

## **Overclassification**

The United States has had in place since 1940 a formal system of classification that allows the U.S. government to restrict as secret certain areas of information or scientific research for purposes of national security. Only select individuals with both security clearance as well as a demonstrated "need to know" can obtain access to classified information. Institutions, including universities, that house classified research must follow strict guidelines, and sometimes a separate, stand-alone facility is required.

Over the last six decades, fierce debate has raged over what information should be classified, who should have access to it, and how unnecessary restrictions on freedom of research and scientific progress can be avoided. There have been many documented cases where the government has used its classification authority illegitimately to cover up mistakes and avoid public scrutiny.<sup>1</sup>

There is no question that some kind of classification system is necessary to protect national security. Clearly, there are certain limited circumstances in which government secrecy is needed — and within those circumstances lie hard cases where the question of whether to err towards secrecy or openness requires keen judgment.

The current situation, however, does not involve hard cases. Instead, what we are witnessing is an era of excessive secrecy marked by sweeping overclassification, reclassification and delayed declassification.

A classification system gone wild can harm scientific and academic freedom in at least two ways. First, classification itself is inherently in tension with the freedom of inquiry and expression that scholarship depends upon. Any information marked "classified" cannot be accessed, analyzed or commented on by the vast majority of researchers and scholars who have not obtained security clearance. Overclassification exacerbates this fundamental problem by unnecessarily removing information from circulation. Second, when a perceived need for more classified research prompts a government to reallocate federal funding of basic research towards classified research, the scientific enterprise can suffer major disruptions. Avenues of important basic research may be discontinued and researchers who choose to remain in open, academic research environments left to compete for diminishing sources of funds.

Today's research community is experiencing both of these side effects of excessive classification. Unfortunately, while historical abuses of classification have made clear that classification must remain the exception rather than the rule, and that restrictions on research should remain precise and narrowly defined, the current administration has failed to heed this lesson.

### **A rising tide of secrecy**

Since 9/11, the Bush Administration has moved aggressively to expand the government's classification authority. Through a 22-page executive order issued by President Bush

<sup>1</sup> In one sad example that reached the Supreme Court in 1948, the government insisted that disclosing a flight accident report to the families of dead soldiers would jeopardize secret military equipment and harm national security. It was not until 2004 that the truth finally emerged: the accident report was devoid of any information warranting secrecy, but did confirm what the families had suspected and deserved to know all along — the cause of the crash was faulty maintenance of the B-29 fleet. See *United States v. Reynolds*, 345 U.S. 1 (1953). See also Marcella Bombardieri, "Victim's daughter says US lied about crash," *Boston Globe*, 18 March 2003.

in March 2003 that swept away a highly successful Clinton-era declassification program,<sup>2</sup> as well as other measures, the Bush Administration has:

- **Extended classification authority to new agencies.** President Bush extended classification authority to several federal agencies that previously lacked it, including the Departments of Agriculture and Health and Human Services, and the Environmental Protection Agency. Each of these agencies funds research in a broad range of scientific areas, much of it carried out on university campuses.
- **Encouraged retroactive and reclassification.** A 2001 Bush Administration memorandum to the heads of all federal agencies obliged all agencies to classify any information that could "reasonably be expected to assist in the development or use of weapons of mass destruction" — including information that had never been classified or had already been declassified.
- **Created a presumption of secrecy.** Under President Clinton's declassification program, agencies were instructed to release information unless there was a strong reason not to. Bush's executive order, on the other hand, declares that "unauthorized disclosure of foreign government information is presumed to cause damage to the national security."<sup>3</sup> In short, Bush flipped the presumption of openness to a presumption of secrecy, thereby

encouraging rather than counteracting the unfortunate tendency of government agencies to keep information hidden from the public.

