U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

*Washington, D.C. 20530*

October 5, 1999

**MEMORANDUM FOR STEVEN GARFINKEL**
**DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE**

**From**: Randolph D. Moss RDM
Acting Assistant Attorney General
Office of Legal Counsel

**Re**: ISCAP Jurisdiction Over Classification Decisions by the Director of Central Intelligence Regarding Intelligence Sources and Methods

This memorandum responds to a request that we resolve a dispute between members of the Interagency Security Classification Appeals Panel ("ISCAP") over whether determinations made by the Director of Central Intelligence ("DCI") about the classification of information pertaining to intelligence sources and methods are subject to substantive review by ISCAP. The Director of the Intelligence Security Oversight Office ("ISOO") and the General Counsel of the National Archives and Records Administration ("NARA") take the view that such determinations by the DCI are subject to substantive ISCAP review; the DCI takes the contrary view.[1] We conclude that the DCI's determinations are subject to substantive ISCAP review.

I.

The Supreme Court has recognized that the President possesses constitutional authority to classify and control access to information bearing on national security:

> The President . . . is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any

[1] The initial request for this opinion was made by the Director, ISOO. See Letter for Janet Reno, Attorney General, from Steven Garfinkel, Director, ISOO (Mar. 23, 1999). The request was joined subsequently by the General Counsel of NARA. See Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, NARA (June 8, 1999). The DCI submitted a statement of his legal position on May 14, 1999. See Letter to Randolph D. Moss from Robert M. McNamara, Jr., General Counsel, Central Intelligence Agency (May 14, 1999) ("DCI Initial Submission"). Responses to the DCI statement were submitted by ISOO and NARA. See Memorandum for Paul P. Colborn, Special Counsel, Office of Legal Counsel, from Steven Garfinkel (June 8, 1999); Memorandum of Law to Department of Justice, Office of Legal Counsel, from Gary M. Stern (June 8, 1999). The DCI then replied to those responses. See Memorandum of Reply from Robert M. McNamara, Jr. (June 28, 1999) ("DCI Reply").

> explicit congressional grant. . . . This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted).

Pursuant to this constitutional authority, Presidents starting with Harry Truman have issued executive orders in order to formalize the classification process for preserving the secrecy of national security information. On April 17, 1995, President Clinton issued the currently applicable order, Executive Order No. 12,958, entitled "Classified National Security Information," 60 Fed. Reg. 19825 (1995) ("the Order"), to"prescribe[] a uniform system for classifying, safeguarding, and declassifying national security information." Id., Preamble. The present dispute concerns provisions of the Order that govern the declassification of information and authorize ISCAP to review certain declassification decisions.

The Order provides that information may be declassified[2] through one of three different mechanisms – "Automatic Declassification," "Systematic Declassification Review" or "Mandatory Declassification Review." The Order's automatic declassification provisions require the declassification of"all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code," "whether or not the records have been reviewed." Id. § 3.4(a).[3] An agency head may exempt certain information from automatic declassification, including information which, if released,

> should be expected to . . . reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States.

Id. § 3.4(b)(1). An agency head who exercises this exemption authority must notify the Director of ISOO, in his or her capacity as the Executive Secretary of ISCAP, of the information the agency proposes to exempt and, "except for the identity of a confidential human source or a human intelligence source, [must provide] a specific date or event for declassification of the

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[2] The Order defines "declassification" as "the authorized change in the status of information from classified information to unclassified information." Id. § 3.1(a).

[3] The Order provides that such automatic declassification is to occur "within 5 years from the date of this order." Id. § 3.4(a). Thereafter, information is automatically declassified "no longer than 25 years from the date of its original classification." Id.

information." Id., § 3.4(d)(3). ISCAP "may direct the agency not to exempt the information or to declassify it at an earlier date," and the agency may appeal any such direction to the President. Id. Information exempted from automatic disclosure, however, "shall remain subject to the mandatory and systematic declassification review provisions" of the Order. Id. § 3.4(f).

