

Legal Sidebar

Presidential Authority to Permit Access to National Security Information

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It appears more likely than not that the President is presumed to have the authority to disclose classified information to foreign agents in keeping with his power and responsibility to advance U.S. national security interests.

As President Trump recently [asserted](#), his “authority to classify and control access to information bearing on the national security flows from the Constitution and does not depend upon a legislative grant of authority.” As one observer [noted](#), the language appears to be drawn from a 1988 Supreme Court case, *Department of the Navy v. Egan*, in which the Court held the Merit Systems Protection Board could not review an agency decision denying an employee a security clearance. While some interpret *Egan* as recognizing that the President has [virtually plenary authority](#) to control classified information, the Court has [suggested](#) elsewhere that “Congress could certainly [provide] that the Executive Branch adopt new [classification procedures] or [establish] its own procedures—subject only to whatever limitations the Executive Privilege may be held to impose on such congressional ordering.” Congress has legislated with respect to classified information on numerous occasions, some of which are outlined in [this CRS report](#), while also generally deferring to the executive branch regarding the classification – and declassification – of national security information.

The *Egan* Court viewed the authority to control access to national security information as falling on the President as head of the Executive Branch and as Commander in Chief. Yet Congress also has authority and responsibility with respect to national security. In enacting the National Security Act of 1947, Congress described its [intent](#) to “to provide a comprehensive program for the future security of the United States [and] to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security.” Congress assigned the responsibility to the Director of National Intelligence, at the direction of the President, to [protect intelligence sources and methods](#), to [establish uniform procedures](#) for the protection of sensitive compartmented information, and to [coordinate intelligence-sharing](#) with foreign governments.

The current standards for classifying and declassifying information are found in [Executive Order 13526](#), issued by President Obama in 2009. Under these standards, the President, Vice President, agency heads, and any other officials designated by the President may classify information upon a determination that the unauthorized disclosure of such information could reasonably be expected to damage national security. In addition, [Executive Order 12333](#) spells out the responsibilities of members of the Intelligence Community for the protection of intelligence information, including intelligence sources and methods. For an overview of regulations regarding actions to be taken in the event of a possible unauthorized disclosure of classified information, see [The Protection of Classified Information: The Legal Framework](#).

The processes for declassification set forth in E.O. 13526 seem to presuppose that agencies and classifying officials will not have any need or desire to disclose classified information in their possession other than to comply with the regulations. Yet it has long been noted that there seems to be an informal process for [“instant declassification”](#) of information whose release to the public serves an immediate need.

E.O. 13526 does not address an informal procedure for releasing classified information. Section 1.1. provides that “[c]lassified information shall not be declassified automatically as a result of any *unauthorized* disclosure of identical or similar information,” but does not address what happens in the event of a disclosure that was *authorized*. By definition,

classified information is designated as classified based on whether its *unauthorized* disclosure can reasonably be expected to cause a certain level of damage to national security. This definition may be interpreted to suggest that disclosures may be authorized under such circumstances when no damage to national security is reasonably expected. It seems likely that those with the authority to disclose classified information would include the President, Vice President, and agency heads with original classification authority and control over the information in question.

With respect to classified communications intelligence information, Congress [defined](#) punishable disclosures of certain classified information in relation to the authority of the recipients rather than the disclosers:

Whoever knowingly and willfully communicates ... to an unauthorized person ... any classified information [concerning cryptography or communications intelligence, including that obtained from a foreign government]-

Shall be fined under this title or imprisoned not more than ten years, or both.

The term “unauthorized person” is [defined](#) to mean:

any person who ... is not authorized to receive information of the categories set forth [above], by the President, or by the head of a [U.S.] department or agency ... which is expressly designated by the President to engage in communication intelligence activities for the United States.

The [Espionage Act](#) similarly punishes the transmittal of defense information to a person “not entitled to receive it.”

However, [another provision](#) that forbids government employees from divulging classified information to representatives of foreign governments does not apply if such disclosure was authorized by the President or agency or department head. Taken together (and as noted above), it appears more likely than not that the President is presumed to have the authority to disclose classified information to foreign agents in keeping with his power and responsibility to advance U.S. national security interests.

Concern that the Obama Administration may have permitted the selective authorized disclosure of classified information using an informal process led Congress to enact [section 504](#) of the Intelligence Authorization Act for FY2013, [P.L. 112-277](#). The provision requires a government official who approves a disclosure of classified information to the media, or to another person for publication, to first report the decision and other related matters to the congressional intelligence committees. The provision applies to “national intelligence or intelligence related to national security” that is classified or has been declassified for the purpose of making the disclosure. According to the [original committee report](#), the reporting is intended to keep the intelligence committees apprised of expected media disclosures of relevant classified information and to assist in distinguishing between “authorized disclosures” and “unauthorized leaks.” It does not address the disclosure of classified information in situations where there is no intent to make the information public.

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