

### Reducing Government Secrecy: Finding What Works

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#### INTRODUCTION

Sunlight is the best disinfectant, Justice Brandeis famously declared, praising publicity as a remedy for corruption.<sup>1</sup> But sunlight is more than that; it is an indispensable precondition of life. And to extend the Brandeis metaphor, sunlight in the form of robust public access to government information is essential to the vitality of democratic governance, even in the absence of corruption. Our political institutions cannot function properly without it.

Whether it concerns matters of high policy, such as the decision to go to war, or the smallest allocation of taxpayer funds, the free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability to hold elected officials accountable. Of course, public disclosure of government information is not the only ingredient needed to sustain a vital democracy, and disclosure has always been conditioned on security, privacy, and other considerations. But without it, citizens are deprived of a meaningful role in the political process, and the exercise of authority is insulated from public oversight and control.

Ensuring appropriate public access to government information, while establishing proper boundaries around the exercise of official secrecy, has proved to be an elusive goal. The expansive secrecy practices of recent years appear to have enhanced the case for a new approach by illustrating the unintentional costs of secrecy, as well as its corrosive effects on government performance and public confidence. For example, as former Justice Department official Jack L.

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1. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, reprinted in LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92, 92 (1932) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

Goldsmith told Congress: “There’s no doubt that the extreme secrecy [associated with the Bush Administration’s Terrorist Surveillance Program] . . . led to a lot of mistakes.”<sup>2</sup> More prosaically, even agency telephone directories have been removed from public access, along with numerous other categories of useful and formerly public information.<sup>3</sup> Not only civil libertarians and public interest activists, but also defense and intelligence officials, now say that secrecy has gone too far and must be restrained. In particular, the classification system that restricts access to government information on national security grounds clearly is not serving its intended purpose. It has become an unwarranted obstacle to information-sharing inside and outside the government, to the detriment of public policy.

The “classification system is broken and is a barrier (and often an excuse) for not sharing pertinent information with homeland security partners,” according to the Homeland Security Advisory Council, chaired by former FBI Director and former Director of Central Intelligence (DCI) William Webster.<sup>4</sup> Others have independently reached identical conclusions. Stephen E. Flynn of the Council on Foreign Relations opined at a 2008 congressional hearing that “on the classification issue, there is just no question that the system is broken, fundamentally broken.”<sup>5</sup> Mr. Flynn observed further that “[b]ecause things get routinely overclassified, they can’t get to the people who need [them].”<sup>6</sup>

Concerns about excessive government secrecy have accompanied the national security classification system for decades. An official review in 1956 complained that, “overclassification has reached serious proportions.”<sup>7</sup> Entire shelves of commission reports, congressional hearings, and independent critiques since then have blasted official secrecy for improperly shielding govern-

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2. *Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 9 (2007) (statement of Jack L. Goldsmith, Professor of Law, Harvard Law School).
  3. Steven Aftergood, *The Age of Missing Information*, SLATE, Mar. 17, 2005, <http://www.slate.com/id/2114963/>.
  4. HOMELAND SEC. ADVISORY COUNCIL, TOP TEN CHALLENGES FACING THE NEXT SECRETARY OF HOMELAND SECURITY 8 (2008), available at <http://www.fas.org/irp/agency/dhs/topten.pdf>.
  5. *The Resilient Homeland: How DHS Intelligence Should Empower America To Prepare for, Prevent, and Withstand Terrorist Attacks: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 110th Cong. 26 (2008) (statement of Stephen E. Flynn, Senior Fellow, Council on Foreign Relations).
  6. *Id.*
  7. DEF. DEP’T COMM. ON CLASSIFIED INFO., REPORT TO THE SECRETARY OF DEFENSE BY THE COMMITTEE ON CLASSIFIED INFORMATION 6 (1956), available at [http://www.thememoryhole.org/foi/coolidge\\_committee.pdf](http://www.thememoryhole.org/foi/coolidge_committee.pdf) [hereinafter COMMITTEE ON CLASSIFIED INFORMATION REPORT].

ment operations from the public, impeding oversight, covering up malfeasance, and, ultimately, undermining national security itself.<sup>8</sup>

Successive waves of critics have rarely succeeded in devising effective solutions or strategies to mitigate the defective secrecy practices that they oppose. The persistent failure to achieve significant reforms over half a century suggests that these critics have not properly formulated their critiques or articulated recommendations in a way that would enable systemic changes. In recent years, in fact, classification—specifically overclassification—has increased, not diminished.

On the other hand, despite the fairly dismal record of the past fifty years, a small number of secrecy reform initiatives have yielded measurable differences in official secrecy policy, reducing the scope of classification activity, and increasing the pace of declassification. Why did those isolated efforts succeed? Can they be distinguished from the other well-intentioned initiatives that ultimately failed? Do they hold lessons for today's potential reformers? This Essay seeks to identify the salient characteristics of successful secrecy reform programs in order to explain their successes and to inform future reform efforts. The following Part introduces national security secrecy, including its structure and operation, along with an explanation of its problematic features. Part II reviews the singularly unproductive history of efforts to reform and rationalize secrecy policy. Parts III and IV examine exceptions to this otherwise dismal history, in which significant reforms were accomplished with meaningful results. The remainder of the Essay proposes lessons for the future that may be derived from these successes.

