Statement of Meredith Fuchs, General Counsel, National Security Archive,
George Washington University
To the Public Interest Declassification Board
January 19, 2006

Mr. Chairman and members of the Board, thank you for this opportunity to speak to you about the challenges to public access posed by the current classification regime. This Board has an opportunity to recommend changes to the system that would expand public access and accountability while protecting the security of this nation. I commend you for your service on this Board and your interest in developing solutions to what have proven to be persistent problems.

As General Counsel to the National Security Archive, I am exposed to problems with the classification system every day. The National Security Archive is one of the most active and successful non-profit users of the Freedom of Information Act (FOIA) and the Mandatory Declassification Review (MDR) program. We have filed thousands of FOIA and declassification requests in our over 20 years of operation, resulting in more than six million pages of released documents that might otherwise be secret today. We have published more than half a million pages on the Web and in other formats, along with more than 40 books by our staff and fellows, including the Pulitzer Prize winner in 1996 on Eastern Europe after Communism. We won the George Polk Award in April 2000 for "piercing self-serving veils of government secrecy." We have partners in 35 countries doing the same kind of work: opening the files of secret police, Politburos, military dictatorships, and the Warsaw Pact, and leveraging openness in both directions.

I don't need to tell you that overclassification is a problem. The reports of the Information Security Oversight Office (ISOO) already cover that territory by tracking the growth in classification decisions from 5.8 million in 1996, to 14.2 million in 2005.[1]

Nor do I need to tell you that the incentives in the system encourage overclassification. As last year's controversy about reclassification of historical records at the National Archives and Records Administration (NARA) taught us, agencies will go to remarkable lengths, expending significant manpower and taxpayers' dollars, to classify even non-sensitive information, if it establishes their control and authority over the records. Past experience has also shown that agencies can make unilateral decisions to "disappear" records permanently with little fear of punishment—either by deliberately destroying them or by ceasing to create them.

What I hope to offer you are some ideas about how to put countervailing pressure on the secrecy system in order to bring the level of classification back to one that protects us without impeding accountability. I will focus on three primary areas of concern: (1) the monopolization of secrecy decisionmaking by individual agencies; (2) the historical record bottleneck; and (3) the woefully inadequate, or misallocated, resources dedicated to declassification programs. In addition, I would like to make several additional recommendations that, if implemented, could help reorient agency thinking about secrecy.

[1] Information Security Oversight Office 2005 Report to the President, p. 13.

End Unilateral Secrecy Decisionmaking Regarding Historical Records

Today, all power for creating and holding secrets rests with a small group of executive branch agencies. While there is no doubt that this individual agency focus does allow for agencies to exercise independent judgment, the unilateral nature of the decisionmaking also perpetuates a secrecy addiction at individual agencies. When that happens, the worst features of turf consciousness and bureaucratic inertia come into play.

One solution is to disperse the authority, particularly with respect to historic materials, where the passage of time and events has made it less necessary for one agency to jealously control all information. The Moynihan Commission recommended setting up a formal Declassification Center based at the National Archives and staffed by an interagency group with delegated powers from their agencies.[2] Its performance would be measured by its success in reviewing and declassifying documents. Just such a group served the Congress well during the Iran-Contra investigations by reviewing and declassifying more than 30 extensive volumes of testimony and documents in record time, with enormous benefits for government accountability and without damage to national security. Under the Moynihan Commission recommendation, an important component of the Declassification Center would be an advisory panel that would provide regular public input and advice on agency declassification priorities.

The National Declassification Initiative (NDI) sponsored by NARA goes part of the way toward making this idea a reality, but there are elements of that program that could be improved to make it a true force for reducing unnecessary secrecy. By harnessing the combined resources and expertise of many different agencies, the NDI could speed access to historical documents for researchers and the general public. Further the NDI could eliminate much of the redundancy in existing FOIA and declassification procedures that leads to inconsistent access to records and wasteful expenditure of resources.

