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Before the
Committee on Oversight and Government Reform
U.S. House of Representatives
Hearing on

Overclassification and Other Failures of the Classification System

December 7, 2016

Thank you Chairman Chaffetz and Ranking Member Cummings for holding this hearing. My name is Steven Aftergood. I direct the project on government secrecy at the Federation of American Scientists, a non-profit policy research and advocacy organization. My project studies the operation of the national security secrecy system and advocates reductions in the scope of secrecy.

What Problem(s) Are We Trying to Solve?

Dissatisfaction with the government's system of classifying national security information is widespread. The President of the United States, senior intelligence officials, members of Congress, frustrated FOIA requesters and others have all criticized secrecy policy at one time or another.

But they are not all talking about the same problem. Some of the various objections to current classification policy that have been raised include these:

- Classification restricts desired information sharing
- Classification impedes congressional oversight
- Classification undermines government accountability
- Classification limits public awareness of national security threats
- Classification clouds the historical record of U.S. government operations
- Classification is inefficient and increases financial costs
- Classification is susceptible to massive single-point failures through unauthorized disclosures

All of these criticisms have some merit, I believe, but they are also distinct problems that are likely to require distinct solutions.

Even the term "overclassification" that is the subject of this hearing has a double meaning that may be a source of confusion.

Overclassification as used within the government usually means that information is classified at a higher level than it ought to be (e.g. Top Secret instead of Secret). This kind of overclassification limits information sharing to those who hold the higher clearance, and increases associated security costs. It can be resolved by reclassifying the information at a lower classification level.

But the word overclassification is also used, often by outside critics, to refer to controls on information that is classified when it shouldn't be. The concern is not about the level of classification, but rather about the fact that the information is classified at all. The only way to fix this kind of overclassification is through declassification and disclosure.

When Congress enacted the Reducing Over-Classification Act of 2010 (P.L. 111-258) requiring agency Inspectors General to investigate the problem, legislators did not include a definition of what they meant by "over-classification," nor did they indicate how to identify it. In the absence of such a definition, the Inspectors General assumed that information was overclassified whenever it did not meet the criteria set forth in the President's executive order on classification, but that it was properly classified if it did meet them. This understandable assumption totally missed the key problem of information that is overclassified yet still within the framework of the executive order.

So selecting the problem that is to be solved, and defining it precisely, is an important step towards devising a solution.

I will propose a particular version of the problem that I think deserves priority attention below. But first I would like to take note of two "all-purpose," general solutions that would improve classification policy across the board.

1. Shrink the Size of the Problem

All of the adverse effects of classifying information can be diminished by reducing the scope and volume of classification activity.

Even if we can't figure out exactly how to get classification "right," classifying less information means that the consequences of getting it "wrong" will be less severe. Obstacles to oversight and accountability will be reduced, financial costs will be diminished, barriers to information sharing will be lowered, and so on.

Remarkably, some progress has been made in recent years towards "shrinking the problem" in this way:

- The number of "original classification decisions" – or new national security secrets – has dropped to historically low levels in recent years,

according to estimates gathered and reported by the Information Security Oversight Office.[1]

- The number of "original classification authorities" – or individuals who are authorized to designate new classified information – hit an all time reported low (2,199 officials) in FY2015, also according to the Information Security Office.

- The national security clearance system for granting eligibility for access to classified information has undergone significant contraction. According to the Office of the Director of National Intelligence, the number of security-cleared personnel dropped from a recent high of 5.1 million clearances in 2013 down to 4.25 million in 2015.[2]

These are positive developments that can collectively help to make the problems of the classification system more tractable and more amenable to possible solutions. (And to bring the persistent remaining problems into sharper relief.) They should be encouraged.

2. Appoint Government Officials Who Value Open Government

"Personnel is policy" according to the Reagan-era slogan. In other words, the selection of agency leadership is likely to have a decisive impact on the execution of national policy. This is also true in the area of classification policy: choosing conscientious officials who favor open government is a highly effective way to correct many weaknesses of the classification system.

This is all the more true since there is an unavoidable element of personal judgment in the classification of information. Classifiers need to make certain assumptions about: the requirements of national security, the sensitivity of specific items of information, the unintended impacts of secrecy in a particular case, and other factors. Based on how they weigh such factors, they then decide whether or not to classify.

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[1] Annual Report to the President for FY 2015, Information Security Oversight Office, July 15, 2016; available at https://www.archives.gov/files/isoo/reports/2015-annual-report.pdf ; and "Number of New Secrets in 2015 Near Historic Low," *Secrecy News*, July 29, 2016; available at https://fas.org/blogs/secrecy/2016/07/new-secrets-2015/

[2] "Security-Cleared Population Continues to Shrink," *Secrecy News*, June 30, 2016; available at https://fas.org/blogs/secrecy/2016/06/clearances-2015/

Those officials who are predisposed to open government and democratic values will conduct their official business accordingly, sometimes even when it seems contrary to their near-term interests. Those who are not so predisposed will favor secrecy, and may even take advantage of classification authority to advance their own policy agenda.

