An Inquiry into the Dynamics of Government Secrecy

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On his first full day in office, President Obama famously committed his Administration to "creating an unprecedented level of openness in Government."[1] This commitment was itself unprecedented. Never before had an incoming President singled out openness as an essential, even paramount, quality of good government and adopted it as his virtual trademark.

In an implicit rebuff to the secrecy policies of the previous Administration, the President said such openness would have to be "created" — it did not yet exist. But he assured Americans it would come to pass. "We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration."[2]

This presidential pledge at first seemed to herald a new dawn of open government. Freedom of information advocates anticipated sharp reductions in official secrecy and substantial reforms in the classification system by which the government determines whether to withhold national security–related information from public disclosure. Soon, however, as idealized scenarios of openness went unrealized and familiar patterns of official secrecy persisted and grew, the President's commitment came to inspire disappointment, then criticism, and finally bitter mockery.[3]

Critics noted that the volume of secret information and the number of classification actions remained dysfunctionally high,[4] that backlogs of unanswered Freedom of Information Act ("FOIA") requests were growing rather

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[1] Presidential Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf.

[2] *Id.*

[3] *See, e.g.*, James Ball, *Obama Administration Struggles to Live Up to Its Transparency Promise,* Post *Analysis Shows*, Wash. Post (Aug. 3, 2012), http://www.washingtonpost.com/world/national-security/obama-administration-struggles-to-live-up-to-its-transparency-promise-post-analysis-shows/2012/08/03/71172462-dcae-11e1-9974-5c975ae4810f_story.html; Mike Riggs, *Obama: Transparently Disappointing*, Reason, http://reason.com/archives/2012/11/14/obama-transparently-disappointing (last visited Mar. 15, 2013).

[4] Nancy E. Soderberg, *Letter to the President*, *in* Pub. Interest Declassification Bd., Transforming the Security Classification System iv (2012), *available at* http://www.archives.gov/declassification/pidb/recommendations/transforming-classification.html ("The system is compromised by overclassification . . . ."). *See generally* OpenTheGovernment.org, Secrecy Report 2012: Indicators of Secrecy in the Federal Government (2012), *available at* http://www.openthegovernment.org/sites/default/files/Secrecy2012_web.pdf (providing numerical measures of secrecy-related activity).

than shrinking in many cases,[5] that the Administration was employing the espionage statutes with new intensity to criminalize unauthorized disclosures to the press,[6] and that official reliance on the state secrets privilege to shield certain controversial government actions was effectively unchanged.[7]

For its part, the White House insisted that "the Administration has done much to make information about how government works more accessible to the public."[8] It pointed to new initiatives to make previously inaccessible data sets available online, efforts to streamline FOIA implementation, the development of agency "Open Government Plans," and more.[9] Overall, it said, "measurable progress" had been made towards fulfilling "the President's commitment to unprecedented openness."[10]

In a trivial sense, one could say that "unprecedented openness" has actually been achieved: all indications are that a greater volume of information about the U.S. government has been made more easily available to more people than ever before, if only by virtue of the passage of time. But also in a non-trivial sense, there have been substantial breakthroughs in openness on some vital topics — such as intelligence spending and nuclear weapons policy[11] — that had been fought over inconclusively for decades.

To some extent, critics and defenders of Administration "openness" are talking past each other, and to some extent each side has a case to make.

This Article reviews selected aspects of secrecy policy in the Obama Administration to better comprehend the dynamics of official secrecy, particularly in the national security realm. An understanding emerges: secrecy policy is founded on a set of principles so broadly conceived that they do not provide unequivocal guidance to government officials who are responsible for deciding whether or not to classify particular topics. In the absence of such guidance, individual classification decisions are apt to be shaped by extraneous factors, including bureaucratic self-interest and public controversy. The lack of clear guidance has unwholesome implications for the scope and operation of the classification system, leading it to stray from its legitimate national security foundations. But an insight into the various drivers of classification policy also suggests new remedial approaches to curtail inappropriate secrecy.

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[5] *Eight Federal Agencies Have FOIA Requests a Decade Old, According to Knight Open Government Survey*, NAT'L SEC. ARCHIVE (July 4, 2011), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB349/index.htm.

[6] Phil Mattingly & Hans Nichols, *Obama Pursuing Leakers Sends Warning to Whistle-Blowers*, BLOOMBERG NEWS (Oct. 17, 2012, 8:01 PM), http://www.bloomberg.com/news/2012-10-18/obama-pursuing-leakers-sends-warning-to-whistle-blowers.html.

[7] John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES (Feb. 9, 2009), http://www.nytimes.com/2009/02/10/us/10torture.html.

[8] THE WHITE HOUSE, THE OBAMA ADMINISTRATION'S COMMITMENT TO OPEN GOVERNMENT: STATUS REPORT 1 (2011), *available at* http://www.whitehouse.gov/sites/default/files/opengov_report.pdf.

[9] *Id.*

[10] *Id.*

[11] *See infra* Parts II and III.

I. The "Many Interpretations" of National Security Secrecy

On the surface, the justification for national security secrecy seems straightforward: there are undoubtedly circumstances in which withholding information from broad dissemination necessarily fosters or reinforces security. This justification is clearly applicable, for example, when it comes to protecting the identities of confidential intelligence sources, the details of ongoing military operations, or the design details of advanced military technologies. In many other cases, however, the national security justification for secrecy is uncertain or probabilistic, setting the stage for disagreements over its necessity.

"[T]hroughout 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," stated the preamble to President Obama's Executive Order 13526, which set the terms of the present classification system.[12]

But proceeding further into the executive order, and inquiring more deeply into the rationale for secrecy, one soon finds a diminution of clarity and precision. The principal condition for imposing classification is that "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage."[13]

What is "damage to the national security"? The terms involved are broad and vague. "National security" is defined as the national defense or foreign relations of the United States, and "damage" simply is defined as harm.[14]

These definitions grant all but unlimited discretion to classification officials. Whatever government information classifiers "reasonably" expect could cause damage (or harm) to the national defense or foreign relations if disclosed without authorization is eligible for classification. While they must be "able" to describe the anticipated damage, they need not do so in fact.

Interestingly, a predecessor order issued by President Nixon actually provided concrete examples of the sort of potential damage resulting from disclosure that would justify a "Top Secret" classification of the information to be withheld: "[A]rmed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communication intelligence systems; the revelation of sensitive intelligence op-

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[12] Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010).
[13] *Id.*
[14] *Id.* at 727, 729.

erations; and the disclosure of scientific or technological developments vital to national security."[15] The order directed that "[t]his classification shall be used with the utmost restraint."[16]

These particularized consequence scenarios provided a degree of focus and a much more substantial basis for assessing the need for classification than does the amorphous phrase "damage to the national security." While many types of information might conceivably cause unspecified "damage" if disclosed, there are few, if any, documents whose release could possibly instigate "armed hostilities against the United States."

