

# **A New Balancing Test**

## *How Excessive Classification Undermines National Security*

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Good morning, everyone. Thank you very much for the kind introduction, Ron, and for providing me the opportunity to participate in your conference this year. It's exciting for me for a number of reasons. First and foremost, while always a critical topic, how we ensure an informed populace is especially critical in a year in which we will elect new national leaders to guide our nation through extremely challenging times. Second, it is quite an honor to be associated with one of the first public events at such a prominent and cutting-edge venue as the Newseum. Lastly, this morning is something of a "coming out" session for me in that today is the first time in almost 35 years that I have the opportunity to address a group of people as something other than a government official. Although I have always taken pride in being candid in all my presentations, for the first time I can say that my remarks reflect upon me alone, a sort of "Leonard Unplugged" if you will for those of you into the MTV scene.

While I want to leave as much time as possible for questions and follow-up, I would like to spend a few minutes this morning discussing what I call a "New Balancing Test" with respect to decisions to classify information in the interest of national security. We are long familiar with what many regard as the "traditional" balancing test of national security versus openness – of secrecy versus transparency. Instead, the balancing test of which I talk is more along the lines of national security versus national security; i.e. what will cause greater damage to national security, the disclosing or withholding of specific information.

Recognize that in many regards, this is not entirely new. The “9-11 Commission” and others have long pointed out that the inappropriate hoarding of information can, at times, be more deleterious to the national interest than inappropriate disclosures. Even the current framework as set forth in Executive Order 12958, as amended (the Order), recognizes, at least implicitly, that the act of original classification is inherently discretionary. It does this by virtue of the two most critical yet overlooked words within the Order. First is the word “may,” when the Order clearly states right up front that “information *may* be originally classified” only when it meets certain standards. In this regard, the Order is permissive rather than prescriptive. This is in sharp contrast, for example, to the predecessor order which dates back to the Reagan era and stated that such information “**shall**” be classified. The second critical word is “unauthorized” as used in the same section of the Order which addresses the standards for classification, which includes the requirement for an original classifier to be able to identify or describe the damage to national security that would arise in the event of the information’s “**unauthorized**” disclosure. This wording makes it clear that situations are envisioned where information will be authorized for disclosure even when it can reasonably be expected to result in damage to national security.

Nonetheless, there are many, especially within government, who believe that any information which can reasonably be expected to cause damage to national security, an exceedingly low threshold, must always be classified no matter what the consequences. Yet, we do not have to look far in order to recognize recent events that have harmed our national security due, at least in part, to decisions by government officials to classify or to otherwise restrict the dissemination of official information.

Of all the decisions that could impact a nation’s security, there is none as profound as the decision to unleash the brutality of war – to choose to send a nation’s younger generation into battle where they will be killed, maimed and traumatized and where they will be called upon to take the life of other humans – and not just adversaries but, unfortunately, the all too frequent unintentional killing of innocent men, women and children. Five years ago next week, our nation made such a choice and much has been written and said about how faulty the original

rationale was for that decision. However, it is useful to also review the role that secrecy played in that tragically flawed commitment of national might and prestige.

### **Unread intelligence estimate**

Prior to their October 2002 vote to authorize the use of military force against Iraq, in order to better inform their deliberations some members of Congress requested that a National Intelligence Estimate (NIE) be prepared on Iraq's programs for weapons of mass destruction. The NIE and its key judgments, in addition to being wrong, were classified. The NIE was delivered to Congress the week before its vote and, since it was classified, in order to read it members had to go to a special room and sign a log. It's been variously reported how many Senators actually read the classified report prior to authorizing the President to take our nation to war, but the publication *The Hill* quoted one senior congressional intelligence staffer as saying that "You can say with 100 percent certainty it's less than 10." How many more would have read it had it not been classified is impossible to say – but we can only hope that it would have been more than 10.

