Statement of Steven Aftergood
Federation of American Scientists

Before the Subcommittee on the Constitution
Of the
Committee on the Judiciary
United States Senate

Hearing on

Restoring the Rule of Law

September 16, 2008

Thank you for the opportunity to address the Subcommittee.

My name is Steven Aftergood. I direct the Project on Government Secrecy at the Federation of American Scientists, a non-governmental policy research and advocacy organization. The Project seeks to promote public oversight and government accountability in intelligence and national security policy.

Summary

Perhaps the single most important action that is needed to invigorate the rule of law today is to reverse the growth of official secrecy, which has shielded misconduct and impeded oversight. The next Administration could initiate a transformation of government secrecy policy by tasking each federal agency that classifies information to conduct a detailed public review of its classification practices with the objective of reducing national security secrecy to the essential minimum. Patterned after the Fundamental Classification Policy Review that was performed by the Department of Energy in 1995, such reexaminations have the potential to dramatically reduce unnecessary secrecy while enhancing external oversight and bolstering public confidence.

Introduction: "We Overclassify Very Badly"

There are many steps that will need to be taken to strengthen the rule of law in the months and years to come. The next Administration and the next Congress will have to reexamine policies on domestic surveillance, prisoner detention and interrogation, and other important aspects of national security policy to make them constitutionally compliant and legally sound. Terms like "waterboarding" and "extraordinary rendition" will need to be relegated to the history books as quickly as possible, to be preserved for posterity as a reminder and a warning, along with others like Manzanar, the World War II internment camp for Japanese Americans.

But the most important systemic change that is needed is to sharply reduce the secrecy that has enveloped the executive branch.

Secrecy is problematic for several distinct reasons. First, it creates the possibility for agencies or officials to depart from legal norms or sound policies without detection or correction. Second, it tends to cripple the oversight process by diverting limited energy and resources into futile disputes over access for information, including even rudimentary and non-controversial factual information.[1] Third, it impoverishes the public domain. Ideally, an open political process helps to educate members of the public. If nothing else, it forces them to formulate and refine their arguments and to engage with those of their opponents. But a closed, secret process makes that impossible.

Secrecy is often criticized by those whose access to information has been barred, but what is more remarkable is that even the agencies themselves and officials who retain access acknowledge that classification authority has been exercised arbitrarily and that secrecy has now grown far beyond what any legitimate justification would allow.

"We overclassify very badly," Rep. Porter Goss, then the chair of the House Intelligence Committee, told the 9/11 Commission in 2003. "There's a lot of gratuitous

[1] "After more than five years of requests, we have only recently received access to redacted versions of OLC [Office of Legal Counsel] legal opinions related to the CIA's interrogation program," wrote Senator Patrick Leahy and Senator Arlen Specter on behalf of the Senate Judiciary Committee in an August 19, 2008 letter to the White House Counsel. "The failure to provide other documents that we have sought repeatedly, however, leaves us without basic facts that are essential to this Committee's ability to conduct its oversight responsibilities."

classification going on."[2] Unfortunately, neither that forthright statement nor Mr. Goss's subsequent tenure as Director of Central Intelligence did anything to reduce classification levels, which remain as high or higher today than they did in 2003.[3]

"The definitions of 'national security' and what constitutes 'intelligence' -- and thus what must be classified -- are unclear," according to a January 2008 report from the Office of the Director of National Intelligence. This is an admission that classification policy in U.S. intelligence agencies lacks a coherent foundation. Ironically, that ODNI report itself was withheld from public disclosure, tending to confirm the report's diagnosis.[4]

Asked to estimate how much defense information is overclassified, Under Secretary of Defense for Intelligence Carol A. Haave told a House subcommittee in 2004 that it could be as much as fifty percent, an astonishingly high figure. Information Security Oversight Office director J. William Leonard added: "I would put it almost even beyond 50/50.... [T]here's over 50 percent of the information that, while it may meet the criteria for classification, really should not be classified."[5]

"It may very well be that a lot of information is classified that shouldn't be," agreed Defense Secretary Donald Rumsfeld in 2004, "or it's classified for a period longer

---

[2] Public hearing before the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission), May 22, 2003. *Secrecy News*, January 14, 2005. transcript available at http://www.fas.org/irp/congress/2003_hr/911Com20030522.html#dys .

