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IF IN DOUBT, CLASSIFY

Steven Aftergood has some advice for the new administration for tackling the unprecedented growth in secrecy under Bush

There are many steps that will need to be taken to strengthen the rule of law in the months and years to come. The next administration and the next Congress will have to re-examine policies on domestic surveillance, prisoner detention and interrogation, and other important aspects of national security policy to make them constitutionally compliant and legally sound. Terms like 'waterboarding' and 'extraordinary rendition' will need to be relegated to the history books as quickly as possible, to be preserved for posterity as a reminder and a warning, along with others like Manzanar, the Second World War internment camp for Japanese Americans. But the most important systemic change needed is to sharply reduce the secrecy that has enveloped the executive branch.

Secrecy is problematic for several distinct reasons. First, it creates the possibility for agencies or officials to depart from legal norms or sound policies, without detection or correction. Second, it tends to cripple the oversight process by diverting limited energy and resources into futile disputes over access to information, including even rudimentary and non-controversial factual information. Third, it impoverishes the public domain.

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Ideally, an open political process helps to educate members of the public. If nothing else, it forces them to formulate and refine their arguments and to engage with those of their opponents. But a closed, secret process makes that impossible.

Secrecy is often criticised by those whose access to information has been barred, but what is more remarkable is that even the agencies themselves, and officials who retain access, acknowledge that classification authority has been exercised arbitrarily and that secrecy has now grown far beyond what any legitimate justification would allow.

'We over-classify very badly,' Representative Porter Goss, then chair of the House Intelligence Committee, told the 9/11 Commission in 2003. 'There's a lot of gratuitous classification going on.' Unfortunately, neither that forthright statement nor Mr Goss's subsequent tenure as director of Central Intelligence did anything to reduce classification levels, which remain as high or higher today than they did in 2003.

'The definitions of ''national security'' and what constitutes ''intelligence'' – and thus what must be classified – are unclear,' according to a January 2008 report from the Office of the Director of National Intelligence (ODNI). This is an admission that classification policy in US intelligence agencies lacks a coherent foundation. Ironically, that ODNI report itself was withheld from public disclosure, tending to confirm the report's diagnosis.

Asked to estimate how much defence information is overclassified, Under Secretary of Defense for Intelligence Carol A Haave told a House subcommittee in 2004 that it could be as much as 50 per cent, an astonishingly high figure. Information Security Oversight Office director J William Leonard added: 'I would put it almost even beyond 50/50 . . . . [T]here's over 50 per cent of the information that, while it may meet the criteria for classification, really should not be classified.'

'It may very well be that a lot of information is classified that shouldn't be,' agreed Defense Secretary Donald Rumsfeld in 2004, 'or it's classified for a period longer than it should be. And maybe we've got to find a better way to manage that as well.' But at the Defense Department, and elsewhere in government, that 'better way' remains elusive and uncharted.

In the interests of a decent, effective and accountable government, the next administration should finally move beyond fervent hope and should start to figure out how to limit official secrecy. One way to do that would be to undertake a systematic review of agency classification policy and practice.

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If secrecy was always inappropriate, then it would be a simple problem with an easy solution – get rid of all secrecy. But we know that there is a place for secrecy in protecting various types of genuine national security information, from advanced military technologies to sensitive intelligence sources and confidential diplomatic initiatives. When properly employed, secrecy serves the public interest. Therefore what is needed is some way to distinguish and disentangle legitimate secrecy from illegitimate secrecy.

The successful experience of the US Department of Energy (DOE) in updating its classification policies a decade ago may provide a helpful exemplar for confronting over-classification today.

In 1995, facing the new realities of the post-Cold War world, the Department of Energy initiated a systematic review of its information classification policies as part of Secretary Hazel O'Leary's Openness Initiative. Formally known as the Fundamental Classification Policy Review, the declared objective of the process was 'to determine which information must continue to be protected and which no longer requires protection and should be made available to the public'.

The review was staffed by 50 technical and policy experts from the department, the national laboratories, and other agencies, divided into seven topical working groups. The groups deliberated for one year, reviewing thousands of topics in hundreds of DOE classification guides, evaluating their continued relevance, and formulating recommendations for change.

Significantly, public input was welcomed and actively solicited at every stage of the process, from identification of the issues to review of the draft recommendations. Public participation was specifically mandated by the Secretary, in order to support a department objective of increasing public confidence in its activities and operations.

Following their year-long deliberations, the reviewers concluded that hundreds of categories of then-classified DOE information should be declassified. In large part, their recommendations were adopted in practice. Broad categories like the production history of plutonium and highly enriched uranium, as well as various narrow technical details, were approved for declassification and public disclosure. At the same time, the review also called for increased protection of certain other categories of classified information, as part of a classification strategy known as 'high fences around narrow areas'.

The review team's guiding principle was that 'classification must be based on explainable judgments of identifiable risk to national security and

Whisper it softly: President Bush and President Paul Kagame of Rwanda
Credit: Reuters/Jim Young

no other reason'. This sensible principle could usefully be applied to classification policy today as well.

With the fruitful example of the 1995 DOE Classification Review in mind, the next president could apply its lessons government-wide. The president could initiate a systematic reduction in over-classification by tasking each agency that classifies information to perform a 'top to bottom' review of its secrecy policies and practices.

