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LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

- CHAPTER 1:** Eliminate Unnecessary Barriers To Legitimate Charitable Work
- CHAPTER 2:** Closing Guantánamo
- CHAPTER 3:** End Illegal Detention, Torture, and Rendition
- CHAPTER 4:** Prosecute Terrorist Suspects in Accordance with the Law
- CHAPTER 5:** Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.
- CHAPTER 6:** Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion
- CHAPTER 7:** Misuse of Immigration Detention Laws in Counterterrorism Efforts
- CHAPTER 8:** Revising Attorney General Guidelines on FBI Investigations
- CHAPTER 9:** Updating the Law Governing the Privacy of Electronic Communications
- CHAPTER 10:** Fusion Centers and the Expansion of Domestic Intelligence
- CHAPTER 11:** Promoting Government Transparency
- CHAPTER 12:** National Security Letters and Section 215 of the USA PATRIOT Act
- CHAPTER 13:** Reform of the National Security Surveillance Laws and Procedures
- CHAPTER 14:** Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents
- CHAPTER 15:** Reforming the State Secrets Privilege
- CHAPTER 16:** Reforming Watch Lists
- CHAPTER 17:** Assertion of Executive Authority in National Security Matters
- CHAPTER 18:** Executive Privilege and Congressional Oversight
- CHAPTER 19:** Signing Statements
- CHAPTER 20:** War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at www.constitutionproject.org, and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

CHAPTER FOURTEEN

Preventing the over-classification and retroactive classification, and promoting de-classification of, government documents

I. The Problem

During the last 8 years unchecked secrecy has repeatedly corrupted the decision making process by allowing poor or inadequate analysis to prevail. Critically important governmental actions have been shrouded from scrutiny under the mantle of national security, with overclassification, selective and limited declassification, and improper reclassification of previously released information used to avoid oversight and accountability. Often, a claim of national security secrecy ends any public inquiry into allegations of misconduct and selective release of national security information allows the government to control public opinion and avoid embarrassment.

Classification of national security information under Executive Order 12958, as amended, is a critical tool at the disposal of the government to protect our nation, but rampant overclassification undermines the integrity of the very system we depend upon to ensure our safety and security. Security classification has surged dramatically since September 11, 2001, reaching an all-time high of 23 million classification decisions in 2007, nearly triple the number in 2001. The cost to protect classified information has skyrocketed from \$4.7 billion in 2001 to \$8.65 billion in 2007. Officials from throughout the military and intelligence sectors have admitted that 50 percent or more of classification decisions are unnecessary or improper.

The declassification process has been plagued by excessive secrecy, delay, obstruction, and avoidance. The direction of significant funds and attention towards unneeded secrecy has left the National Archives and Records Administration (NARA)—tasked with processing declassified documents for release—with insufficient resources to do its job. And largely unchecked power to create and hold secrets in the federal government is concentrated in a small group of executive branch agencies that often fail to consider significant public interest's in release of certain classified records or the damage to government operations and national security created by barriers to information sharing. Those agencies have reclassified publicly released records with abandon and fought efforts to declassify non-sensitive records.

II. Proposed Solutions

A. Guiding Principles

To facilitate sound decisions, it is critical that secrecy be applied only when necessary for national security purposes and that unnecessary constraints on coordination and consultation not be imposed for bureaucratic or political reasons. Government activities in the national security arena are of tremendous interest to the public, both because transparency ensures our actual security and because the

records that chronicle the actions of government officials provide the accountability necessary for a healthy and vital democracy. When classification is limited to real secrets, the people who have access to those secrets will have greater respect for the system, there will be fewer leaks of sensitive information, and our safety and security will be protected. Reforming the declassification process will allow for effective information sharing and swift release of classified information that no longer requires protection and will prevent improper reclassification of previously released information.

