Prepared Statement
of
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before the
Subcommittee on National Security
House Committee on Government Reform

"Too Many Secrets:
Overclassification as a Barrier to Critical Information Sharing"

August 24, 2004

Mr. Chairman, thank you for the opportunity to testify today.

I am a senior research analyst at the Federation of American Scientists, a policy research and advocacy organization concerned with science and national security. I direct the FAS Project on Government Secrecy, which aims to reduce the scope of national security secrecy and to promote enhanced public access to government information. I write the email newsletter *Secrecy News*, which monitors developments in government information and intelligence policies. My project has not been the recipient of federal funding or contracts.

Introduction

The 9/11 Commission performed an important service by identifying overclassification as an impediment to information sharing and more generally as an obstacle to oversight and accountability.

Even under optimal circumstances, there will always remain a tension between the need to protect certain types of highly sensitive information and the need to share such information with those who can put it to good use in the service of national security. But present circumstances are far from optimal.

National security classification policy today is erratic, undisciplined and prone to abuse.

To illustrate the problem, I will cite three recent examples of dubious classification decisions, which are documented in the attachments to this testimony, and then outline some directions forward.

Some Recent Classification Errors and Abuses

I. The Classified Cost of Aluminum Tubes

The cost of aluminum tubes that were acquired by Iraq was deleted by CIA classification officials from one page of the recent Senate Intelligence Committee report on pre-war intelligence on Iraq.

But the very same information was disclosed on another page of the same report.

Thus, on page 96 of the report (attached below), it was noted that "Iraqi agents agreed to pay up to [deleted] for each 7075-T6 aluminum tube. Their willingness to pay such costs suggests the tubes are intended for a special project of national interest."

Then, on page 115 (also attached), the report stated: "Iraqi agents agreed to pay up to U.S. $17.50 each for the 7075-T6 aluminum tube. Their willingness to pay such costs suggests the tubes are intended for a special project of national interest."

Clearly a mistake was made here, either by deleting the cost information on the earlier page or by disclosing it on the later page.

I believe that it was an error of overclassification, and that the cost information should not have been deleted. Certainly the Iraqis know the amount that they agreed to pay for the aluminum tubes, as do the tube vendors. They also know that we know the amount, since that fact was not withheld by the CIA reviewers.

So no valid national security purpose was served by classifying the tube cost. Instead, CIA reviewers erected an arbitrary barrier to disclosure. The fact that they did so imperfectly and inconsistently is small consolation.

II. The Classification of Criminal Activity at Abu Ghraib Prison

By classifying a report on the torture of Iraqi prisoners as "Secret," the Pentagon may have violated official secrecy policies, which prohibit the use of classification to conceal illegal activities.

The report, authored by Maj. Gen. Antonio Taguba, found that "between October and December 2003, at the Abu Ghraib Confinement Facility, numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees."

"The allegations of abuse were substantiated by detailed witness statements and the discovery of extremely graphic photographic evidence," Gen. Taguba wrote in paragraph 5, page 16 of his report (attached).

This specific observation, as well as the itemized list of criminal activities on paragraph 6 of the same page, and the report as a whole, were all classified "Secret / No Foreign Dissemination" (see title page, attached).

Such classification may have been more than simply inappropriate. It appears to have been a violation of official policy, which forbids the use of secrecy to cover up crimes.

That policy states in Section 1.7 of Executive Order 12958, as amended (EO 13292):

> "In no case shall information be classified in order to ... conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization, or agency.…"

If it is true that the classification system's own rules were violated in this case, as I believe, then that is a sign that there is insufficient oversight to enforce existing rules.

III. The Classification of Historical Intelligence Budget Data

In what may be the most extravagant current case of overclassification, the Central Intelligence Agency contends that 50 year old intelligence budget figures are still properly classified today.

To fully appreciate the baselessness of the CIA position, it is important to realize that the Agency itself declassified the total intelligence budget (in response to Freedom of Information Act litigation) for Fiscal Year 1997 and 1998.

But thereafter, in December 2000, Agency officials said that similar information from half a century earlier could not be released. (See the 12/14/00 CIA letter, attached).

This is not simply a disagreement over a matter of policy – it is a sign of radical incompetence on the part of CIA classification officials. What is worse is that there is no effective check on such erratic behavior.[1]

Steps Towards a More Rational Classification Policy

There is no single prescription that will cure all of the defects in current classification policy. In fact, it may be that national security secrecy, even when indisputably necessary, will always be an anomaly and an irritant in a democracy.