But similar specificity has been lacking in subsequent executive orders, allowing classifiers broad latitude as to the proper scope of classification.[17] This high level of generality may provide some needed flexibility, but it heightens the inherent subjectivity of the classification process and introduces an element of unchecked arbitrariness.[18]

A study performed in 2008 by the Office of the Director of National Intelligence acknowledged the problem. "The definitions of 'national security' and what constitutes 'intelligence' — and thus what must be classified — are unclear."[19] "There appears to be no common understanding of classification levels . . . nor any consistent guidance as to what constitutes 'damage,' 'serious damage,' or 'exceptionally grave damage' to national security . . . . There is wide variance in application of classification levels."[20]

The problem is not that these terms are meaningless, but that they have accumulated a plethora of highly subjective meanings. "Many interpretations exist concerning what constitutes harm or the degree of harm that might result from improper disclosure of the information, often leading to inconsistent or contradictory guidelines from different agencies."[21]

If there are "many interpretations" about the potential consequences of disclosure of a certain item of information, some of those interpretations will

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[15] Exec. Order No. 11,652, 37 Fed. Reg. 5,209 (Mar. 10, 1972).

[16] *Id.* at 5210.

[17] There are many subsequent orders which, in turn, have governed the national security classification system. *See, e.g.*, Exec. Order No. 13,526, 75 Fed. Reg. at 707 (Obama); Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) (Bush); Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995) (Clinton); Exec. Order 12,356, 47 Fed. Reg. 14,874 (Apr. 6, 1982) (Reagan); Exec. Order No. 12,065, 43 Fed. Reg. 28,948 (July 3, 1978) (Carter).

[18] A newly reissued Pentagon manual provides additional detail on the intended scope of classification of defense-related information. *See* U.S. DEP'T OF DEF., MANUAL 5200.45: INSTRUCTIONS FOR DEVELOPING SECURITY CLASSIFICATION GUIDES 8 (2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/520045m.pdf. Even with this further guidance, the Manual advises that the necessary precision cannot be specified in advance. Instead, it remains true that "judgment must be applied in all cases." *Id.* at 20.

[19] OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY CLASSIFICATION GUIDANCE FINDINGS AND RECOMMENDATIONS REPORT 11 (2008), *available at* http://www.fas.org/sgp/othergov/intel/class.pdf.

[20] *Id.*

[21] *Id.* at 6.

be more plausible than others, some of them are likely to be poorly justified, and some may be quite wrong.[22]

Therefore, the task of secrecy reform can be conceived as an attempt to test those various interpretations, to affirm those that seem well founded, and to strike those that are idiosyncratic, unsupported, or erroneous. Because the number of official classification actions each year can number in the hundreds of thousands, or even the millions, this task is a tall order.[23]

The classification system's size makes it difficult to control but also makes controlling it imperative. Secrecy imposes significant financial[24] and operational[25] costs, even when it is justified by compelling national security considerations. It also impedes government accountability and tends to discourage public engagement with vital issues of national policy.[26]

Before considering the options for validating or invalidating particular classification judgments, it is instructive to look at how and why some longstanding interpretations of the classification requirements of national security have changed in recent years. The decision to publish the total intelligence budget figure and the disclosure of the size of the U.S. nuclear weapons arsenal are exemplary cases.

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[22] Disparate classification judgments that result in inconsistent acts of disclosure and withholding are not uncommon. Occasionally, they even can be found within the very same document. So, for example, the Senate Select Committee on Intelligence stated in a 2004 report, "Iraqi agents agreed to pay up to [deleted] for each 7075-T6 aluminum tube." S. REP. NO. 108-301, at 96 (2004), *available at* http://www.intelligence.senate.gov/108301.pdf. The redacted cost information is later revealed: "Iraqi agents agreed to pay up to U.S. $17.50 each for the 7075-T6 aluminum tube." *Id.* at 105. The disclosure and the withholding of the price paid by Iraqi agents for an aluminum tube cannot both be correct, and yet there they are.

[23] According to statistics compiled by the Information Security Oversight Office, there were over 127,000 "original" classification decisions — in which information was classified for the first time — in fiscal year 2011 and over 92,000,000 "derivative" classification decisions — in which previously classified information was incorporated in a new record. *See* INFO. SEC. OVERSIGHT OFFICE, NAT'L ARCHIVES & RECORDS ADMIN., 2011 REPORT TO THE PRESIDENT 1 (2011), *available at* http://www.archives.gov/isoo/reports/2011-annual-report.pdf.

[24] The annual cost of protecting classified information in government and industry reached $12.62 billion in fiscal year 2011. INFO. SEC. OVERSIGHT OFFICE, NAT'L ARCHIVES & RECORDS ADMIN., REPORT ON COST ESTIMATES FOR SECURITY CLASSIFICATION ACTIVITIES FOR FISCAL YEAR 2011 4 (2012), *available at* http://www.archives.gov/isoo/reports/2011-cost-report.pdf.

[25] According to the final report of the 9/11 Commission, "current security requirements nurture overclassification and excessive compartmentation of information among agencies. Each agency's incentive structure opposes sharing, with risks (criminal, civil, and internal administrative sanctions) but few rewards for sharing information." NAT'L COMM'N ON TERRORIST ATTACKS AGAINST THE U.S., THE 9/11 COMMISSION REPORT § 13.3, at 417 (2006), *available at* http://govinfo.library.unt.edu/911/report/911Report.pdf [hereinafter 9/11 REPORT].

[26] COMM'N ON PROTECTING & REDUCING GOV'T SECRECY, REPORT xxi (1997), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CDOC-105sdoc2/content-detail.html ("Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate.").

II. Disclosure as Self-Interest: The Case of the Intelligence Budget

Because of the subjective character of classification policy, merely stipulating that damage to national security should be avoided is not sufficient to determine that any particular item of information should be classified. Nor is it possible to devise a formula that will unambiguously dictate in every case what should be classified. Instead, judgments must be made, and a wide variety of factors may influence a classifier's judgment. Some factors have little relevance to national security, narrowly construed. This truth becomes most clearly evident when classification judgments have changed sharply, as in the case of intelligence spending.

