committees, and it is those committees who possess and produce classified records.¹ Widespread access by lawmakers to classified records is a relatively recent development. While Congress has always had a significant role in appropriating money for military and intelligence activities, from the passage of the National Security Act in 1947 until the mid 1970s, Congress deferred to the Executive branch on almost all intelligence matters.² Following the faultfinding reports of the Pike Committee and the Church Committee investigations into intelligence activities in the mid-1970s and the establishment of the Senate Select Committee on Intelligence in 1976 and the House Permanent Select Committee on Intelligence in 1977, congressional oversight of intelligence activities—and congressional use of classified records—increased dramatically.³

Congressional access to classified records is governed by both statute and executive order. The National Security Act of 1947, as amended, states that, “The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States,” and that, “Nothing in this Act shall be construed as authority to withhold information from the congressional committees on the grounds that providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.”⁴ Furthermore, the Intelligence Reform and Terrorism Prevention Act of 2004

¹ At least ten committees have access to classified intelligence records. L. Britt Snider counted eight in his article, “Sharing Secrets with Lawmakers: Congress as a User of Intelligence,” *Studies in Intelligence*, Spring 1998: 47-69. These were the Senate Appropriations Committee, the Senate Foreign Relations Committee, the Senate Armed Services Committee, the Senate Select Committee on Intelligence, the House Appropriations Committee, the House International Relations Committee, the House National Security Committee, and the House Permanent Select Committee on Intelligence. The Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Homeland Security, established after Snider’s survey, currently have access to classified records.

² Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994* (Knoxville: University of Tennessee Press, 1994), pp. 4-5.

³ Snider, “Sharing Secrets with Lawmakers.”

⁴ 50 U.S.C. 413 (a) (1); 50 U.S.C. 413 (e).

mandates that the newly created Director of National Intelligence ensure that national intelligence is provided to the “Senate and House of Representatives and the committees thereof.”⁵ Additionally, Executive Order 12333, “United States Intelligence Activities,” contains the provision that the Director of Central Intelligence shall, “Facilitate the use of national foreign intelligence products by Congress in a secure manner.”⁶ The sharing of classified national security information by the Executive branch with the Legislative branch is based on comity but conditioned by the responsibility of each branch to defend its privileges.

In practice, Congress, primarily through the House and Senate intelligence committees, receives finished intelligence products such as the National Intelligence Estimates (NIEs) and Senior Executive Intelligence Brief (SEIB, formerly known as the National Intelligence Daily) produced by the CIA and the Military Intelligence Digest (MID), produced by the Defense Intelligence Agency (DIA). Not routinely shared with Congress are products such as the President’s Daily Brief (PDB), National Terrorism Brief (NTB), raw or single-source intelligence reports, or speculative Red Cell analyses.⁷ Congress also receives classified records as a direct result of legislation establishing its oversight role. For example, the Secretary of Defense is required to submit annual reports concerning the nature and costs of all the special access programs under its control to the congressional committees concerned with defense policy and appropriations.⁸ The House Permanent Select Committee on Intelligence, furthermore, is charged with obtaining annual reports from the Director of National Intelligence, the Director of the Central Intelligence Agency, the Secretary of Defense, the Secretary of State, and the Director of the Federal Bureau of Investigation regarding their intelligence activities. The

⁵ P.L. 108-458, Sec. 1011.

⁶ Executive Order 12333, sec. 1.5(s).

⁷ Alfred Cumming, “Congress as a Consumer of Intelligence Information,” Congressional Research Service Memorandum, December 14, 2005, pp. 9-13.

⁸ 10 U.S.C. 119 (a)(1).

Committee may release an unclassified version of each report at its discretion.⁹ While Congress does not have original classification authority to classify records, and most of the security-classified records in possession of its committees originate from within the Executive branch, the transcripts of security-classified, closed committee hearings are also created and maintained by Congress.¹⁰ These transcripts pose particular classification and declassification challenges. A transcript of classified testimony may not be marked with the proper source for its derivative classification, and may not be correctly portion-marked.

