

**Hearing on
Classification of National Security Information and its Implications for the
Intelligence Community**

**United States House of Representatives
Permanent Select Committee on Intelligence
Subcommittee on Intelligence Community Management**

Statement of Meredith Fuchs, General Counsel, National Security Archive
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Chairwoman Eshoo, Ranking Member Issa and Members of the Subcommittee on Intelligence Community Management, I am pleased to appear before you to discuss the issue of classification and declassification of national security information.

I am General Counsel to the National Security Archive (the "Archive"), a non-governmental, non-profit research institute. The Archive is one of the most active and successful non-profit users of the Freedom of Information Act (FOIA) and the Mandatory Declassification Review (MDR) system. We have published more than half a million pages of released government records, and our staff and fellows have published more than 40 books on matters of foreign, military, and intelligence policy. In 1999, we won the prestigious George Polk journalism award for "piercing self-serving veils of government secrecy" and, in 2005, an Emmy award for outstanding news research.

Skeletons in the Closets

Two weeks ago the Central Intelligence Agency (CIA) declassified a 702-page file amassed in 1973 at the order of then-CIA director James Schlesinger about the CIA's illegal activities – the so-called "family jewels." It was released pursuant to a FOIA request filed 15 years ago by my organization. There was plenty of news coverage about the release. I won't take time today to recount the details of illegal wiretapping, domestic surveillance, assassination plots, and human experimentation acknowledged in the file. The CIA deserves credit for actually reviewing and releasing portions of these records as the FOIA obliges it to do; the Agency is not always so diligent in fulfilling its FOIA obligations. Instead I want to focus on a broader issue about why it is important for records about our government's misdeeds and mistakes to be made available to the public.

For one thing, the law requires the release. When Congress passed the FOIA in 1966 and President Lyndon Johnson reluctantly signed it into law, the President declared that: "A democracy works best when the people have all the information that the security of the nation will permit." Under the FOIA, agencies are supposed to respond to a request for documents within 20 business days. Yet it took some bad publicity about FOIA delays up to 20 years, some pressure from Congress in the form of the OPEN Government Act of 2007 – which awaits a Senate vote – and a presidential executive order (E.O. 13392) directing agencies to handle backlogs for this request to finally reach

the front of the queue. A central tenet of the FOIA is that in a democracy, the people have a right to know what their government is doing. Congress passed FOIA because the government bureaucracy, reluctant to have anyone scrutinizing its work, was resistant to public requests for information. The law is tool for individuals to demand records of agency activities so that those agencies will be more accountable and make better decisions in the future.

The second reason it is important for agencies to release records like the “family jewels” is that in a mature democracy such as ours, opening up to scrutiny vital parts of our country's recent history builds trust in government institutions and reaffirms their legitimacy. For an agency like the CIA, subject to attack concerning activities such as transporting detainees to secret prisons around the world, the release of the “family jewels” seems to be an attempt to draw a clear line between the past and the present. The acknowledgment of wrongdoing is like an act of atonement and suggests the intent to reform bad practices. The message to the public is that the Agency is not unaccountable.

A third reason the release is important is it allows people to understand what has happened in the past and reminds people that abuses can occur if there is no oversight. A functioning democracy needs an informed citizenry armed with the tools and knowledge to play their role in the political system. Finally, the “family jewels” helps us better understand the thinking of many current government officials who first served in government policy positions in the 1970s, including those who were not happy about the congressional reforms enacted in the 1970s and the weakening of executive branch power.

The Explosion of Secrecy

I would like to return to President Johnson’s statement when he signed the FOIA. He did not promise complete openness, but only such openness as the security of the nation permits. We all know secrecy is necessary to avoid providing our enemies with means to harm us, to enable us to forcefully negotiate with foreign governments, and to ensure that the sources and methods of intelligence gathering are protected. The protection of these sorts of secrets is primarily governed by Executive Order 12958, as amended, and a series of provisions in statutes governing the intelligence community.

