OPENTHEGOVERNMENT.ORG
Americans for Less Secrecy, More Democracy

# Secrecy Report Card 09

Indicators of Secrecy in the Federal Government

**THIS REPORT** was made possible by the generous support of the Carnegie Corporation of New York and the CS Fund.

The authors of this report are Patrice McDermott and Amy Fuller Bennett. The report benefited from the helpful advice and assistance of the OpenTheGovernment.org Steering Committee, including its co-chairs Gary Bass of OMB Watch and Tom Blanton of the National Security Archive.

We would like to express special appreciation to Kristin Adair, Steve Aftergood, Todd Harrison, and the Information Security Oversight Office at the National Archives.

## About OpenTheGovernment.org

OpenTheGovernment.org is an unprecedented coalition of consumer and good government groups, librarians, environmentalists, labor, journalists, and others united to push back governmental secrecy and promote openness. We are focused on making the federal government a more open place to make us safer, strengthen public trust in government, and support our democratic principles.

To join the coalition, individuals are invited to read and sign the Statement of Values. Organizations are welcome to visit our site, read the Statement of Values, and contact us if interested in becoming a coalition partner: www.OpenTheGovernment.org.

## Steering Committee



OPENTHEGOVERNMENT.ORG
Americans for Less Secrecy, More Democracy

1742 Connecticut Avenue, 3rd Floor
Washington, DC 20009
(202) 332-OPEN (6736)
info@openthegovernment.org

# By The Numbers

## CLASSIFIED INFORMATION

- **Classification Activity Still Remains High**
  In 2008, the number of original classification decisions decreased to 203,541, a 13% drop from 2007, but the numbers remain high.

- **Almost $200 Spent Creating and Securing Old Secrets for Every Tax Dollar Spent Declassifying**
  The government spent nearly $200 maintaining the secrets already on the books for every one dollar the government spent declassifying documents in 2008, a 2% increase in one year. At the same time, 16% fewer pages were declassified than in 2007.

- **National Intelligence Program Budget Shows Significant Growth**
  The FY2008 budget for the National Intelligence Program was $47.5 billion, a 9.2% increase over 2007.

- **19% of DOD FY 2008 Acquisition Budget Is Classified or "Black"**
  "Black" programs accounted for about $34 billion, or 19 percent of the (FY) 2009 Department of Defense (DOD) acquisition funding requested in 2007. Classified acquisition funding continues to be more than double in real terms the level of funding in FY 1995.

- **Mandatory Declassification Review Process Yields Information, But Backlogs Growing**
  In 2008, agencies received 8,264 new initial requests for Mandatory Declassification Review (MDR), of which 90% were processed, resulting in the declassification of information in 240,510 pages: 73% in full; 19% in part. For 2008, almost 6,000 initial requests were carried over into 2009—a 23% growth in the backlog.

## NATIONAL SECURITY LETTERS

- **National Security Letter Requests Decrease from 2006**
  The Department of Justice reports 24,744 requests pertaining to roughly 7,225 different U.S. persons were made in 2008, an 18% increase over requests in 2007—but a 50% decrease from reported 2006 numbers.

## "STATE SECRETS" PRIVILEGE

- **Reported Invocations Continue to Rise**
  Invoked only 6 times between 1953 and 1976, the privilege has been used a reported 48

times—an average of 6 times per year in 8 years (through 2008)—more than double the average (2.46) in the previous 24 years.

## ASSERTIONS OF EXECUTIVE PRIVILEGE

- **President Bush Surpassed All Presidents Since Kennedy**
  President G.W. Bush asserted Executive Privilege 6 times in response to congressional requests, as of August 21, 2008.

## FREEDOM OF INFORMATION ACT

- **FOIA Requests and Costs Appear to Drop**
  Both the total number of public requests (506,471) and the total spent processing those requests ($338,677,544) dropped from 2007 to 2008. This is largely attributable to a change in how agencies classify Privacy Act (PA) requests for information about one's self: previously, some agencies had included PA requests in both their total number of requests received and their total of the cost of FOIA.

- **FOIA Backlogs Slightly Reduced**
  The federal government processed 17,689 more FOIA requests than it received in 2008. The net improvement is in part the result of significant backlog progress on the part of a few agencies.

## INVENTION SECRECY

- **68 New Patents Kept Secret, 5,023 "Secrecy Orders" in Effect**
  In 2007, the federal government closed the lid on 68 patents, but lifted it on only 47. Overall, that brings the total number of inventions kept under "secrecy orders" to 5,023.

## THE COURTS

- **2,083 Orders of the Secretive Foreign Intelligence Surveillance Court**
  The Department of Justice reported that, in 2008, the FISC approved 2,083 orders—rejecting one and approving two left over from the previous year.

## WHISTLEBLOWERS

- **Whistleblowers Lawsuits Recover Billions for Taxpayers**
  In FY 2008, suits brought by whistleblowers accounted for $1.04 billion of the $1.34 billion the United States obtained in settlements and judgments concerning fraud on the United States.

## FEDERAL CONTRACT COMPETITION

- **More Than 25% of All Awards Are not Competed at All**
  In 2008, 26.6% ($140 billion) of federal contract dollars were completely uncompeted; slightly more than one-third of contract dollars were subject to full and open competition. On average since 2000, approximately 25% of all contract funding has not been competed, and fully and openly competed contracts have dropped by almost 20 percent.

## FEDERAL ADVISORY COMMITTEE ACT (FACA) MEETINGS

- **Scientific and Technical Advice Increasingly Closed to Public**
  In 2008, governmentwide 65% of FACA committee hearings were closed to the public; 17% of those not held by groups advising the three agencies that historically have accounted for the majority of closed meetings were closed. The same number of meetings was closed in 2008 as in 2007, but the total number of meetings fell—leaving fewer opportunities for public participation.