In a sense, the selection of national security officials may the single most consequential step in the proper implementation of secrecy policy. That is because it is hard to formulate a comprehensive secrecy policy that will fit every conceivable circumstance. But a wise official will act properly despite an inadequate written policy. On the other hand, an imprudent official will not be constrained by even the most carefully crafted statement of principles and procedures.

This is a particular concern at this historical moment, when some of our elected officials and their designated appointees have engaged in reckless and irresponsible speech.[3]

<u>Next, Define a Performance Goal</u>

To move beyond general reductions in unnecessary secrecy ("shrinking the problem") and the good faith exercise of classification authority -- both of which are desirable under any circumstances -- it is necessary to set a performance goal and then to pursue it.

But just as there are numerous facets to the problem of secrecy, there are multiple potential goals that could be pursued: Should we seek to reduce the cost of the classification system? Expedite declassification of historical records? Enhance congressional oversight of classified programs? Expand sharing of classified information? Increase protections against unauthorized disclosures?

These are not necessarily incompatible objectives, but they involve different areas of emphasis that are likely to require different approaches.

Speaking for myself – as an individual citizen and advocate – I would say that <u>the most important task is to modify secrecy policy so as to increase government accountability to the public</u>. That means that special efforts should be made to reduce secrecy concerning military conflict, intelligence policy, foreign relations, defense spending, and other major areas of national security policy.

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[3] See, e.g., "The Disruptive Career of Michael Flynn, Trump's National-Security Adviser," by Dana Priest, The New Yorker, November 23, 2016; available at: http://www.newyorker.com/news/news-desk/the-disruptive-career-of-trumps-national-security-adviser

Although those categories may seem very broad, adopting government accountability as the guiding principle for secrecy reform would actually simplify the problem and focus efforts to mitigate it. That's because not all classified information is relevant to questions of accountability; there is a great deal of secret information that is of little or no value for that purpose. So, for example, in most cases it would be of no concern to the public if some specific component of a military platform or weapon system were classified, overclassified, or altogether unclassified. There may or may not be valid reasons to protect such information, but if enhancing government accountability is the priority, then the classification status of some detail of military hardware will usually be of little or no interest.

By contrast, prioritizing government accountability would dictate reduced secrecy and heightened disclosure concerning the justifications for U.S. military action, the consequences of such action, and the parameters of U.S. military and intelligence policies.

The Role of Congress / Legislative Options

What can Congress do to encourage improvements in national security classification policy? There are lots of possibilities.

- *First, do no harm*

Of course, Congress should take no action that would aggravate the existing problems of secrecy. As noted above, significant progress has recently been made in slowing the pace of classification activity, reducing the number of classifiers, and shrinking the security clearance system. These are wholesome trends that should be encouraged, not reversed. Recent breakthroughs in disclosure such as declassifying the size of the U.S. nuclear stockpile, disclosing the annual intelligence budget appropriation and request, and declassification of historical editions of the President's Daily Brief should also be preserved and built upon, not reversed.

Regrettably, however, there has been a notable erosion of transparency standards this year with the refusal of President-elect Trump to release his tax returns prior to the election (or since). This is not a matter of national security secrecy *per se*, but the President's finances could easily have national security implications if they create conflicts of interest. In any event, such disclosure had been a routine practice among presidential candidates of both parties for four decades. Today it can no longer be taken for granted.

- *Conduct regular oversight of the secrecy system*

Congress should signal its interest in classification policy by conducting regular oversight of the secrecy system. Each year, the Information Security Oversight Office

produces an annual report to the President concerning government-wide classification and declassification activity. Release of this report would be a fitting occasion for legislators to review the latest trends in national security secrecy, and to examine what is working and what is not. Likewise, the ongoing production by the U.S. State Department of the *Foreign Relations of the United States* series -- which incorporates declassified historical records to produce a "thorough, accurate and reliable" account of U.S. foreign policy – would also benefit from periodic congressional oversight, but practically never receives it. Throughout the budget cycle and in the course of oversight, Members should also routinely ask government officials to explain and to justify their national security classification practices.

- *Provide adequate funding for declassification and internal oversight*

Declassification – whether of historical records or of current policy and program information – cannot proceed without the requisite funding. Without adequate funding, a backlog of materials awaiting declassification quickly builds up, agency responsiveness to declassification requirements slows down, and dysfunction ensues. Congress should provide stable, predictable funding to ensure this does not occur.