## I. THE BASICS OF NATIONAL SECURITY SECRECY

The purpose of the classification system is to prevent disclosure of information that could damage our national security. This straightforward definition, however, begs several questions: What is national security, if not the vitality of its democratic institutions that would be hobbled by secrecy? What constitutes damage? Who decides?

Even the architects and devotees of national security secrecy implicitly acknowledge that it represents a departure from the norms of democratic governance. In his 2003 executive order on classification policy, President George W. Bush affirmed both the norm and the departure:

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8. Among the most thoughtful and substantive reviews was that of the congressionally-mandated Commission on Protecting and Reducing Government Secrecy, chaired by Senator Daniel P. Moynihan. See REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2 (1997), available at <http://www.fas.org/sgp/library/moynihan/index.html> [hereinafter MOYNIHAN COMMISSION REPORT]; see also Federation of American Scientists Project on Government Secrecy, Secrecy and Security Library, <http://www.fas.org/sgp/library/index.html> (last visited Mar. 9, 2009) (listing noteworthy reports on government secrecy).

Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security remains a priority.<sup>9</sup>

The presidential "nevertheless," which qualifies and limits the "free flow of information," has by now justified an enormous bureaucracy that implements and sustains the government secrecy system. By 2008, classification activity had increased to a total of more than 23 million classification actions per year.<sup>10</sup> The most recent reported cost of protecting classified information in government and industry was a record annual high of \$9.9 billion in 2007.<sup>11</sup> Untold billions of pages of government records, some dating back to World War I, have remained inaccessible to the public on asserted national security grounds, and fateful government deliberations on questions of war and peace, human rights, and domestic surveillance have increasingly moved beyond public ken.

In practice, it is possible to distinguish at least three distinct categories of government secrecy. The first, "genuine national security secrecy," works to protect information that would pose an identifiable threat to the security of the nation by compromising its defense or the conduct of its foreign relations. Such information could include design details of weapons of mass destruction and other advanced military or intelligence technologies, current military operational plans, identities of intelligence sources, confidential diplomatic initiatives, and similarly sensitive matters. Protection of such information is not controversial. These safeguards are the *raison d'être* of the classification system, and the public interest is served when this type of information remains secure.

A second category that often masks itself as genuine national security secrecy, however, is actually something quite different. One might deem this version "bureaucratic secrecy." It reflects that natural tendency of bureaucracies, famously identified by Max Weber, to hoard information.<sup>12</sup> Whether out of convenience or a dim suspicion that disclosure is intrinsically riskier than non-

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9. Exec. Order No. 13,292, 3 C.F.R. 196 (2003).

10. INFO. SEC. OVERSIGHT OFFICE, 2008 REPORT TO THE PRESIDENT 1 (2009), available at <http://www.archives.gov/isoo/reports/2008-annual-report.pdf> [hereinafter 2008 OVERSIGHT OFFICE REPORT].

11. INFO. SEC. OVERSIGHT OFFICE, 2007 REPORT TO THE PRESIDENT 28 (2008), available at <http://www.archives.gov/isoo/reports/2007-annual-report.pdf>.

12. Max Weber, *Bureaucracy*, in *ESSAYS IN SOCIOLOGY* 196, 233-34 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946) ("Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret.").

disclosure, government agencies always seem to err on the side of secrecy even when there is no obvious advantage to doing so.

When asked how much defense information in government is overclassified or unnecessarily classified, former 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.<sup>13</sup> Former 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 . . .”<sup>14</sup> “It may very well be that a lot of information is classified that shouldn’t be,” admitted Defense Secretary Donald Rumsfeld in a 2004 news conference, “or it’s classified for a period longer than it should be.”<sup>15</sup> Yet these official acknowledgments of unnecessary secrecy have not prompted any reversal of course. In fact, the pace of classification activity has continued to increase each year, a tribute to the bureaucratic impulse.

The third category of secrecy, “political secrecy,” uses classification authority for political advantage. While probably the smallest in quantitative terms, this form of secrecy is actually the most problematic and objectionable. It exploits the generally accepted legitimacy of genuine national security interests in order to advance a self-serving agenda, to evade controversy, or to thwart accountability. In extreme cases, political secrecy conceals violations of law and threatens the integrity of the political process itself.

In one unusually explicit example of the practice, a 1947 Atomic Energy Commission memorandum concerning “Medical Experiments on Humans” instructed as follows: “It is desired that no document be released which refers to experiments with humans and might have adverse effect on public opinion or result in legal suits. Documents covering such work . . . should be classified ‘secret.’”<sup>16</sup> This is by no means the only example of political secrecy. The CIA notoriously concealed the use of hallucinogens and other behavior-altering substances on unsuspecting persons in a behavior modification program code-named MKULTRA, and the Department of Energy hid the deliberate exposure of unwitting subjects to radiation in the early Cold War era. More recently, the Bush Administration secretly conducted domestic surveillance outside the

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13. *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats and Int’l Relations of the H. Comm. on Gov’t Reform*, 108th Cong. 82 (2005) (statement of Carol A. Haave, Under Secretary of Defense for Intelligence).
  14. *Id.* 83 (2005) (statement of J. William Leonard, Director, Information Security Oversight Office).
  15. Donald H. Rumsfeld, U.S. Sec’y of Def., Press Conference in Phoenix, Arizona (Aug. 26, 2004), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2714>.
  16. U.S. ATOMIC ENERGY COMM’N, MEDICAL EXPERIMENTS ON HUMANS 1 (1947), available at <http://www.fas.org/sgp/othergov/doe/aec1947.pdf>.

statutory framework and performed interrogations subjecting suspected enemy combatants to extreme mental and physical pain. As these examples show, political secrecy is often used to circumvent the institutions of law rather than to protect them.