The Order's systematic declassification review provisions require each agency to "establish and conduct a program for systematic declassification review" that prioritizes record review based on either the recommendations of an Information Security Policy Advisory Council established by the Order, or the degree of researcher interest in the information and the likelihood of declassification upon review. Id. § 3.5(a). This program applies "to historically valuable records exempted from automatic declassification under section 3.4." Id. The DCI is authorized to establish special procedures for the systematic review of "information pertaining to . . . intelligence sources or methods." Id. § 3.5(c).

Under the Order's mandatory declassification review provisions, each agency head must develop procedures "to process requests for the mandatory review of classified information." Id. § 3.6(d). Section 3.6(a) provides that

> [e]xcept as provided in paragraph (b) below, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if: (1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort; (2) the information is not exempted from search and review under the Central Intelligence Agency Information Act; and (3) the information has not been reviewed for declassification within the past 2 years.

Id. § 3.6(a) (emphasis added). Section 3.6(b) exempts from mandatory declassification review information originated by the incumbent President, the incumbent President's White House Staff, entities within the Executive Office of the President that solely advise or assist the incumbent President, and any committees, commissions or boards appointed by the incumbent President. Id. § 3.6(b). The procedures each agency develops for processing mandatory declassification requests must provide a means for administrative appeal, as well as notice to the requester "of the right to appeal a final agency decision to [ISCAP]." Id. § 3.6(d). The Order permits the DCI, the Secretary of Defense and the Archivist to develop "special procedures for the review" of particular types of information; of relevance here, the DCI may establish such procedures "for the review of information pertaining to . . . intelligence sources or methods." Id. § 3.6(e).

Finally, the Order establishes ISCAP "for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States." Id. § 5.4(e). The Secretaries of Defense and State, the Attorney General, the DCI, the Archivist and the Assistant to the President for National Securities Affairs must each appoint a senior level representative to serve as a member of ISCAP, and the President

selects one such representative to serve as ISCAP's Chair. Id. § 5.4(a)(1). ISCAP is authorized to decide appeals by persons who challenge classification decisions; to "approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.4 of this order"; and to "decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.6 of this order." Id. § 5.4(b). ISCAP's decisions may be appealed to the President. Id. § 5.4(d).

In a March 9, 1999, memorandum addressed to the Attorney General, the Secretaries of State and Defense, and the Assistant to the President for National Securities Affairs, the DCI challenged ISCAP's authority to review the merits of a DCI decision declining to declassify certain documents that were requested under the mandatory disclosure review procedures. DCI Initial Submission at 6. The DCI concedes that his classification decisions are generally subject to both substantive and procedural review by ISCAP, but he argues that his classification decisions relating to the protection of intelligence sources and methods are substantively "conclusive in the context of classification determination appeals arising before [ISCAP]." Id. at 1. According to the DCI, "ISCAP may not substitute its judgment for that of the DCI in making the decision whether it is necessary to protect specific intelligence sources and methods from unauthorized disclosure, or whether and in what circumstances a prospective disclosure would be authorized." Id. at 25. Under this view, ISCAP is limited in appeals involving intelligence sources and methods to the procedural review of "determin[ing] whether the DCI indeed has made the protection determination at issue." Id. at 27. The ISOO and NARA strongly disagree with these views.

II.

The DCI argues that, in the Order, the President has "delegate[d] his constitutional authority relating to the classification of intelligence sources and methods . . . to the DCI and has not delegated that authority to ISCAP." DCI Reply at 1. The DCI bases this contention on three propositions. First, he notes that, under the National Security Act of 1947, as amended, 50 U.S.C. § 401 (the "NSA"), he has "uniquely broad authority to protect intelligence sources and methods from unauthorized disclosure." DCI Initial Submission at 1. Second, the DCI argues that, because every President since Truman has recognized and relied upon the DCI's broad authority, and because no President has placed limits on that authority, there must be a clear indication in the Order that President Clinton intended to curtail that authority. Id. at 11. Third, the DCI claims that the Order contains no such clear indication, and instead expressly confirms his exclusive authority to protect intelligence sources and methods by stating that the Order does not "supersede any requirement made by or under . . . the [NSA]," Order, § 6.1(a), and that it does not "limit[] the protection afforded any information by . . . the [NSA]," id. § 6.1(c). Indeed, the DCI suggests that if the Order did not recognize and defer to his broad authority to protect intelligence information and sources, it "would contravene the provisions of" the NSA. DCI Initial Submission at 25.