[1] This matter is currently the subject of litigation under the Freedom of Information Act in DC District Court (*Aftergood v. CIA*, Case No. 01-2524).

Even so, there are important steps that can be taken both to limit overclassification and to enhance the integrity of the national security classification system. These include the following.

1. Declassification of Intelligence Budgets

The 9/11 Commission wisely identified intelligence budget disclosure as an important first step in reversing overclassification:

> To combat the secrecy and complexity we have described, the overall amounts of money being appropriated for national intelligence and to its component agencies should no longer be kept secret. (Commission report, page 416)

This is a modest but exceptionally astute recommendation. Several aspects of intelligence budget disclosure make it an outstanding starting point for classification reform.

First, it is a very specific, non-rhetorical secrecy reform. It will be clear to all whether or not it has been implemented.

Moreover, budget disclosure is a defining characteristic of our system of government. Budget data are one of only two categories of government information whose publication is specifically required by the U.S. Constitution (in Article I). (The other category is the Journal of the Congress).

Most important of all, the secrecy of intelligence appropriations is perhaps the preeminent symbol of the cold war secrecy system, and its rejection will signal the overcoming of that inherited system.

No other single category of secret government information has been as fiercely defended by proponents of official secrecy for so long as the size of the intelligence budget. Indeed, the very subject of budget secrecy has become a kind of totem or fetish such that half century-old figures are still officially withheld, as noted above.

If such a deeply entrenched symbol of reflexive secrecy can finally and permanently be overcome, it will clear a path to the rethinking of other poorly justified secrecy policies within the intelligence community and beyond.

2. Expanded Executive Branch Oversight of Classification Activity

One unheralded success story in the world of classification policy is the role of the Interagency Security Classification Appeals Panel (ISCAP), a body established by executive order 12958 to consider appeals from the public of document declassification requests that have been denied (among other duties).

Although it is composed of representatives of five executive branch agencies – the CIA, Department of Defense, Department of State, Department of Justice and NARA – the Panel has overruled the classification decisions of its own member agencies in about 70% of the appeals that it has considered since 1996.

This surprising record confirms that overclassification is a real problem but also points the way towards a solution: increased oversight and review of classification activity within the executive branch itself.

Such internal executive branch oversight could take various forms—an expansion of the valuable but miniscule Information Security Oversight Office; creation of agency ombudsmen whose task is to supervise classification activity with an eye toward eliminating excessive secrecy; regular periodic inspector general audits of classification practices within the key national security agencies; and so on.

Such oversight should not be viewed as a concession to critics or a mere gesture towards abstract values of "openness." To the contrary, whether they realize it or not, executive branch agencies have a material interest in reducing unnecessary secrecy, which imposes severe financial and operational costs on their performance.

3. Enhanced Congressional Oversight of Secrecy Policy

If the proper conduct of national security classification policy is important, which it plainly is, then it is also an important subject for congressional oversight. But routine, systemic oversight of classification policy has often been lacking.

In 1997, a Congressionally-mandated Commission on Protecting and Reducing Government Secrecy (the "Moynihan Commission") produced an outstanding report on the problems of secrecy and proposed a series of recommended reforms, including legislative actions. For the most part, the Commission recommendations were ignored.

On the other hand, this Committee's important hearings on Presidential records and other information policy issues in recent years suggest that even more attention could be usefully turned to the subject.

Such oversight need not be an arduous or elaborate undertaking. It can be as simple as posing a question to the Pentagon: Why was the Taguba report on the abuse of Iraqi prisoners classified as a national security secret? Or to the CIA: Why are 50 year old budget data still withheld from public disclosure?

The Information Security Oversight Office already reports to the President annually on the state of classification and declassification activity throughout the executive branch. It may be that the submission of this report would serve as a convenient occasion for regular annual hearings on the subject.

Congress should also give careful consideration to the pending proposal for an Independent National Security Classification Board, as set forth in H.R. 4855.

4. Invigorated Judicial Review

In the Freedom of Information Act, Congress mandated *de novo* judicial review of agency decisions to withhold information, including classified information, from public disclosure.

But over the years, the strong review that Congress established has diminished nearly to the vanishing point in favor of a doctrine of "judicial deference," i.e. deference to the executive branch on questions of national security secrecy.