And what would they have learned if they had read the original NIE rather than rely upon the unclassified white paper which was released by the Director of Central Intelligence at the same time and which was intended as an unclassified version of the NIE? According to the Senate report on pre-war intelligence on Iraq, they would have learned of the State Department's Bureau of Intelligence and Research alternative view on whether Iraq would have a nuclear weapon this decade and that the Department of Energy dismissed attempts by Iraq to obtain high-strength aluminum tubes as being part of Iraq's effort to reconstitute its nuclear program. They would also have learned that while the key judgments were almost identical in layout and substance in both papers, the key judgments of the unclassified paper were missing many of the caveats that were used in the classified NIE. As concluded by the Senate Select Committee on Intelligence, removing caveats such as "we judge" or "we assess" changed many sentences in the unclassified paper to statements of fact rather than assessments – an egregious act since

a cardinal rule of the declassification process is to ensure that it does not alter the substance of the information released.

What is equally disturbing is the rationale offered by drafters of the classified NIE as to why the unclassified paper omitted the fact that the intelligence community's own nuclear experts at the Department of Energy did not agree with the NIE's conclusion regarding the aluminum tubes, even though the allegation was being used by some of our leaders to stir up images of mushroom clouds appearing somewhere over the United States. Again according to the Senate Select Committee on Intelligence, officials at the National Intelligence Council indicated that they did not refer to disagreements between intelligence agencies in unclassified documents out of concern that the country being discussed would be "tipped off to a potential cover story." Such a concern can understandably justify classification in some instances. However, to use it as a rationale for a decision which ultimately led to the production of a paper which has been judged as being misleading to both the Congress and the American people, in as grave a matter as a decision to go to war, is a perfect example of how the failure to balance the damage that results from disclosure, with the damage that results from classifying, can have exceedingly tragic consequences for our nation.

It is interesting to note, however, the real lesson-learned that some in the government have apparently taken from this experience as we enter the sixth year of the Iraq War. According to a report last week in the *Washington Post*, intelligence community leaders are leaning toward keeping secret the key judgments of a new NIE on Iraq scheduled to be completed this month – notwithstanding the American nation and its people having invested for over five years both blood and treasure in a war which shows no sign of ending soon.

The lead up to the Iraq War provides another excellent example of how even our own intelligence community can be hampered by excessive and needless classification and compartmentalization. Again, it is well known now that when Secretary of State Colin Powell spoke to the U.N. Security Council in February 2003 just before the war, the most impressive part of his presentation which talked about eyewitness accounts of mobile biological labs and

an accident that killed a dozen people was a fraud, based upon debriefings by German intelligence officials of a human source aptly codenamed “Curveball.” What is truly noteworthy, however – according to Los Angeles Times reporter Bob Drogin who wrote a book on Curveball – is that at the time of the U.N. presentation, and even not until well after the war had begun, the CIA did not even know the name of the source whose fabrications served as the basis upon which our nation chose to go to war. And, according to Drogin, the reason why is that German intelligence refused to share his name. They did so simply because they could; it was “pride of service”, a form of one-upmanship.

There are yet other examples of how excessive classification can harm our national security. For example, our current national security strategy recognizes that we are engaged in an ideological struggle against many forms of extremism. In fact, the first pillar of that strategy as articulated by the current administration is promoting freedom, justice, and human dignity, which includes offering people throughout the world a positive vision rooted in America's beliefs, thereby isolating and marginalizing violent extremists. This strategy reflects our success in ending the Cold War, not by defeating the Soviet Union militarily, but rather by promoting American ideals and values which ultimately led to the demise of the most formidable foe our nation has ever confronted.

So how are we doing – how successful have we been in isolating and marginalizing violent extremists and offering the world’s populace a positive vision of our society? Even many of our government’s leaders acknowledge that we are not doing very well, and this perspective is supported by empirical evidence. For example, in June 2007, the Pew Global Attitudes Project released the results of a worldwide public opinion survey that focused on global unease with major world powers. Among other results, this poll revealed that widespread anti-American sentiment had significantly deepened since 2002. Specifically, in virtually every area of the world -- Western Europe, Eastern Europe, Latin America and Asia -- overwhelming majorities of people viewed the U.S. favorably prior to 2002. But in virtually every single country in each of those regions, the percentage which now views the U.S. favorably has significantly decreased. The notable drop in U.S. credibility is as pronounced among America's traditional allies as it is in

less friendly regions. More significantly still, significant majorities in Europe and Latin America who supported the U.S. in its war on terrorism in the immediate aftermath of 9/11 have notably reversed their positions.

