Statement of Steven Aftergood
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Before the Subcommittee on the Constitution
Of the
Committee on the Judiciary
United States Senate

Hearing on

Secret Law and the Threat to Democratic
and Accountable Government

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Thank you for the opportunity to address the Subcommittee.

My name is Steven Aftergood. I direct the Project on Government Secrecy at the Federation of American Scientists, a non-governmental policy research and advocacy organization. The Project seeks to promote public oversight and government accountability in intelligence and national security policy.

Summary

Secret law that is inaccessible to the public is inherently antithetical to democracy and foreign to the tradition of open publication that has characterized most of American legal history. Yet there has been a discernable increase in secret law and regulation in recent years. This testimony describes several of the major categories of secret law, including secret interpretations of the Foreign Intelligence Surveillance Act, secret opinions of the Office of Legal Counsel, secret Presidential directives, secret transportation security directives, and more. Legislative intervention may be required to reverse the growth of secret law.

Introduction: "The Idea of Secret Laws is Repugnant"

To state the obvious, secret law is not consistent with democratic governance. If the rule of law is to prevail, the requirements of the law must be clear and discoverable. Secret law excludes the public from the deliberative process, promotes arbitrary and deviant government behavior, and shields official malefactors from accountability.

In short, as one federal appeals court put it, "The idea of secret laws is repugnant."[1]

From the beginning of the Republic, open publication of laws and directives was a defining characteristic. The first Congress of the United States mandated that every "law, order, resolution, and vote [shall] be published in at least three of the public newspapers printed within the United States."[2]

Secret law in the United States also has a history, but for most of the past two centuries it was attributable to inadvertence and poor record keeping, not deliberate choice or official policy. In 1935, for example, "Federal attorneys, to their great embarrassment, found they were pursuing a case before the Supreme Court under a revoked executive order."[3]

Confronted with the rise of the administrative state and its increasingly chaotic records management practices, Congress responded with a series of statutory requirements designed to regularize the publication of laws and regulations, and to prevent the growth of secret law. These included the Federal Register Act of 1935, the Administrative Procedures Act of 1946, and later the Freedom of Information Act. "The

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[1] *Torres v. I.N.S.*, 144 F.3d 472, 474 (7th Cir. 1998).

[2] 1 Stat. 68. Cited by Harold C. Relyea, "The Coming of Secret Law," *Government Information Quarterly*, Vol. 5, No. 2, 1988, pp. 97-116.

[3] Relyea, "The Coming of Secret Law," p. 104, citing *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935).

FOIA was designed… as a means of deterring the development and application of a body of secret law."[4]

But with the start of the Cold War and the creation of the various institutions and instruments of national security decisionmaking, secret law, directives and regulations became a continuing part of American government.

Today, such secrecy not only persists, it is growing. Worse, it is implicated in fundamental political controversies over domestic surveillance, torture, and many other issues directly affecting the lives and interests of Americans.

FISA Court Opinions

Many of the concerns that arise from secret law are exemplified in the dispute over public access to judicial interpretations of the Foreign Intelligence Surveillance Act (FISA), the law that regulates domestic intelligence surveillance.

The ongoing political turmoil associated with amending the FISA was prompted by decisions made in 2007 by the Foreign Intelligence Surveillance Court, reinterpreting that law. Yet the specific nature of the Court's reinterpretations is not reliably known. And so the current debate over amending the FISA proceeds on an uncertain footing.

In August 2007, the American Civil Liberties Union petitioned the Foreign Intelligence Surveillance Court (FISC) on First Amendment grounds to publicly disclose those legal rulings, after redacting them to protect properly classified information.[5]

The ACLU noted that the contents of the requested rulings had been repeatedly referenced by Administration officials, including the Attorney General and the Director of National Intelligence, without identifiable harm to national security.

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[4] *Providence Journal Co. v. Department of the Army*, 981 F.2d 552, 556 (1st Cir. 1992).

[5] Motion of the American Civil Liberties Union for Release of Court Records, August 8, 2007. Copy available at: http://www.fas.org/irp/agency/doj/fisa/aclu080807.pdf. The same records were independently sought by the Electronic Frontier Foundation under the Freedom of Information Act, without success.