According to this view, courts are wholly unqualified to assess the substantive legitimacy of classification decisions (though they may rule on procedural adequacy) and they must accept the assurances of agency officials that contested information is properly classified.

In effect, through a series of unfortunate precedents, the courts have abdicated the judicial function when it comes to the review of agency classification decisions.

This explains the astonishing disparity between the executive branch ISCAP -- which, as noted above, has overturned classification decisions in the majority of cases it has considered in recent years -- and the judicial branch, which has overturned essentially zero classification decisions.

By now, the effectiveness of the Freedom of Information Act as a mechanism for classification oversight has been severely curtailed.

Therefore: Congress could restore the vitality of the Act with an amendment to strengthen judicial review of contested classification decisions. Such review might permit judicial deference to the executive branch -- but would no longer require it as a matter of course.

5. Limit the Definition of Intelligence "Sources and Methods"

Perhaps the single most penetrating measure that Congress could enact to combat excessive secrecy in U.S. intelligence would be to amend the requirement to protect intelligence sources and methods, so as to limit such protection to those cases it is justified by national security concerns.

Pursuant to 50 U.S.C. 403-3(c)(7), the Director of Central Intelligence is obliged to "protect intelligence sources and methods from unauthorized disclosure."

Maximizing its secrecy authority, the CIA interprets this statute liberally to include any and all intelligence "sources and methods," even those that do not warrant national security classification.

As a result, even the most mundane information is buried under a blanket of secrecy. How many subscriptions to the New York Times does the CIA have? How much does the Agency spend on stationery or pens and pencils? All such information is guarded as if the very future of liberty depended upon it.

Much of this arbitrary secrecy could be eliminated at a single stroke if Congress specified that the DCI is obligated to protect only those intelligence sources and methods that could be jeopardized or compromised by disclosure.

Some Other Issues

In the interest of brevity, I would like to mention two other issues of significance, without fully exploring them at this time.

1. The Proliferation of Controls on Unclassified Information

The 9/11 Commission focused on the problem of overclassification as an impediment to information sharing. But a comparable and possibly greater problem is due to expanding controls on unclassified information.

A plethora of new controls is increasingly being applied to unclassified information, including information that was formerly in the public domain.

These controls are denominated by various terms: Sensitive But Unclassified (SBU), Sensitive Security Information (SSI), Sensitive Homeland Security Information (SHSI), Law Enforcement Sensitive (LES), Critical Infrastructure Information (CII), Critical Energy Infrastructure Information (CEII), For Official Use Only (FOUO), Unclassified Controlled Nuclear Information (UCNI), Limited Official Use (LOU), and so forth and so on.

These are multiple, overlapping and sometimes inconsistent control systems that replicate features of the national security classification system such as "need to know" in an irregular, haphazard way. Thus, for example, the Department of Homeland Security now requires a non-disclosure agreement to be executed for access to "sensitive but unclassified" (SBU) information.

Whereas the classification system has at least some internal and external constraints and prohibitions, the new controls on unclassified information are largely unchecked.

This is a recipe for chaos that has not yet received the attention it deserves.

2. The "Dark Side" of Information Sharing

It is often taken for granted that information sharing among government agencies and with state and local officials is an unalloyed good. Indeed, the failure to share information is one of the clearest problems identified by the investigations into September 11.

But efforts to lower barriers to access for government officials in order to enhance information sharing often entail raised barriers to access for members of the general public.

Vast amounts of formerly public information has been removed from the public domain. The non-disclosure agreements that state and local officials sign as a condition of information sharing threaten to become walls between those officials and the communities that they serve.

It seems that a decision has been tacitly made that the American public does not have a "need to know" any information that some unaccountable official has determined is suitable "for official use only." This is unsatisfactory.

While some new controls on unclassified information are bound to be justified, they need to be matched by new mechanisms for reviewing and challenging decisions to withhold such information from the public. Up to now, such mechanisms have been lacking.

Conclusion

The complexity of government information policy is matched and exceeded by its importance. More than any organizational or structural reform, improvements in information policy will pay immediate dividends in performance.

But merely talking about improvements and criticizing overclassification is not enough. Action is now required.

The first order of business, as the 9/11 Commission recommended, should be the disclosure of intelligence budget appropriations. That will set the stage for a continuing process of classification reform and revision that is long overdue.

Thank you again for convening a hearing on this important subject.

