

November 2, 1977

cc: Files  
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Office of Legal Counsel

Basis for Executive Branch Authority to Classify Information

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This is in response to your request, which was promoted by an inquiry from Tom Lattimer, concerning the basis for the Executive to establish a system for the classification of information. You indicated that a detailed response was not necessary and suggested that we just provide you with whatever this office had said in the past on the subject. Accordingly, attached is a copy of a Statement made by former Assistant Attorney General Erickson of this office on March 13, 1972 before the Special Subcommittee on Intelligence of the Armed Services Committee of the House of Representatives and a copy of former Assistant Attorney General Dixon's Statement on May 30, 1974, before the Senate's Governmental Relations Subcommittee of the Committee on Government Operations. \*/

These statements contain a fairly thorough explanation of the constitutional and related statutory bases for the Executive to establish a classification system. Briefly, they can be summarized as follows:

1. Constitutional: Article II, section 1 vests the executive power in the President; Article II, section 2 makes the President Commander-in-Chief of the Armed Forces; and Article II, section 3 requires the President to "take care that the laws be faithfully executed." From these provisions, particularly the Commander-in-Chief section, flow the President's constitutional authority,

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\*/ Pages 11 through 18 of the Erickson Statement and pages 13 through 19 of the Dixon Statement deal particularly with the basis for a classification system.

perhaps even a duty, to establish a system for protecting the confidentiality of information necessary for the President to carry out his responsibilities. See New York Times v. United States, 403 U.S. 713, 729-30, 741 (1971) (concurring opinions of Justices Stewart, White and Marshall).

2. Statutory: The espionage laws, 18 U.S.C. §§792-798, refer to classified information and apparently envision the establishment of a classification system so that the laws can be enforced. The Internal Security Act, 18 U.S.C. §783(b), makes it a crime "for an officer or employee of the United States" to communicate to a foreign power information "which shall have been classified by the President as affecting the security of the United States." See also 18 U.S.C. §783(c). And, the Freedom of Information Act, 5 U.S.C. §552(b)(1), generally exempts from disclosure information properly classified pursuant to Executive Order.