I would suggest our failure to isolate the extremists is due, in part, to the worldwide perception that we continue to violate our own values and ideals, especially as they relate to human dignity and the rule of law. This perception is fostered by some of our own government officials when they refuse to plainly state that physically restraining an individual and forcing his lungs to slowly fill up with water constitutes torture. They do this, in part, by hiding behind the classification system – by stating that to acknowledge limits to interrogation techniques used by our intelligence services (but not our military) would somehow disclose classified information – would harm our national security.

### **Indiscriminate secrecy**

While a case may be made that the *unauthorized* disclosure of specific interrogation techniques can reasonably be expected to result in damage to the national security (a basic standard for classification), a far more compelling case can be made that greater harm to national security results by not unequivocally acknowledging whether specific techniques are consistent with American values and our commitment to preserving human dignity and the rule of law. Such evasion, rather than isolating and marginalizing violent extremists, instead provides them with fodder for their web sites and other mass media in order to further inflame passions and recruit new members to their cause.

In fact, the argument for classification of specific interrogation techniques has already been rejected by our military's combatant commanders. When releasing the Army's revised interrogation techniques in September 2006, Lt. Gen. John Kimmons, the Army Deputy Chief of Staff for Intelligence, acknowledged that they considered classifying some of the techniques in order to keep them out of the hands of the enemy. Instead, they opted for transparency, in part to be, as General Kimmons stated, "as clear as we can be in the training of these techniques to our own soldiers, sailors, airmen and Marines."

In that vein, the young men and women that we send into combat every day understand that if in the heat of battle they make a split-second decision that involves the indiscriminate use of force, it can result not only in the loss of innocent life, but can also undercut our national security by feeding a negative vision of our nation to the rest of the world. As such, like the dozens of service members criminally charged to date for unlawful killings, they know that they can and will be held accountable. Indiscriminate government secrecy can have an equally deleterious impact on our national security strategy. Yet, we are a long way from instilling the same sense of discipline and accountability for all government officials who wield the critical national security tool of classification.

A prime example of indiscriminate secrecy was recently revealed by Jack Goldsmith, the former head of the Office of Legal Counsel (OLC) in the Department of Justice. Goldsmith wrote that senior officials within the government “blew through [the Federal Intelligence Surveillance Act] in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.” Goldsmith further recounted one of his first experiences with such extraordinary concealment, in late 2003 when, as he recalls, David Addington of the Office of the Vice President angrily denied a request by the National Security Agency’s (NSA) inspector general to see a copy of OLC’s legal analysis supporting the oft discussed secret NSA terrorist surveillance program. Goldsmith wrote: “Before I arrived in OLC, not even NSA lawyers were allowed to see the Justice Department’s legal analysis of what NSA was doing.”

I cannot recall a more blatant example of using classification not for its intended purpose of denying information to our nation’s adversaries but rather to use it as a bureaucratic weapon to blunt potential opposition. To treat NSA lawyers who have the highest of clearance levels as if they were legal counsel for Al-Qaeda gives yet more fodder to our nation’s adversaries to represent us as having contempt for the rule of law. Much like the 18-year-old soldier who indiscriminately fires his weapon, such conduct severely undermines our national security strategy of providing the world populace with a positive vision of the United States and thereby isolating and marginalizing violent extremists. The only difference is, the 18-year-old soldier, who literally risks his life for his nation, would be held accountable.