[redacted]

REPORT ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ

Ordered Reported on July 7, 2004

SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE

108th CONGRESS

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THOMAS A. DASCHLE, South Dakota, *Ex Officio*

[redacted]

[redacted]

(3) Iraqi agents agreed to pay up to [redacted] for each 7075-T6 aluminum tube. Their willingness to pay such costs suggests the tubes are intended for a special project of national interest.

(4) Iraq has insisted that the tubes be shipped through such intermediary countries as [redacted] in an attempt to conceal the ultimate end user; such activity is consistent with Iraq's prewar nuclear procurement strategy but are more robust than post-war denial and deception (D&D) efforts.

(5) Procurement agents have shown unusual persistence in seeking numerous foreign sources for the tubes, often breaking with Iraq's traditionally cautious approach to potential vendors.

(6) An aluminum tube built to the Iraqi specifications for the tubes seized [redacted] was successfully spun in a laboratory setting to 60,000 rpm (1000Hz). This test was performed without balancing the tube; a critical step required for full speed operation, but still provided a rough indication that the tube is suitable as a centrifuge rotor.[15]

(7) The dimensions of the tubes [redacted] are similar to those used in the Zippe and Beams-type gas centrifuges. The inner diameter of the seized tubes - 74.4 mm – nearly matches the tube size used by Zippe and is described in detail in his unclassified report on centrifuge development. The length and wall thickness of the seized tubes are similar to Iraq's prewar Beams design.

(8) Iraq performed internal pressure tests to induce a hoop-stress level similar to that obtained by an operating rotor.

(9) [redacted]

(U) The NIE included discussion of some of these assessments in the main text and contained an annex with a more extensive discussion of the assessments and extensive dissenting opinions from both the DOE and INR. The following section outlines the intelligence and assessments provided by the intelligence agencies on the aluminum tubes.

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[15] [redacted]

[redacted]

[redacted]

that in manufacturing rockets either a layer of insulating material is painted to the interior wall and the case is then filled with solid propellent, or a precast grain of solid propellant is loaded inside the tube cavity using thin metal spacers to separate the grain from the tube wall. In either case, minor surface imperfections would have no effect on the performance of the rocket. According to the IAEA, the finish of the Iraqi tubes that were intercepted [redacted] was worse than the finish on the older tubes Iraq declared in 1996. In addition, any machining Iraq had to perform to change the wall thickness of the tubes would also change the interior surface of the tubes, making a request for a smooth finish unnecessary if the tubes were intended to be used in a thin walled centrifuge.

([redacted]) (3) Iraqi Agents Agreed to Pay up to U.S. $17.50 Each for the 7075-T6 Aluminum Tube. Their Willingness to Pay Such Costs Suggests the Tubes Are Intended for a Special Project of National Interest

([redacted]) A [redacted] intelligence report does indicate, as the NIE notes, that Iraq may have agreed to a price of about U.S. $17.50 per tube in an attempt to procure aluminum tubes. Most reports showed, however, that Iraq had negotiated lower prices for the tubes, typically U.S. $15 to U.S. $16 per tube, and as low as U.S. $10 per tube [redacted]. The DOE told Committee staff that according to the IAEA [redacted] Iraq paid between [redacted] for each aluminum tube acquired in the 1980s. If inflation is taken into account, Iraq would be paying less today than in the 1980s for the same tubes. A DOE analyst also contacted a U.S. aluminum tube manufacturer to request a price quote for 7075-T6 aluminum tubes with similar dimensions to the Iraqi tubes. The analyst did not request specific tolerances which could have raised the price of the tubes. The U.S. manufacturer quoted a price of $19.27 per tube, higher than the price Iraq was able to negotiate.

(U) Furthermore, the NIE assessment about the cost of the tubes referenced the fact that Iraq was using 7075-T6 aluminum, which the NIE noted "is considerably more expensive than other, more readily available material." As noted previously, DOD rocket engineers told Committee staff that 7075-T6 aluminum is not more expensive that other suitable materials, suggesting that the use of 7075-T6 aluminum did not increase the cost of the tubes.