# Introduction

The first Secrecy Report Card was issued by OpenTheGovernment.org in 2004, chronicling the events in secrecy and openness in 2003. As readers will recall, that was the year of the U.S. invasion and occupation of Iraq and the third year of the Bush-Cheney Administration. Over the course of the last five years, we charted a significant increase in secrecy and a concomitant decrease in accountability—especially to the public, but also to Congress.

The elections of 2008 were viewed by many as a referendum on that secrecy and unaccountability, and the country elected a president who promises the most open, transparent and accountable federal government (the executive branch, anyway) in history. How well that promise is fulfilled will be chronicled in next year's report, although we have provided a non-quantitative 6-month overview in a special section in this year's. The record to date is mixed.

Over the course of the previous Administration, we learned what can happen when we don't have all three branches of our government carrying out their constitutional responsibilities. We saw a substantial increase in power in the White House and enhanced control over information. This constraint applied not only to information released to the public but also to that shared with the courts and with Congress.

The final year of the Bush-Cheney Administration saw slight decreases in secrecy in a number of areas in the executive branch. The record is not clear that there was a concomitant increase in openness. Signs of progress exist in some areas toward more openness, the results of continued determination on the part of the public and its representatives. Congress continues working to identify ways to rein in the use and abuse of categories, such as "Sensitive But Unclassified," and has also taken steps to counter the tendencies of agencies and departments in areas such as over-classification.

Creating and maintaining an open and accountable government requires the committed focus of both the public and the government. One indication of the needed attention to the details was brought to our attention recently. The President personally acknowledged by letter receipt and reading of the Information Security Oversight Office (ISOO) Annual Report from 1984 (Ronald Reagan) through 1992 (George H.W. Bush). During the Clinton Administration, the acknowledgments came from the National Security Advisor, rather than the President (1993, 1994, and 1996); in 1999, it came from the Deputy Assistant National Security Advisor. No acknowledgments have been received since 1999.

What follows is a brief look at how the main indicators we examine have changed over time. We have added one new indicator—Classification Challenges. We have also added—for this year only—two sections: one on fiscal transparency and one providing a quick look at the openness and secrecy trends in the new Administration.

## 2008 Highlights

- The government spent almost $200 maintaining the secrets already on the books for every one dollar it spent declassifying documents in 2008, a 2% increase in one year. Both the number of pages declassified, and the total spent on declassification fell in 2008. The intelligence agencies, which account for a large segment of the declassification numbers, are excluded from the total reported figures.
- FOIA backlogs were reduced slightly in 2008: governmentwide, 17,689 more FOIA requests were processed than received in 2008.
- In 2008, the number of original classification decisions decreased to 203,541, the fewest since 1999. The number of derivative classifications, however, has continued to increase significantly, although the annual rate of increase declined from almost 13% to 1.5%.
- After rising for nine years in a row, the total number of secret surveillance orders approved dipped. After peaking in 2007 at 2371 applications, the total number of requests dipped to 2083 in 2008.
- The 2008 National Intelligence Program budget was $47.5 billion, a 9.2% increase over the fiscal 2007 budget of $43.5 billion. The disclosure marks only the fourth time that the intelligence budget has been officially disclosed.
- More than 65% of the 6,840 meetings of federal advisory committees that fall under the Federal Advisory Committee Act (FACA) were completely closed to the public in 2008. Comparing 2008 to 2007, the total number of meetings held dropped while the percentage of closed meetings rose, meaning far fewer meetings were open to the public in 2008 than in 2007.
- In the fiscal year ending September 30, 2008, the United States obtained over $1.3 billion in settlements and judgments concerning fraud on the United States, more than 78% as a result of whistleblower qui tam suits.
- Use of full and open competition has dropped from almost 45 % of contract dollars in FY 2000 to 36 % in FY 2008. At the same time, the percentage of contracts not competed at all has risen: from 23% in FY 2000 to almost 27% in FY 2008. An additional approximately 5% were also no-bid deals because of various requirements.
- In 2008, agencies received 8,264 new initial requests for Mandatory Declassification Review (MDR), of which 90% (7,407) were processed. Out of 261,283 pages reviewed, 240,509 were released in full or in part. Although agencies processed initial requests at a slightly higher rate in 2008, the already sizeable backlog grew by 23%.

## A Note on the Indicators

OpenTheGovernment.org seeks to identify measurable indicators that can be used as benchmarks to evaluate openness and secrecy in government in the United States. We include data based on three criteria:

- data that show trends over time;
- data that have an impact across the federal government or the general public; and
- data that already exist and require little or no further analysis.

These indicators are not intended to be comprehensive; there are many indicators out there that could be included. We will continue to add to the indicators as we become aware of them and they fit the focus of this report.

# Special Section: Openness & Secrecy Trends in the Obama Administration

## Policy

### *OPEN GOVERNMENT DIRECTIVE*

The day after his inauguration, President Obama issued a Memorandum on Transparency and Open Government[1] calling on his administration to develop recommendations that would "establish a system of transparency, public participation, and collaboration." The recommendations, which together would represent an "Open Government Directive (OGD)," were due to the President within 120 days.

The Administration began the process by gathering inter-agency comments on the OGD using the MAX OMB Wiki, and later publicly released those comments after all identifying information about the commenter was stripped out. On May 21, about one hundred and twenty days after the President issued his memo, the Administration announced a three-phase process for gathering public input on the OGD. The three phases consisted of "brainstorming," "discussion," and "drafting." During each phase, the Office of Science and Technology Policy (OSTP) directed the public to different social media technologies that allowed them to participate in a segment of a policy-making process. Unfortunately, at this point it is impossible to say if the use of social media tools in the OGD process has enhanced the policy making process.