> While the government contends to this Court that the sealed materials are properly classified and must remain secret in their entirety, administration officials continue publicly to reference, characterize, and discuss the materials in the service of a legislative and political agenda.
>
> Given the many public statements made by government officials, it is plain that at least some of the sealed materials can be disclosed…. The administration's own public statements make clear that the materials can be discussed without reference to any particular investigation or surveillance target.[6]

And the requesters proposed a crucial distinction between the Court's legal interpretations, which they argued should be presumptively releasable, and operational intelligence material, which they admitted to be presumptively classified.

> The material that the ACLU seeks consists not of factual information but legal analysis…. The ACLU seeks court records containing legal reasoning and legal rulings, and only to the extent they contain legal reasoning and legal rulings.[7]
>
> Needless to say, the ACLU does not ask the Court to disclose information about specific investigations or information about intelligence sources or methods. However, this Court's legal interpretation of an important federal statute designed to protect civil liberties while permitting the government to gather foreign intelligence should be made public to the maximum extent possible.[8]

The Justice Department denied that such a distinction could be maintained:

> Any legal discussion that may be contained in these materials would be inextricably intertwined with the operational details of the authorized surveillance.[9]

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[6] Reply of the American Civil Liberties Union in Support of Motion for Release of Court Records, September 14, 2007, at pp. 1, 2, 10. Copy available at: http://www.fas.org/irp/agency/doj/fisa/aclu-reply091407.pdf.

[7] Ibid., pp. 8, 12-13.

[8] Motion of the American Civil Liberties Union for Release of Court Records, August 8, 2007, at p. 12.

[9] Opposition to the American Civil Liberties Union's Motion for Release of Court Records, August 31, 2007, at p. 14. Copy available at: http://www.fas.org/irp/agency/doj/fisa/aclu-doj-resp083107.pdf .

The Justice Department went on to assert, improbably in my opinion, that not even the "volume" of the materials at issue, let alone their contents, could be safely disclosed.[10]

The Court denied the ACLU motion and asserted, in any case, that it lacked the expertise to declassify the requested records without undue risk to national security. Nevertheless, in issuing its denial, the FIS Court endorsed some of the ACLU's major premises:

> The ACLU is correct in asserting that certain benefits could be expected from public access to the requested materials. There might be greater understanding of the FISC's decisionmaking. Enhanced public scrutiny could provide an additional safeguard against mistakes, overreaching or abuse. And the public could participate in a better-informed manner in debates over legislative proposals relating to FISA.[11]

Perhaps most important, the Court decision confirmed that the FISA Court is not simply engaged in reviewing government applications for surveillance authorization to ensure that they conform with legal requirements. Rather, the Court has repeatedly generated binding new interpretations of the FISA statute. Thus, aside from the 2007 opinions sought by the ACLU,

> the FISC has in fact issued other legally significant decisions that remain classified and have not been released to the public (although in fairness to the ACLU it has no way of knowing this).[12]

In summary, it has become evident that there is a body of common law derived from the decisions of the Foreign Intelligence Surveillance Court that potentially implicates the privacy interests of all Americans. Yet knowledge of that law is deliberately withheld from the public. In this way, "secret law" has been normalized to a previously unknown extent and to the detriment, I believe, of American democracy.

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[10] Ibid., p. 14, footnote 9.

[11] Memorandum Opinion by Judge John D. Bates, Foreign Intelligence Surveillance Court, Docket No. MISC. 07-01, December 11, 2007, at p. 16. Copy available at: http://www.fas.org/irp/agency/doj/fisa/fisc121107.pdf .

[12] Ibid., at page 15.

Office of Legal Counsel Opinions

The Office of Legal Counsel at the Justice Department produces opinions on legal questions that are generally binding on the executive branch. Many of these opinions may be properly confidential. But others interpret the law authoritatively and in ways that are reflected in government policy. Yet most of these opinions are secret, so that the legal standards under which the government is actually operating at any given moment may be unknown to the public.