[3] According to the latest report of the Information Security Oversight Office, original classification activity in 2007 was approximately the same as in 2003 and "The number of reported combined classification decisions has risen each year." 2007 Report to the President, Information Security Oversight Office, available at: http://www.fas.org/sgp/isoo/2007rpt.pdf .

[4] "Intelligence Community Classification Guidance Findings and Recommendations Report," Office of the Director of National Intelligence, January 2008. I obtained an unauthorized copy, which is available at: http://www.fas.org/sgp/othergov/intel/class.pdf . "I'm not going to be able to comment on an internal document that has not been publicly released," an ODNI spokesman told the Washington Post in response to a question about the report. See "Agencies Use Contradictory Rules for Classifying Information" by Walter Pincus, April 11, 2008, page A4.

[5] "Too Many Secrets: Overclassification as a Barrier to Information Sharing," hearing before the House Committee on Government Reform, August 24, 2004, at pp. 82-83; copy available at http://www.fas.org/sgp/congress/2004/082404transcript.pdf.

than it should be. And maybe we've got to find a better way to manage that as well."[6] But at the Defense Department and elsewhere in government, that "better way" remains elusive and uncharted.

"I think secrecy is one of the hard issues," said Michael Chertoff, the Secretary of Homeland Security, last month. "We will have to figure out how to be open to the extent we can while recognizing you live in a world where openness can be a problem too. It is my fervent hope that more and more […] will be public and only things that really have to be kept secret will be kept secret."[7]

In the interests of a decent, effective and accountable government, the next Administration should finally move beyond fervent hope and should start to figure out how to limit official secrecy. One way to do that would be to undertake a systematic review of agency classification policy and practice.

Recalling the 1995 DOE Fundamental Classification Policy Review

If secrecy was always inappropriate, then it would be a simple problem with an easy solution-- get rid of all secrecy. But we know that there is a place for secrecy in protecting various types of genuine national security information, from advanced military technologies to sensitive intelligence sources and confidential diplomatic initiatives. When properly employed, secrecy serves the public interest. Therefore what is needed is some way to distinguish and disentangle legitimate secrecy from illegitimate secrecy.

The successful experience of the U.S. Department of Energy in updating its classification policies a decade ago may provide a helpful exemplar for confronting overclassification today.

In 1995, facing the new realities of the post-Cold War world, the Department of Energy initiated a systematic review of its information classification policies as part of

---

[6] News briefing, August 26, 2004. *Secrecy News*, September 7, 2004; excerpts posted at http://www.fas.org/sgp/news/2004/08/dod082604.html .

[7] "Chertoff: I'm Listening to the Internet (Not in a Bad Way)" by Ryan Singel, *Threat Level*, August 6, 2008; http://blog.wired.com/27bstroke6/2008/08/chertoff.html . The Secretary's remarks were focused specifically on the national cybersecurity initiative.

Secretary Hazel O'Leary's Openness Initiative. Formally known as the Fundamental Classification Policy Review, the declared objective of the process was "to determine which information must continue to be protected and which no longer requires protection and should be made available to the public."[8]

The Review was staffed by 50 technical and policy experts from the Department, the national laboratories, and other agencies, divided into seven topical working groups. The groups deliberated for one year, reviewing thousands of topics in hundreds of DOE classification guides, evaluating their continued relevance, and formulating recommendations for change.

Significantly, public input was welcomed and actively solicited at every stage of the process, from identification of the issues to review of the draft recommendations. Public participation was specifically mandated by the Secretary in order to support a Department objective of increasing public confidence in Department activities and operations.

Following their year-long deliberations, the reviewers concluded that hundreds of categories of then-classified DOE information should be declassified. In large part, their recommendations were adopted in practice. Broad categories like the production history of plutonium and highly enriched uranium as well as various narrow technical details were approved for declassification and public disclosure. At the same time, the Review also called for increased protection of certain other categories of classified information, as part of a classification strategy known as “high fences around narrow areas.”

The review team's guiding principle was that "classification must be based on explainable judgments of identifiable risk to national security and no other reason." This sensible principle could usefully be applied to classification policy today as well.

---

[8] Congress endorsed the review in the FY 1994 Energy and Water Appropriations Bill. For detailed history and recommendations, see the final "Report of the Fundamental Classification Policy Review Group," Dr. Albert Narath, chair, issued by the Department of Energy, December 1997, available at: http://www.fas.org/sgp/library/repfcprg.html . A brief narrative account of the process is available here: https://www.osti.gov/opennet/forms.jsp?formurl=od/fcprsum.html .