After the public participation process ended on July 6, the Administration indicated it would take all of the input received during the process and begin drafting recommendations. The undefined connection between the recommendations developed during the process and what will be presented to the President has led to some concern that the process may be little more than "transparency theater." It is too early to judge the validity of these concerns at this point. The Administration has promised that the resulting recommendations will be released for public comment before final recommendations are presented to the President. It is unclear if this will be done purely on-line, through the *Federal Register* notice and comment process,[2] or using some combination of the two.

The OGD process was an innovative experiment in soliciting public participation in the policy-making process: this first use has produced mixed results. A number of non-profit organizations are evaluating the process with the goal of helping the Administration hone the "tools and rules" it uses to engage the public online.[3] Clearly, the Administration is committed to making its experiment work. OSTP has hosted and helped create online public policy-making forums for

1 http://edocket.access.gpo.gov/2009/pdf/E9-1777.pdf

2 Prior to the launch of the process, more than 60 open government organizations signed onto a letter asking that the on-line process be paired with a traditional *Federal Register* notice and comment process. The *Federal Register* process has well-defined transparency elements, including a requirement that the Administration respond to public comments, that should be incorporated into the on-line model.

3 http://www.surveymonkey.com/s.aspx?sm=eTvTvChVronq9O_2fZwwCbBQ_3d_3d

the Public Interest Declassification Board on classification policy, the Office of Management and Budget on the federal website cookies policy, the Department of Defense on web 2.0 guidance, and the Federal Communications Commission on a national broadband strategy (to name a few).

The OGD process also raised important questions about the appropriate role for moderation in a government-sponsored forum: for example, is the government committing censorship by moving "off-topic" comments to another section of the forum; is it democratic to effectively close participation off from anyone who does not have access to the internet? Careful consideration of these types of questions should inform the ongoing uses of these technologies by the federal government.

As the number of experiments grows, the public will have more opportunities to participate in the policy-making process, and more opportunities to help ensure the process is truly "open, participatory, and collaborative."

## *POLICIES ON CLASSIFICATION AND CONTROLLED UNCLASSIFIED INFORMATION*

On May 27, President Obama issued a memo directing his Administration to conduct a review of classified information and controlled unclassified information (CUI) policies.[4] Classified information and CUI present very different problems for the government, and must be governed by very different policies. That being said, it is impossible to effectively address the two policies in isolation. Government control of information in the security arena has been compared to a balloon: if you squeeze it on one end, it expands on the other. It is argued that strengthening regulations on CUI, for example, in absence of policies to address classification abuses could lead to increases in over-classification, and vice versa.

The reviews called for by President Obama's memo are discrete: a complete review of the Executive order on Classification, and a separate review of procedures for CUI.

### Classification and Declassification Policy

President Obama's memo[4] directed the Assistant to the President for National Security Affairs, General James L. Jones, to submit recommendations to the President within 90 days. At the request of General Jones, the Public Interest Declassification Board (PIDB) launched a process to gather public input on classification and declassification policies to inform the review. The PIDB gathered this input through a combination of a public hearing[5] at NARA and an online Declassification Policy Forum. The meeting took place after the launch of the Declassification Policy Forum, but before all topic areas were open for comment. During the hearing, the members of the PIDB summarized comments that had been posted on the Declassification Policy Forum, and discussed other topics they would like the forum users to address.

The online forum was hosted on the OSTP Blog and solicited contributions from the public on four specific topics: declassification policy; envisioning a National Declassification Center; classification policy; and technology challenges and opportunities. Initially, each topic area was to open sequentially and be left open for comments for three days; after receiving negative public feedback

4 http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Classified-Information-and-Controlled-Unclassified-Information/

5 http://edocket.access.gpo.gov/2009/E9-14691.htm

about the tight time-fame, PIDB agreed to keep the topics open throughout the process. The PIDB also accepted emailed comments on any of the topics at anytime during the process.

The Declassification Policy Forum both differed from and resembled the OGD process in important aspects. For example, while there was relatively little OSTP staff interaction during the OGD process, PIDB staff actively participated in the process by providing detailed questions to guide postings on each topic, and providing summaries of comments received on each topic. In this way, the Forum adapted some aspects of the standard *Federal Register* notice and comment process that requires the government to address comments received. Similar to the OGD process, however, the public input gathered by the PIDB entered a "black box." At the end of the process, the public had no sense of what would be included in the final recommendations. In the interest of the unprecedented levels of transparency, participation, and collaboration promised by the President, a number of open government advocates urged General Jones to release exact revision language of the Executive Order for public review and comment before presenting it to the President.[6]

**Controlled Unclassified Information**

President Obama's memo[4] also called for the establishment of an inter-agency task force to review current procedures for categorizing and sharing CUI. The procedures to be reviewed are defined in a memo issued by President Bush[7] setting up a "CUI Framework" for designating, marking, safeguarding, and disseminating designated information. The task force, which is chaired jointly by the representatives of the Attorney General and the Secretary of Homeland Security and includes representatives from agencies inside and outside the Information Sharing Environment, is directed to present recommendations to the President on how to proceed with respect to the CUI Framework within 90 days. During the review process, President Obama directed agencies to continue to implement the CUI Framework.

The inter-agency review task-force has conducted the review largely behind closed doors. The task force set up meetings with representatives of stakeholder communities and while these meetings did include at least one session with representatives of public interest organizations, the task force has not made any significant effort to gather public input. Given the opaque nature of the process, there is little indication of the substance of the final set of recommendations that will be given to the President.