The available statistics show that there has been a dramatic upsurge in this sort of government secrecy since the September 11 attacks on the United States. Classification has multiplied, reaching an all-time high of 15.6 million classification actions in 2004, nearly double the number in 2001, and was at a level of 14.2 million classification actions in 2005.¹ Moreover, the cost of the program has skyrocketed from an estimated \$4.7

¹ ISOO, 2004 Report to the President at 3 (2005), <http://www.archives.gov/isoo/reports/2004-annual-report.pdf>; ISOO, 2005 Report to the President at 2 (2006), <http://www.archives.gov/isoo/reports/2005-annual-report.pdf>.

billion in 2002 to \$7.7 billion in 2005.² At the same time, declassification activity shrank from a high of 204.1 million pages declassified in 1997, down to 29.5 million pages declassified in 2005.

Officials from throughout the military and intelligence sectors have admitted that much of this classification is unnecessary. Secretary of Defense Donald Rumsfeld acknowledged the problem in a 2005 *Wall Street Journal* op-ed: “I have long believed that too much material is classified across the federal government as a general rule”³ The extent of over-classification is significant. Under repeated questioning from members of Congress at a hearing concerning over-classification, Deputy Secretary of Defense for Counterintelligence and Security Carol A. Haave, eventually conceded that approximately 50 percent of classification decisions are over-classifications.⁴ These opinions echoed that of Porter Goss, then Chair of the House Permanent Select Committee on Intelligence, and later Director of Central Intelligence, who told the 9/11 Commission, “we overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them.”⁵

There are many reasons for the increased numbers of secrets and the increase in costs associated with the national security classification program. We are at war and are highly conscious of the need to prevent terrorist attacks. Yet, what about the unnecessary secrets that clog up the security classification system without offering any additional security? Those unnecessary secrets come at a greater price than the money it costs to protect them.

The Director of the Information Security Oversight Office (ISOO), the governmental agency responsible to the President for policy oversight of the government-wide security classification system and the National Industrial Security Program, who is testifying today, has called secrecy a “double edged sword.”⁶ While classification serves the purpose of keeping information out of the hands of the enemy, it also sometimes

² ISOO, *2005 Report on Cost Estimates for Security Classification Activities for 2005* at 3 (2006), <http://www.archives.gov/isoo/reports/2005-cost-report.pdf>; ISOO, *2001 Report to the President* at 9 (2002), <http://www.archives.gov/isoo/reports/2001-annual-report.pdf>.

³ Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12.

⁴ *Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Gov't Reform Hearing*, 108th Cong. (2004) (testimony of Carol A. Haave), <http://www.fas.org/sgp/congress/2004/082404transcript.pdf>; *See id.*, (Testimony of J. William Leonard, Director of ISOO) (“It is my view that the government classifies too much information.”).

⁵ *9/11 Commission Hearing*, (Testimony of then Chair of the House Permanent Select Committee on Intelligence Porter Goss) (2003), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

⁶ *Emerging Threats: Overclassification and Pseudo-classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. (2005) (statement of J. William Leonard, Director, ISOO, Nat'l Archives and Records Admin.), [http://reform.house.gov/UploadedFiles/ISOO Leonard testimony final 3-2-05 hearing.pdf](http://reform.house.gov/UploadedFiles/ISOO%20Leonard%20testimony%20final%203-2-05%20hearing.pdf).

keeps it out of the hands of friends or allies who could use it to protect us. Too much secrecy conceals our vulnerabilities until it is too late to correct them. Indeed, all of the inquiries concerning the September 11 attacks on the United States found that better information dissemination would have made us safer. It is not only government agencies who must share information with each other, but agencies must learn to share information with the public. As Eleanor Hill, Staff Director of the Joint House-Senate Intelligence Committee Investigation into September 11 Attacks, explained in a Staff Statement summarizing the testimony and evidence:

[T]he record suggests that, prior to September 11th, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public. One needs look no further for proof of the latter point than the heroics of the passengers on Flight 93 or the quick action of the flight attendant who identified shoe bomber Richard Reid.⁷

There are other costs to keeping the public in the dark. Dissemination of information has always been critical for advancing technological and scientific progress. When considering the option of making the genome databases secret, even though the data could be used to engineer pathogens for use as biological weapons, the National Academy of Sciences concluded:

[A]ny policy stringent enough to reduce the chance that a malefactor would access data would probably also impede legitimate scientists in using the data and would therefore slow discovery. . . . It is possible that the harm done during a process of negotiating such an agreement—through building walls of mistrust between peoples—would be greater than the benefit gained through the sense of security that such a regime might provide. Finally, such a restrictive regime, the committee believes, could seriously damage the vitality of the life sciences... There is some concern that restricting access to this information might lead to a situation in which the mainstream scientific community is unaware of dangers that may threaten us.’’⁸

Moreover, overclassification and unneeded secrecy also undermine the effort to keep truly sensitive information secret, “[f]or when everything is classified, then nothing

⁷ *Intelligence Community’s Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001: Hearing Before the J. H./S. Intelligence Comm.*, 107th Cong. (2002) (Joint Inquiry Staff Statement, Eleanor Hill, Staff Dir.), <http://intelligence.senate.gov/0210hr/021008/hill.pdf>.