I often talked about how secrecy is a two-edged sword. For example, denying information to the enemy on the battlefield also increases the risk of a lack of awareness on the part of our own forces, contributing to the potential for fratricide or other failures. Similarly, strict compartmentalization in handling human agents increases our own vulnerability to deception as a consequence of using sources that ultimately prove to be unreliable. Simply put, secrecy comes at a price – sometimes a deadly price – oftentimes through its impact upon the decision-making process. Whether seeking advances in science and technology, formulating government policy, developing war plans or assessing intelligence, the end product can always be enhanced as a consequence of a far reaching give and take during which underlying premises are challenged and alternate approaches are considered. As such, secrecy and compartmentalization just about guarantees the absence of an optimized end product. The challenge is ensuring that this tradeoff – i.e., accepting something less than the optimal result in exchange for denying a potential adversary insight or knowledge into our capabilities or intentions – is taken into account when making a decision to cloak certain information in secrecy.

### **Secrecy for bureaucratic reasons**

The damage to the national interest as a consequence of excessive secrecy is not relegated solely to the national security arena; for example, the administration's decision to create the Department of Homeland Security over five years ago, the most massive reorganization of the Federal government since 1947, was cloaked in secrecy for purely bureaucratic reasons. One homeland security official was quoted at the time as stating that "the bureaucracy would have smothered this in its infancy if the White House had let it out." Once again, however, excessive secrecy came at a price and there were consequences to be paid.

In the journal *Presidential Studies Quarterly*, Harold Relyea of the Congressional Research Service wrote about the consequences of the administration developing somewhat hastily and in complete secrecy its proposal for a Department of Homeland Security. Specifically, "available reorganization expertise was not utilized and support from agencies and professional

constituencies directly affected was not sought.” Relyea went on to point out that the president’s proposal failed to address a definition of the organizing concept – i.e. “a Department of Homeland Security was proposed but what was homeland security?” Absent such a common understanding, Relyea highlights that there was no standard for determining which existing agencies, programs and functions merited transfer to the new department and, even more importantly, what should be done with the non-homeland security programs and functions of an agency being transferred.

At the time, many were concerned that non-homeland security functions transferred to the new department, i.e. those programs not directly related to countering terrorism, would become the victims of benign neglect; that programs not focused on the terrorist threat would be regarded as having a lower priority and would be allocated insufficient resources for their full and effective execution. For example, the House Committee on the Judiciary recommended transferring only the Office of National Preparedness of the Federal Emergency Management Agency (FEMA) to the new department, not the entire agency. Nonetheless, these and other voices of concern were drowned out and in the end the administration pretty much got what it wanted. Unfortunately, a little over two years later, the citizens of New Orleans and coastal Louisiana and Mississippi would discover the hard way that such concerns were well-founded. Had such a massive bureaucratic undertaking as the creation of the Department of Homeland Security not been undertaken in such secrecy, the lives of tens of thousands of Americans may not have been upended to the extent they were and continue to be as our government still struggles to meet its most basic commitment to provide for the common welfare of its most needy citizens.

Of course, the most infamous instance of the use of excessive secrecy in the formulation of government policy centers around the National Energy Policy Development Group – otherwise known as the Energy Task Force – in the early days of the current administration. Much has been written about this issue and the subsequent lawsuit between the Government Accountability Office and the Vice President. While the courts have recognized the President’s and Vice President’s authority to receive information in confidence, what concerns me most

about the administration's arguments made in this case was that they centered primarily upon executive power, as if such power was an end in and of itself. Our government's power, as we all know, emanates from the people – and it is entrusted into the custody and care of our nation's leaders in order to promote the common good.

I do not recall any arguments from the administration that secrecy in this case somehow promoted the common good. Instead, we heard arguments to the effect that the President and the Vice President cannot expect to be able to receive candid advice from others unless they can assure them complete confidentiality – that others, to include the American people, would not learn of what was discussed. From my perspective, if someone who has been invited into the Oval Office refuses to provide candid advice to the President unless assured that the American people will not learn of it – that person probably should not be invited into the Oval Office in the first place. And I believe that history supports me on that point. And with respect to the specifics associated with the Energy Task Force, I believe the specter of American's paying \$4.00 a gallon for gasoline at the pump at the same time the oil industry enjoys record profits further supports my concerns.