A.

We believe that the language of the Order squarely forecloses any claim that the President

has delegated to the DCI unreviewable discretion concerning the declassification of information pertaining to intelligence sources and methods, and that the President has thereby exempted such decisions from substantive review by ISCAP. To the contrary, the Order makes clear that all DCI declassification decisions, including those involving information about intelligence sources and methods, are subject to substantive ISCAP review.

Consistent with its purpose of prescribing "a uniform system for classifying, safeguarding, and declassifying national security information," Order, Preamble (emphasis added), the Order requires the automatic declassification of "all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code," "whether or not the records have been reviewed." Id. § 3.4(a) (emphasis added). By its plain terms, this requirement extends to information about intelligence sources and methods. This straightforward reading, moreover, is confirmed by section 3.4(b)(1), which permits an agency head to exempt from the automatic declassification requirement information which, if released, would reveal the "identity of a confidential human source," "the application of an intelligence source or method," or "the identity of a human intelligence source." Id. § 3.4(b)(1). It is likewise confirmed by the notice requirements of the automatic declassification provision, which require an exempting agency to provide a specific date or event for the declassification of exempted information, "except for the identity of a confidential human source or a human intelligence source." Id. § 3.4(d)(3).

The Order further provides that any information exempted from automatic declassification "shall remain subject to the mandatory and systematic declassification review provisions of this order." Id. § 3.4(f). The former provisions specifically allow the DCI to establish special procedures for "information pertaining to . . . intelligence sources or methods," id. § 3.6(e), but do not exempt such information from mandatory declassification review. To the contrary, the Order requires such review for "all information classified under this order or predecessor orders" subject to two specific exceptions: (1) information originated by the incumbent President, that President's White House Staff, entities within the Executive Office of the President that solely advise or assist the incumbent President, or any committees, commissions or boards appointed by that President, and (2) information exempted from search and review under the Central Intelligence Agency Information Act ("CIAIA"). Id. § 3.6(a)-(b) (emphasis added). The specification of these two exceptions – one of which exempts from review certain information originated by the Central Intelligence Agency ("CIA") itself[4] – precludes recognition of an

[4] Subsections (a) and (b) of the CIAIA added Title VII to the NSA. See Pub. L. No. 98-477, § 2, 98 Stat. 2209, 2209 (1984). Title VII of the NSA permits the DCI to exempt from search, review, publication or disclosure the CIA's "operational files," which are defined to include, among other things, the "files of the Directorate of Operations which document . . . intelligence or security liaison arrangements or information exchanges with foreign governments"; the "files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems"; and the "files of the Office of Personnel Security which document the investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." 50 U.S.C. § 431(b) (1994 & Supp. I 1995). The CIAIA exemption, however, does not apply to files that are the sole repository of disseminated information; to files that contain information derived or disseminated from operational files; or to

additional implied exception for all information pertaining to intelligence sources and methods originated by that same agency.

The Order likewise makes clear that ISCAP has jurisdiction to review decisions concerning the proper classification of CIA-originated information about intelligence sources and methods (not otherwise exempt under the CIAIA) when such information is sought under the Order's mandatory declassification review provisions. Section 5.4(b)(3) of the Order authorizes ISCAP to "decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.6 of this order." Id., § 5.4(b)(3). By its plain terms, this provision applies to all appeals brought under section 3.6, and makes no exception for appeals that challenge DCI decisions declining to declassify information about intelligence sources and methods. Indeed, recognition of an implied exception is flatly inconsistent with the structure of the Order, which subjects such information to mandatory declassification review (subject to certain limited exceptions), requires each agency to notify requesters of their right to appeal adverse mandatory declassification review decisions to ISCAP, and then authorizes ISCAP to decide appeals of such decisions.

Section 5.4(b)(2) of the Order, moreover, confirms ISCAP's jurisdiction to review DCI declassification decisions involving intelligence sources and methods. That provision, which empowers ISCAP to "approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.4," id., § 5.4(b)(2), indisputably confers jurisdiction on ISCAP to conduct a substantive review of DCI decisions exempting information concerning "the application of an intelligence source or method" or "the identify of a human intelligence source" from automatic declassification. See id., § 3.4(b)(1); see also id., § 3.4(d)(3) (ISCAP may direct an agency "not to exempt the information or to declassify it at an earlier date than [the agency] recommended"). ISCAP's clear jurisdiction to review DCI exemption decisions for intelligence sources and methods subject to automatic declassification buttresses the conclusion that ISCAP has jurisdiction to review DCI decisions concerning the very same information when it is requested under the mandatory declassification provisions.