The Proposal: Assign Each Agency to Perform a Classification Policy Review

With the fruitful example of the 1995 DOE Classification Review in mind, the next President could apply its lessons government-wide. The President could initiate a systematic reduction in overclassification by tasking each agency that classifies information to perform a "top to bottom" review of its secrecy policies and practices.[9]

The agencies should be specifically directed to seek out and identify classified information that no longer requires protection and that can be publicly disclosed. The primary objective of the review should be to reduce classification to its minimum required scope. Every classification policy and every classification guide should be subjected to scrutiny and reconsideration -- resulting in affirmation, modification, or revocation. Each agency's review should be completed in a year or less.

As far as possible, the review process itself should be transparent and publicly accessible. At a minimum, agencies should solicit public input, suggestions and recommendations for policy changes, and should provide an opportunity for public comment prior to finalization of draft recommendations.

The Logic of the Proposal

Why would the executive branch voluntarily undertake such a review of its classification policies? One answer is that classification is enormously costly to the government, both operationally and financially.[10] Therefore reducing classification to its necessary minimum would be good management policy and a wise use of finite security

[9] The process could be initiated by executive order, national security directive, or other presidential instrument. Most of the agencies that have been granted authority to classify information were designated in an October 17, 1995 presidential order, available here: http://www.fas.org/sgp/clinton/oca.html . In the Bush Administration, classification authority was also extended to the Secretary of Agriculture, the Secretary of Health and Human Services, the Administrator of the Environmental Protection Agency, the Director of the Office of Science and Technology Policy, and the Director of National Intelligence.

[10] The Information Security Oversight Office reported that classification costs within Government reached a record high $8.65 billion in FY 2007, not including the significant costs of the CIA, NGA, NSA, DIA and NRO (which are classified). An additional $1.26 billion was spent to protect classified information in industry. ISOO Annual Report to the President for FY 2007, p. 27; copy available at http://www.fas.org/sgp/isoo/2007rpt.pdf .

resources even if other considerations were lacking. As noted above, this fact has already been recognized by various executive branch agencies and officials. So it would be a matter of enlightened self-interest for agencies to undertake the proposed review.

The proposal has some other noteworthy features.

Significantly, the proposal would enlist the agencies themselves as agents of the classification reform process, and not simply its objects. Without agency cooperation, classification reform efforts will be piecemeal at best and may be futile. External pressure on an agency typically elicits internal opposition. By contrast, directing the agencies to lead classification reform, in cooperation with interested members of the public, stands a good chance of modifying the rules of these rule-based organizations, as it did for a while at the Department of Energy. It offers a way to alter their bureaucratic DNA.

Another important feature is that the proposed classification policy reviews would be conducted independently by each agency. This approach is based on the premise that far-reaching classification reform can best be accomplished at the individual agency level. In other words, a government-wide statement on classification policy (as important as that might be) will not suffice, because the classification issues that arise in each major national security agency are distinct. For example, intelligence agencies are concerned above all with protection of sources and methods. Military agencies are concerned with the security of military technology and operational planning. Foreign policy agencies must weigh the international impacts of classification and declassification. And so on. Although there may be a role for interagency consultation at some stage of the process, most agencies will need to conduct the bulk of their assessment independently.

Dividing the task among individual agencies in this way may even produce some constructive tension among the agencies. They may find themselves in competition to see which of them can implement the President's directive most effectively, and which one can generate the most significant reforms.

Finally, the role of public participation is essential. Public input will provide agencies with important perspectives on public interests and expectations. It will help to motivate and "incentivize" the process. And it may even nurture a wholesome public engagement with agencies on security policy that has been lacking for years. While

agency officials may be best qualified to make the final classification decisions in many cases, members of the public are best qualified to articulate their own information needs.[11] Agency responsiveness to public concerns would also serve to increase the legitimacy of the review process.

On the Other Hand: A Few Caveats

Even if the proposal were adopted, it would not constitute a complete solution to the problem of government secrecy. There are several reasons for this.

For one thing, not all government secrecy abuses are rooted in classification policy. Unwarranted restrictions on information that have the same debilitating effects as overclassification can also arise from indiscriminate use of executive privilege, deliberative process claims, and assertions of the state secrets privilege. An expansive new category of "controlled unclassified information" could be applied to something as innocuous as an embargoed press release, according to an official background paper.[12] And a federal court noted last month that the present Administration was withholding unclassified information from disclosure without any justification at all.[13] The current proposal would not fix such problems.