- **Lengthened classification periods.** Bush's Executive Order makes it easier for the government to classify information for longer periods of time. Under Clinton, deadlines were imposed for the automatic declassification of classified documents. For example, an agency wanting to classify information for more than 10 years had to show that a release of the information could reasonably be expected to harm national security in one of nine specific ways. The Bush executive order eliminates this provision and allows officials to classify information for up to 25 years if the classification is merely warranted by "the sensitivity of the information."<sup>4</sup>
- **Reallocated federal resources towards classified research and away from basic university research.** The Defense Advanced Research Projects Agency (DARPA) at the Pentagon recently reported that while their budget for computer science research had risen since 2001, the portion going to university researchers had been cut nearly in half.<sup>5</sup> Similarly, in the area of biodefense, the government has funneled millions of federal dollars into the construction of at least four new, high-security "biosafety level 4" laboratories for the conduct of research on the most dangerous and exotic pathogens,

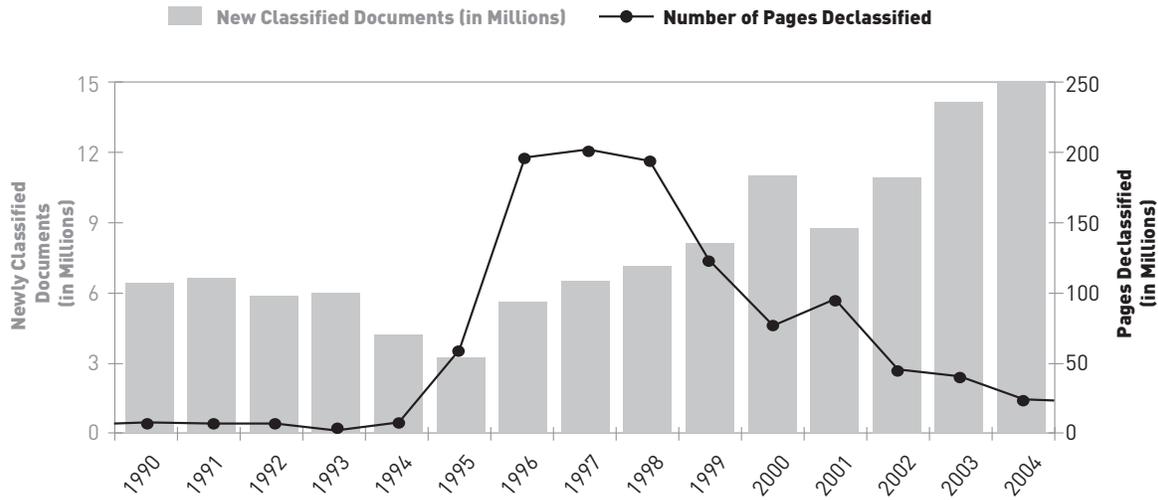
<sup>2</sup> Within its first six years Clinton's order resulted in the declassification of more than five times the number of records that had been declassified in the previous 14 years. *Public Citizen*, "Analysis of Executive Order 13292." Available at: <http://www.bush-secrecy.org/page.cfm?PagesID=31&ParentID=4&CategoryID=4>.

<sup>3</sup> Executive Order 13292, Section 1.1(c). Available at: <http://www.fas.org/sgp/bush/eoamend.html>.

<sup>4</sup> *Ibid.*, Section 1.5(b).

<sup>5</sup> DARPA's overall budget for computer science research increased from \$546 million in 2001 to \$583 million in 2004, while the portion of this funding going to university researchers fell from \$214 million to \$123 million. See Markoff, John, "Pentagon Redirects Its Research Dollars," *New York Times*, 2 April 2005.

## U.S. Classifies More, Releases Fewer 'Old Secrets'



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while funding for basic microbiology and genetics research at universities has declined.<sup>6</sup>

### Evidence of abuse

Evidence that expanded classification authority is being overused and abused is already plentiful. According to the government's own statistics, classification rates have consistently increased under the Bush Administration. During the first two years after 9/11, classification rates were twice that of the Clinton Administration.<sup>7</sup> And 2004 marked a record high: 15.6 million records were classified —

a ten percent increase over 2003.<sup>8</sup>

At the same time, declassification rates have dramatically declined. Since 9/11, declassification rates have fallen by 72%, and fewer pages of secret material were declassified in 2004 than in any other year of the past decade.<sup>9</sup>

Several senior government officials have admitted that much of this secrecy is unnecessary.<sup>10</sup> In August, 2004, J. William Leonard, Director of the National Archives' Information Security Oversight Office, testified that the amount of information that should never have

<sup>6</sup> Check, Erika, "Protest letter accuses health agency of biodefense bias," *Nature*, 1 March 2005. Available at: <http://news.nature.com/news/2005/050228/434007a.html>.