The NDI's underlying innovation, however, —the establishment of a comprehensive, interdepartmental declassification review capability for the federal government—could prove to be a serious flaw. The concentration of declassification activities in one location presents the risk that official declassification will fall prey to an unhealthy consensus, built upon the worst disclosure fears of individual agencies rather than principles of increased transparency and public access. As NARA itself has noted, "the biggest impediments to the NDI are culture, attitude, and resistance to change" on the part of participating Executive Branch agencies.[3]

One method of countering the tendency towards group think would be to create a non-partisan, non-governmental board of private citizens to represent the interest of professional researchers, historians, and the general public in the NDI declassification process. Such a board could serve as a conduit for public input and oversight. There are models for such a board, including the ones authorized by the President John F. Kennedy Assassination Records Collection Act of 1992 or the Nazi War Crimes Disclosure Act. The mission of the board would be distinct from that of the PIDB because the former would be focused on unique oversight

[2] Report of the Commission on Protecting and Reducing Government Secrecy.
[3] See http://www.archives.gov/declassification/challenges.pdf

challenges arising within the NDI whereas, the PIDB exercises a far broader mandate to monitor open government developments throughout the Executive Branch

Another model would be the establishment of a statutory independent review board at every agency with classification authority. Such boards have had great success pushing out of the system the secrets that do not need keeping. The State Department's Advisory Committee on Historical Diplomatic Documentation[4] offers an example of how such a board can be effective at pushing out important information that need not be kept secret. Every agency needs such a review board, with authority in statute, with scholars and former officials doing the oversight, with regular reporting requirements and open meetings. The model we should not follow is that of the CIA, where the Historical Review Committee has no statute behind it and, by allowing its recommendations to remain confidential, has voluntarily given up what little leverage it might have had. Review boards should not be the creatures of the agencies they are supposed to monitor.

Change the Standard of Review for Historical Records

The NDI, a Declassification Center, and statutory independent review boards all can help break down the excessive control that agencies have exerted over historical records. Yet, historical records will still clog up the system because they are subject to the same type of review as current records. To illustrate the problem, consider the myth of automatic declassification. As of January 1 of this year, over 1 billion pages of records had been declassified under the provisions of Executive Order 12958, as amended. Yet, none of us can stroll into the National Archives and see those records. All the newly declassified records still must be processed by NARA before they will be made available to the public at NARA research facilities. The problem is that reviewers of historical records follow standards very close to those used under the FOIA, leading them to treat the information as contemporary information. Thus, they are reviewed as if they were created today, instead of decades ago. That is the same review that in some cases has held records for up to 17 years after a request is made. This leads to a backlog in the release of historical records even when they are ripe for release

This Board could recommend the enactment of a Historical Records Review Act that would alter the standard for review and withholding of records older than 25 years. Like the Nazi War Crimes Disclosure Act and the President John F. Kennedy Assassination Records Collection Act of 1992, such an act would recognize the important public interest in such materials and the diminished sensitivity of such records. Experience shows that information requiring absolute secrecy at the time of its origin can be opened to the public after the passage of time without any harm to national security. In the case of the Kennedy assassination release, there were hundreds of cables from CIA stations in Miami and Mexico City that would have been wholly unreachable through FOIA due to the CIA's operational files exception. Yet the release was justified by the strong public interest in access to the information – including the need to satisfy public questions and concerns about the assassination of a sitting president – and the passage of time.

[4] Established by Public Law 102-138, the Foreign Relations Authorization Act, 1992 and 1993. See 22 USC Sec. 4351-4357.

A similar large scale release took place under the Nazi War Crimes Disclosure Act and resulted in the release of 800 CIA name and subject files. As the Interagency Working Group overseeing the matter recognized, these documents "alter[ed] our understanding" of certain aspects of the Holocaust, including "the failure of U.S. and Allied intelligence to understand how closely tied the 'Jewish question' was to the central goals of the Nazi regime; the ways in which U.S. financial institutions helped the German government between 1936 and 1941, and the extent to which U.S. and Allied government aided and protected war criminals after the war." In particular these records:

> Show that at least five of Eichmann's associates, each a significant participant in Hitler's war upon the Jews, had worked for the CIA. Additionally, the records reveal that at least 23 war criminals or Nazis were approached by the CIA for recruitment. The documents help answer the question of how and why these war criminals were given employment, assistance, and, in two cases, U.S. citizenship by a nation that had lost more than 300,000 lives in World War II.[5]

All these records – which could have been held back as "operational files" – were released without any resulting harm. There is no question that these records are historically valuable and that there was a strong public interest in their release.

