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Senator Moynihan's Office

From: Jeremy Gunn
JFK Review Board

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Subject: Quick Comments on Discussion Draft of S. 712 [O:\ARM\ARM98.350]

These are very rough and quick suggestions that I was able to pull together this morning. As I mentioned to you, I would be happy to spend more time on this in the future if it would be helpful.

Major thoughts and suggestions:

My principal concern is that this version would not have an impact that differs significantly from the current system. It also gives agencies additional places to hide the ball.

Agencies will have no difficulty articulating reasons for classification and for postponing declassification. The requirement of preparing a certification to the President (e.g., Sec. 2(d)(3)(B) and Sec. 2(d)(4)(B)(ii)) will take time, but will not be a substantial impediment. The best way to further the interests of the legislation, within its current framework, is to ensure that the Director of the Office of National Classification and Declassification Oversight and the members of the Classification and Declassification Review Board: (a) have as much independence as reasonable, and (b) that the legislation articulate that their principal mission is to further the legislative intent to minimize classification and maximize declassification. This could be accomplished, in part, by:

-- making a clear statement of legislative purpose. For example:

PURPOSE. Congress has determined that too much information is being classified on national security and other grounds and that too little is being declassified expeditiously. The purpose of this law is to ensure that, consistent with the national security needs of the United States, the minimum amount of information is classified and that the maximum amount of information is declassified. All relevant government officials, including the President, the Director of the Office of National Classification and Declassification Oversight, the members of the Classification and Declassification Review Board, shall work to ensure that the purpose of S.712 is fulfilled to the greatest reasonable extent.

-- Should such a statement be a new Sec. 2? Be made a new Sec. 2(a)(3)?

-- giving either independent authority or the clear responsibility to the Director of the Office of National Classification and Declassification Oversight and the members of the Classification and Declassification Review Board. For example, amend Sec. 3(d)(1) by adding that the duties include ensuring, to the greatest reasonable, that the statutory purpose on classification/declassification are accomplished. This gives the Director at least the ability to stand up to the agencies and, perhaps to some extent, to the President as well.

Relationship with other law/procedures.

Under current law, the President has authority to classify and declassify. Does S.712 remove any independent authority of the President to classify or declassify? Is S.712 effectively creating a second scheme for class/declass?

Can the President say, "I'm not classifying document X pursuant to S.712, I am classifying it pursuant to my inherent authority and S.712 does not apply"?

Should S.712: (a) be the *sole* authority for future classification, and (b) a guaranteed minimum basis for declassification? Regardless of what the decision is, the legislation should be clear as to whether there is only one classification scheme and whether S.712 is it.

Declassification timetable: postponement or permanent withholding

Sec. 2(d)(4) suggests that agencies can "postpone[]" declassification -- but until when? Two years -- 5 years -- forever?

Specific section-by-section comments

See handwritten comments.

Conclusion

These comments are quite rough. In order to do this the right way, I really would need to spend more time and devote much more thought to it. I am willing to do it later if it would help.