## *THE FREEDOM OF INFORMATION ACT (FOIA)*

On his first full day in office, President Obama issued a Presidential Memorandum on the FOIA, which opens by noting

> A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

6 http://www.openthegovernment.org/otg/Gen%20Jones%20letter%208-1-09.pdf

7 "Designation and Sharing of Controlled Unclassified Information," May 9, 2008. http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html

The Memorandum directs that the Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. Agencies are directed to adopt a presumption in favor of disclosure that should be applied to all decisions involving FOIA, and to take affirmative steps to make information public, without waiting for specific requests from the public.

Moreover, the government is directed to not keep information confidential merely because public officials might be embarrassed by disclosure (but see the discussion of release of former Vice-President Cheney's interviews with special prosecutor Patrick Fitzgerald below), because errors and failures might be revealed, or because of speculative or abstract fears.

The President ordered the Department of Justice to issue guidance within 90 days. To say that the openness community was elated by the language of the Memorandum would be a tremendous understatement.

**The Department of Justice**

On Friday, January 24, 2009, the Department of Justice sent an e-mail[8] to all FOIA Officers that said among other things, "[t]he President's memorandum was effective immediately and supersedes former Attorney General Ashcroft's Memorandum on the FOIA dated October 12, 2001. As a result, agency personnel should immediately begin to apply the presumption of disclosure to all decisions involving the FOIA, as the President has called for."

**Attorney General Holder**

On March 19, Attorney General Eric Holder issued much-anticipated comprehensive new guidelines to the heads of executive departments and agencies governing the Freedom of Information Act (FOIA), directing them to apply a presumption of openness when administering the FOIA. It expressly rescinds guidelines issued on Oct. 12, 2001, by former Attorney General John Ashcroft.

DOJ's press release contained an exhortatory statement that echoed President Obama's:

> By restoring the presumption of disclosure that is at the heart of the Freedom of Information Act, we are making a critical change that will restore the public's ability to access information in a timely manner. The American people have the right to information about their government's activities, and these new guidelines will ensure they are able to obtain that information under principles of openness and transparency.

The memo directs that FOIA denials will only be defended if an agency "reasonably foresees that the disclosure would harm an interest" protected by one of the exemptions to release or if it is prohibited by law; agencies must be "fully accountable" for administering FOIA; agencies should "readily and systematically post information online in advance of any public request"; and FOIA professionals within the agencies are "equally important" to any other component of application and accountability to FOIA and should have "full support" from their agencies as well as "the tools they need to respond promptly and efficiently to FOIA requests."

Unlike Attorney General Reno's 1993 memo, which explicitly required a review of "all pending FOIA cases" to ensure that Justice's outstanding positions were in compliance with the new standard, the Holder memo creates no such requirement on the Justice Department. It directs the Department to take into account and apply the guidance to pending cases "if practicable when, in

8 http://www.llrx.com/columns/foia54.htm

the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information." This sentence contains no less than six hedges and a well-placed "and"—placing the decision not only with the Justice Department's litigators but also in the hands of the very agencies that made the initial decision to deny the request—that could allow the government to decide to skip reviewing its position on a case.

**Office of Information Policy (OIP)**

The Attorney General Guidelines were followed on April 17 by guidance[9] from the Office of Information Policy that begins the process of assisting agencies in the implementation of President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines.

# Practice

## *THE FREEDOM OF INFORMATION ACT (FOIA)*

The federal government has slowly begun to implement many of the requirements of the OPEN Government Act,[10] signed into law on 31 December 2007. The requirements of the law include: the assigning of tracking numbers to FOIA requests that take longer than 10 days to process; removal of the ability of agencies to charge requesters for research and copying costs, if the response deadlines in the statute are not met; more accurate reporting by agencies to Congress with respect to FOIA compliance; and the establishment of the Office of Government Information Services at the National Archives to mediate conflicts between FOIA requesters and agencies.

The statute also restored the full circumstances under which FOIA requesters may obtain attorneys' fees when forced to litigate for release of documents. Under a recent decision by the U.S. Court of Appeals for the D.C. Circuit,[11] though, the change in attorney's fees will not be applied retroactively.

NARA announced the appointment of Miriam Nisbet as the director of the newly established Office of Government Information Services (OGIS) on June 10. Congress has dedicated $1 million in funding at NARA to stand up the new office.

**FOIA Litigation**

As a result of the Obama Memorandum and the Holder Guidelines, in two known cases, CREW vs. EPA and CREW vs. Council on Environmental Quality, the agency made additional releases of previously withheld material after agreeing to re-review documents withheld under Exemption 5 to the FOIA. We have heard anecdotally of a few other such instances, but this does not seem to be the trend.[12]

9 http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm

10 Public Law 110-75, signed by President Bush on 3 1December 2007. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ175.110.pdf

11 Summers v. Department of Justice. http://pacer.cadc.uscourts.gov/common/opinions/200906/07-5315-1193373.pdf

12 OpenTheGovernment.org has posted on our website a FOIA litigation scorecard: FOIA Risk Assessment, which includes cases where the government has responded to the Obama Memorandum and Holder Guidelines by releasing more information (Low Risk), where the government has yet to respond to requests (Guarded),where the government has responded by partially releasing some information (Elevated), and where the government has continued to refuse to release information (High).