Indeed, the National Security Archive's own research projects on U.S. relations with countries including Guatemala, Cuba, and Chile have all relied on records released under special declassification projects that would not have been accessible through FOIA. The information in these records has significantly affected public understanding about the history of U.S. intelligence policy and operations in Latin America, U.S. intelligence relations with security services, and key human rights cases. These records are being used today as educational tools throughout the United States, and have contributed to advancing U.S. efforts at strengthening democracy and justice in Latin America.

These examples demonstrate that the passage of time and changing circumstances in the world can affect the sensitivity of records even as the public interest in the records remains strong. These examples also show the viability of systematic declassification efforts under relaxed review criteria. The Board could begin a dialogue that would lead to the true opening of history by recommending a Historical Records Review Act.

Provide Adequate Resources

For all agencies, one of the principal excuses for slow processing and non-processing of records requests is that FOIA and other declassification programs are large unfunded mandates. It is ironic that these programs are given so little attention as their purpose is to improve the functioning of the government. To accomplish this goal requires sufficient funding to attract and train qualified people to oversee these programs.

Review of the data concerning classification and declassification suggests that there is an inverse relationship between the resources devoted to the two programs. When classification is

[5] See www.archives.gov/media_desk/press_releases/nr04-55.html.

on the rise, declassification is on the decline. The PIDB could conduct, perhaps with the help of other government agencies, a special review of funding levels for FOIA and other declassification work at the agencies and determine whether staffing levels are adequate to ensure timely responses to declassification requests. This Board could recommend that the budgets for declassification activity be linked to the budgets for classification activity in order to ensure that the declassification programs do not fall behind. Alternatively, this Board could recommend funding to process all the records that are now automatically declassified under the terms of Executive Order 12958. Eliminating that backlog could be a tremendous boon to the nation and permit the creation of an orderly declassification system. Agency officials must not be permitted to use a lack of resources as an excuse for inordinate delays or improper denials in responding to FOIA requesters.

Clarify and Limit Source and Method Protection

I spoke earlier about the Moynihan Commission. One of that Commission's recommendations recognized that the authority of the intelligence community to withhold information on the basis of "intelligence sources and methods" must be radically revised. Although agencies have the responsibility to protect legitimately sensitive information, too often there is a tendency to use the sources and methods protection to automatically classify anything that is collected by an intelligence agency, even if it comes from an open source. The Moynihan Commission recommended that the Director of the intelligence community clarify the scope of and reasons for sources and methods protection, so as to prevent the automatic withholding of any information that might relate in any manner to a source or method. This Board should remind the Executive Branch and Congress of the need for such clarification by issuing a recommendation similar to that made by the Moynihan Commission.

Begin Orderly Declassification of Intelligence Budgets and Presidential Daily Briefs

There are certain secrecy fetishes that no amount of reason can break. Two that stand out are the perpetual secrecy of the aggregate U.S. intelligence budget and the Presidential Daily Brief.

The aggregate intelligence budget, which includes the CIA, the National Security Agency, the National Reconnaissance Office, and a handful of other agencies, has long been sought by critics of secret government spending. These critics charge that black budgets violate every citizen's constitutional right to a full account of the expenditure of public monies. A lawsuit filed in 1997 forced the CIA's hand at last, revealing the total aggregate intelligence budget for that year at $26.6 billion. Director of Central Intelligence George Tenet disclosed the budget in the following year ($26.7 billion) and then reversed himself by withholding the figure for 1999. A federal court upheld his decision, saying that yearly disclosures could provide dangerous "trend information" to enemies of the United States. Nonetheless, the National Commission on Terrorist Attacks against the United States ("9/11 Commission") recommended the release of such budgets, in part because secrecy can hinder oversight. Still, the budgets remain a secret and the intelligence community takes the position that they must remain so for all time.

