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The Enlargement of the Classified Information System

This is the second of two reports, prepared by a subcommittee of Committee A on Academic Freedom and Tenure and approved by the Committee for publication, on the subject of federal restrictions on scientific research. The first report, which appeared in the September-October issue of Academe, dealt with restraints by government officials on the free dissemination of nonclassified scientific ideas. The following report examines Executive Order 12356 (April 2, 1982), which prescribes a system for classifying information on the basis of national security concerns. Comments are welcome, and should be addressed to the Association's Washington office.

The national government severely limits academic research in the United States in two distinct ways.

The first of these was the subject of a critical report in the September-October, 1982, issue of Academe: Bulletin of the AAUP. That report discussed the network of statutes and regulations applicable to unclassified research, travel, and publication. The conclusion of the report, similar to that reached by several other national academic associations, was that the scope of such restrictions, as written and applied, significantly abridges academic freedom beyond the needs of national security. In reviewing current restrictions on the sharing of research, exchange of scholars, and related means by which American academic scientists can remain informed of developments within their disciplines, the report also argued that insofar as academic freedom is improperly curtailed, the nation's security is ill-served: barriers to learning from others, and concern that innovative work may be suppressed whenever its originality might be useful even to the industrial or technological progress of other nations, are necessarily discouraging to the maintenance of research leadership within the United States. The relatively arbitrary prerogative of the government to forbid the circulation of research, itself unclassified, was a principal part of the report's criticism.

Recent events have tended to justify that criticism. A university professor submitted two papers for presentation, and subsequent publication, to the twenty-sixth Annual Technical Symposium of the Society for Photo-Optical Instrumentation Engineers, meeting in San Diego in August, 1982. The professor's research was supported by a grant from the Air Force. The research was not classified, consistent with the university's stated policy "to undertake only those research projects in which the purpose, scope, methods, and results can be fully and freely discussed." As he had done routinely in the past, the professor also sent the papers to the program officer in the Air Force. A week before the papers were scheduled for presentation, the professor was told by the Air Force officials that his papers had not been "cleared" and therefore they should not be presented to the symposium. The professor withdrew the papers and did not attend the meeting in San Diego. Some three months later the papers were "cleared" by the Department of Defense.

Our critical report on the large variety of threats to unclassified research postponed a review of the classification system itself until this report. Nonetheless, the implication of our earlier report was to favor a limited classification system, to the extent that such a system may minimize uncertainty and provide a less random threat to academic freedom.

Certain research conducted in universities may have (and sometimes do have) immediate and direct national security implications. Some of that work is undertaken pursuant to Department of Defense contracts. Universities generally recognize that such arrangements may compromise their commitment to academic freedom, and they vary in their policies respecting the wisdom and acceptability of such arrangements. The AAUP has thought it inappropriate to condemn faculties and universities for mak-
ing such arrangements per se, but it has regularly expressed concern that inconsistency with academic freedom is a genuine danger which all academic institutions should weigh carefully in the research and restrictions they accept.

In this respect a clear and circumspect classification system may be both important and helpful. Ideally, a proper classification system will provide reasonable certainty as to what research and publication must necessarily be treated in confidence, according to needs of national security that are plain and compelling. It will enable universities and their faculties to make informed decisions about their research. Very different, and strongly objectionable, is a classification system that sweeps within it virtually anything conceivably useful industrially, technically, or militarily to at least someone, administered by officials placed in a position where virtually any doubt must move them to classify (to avoid having to answer for appearing too cavalier about national security). When laid alongside a network of criminal statutes and ad hoc regulations that serve to inhibit broadly unclassified research as well, such a classification system magnifies hazards to academic freedom. It must compound the problems of universities in making principled decisions and threaten the capacity of scholars and scientists in the United States to advance the frontiers of knowledge.

Here we review briefly recent changes introduced into the classification system by Executive Order 12356, issued by President Reagan on April 2, 1982. A recent report of the National Academy of Sciences Panel on Scientific Communication and National Security, a report we think sensitive and sound, concludes that open and free scientific communication is essential for ensuring long-term national security.  