The President did release four Office of Legal Counsel memos, but resisted a court order[13] to release photos from Army interrogation investigations. When discussing his decision to release the memos and his ultimate decision to fight the court order requiring the release of the photos, Obama said that, in situations where his administration declines to release information for national security reasons, he "will insist that there is oversight of my actions—by Congress or by the courts." On August 7, the Administration asked the U.S. Supreme Court to block release of detainee abuse photos.[14] The White House also supported legislation passed by the Senate, S. 1100 that seeks to prohibit the photos' release. The bill would carve out an exception in the FOIA for certain photographs when such disclosure would endanger US personnel. It has not been introduced in the House.

OpenTheGovernment.org has created a scorecard[12] of on-going FOIA litigation, "FOIA Risk Assessment." The chart, modeled on the Department of Homeland Security's Advisory System,[15] separates cases into four categories based on the threat the case presents to the Obama Administration successfully living up to its FOIA rhetoric.

## *PRESIDENTIAL SIGNING STATEMENTS*

As a candidate, Senator Obama opposed President Bush's use of signing statements to reject provisions of the law as intrusive on presidential authority, and promised he would not follow the practice. Once in office, however, President Obama pivoted on the issue—issuing several signing statements that have rankled Members of Congress and the public.

As of the August 2009 Congressional recess, President Obama has issued seven signing statements.[16] A few of these statements are merely ceremonial, but most challenge specific provisions of the law. One statement in particular has sparked a public disagreement between the President and the House of Representatives. In the statement accompanying the Supplemental Appropriations Act of 2009 (P.L. 111-32), the President stated that limitations on some international funding would "interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with international organizations and foreign governments, or by requiring consultation with the Congress prior to such negotiations or discussions." The House countered by attaching an amendment to the FY 2010 Department of State, foreign operations, and related programs bill (H.R. 3081) which would bar the Treasury Department from dispersing any funds that do not meet conditions set by the Supplemental Appropriations bill.

While President Obama's signing statements thus far have not been as expansive or specific as his predecessors, Congress has already begun to push back against the President.[17] This sets up a possible showdown between the legislative and executive branches that will be important to monitor in coming years.

---

13 The US Court of Appeals for the Second Circuit ruled in June that the US government could continue to withhold photos of alleged detainee abuse while it awaits a response from the Supreme Court. The original court mandate to release the photos came from a FOIA challenge successfully brought by the ACLU in 2005 and confirmed by the Second Circuit in April of this year.

14 "Obama administration asks Supreme Court to block release of detainee abuse photos" *Jurist,* August 8, 2009.

15 http://www.dhs.gov/files/programs/Copy_of_press_release_0046.shtm

16 http://www.coherentbabble.com/listBHOall.htm

17 See Legislative Initiatives Toward Executive Branch Openness in this report.

## STATE SECRETS PRIVILEGE

As a presidential candidate, Senator Obama campaigned in favor of a law that would regulate the use of the state secrets privilege. Once sworn into office, however, he has deeply disappointed advocates who had hoped he would act quickly to rein in the abuse of the privilege to shut down litigation. President Obama's DOJ cited the state secrets privilege in filing a motion to dismiss a case brought by the Electronic Frontier Foundation (EFF) against the government for warrantless wiretapping, *Jewel v. NSA*.[18] In that April 2009 filing, the Obama Administration demanded dismissal of the entire lawsuit and went even further than invoking the state secrets by arguing that the government has "sovereign immunity" against any such claims. This new claim represents a broad expansion of the concept of executive powers.

In June, the Obama administration maintained the Bush Administration position in *Mohamed vs. Jeppesen DataPlan*,[19] arguing that trying the lawsuit, which alleges that Boeing chauffeured terror suspects to secret CIA torture prisons, would compromise security. An appeals court rejected this state secrets argument earlier in 2009, as did a district judge last year—in a separate case, *Al-Haramain Islamic Foundation vs. Bush*[20]—when the Bush administration tried to stop the charity from suing the government for allegedly wiretapping it without a warrant. The Obama Justice Department also upheld the Bush Administration's state-secret stance in the *Al-Haramain* case, even threatening to "spirit away the top-secret documents" if the judge did not reconsider.[21]

More disturbingly, last month, the *New York Times* reported[22] the Obama administration filed a friend-of-the-court brief[23] to the Supreme Court which, "though no one had asked," stated that the state secrets privilege has a constitutional basis. The case has to do with whether a party has the right to an immediate appeal under the collateral order doctrine from a district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials**.**

In February of 2009, President Obama's newly-confirmed Attorney General announced that the Department of Justice (DOJ) would conduct a review of on-going litigation from the Bush Administration in which the state secrets privilege has been invoked. Thus far, the Administration has not changed course on any of the reviewed cases. Critically, the Administration's new approach—rooting the privilege in the Constitution—could hinder Congress's legal ability to regulate it. (See page 43.)

## EXECUTIVE PRIVILEGE

In January, Representative John Conyers, Jr. (D-Mich.), in his capacity as chairman of the House Judiciary Committee, subpoenaed Karl Rove to testify before Congress about the Bush Administration's firing of nine U.S. attorneys and the prosecution of former Alabama governor Don Siegelman on bribery charges. Rove, who had previously refused to appear by claiming

18 http://www.eff.org/cases/jewel

19 http://www.aclu.org/safefree/torture/29921res20070530.html

20 http://www.eff.org/deeplinks/2009/01/government-motion-dismiss-al-haramain-spying-case-

21 Carrie Johnson, "Handling Of 'State Secrets' At Issue: Like Predecessor, New Justice Dept. Claiming Privilege," *Washington Post*, March 25, 2009. http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032403501.html

22 Adam Liptak. "Obama Administration Weighs in on State Secrets, Raising Concern on the Left." *New York Times,* August 3, 2009. http://www.nytimes.com/2009/08/04/us/politics/04bar.html

23 http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-678_RespondentAmCuUSA.pdf

executive privilege, instructed his lawyer to ask the Obama White House whether the same privileges currently exist. The Obama Administration was able to avoid taking a stand on the issue: in March, an agreement was reached between the former Bush administration and Rep. Conyers.[24]

At a federal court hearing in July, an attorney in the Justice Department's Civil Division, argued[25] that the transcript of former Vice-President Cheney's 2004 interview with special prosecutor Patrick Fitzgerald, about the leak of Valerie Plame's covert CIA identity, should remain secret for as long as 10 more years to protect Cheney from any political embarrassment that would result from the transcript being released. U.S. District Court Judge Emmett Sullivan called this the "Daily Show exemption." The Justice Department argued that, if released sooner, the transcript would become part of the "political fray" and that, by withholding it for as long as 10 years, its use would be limited to historical purposes.