2. Records of Congress: Access

While the open proceedings and actions of Congress are printed in the Congressional Record, the Federal Register, and other sources, the unpublished, deliberative records of the House and Senate and their committees—including whatever classified records they possess—are considered to be closed records according to the rules of the House and Senate. Most unpublished records of the House of Representatives are closed for 30 years. Investigative records containing personal data about a living person or records from a hearing closed due to national security or law enforcement concerns, however, are closed for 50 years.¹¹ Unpublished records of the Senate are closed in most cases for 20 years, with a 50-year closure period applying to investigative files and records of executive nominations.¹² The rules of the House contain a provision to extend the period of closure, if “...such availability would be detrimental to the public interest or inconsistent with the rights and privileges of the House.”¹³ The Senate resolution governing access to its records also contains similar language, and both sets of

⁹ Rules of the House of Representatives, 110th Congress, rule X, clause 11(c)(2).

¹⁰ Senate Committee on Foreign Relations Rules of Procedure, Rule 12—Transcripts (Congressional Record—Senate, 110th Congress, p. S2894).

¹¹ Rules of the House of Representatives, 110th Congress, rule VII, 3(b)(1-4).

¹² Senate Resolution 474, 96th Congress.

¹³ Rules of the House of Representatives, 110th Congress, rule VII, 4(a).

guidance allow for the release of records before the prescribed time limits.¹⁴ Additionally, neither the House nor the Senate regulation is intended to normally act as a method to declassify classified information, "...if such disclosure is prohibited by law or Executive order of the President."¹⁵ Finally, even though the rules of the Senate and House call for the Secretary of the Senate and the Clerk of the House to transfer to NARA for the purposes of preservation and access non-current records of Congress and their committees at the end of each Congress, those records remain the permanent legal property of Congress.¹⁶ The Center for Legislative Archives, an office within NARA, receives these non-current records and follows the conditions for their release to the public as established by Congress. Congressional records are not subject to the provisions of the Freedom of Information Act (FOIA).¹⁷ In contrast to the institutional records of the House and Senate and the records of their committees, the papers of an individual senator or congressman are considered the "private property of the individual member," and are often donated to an archival repository in the politician's home state upon retirement.¹⁸ Any classified information contained in the private papers of a senator or congressman remains under the control of the Executive branch agency that created and classified that information, even while the medium on which that information is communicated is the property of that politician. That classified information, wherever it is, must be protected in a manner equivalent to that provided within the Executive branch.¹⁹

¹⁴ Senate Resolution 474, 96th Congress.

¹⁵ Rules of the House of Representatives, 110th Congress, rule VII, 5(a) and Senate Resolution 474, 96th Congress. The House and Senate use the same language.

¹⁶ Rules of the House of Representatives, 110th Congress, rule VII, 2; Rules of the Senate, 110th Congress, rule XI, 2.

¹⁷ 5 U.S.C. 551 (1)(A); 5 U.S.C. 552 (f)(1).

¹⁸ Karen Dawley Paul, *Records Management Handbook for United States Senators and Their Archival Repositories* (United States Senate, Senate Historical Office: Washington, D.C., 2006), p.5.

¹⁹ Executive Order 12958, as amended, sec. 4.1.

3. Records of Congress: Records Management and Information Security

Records management and information security functions within the Senate are managed by the Secretary of the Senate. The Office of Senate Security, established in 1987, issues the *Senate Security Manual*, which covers all aspects of security, from physical requirements for the storage of classified information to procedures for conducting investigations of security violations. The House of Representatives moved in 2005 to establish its own office of security under the control of the House Sergeant at Arms, but its program is not yet as robust as that of the Senate.²⁰ The Senate Archivist, also under the administration of the Secretary of the Senate, has issued a records management handbook that addresses the handling of classified records. According to the Handbook, any classified records in the personal collections of senators—which should not include committee records or other records covered by statute or standing rule of Congress—should be reviewed for declassification before donation. This review should be coordinated by the Senate Archivist with the Center for Legislative Archives and the Information Security Oversight Office of NARA.²¹