### **When secrecy is needed**

Before I end, I want to make one thing perfectly clear. Government secrecy is an essential national security tool that must be preserved. I make this observation having spent my 34-year Federal career immersed in the arcane world of Government secrecy. The government's system of secrecy has had more than a theoretical application for my family. In service to their country, my two sons placed themselves in harm's way – one through overseas travel in support of our nation's intelligence efforts, and the other as a combat infantry platoon leader in Iraq. Thus, their well-being was dependent, in part, upon effective government secrecy. I know the value of government secrecy in an uncertain world.

The ability to surprise and/or deceive the enemy can spell the difference between life and death on the battlefield. Certain intelligence methods can work only if the adversary is unaware of their existence. Similarly, it is nearly impossible for our intelligence services to

recruit human sources who often risk their lives aiding our country or to obtain assistance from other countries' intelligence services, unless such sources can be assured complete and total confidentiality. The successful discourse between nations often depends upon constructive ambiguity and plausible deniability as the only way to balance competing and divergent national interests

However, much the same way our nation's military leaders—in developing and implementing a new counterinsurgency strategy—have come to the conclusion that the more force you use, the less effective it can be, our nation's bureaucracies must similarly use government secrecy more selectively and recognize that in today's environment, less secrecy and increased transparency can, at times, be more effective in denying adversaries the ability to harm our nation.

So, what to do about all this? How do we preserve the essential national tool of government secrecy while at the same time minimizing the harm to national security which excessive secrecy can cause? There is, of course, no “silver bullet.” There is, however, one relatively simple test that I believe can well make a difference.

Specifically, I recommend that the current policy be revised so as to make the current **implicit** “balancing test” of national security versus national security **explicit** in the governing order. As such, in making an original classification decision, classifiers would be explicitly required to assess the damage to national security that could arise as a consequence of withholding the information and compare it to the damage that could reasonably be expected if the information was disclosed.

Such a simple added step to the classification process has already proven itself in another context. I know many of you recall the audit my former organization, the Information Security Oversight Office (ISOO), conducted a couple of years ago with respect to the withdrawal of records from public access at the National Archives for classification purposes. Specifically, ISOO performed an audit of all re-review efforts undertaken since 1995 by agencies in their belief that certain records at the National Archives had not been properly reviewed for

declassification, but had been made available to the public. The audit found a total of ten unrelated efforts to identify such records, which resulted in the withdrawal of over 25,000 publicly available records.

One of the ironies of the withdrawal of records from public access is that while it was done in an attempt to mitigate the potential damage to national security that may arise as a consequence of having information perceived to be classified (albeit information up to 50-60 years old) available on the public shelves, in some cases such withdrawals actually exacerbated the potential damage. This would occur since much of the withdrawn information standing alone proved to be just a single factoid in the otherwise innocuous detritus of history. However, by withdrawing the record from public access, the agency was actually drawing a bright red line to today's national security concerns thus highlighting the very fact the agency wanted to conceal.

It was in recognition of this reality that a key element of the protocol put in place to govern potential future withdrawal from public access of records at the National Archives was that prior to making such a request of the Archives, an agency must first consider whether withdrawing the record might damage national security by highlighting or otherwise bringing undue attention to the information. The value of this simple added step can be ascertained by just looking at the numbers. As I mentioned, in the ten years prior to the conduct of the audit, over 25,000 records were removed from public access at the Archives. In the two years since the protocol was instituted with the added balancing test of national security versus national security, only seven records have been removed from the Archives, to include the Presidential Libraries. And in keeping with the Archivist's commitment that such withdrawals will be infrequent and transparent, the details surrounding these withdrawals have been made public.

To reiterate, the ability and authority to classify national security information is a critical tool at the disposal of the Government and its leaders to protect our nation and its citizens. In this time of constant and unique challenges to our national security, it is the duty of all engaged in public service to do everything possible to enhance the effectiveness of this tool and to wield it

with precision. My goal today was to outline a simple but necessary additional step which can, in fact, add to the classifications system's effectiveness.

I thank you for your time and attention and look forward to any questions or comments you may have.