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Clarify and Delimit Scope of Classified "Methods"

Professor Morrison, Members of the Board, and Mr. Ferreiro, thank you for this opportunity to share some ideas about steps needed to modernize the national security classification and declassification systems through the next Administration's Executive Order. As we all know, Section 102(d)(3) of the National Security Act of 1947[i] makes the Director of National Intelligence responsible for protecting intelligence sources and methods from unauthorized disclosure. The director has "very broad authority to protect all sources of intelligence information from disclosure."[ii]

I hope to add to the discussion of reducing over-classification by pointing to the necessity of clarifying and delimiting the scope of classified methods. Let me stipulate that I believe that "sources" seem to be also overclassified, but we really cannot tell. That topic is, though, beyond the scope of my remarks today.

I am not the deep scholar on national security classification that most of you in this room are. Let me first, then, address the clear problems and —in my mind and those of many in the reducing-secrecy community—the dangers of the over-classification of practices that are deemed intelligence methods.

In the late years of the last decade and the first few years of this one assertions were regularly made that classified methods were so intertwined with policy discussions that documents (in particular FISC orders) could not possibly be declassified, even in a redacted form. We have had confirmation since 2013 that these assertions were not true. The documents could not be declassified--until they were.[iii] Moreover, bulk collections of US persons' communications records, a classified method, were declared unconstitutional by a three-judge panel for the United States Court of Appeals for the Second Circuit. The FISC has also found in several cases that the government's communications surveillance, classified as a method, was unlawful.

In April 2014, the Senate Select Committee on Intelligence (SSCI) voted across party lines to begin declassification of the Committee's Study of the CIA's Detention and Interrogation Program, aka the Torture Report. The President promised to swiftly declassify the material that the committee submitted for declassification review. At that time OTG noted that, in order for that review to be meaningful, the President must ensure that the CIA abandon its prior position that the details of individual detainees' torture are classified "sources and methods." In terms of the defense of Guantanamo detainees, this stance necessitated that their lawyers had to treat their clients' *experiences* — and their memories thereof — as secret information.

The December 2014 public release of the 500-page executive summary of the Senate detailed several of the intelligence agency's so-called "enhanced interrogation techniques," which had previously been secret. Up until this public release, the government's argument was that the entire torture program was classified.

In January 2015, the government modified its classification rules for the military commissions, the court system in which several Guantanamo detainees are being tried for war crimes. Under the new rules, the torture methods used in CIA prisons are no longer subject to classification, although any information -- that could reveal the locations where torture took place *or the people who helped facilitate it* -- remains secret.

So, although the 2015 modification is a step forward, problems with classification remain and they continue because there is no clarity or delimitation. As Air Force Capt. Michael Schwartz, an attorney for Walid bin Attash, another co-defendant in the 9/11 attacks case, put it, "When we say this is the tip of the iceberg, this is what we mean. When you compile a report that has a bunch of embarrassing facts about the executive branch, and then you send it to the executive branch for their redactions, what do you think you're going to get?"[iv]

And, just in case we think that the broad latitude the IC has should satisfy them, last year — right about this time, late in the day on the Friday before the House FOIA bill was going to the Floor — House Intelligence Committee (HPSCI) staff went to House Oversight & Government Reform staff. The HPSCI staff representatives convinced HOGR staff to insert language, a "Rule of Construction" for the new Presumption of Openness provision--b(1)(C)(i):

> (2) RULES OF CONSTRUCTION.—
> (A) INTELLIGENCE SOURCES AND METHODS.—Nothing in the amendments made by this Act to section 552(b) of title 5, United States Code, shall be construed to require the disclosure of information that—
> (i) is exempt under paragraph (1) of such section; or
> (ii) would adversely affect intelligence sources and methods that are protected by an exemption under such section.

(A)(i) is "belts and suspenders" and does not affect the legal grounds for withholding records under exemption 1; Exemption 1 is mandatory as long as the information is properly classified. Its intent, though, is not to clarify the exclusion of Exemption 1 from the new presumption of openness provision, but rather to expressly (and unnecessarily) exclude it.

Under the second rule of construction, (A)(ii), the term "adversely affect," invites expansive interpretations of how it could be applied, and could potentially weaken the standard for withholding classified information. It seemed clear to the reducing-secrecy community that it would be easier to show that the disclosure of a record would "adversely affect" "sources and

methods" than to show that the disclosure of the same record would "cause describable harm to national security."

Our other concern was that the provision could apply to a b(3) exemption in *any* statute, not just national security statutes. If the aim of inserting this language was, in fact, to protect information relating to intelligence sources and methods, the language should have indicated the specific statute(s) so it would not be left open for interpretation.

In the end, this HPSCI provision was strongly rejected by the Senate Judiciary Committee members.

As has been regularly noted, almost anything can serve as an intelligence source or method, including a subscription to the daily newspaper. And Executive Orders on National Security Classification have routinely extended the permission to classify intelligence sources and methods. It is instructive to note that a predecessor order [5], EO 11652, issued by President Nixon in 1972, gave concrete examples of the sort of potential damage resulting from disclosure that would justify a "Top Secret" classification of the information to be withheld: "… the compromise of vital national defense plans or complex cryptologic and communication intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security."[v]

The overbroad terminology and lack of specificity in subsequent Orders has given broad rein to the Intelligence Community. Indeed, twenty-five years later Senator Patrick Moynihan, in the 1997 Moynihan Commission report, addressed this same issue:

> Underlying the rationale of "sources and methods" as the reason that information is kept secret is not the content of the information itself, but instead the way it was obtained. …the public and historians … want to know how it was used and what decisions it informed. Too often, there is a tendency to use the sources and methods language contained in the National Security Act of 1947 to automatically classify virtually anything that is collected by an intelligence agency--including information collected from open sources.
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> … Clarification through issuance of a directive by the Director of Central Intelligence of the scope of and reasons for sources and methods protection would still ensure that sensitive information stays secret. At the same time, such a directive explaining the appropriate scope of that protection would help prevent the automatic withholding of all information that might relate in any manner, however indirectly, to an intelligence source or method.

National security classification should *protect* our democracy, not shield government actions that – too often consciously and deliberately – go around democratic practices and subvert constitutional protections.

The vagueness and un-delimited scope of classified "intelligence methods" needs to be rectified to ensure that it does not permit these uses.

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[i] 50 U.S.C.§ 403(d)(3)

[ii] *Central Intelligence Agency v. Sims*, 471 U.S. 159, 168-169 (1985).

[iii] DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001: https://icontherecord.tumblr.com/post/70683717031/dni-announces-the-declassification-of-the.

[iv] Jessica Schuldberg, U.S. Government Starting to Allow CIA Torture Victims to Discuss their Own Memories, Huffington Post, September 8, 2015: http://www.huffingtonpost.com/2015/06/11/guantanamo-cia-torture_n_7552314.html.

[v] Arvin S. Quist, Security Classification Information, Volume 2, Principles for Classification of Information, April 1993, Chapter 7, Classification Levels, made available by the Federation of American Scientists: http://www.fas.org/sgp/library/quist2/chap_7.html.