We agree. We believe the enlargement of the classification system contemplated in Executive Order 12356 is seriously mistaken. It poses an unwarranted threat to academic freedom and hence to scientific progress and the national security.

I. SUMMARY OF RECENT CHANGES

Executive Order 12356 is the most recent presidential executive order prescribing a system for classifying and declassifying information on the basis of national security concerns. President Franklin Roosevelt issued the first such order in 1940. Succeeding executive orders were signed by Presidents Truman, Eisenhower, Nixon, and Carter. In their details, these earlier executive orders differed from one another on such matters as what information was to be classified, for what period of time, and according to what standards. Their similarities, however, are more noteworthy than their differences. They sought to preserve the public’s interest in the free circulation of knowledge by limiting classification authority, by defining precisely the purposes and limits of classification, and by providing procedures for declassification.

By contrast, Executive Order 12356 significantly broadens the authority of government agencies to classify information as secret. It removes a previous requirement for classification that damage to the national security be identifiable. It resolves doubts about the need to classify in favor of classification. It permits indefinite classification. It provides for reclassification of declassified and publicly released information. It expands the categories of information subject to classification to include nonclassified research developed by scientific investigators outside the government.

II. MAIN PROVISIONS

The preamble to Executive Order 12356 states that the “interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure.” To prevent “unauthorized disclosure,” the order establishes three levels of classification: “top secret,” “secret,” and “confidential.” The standards for “top secret” and “secret” are the same as in previous executive orders. However, Executive Order 12356 omits the earlier qualifying word “identifiable” in describing the damage to the national security that can justify classification at the lowest, or “confidential,” level. The text reads: “confidential shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.” At a congressional hearing, a deputy assistant attorney general explained the deletion of the requirement of “identifiability” as follows:

Every new qualifier or adjective, such as “identifiable,” added to the requirement of showing “damage” or any other requisite element of proper classification, raises new uncertainties or areas of ambiguity that may lead to litigation . . . [T]he requirement of “identifiable” damage may be construed to suggest that disclosure must cause some specific or precise damage, a requirement that the government might not reasonably be able to meet in some cases. . . . Provisions of such orders should be simple, general, less complex and require no more precision than the subject matter reasonably allows. The requirement of “identifiable” damage fails on all these counts.

In the event that a government official is uncertain about whether to classify information, the doubt will be resolved in favor of classification pending a final determination within thirty days. In addition, if there is doubt about the level of classification, the information will be classified at a higher level, also pending a final decision within thirty days. Once information is classified, it can remain so at the discretion of government officials “as long as required by national security considerations.” There is no provision in Executive Order 12356 for justifying the need for classification beyond a stated period of time (President

1 Excerpts from the report of the National Academy of Sciences are reprinted below as an appendix to this report.
Nixon’s executive order called for automatic declassification after thirty years, unless the government determined that continued classification was still necessary and set a time for eventual declassification; President Carter’s executive order established a six-year declassification period, and the order is silent as to whether declassifying information is generally desirable.

If information has been declassified, it may be reclassified under Executive Order 12356 following the requirements for classification. Information which has been properly declassified and is in the public domain apparently may remain “under the control” of the government (the order defines information as “any information or materials . . . that is owned by, produced by or for, or is under the control of the United States Government”) and thus can be reclassified by the government.

The executive order provides for limitations on classification. It states that “basic scientific research information not clearly related to the national security may not be classified.” Early drafts of the executive order had not included this provision, which appears in the executive order issued by President Carter. Protests from the scientific community and others led to its retention. However, as will be discussed later, it is not clear what this limitation actually safeguards.

Sanctions for violations of the executive order may be imposed on the government’s “contractors, licensees, and grantees.”

III. Comments

Basic national security obviously requires some classification of information as secret. It is also obvious that freedom to engage in academic research and to publish the results is essential to advance knowledge and to sustain our democratic society. The possibility for friction between classification and academic freedom is always there. Secrecy, an inescapable element in classification, is fundamentally inconsistent with open inquiry. The friction can be reduced if classification is invoked before research has begun and is cautiously applied for a limited period of time and only to matters of direct military significance.