Similarly, the CIA refuses to consider declassification of records such as the President's Daily Brief (PDB). The process and use of the PDB is officially acknowledged by the CIA. In addition to prominent disclosure of PDBs and references to PDBs in the recent reports of the 9/11 Commission and the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction ("WMD Commission"), the CIA has published and released histories describing the way PDBs are created and the use of PDBs by the Agency. PDBs, like other documents, can be reviewed for source and method material and redacted to protect ongoing security interest. Although more than 30 PDBs or excerpts of PDBs have previously been declassified and released, the intelligence community refuses to review PDBs on the merits for possible declassification.

This Board could recommend an orderly declassification of intelligence budgets and Presidential Daily Briefs (and its predecessor the President's Intelligence Check List). Surely there is some period after which the sensitivity of these records is sufficiently diminished that they could be reviewed for declassification.

Declassify Historical Covert Operations

This Board should recommend declassification for records of at least 11 CIA covert operations that have been acknowledged, including the 1948 Italian and French elections, the 1953 Iranian coup, the 1958 Indonesian coup, support to Tibetan guerrillas in the 1950s-60s, operations against North Korea during the Korean War and operations in Laos in the 1960s, and operations in the Dominican Republic and the Congo. These publicly acknowledged special activities are of tremendous interest to the public, both for the myth and reality of CIA involvement. Systematic declassification projects related to these actions would provide historians with a treasure trove of information that is historically valuable and would serve the public interest.

Declassify NSA Signals Intelligence from World War II and Later

In many respects, the National Security Agency (NSA) has been more forthcoming on sensitive intelligence issues than the rest of the U.S. intelligence community. In recent years it has released important signals intelligence (SIGINT) materials about the Tonkin Gulf incident and significant SIGINT materials from World War II, such as the MAGIC intercepts of Japanese communications. Given the passage of time, it is appropriate that the NSA declassify remaining World War II records as well as records from the first five years of the Cold War, 1945-1950, a critical period in U.S. history. There is still a vast amount of World War II materials that NSA has not declassified, such as the meeting minutes and internal papers/correspondence files of the Army-Navy Communication Intelligence Board (ANCIB) and its predecessor organization. For the early Cold War years, NSA could declassify the minutes of meetings of ANCIB's post war successor organizations, the State-Army-Navy Communication Intelligence Board (1945-1946), and the U.S. Communications Intelligence Board (USCIB).

Former NSA director (and DNI nominee) Vice Admiral John M. McConnell explained the importance of declassification when he told NSA employees in 1994 that "In these changing times we, as an Agency, must take advantage of appropriate opportunities to give today's

customer base (which includes the general public) a clear understanding of why we are relevant." Many outside observers agree with these sentiments, believing that this would go a long way towards reestablishing a semblance of confidence and trust in the NSA amongst an increasingly skeptical NSA customer base and the general public.

Eliminate CIA Veto at ISCAP

The Interagency Security Classification Appeals Panel (ISCAP) has proved to be an effective way to handle challenging classification decisions. Because the membership is limited to agencies with classification authority, it is the only forum in which the public can have confidence that the true reasons for maintaining classification are provided. Yet, despite the expertise and conscientiousness of the members of ISCAP, the amendments to Executive Order 12958 provided that ISCAP decisions could be overridden by the Central Intelligence Agency. Prior to those amendments, ISCAP functioned without the CIA having veto authority without any resulting harm. There was adequate protection to true secrets in the system because any agency that did not agree with ISCAP's decision could itself appeal to the President of the United States. This Board should recommend that no agency have unilateral authority to overrule ISCAP. Instead, any agency that remains dissatisfied with ISCAP's decision should itself be responsible for appealing to the President of the United States.

Thank you, Mr. Chairman, and I look forward to any questions you may have.