Today, one may accurately say that there is an "unprecedented" degree of transparency regarding U.S. intelligence spending. Not only is the aggregate amount that has been appropriated for intelligence disclosed, so is the total for each of the two subsidiary budget constructs — the National Intelligence Program ("NIP") and the Military Intelligence Program ("MIP").[27] Furthermore, the amount of money requested for the coming year for each of those budget constructs has also become public knowledge.

All of this disclosure is rather new — the MIP budget request was revealed for the first time in 2012,[28] and it took a surprisingly long time to accomplish, considering that the underlying policy debate had lasted for several decades. But the belated normalization of intelligence budget disclosure illustrates how entrenched secrecy policies can be reversed when bureaucratic self-interest dictates such a reversal.

The essential case for intelligence budget disclosure was clearly articulated at least as early as the final report of the congressional Church Committee in 1976.[29] After weighing the pros and cons in an entire chapter devoted to the subject, the Committee recommended annual publication of the budget total.[30] It concluded that "publication of the aggregate figure for national intelligence would begin to satisfy the constitutional requirement [for publication of appropriations that appears in Article I's Statement and Account Clause] and would not damage the national security."[31]

But this recommendation was not adopted by Congress or the Ford Administration, and no such disclosure ensued for two decades. Then, in 1997, the Director of Central Intelligence ("DCI") disclosed the budget total under

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[27] Recent official disclosures of intelligence budget information are tabulated at *Intelligence Budget Data*, Fed'n of Am. Scientists, http://www.fas.org/irp/budget/index.html (last visited Mar. 2, 2013).

[28] *DOD Releases Military Intelligence Program Requested Top Line Budget for Fiscal 2013*, U.S. Dep't of Def. (Feb. 13, 2012), http://www.defense.gov/releases/release.aspx?releaseid=15058.

[29] *See* S. Rep. No. 94-755, at 367 (1976), *available at* http://www.intelligence.senate.gov/pdfs94th/94755_I.pdf.

[30] *Id.* at 384.

[31] *Id.*

pressure of FOIA litigation.[32] Although similar information was again revealed in 1998,[33] this revelation proved to be a transient step. When challenged to publish budget information the following year, the government reverted to past practice and refused to divulge it. In response to another FOIA lawsuit,[34] DCI George J. Tenet declared under oath that disclosure of the requested information for 1999 would damage national security, notwithstanding the disclosures in the previous two years:

> Disclosure of the budget request or the total appropriation reasonably could be expected to cause damage to the national security in several ways. First, disclosure of the budget request reasonably could be expected to provide foreign governments with the United States' own assessment of its intelligence capabilities and weaknesses. The difference between the appropriation for one year and the Administration's budget request for the next provides a measure of the Administration's unique, critical assessment of its own intelligence programs. A requested budget decrease reflects a decision that existing intelligence programs are more than adequate to meet the national security needs of the United States. A requested budget increase reflects a decision that existing intelligence programs are insufficient to meet our national security needs. A budget request with no change in spending reflects a decision that existing programs are just adequate to meet our needs.[35]

The U.S. District Court for the District of Columbia accepted this rationale,[36] terminating publication of intelligence budget information for years to come.[37]

And there the matter rested until it was raised again by the final report of the 9/11 Commission ("the Commission") in 2004. The Commission, perhaps unexpectedly, advocated annual intelligence budget disclosure in

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[32] *DCI Statement on FY97 Intelligence Budget*, CENT. INTELLIGENCE AGENCY (Oct. 15, 1997), https://www.cia.gov/news-information/press-releases-statements/press-release-archive-1997-1/pr101597.html. The FOIA lawsuit noted by the DCI was *Aftergood v. Cent. Intelligence Agency*, 355 F. Supp. 2d 557 (D.D.C. 2005).

[33] *Disclosure of the Aggregate Intelligence Budget for FY1998*, CENT. INTELLIGENCE AGENCY (Mar. 20, 1998), https://www.cia.gov/news-information/press-releases-statements/press-release-archive-1998/ps032098.html.

[34] *Aftergood*, 355 F. Supp. 2d at 557.

[35] Declaration of George J. Tenet ¶ 15, *Aftergood*, 355 F. Supp. 2d 557 (No. 98-CV-2107), *available at* http://www.fas.org/sgp/foia/tenet499.html. The CIA's opposition to disclosure may have been aggravated by the fact that in the 1999 case what was sought was not only the budget appropriation, as in the previous two years, but also the budget request. *Id.* ¶ 3.

[36] *See Aftergood*, 355 F. Supp. 2d at 563.

[37] The next authorized disclosure of intelligence budget information did not occur until 2007. *See* Press Release, Office of the Dir. of Nat'l Intelligence, ODNI Releases Budget Figure for National Intelligence Program (Oct. 30, 2007), *available at* http://www.dni.gov/files/documents/Newsroom/Press%20Releases/2007%20Press%20Releases/20071030_release.pdf.

one of the forty-one recommendations to emerge from its investigation of the terrorist attacks of September 11, 2001.[38]

Significantly, the Commission did not base its recommendation to publish the intelligence budget on an abstract appeal to transparency or "open government." Rather, it argued on the very practical grounds that budget disclosure would enable improved control of intelligence within the executive branch and was a prerequisite to more responsive oversight within Congress.[39]

The issue arose because intelligence appropriations are concealed within the defense budget. As long as that remains the case, the Commission argued, the leadership of the intelligence community would inevitably be constrained by the policy agenda of the military and its congressional overseers.[40] With most intelligence money under the control or influence of the Secretary of Defense, and with intelligence budget priorities shaped by defense overseers in Congress, the authority of the Director of National Intelligence would be diminished. He could not even fire his subordinates in Pentagon intelligence agencies.[41]

Conversely, a stand-alone intelligence budget — which would necessitate an unclassified budget allocation — would enable a new degree of bureaucratic independence for intelligence as well as the reform of congressional intelligence oversight favored by the Commission. The Director of National Intelligence would control the national intelligence budget and would lead the intelligence community in fact, not just in name. To advance that objective, the Commission therefore urged that the total intelligence budget finally be declassified.

The recommendation to disclose the intelligence budget was rejected by President George W. Bush and would not be approved for several more years.[42] The larger goal of a separate appropriation for intelligence appears unlikely ever to be accomplished.[43] But the recommendation nevertheless altered the debate on the subject. Essentially, disclosure of the intelligence budget was now cast as a means to enhance the budget authority of the intelligence community and to bolster its independence from the Department of Defense and the congressional Armed Services Committees.[44]

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[38] 9/11 REPORT, *supra* note 25, § 13.2, at 416.