On executive privilege, the Department argued in court documents[26] that just because Cheney voluntarily agreed to be interviewed by the special prosecutor investigating the leak doesn't mean Cheney "waived any privileges to which he may have been entitled to" since "none of the privileges at issue here was ever his to waive." In a footnote contained in a 12-page court filing, Justice wrote, "These privileges belong to the government. The presidential communications privilege belongs to the President; the deliberative process privilege asserted here belongs to the White House; and the law enforcement privilege asserted here belongs to DOJ."

## *AGENCIES AND DEPARTMENTS*

Below is a snapshot of some of the openness initiatives being undertaken in 2009 in the agencies and departments.

### Environmental Protection Agency (EPA)

The EPA has been a leader in moving toward greater openness in its practices and its public presence. In April, it proposed a greenhouse gas registry, and reversed a decision by the Bush administration in 2006 that reduced reporting of toxic pollution for more than 3,500 facilities nationwide. In late May, it announced a process for increasing the influence of scientists, the level of transparency, and public involvement in setting standards for common air pollutants. In July, EPA Administrator Lisa P. Jackson called for an increase in the transparency of the agency's water quality enforcement and compliance programs, and told staff to post state performance reports under the Clean Water Act on the Web.

In August, the eRulemaking Program launched a significant upgrade to the regulations.gov site. Enhancements include improved search capabilities, new navigation tools, and easier access to areas for the public to provide comments on proposed regulations. EPA is the managing partner of the inter-agency eRulemaking Program, which operates regulations.gov.

Finally, a less laudable action from EPA: During her confirmation, Jackson had promised Congress the agency would evaluate the hazard and integrity of the ash ponds. When EPA finally whittled its high-hazard list down to 44, it bowed to pressure from the Army Corps of Engineers and the Department of Homeland Security to not release the information; they asserted that

24 http://judiciary.house.gov/news/090304.html

25 Jason Leopold. "Obama's DOJ Wants to Protect Cheney From Political Embarrassment," *The Public Record*, July 21, 2009. http://pubrecord.org/law/2623/obamas-wants-protect-cheney-political/

26 http://www.citizensforethics.org/files/Document%2019%20%287-17-09%29.pdf

terrorists might attack the ash ponds if they knew where they were. EPA gave the list to Senate Environment Committee Chair Barbara Boxer (D-CA), asking her not to release it. Senator Boxer held a press conference objecting to the black-out and put the onus back on EPA to explain why the list needed to be withheld. EPA relented on June 29, 2009, and released the list.

**Federal Aviation Administration (FAA)**

In April, the FAA released data on airplane-bird collisions, after having sought a regulation to keep it secret. According to the March 19 *Federal Register* notice,[27] "The agency is concerned that there is a serious potential that information related to bird strikes will not be submitted because of fear that the disclosure of raw data could unfairly cast unfounded aspersions on the submitter." Because of the voluntariness of the reporting by airlines and airports, the data are very incomplete. FAA plans to bring the industry together to figure out how to collect more voluntary data, and told *ABC News*, "If we're not able to do that, then we could move toward mandatory reporting."[28]

**Food and Drug Administration (FDA)**

In June, the FDA formed a task force to develop recommendations for enhancing the transparency of the agency's operations and decision-making process. To support the efforts of the task force, FDA held a public meeting to solicit recommendations on how the agency can make more available, useful and understandable information on its activities and decisions. The task force will, among other things, seek public input on issues related to transparency and also recommend ways to reveal more information about FDA decisions, possibly including the disclosure of now secret data about drugs and devices under study.

**Securities Exchange Commission (SEC)**

The SEC is considering requiring companies to disclose various risks they may face as a result of climate change.[29]

27 http://www.gpo.gov/fdsys/pkg/FR-2009-03-19/html/E9-5868.htm Notice of Proposed Order Designating Information as Protected from Disclosure.

28 Lisa Stark, Kate Barrett and Matt Hosford. "FAA's Bird Strike Database Goes Public," ABC News, April 24, 2009. http://abcnews.go.com/Travel/Story?id=7419909&page=1

29 "SEC Turnaround Sparks Sudden Look at Climate Disclosure," ClimateWire/New York Times, July 13, 2009, by Evan Lehmann.

# Special Section: Fiscal Transparency & Accountability, Bailout vs. Stimulus

In late 2008 and early 2009, the U.S. economy went into a tail-spin, brought on largely by activities by the financial sector over the last several years and by the failure of the federal government to regulate that sector and to require openness and transparency about the instruments being created and the risks entailed. We have added a brief separate section in this year's report to look at how Congress and the Executive Branch have begun to address the openness and accountability concerns related to the bailout of the financial sector and to efforts to stimulate the rest of the economy.