The agencies should be specifically directed to seek out and identify classified information that no longer requires protection and that can be publicly disclosed. The primary objective of the review should be to reduce classification to its minimum required scope. Every classification policy and every classification guide should be subjected to scrutiny and reconsideration – resulting in affirmation, modification or revocation. Each agency's review should be completed in a year or less.

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As far as possible, the review process itself should be transparent and publicly accessible. At a minimum, agencies should solicit public input, suggestions and recommendations for policy changes, and should provide an opportunity for public comment prior to finalisation of draft recommendations.

Why would the executive branch voluntarily undertake such a review of its classification policies? One answer is that classification is enormously costly to the government, both operationally and financially: the Information Security Oversight Office reported that classification costs within government reached a record high $8.65 billion in 2007. Therefore reducing classification to its necessary minimum would be good management policy and a wise use of finite security resources even if other considerations were lacking. As noted above, this fact has already been recognised by various executive branch agencies and officials. So it would be a matter of enlightened self-interest for agencies to undertake the proposed review.

The proposal has some other noteworthy features. Significantly, it would enlist the agencies themselves as agents of the classification reform process, and not simply its objects. Without agency co-operation, classification reform efforts will be piecemeal at best and may be futile. External pressure on an agency typically elicits internal opposition. By contrast, directing the agencies to lead classification reform, in co-operation with interested members of the public, stands a good chance of modifying the rules of these rule-based organisations, as it did for a while at the Department of Energy. It offers a way to alter their bureaucratic DNA.

Another important feature is that the proposed classification policy reviews would be conducted independently by each agency. This approach is based on the premise that far-reaching classification reform can best be accomplished at the individual agency level. In other words, a government-wide statement on classification policy (as important as that might be) will not suffice, because the classification issues that arise in each major national security agency are distinct. For example, intelligence agencies are concerned above all with protection of sources and methods. Military agencies are concerned with the security of military technology and operational planning. Foreign policy agencies must weigh the international impacts of classification and declassification. And so on. Although there may be a role for inter-agency consultation at some stage of the process, most agencies will need to conduct the bulk of their assessment independently.

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Dividing the task among individual agencies in this way may even produce some constructive tension among the agencies. They may find themselves in competition to see which of them can implement the president's directive most effectively, and which one can generate the most significant reforms.

Finally, the role of public participation is essential. Public input will provide agencies with important perspectives on public interests and expectations. It will help to motivate and 'incentivise' the process. And it may even nurture a wholesome public engagement with agencies on security policy that has been lacking for years. While agency officials may be best qualified to make the final classification decisions, in many cases, members of the public are best qualified to articulate their own information needs. Agency responsiveness to public concerns would also serve to increase the legitimacy of the review process.

Even if the proposal were adopted, it would not constitute a complete solution to the problem of government secrecy. There are several reasons for this.

For one thing, not all government secrecy abuses are rooted in classification policy. Unwarranted restrictions on information that have the same debilitating effects as over-classification can also arise from indiscriminate use of executive privilege, deliberative process claims, and assertions of the state secrets privilege. An expansive new category of 'controlled unclassified information' could be applied to something as innocuous as an embargoed press release, according to an official background paper. And a federal court noted in August that the Bush administration was withholding unclassified information from disclosure without any justification at all. The current proposal would not fix such problems.

The next administration could conceivably undertake a broad-based review of all restrictions on public disclosure that encompassed controls on classified, privileged, and unclassified information, which would be a commendable thing to do. But my sense is that the classification system, with its uniquely articulated guidelines and procedures, can best be tackled separately from other information policy issues, and that classification reform would complement and facilitate other needed reforms.

A second caveat is that a sound classification policy depends on the good faith of its practitioners. Our leaders and public servants need not be angels, but if they are demons, or if they are simply determined to violate classification policy for whatever reason, they will likely find a way to do so.

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Good faith cannot be mandated or made compulsory through any kind of reform process. All we can do is to elect leaders who act in good faith and seek to replace those who do not.

Lastly, continuing disputes over classification policy are inevitable due to the inherently subjective character of the classification process. It would never be possible to programme a computer to decide what information should be classified, since there is no precise, objective definition of what constitutes unacceptable 'damage to national security' that would justify such decisions. Instead, classification decisions must be based on judgment and experience. On matters of judgment, there are always likely to be disagreements.

On the other hand, a hypothetical computer programme would discover such objectively clear contradictions in current classification practices that it would be able to flag them as 'system errors'. For example, the director of National Intelligence formally declassified the fiscal year 2007 budget for the National Intelligence Program on 30 October 2007. But in response to a Freedom of Information Act request, the office of the director of National Intelligence said earlier this year that the fiscal year 2006 budget for the National Intelligence Program is properly classified. It seems unlikely that both of these judgments are correct.

While such caveats represent limits to the probable impact of the proposed classification review, none of them negates its inherent utility. Even under the imperfect conditions we face, the proposed steps to eliminate unnecessary classification would be worth taking. Moreover, by 'draining the swamp' of over-classification, it will become easier to identify pockets of resistance and to focus more closely on classification issues that remain in dispute. ❐

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Steven Aftergood directs the Project on Government Secrecy at the Federation of American Scientists. This is an edited version of a statement delivered to the Senate subcommittee on the constitution of the committee on the judiciary, at a hearing on restoring the rule of law, 16 September 2008