B. Proposed Measures

1. **New executive order on classification.** The new president should immediately issue a presidential directive rejecting prior abuses of the classification system and pledging accountability in the classification process. In the directive, the administration should commit to consulting with the public and an executive branch task force to develop a new executive order on classification. The new executive order, revising Executive Order 12958, as amended, should establish a new framework for designating information that limits classification only to information that must be protected to avoid harm to national security. The new executive order should:
 - a. Set forth clear standards and procedures for proper classification;
 - b. Reestablish a presumption against classification and ensure consideration of the public interest before information is classified;
 - c. Limit the duration of classification and prohibit abuse of classification markings;
 - d. Systematize and improve the process for declassification of historical records and institute stricter standards for reclassification;
 - e. Create clear and effective processes for sharing classified information among agencies and state and local entities; and
 - f. Establish new mechanisms for oversight of the classification system.¹

2. **Review and oversight of classification practices.** Once a new executive order is issued, the president should task each federal agency that classifies information to conduct a detailed public review of its classification practices with the objective of reducing national security secrecy to the essential minimum and declassifying all information that has been classified without a valid national security justification, whose disclosure would no longer cause any harm to the national security, or of which the continued classification would be outweighed by the public interest.²

In addition, the president should direct agency heads to task inspectors

¹ See National Security Archive et al, Proposed Revision to Exec. Order 12958, at http://www.gwu.edu/~nsarchiv/nsa/foiatrans/Classification_Transition_Recommendation.pdf.

² See OMB Watch, "The 21st Century Right to Know Project" (September 2008), at 25-26; Statement of Steven Aftergood (Federation of American Scientists), Hearing on Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary (2008), http://www.fas.org/irp/congress/2008_hr/091608aftergood.pdf.

general at the agencies to perform oversight of secrecy and classification. The inspectors general, who are already in place at each agency, should perform periodic audits of classification and declassification activity to ensure that classification is properly applied and limited to the essential minimum.³

3. **Increased congressional scrutiny of classification.** Congress should exercise its authority to obtain classified materials concerning controversial and unauthorized intelligence programs and use its power to declassify such materials in order to conduct oversight over the executive branch and restore accountability to intelligence programs. Limiting classification abuses and overclassification is only part of what is necessary to reduce excessive secrecy in the executive branch. All too often, Congress accepts a simple assertion by the executive that information is classified without first ensuring that the information has been subjected to the executive's own standards and procedures.⁴
4. **Legislation to Reduce Overclassification.** The President should work with Congress to ensure passage of legislation designed to reduce overclassification, which shall at a minimum require original classifiers to identify or describe the damage to national security that could result from the unauthorized disclosure of the information and to balance that with the damage to national security that could occur from classifying the information; requiring original classifiers to consider the public interest prior to classifying information; mandate that classifiers use the lowest appropriate classification level and the shortest appropriate duration for classification; establish oversight mechanisms at each agency, including independent classification and declassification advisory boards, systems to track classification decisions, training, regular auditing by the inspectors general and reporting to Congress about classification policies and compliance, and internal remedies for improper classification; and require that agencies provide for internal challenges to classification decisions without retribution, reward employees who identify improper classification, and develop remedies for improper classification decisions by agency employees.
5. **Historical Records Act.** The president should work with Congress to accelerate declassification of historical records through passage of an omnibus Historical Records Act (HRA). An omnibus Historical Records Act should be enacted in order to facilitate the declassification of historically significant information in a timely manner, bring greater consistency and efficiency to the declassification process, consider the significant public interest in the declassification of historical records, and reduce the burden and delay inherent in the current declassification process. The HRA should establish a National Declassification Center to speed review and release of critical historical

³ See OMB Watch, 37.

⁴ See OMB Watch, 26-27; Meredith Fuchs, "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," 58 *Administrative Law Review* 131 (2006).

materials, institute a very strict standard for reclassification, and reform the procedure for reviewing records older than 25 years.⁵

III. Allies*

American Library Association

Lynne E. Bradley, Director

[lbradley\(at\)alawash.org](mailto:lbradley(at)alawash.org)

202-682-8410

The ALA Policy Manual: The Rights of Library Users and the USA
Patriot Act (52.4.5) *available at*

http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf

American Association of Law Libraries

Mary Alice Baish, Acting Washington Affairs Representative

[baish\(at\)law.georgetown.edu](mailto:baish(at)law.georgetown.edu)

202-662-9200

American Association of University Professors

John W. Curtis, Ph.D., Director of Research and Public Policy

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202-737-5900 (ext. 143)

Association of Research Libraries

Prudence Adler

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202-296-2296 (ext. 104)