Over the past year, Congress passed two bills to address different aspects of the financial crisis: the Emergency Economic Stabilization Act (the bailout bill), and the American Recovery and Reinvestment Act (the stimulus bill). The transparency requirements of the ensuing statutes are starkly different.[30]

## Transparency as a Tool for Accountability in Action

The differing commitments to transparency in the bailout and stimulus statutes, and the practical implications of those differences, are apparent in the information available on FinancialStability.gov, and Recovery.gov, the public faces of the bailout and the stimulus, respectively.


**FinancialStability.gov,** run by the Treasury Department, provides a fairly comprehensive account of the activities of the Treasury Department in its responsibilities under the Financial Stability Act. The Treasury regularly posts updated reports on transactions made under the Capital Purchase Program (CPP), reports to Congress, joint statements with other executive branch authorities on bailout programs, and speeches and testimony presented by Treasury officials. The Treasury has also begun posting reports on dividend and interest payments related to the bailout. It does not, however, provide the information in ways that makes it useful for public assessment of the use of funds or for accountability. Treasury's reports are posted, for example, only as PDFs.

Also, Treasury only tracks money as far as the bank's official headquarters. So, money that appears to be going to your area (under "Local Impact") may actually be in use at another branch, or even cycled to another financial institution. A recent report[31] from the SIGTARP indicates

30 For more information on the genesis and requirements of each of the statutes, see "Fiscal Transparency and Accountability: Bailout vs. Stimulus" at www.openthegovernment.org.

31 *SIGTARP Survey Demonstrates that Banks Can Provide Meaningful Information on Their Use of TARP Funds*

Treasury can (and should) collect meaningful information from banks that can help decision-makers and the public assess the utility and effectiveness of the TARP program.


All that said, the site is overall a good source of information about Treasury's use of bailout funds.

If you are interested in reports from both Treasury and other executive branch agencies involved in the bailout (the Federal Reserve, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, etc) or from various bailout-related oversight bodies (the Special IG for the Troubled Asset Relief Program- SIGTARP, the Congressional Oversight Panel- COP, Congressional Committees, GAO, etc.), you will have to look elsewhere. For those interested in finding all bailout related information, OpenTheGovernment.org, with funding from the Ford Foundation, maintains BailoutWatch.net—a clearinghouse of the latest news, events, federal reports, and other useful resources.


**Recovery.gov,** run by the Recovery Accountability and Transparency (RAT) Board[32], is the information site for the stimulus bill. The stimulus statute directs that the RAT Board coordinate and conduct oversight of stimulus funds to prevent fraud, waste, and abuse, and to foster transparency on Recovery spending by providing the public with accurate, user-friendly information. It requires posting of many of the types of information on the site, including: findings from audits, inspectors general, and the GAO; links to estimates of the jobs sustained or created; information about announcements of grant competitions and solicitations for contracts to be awarded; and detailed data on contracts awarded by the Federal Government that expend covered funds. Not all of the information on the site is up yet, but it does provide information for accountability from a variety of sources. The site provides links to other government websites with information concerning covered funds, including Federal agency and State websites.

In July 2009 the General Services Administration (GSA), working on behalf of the RAT Board, awarded a contract to a private company to re-design the site. Even after the re-design, however, there will be obvious limitations to Recovery.gov that keep the stimulus program from being a true model of fiscal transparency, barring further changes in regulations or statute. Under the statute and current OMB guidance, not all sub-contractors that receive stimulus money are required to report on the uses of the money. Until all recipients of federal funds above a certain dollar amount are reporting on the use of those funds, it will be impossible to really understand where the money is going or the uses to which it is being put.

32 Headed by Earl Devaney, former Inspector General of the Department of the Interior, and composed of 12 additional federal IGs.

# 2008 Information Trends in Secrecy and Openness

## Information Moving In and Out of the Classification System

### *CLASSIFICATION*

In 2008,[33] the number of original classification decisions, the "sole sources of newly[34] classified information," decreased 13% to 203,541—down from 233,639 in 2007. The Information Security Oversight Office (ISOO) reports[35] that, for the third year in a row, the majority (58%) of original classifications decisions have been assigned a declassification date of ten years or less.

| Classification Activity Remains High | | |
|---|---|---|
| Fiscal Year | Original Classification Decisions | Number of Pages Declassified |
| 1995 | 167,840 | 69,000,000 |
| 1996 | 105,163 | 196,058,274 |
| 1997 | 158,733 | 204,050,369 |
| 1998 | 137,005 | 193,155,807 |
| 1999 | 169,735 | 126,809,769 |
| 2000 | 220,926 | 75,000,000 |
| 2001 | 260,678 | 100,104,990 |
| 2002 | 217,288 | 44,365,711 |
| 2003 | 234,052 | 43,093,233 |
| 2004 | 351,150 | 28,413,690 |
| 2005 | 258,633 | 29,540,603 |
| 2006 | 231,995 | 37,647,993 |
| 2007 | 233,639 | 37,249,390 |
| 2008 | 203,541 | 31,443,552 |

**Tip of the Iceberg: 4,109 "original classifiers"**

Several thousand federal workers have "original classification authority (OCA)": the authority to create a new memo, analysis, or report and to classify the information contained in the document as either "top secret," "secret" or "confidential." After a 2% increase in OCAs between 2006 and 2007, the number of OCAs dropped slightly from 4,128 in 2007 to 4109 in 2008.

33 All years are Fiscal Years unless otherwise indicated or a specific date is given.

34 ISOO only reports the total figure and indicated in a telephone conversation that actual activity varies significantly from agency to agency. Not all of these decisions are necessarily "new secrets."

35 Information Security Oversight Office. 2008 Report to the President. http://www.archives.gov/isoo/reports/2008-annual-report.pdf. All information in this section is derived from this report.