Classification defeats its own purpose, however, if it imperils the freedoms it is meant to protect. In our judgment, Executive Order 12356 does exactly that. It gives unprecedented authority to government officials to intrude at will in controlling academic research that depends upon federal support. The order permits and encourages the classification of information merely on the speculative assertion that its open dissemination might damage the national security. The classification may be imposed at whatever stage a research project has reached and can be maintained for as long as the government deems prudent. Academic research not born classified may, under this order, die classified.

The provision in the Executive Order that “basic scientific research information not clearly related to the national security may not be classified” carries the suggestion that basic scientific research may be classified if the government determines it to be “clearly related to the national security.” This standard for classification is looser than “could be expected to cause damage to the national security.” We may be reading too much into this provision: we hope that it will be interpreted simply as an exemption and nothing more. Unfortunately, even with the most favorable gloss the exemption strikes us as a weak safeguard for scientific inquiry. Under Executive Order 12356, information “produced by or for” the government is subject to classification, and sanctions may be imposed on government “contractors and grantees” who violate the executive order. There is an exemption from classification for “basic scientific research not clearly related to the national security,” yet the government official who cannot fix a clear relationship but nonetheless has doubts could still classify funded or contracted research consistent with other provisions of the executive order. Considering the emphasis placed on classification in the executive order, it seems all too likely that uncertainty will be resolved in favor of restraints.

Academic researchers require freedom and security to take the risk of occasionally being wrong. In their pursuit of knowledge they should not have to look backward either in hope of favor or in fear of disfavor. However, in an era of reduced federal support for research except in the area of national security, and with investments in research programs and facilities significantly reliant upon federal funding already having been made, the academic researcher is under enormous pressure to submit to classification no matter how restrictive or apparently arbitrary the demand. The adverse effects on academic freedom and thus on the advancement of knowledge and on the national security can be grave.

The executive order can inhibit academic researchers and research institutions from making long-term intellectual investments in research projects that are potentially classifiable. It can serve to foster unnecessary duplication of research efforts. It is likely to encourage reluctance to share research methods and results with professional colleagues because of uncertainty as to whether something that a government official can call harmful to the national security may be unwittingly revealed. There is the bleak prospect of academic researchers who are walled-off from each other, either by classification or by the worry that it might be imposed, thus forestalling mutual enrichment through the exchange of ideas and constructive criticism. Those in government concerned with the uses of new knowledge are not likely to obtain the benefit of the widest possible evaluation of their plans and projects. All these consequences of the executive order are likely to be felt outside as well as within the field of research in which classification is imposed.

The government has not put forward any compelling reasons for instituting a system of classification that is so at odds with previous systems. The government’s own reports, including reports issued by the Department of Defense, seriously question the
cost, effectiveness, and need for more classification. These reports draw particular attention to the dangers of overclassification.

Executive Order 12356 requires drastic revision if it is to be tolerable to a community of higher learning committed to academic freedom. The application of the order to nonclassified information, which is already subject to potential restraints under existing laws and regulations, is at best superfluous. The heavy emphasis on classification is misplaced: the provision for recategorization should be removed, and the standards for classification rewritten so that they do not sweep unnecessarily broadly.

If the government's executive order or its successor continues to deny due recognition to the need of the independent research scholar for academic freedom, the cost will be borne not only by the researchers who are affected but by the nation as a whole.

Commenting on the prepublication text of this report, Richard G. Stilwell, deputy in the Office of the Under Secretary of Defense for Policy, provided a detailed reply which included the following points:

Your report takes issues with the deletion of the word "identifiable" from the damage test for assignment of the Confidential security classification. It should be noted that this word was not used in previous Executive orders other than the one signed by President Carter. Its deletion in the current Order does not change the way in which people classify nor does it change what may be classified. Executive Order 12356 continues the two-step classification process. An original classification authority must first determine that information being considered for classification falls within one of the several categories of information that are classifiable. Only upon an affirmative determination that the information is classifiable may the classification authority proceed to the second step. That step involves a determination that unauthorized disclosure of the information would or would not cause a degree of damage to the national security. In making that determination, one naturally must envision what damage, if any, reasonably could be expected to occur. Thus, a decision to classify at the second step inherently involves identification of the damage.