Because declassification is part of the "life cycle" of classified information (at least in the case of those records that are deemed to be permanently valuable), it would be reasonable to allocate funding for declassification as a normal part of the budget for managing classified information.

In order to maintain viable internal oversight of executive branch classification activity, Congress should also provide robust funding for the Information Security Oversight Office (housed at the National Archives), and for agency Inspectors General.

- *Prioritize topics of special interest for declassification*

It is well within Congress's power to select and to mandate declassification of topical areas that are of particular public or congressional interest.

This was notably accomplished in the case of the John F. Kennedy Assassination Records Collection Act of 1992, which established an Assassination Records Review Board. The Board led a highly productive declassification effort that yielded millions of pages of records.

This example could profitably be replicated, even if on a smaller scale, to address declassification of other issues of current interest.

- *Legislate a secrecy system?*

It is also within Congress's power to legislate a statutory foundation for the national security classification system, as it has in fact done for control of atomic energy information in the Atomic Energy Act.

The case for such a statutory classification system was presented in the 1997 report of the Commission on Protecting and Reducing Government Secrecy (the Moynihan Commission). A bill to that effect was actually introduced in the 105th Congress (S. 712) and was the subject of hearings before the Senate Governmental Affairs Committee.[4] But the fact that the bill never made it out of committee is an indication that this is a politically difficult undertaking that may not be worth the effort. Congress can assert its interests in classification policy effectively in other ways.

- *Repeal the "Kyl-Lott Amendment"*

Congress could expedite the declassification of historically valuable records by repealing a measure known as the Kyl-Lott Amendment that was enacted in the FY1999 Defense Authorization Act (Public Law 105-261, section 3161).

That measure was adopted in response to inadvertent disclosures of classified atomic energy information that occurred occasionally in the 1990s in the course of declassification of historical records. It required a dedicated audit or review of entire record collections to screen them for protected atomic energy records before declassification could proceed.

While this cumbersome approach may have made sense at the time, the improved quality and professionalism of current declassification activities at National Declassification Center render it an unnecessary obstacle to declassification today. Its repeal would help to streamline and improve the efficiency of declassification.

- *Address the legacy of congressional secrecy*

For more than half a century, congressional committees have periodically held closed hearings on sensitive or classified topics. Defense and intelligence committees routinely enact classified annexes to the annual authorization bills they mark up. Much of this material is likely to be of profound historical and even contemporary public interest. But there is no mechanism for bringing it to light. As you know, the Freedom of Information Act does not apply to Congress.

The Office of the Historian of the House of Representatives could be asked to formulate a plan, in cooperation with the relevant committees, for curating these

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[4] Prepared testimony from that March 25, 1998 hearing is available here: http://www.fas.org/sgp/congress/hr032598/index.html

secret archives, identifying those collections that have enduring value, and initiating their orderly declassification and disclosure.

- *Task GAO to identify best practices and new options*

While the overall framework of the government-wide classification system is set by executive order, actual classification practices differ from agency to agency. Government agencies naturally vary in their commitment and competence with respect to information security and disclosure. Also, the secrecy required for military operations, for example, is qualitatively different from the secrecy needed for intelligence sources, and both differ from diplomatic secrecy.

This Committee could task the Government Accountability Office to identify those best practices in national security classification and declassification that could be broadly adopted by multiple agencies. GAO could also be asked to survey options for enhancing the performance of the classification system.[5]

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In short, there are many constructive steps that Congress could take to help improve the functioning of the national security classification system, and to make it more responsive to the broad public interest.

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[5] The FY 2017 Intelligence Authorization Act (H.R. 6393), adopted by the House on November 30, 2016, included a provision (Section 708) to require the Director of National Intelligence "to review the system by which the Government classifies and declassifies information" and to develop recommendations to improve it.

Steven Aftergood

Steven Aftergood directs the Federation of American Scientists Project on Government Secrecy, which works to reduce the scope of national security secrecy and to promote reform of related security practices.

He writes *Secrecy News*, an online publication.

In 1997, Mr. Aftergood was the plaintiff in a Freedom of Information Act lawsuit against the Central Intelligence Agency that led to the declassification and publication of the total intelligence budget ($26.6 billion in 1997) for the first time in fifty years. In 2006, he won a ruling against the National Reconnaissance Office requiring that agency to disclose unclassified budget records.

Mr. Aftergood is an electrical engineer by training.

His writing has appeared in Nature, Science, Nonproliferation Review, Social Research, Slate, Forward, and other publications. From 1992 to 1998 he served on the Aeronautics and Space Engineering Board of the National Research Council.

Committee on Oversight and Government Reform
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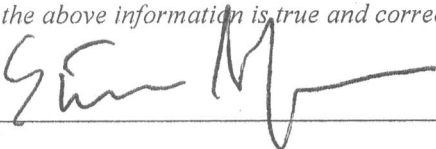
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