---

[11] The feasibility of soliciting public input on security policy has been demonstrated most recently by the Nuclear Regulatory Commission, which asked members of the public to suggest categories of security-related information that should be publicly disclosed. See "NRC Solicits Public Input Into How It Can Increase Public Access to Security Information," Nuclear Regulatory Commission, July 29, 2008; copy available at http://www.fas.org/sgp/news/2008/07/nrc072908.html .

[12] See "Background on the Controlled Unclassified Information Framework," May 20, 2008, copy available at http://www.fas.org/sgp/cui/background.pdf ; and "Press Releases Could Become 'Controlled Unclassified Info'," *Secrecy News*, May 28, 2008.

[13] In a pending lawsuit over the refusal of former White House Counsel Harriet Miers to testify before the House Judiciary Committee, DC District Judge John D. Bates wrote that "the Executive has supplied no justification, and the Court cannot fathom one, for its failure to produce non-privileged documents to the Committee." Memorandum Opinion, Committee on the Judiciary v. Harriet Miers, et al, DC District Court, August 26, 2008, p.8 (emphasis added); copy available at http://www.fas.org/sgp/jud/miers082608.pdf .

A future Administration could conceivably undertake a broad-based review of all restrictions on public disclosure that encompassed controls on classified, privileged, and unclassified information, which would be a commendable thing to do. But my sense is that the classification system, with its uniquely articulated guidelines and procedures, can best be tackled separately from other information policy issues, and that classification reform would complement and facilitate other needed reforms.

A second caveat is that a sound classification policy depends on the good faith of its practitioners. Our leaders and public servants need not be "angels," but if they are demons, or if they are simply determined to violate classification policy for whatever reason, they will likely find a way to do so. Good faith cannot be mandated or made compulsory through any kind of reform process. All we can do is to elect leaders who act in good faith and seek to replace those who do not.

Lastly, continuing disputes over classification policy are inevitable due to the inherently subjective character of the classification process. It would never be possible to program a computer to decide what should information be classified, since there is no precise, objective definition of what constitutes unacceptable "damage to national security" that would justify such decisions. Instead, classification decisions must be based on judgment and experience. On matters of judgment, there are always likely to be disagreements.

(On the other hand, a hypothetical computer program would discover such objectively clear contradictions in current classification practices that it would be able to flag them as "system errors." For example, the Director of National Intelligence formally declassified the Fiscal Year 2007 budget for the National Intelligence Program on October 30, 2007. But in response to a Freedom of Information Act request, the Office of the Director of National Intelligence said earlier this year that the Fiscal Year 2006 budget for the National Intelligence Program is properly classified.[14] It seems unlikely that both of these judgments are correct.)

While such caveats represent limits to the probable impact of the proposed classification review, none of them negates its inherent utility. Even under the imperfect conditions we face, the proposed steps to eliminate unnecessary classification would be

[14] See the June 4, 2008 denial letter at http://www.fas.org/sgp/news/2008/06/odni060408.pdf .

worth taking. Moreover, by "draining the swamp" of overclassification, it will become easier to identify pockets of resistance and to focus more closely on classification issues that remain in dispute.

Conclusion

There are numerous other useful steps that can and should be taken to eliminate and prevent inappropriate secrecy, and to promote robust public access to government information. For example:

* Agency inspectors general should be tasked to perform routine periodic audits of agency classification activities to ensure that they are consistent with declared policy.
* In confirmation hearings, presidential nominees should be closely questioned as to their attitudes on transparency and accountability, and should be asked to make specific commitments on secrecy reform.
* Oversight of intelligence agencies should be augmented through the use of cleared auditors from the Government Accountability Office, which has faced resistance from the present DNI and other intelligence agency officials.
* Just as OMB has required all agencies to designate a senior official responsible for privacy matters, agencies should designate another such senior official to be responsible for optimizing public access to agency information. And so on.

But if I were to select one idea out of the many possibilities, I would urge the next Administration and the next Congress to require each classifying agency to perform a fundamental classification policy review of the kind described above.

While the proposed reviews will not resolve all disputed classification issues, there is reason to believe that the review process will serve to discipline classification policy and that it will pay meaningful dividends to the public and the agencies themselves.

Thank you for your consideration of these views.