B.

Notwithstanding the foregoing provisions, the DCI takes the view that the Order's two savings provisions necessarily carve out of ISCAP's jurisdiction all "sources and methods" information the DCI is required to protect under the NSA. The savings provisions state, respectively, that "[n]othing in this order shall supersede any requirement made by or under . . . the [NSA]," id., § 6.1(a), and that "[n]othing in this order limits the protection afforded any information by . . . the [NSA]." Id., § 6.1(c). We do not believe this language can bear the interpretive weight the DCI places upon it. Numerous provisions of the Order clearly establish

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records from operational files that are disseminated or referred to in non-exempt files. Id. § 431(b), (d)(1) & (d)(3) (1994 & Supp. I 1995). We assume that the three documents at issue in this dispute are not exempt from review as "operational files" within the meaning of section 701 of the NSA.

that, with the narrow exception of information exempted under the CIAIA, information concerning intelligence sources and methods is subject to mandatory declassification review, and that ISCAP has jurisdiction to review the substance of such declassification decisions. The Order's savings provisions, by contrast, do not mention "intelligence sources and methods" or ISCAP's appellate jurisdiction. Neither provision purports to create any exceptions from the requirements of the Order, let alone to create an exception that carves out ISCAP's jurisdiction to review the substance of a classification decision but not the procedural underpinnings of that decision. In light of the clarity with which the Order speaks to ISCAP's authority, we would infer such an elaborate exception only if the otherwise clear requirements of the Order squarely conflicted with the requirements of the NSA. There is, however, no such conflict here, because disclosure of intelligence sources and methods after ISCAP review cannot be an "unauthorized" disclosure within the meaning of the NSA and does not limit the protections the NSA affords such information.

The NSA provides that the Director "shall . . . protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-3(c)(6) (Supp. II 1996) (emphasis added). This statutory authority is undoubtedly broad, as the DCI emphasizes. The fact remains, however, that the decision to classify information bearing on national security is an exercise of the President's independent constitutional power to control access to such information. Egan, 484 U.S. at 527. If the President concludes that information concerning intelligence sources and methods should not be classified, the disclosure of such information simply is not "unauthorized" within the meaning of the NSA.[5]

The President created ISCAP for the express purpose of "advising and assisting [him] in the discharge of his constitutional and discretionary authority to protect the national security of the United States." Order, § 5.4(e). An ISCAP ruling constitutes advice to the President that an agency's declassification decision is inconsistent with his classification standards and may result in the withholding of information that should, under those same standards, be disclosed. The DCI, of course, is free to appeal an ISCAP ruling to the President. Id., § 5.4(d). Accordingly, under the Order, the final decision over whether to declassify and to disclose or withhold information rests with the President, or, where no appeal is taken, with ISCAP as his delegee.

In short, because the President may override the views of the DCI and authorize the disclosure of information pertaining to intelligence sources and methods, any disclosure of such

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[5] This conclusion is reinforced by the fact that the language of the NSA upon which the DCI relies "stemmed from President Truman's Directive of January 22, 1946, 11 Fed. Reg. 1337, in which he established . . . [the CIA's] predecessors." CIA v. Sims, 471 U.S. 159, 172 (1985). It thus appears that Congress intended to confer on the DCI a statutory duty that, like its administrative antecedent, is in aid of the President's authority. Indeed, to assume otherwise would raise grave concerns about the constitutionality of the NSA. A construction of the Act that permitted the DCI to block the release of national security information that the President believes should be disclosed would appear to conflict with the Framers' considered judgment, embodied in Article II, that, within the executive branch, all authority over matters of national defense and foreign affairs is vested in the President as Chief Executive and Commander in Chief. In addition, the President must retain authority over the disposition of national security information to the extent necessary to discharge his constitutionally assigned duties.