If all government secrecy actions were uniformly bad or abusive, the public policy solution would be simple: to eliminate secrecy. If all government secrecy actions were necessary or prudent, no solution would be required, since there would be no problem. But in practice, government secrecy seems to be comprised of a shifting mix of the legitimate and the illegitimate. Genuine national security secrecy is diluted in an ocean of unnecessary bureaucratic secrets and defamed from time to time by abuse in the form of political secrecy. The enduring public policy problem is to disentangle the legitimate from the illegitimate, preserving the former and exposing the latter.

## II. A BRIEF HISTORY OF SECRECY REFORM

Over the past fifty years, generations of critics have risen to attack, bemoan, lampoon, and correct the excesses of government secrecy. Only rarely have they had a measurable and constructive impact.

The 1956 Coolidge Committee, led by Assistant Secretary of Defense Charles Coolidge, identified widespread overclassification that it attributed to vague classification standards and lack of any associated accountability or punishment. The Coolidge Committee recommended the creation of a Director for Declassification within the Office of the Secretary of Defense and a reduction in the number of authorized classifiers.<sup>17</sup> There is no record that these suggestions were ever adopted.

The 1970 Defense Science Board Task Force on Secrecy concluded that the amount of scientific and technical information that is classified “could profitably be decreased perhaps as much as 90 percent . . .”<sup>18</sup> The Task Force recommended a maximum classification lifetime of five years for most scientific and technical information and declassification of most currently classified technical information within two years.<sup>19</sup> These recommendations were ignored.

The 1985 Stilwell Commission, chaired by the late Army General Richard G. Stilwell, again found that “too much information appears to be classified and much at higher levels than is warranted.”<sup>20</sup> From this commission’s optimistic perspective, “[t]he remedy is straightforward: disciplined compliance with the

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17. COMMITTEE ON CLASSIFIED INFORMATION REPORT, *supra* note 7 at 6, 13-14.

18. DEF. SCI. BD., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON SECRECY, at v (1970), available at <http://www.fas.org/sgp/othergov/dsbrep.pdf>.

19. *Id.* at 2.

20. COMM’N TO REVIEW DOD SEC. POLICY AND PRACTICES, KEEPING THE NATION’S SECRETS 49 (1985).

rules.”<sup>21</sup> Straightforward or not, however, the Commission’s advice had no discernable impact on the problem.

The 1994 Joint Security Commission reported to the Secretary of Defense and the DCI that, “the classification system, largely unchanged since the Eisenhower administration, has grown out of control.”<sup>22</sup> Not only that, but “the classification system is not trusted on the inside any more than it is trusted on the outside. Insiders do not trust it to protect information that needs protection. Outsiders do not trust it to release information that does not need protection.”<sup>23</sup> The Joint Security Commission recommended adoption of a single classification level (offering two degrees of protection) to replace the existing three-level system.<sup>24</sup> This recommendation was not accepted.

The 1997 Moynihan Commission, chaired by the late Senator Daniel P. Moynihan, found that the secrecy system “is used too often to deny the public an understanding of the policymaking process . . . . There needs to be some check on the unrestrained discretion to create secrets.”<sup>25</sup> Toward that end, the Moynihan Commission recommended adopting legislation that would clearly define what may or may not be classified.<sup>26</sup> Such legislation was introduced in Congress, but it expired without a vote.

The 9/11 Commission also singled out secrecy as a problem, created to investigate the terrorist attacks of September 11, 2001 and to derive the public policy lessons that might be learned from them. The Commission explained in its 2004 final report that, “[c]urrent security requirements nurture overclassification and excessive compartmentation of information among agencies.”<sup>27</sup> The Commission recommended legislation to disclose the budgets of intelligence agencies and called for new incentives to reward information sharing.<sup>28</sup> In this case, the recommendations were largely accepted. Legislation to require disclosure of the intelligence budget total (though not the budgets of individual agencies) was enacted, and effective steps were taken to improve information shar-

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21. *Id.* at 50.

22. JOINT SEC. COMM’N, REDEFINING SECURITY: A REPORT TO THE SECRETARY OF DEFENSE AND THE DIRECTOR OF CENTRAL INTELLIGENCE 6 (1994), *available at* <http://www.loyola.edu/dept/politics/intel/jsc-report.pdf>.

23. *Id.*

24. *Id.* at 77.

25. MOYNIHAN COMMISSION REPORT, *supra* note 8, at xxi-xxii.

26. *Id.* at xxii.

27. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 417 (2004), *available at* <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

28. *Id.* at 416-17.

ing among government agencies.<sup>29</sup> But the problem of systemic overclassification was unaffected.

Of course, not even the briefest account of secrecy reform's history could fail to mention the Freedom of Information Act (FOIA), which gave legal force to public requests for government information. The Act mandated the release of classified information upon request unless it was "properly classified."<sup>30</sup> FOIA has been used successfully over the years to challenge the classification of particular records and to dislodge mountains of government documents (classified and unclassified) that would otherwise not have been released. But at its best, FOIA only facilitates access to specific records; it does not and cannot alter the practices and procedures that make them inaccessible in the first place. Thus, indispensable as it was and remains, FOIA did not provide an effective remedy for the excesses of government secrecy that were identified by the various secrecy reform efforts that preceded and followed the Act's passage in 1966.

Other targeted initiatives have likewise fallen short of systemic reform but did generate some success. The John F. Kennedy Assassination Records Collection Act<sup>31</sup> and the Nazi War Crimes Disclosure Act<sup>32</sup> each led to the declassification of significant bodies of historical records. President Clinton's 1995 executive order, which aimed to set a twenty-five-year lifetime for most classified documents,<sup>33</sup> led to the declassification of approximately a billion pages of historically valuable records.<sup>34</sup>

Yet these achievements, while intrinsically valuable and a boon to historians, did nothing to restrain the scope of current classification activity or to promote public access to contemporary records that were unnecessarily withheld. In that respect, the continuity of the complaints voiced by critics of government secrecy over the period reviewed in this Part is striking. Despite the intellectual firepower brought to bear and the political effort that was invested, very little has changed with respect to classification policy. The 1997 Moynihan Commission report stated with unusual self-awareness: "We started our work with the knowledge that many commissions and reports on government secrecy have preceded us, with little impact on the problems we still see and on the new

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29. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007).

30. Freedom of Information Act of 1966, 5 U.S.C. § 552(b)(1)(A) (2000).

31. President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (2000).

32. Nazi War Crimes Disclosure Act of 1998, 5 U.S.C. § 552 (2000).

33. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995).

34. See, e.g., PUB. INTEREST DECLASSIFICATION BD., IMPROVING DECLASSIFICATION 5 (2008), available at <http://www.archives.gov/declassification/pidb/improving-declassification.pdf>.



ones we have found.”<sup>35</sup> More than a decade later, the same may unfortunately be said of that commission and its report.

And yet, there are some remarkable exceptions to this discouraging record, namely secrecy reform proposals that produced results that were both tangible and instructive. Closer consideration of these exceptions provides practical guidance for contemporary efforts to control government secrecy.

### III. THE INTERAGENCY SECURITY CLASSIFICATION APPEALS PANEL

One example of a successful secrecy reform was an unexpectedly effective new procedure for reconsidering agency decisions not to declassify and release a document. Executive Order 12,958 established a little-known Interagency Security Classification Appeals Panel (ISCAP) to consider appeals from members of the public whose requests for declassification review had been denied.<sup>36</sup> Even those who devised the ISCAP scheme did not anticipate how well it would perform its assigned task.

The ISCAP is composed exclusively of executive branch officials, including representatives of the major national security agencies that are the most prolific classifiers: the Departments of Defense, State, and Justice; the CIA; the National Security Council; and the National Archives and Records Administration. Bringing these classifiers together to review individual agency classification decisions did not appear to be a radical innovation. But to the surprise of many observers, the ISCAP has proved to be an exceptionally independent and effective check on individual executive branch agency classification practices.

Incredibly, the ISCAP has voted more often than not to declassify records that the originating agency had refused to declassify. Between May 1996 and September 2008, the ISCAP considered appeals concerning 769 documents, and voted to declassify, in whole or in part, 495 of them.<sup>37</sup> In other words, the Panel overruled the classification position of one of its own member agencies in a clear majority (64%) of the cases that were presented to it.

By comparison, one may note that federal courts, which have adopted a deferential posture to the executive branch on national security matters, almost never overturn agency classification decisions. There are no more than a few dozen FOIA cases over the past thirty years in which an agency’s assertion of a classification exemption has been overruled by a court. Even then the decision was reached primarily on technical rather than substantive grounds.<sup>38</sup>

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35. MOYNIHAN COMMISSION REPORT, *supra* note 8, at xxii.

36. Classified National Security Information, 60 Fed. Reg. 19,285 (Apr. 20, 1995).

37. 2008 OVERSIGHT OFFICE REPORT, *supra* note 10, at 19-20.