Other witnesses today will address this category of "secret law" in detail. I would only note that there appears to be a precipitous decline in publication of OLC opinions in recent years, judging from the OLC website.[13] Thus, in 1995 there were 30 published opinions, but in 2005 there were 13. In 1996, there were 48 published opinions, but in 2006 only 1. And in 1997 there were 29 published opinions, but only 9 in 2007.

Other things being equal, OLC "publication policy and practice should not vary substantially from administration to administration," according to a statement issued by several former OLC employees. "The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law."[14]

But despite these constants, current OLC publication policy has varied substantially from the past Administration, in the direction of greater secrecy.

[13] http://www.usdoj.gov/olc/opinionspage.htm . Some opinions were not published until years after they were issued. Accordingly, publication of additional recent opinions might still be expected in years to come. Nevertheless, even allowing for such delays, there appears to be a real decline in the current pace of publication.

[14] Principles to Guide the Office of Legal Counsel, a White Paper published by the American Constitution Society, December 2004, available at: http://www.acslaw.org/node/5561.

Reversible Executive Orders

One secret OLC opinion of particular significance, identified last year by Senator Whitehouse, holds that executive orders, which are binding on executive branch agencies and are published in the Federal Register, can be unilaterally abrogated by the President without public notice. Because many executive orders are partly rooted in statute or reflect statutory imperatives, this approach has the potential to subvert Congressional intent and to do so secretly.

Based on his review of the document, Sen. Whitehouse paraphrased the classified OLC opinion as follows:

> An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.[15]

Sen. Whitehouse expressed particular concern about the status of Executive Order 12333, an order published in 1981 which governs the conduct of surveillance and other intelligence activities. The President's authority to issue the order was explicitly derived, in part, from the National Security Act of 1947.[16] Congress plainly has an interest in the exercise of the authority that it delegated by statute.

But if the terms of such an order can be modified or waived by the President "whenever he wishes" and without notice, Congress is left with no opportunity to respond to the change and to exercise its own authorities as it sees fit. Worse, the OLC policy disclosed by Sen. Whitehouse implies a right to actively mislead Congress and the public, who will mistakenly believe that a published order is still in effect even when it isn't.

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[15] Statement of Sen. Whitehouse, December 7, 2007, Congressional Record, pp. S15011-S15012, available at: http://www.fas.org/irp/congress/2007_cr/fisa120707.html .

[16] "United States Intelligence Activities," Executive Order 12333, 4 December 1981, preamble: "… by virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947, as amended..." Copy available at: http://www.fas.org/irp/offdocs/eo12333.htm .

Executive orders are used to define some of the most basic policy positions of the United States, on everything from assassination of foreign leaders to domestic intelligence activities to protection of human subjects in scientific research. But now it appears that none of these policies are securely established. In fact, any of them may already have been violated (or, rather, "waived") without notice. We just don't know.

Two additional points may be worth noting. First, following Senator Whitehouse's disclosure, I requested a copy of the referenced opinion from OLC under the Freedom of Information Act. The request was denied, on grounds that the opinion is classified, that it would reveal intelligence sources and methods, and that it is protected by deliberative process and attorney-client privileges. Not even the language cited by Sen. Whitehouse could be released.[17] Thus the legal opinion that places the status of thousands of executive orders in doubt itself remains classified.

Secondly, the idea that a President can simply waive an executive order "whenever he wishes" without notice (as opposed to formally rescinding or replacing it, which he is entitled to do) appears to be a novel interpretation. OLC opinions, as far as I can tell, do not simply restate well-established legal positions; rather, they address new issues and new circumstances. So once again, this classified OLC opinion appears to represent a new departure and a secret new expansion of unchecked executive authority.

Secret Presidential Directives

By late January 2008, the Bush Administration had issued 56 National Security Presidential Directives (NSPDs) on many diverse national security topics. Most of these directives are undisclosed. Texts of the directives or descriptive fact sheets have been obtained for about a third of them (19). Titles alone have been ascertained for 8 more.

[17] Letter to me from Paul P. Colborn, Special Counsel, Office of Legal Counsel, February 5, 2008, denying a FOIA request dated December 18, 2007.