[39] *See id.*

[40] *See id.* at 410.

[41] *Id.*

[42] *White House 'Strongly Opposes' Intel Budget Disclosure*, SECRECY NEWS (Mar. 2, 2007), http://www.fas.org/blog/secrecy/2007/03/white_house_strongly_opposes_i.html. Yet, over White House objections, a budget disclosure requirement was enacted by Congress. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 601, 121 Stat. 266, 335 (2007).

[43] It "ain't gonna happen," said Director of National Intelligence James R. Clapper. *Prospects Fade for a Separate Intelligence Budget*, SECRECY NEWS (Nov. 1, 2011), http://www.fas.org/blog/secrecy/2011/11/prospects_fade.html.

[44] As 9/11 Commission executive director Philip Zelikow explained the proposal:

As a result of this shift in perspective — and in self-interest — the intelligence community totally revised its view of intelligence budget disclosure, and intelligence leaders were abruptly transformed from the primary opponents of disclosure to its most outspoken supporters. "I think the American people are entitled to know the totality of the investment we make each year in intelligence," said Lieutenant General James R. Clapper, the Director of National Intelligence, at his 2010 confirmation hearing.[45]

This stark reversal of polarity on the subject of intelligence budget disclosure underscores the role of agency self-interest in making classification determinations. Perhaps that fact is altogether unsurprising. But it reflects the elastic character of classification judgments, which are subjective rather than absolute. Moreover, it underscores the fact that "security" is only one factor among several in determining whether and when to disclose information.

III. Tactical Disclosure: Transparency in the Nuclear Weapons Stockpile

While intelligence budget disclosure was prompted by a desire to strengthen the Director of National Intelligence and to promote the bureaucratic self-interest of the intelligence community, comparable changes in classification status have also been performed as tactical steps in the service of other policy goals.

An outstanding example of a genuinely "unprecedented" disclosure of what had long been classified information is the Obama Administration's decision in May 2010 to reveal the size of the current U.S. nuclear weapons stockpile in order to support the Administration's nuclear policy objectives.[46]

Release of this stockpile information, which is at the heart of the U.S. nuclear weapons enterprise, had been pursued for decades in the name of arms control, accountability, environmental protection, and nonproliferation.

> This was of course about much more than mere openness. Such a declassification [of the intelligence budget total] was the key to unlock the concealment of the intelligence budget inside the Pentagon budget and, with it, control by the defense appropriations subcommittee and the Pentagon. With that declassification, our proposed reform of Congress was possible, adding budget control to the general oversight authority of the intelligence committees.

Philip Zelikow, *The Evolution of Intelligence Reform, 2002–2004*, 56 Stud. in Intelligence 3, 15 (2012), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol.-56-no.-3/pdfs/Zelikow-Reflections%20on%20Reform-18Sep2012.pdf.

[45] *Nomination of Lieutenant General James Clapper, Jr., USAF, Ret., to be Director National Intelligence: Confirmation Hearing Before the S. Select Comm. on Intelligence*, 111th Cong. 36 (2010) (statement of Lieutenant General James R. Clapper), *available at* http://www.fas.org/irp/congress/2010_hr/clapper.pdf.

[46] *See* U.S. Dep't of Def., Fact Sheet: Increasing Transparency in the U.S. Nuclear Weapons Stockpile 1 (2010), *available at* http://www.fas.org/sgp/othergov/dod/stockpile.pdf. The stockpile was reported to contain precisely 5,113 nuclear warheads as of September 30, 2009. *Id.*

And for decades it had been withheld from disclosure, not only from the public,[47] but even from legislators and other senior government officials. "Do we possess five bombs, or fifty bombs, or five hundred bombs?" mused Senator Brien McMahon in a 1949 speech.[48] He continued:

> Are we strong or weak in the field of atomic weapons? Only the Atomic Energy Commissioners, high-ranking military men, and a few others know the correct answer to these vital questions. Though I have been a member of the Joint Congressional Committee on Atomic Energy since its inception, and though I have just been elected its chairman, I do not myself know how many bombs we possess or how rapidly we are making new ones.[49]

For more than half a century, the public was not able to gain authorized access to this information or to engage policymakers or political representatives on the basic facts of nuclear weapons policy. Even amidst the general relaxation of international tensions following the end of the Cold War, the U.S. Department of Defense blocked the public release of current stockpile data.[50] "We believe the proposal [for stockpile declassification] would be inconsistent with national security interests, particularly in a changing threat environment as reflected in the Nuclear Posture Review, by removing protection or uncertainty from certain stockpile information," an official advisory body at Los Alamos National Laboratory concluded in 2003.[51]

But then, in 2010, what had been deemed "inconsistent with national security interests" became neatly aligned with, and indeed beneficial to, those interests. Specifically, the U.S. government sought to lay the foundation for a future agreement with Russia to reduce both strategic and tactical nuclear warheads, which was contingent on increased disclosure by both parties. "Increasing the transparency of our nuclear weapons stockpile, and our dismantlement, as well, is important to both our nonproliferation efforts and to the efforts we have under way to pursue arms control that will follow

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[47] "This information has been long sought by certain public interest groups through Freedom of Information Act requests," the Department of Energy noted in 1997, referring to nuclear stockpile data. *Declassification of Certain Characteristics of the U.S. Nuclear Weapon Stockpile*, U.S. DEP'T OF ENERGY (May 30, 2012), http://www.osti.gov/opennet/forms.jsp?formurl=document/press/pc26.html. Historical stockpile figures from 1949 through 1961 were released at that time. *Id.*

[48] Senator Brien McMahon, Address Before the Economic Club of Detroit 1 (Jan. 31, 1949), *available at* http://www.fas.org/sgp/eprint/mcmahon.pdf.

[49] *Id.*

[50] *See* U.S. DEP'T OF ENERGY, FACT SHEET ON PROPOSED DECLASSIFICATION OF THE NUMBER OF NUCLEAR WARHEADS IN THE U.S. STOCKPILE (2000), *available at* http://www.fas.org/sgp/othergov/doe/fs_stockpile.html.

[51] Letter from Philip Goldstone, Chairman, Technical Evaluation Panel, to Joseph S. Mahaley, Dir., Office of Sec. Affairs 1 (Sept. 17, 2003), *available at* http://www.fas.org/sgp/othergov/doe/decl/lanl-let.pdf.

the new START treaty," a senior Pentagon official told reporters when the stockpile numbers were disclosed.[52]

More particularly, the United States hoped to elicit complementary disclosures by Russia — as well as China — about its own nuclear stockpile.[53] That is, it became tactically useful for the U.S. government to declassify the stockpile figures in order to help advance its larger nuclear nonproliferation and arms control agenda; and so it did.