38. A Department of Justice tally identified only eighteen cases from 1979 to 1995 in which a court ordered disclosure of classified information, and several of those were reversed on appeal. Office of Info. Policy, U.S. Dep’t of Justice, *Litigation Review: History of Exemption 1 Disclosure Orders*, 16 FOIA UPDATE 4 (1995),

Reflecting on the ISCAP's record of granting appeals to declassify agency records, ISCAP Chair Roslyn A. Mazer averred in 1998: "I am confident that had just about all of these appeals been brought before the federal courts under the Freedom of Information Act, the appellant would not have prevailed, and the information would have remained classified unless the agency itself decided to declassify it."<sup>39</sup> But under its own much more forthcoming procedures, ISCAP declassified the contested information.<sup>40</sup>

The ISCAP soon became such a potent tool for challenging classification errors that one member agency, the CIA, sought relief from its jurisdiction. At first the CIA was unsuccessful. In 1999, the Justice Department Office of Legal Counsel produced an opinion that concluded that, contrary to the CIA's position, "the DCI's [classification] determinations are subject to substantive ISCAP review."<sup>41</sup> But then in 2003, the CIA requested and received the authority from President George W. Bush to veto ISCAP decisions declassifying and disclosing CIA information.<sup>42</sup> Such CIA vetoes of ISCAP decisions have been exercised in two reported cases.<sup>43</sup> In recent years, the Panel has amassed a backlog of pending appeals, and it has never had the capacity to address more than a handful of classification challenges. But the ISCAP still retains its overall track record of voting to release information in the majority of classified documents presented to it.<sup>44</sup>

What does the success of this program tell us? I believe that the actions of the ISCAP can best be understood in terms of the three categories of classified information described above: genuine national security secrecy, bureaucratic secrecy, and political secrecy. The ISCAP structure offers a way to winnow out the latter illegitimate forms of secrecy, while preserving its legitimate applications to justifiable ends.

All member agencies within the ISCAP share a commitment to genuine national security secrecy, i.e., the use of classification authority to protect legitimate secrets, and they have affirmed such secrecy whenever they encountered it. Former ISCAP Chair Mazer noted, for example, that, "[the ISCAP] member-

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*available at* [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XVI\\_2/page4.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XVI_2/page4.htm) (last visited Apr. 15, 2009).

39. Roslyn A. Mazer, Chair, Interagency Sec. Classification Appeals Panel, Remarks at the Meeting of the Department of Defense Historical Records Declassification Advisory Panel (Mar. 6, 1998), *available at* <http://www.fas.org/sgp/advisory/iscap/iscap0398.html>.

40. *Id.*

41. Memorandum from the Office of Legal Counsel, Dep't of Justice, to Steven Garfinkel, Dir., Info. Sec. Oversight Office (Oct. 5, 1999), *available at* [http://www.fas.org/sgp/advisory/iscap/olc\\_opinion.html](http://www.fas.org/sgp/advisory/iscap/olc_opinion.html).

42. Exec. Order No. 13,292, 3 C.F.R. 196 § 5.3(f) (2003).

43. See 2008 OVERSIGHT OFFICE REPORT, *supra* note 10, at 20.

44. *Id.* at 19-20.

ship has consistently voted to retain classification of information that would identify a human intelligence source, even after thirty-plus years.”<sup>45</sup> But even though all of the member agencies may also practice their own illegitimate bureaucratic and political forms of secrecy, they evidently have no self-interest at stake in the bureaucratic or political uses of secrecy by other individual agencies. It turns out that they also have no patience for these activities. No federal judge or other external oversight body has been as ruthlessly effective in overturning unjustified classification actions as the ISCAP.<sup>46</sup>

Essentially, the ISCAP process extended declassification authority beyond the agency that classified the information. In doing so, it removed bureaucratic and political self-interest from the equation, making it possible to distinguish legitimate national security secrecy from its impostors and to strip away the latter. This extension of declassification authority, though it may offend the autonomy of individual agencies, has improved the functioning of the overall classification system and is likely to have many other applications.

#### IV. THE FUNDAMENTAL CLASSIFICATION POLICY REVIEW

Another rare innovation in government secrecy policy that produced exceptional results was the Fundamental Classification Policy Review (FCPR) undertaken by the Department of Energy (DoE) in 1995.<sup>47</sup> This process represented a dedicated effort to review, revise, and update the department’s classification guides—the templates for applying classification controls—with the declared intention of reducing the scope of DoE classification.<sup>48</sup>

The FCPR emerged from the “Openness Initiative” led by Energy Secretary Hazel O’Leary. It was a bold effort to reverse the excesses of Cold War secrecy, to modernize the department’s security policies, and to rebuild flagging public confidence in DoE management of the troubled nuclear weapons complex. Secretary O’Leary declassified the complete list of U.S. nuclear explosive tests, released information on the history of U.S. production of plutonium and highly

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45. Roslyn A. Mazer, Chair, Interagency Sec. Classification Appeals Panel, Remarks at the Joint Intelligence Community Information and Classification Management Conference (Nov. 2, 1998), *available at* <http://www.fas.org/sgp/advisory/iscap/mazer98.html>.

46. Courts have been reluctant to challenge executive branch secrecy judgments “for separation of powers reasons, for fear of becoming enmeshed in political questions, and out of concern that the judiciary lacks the expertise to reach appropriate decisions in these areas.” Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 158 (2006). But these concerns are not well founded. *See, e.g., id.* (arguing that the courts’ concerns lack a strong basis).

47. U.S. DEP’T OF ENERGY, REPORT OF THE FUNDAMENTAL CLASSIFICATION POLICY REVIEW GROUP (1997) [hereinafter FCPR REPORT].

48. *Id.* at 3-4.

enriched uranium, and authorized release of previously classified aspects of inertial confinement fusion technology.