⁸ See, e.g., Nat’l Acad. of Sciences, *Seeking Security: Pathogens, Open Access, and Genome Databases* 54-57 (2004), <http://www.nap.edu/books/0309093058/html/52.html>.

is classified, and the system becomes one to be disregarded by the cynical or careless, and to be manipulated by those intent on self-protection or self-promotion.”⁹

If secrecy comes with so many costs, why is there so much unnecessary secrecy? Secrecy can be used as a tool by the government in many ways. When claims of national security secrecy are plausible, secrecy often allows the government to enforce policies that otherwise would be unthinkable. Often, the claim of secrecy ends any public inquiry into allegations of misconduct, as well as any governmental liability. We see this today in the context of the warrantless wiretapping program initiated after September 11, 2001. To date there has been minimal success challenging the program despite confirmation of the program and signs of official concern about the illegality of the program.

Perhaps an even stronger motivation is that by controlling information through classification and selective declassification, the government also has the ability to control public opinion and avoid embarrassment. As former Solicitor General of the United States Erwin Griswold, who led the government’s fight for secrecy in the Pentagon Papers case, acknowledged:

It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.¹⁰

Controlling Excessive Secrecy

Today, all power for creating and holding secrets rests with a small group of executive branch agencies. While there is no doubt that the individual agency-centered approach allows for agencies to exercise independent judgment, the unilateral nature of the decision-making allows excessive secrecy to permeate individual agencies unchecked. When that happens, all of the worst features of turf consciousness and bureaucratic inertia come into play.

One solution is to disperse the power, particularly with respect to historic materials where the passage of time and events has made it less necessary for one agency to jealously control all information. The Moynihan Commission, for example, recommended setting up a formal Declassification Center based at the National Archives

⁹ *New York Times Co.*, 403 U.S. at 729 (Stewart, J., concurring).

¹⁰ Erwin N. Griswold, *Secrets Not Worth Keeping: The courts and classified information*, Wash. Post, Feb. 15, 1989, at A25.

and Records Administration (NARA) and staffed by an interagency group with delegated powers from their agencies.¹¹ The National Declassification Initiative (NDI) that emerged last year, only after my organization, working with historian Matthew Aid, exposed the unilateral reclassification by agencies of historical materials that had been publicly available for years, goes part of the way to making this idea a reality. The NDI is sponsored by NARA. By harnessing the combined resources and expertise of many different agencies, the NDI could speed access to insightful historical documents for researchers and the general public. However, the NDI's underlying innovation—the establishment of a comprehensive, interdepartmental declassification review capability for the federal government—could prove to be a serious flaw. The concentration of declassification activities in one location presents the risk that official declassification will fall prey to an unhealthy consensus, built upon the worst disclosure fears of individual agencies rather than principles of increased transparency and public access. As NARA itself has noted, “the biggest impediments to the NDI are culture, attitude, and resistance to change” on the part of participating Executive Branch agencies.¹²

One method of countering this tendency towards group think would be to establish a non-partisan, non-governmental board of private citizens to represent the interests of professional researchers, historians, and the general public in the declassification process of the NDI. Such a board could serve as a conduit for public input and oversight. There are models for such a board, including those authorized by Congress in the President John F. Kennedy Assassination Records Collection Act of 1992 and the Nazi War Crimes Disclosure Act. Another model would be the establishment of a statutory independent review board at every agency with classification authority. The State Department's Advisory Committee on Historical Diplomatic Documentation offers an example of how such a board can be successful in pushing out of the system the secrets that do not need keeping.