Remarkably, the disclosure proved to be ineffective in generating reciprocal revelations from Russia.[54] In effect, the tactic failed. And so, although the current U.S. stockpile numbers are different from those revealed in 2010, the latest numbers are once again classified,[55] highlighting the tactical character of the previous disclosure.

IV. Demonstrating the Possibility of Change

As suggestive as these particular examples are, they do not by themselves provide a recipe for disclosure that can be readily applied to other contested secrecy issues. The factors that led officials to see declassification as palatable or even imperative in the case of intelligence spending or the nuclear stockpile were largely specific to those topics.

But those cases do illustrate a saving plasticity in the otherwise sclerotic classification system. If the system were entirely resistant to external pressure, rational persuasion, or internal reevaluation, then it would cease to present an interesting policy problem. It would either have to be tolerated or jettisoned.

Fortunately, it appears that there is just enough flexibility in classification policy to justify creative efforts to change current practices and to revise longstanding habits of secrecy. In fact, transformations in classification status and policy take place frequently, if not continuously, on matters great and small.

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[52] *DOD Background Briefing with Senior Defense Official from the Pentagon*, U.S. Dep't of Def. (May 3, 2010), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4619.

[53] According to the Department of Defense spokesman, "we'd like to encourage the other parties and particularly as I said China and as we go forward with Russia as well, to show more transparency." *Id.*

[54] The Stockholm International Peace Research Institute stated:

> [T]ransparency in Russia has decreased as a result of its decision not to publicly release detailed data about its strategic nuclear forces under the 2010 Russia–USA New START treaty, even though it shares the information with the USA. China remains highly non-transparent as part of its long-standing deterrence strategy, and little information is publicly available about its nuclear forces and weapon production complex.

World Nuclear Forces, Stockholm Int'l Peace Research Inst. (2012), http://www.sipri.org/yearbook/2012/07.

[55] *See* Hans M. Kristensen, *(Still) Secret U.S. Nuclear Weapons Stockpile Reduced*, Strategic Sec. Blog (Feb. 26, 2013), http://blogs.fas.org/security/2013/02/stockpilereduction/ (noting renewed classification of current stockpile total).

For example, the Central Intelligence Agency ("CIA") had argued for years that the President's Daily Brief — an official compilation of intelligence data prepared for the President each day — was itself an "intelligence method" and that it was categorically exempt from disclosure.[56] Rejecting this line of argument, President Obama directed in 2009 that "[n]o information may be excluded from declassification . . . based solely on the type of document or record in which it is found."[57] In 2011, President Obama personally intervened to order the declassification of an excerpt from the President's Daily Brief over CIA objections.[58]

After the National Research Council prepared a study for the Department of Homeland Security ("DHS") on the vulnerability of the electric grid to terrorism in 2008, DHS decided that the study should be classified in its entirety even though the Council authors believed it contained no restricted information.[59] Neither the facts of the matter nor the international security environment has changed significantly since then, but DHS eventually yielded in 2012 and authorized publication of the report.[60]

And so on. Such encouraging examples abound in recent history. Of course, these corrections are not entirely good news. One of the preconditions for overcoming dubious classification decisions is that there must be dubious classification decisions to overcome. And so there are, in abundance.[61]

But once it is established that deliberate changes in classification policy can actually be accomplished, one may inquire further into the tools and strategies to help bring about such changes. The factors that tend to motivate disclosure can be encouraged and rewarded, while those that impede disclosure can be challenged and subjected to a new, more demanding level of review.

V. Nurturing the Impulse to Disclose

It is obvious that secrecy can serve the bureaucratic interests of executive branch agencies, over and above any national security considerations.

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[56] Declaration of Terry N. Buroker at 17, Berman v. CIA, 378 F. Supp. 2d 1209 (E.D. Cal. 2005) (No. 04-CV-2699) ("The PDB is an Intelligence Method.").

[57] Exec. Order No. 13,526, 75 Fed. Reg. 707, 714 (Jan. 5, 2010).

[58] Steven Aftergood, *Obama Declassifies Portion of 1968 President's Daily Brief*, Secrecy News (June 3, 2011, 10:49 AM), http://www.fas.org/blog/secrecy/2011/06/obama_pdb.html.

[59] Nat'l Research Council, Terrorism and the Electric Power Delivery System vii (2012), *available at* http://www.nap.edu/catalog.php?record_id=12050 ("[T]he committee believed that the report as submitted contained no restricted information.").

[60] *Id.*

[61] *See, e.g.*, Steven Aftergood, *At CIA, Climate Change Is a Secret*, Secrecy News (Sept. 22, 2011, 10:00 AM), http://www.fas.org/blog/secrecy/2011/09/cia_climate.html. Sometimes information that is already in the public domain is marked "classified" due to inattention or confusion. *See, e.g.*, Michael Dobbs, *Freedom of Information Follies: FOIA Reviewers Declassify Same Rwanda Document Four Times, Creating New Secrets Each Time*, Nat'l Sec. Archive (Apr. 3, 2013), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB420/.

Withholding information can be an effective means of evading controversy, gaining political advantage, concealing misconduct, excluding critical voices, and undermining accountability.

Though it is perhaps less obvious, government agencies also have compelling interests in disclosure of information to the public. An official decision to release restricted information may be driven by, among other reasons, a desire to establish legitimacy, to reassure supporters and assuage critics, or to counter errors in the record. The impulse towards openness and publication is a significant factor in government information policy and a spark that can be fanned into a flame in the right circumstances.

In a 1992 directive on U.S. nonproliferation policy, for example, President George H.W. Bush ordered U.S. intelligence agencies to ensure "that necessary information is made available for support of United States diplomatic initiatives and for public release."[62] As if to underscore its importance, the paragraph containing that instruction to prepare information for public release was itself classified.[63]

The declassification of millions of pages of government records related to the assassination of President John F. Kennedy — the single most ambitious and extensive declassification project ever conducted on a single topic[64] — was initiated by the government to combat conspiracy theories surrounding the assassination.[65]

"The suspicions created by government secrecy eroded confidence in the truthfulness of federal agencies in general and damaged their credibility," according to the Final Report of the JFK Assassination Records Review Board. "Finally, frustrated by the lack of access and disturbed by the conclusions of Oliver Stone's [1991 film] 'JFK', Congress passed the President John F. Kennedy Assassination Records Collection Act of 1992, mandating the gathering and opening of all records concerned with the death of the President."[66]

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[62] Pres. George H.W. Bush, National Security Directive 70: United States Nonproliferation Policy 7 (July 10, 1992), *available at* http://www.fas.org/irp/offdocs/nsd/nsd70.pdf.