One of the more interesting aspects of the FCPR was the way in which it tackled the agency's entire classification infrastructure through an unprecedented systematic critical examination. The mission of the FCPR was to determine "what information must continue to be protected . . . [and] which information no longer requires protection and should be made available to the public . . ." <sup>49</sup> Among the guiding principles was the view that, "[c]lassification must be based on explainable judgments of identifiable risk to national security and no other reason." <sup>50</sup> Thus, "an identified benefit or need is not required to justify declassification and release to the public. Rather, the federal government must establish the reason for classification." <sup>51</sup>

The FCPR was conducted over a one-year period by fifty technical experts from the DoE, national laboratories, and other agencies, divided into seven topical working groups. The reviewers examined thousands of topics in hundreds of DoE classification guides, evaluated their continued relevance, and formulated recommendations for change. Significantly, public input was actively solicited at every stage of the process, from identification of the issues to review of the final draft recommendations. Following their year-long deliberations, the reviewers concluded that hundreds of categories of classified DoE information should be declassified. In some cases, they recommended increased protection for particularly sensitive categories of information. In large part, the reviewers' recommendations were adopted in practice. <sup>52</sup>

Other attempted secrecy reform initiatives tended to use general terms in outlining desired outcomes (e.g., more openness or less classification) or intermediate steps (e.g., legislation or a new executive order). But the FCPR distinguished itself by directly examining the decision to classify thousands of specific categories of information. The reviewers essentially queried: Were those decisions justifiable on genuine national security grounds? If so, they would be upheld. If not, the reviewer would eliminate them.

But perhaps the most remarkable feature of this exercise was that *it mobilized the DoE bureaucracy itself as an agent of secrecy reform and not merely as its object*. The defense mechanisms that would normally be triggered in response to legislative intervention or FOIA litigation—delay, defiance, or mere pro forma compliance—for the most part did not materialize. Instead, the DoE secrecy bureaucracy was effectively reprogrammed with a new mission: reduce secrecy

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49. FCPR REPORT, *supra* note 47, app. A at A-1.

50. *Id.* at 17.

51. *Id.* at 17 n.12.

52. Some declassification recommendations, like the disclosure of locations of historical nuclear weapons depots abroad, were blocked by the Department of Defense. U.S. Dep't of Energy, Fact Sheet: Proposed Declassification of the [Locations of Former Nuclear Weapons Storage] Sites, [http://www.fas.org/sgp/othergov/doe/fs\\_sites.html](http://www.fas.org/sgp/othergov/doe/fs_sites.html) (last visited Apr. 15, 2009).

to the minimum necessary. That objective was satisfied to an unprecedented extent.

## V. THE SECRETS OF EFFECTIVE SECRECY REFORM

Against the desolate backdrop of futile criticism of government secrecy policy that has persisted for decades, the comparatively successful initiatives described above allow some inferences to be drawn regarding the elements of successful secrecy reform that could be applied in the future.

### A. *Secrecy Reform Is Best Pursued at the Agency Level*

Practical secrecy reform is most effectively pursued at the agency level, where secrecy is actually implemented, rather than through abstract or hortatory government-wide statements of policy. The classification issues that arise in each major national security agency are substantively different, as are the associated security cultures. Intelligence agencies are concerned above all with the protection of sources and methods. Military agencies, for example, focus on the security of weapons technology and operational plans. Foreign policy agencies, on the other hand, must weigh the international impacts of classification and declassification.

Each agency that classifies information maintains its own classification guides, specifying in detail exactly what information may be classified and at what level. Furthermore, each agency is prone to overclassify different types of material. It follows that a successful retooling of the classification system must be undertaken where the real classification activity takes place: at the agency level, as the Energy Department's FCPR shows. It is true that revisions to an executive order on classification can signal new directions for the entire executive branch and impose new limits, which are both desirable and necessary. But all such revisions will still need to be translated into concrete procedures.

Despite the centrality of individual agency secrecy procedures, they have been seriously neglected by overseers and reformers. A large fraction of agency classification guides have not been reviewed or updated for years, dating back to before the Bush administration's 2003 revisions to classification policy. "Overall, 67 percent of the guides agencies reported as being currently in use had not been updated within the past five years," according to the Information Security Oversight Office.<sup>53</sup> This means that obsolete secrecy practices are being perpetuated automatically. Therefore, *the single most productive secrecy reform action that could now be undertaken would be to conduct the equivalent of the Fundamental Classification Policy Review at each one of the major classifying agencies.* In other words, the president could achieve a systematic reduction in government secrecy by directing each agency that classifies information to conduct a detailed public review of its classification policies with the objective of reducing secrecy to the essential minimum and declassifying everything that does not

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53. 2008 OVERSIGHT OFFICE REPORT, *supra* note 10, at 23.

meet the standard for classification. Crucially, as with the DoE's FCPR, the agencies themselves would be tasked to lead the secrecy reform process, not simply to endure it passively. Harnessing the bureaucracy in this way minimizes the likelihood of institutional foot-dragging or even sabotage. It could also produce some constructive tension among agencies, as they compete to see which can implement the president's directive most effectively and which can generate the most significant reforms.