Non-elected personnel on the staffs of congressional committees that work with classified records must obtain security clearances and sign a Standard Form 312 (Classified Information Nondisclosure Agreement). Security clearances for staff are administered by the House and Senate security offices or by the individual committees.²² Senators and congressmen, along with other Federal officials including the President, Vice President, and Supreme Court justices, have access to classified records by virtue of their positions, and neither undergo background checks to obtain security clearances nor sign an SF 312, though House members must undertake a

²⁰ Frederick M. Kaiser, “Protection of Classified Information by Congress: Practices and Proposals,” Congressional Research Service Report for Congress (March 30, 2007), p. 2.

²¹ Paul, *Records Management Handbook for United States Senators*, pp. 60-61.

²² Kaiser, “Protection of Classified Information by Congress,” p. 3.

secrecy oath.²³ Leaks of classified information from Congress are to be investigated by the House and Senate security offices as well as by the Senate Ethics Committee and House Committee on Standards of Official Conduct.²⁴

4: The Congressional Intelligence Committees

The intelligence committees of the House and Senate have developed additional controls and procedures for handling classified records. The rules of procedure of the Senate Select Committee on Intelligence prescribe that the Staff Director of that committee maintain a registry of all classified documents in the possession of that office, that access to classified records to staff members be limited to those with the proper clearance and need-to-know, and that when making classified records available to a senator outside of the committee, that senator must be advised of the responsibility to protect those records, and that all such transmittals must be recorded by the Clerk of the Committee.²⁵ The rules of procedure of the House Permanent Select Committee on Intelligence also specify that the Director of Security and Registry of that Committee keep a numbered registry of, "...all classified documents provided to the Committee by the Executive branch that remain in the possession of the Committee," and establish control over the dissemination of classified information outside the Committee.²⁶ As part of the oversight role of the committees, the rules of both the House and Senate committees specify that each committee, "...may disclose publicly any information in its possession after a determination

²³ Ibid.; Classified Information Nondisclosure Agreement (Standard Form 312) Briefing Booklet, Information Security Oversight Office (Spring 2002), p. 66.

²⁴ Kaiser, "Protection of Classified Information by Congress," pp. 3-4.

²⁵ S. Prt. 109-22: Rules of Procedure for the Select Committee on Intelligence, United States Senate, Rule 9. The requirement to keep a register of classified documents has been part of the rules of procedure since at least the 1995 amendment to the rules.

²⁶ Rules of Procedure for the Permanent Select Committee on Intelligence, United States House of Representatives, 110th Congress (January 18, 2007), 14(e)(1).

by the Select Committee that the public interest would be served by such disclosure.”²⁷ In cases where the President objects to the disclosure of classified information, the rules of the committees specify procedures for referring the issue to a closed session of the full chamber followed by a yes or no vote with no open debate. While this provision to declassify information is asserted by Congress, it does not appear to have been invoked.

5: Declassification of Congressional Records

Classified congressional records become declassified in three ways. First, Congress may initiate a special declassification program, such as the effort to release Vietnam-era records collected by the Senate Select Committee on POW/MIA Affairs in the mid-1990s. In that project, over 1,000,000 pages of classified congressional testimony and historical records relating to American servicemen captured or missing in Southeast Asia were released to the public.²⁸ The review of the records of the Senate committee was accomplished by NARA staff using guidance provided by the Defense Prisoner of War/Missing Personnel Office (DPMO); records not covered by that guidance were reviewed by the agencies who originated the classified information. This type of declassification action is rare, instituted only for records of high researcher interest and political visibility.²⁹ Second, researchers interested in using classified records that Congress has transferred to the physical custody of the Center for Legislative Archives may file a Mandatory Declassification Review request—in accordance with section 3.5 of Executive Order 12958, as amended—on a specific record they have identified. If the request is for records that are otherwise eligible for release under the special 20, 30, or 50-year closure restrictions of Congress, Center for Legislative Archives staff then refer the request

²⁷ Rules of the House of Representatives, 110th Congress, Rule X, 11(g)(1); S. Res. 400, 94th Congress, Sec. 8(a). The House and Senate use the same language.