[63] *Id.*

[64] The authorities and the accomplishments of the JFK Assassination Records Review Board were described in the Executive Summary of its Final Report. Assassination Records Review Bd., *Executive Summary*, FED'N OF AM. SCIENTISTS (1998), http://www.fas.org/sgp/advisory/arrb98/part02.htm.

[65] Describing the origins of the project during a 1992 Senate hearing on the matter, Senator John Glenn said:

> This bill is the result of a climate of suspicion and distrust that has grown over the years regarding the official explanation of the assassination of President Kennedy, a climate nurtured by many books and articles, television programs, and the recent movie 'JFK'. Disclosure of information is the only reliable way to maintain the public trust and to dispel distrust.

The Assassination Materials Disclosure Act of 1992: Hearing on S. J. Res. 282 Before the S. Comm. on Governmental Affairs, 102d Cong. 1 (1992) (statement of Sen. John Glenn, Chairman, S. Comm. on Governmental Affairs).

[66] *Id.*

The U.S. Air Force conducted a review of classified and other records concerning an alleged crash of an unidentified flying object in Roswell, New Mexico in 1947 and published a lengthy rebuttal to such allegations. "The misrepresentation[] of Air Force activities as an extraterrestrial 'incident' is misleading to the public and is simply an affront to the truth," the final report harrumphed.[67]

In 2009, President Obama dramatically declassified four Office of Legal Counsel memoranda on the use of coercive interrogation techniques in the Bush Administration, saying that their disclosure was required to preserve the integrity of the historical record. "[W]ithholding these memos would only serve to deny facts that have been in the public domain for some time," the President said. "This could contribute to an inaccurate accounting of the past, and fuel erroneous and inflammatory assumptions about actions taken by the United States."[68]

More recently, intelligence information that would normally have been withheld was released in an effort to correct what were said to be mistaken news reports about the September 2012 attack on the U.S. diplomatic facility in Benghazi, Libya. "U.S. officials said they decided to offer a detailed account of the CIA's role to rebut media reports that have suggested that agency leaders delayed sending help to State Department officials seeking to fend off a heavily armed mob."[69]

In other words, there is a considerable repertoire of motivations for the declassification and official disclosure of national security information. When the conditions are right, these motivations can be summoned to justify new disclosures, or to rationalize them after the fact. Appealing to the bureaucratic or political self-interest of an agency may sometimes be more productive than a frontal challenge to the agency's authority to withhold information.

It would be easy to be cynical about the role of self-interest in classification policy and to imagine that it is the central factor in classification decisions, rather than an incidental or contributing factor. A degree of cynicism, or at least clear-eyed skepticism, may indeed be warranted in many cases. Fortunately, it is possible to counter any official tendency to exploit the classification system for political or bureaucratic advantage by engaging a

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[67] James McAndrew, U.S. Air Force, The Roswell Report: Case Closed 125 (1997). A massive collection of official records was published by the U.S. Air Force in 1995. *See, e.g.*, U.S. Air Force, The Roswell Report: Fact vs. Fiction in the New Mexico Desert (1995).

[68] Press Release, The White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/.

[69] Greg Miller, *CIA Rushed to Save Diplomats as Libya Attack Was Underway*, Wash. Post (Nov. 2, 2012, 4:20 PM), http://www.washingtonpost.com/world/national-security/cia-rushed-to-save-diplomats-as-libya-attack-was-underway/2012/11/01/c93a4f96-246d-11e2-ac85-e669876c6a24_story.html.

broader circle of participants, whose interests do not all coincide, in the classification process.

VI. The Key: Expanding the Circle of Decisionmakers

Classified national security information enters the public domain in a variety of ways: formal declassification procedures, routine congressional oversight, FOIA requests, litigation, leaks, and errors, among others.[70]

What underlies many of these paths to disclosure is a multi-layered process that permits the initial classification decision to be reconsidered from perspectives other than that of the original classifier. This simple but crucial step can be as straightforward as filing an appeal of the denial of a FOIA request.

Precisely because classification is a subjective process, the act of introducing additional "subjects" into the process can destabilize it in a fruitful way. While individual classifiers rarely seem to change their own judgments when challenged, those individual judgments are overturned with some frequency when the opinions of other persons are consulted and integrated into the process.

This basic corrective mechanism occurs in many contexts. Simply by asking an agency to reconsider an unfavorable disclosure decision under the Freedom of Information Act, for example, a member of the public can often win a more favorable outcome. Thus, a recent report on implementation of the FOIA process at the Department of State found that requests that are appealed after an initial denial yield more information in about half of the cases as a result of the appeal.[71]

Even more impressive is the track record of the Interagency Security Classification Appeals Panel ("ISCAP"), a body established by President Clinton's 1995 Executive Order 12958.[72] The ISCAP is responsible for, among other things, considering appeals from the public of requests for mandatory declassification review of government records that have been denied by the originating agency.[73]

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[70] *See generally* Steven Aftergood, *National Security Secrecy: How the Limits Change*, 77 Soc. Res. 839 (2010) (explaining pathways for public disclosure of national security information).

[71] Office of Inspector Gen., Inspection of the Bureau of Administration, Global Info. Services, Office of Info. Programs and Services 6 (2012), *available at* http://oig.state.gov/documents/organization/199774.pdf ("Roughly half of the appeals result in the release of additional information because of the passage of time, an error in the original case analysis within IPS [the State Department Office of Information Programs and Services], or an insufficient records search by the tasked Department bureau.").

[72] Exec. Order No. 12,958, 60 Fed. Reg. 19,825, 19,839 (Apr. 20, 1995).

[73] The mandatory declassification review ("MDR") process permits a requester to ask an agency to declassify a specific record. Exec. Order No. 13,526, 75 Fed. Reg. 707, 717–18 (Jan. 5, 2010). It is not a statutory process, and unlike FOIA, if the request is denied (or ignored), judicial review of the denial is not available. *Id.* Requesters can ask the ISCAP, however, to review a denied MDR request. *Id.*

Even though the ISCAP is composed of executive branch officials from the major classifying agencies — including the Departments of Defense, State, and Justice, as well as the Office of the Director of National Intelligence, the National Archives, and the National Security Staff — it has frequently ruled in favor of requesters and against the positions of its own member agencies. Since it commenced operation in 1996, the ISCAP has declassified in full 24% of the contested documents that were presented to it, and partially declassified an additional 40%.[74] In other words, the ISCAP has declassified all or some information in a clear majority of the disputed cases it reviewed, even though the classifying agency had refused to do so.