*B. Extend Declassification Authority Beyond the Originating Agencies*

If the task of secrecy reform is to disentangle legitimate from illegitimate secrecy and to uphold genuine national security secrecy while reducing and eliminating bureaucratic and political secrecy, then the track record of the ISCAP suggests that the most practical and effective method is to extend declassification authority beyond the agency in which it originated. This is the best way to nullify agency self-interest and purge it from the classification process.

This notion is generally abhorrent to most agencies, which doubt that other federal agencies can truly appreciate the sensitivity of "their" information. The CIA felt so strongly about the possibility that other agencies might order release of its information that it successfully petitioned the President for the authority to veto ISCAP decisions requiring the CIA to declassify information against its will. Nonetheless, something along these lines is essential to break down the self-serving barriers to disclosure produced by bureaucratic, illegitimate secrecy. If one executive branch agency cannot successfully explain to a senior official from another executive branch agency why the national security requires that a certain item be classified, then there is reason to doubt the necessity of its continued secrecy.

There is a dawning awareness that the days of unilateral agency control of information must come to a close. At his 2007 confirmation hearing to become Under Secretary of Defense for Intelligence, Lieutenant General James R. Clapper concurred with the statement that "the information gathered by the various [intelligence] collection agencies, such as CIA, NSA, and DIA, is not 'owned' by those agencies, and those agencies [should] not control decisions about who should get access to collected information."<sup>54</sup> But, he added, those decisions should be controlled by the Director of National Intelligence (DNI). Such change would constitute real progress, though it stops short of addressing overclassification in the Office of the DNI.

*C. Encourage Experimentation and Pilot Projects*

A qualitatively new twenty-first century information security policy that truly serves the national interest will not emerge spontaneously. Rather, it must

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54. *Nominations: Hearings Before the S. Comm. on Armed Servs. on Nominations*, 110th Cong. 465 (2008) (prepared response of James R. Clapper, Jr., Lieutenant General (Ret.), U.S. Air Force).

be approached incrementally in order to win acceptance and to correct initial errors. The process likely will start modestly in one corner of the government and then expand. The possibility of such innovations in security policy should be actively cultivated and encouraged through an officially sanctioned pilot program.

Security policy thus far has tended to be something of an intellectual backwater, where conformity and obedience are prized above all. These qualities have their place, but they need to be leavened by innovation and alertness to the lessons of experience. Small-scale tests of new approaches to information security could be explored at the individual program and agency level, and could be overseen and nurtured by the Obama Administration's new Chief Technology Officer, who is charged with, among other things, promoting transparency.<sup>55</sup>

Almost by definition, innovation cannot be prescribed or institutionalized easily, but it can be rewarded and emulated where appropriate. Successful secrecy reform initiatives such as the FCPR and the ISCAP both began on a limited scale as experiments whose outcomes were uncertain. The FCPR was a one-year process within a single agency. The ISCAP is a low-activity operation that usually meets no more than once per month to consider only one or two dozen cases per year. More experiments and pilot projects in modifying classification policy are needed.

A fundamental transformation of the entire government secrecy system may be out of reach, at least as long as there is no consensus about what form it should take. But a series of small-scale experiments could help shape such a consensus and point to a new direction for the future. What if an agency or a program manager decided to treat documents marked "Confidential" (the lowest of the three classification levels) as unclassified? What if the inspector general at each agency were granted authority to declassify or downgrade any classified document in the agency that he or she concluded no longer required classification? What if all newly declassified documents in one agency were immediately scanned and placed on the agency's website? Tests along these lines could be conducted on a limited scale and in such a way that, even if they went astray, would not incur much damage or expense. No matter the outcome, however, such efforts should provide valuable new insight into the process of innovation in security policy. Many such experiments are possible, and a few might succeed.

#### *D. The Importance of Leadership*

The last lesson that emerges from the intermittent success of secrecy reform is the essential role of high-level leadership. Any agency head might have undertaken an initiative akin to the FCPR, but only Secretary O'Leary did so. The Openness Initiative that she launched seems to have been attributable to idio-

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55. See CONG. RESEARCH SERV., A FEDERAL CHIEF TECHNOLOGY OFFICER IN THE OBAMA ADMINISTRATION: OPTIONS AND ISSUES FOR CONSIDERATION 1 (2009), available at <http://www.fas.org/sgp/crs/misc/R40150.pdf>.

syncratic factors as much as any others. It was true, as she said, that President Clinton had declared: “The more the American people know about their government the better they will be governed.”<sup>56</sup> Though Clinton directed that message to the entire executive branch, Secretary O’Leary was the only one of all the Clinton Administration agency heads who acted on it in a serious and systematic way.

Her actions reflect the Reagan-era maxim: “personnel is policy.”<sup>57</sup> In other words, the choice and placement of competent, motivated government employees is at least as important and influential as the wording of any particular policy statement. Dedicated and skillful personnel can flourish even in a policy vacuum, while obstructionist or incompetent persons can frustrate the most carefully conceived plans. We live in a democracy, but not all of us are “democrats” by instinct or inclination. That is to say, not all of us are equally committed to open, accountable government or to constructive engagement with members of the public. Indeed, some are actually quite hostile to such interaction.