[redacted]

ARTICLE 15-6 INVESTIGATION OF THE 800th MILITARY POLICE BRIGADE

SECRET/NO FOREIGN DISSEMINATION

February 2004, COL Thomas M. Pappas was the Commander of the 205th MI Brigade and the Commander of FOB Abu Ghraib (BCCF). **(ANNEX 31)**

3. (U) That the 320th Military Police Battalion of the 800th MP Brigade is responsible for the Guard Force at Camp Ganci, Camp Vigilant, & Cellblock 1 of FOB Abu Ghraib (BCCF). That from February 2003 to until he was suspended from his duties on 17 January 2004, LTC Jerry Phillabaum served as the Battalion Commander of the 320th MP Battalion. That from December 2002 until he was suspended from his duties, on 17 January 2004, CPT Donald Reese served as the Company Commander of the 372nd MP Company, which was in charge of guarding detainees at FOB Abu Ghraib. I further find that both the 320th MP Battalion and the 372nd MP Company were located within the confines of FOB Abu Ghraib. **(ANNEXES 32 and 45)**

4. (U) That from July of 2003 to the present, BG Janis L. Karpinski was the Commander of the 800th MP Brigade. **(ANNEX 45)**

5. (S) That between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force (372nd Military Police Company, 320th Military Police Battalion, 800th MP Brigade), in Tier (section) 1-A of the Abu Ghraib Prison (BCCF). The allegations of abuse were substantiated by detailed witness statements **(ANNEX 26)** and the discovery of extremely graphic photographic evidence. Due to the extremely sensitive nature of these photographs and videos, the ongoing CID investigation, and the potential for the criminal prosecution of several suspects, the photographic evidence is not included in the body of my investigation. The pictures and videos are available from the Criminal Investigative Command and the CTJF-7 prosecution team. In addition to the aforementioned crimes, there were also abuses committed by members of the 325th MI Battalion, 205th MI Brigade, and Joint Interrogation and Debriefing Center (JIDC). Specifically, on 24 November 2003, SPC Luciana Spencer, 205th MI Brigade, sought to degrade a detainee by having him strip and returned to cell naked. **(ANNEXES 26 and 53)**

6. (S) I find that the intentional abuse of detainees by military police personnel included the following acts:

   a. (S) Punching, slapping, and kicking detainees; jumping on their naked feet;
   b. (S) Videotaping and photographing naked male and female detainees;
   c. (S) Forcibly arranging detainees in various sexually explicit positions for photographing;
   d. (S) Forcing detainees to remove their clothing and keeping them naked for several days at a time;
   e. (S) Forcing naked male detainees to wear women's underwear;
   f. (S) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;

Central Intelligence Agency

Washington, D.C. 20505

DEC 14 2000

Mr. Steven Aftergood
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307 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Reference: F95-0825

Dear Mr. Aftergood:

This is in response to your 5 June 1995 in which you appealed the 30 May 1995 determination of this agency in response to your 11 May 1995 Freedom of Information Act request for **"a copy of historical U.S. intelligence budget data from 1947 through 1970."**

Specifically, you appealed our determination to deny you access to information in its entirety on the basis of Freedom of Information Act exemptions (b)(1) and (b)(3).

Your appeal has been presented to the appropriate member of the Agency Release Panel, the Information Review Officer for the Director of Central Intelligence area. Pursuant to the authority delegated under paragraph 1900.43 of Chapter XIX, Title 32 of the Code of Federal Regulations (C.F.R.), the Information Review Officer has reviewed the material, the determinations made with respect to it, and the propriety of the application of the Freedom of Information Act exemptions asserted with respect to the material. It has been determined that the material must continue to be withheld in its entirety on the basis of Freedom of Information Act exemptions (b)(1) and (b)(3). Further, in regard to your appeal and in accordance with CIA regulations appearing at 32 C.F.R. paragraph 1900.41(c)(2), the Agency Release Panel has affirmed this determination.

Mr. Steven Aftergood

Exemption (b)(1) pertains to matters which are specifically authorized under criteria established by Executive Order 12958 to be kept secret in the interest of national defense or foreign policy and which are currently and properly classified.

Exemption (b)(3) pertains to information exempt from disclosure by statute. The relevant statutes are Subsection 103(c)(6) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-3(c)(6), which makes the Director of Central Intelligence responsible for protecting intelligence sources and methods from unauthorized disclosure, and Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. §403g, which exempts from the disclosure requirement information pertaining to the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

In accordance with the provisions of the Freedom of Information Act, you have the right to seek judicial review of this determination in a United States district court.

We appreciate your patience while your appeal was being considered.

Sincerely,

Gregory L. Moulton
Executive Secretary
Agency Release Panel