Suspected or reported topic areas have been proposed for another 19. No data at all are available for at least ten others.[18]

Unlike the case of some other categories of "secret law," this does not represent a significant departure from recent past practice. The Clinton Administration, for example, issued a total of 75 Presidential Decision Directives, with a roughly comparable proportion of classified, unclassified, and unidentified directives.

Nevertheless, such national security directives are a vexing instrument of executive authority since they often combine significant national policy initiatives with unwavering secrecy. They "commit the Nation and its resources as if they were the law of the land" and yet in most cases "they are not shared with Congress" or the public.[19]

Presidential directives, many of which carry the force of law, can take a bewildering number of different forms, including memoranda, orders, proclamations, and more.[20] Because the President is not subject to the Freedom of Information Act, the public is dependent on the good graces of the Administration for access to many of these records.

Transportation Security Directives

The Transportation Security Administration has imposed a control category known as "Sensitive Security Information" on many of its security policies with the result that some unclassified security regulations affecting ordinary airline passengers have been withheld from disclosure.

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[18] A collection of unclassified NSPDs, fact sheets and related material is available here: http://www.fas.org/irp/offdocs/nspd/index.html .

[19] Relyea, "The Coming of Secret Law," op.cit., p. 108. See also U.S. General Accounting Office, "National Security: The Use of Presidential Directives to Make and Implement U.S. Policy," January 1992, report no. GAO/NSIAD-92-72.

[20] See Harold C. Relyea, "Presidential Directives: Background and Overview," Congressional Research Service, updated August 9, 2007. Copy available at: http://www.fas.org/sgp/crs/misc/98-611.pdf .

In the post-September 11, 2001 statute that created the TSA, Congress directed the agency to devise regulations to prohibit disclosure of "information obtained or developed in carrying out security [if disclosure would] be detrimental to the security of transportation."[21]

But in its implementing rule, TSA interpreted this mandate broadly to permit or require the withholding of an entire class of "security directives."[22]

Consequently, in an apparent departure from congressional intent, a whole series of binding regulations governing passenger inspection, personal identification and other practices were rendered inaccessible, to the frustration of some and the disgust of others. Some Americans understandably wondered why and how they could be required to comply with regulations that they could not see.[23]

Secret Law in Congress

It may be noted that the problem of secret law is not exclusively attributable to the executive branch. Congress has participated in the propagation of secret law through the adoption of classified annexes to intelligence authorization bills, for example. Such annexes may establish national policy, or require or prohibit the expenditure of public funds, all without public notice or a semblance of accountability. In a broader sense, Congress has acquiesced in the secret law practices identified above by failing to effectively challenge them.

On the other hand, Congress enacted legislation for the first time last year to require public disclosure of the amount of the National Intelligence Program budget, a step away from the inherited Cold War practice of secret law.

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[21] The Aviation and Transportation Security Act, 49 U.S. Code 114(s)(1).

[22] Protection of Sensitive Security Information, Interim Final Rule, Federal Register, May 18, 2004, pp. 28066-28086, section 15.5 (b)(2), copy available at: http://www.fas.org/sgp/news/2004/05/fr051804.html .

[23] See my article "The Secrets of Flight," Slate, November 18, 2004, available at: http://www.slate.com/id/2109922/ .

Conclusion

It should be possible to identify a consensual middle ground that preserves the security of genuinely sensitive national security information while reversing the growth of secret laws, regulations and directives.

The distinction advanced by the ACLU in its pursuit of FIS Court rulings between legal analysis which should be released and operational intelligence information which should be protected was appropriate and correct, in my opinion.

The fact that the FIS Court was unwilling (and believed itself unable) to adopt and apply this distinction in practice suggests that legislative action may be needed to reestablish the norm that secret laws are anathema. The pending "State Secrets Protection Act" (S. 2533) that was reported out of the Judiciary Committee on April 24 represents one promising model of how conflicting interests in secrecy and disclosure may be reconciled.

The rule of law, after all, is one of the fundamental principles that unites us all, and one of the things we are committed to protect. Secret law is inconsistent with that commitment.