A year ago, I requested a copy of a specific unclassified document from the CIA under FOIA. Despite repeated inquiries, the CIA FOIA staff would not acknowledge receipt of the request for six months. Even months later, this simple request remained open—neither granted nor denied. By contrast, a member of the FOIA staff at the Office of the DNI recently alerted me to the availability of a document that I had not even requested, because she knew I was interested in the subject. The basic difference in orientation reflected in these two encounters cannot be located in specific agency regulations or guidelines. It is a matter of personal characters and attitudes. And so, to a large extent, good personnel will produce good results. This is more easily stated than implemented. Improving the quality of the government workforce is a challenge for many reasons, including financial, educational, and demographic considerations.

When it comes to secrecy reform, though, improvements can be encouraged through employee performance evaluations that reward proper disclosure and through care in the nomination and confirmation process to select those individuals who truly value open government and limited secrecy. Fortunately, the most senior official of all—the President of the United States—has embraced open government as a guiding principle. “Starting today,” President Obama remarked on his first full day in office, “every agency and department should know that this administration stands on the side not of those who seek to withhold information, but those who seek to make it known.”<sup>58</sup> As a result of this confluence of circumstances and personal commitments, there is now fertile ground for a transformation of inherited secrecy practices.

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56. FCPR REPORT, *supra* note 47, at 3.

57. See, e.g., David Frum, *Personnel Is Policy*, NAT’L REV., Oct. 24, 2005, at 17.

58. President Barack Obama, Remarks to White House Senior Staff, 12 DAILY COMP. PRES. DOC. 2 (Jan. 21, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900012.pdf>.



## CONCLUSION

Even in the inner chambers of the national security bureaucracy, it is now acknowledged that the secrecy system is dysfunctional and that its basic concepts are open to question. Remarkably, after more than fifty years of implementing national security classification policy, an internal Intelligence Community study admitted that, “[t]he definitions of ‘national security’ and what constitutes ‘intelligence’—and thus what must be classified—are unclear.”<sup>59</sup> And so, unsurprisingly, the application of those definitions in practice produces murky results.

There is no disagreement in any domain that robust public access to government information is an essential characteristic of a vital democracy. Nor, on the other hand, is there any dispute that some types of government information require protection on national security grounds. Beyond these points, however, consensus gives way to confusion, inertia, and the weight of past practice. In 2007 and 2008, for example, the total budget for the National Intelligence Program was declassified, pursuant to legislation recommended by the 9/11 Commission. But earlier this year, the DNI rejected a request for disclosure of the 2006 intelligence budget total, declaring that it is properly classified.<sup>60</sup> How can that be, when more recent information is freely disclosed? No sensible answer is forthcoming.

As a result of this incoherence and the mounting dissatisfaction with classification policy, the government secrecy system is now ripe for reform. The Obama Administration’s emphatic commitment to “creating an unprecedented level of openness in Government”<sup>61</sup> provides the needed impetus for the reform process. If current reform efforts are to succeed, this Essay has argued that today’s reformers must recognize the failures of the past and learn the lessons of our occasional successes. Rhetorical statements of principle are fine and necessary. In order to change classification practice, though, it will be necessary to revise the classification process itself.

The alternative to indiscriminate secrecy is not indiscriminate openness. Rather, the new Administration should undertake a thoughtful, critical, and open review of individual agency classification guides to redefine the scope of national security secrecy in light of current geopolitical and technological realities. Nothing should ever be classified in the absence of an identifiable threat to national security. Declassification authority must be extended beyond the origi-

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59. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY CLASSIFICATION GUIDANCE FINDINGS AND RECOMMENDATIONS 11 (2008), *available at* <http://www.fas.org/sgp/othergov/intel/class.pdf>.

60. Letter from Ronald L. Burgess, Jr., Dir. of the Intelligence Staff, Office of the Dir. of Nat’l Intelligence to author (Jan. 14, 2009), *available at* [http://www.fas.org/blog/secrecy/2009/01/odni\\_denies.html](http://www.fas.org/blog/secrecy/2009/01/odni_denies.html).

61. Memorandum for the Heads of Executive Dep’ts & Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment/](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/).

nating agency so as to mitigate the tendency toward bureaucratic secrecy. Other checks and balances on classification could be added to provide opportunities to identify and correct classification errors. Innovations and experiments in security policy should be promoted to identify fruitful directions for system-wide reform. “[T]here is a tendency to use the classification system to protect information which is not related to the national security,” the Coolidge Committee observed in 1956, offering a familiar complaint that might have been uttered yesterday.<sup>62</sup> According to its members, “[t]his constitutes an abuse of the classification system . . . and tends to destroy public confidence in the system.”<sup>63</sup> A solution to such classification abuse is long overdue, and now is finally within reach. The benefits of renewed sunlight for the health of our democracy are likely to be abundant.

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62. COMMITTEE ON CLASSIFIED INFORMATION REPORT, *supra* note 7, at 4.

63. *Id.*