Your report states, in essence, that when there is doubt regarding whether information should be classified, the new Executive Order requires classification. Similarly, the report indicates that when there is doubt about the level of classification, the Order requires classification at the higher level. In fact, Executive Order 12356, and the Department's implementing Regulation, specify that when in doubt, safeguard the information as though it were classified or classified at the higher level until a classification decision is made (within thirty days). "Safeguard" as used here is quite distinct from classification. The terms are not synonymous and should not be confused.

There is concern expressed that the new Executive Order is silent on whether declassifying information is generally desirable. However, the Order does state that "information shall be declassified or downgraded as soon as national security considerations permit." Moreover, the Order itself provides for declassification in three distinct ways, namely, through the setting of dates or events for automatic declassification, systematic review for declassification, and mandatory review for declassification. What has been removed are artificially set time limits for automatic declassification. What remains is provision for automatic declassification when it can be determined.

It is true that information that has been disclosed may be recategorized under the terms of this Order but only if it may reasonably be recovered. Within the Department of Defense, only four officials, the Secretary of Defense and the Secretaries of the three Military Departments, may exercise this authority. I think that we can agree that classification of information that is broadly held by the public only serves to strain the credibility of the security classification system. But, it is the intent of the new Order to recognize that the government, in limited circumstances, should be able to reclassify information that has been released incorrectly or inadvertently but only to a few people who then can be contacted and agreement reached concerning the sensitivity of the information.

The report recognizes that basic scientific research not clearly related to the national security cannot be classified. However, the report permits readers to conclude that there exists a lesser standard for the classification of such information. Let me assure you
that this is not correct; the Order expressly prohibits classification of basic scientific research not clearly related to the national security. Moreover, Defense regulations stipulate that the classification of basic scientific research would be appropriate only if the information concerns an unusually significant scientific breakthrough and there is sound reason to believe that the information is not known and it supplies the United States an advantage related directly to the national security.

In summary, I think it fair to characterize this Order not as a drastic departure from past practice but rather as a practical approach to the security needs of government. The trend toward openness in government had run virtually uninterrupted for the past thirty years. It was a trend that the Department of Defense supported over those years and it long has been the Department's policy not to constrain information the public requires to be informed sufficiently about the activities and operating functions of the Department. However, Executive Order 12065 treated classification almost as an evil to be avoided at all cost. The new Executive Order seeks to redress this imbalance and provide a more even approach to the issues of protection versus openness.

APPENDIX

Report of the National Academy of Sciences
Panel on Scientific Communication and National Security

PRINCIPLES FOR UNIVERSITY RESEARCH

The Panel concludes that the vast majority of university research, whether basic or applied, should be subject to no limitations on access or communications.

Undoubtedly, some things must, by their very nature, be kept secret. It is clearly important, for example, to keep secret those properties of actual weapons systems that would enable a potential enemy to develop effective countermeasures. Where specific information must perforce be kept secret, it should be classified strictly and guarded carefully. The decision to accept or reject classified research projects or to establish off-campus classified facilities is a matter to be decided by universities.

The Panel concludes that there are a few gray areas of research that are sensitive from a security standpoint, but where classification is not appropriate. These research areas are at the ill-defined boundaries between basic research and application and are characteristic of fields where the time from discovery to application is short. At present, a portion of the field of microelectronics is the most visible among the small handful of such new technologies.

GUIDELINES FOR CLASSIFIED AND GRAY-AREA RESEARCH

While it is impossible to specify classified and gray-area research with precision, there are some broad criteria that help to define the few areas in question.

The Panel recommends that no restriction of any kind limiting access or communication should be applied to any area of university research, be it basic or applied, unless it involves a technology meeting all of the following criteria:

- The technology is developing rapidly, and the time from basic science to application is short;
- The technology has identifiable direct military applications, or it is dual-use and involves process or production-related techniques;
- Transfer of the technology would give the U.S.S.R. a significant near-term military advantage; and
- The United States is the only source of information about the technology, or other friendly nations that could also be the source have control systems as secure as ours.