This phenomenal record deserves more consideration than it has received to date. Among other things, it tends to confirm a widespread perception that overclassification of national security information is rampant, even by internal executive branch standards.

But it also demonstrates what has proven to be an exceptionally effective mechanism for confronting and reversing overclassification. The fact that the ISCAP has overturned classification decisions, in whole or in part, in the majority of cases it has considered each year for more than fifteen years is extraordinary. In fact, the ISCAP's record in this regard is unparalleled by any other classification oversight process or corrective mechanism.

For example, it contrasts with FOIA disputes concerning classification. In FOIA litigation, courts almost never overrule classification decisions or order agencies to disclose involuntarily records they consider classified.[75] Instead, courts habitually adopt a posture of deference towards the executive on national security matters.[76]

The ISCAP, by comparison, is a virtual mass production line for the repudiation and at least partial correction of classification errors. Because the ISCAP is composed of executive branch national security officials, the issue of deference to the executive that has often discouraged judicial action does not arise. And while it cannot resolve all disagreements over particular secrecy issues,[77] it provides a promising model for further development.

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[74] INFO. SEC. OVERSIGHT OFFICE, 2011 REPORT TO THE PRESIDENT 23 (2012), *available at* http://www.archives.gov/isoo/reports/2011-annual-report.pdf.

[75] *History of Exemption 1 Disclosure Orders*, DEP'T OF JUSTICE (1995), http://www.justice.gov/oip/foia_updates/Vol_XVI_2/page4.htm. In February 2012, for the first time in many years, a federal court ordered an agency to release a classified document. Ctr. for Int'l Envtl. Law v. U.S. Trade Representative, 845 F. Supp. 2d 252 (D.D.C. 2012). The ruling was appealed by the government. Defendant's Notice of Appeal, *Ctr. for Int'l Envtl. Law*, 845 F. Supp. 2d 252 (No. 01-CV-498), *available at* http://www.fas.org/sgp/jud/ciel/042612-notice.pdf.

[76] Courts could arguably do more to curb secrecy than they do. *See generally* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131 (2006).

[77] An appeal I filed with the ISCAP in 1999 for disclosure of the intelligence budget for fiscal year 1988 was not granted by the Panel. *See Highlights of Activities of the Interagency Security Classification Appeals Panel, October 1999–September 2000*, INTERAGENCY SEC. CLASSIFICATION APPEALS PANEL, http://www.fas.org/sgp/advisory/iscap/iscap00.html (last visited Apr. 8, 2013).

Yet, further development is needed. Although the ISCAP has broken new ground in rectifying classification policy, it is currently able to review only several dozen cases per year — a small fraction of contested classification cases.[78] Thus, an obvious recommendation would be to multiply the capacity of the ISCAP to exercise corrective oversight of disputed classification cases. It stands to reason that simply meeting more frequently or for longer periods might suffice to double or triple the number of cases the ISCAP can address.

Even more important than increasing its capacity, the ISCAP's focus also could be shifted from an emphasis on historical issues to topics of current public controversy. Today, most of the appeals that the ISCAP receives are from researchers seeking declassification of records from several decades ago.[79] With due respect for the needs of historians, this focus may not be the most productive use of the ISCAP model.

Instead of (or in addition to) such archival matters, the ISCAP could be asked to undertake critical, independent reviews of present-day classification disputes. For example: to what extent can the role of the Central Intelligence Agency in targeted killing operations be publicly acknowledged? What are the proper boundaries of public knowledge concerning the U.S. government offensive operations in cyberspace? How do current intelligence surveillance practices impinge on the privacy of American domestic communications? To date, litigation under the FOIA has failed to advance public understanding of these issues significantly. It would be most interesting to test the ISCAP model on such topics and to see whether it yields a different, more substantial result.[80]

Beyond adjudicating individual cases, the ISCAP also has unmet potential to propagate its decisions throughout the classification system in a way that could improve the overall quality of classification activity. In his 2009 executive order, President Obama ordered the ISCAP to "appropriately inform senior agency officials and the public of final Panel decisions."[81] In response to that directive, the ISCAP in 2012 began posting copies of the

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[78] A table of ISCAP decisions reached in fiscal year 2012 lists only two dozen cases. *ISCAP Released Files Decisions Table*, NAT'L ARCHIVES, http://www.archives.gov/declassification/iscap/decision-table.html (last visited Apr. 4, 2013).

[79] All but one of the documents that the ISCAP acted upon in fiscal year 2012 were at least two decades old. Most dated from three to five decades ago. *Id.* The mandatory declassification review process allows requests for declassification of records of any age, and "the ISCAP in the past several years has seen an increase in appeals for classified records of the recent past." Telephone Interview with William Carpenter, Info. Sec. Oversight Office (Apr. 8, 2013).

[80] One could envision a petition process by which particular classification topics of contemporary interest could be nominated by members of the public for an independent declassification review. As in the case of the "We The People" petition established by the Obama Administration, those topics that received a threshold number of public endorsements would be subjected to the desired declassification review. *See generally We The People: Your Voice In Our Government*, THE WHITE HOUSE, https://petitions.whitehouse.gov/ (last visited Apr. 4, 2013).

[81] Exec. Order No. 13,526, 75 Fed. Reg. 707, 725 (Jan. 5, 2010).

documents whose release it had ordered.[82] But it has not issued formal "decisions" that detail the rationale for its corrective actions, and so the precedential value of these ISCAP judgments is muted or lost.

The basic principle of layered and expanded review of classification judgments can potentially be applied in many other forms.

Critical scrutiny of the detailed classification and declassification guidance that governs agency classification activity is perhaps the most direct way to refine agency secrecy practices. A Fundamental Classification Guidance Review that was conducted by executive branch agencies from 2010 to 2012 led to a 25% reduction in the number of classification guides and the removal of hundreds of specific items from classification controls.[83] But much more could have been accomplished if the reviews performed by individual agencies had included the broad participation of non-agency experts, as was expected.[84] The next iteration of the Fundamental Classification Guidance Review, scheduled to begin by 2015,[85] offers an opportunity for a more rigorous, diverse, and productive examination.

Another, complementary approach is to harness the efforts of the inspectors general at all agencies that classify national security information, who have been tasked already by Congress to assess agency compliance with existing classification policies.[86]

Other, more remote possibilities can be imagined, such as the appointment of a classification ombudsperson at each agency whose specific responsibility would be to seek out and eliminate unnecessary classification.