Bill of Rights Defense Committee (BORDC)

Chip Pitts, President

[chip.pitts\(at\)att.net](mailto:chip.pitts(at)att.net)

Center for Democracy & Technology

Gregory T. Nojeim

[gnojeim\(at\)cdt.org](mailto:gnojeim(at)cdt.org)

202-637-9800 (ext 113)

The Internet in Transition, *available at* <http://www.cdt.org/election2008/>

Citizens for Responsibility and Ethics in Washington

Anne Weismann, Chief Counsel

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202-408-5565

Common Cause

⁵ See OMB Watch, at 27; National Security Archive, Letter to Stephen J. Hadley and Kenneth L. Wainstein regarding PIDB report (April 15, 2008).

Sarah Dufendach, Vice President for Legislative Affairs
www.commoncause.org
202-736-5709

The Constitution Project

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202-580-6920

Electronic Frontier Foundation (EFF)

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415-436-9333 (ext. 116)
A Transparency Agenda for the New Administration, *available*
at <http://www.eff.org/deeplinks/2008/11/transparency-agenda>

Essential Information

John Richard or Robert Weissman
202-387-8034

Federation of American Scientists

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Government Accountability Project

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202-408-0034 (ext. 107)

Liberty Coalition

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National Coalition Against Censorship

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202-994-7000

OMB Watch

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OpenTheGovernment.org

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Public Citizen

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* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

IV. Counter-Arguments and Rebuttal:

A. *Intelligence agencies and other executive branch agencies with classification authority have routinely opposed systematic classification reform out of fear that they may lose the ability to protect information.*

Officials from throughout the intelligence and military agencies have acknowledged that overclassification endangers our security; it interferes with information sharing, harms the integrity of the classification system; and interferes with effective oversight. Reform of the classification system does not mean that sensitive secrets will be released. What it should accomplish is better protection of genuinely sensitive information, more appropriate use of resources, improved communication between the branches of government, improved information sharing, and greater public disclosure on matters of public interest.

V. Recommended Documents for Further Information:

- a. OMB Watch, “The 21st Century Right to Know Project” (September 2008).
- b. National Security Archive et al, Classification Proposal, *available at* http://www.gwu.edu/~nsarchiv/nsa/foiatrans/Classification_Transition_Recommendation.pdf.
- c. National Security Archive, Letter to Stephen J. Hadley and Kenneth L. Wainstein regarding PIDB report (April 15, 2008), *available at* http://www.gwu.edu/~nsarchiv/foia/pidb_report_comments.pdf.
- d. Public Interest Declassification Board, “Improving Declassification: A Report to the President” (December 2007), <http://www.archives.gov/declassification/pidb/improving-declassification.pdf>.
- e. Testimony of John D. Podesta, Center for American Progress, Hearing on Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary (Sept. 16, 2008), *available at* http://www.americanprogressaction.org/issues/2008/pdf/podesta_law_testimony.pdf.
- f. Statement of Steven Aftergood, Federation of American Scientists, Hearing on Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary (Sept. 16, 2008), *available at* http://www.fas.org/irp/congress/2008_hr/091608aftergood.pdf
- g. Statement of Meredith Fuchs, National Security Archive, Hearing on Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary (Sept. 16, 2008), *available at*
- h. <http://feingold.senate.gov/ruleoflaw/testimony/nationalsecurityarchive.pdf>.
- i. Statement of Patrice McDermott, OpenTheGovernment.org, Hearing on Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the

- Judiciary (Sept. 16, 2008), *available at* <http://feingold.senate.gov/ruleoflaw/testimony/open.pdf>.
- j. H.R. 4806, “Reducing Over-Classification Act of 2008” (passed by the House, July 30, 2008).
 - k. H.R. Rep. No. 110-776 (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr776.110.pdf.
 - l. H.R. 6575, “Over-Classification Reduction Act” (passed by the House, Sept. 9, 2008).
 - m. H.R. Rep. No. 110-809 (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr809.110.pdf
 - n. Geoffrey R. Stone, *On Secrecy and Transparency: Thoughts for Congress and a New Administration* (June 2008), *available at* <http://www.acslaw.org/files/Geoff%20Stone%20Issue%20Brief.pdf>