²⁸ Senate Report 103-1, Report of the Select Committee on POW/MIA Affairs, p. 243.

to the Special Access/FOIA staff of NARA, who use their existing guidance or seek the declassification decision of the Executive branch agency that originally classified the information. According to Center for Legislative Archives staff, Mandatory Declassification Review requests are rare, with no more than four or five occurring each year. Finally, Congressional records may be systematically reviewed for declassification in a manner similar to the procedure followed by Executive branch records. In the late 1990s, following the issuance of Executive Order 12958, the Secretary of the Senate, in consultation with the chairs of committees of the Senate who hold classified records, expressed to the National Archives the desire to comply with the spirit of the Order, even if Legislative branch records were not covered by its automatic declassification provisions. The Center for Legislative Archives consulted with the Initial Processing and Declassification Division of NARA, who determined that the resources of that division would be best expended in preparing Executive branch records for the approaching automatic declassification deadline. In the spring of 2007, however, the Initial Processing and Declassification Division started to develop procedures for systematically declassifying approximately 750,000 pages of Senate records in the custody of the Center for Legislative Archives that would otherwise be eligible for public release. These records, which include records from the Judiciary and Appropriations Committees, will be reviewed by NARA staff to identify which Executive branch agencies hold declassification authority for the records. Agency reviewers will then record their declassification decisions during their review of the documents in the Interagency Referral Center, managed by NARA at their facility in College Park, Maryland.³⁰

²⁹ Other declassification actions such as this include projects to declassify records relating to the assassination of President John F. Kennedy and to war crimes committed by Nazi Germany and Imperial Japan during World War II.

³⁰ Information about the declassification of congressional records obtained in interviews with Matt Fulgham and Kristen Wilhelm of the Center for Legislative Archives in May 2007.

Conclusion:

The enabling legislation of the Public Interest Declassification Board states that one of the purposes of the board is, “To promote the fullest possible public access to a thorough, accurate, and reliable documentary record of significant United States national security decisions and significant United States national security activities in order to: (A), support the oversight and legislative functions of Congress; (B), support the policymaking role of the Executive branch; (C), respond to the interest of the public in national security matters; and (D), promote reliable historical analysis and new avenues of historical study in national security matters.”³¹

Although the Board is charged with providing advice and recommendations only to the President and other Executive branch officials regarding declassification policy and practice, and has no mandate to issue recommendations to Congress, its role in promoting a full documentary record of national security activities to support Congress places the Board in a position to evaluate how Congress handles its own classified records. The Legislative branch has a significant role in the collection and interpretation of classified national security information, and the role of Congress in the funding and oversight of the United States’ intelligence, foreign policy, and military activities is of enduring historical interest. How Congress has historically handled its records containing classified national security information, however, presents challenges for the declassification of records as appropriate as well as for the identification and protection of records that require continued classification. While the Office of Senate Security currently has strong procedures in place for the control of classified records and the rules of the House and Senate intelligence committees call for registers of classified documents to be kept, for decades the classified records of Congress were not systematically controlled, and the House security office, while promising, is not yet fully operational. Furthermore, according to the staff of the Center for Legislative Archives, the congressional committees who handle the most classified

national security information do not routinely transfer their most sensitive records to the physical custody of the Center for preservation, description, and eventual access.³² The Public Interest Declassification Board is an appropriate advocate for an effective declassification program for the classified records of Congress to ensure the proper safeguarding of classified national security information and to promote the fullest documentary record of American history.

³¹ Public Law 106-567, sec. 103 (b)(2).

³² Interviews with Matt Fulgham and Kristen Wilhelm of the Center for Legislative Archives in May 2007.