In order to specify the areas where greater control would be appropriate, it may be useful to look at some examples of research that do not meet all of the above four criteria.

Monoclonal antibody research is developing rapidly, and the interval from basic discovery to application may be short; but there appears to be no way in which this research could result in a significant military advance. Hence, there should be no need to impose controls in this field. Similarly, the science underlying aerodynamic design, even though it possesses obvious military significance, is a mature, slowly evolving field that is unlikely to provide any significant near-term military advantage to the Soviets. Thus, it too should be free of controls.

The Panel recommends that if government-supported research demonstrably will lead to military products in a short time, classification should be considered. It should be noted that most universities will not undertake classified work, and some will undertake it only in off-campus facilities.

In those few cases of government-sponsored research where national security considerations may require restrictions on publication, limitations on foreign access to facilities, or security classification, the Panel believes that certain guiding principles and procedures should be followed. The provisions of EAR [Export Administration Regulations of the Department of Commerce] and ITAR [International Traffic in Arms Regulations of the Department of State] should not be invoked to deal with gray areas in government-funded university research. Rather, in the Panel's view, appropriate procedures should be incorporated in research contracts or other written agreements in those rare cases where some measure of control is required. The advantages of such provisions are that they give prior notice to the researcher that the funded research may turn out to have national security significance and foster a spirit of negotiated accommodation that helps prevent future misunderstandings about the researcher's obligations and recourse.

The Panel recommends that in the limited number of instances in which all of the above criteria are met but classification is unwarranted, the values of open science can be preserved and the needs of government can be met.
by written agreements no more restrictive than the following:

a) Prohibition of direct participation in government-supported research projects by nationals of designated foreign countries, with no attempt made to limit physical access to university space or facilities or enrollment in any classroom course of study. Moreover, where such prohibition has been imposed by visa or contractually agreed upon, it is not inappropriate for government-university contracts to permit the government to ask a university to report those instances coming to the university’s attention in which the stipulated foreign nationals seek participation in such activities, however supported. It is recognized that some universities will regard such reporting requests as objectionable. Such requests, however, should not require surveillance or monitoring of foreign nationals by the universities.

Restrictions on access to nonclassified research, whether to research results or to physical facilities, are outside the normal operating procedures of research universities. It is, of course, within the power of the government to deny or issue conditional visas to foreign nationals who are believed to be seeking skills or technical data that will significantly damage our national security. In extraordinary circumstances, the government may seek to ensure that government-provided resources are not used to support nationals of specified countries who seek to work in specified programs. Access to program resources by nationals of designated foreign countries may be limited either through research contract terms or through other agreements negotiated with particular universities. Such contracts or agreements should not attempt to deny physical access to any university space or facility to any person accepted by the university into its community. The danger to national security lies in the immersion of a suspect visitor over an extended period of time. Not in casual observation of equipment or research data.

b) Submission of stipulated manuscripts simultaneously to the publisher and to the federal agency contract officer, with the federal agency then having sixty days to seek modification in the manuscript. The review period is not intended to give the government the power to order changes: the right and freedom to publish remain with the university, as they do with all unclassified research. This does not, of course, detract from the government’s ultimate power to classify in accordance with law any research it has supported.

In some cases, a contractual agreement providing for simultaneous review of manuscripts at the time of their submission to scientific journals may be appropriate. A requirement for government comment within sixty days of submission of the manuscripts should provide adequate time for the government to assess the potential near-term military significance of the dissemination and to reach accommodation with the researcher before public release. Experience suggests that disagreements about publication can almost always be resolved between the principal investigator and the technical contract manager. The Panel emphasizes that its support for a review period is not intended to support any government effort to veto publication, or to limit the government’s power to classify, in accordance with law, any research it has supported.

To help government policy officials to supervise the application of the gray-area research criteria and to gain perspective on the longer-term effects of the restrictions imposed on such research, there is a need to ensure that an accurate accounting of such restrictions is kept.

The Panel recommends that in cases where the government places such restrictions on scientific communication through contracts or other written agreements, it should be obligated to record and tabulate the instances of those restrictions on a regular basis.