information that results from the President's decision to uphold an ISCAP ruling is not "unauthorized" within the meaning of the NSA, 50 U.S.C. § 403-3(c)(6), and thus cannot "supersede" any requirement of that statute. Similarly, any declassification or disclosure of such information that results from presidential affirmation of an ISCAP ruling does not "limit[] the protection" otherwise afforded such information: under the NSA, such information enjoys only the level of protection that the President, in the discharge of his constitutional duties, believes such information deserves. Moreover, because the President has authorized ISCAP to act as his delegee regarding classification decisions, an ISCAP declassification decision that the DCI does not appeal has the same significance, for purposes of the NSA, as a decision made by the President himself, and likewise does not "limit[]" or "supersede" the protections and requirements of the NSA, or result in an "unauthorized" disclosure within the meaning of that statute. The Order's two savings provisions thus provide no basis for departing from the plain language of the Order, which authorizes ISCAP to review the substance of DCI decisions concerning the classification of information pertaining to intelligence sources and methods, and recognition of ISCAP's authority in no way contravenes the requirements of the NSA.[6]

The DCI's makes two further arguments in support of a jurisdictional exception. Citing the Supreme Court's decisions in CIA v. Sims, 471 U.S. 159 (1985), and Department of the Navy v. Egan, the DCI contends the Order should be construed to require ISCAP deference to his judgments concerning the protection of intelligence sources and methods because he is the most knowledgeable expert within the executive branch on such matters. DCI Reply at 5-6; see also id. at 6 n.5 (noting that most ISCAP agencies do not have programmatic, working experience with intelligence activities and that several representatives are not intelligence professionals at all). In discharging his constitutional duties to protect the national security, however, the President may seek the advice and assistance of other executive departments as he deems appropriate. The language of the Order makes clear that, in establishing ISCAP, the President has done precisely that; the DCI's belief that his views should be given primacy over the views of other departments provides no basis for ignoring the contrary judgment the President has expressed in the Order.[7]

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[6] This reading of the savings provisions, moreover, does not render them "meaningless," as the DCI suggests. DCI Reply at 5. Because the Order and the NSA address a number of subjects in addition to the classification and declassification of information, the drafters had reason to be concerned that unanticipated ambiguities in the Order might result in inadvertent conflicts between the Order and the NSA. The savings provisions establish that, in such an event, a construction of the Order that avoids a conflict must be chosen over a construction that creates such a conflict. This rule of construction, however, has no application here, where the provisions of the Order are clear and do not conflict with the requirements of the NSA.

[7] The DCI's reliance on Sims and Egan is thus misplaced. In both cases, the Court construed statutes based on the assumption that Congress could not have intended to authorize judicial or administrative adjudicators to second-guess security decisions rendered by the executive agencies or departments charged with protecting classified information. Sims, 471 U.S. at 168-73 (construing Freedom of Information Act); Egan, 484 U.S. at 529-30 (construing the Civil Service Reform Act of 1978). Congress's intent, however, is irrelevant here, where we are construing an Order in which the President is exercising his independent constitutional authority to protect classified information.

Finally, the DCI argues that the Order cannot be read to confer jurisdiction on ISCAP over the classification of information involving intelligence sources and methods because such a reading will require the President to hear and decide appeals in every case in which ISCAP overrules the DCI. Id. at 8. As a factual matter, there appears to be little basis for the DCI's claim that such review will entail a heavy burden. The present dispute did not arise until nearly four years after the Order took effect and involves only three documents. DCI Initial Submission at 4. The DCI himself, moreover, notes that "[d]ecisions regarding the classification of intelligence sources and methods represent only a relatively small percentage of the total universe of issues that come before the ISCAP." Id. at 28. Whatever the nature of the burden, however, it is one the President has chosen, through the language of the Order, to shoulder. He is of course free to change his policy should he conclude that review of DCI appeals constitutes an undue burden on his time and energy. Unless and until the President does so, however, this burden provides no basis for ignoring the plain language of the Order and creating an exception to ISCAP's otherwise plenary jurisdiction to decide appeals of all mandatory review declassification decisions.[8]

We express no view, of course, on the question whether the information at issue in the appeal giving rise to this dispute should remain classified. We address only the authority of ISCAP to decide that question.

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