The NDI and statutory independent review boards are well suited to breaking down the excessive control that agencies have exerted over historical records. Yet, historical records will still clog up the system because they are subject to the same type of review as current records. To illustrate the problem, consider the myth of automatic declassification. As of January 1 of this year, over 1 billion pages of records had been declassified under the provisions of Executive Order 12958, as amended. Yet, none of us can stroll into the National Archives and get to see those records. All the newly declassified records still must be processed by NARA before they will be made available to the public at NARA research facilities. Each of those records essentially has to go through standard FOIA review before it can be released for the public. That is the same review that in some cases has held records for up to 20 years after a FOIA request is made. A historical records review act that would alter the standard for review and withholding of records older than 25 years could end the bottleneck. Like the Nazi War Crimes Disclosure Act and the John F. Kennedy Assassination Records Review Act, which altered the standards for review and withholding of records older than 25 years,

¹¹ Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2 (1997), at Ch. 3.

¹² See <http://www.archives.gov/declassification/challenges.pdf>.

such an act would serve the public interest in such materials without compromising any significant protected interests.

In addition, changes to the Executive Order on classification could lead to less unnecessary classification. In 1995, President Clinton issued Executive Order 12958, which overhauled the national security classification system by (1) employing a presumption against classification; (2) emphasizing limited duration of classification; (3) providing for increased declassification; and (4) providing for oversight of the classification system.

Executive Order 13,292, issued in March 2003, retains most of the structure of the 1995 Order but modifies many of the critical provisions in ways that encourage greater secrecy. In particular:

- It made it easier to extend periods of classification for unlimited periods of time.
- It made it possible for agencies to reclassify previously declassified information.
- It added a presumption that "unauthorized disclosure of foreign government information is presumed to cause damage to the national security."
- It eliminated provisions designed to discourage unnecessary classification and to maintain the lowest level of classification that is necessary.
- It postponed the automatic declassification of historical records more than 25 years old.
- The new order preserves the Interagency Security Classification Appeals Panel (ISCAP), an innovation of the 1995 Order. ISCAP is an interagency panel with the authority to review decisions made by agencies in the context of automatic declassification exemptions, challenges to classification decisions by holders of classified information, or mandatory declassification review requests. However, the new order limits ISCAP's authority by permitting the Director of Central Intelligence (DCI) to reject Panel rulings.

Although several of these provisions could be amended to better limit unnecessary secrets, I want to touch for a moment on the last of these changes. ISCAP has proved to be an effective way to handle challenging classification decisions. Because the membership is limited to agencies with classification authority, it is the only forum in which the public can have confidence that the true reasons for maintaining classification are provided. Yet, despite the expertise and conscientiousness of the members of ISCAP, the amendments to Executive Order 12958 provided that ISCAP decisions could be overridden by the Central Intelligence Agency. Prior to the amendment providing for the CIA veto authority, ISCAP functioned without any resulting harm to national security. There was adequate protection to true secrets in the system because any agency that did not agree with ISCAP's decision could itself appeal to the President of the United States. On two occasions, the DCI has vetoed ISCAP decisions and the Panel has appealed to the President. In one of those instances, the matter was mooted out by the Agency later declassifying the document in its entirety late that year.

In the final analysis, we must understand and accept that openness empowers our citizens, weeds out imprudent policy proposals, ensures the most efficient flow of information to all levels of law enforcement, and keeps our means more consistent with our ends. We must build into all of our secrecy systems multiple provisions for cost-benefit analysis, audits, oversight offices, cost accounting, and independent reviews.

I am hopeful that my testimony today has offered a glimpse into the importance for oversight over the national security classification system and the need for increased efforts to declassify records. I am grateful for your interest in these issues and am happy to respond to any questions.

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act litigation, advocates for open government, and frequently lectures on access to government information. She has supervised six government-wide audits of federal agency policy and performance under federal disclosure laws, including one relating to the proliferation of “sensitive but unclassified” document control policies at federal agencies. She is the Secretary of the Board of Directors of the American Society of Access Professionals (ASAP), a private professional association of FOIA personnel who serve throughout the federal government. She is the author of “Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy,” 58 Admin. L. Rev. 131 (2006); and “Greasing the Wheels of Justice: Independent Experts in National Security Cases,” 28 Nat’l Sec. L. Rep. 1 (2006).

Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP, where she was a member of the Litigation, Insurance, Privacy and E-Commerce practice groups. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. from the New York University School of Law.