Nor should the role of congressional oversight be neglected. In fact, the single most important driver of disclosure of government information is not FOIA or investigative reporting; it is the natural friction between the branches of government, which generates a constant eruption of official information and records in the form of detailed budget justification materials, hearing testimony, reports to Congress, and much more. It is unreasonable and perhaps unfair to expect the executive branch to resolve unilaterally its

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[82] Steven Aftergood, *ISCAP to Provide Increased Disclosure of Its Decisions*, SECRECY NEWS (July 16, 2012, 11:26 AM), http://www.fas.org/blog/secrecy/2012/07/iscap_disclosure.html.

[83] Steven Aftergood, *Fundamental Review Leads to Some Reductions in Secrecy*, SECRECY NEWS (Aug. 30, 2012, 1:15 PM), http://www.fas.org/blog/secrecy/2012/08/fcgr_reductions.html.

[84] The implementing directive issued by the Information Security Oversight Office called for broad participation in the review. Classified National Security Information Implementing Directive, 75 Fed. Reg. 37,254, 37,258 (June 28, 2010), *available at* http://www.archives.gov/isoo/policy-documents/isoo-implementing-directive.pdf ("To the extent practicable, input should also be obtained from external subject matter experts and external users of the reviewing agency's classification guidance and decisions."). But external input was rarely if ever obtained by most reviewing agencies.

[85] Such reviews must be performed at least once every five years. *Id.* Because the last review commenced in 2010, the next one is due to begin by 2015.

[86] Reducing Over-Classification Act of 2010, Pub. L. No. 111-258, § 6(b), 124 Stat. 2648 (2010). The initial findings of this Inspector General review are due to be reported by September 2013. *Id.* § 6(b)(2)(A).

own conflicting interests in secrecy and disclosure. It is Congress's role (and to a lesser extent the courts') to compel that resolution.

But in recent years, Congress has often been strangely quiescent on secrecy-related national security matters. Despite the intense controversies surrounding the post-9/11 "war on terror," there has been no systematic attempt by Congress to probe publicly and evaluate the government's conduct. There was no contemporary equivalent of the Church Committee investigations of the 1970s to determine the scope and legality of government counterterrorism activities — though such an investigation would seem to have been clearly warranted by a variety of transgressions, from violations of the Foreign Intelligence Surveillance Act[87] to waterboarding.[88] Remarkably, the Senate Intelligence Committee recently went a whole year without holding a single public hearing.[89]

Exacerbating the problem are the well-known financial and structural difficulties affecting the news media and the associated erosion in the vitality of the national security press corps. Under the best of circumstances, there is a synergy between news coverage and congressional oversight that strengthens them both and enriches public awareness of government operations. As Senator Ron Wyden noted recently:

> I have been on the Senate Intelligence Committee for 12 years now, and I can recall numerous specific instances where I found out about serious government wrongdoing — such as the [National Security Agency's] warrantless wiretapping program, or the CIA's coercive interrogation program — only as a result of disclosures by the press.[90]

But with weakened oversight and an embattled press, this valuable synergy is diminished or absent.

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[87] *See* OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT'L SEC. AGENCY, & OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 4–5 (2009), *available at* http://www.fas.org/irp/eprint/psp.pdf.

[88] *See* Letter from Michael B. Mukasey, Attorney Gen., to Senator Patrick J. Leahy (Jan. 29, 2008), *available at* http://www.justice.gov/ag/speeches/2008/letter-leahy-013008.pdf.

[89] *See Hearings*, U.S. SENATE SELECT COMM. ON INTELLIGENCE, http://www.intelligence.senate.gov/hearings.cfm (last visited Apr. 4, 2013). No open hearings were scheduled between January 31, 2012 and February 7, 2013, when the Committee held a confirmation hearing for John O. Brennan to be Director of the Central Intelligence Agency. *Id.* That hearing coincided with a new congressional push for access to classified records on targeted killing operations. *See, e.g.*, Mark Mazzetti & Scott Shane, *Drones Are Focus as C.I.A. Nominee Goes Before Senators*, N.Y. TIMES (Feb. 7, 2013), http://www.nytimes.com/2013/02/08/us/politics/senate-panel-will-question-brennan-on-targeted-killings.html. Since 2009, Democrats on the Senate Intelligence Committee have been reviewing the record of CIA interrogation practices. A report on the matter is said to have been completed, but has not been made public. *See* Press Release, Senator Dianne Feinstein, *Feinstein Statement on CIA Detention, Interrogation Report* (Dec. 13, 2012), *available at* http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635.

[90] 158 CONG. REC. S6,793–94 (daily ed. Nov. 14, 2012) (statement of Sen. Ron Wyden).

In any case, a more constructive form of congressional engagement in regulating executive branch secrecy will be essential if there is to be any hope of reaching some kind of sensible equilibrium in classification policy.

Conclusion

Today's national security secrecy system is almost certainly not sustainable over the long term. It is predicated on Cold War–era presumptions about how national security information is supposed to flow exclusively to authorized persons and to be utilized for approved purposes. Such presumptions now cease to correspond to prevailing conditions. The rigid, pyramid-like structure of the secrecy system of the past century has been superseded by a more fluid system of information sharing practices, in which the "need to know" cannot be precisely determined in advance or from above.

Moving forward, an information security policy must be based more on the principle of "resilience" to the foreseeable disclosure of sensitive information than on the desired prevention of such disclosure. This is easier said than done, but it must be done.

Entire domains of national security secrecy have already been nullified by new technological realities. The advent of commercial satellite imagery, for example, makes the long-term operation of "secret facilities" in the United States and abroad all but impossible.[91]

In the near term, however, new constraints on the existing and largely unchecked secrecy system are urgently needed. As argued above, this goal could be achieved by incorporating a broader range of perspectives into the classification process.

Providing for a series of layered reviews of classification decisions — within agencies, across the executive branch, and with the active oversight of Congress and the courts — offers a straightforward mechanism for mitigating classification abuses. By itself, this kind of approach will not resolve all disputes over what should or should not be secret. But a more consensual style of making classification decisions, with more robust opportunities for error detection and correction, would be a marked improvement over current practice.

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[91] *See* Noah Shachtman, *Is This the Secret U.S. Drone Base in Saudi Arabia?*, Wired (Feb. 7, 2013, 8:12 PM), http://www.wired.com/dangerroom/2013/02/secret-drone-base-2/.