<sup>7</sup> Schmitt, Christopher H. and Edward T. Pound, "Keeping Secrets," *U.S. News & World Report*, 12 December 2003. Available at: <http://www.howardlabs.com/12-03/Keeping%20Secrets.html>. See also OMB Watch, "Bush Administration Suppressing Documents in Classification Frenzy," 22 March 2004. Available at: <http://www.ombwatch.org/article/article-view/2099/1/210/>.

<sup>8</sup> Information Security Oversight Office (ISOO), *Report to the President 2004*, 31 March 2005, p. 3. Available at: [http://www.archives.gov/isoo/reports/2004\\_annual\\_report.html](http://www.archives.gov/isoo/reports/2004_annual_report.html).

<sup>9</sup> The Fund for Constitutional Government, *Secrecy Report Card: An Update*, 5 April 2005. Available at: [www.openthegovernment.org](http://www.openthegovernment.org).

<sup>10</sup> Information Security Oversight Office (ISOO), *Report to the President 2003*, 31 March 2004, p. 6. Available at: [http://www.archives.gov/isoo/reports/isoo\\_reports.html](http://www.archives.gov/isoo/reports/isoo_reports.html).

been classified in the first place is "disturbingly increasing, where information is being classified that is in clear, blatant violation of the order" and that over 50% of the information classified "really should not be classified."<sup>11</sup>

In the meantime, the government's reallocation of federal funding towards classified research has severely affected many of America's scientists and engineers. Many university researchers have had their funding discontinued or have been squeezed out by diminishing federal support for basic research.<sup>12</sup> And as a larger portion of scientific research is driven into secrecy, open communication is hampered and our ability to respond to an act of terrorism or other public health threat is placed at risk.<sup>13</sup>

Classification has always been highly subjective, inconsistent, and susceptible to abuse, but these problems have intensified sharply under this administration. The full effects of overclassification are difficult to measure, due to the secret nature of the information itself. Nonetheless, it is clear that rampant overclassification will do nothing to protect national security. Instead, it can infringe on security by suppressing information that should be readily shared, obscuring research that should remain transparent, and by diluting respect for the laws protecting the narrower range of information that is deserving of real protection.

### **"Sensitive But Unclassified" Information**

An even more ominous assault on the free flow of information is the creation of a broad category of restricted information, referred to as "sensitive but unclassified." Classification, despite its rampant overuse, is at least subject to a limited set of fairly well-specified rules, within which debates over public access to a particular piece of information or research can take place. By comparison, the move to designate whole areas of research or knowledge as "sensitive" based on only the vaguest criteria is a recipe for runaway secrecy with especially grave implications for scientific research and communication.

### **Cold War revisited**

The effort to stamp certain unclassified information as "sensitive" is not new. Various federal agencies have used a number of designations to identify unclassified information as sensitive, such as "Official Use Only," "Limited Use Only," or "Law Enforcement Sensitive." Until recently, however, these designations have been narrowly applied.

The strongest push to designate vast categories of information as "sensitive" came in 1982, when the U.S. Department of Defense (DOD) proposed a set of broad constraints on scientific information. These included outright bans on the dissemination of some unclassified research results as well as denial of foreign nationals' access to "sensitive" research facilities and campuses.

<sup>11</sup> J. William Leonard, Response to question raised by Rep. Shays, "Too many secrets: A House Government Reform Subcommittee Hearing on Over-classification," 24 August 2004. Hearing transcript available at: <http://www.fas.org/sgp/congress/2004/082404transcript.html>.

<sup>12</sup> Markoff 2005.

<sup>13</sup> A letter signed by 750 individuals — including two Nobel laureate and seven past presidents of the American Society for Microbiology — warned that current biodefense federal funding patterns are a detriment to the U.S. national interest and threaten public health. *See* Check 2005.