Once information is designated as classified by an OCA, it can be "derivatively classified": used by many people in government in many different ways, creating new and possibly multiple forms of the information. Derivatively classified information may potentially be generated by any of the more than *2 million* persons who hold clearances for access to classified information.

| Persons in Government with Original Classification Authority | |
|---|---|
| Year | # of Persons |
| 1993 | 5,661 |
| 1994 | 5,461 |
| 1995 | 5,379 |
| 1996 | 4,420 |
| 1997 | 4,010 |
| 1998 | 3,903 |
| 1999 | 3,846 |
| 2000 | 4,130 |
| 2001 | 4,132 |
| 2002 | 4,006 |
| 2003 | 3,978 |
| 2004 | 4,007 |
| 2005 | 3,959 |
| 2006 | 4,042 |
| 2007 | 4,182 |
| 2008 | 4,109 |

*Source: Information Security Oversight Office (ISOO). 2008 Report to the President.*

About 3.4 million people[36]—excluding some of those with clearances who work in areas of national intelligence—currently hold or are eligible for security clearances.[37] Additionally, the Office of Personnel Management (OPM) conducted about 750,000 national security background investigations for clearance in fiscal year 2008. Individuals with security clearances may read classified information at the level of their clearance—and share it with others at that level or above. Such sharing leads to "derivative" classification.

**Derivative Classifications**

The number of derivative classifications continues to climb: from 20,324,450 in 2006 to 22,868,618 in 2007 to 23,217,557 in 2008. Of the 2008 actions, 70% were at the 'secret' level, and 15% each were at the 'top secret' and 'confidential' levels. Although the annual rate of increase did decline from almost 13% to 1.5%, the 2008 number of derivative classifications is significantly larger than the average (16,973,690) from 1996–2007.

36 According to Secrecy News, an accurate tally of the number of cleared government employees and contractors—as opposed to a round-number estimate—is not currently available anywhere in government. The House version of the FY2010 Intelligence Authorization Act (sec. 366) would require an annual report that indicates the number of individuals with security clearances.

37 Government Accountability Office (GAO). "Personnel Security Clearances," May 2009. http://www.gao.gov/new.items/d09488.pdf; Joint Security and Suitability Reform Team. "Security and Suitability Process Reform: Initial Report," April 30, 2008. http://www.whitehouse.gov/omb/assets/omb/reports/reform_plan_report_2008.pdf

Derivative classifications replicate originally-classified information in different ways and formats. In 2008, the growing number of derivative classifications ran counter to the decline in original classification. According to ISOO, the additional dissemination of classified information due to changes in information sharing policies and the use of classified e-mail, web pages, blogs, wikis, etc. Whatever the reasons, these actions indicate the ever-growing workload that government declassifiers will face in the coming years.

### Classification Challenges

Section 1.8 of E.O. 12958, issued in April 1995 and amended by President Bush in March of 2003,[38] encourages authorized holders of classified information to challenge the classification status of information that they believe, in good faith, to be improperly classified. Challenges are handled both informally and formally. Agencies reported 275 formal classification challenges in 2007 and 436 in 2008.

The ISOO report notes that out of more than 1,000 classified documents examined by ISOO in 2008, "the appropriateness of classification was subject to question in over 25 percent." Nearly 18% of the documents did not contain either a "Classified By" line or a "Derived From" line. In 14% of the documents that were derived from multiple sources, a derivative classification did not include a list of source materials with or on the official file or record copy of the document, as required.[39] Without this information, it was not possible to readily determine if the information was properly classified.

ISOO's program reviews have revealed that most authorized holders are not aware of the provision in the E.O. They conclude this is the reason that classification is not challenged "as much as should be expected in a robust system." A more likely explanation is that the agencies that routinely use classified information—the FBI, CIA, NSA and the other intelligence agencies—are specifically exempted from the Whistleblower Protection Act. As a result, the employees who are most likely to see examples of classification abuse do not have an effective mechanism to protect themselves if they are retaliated against for reporting this type of misconduct. A right is meaningless without a remedy, which would be for Congress to extend full and effective whistleblower protection rights to all federal employees, especially those entrusted with national security secrets.

## *DECLASSIFICATION*

### Automatic and Systematic Declassification Review

E.O. 12958 requires all agencies to automatically declassify information that has "permanent historical value," unless the information falls under several limited exemptions allowing continued classification. After several deadline extensions, automatic declassification came into effect on December 31, 2006. The E.O. also requires agencies to create and maintain a viable systematic review of records less than 25 years old and those exempted from automatic declassification, and to prioritize review based on researcher interest and the likelihood of declassification. Automatic declassification review and systematic declassification review are combined in the data ISOO collected from 1996 through 2008.

38 Hereafter, the E.O. or E.O. 12958.
39 32 C.F.R Part 2001.22(b)(1)(ii)

For the second year in a row, both pages reviewed and paged declassified declined:

- **Pages reviewed for declassification:** 51,454,240 pages in 2008, 59,723,753 pages in 2007—a decrease of 14%.
- **Pages declassified:** 31,400,000 pages in 2008, 37,249,390 in 2007—16% fewer pages.

The declassification rate also fell slightly again, from 62% of all material reviewed in 2007 to 61% in 2008.

**Electronic and Special Media Records—Looming Problems**

E.O. 12958 gave agencies a five-year delay in the automatic declassification review of the information contained in "special media"—microforms, motion pictures, audio tapes, videotapes, or "comparable media"—records that are 25 years of age or older. This delay expires on December 31, 2011. In its December 2007 Report to the President,[40] the Public Interest Declassification Board noted that too little has been done with regard to meeting that deadline. Nor has much been done toward developing plans to cope with the "truly monumental problem looming on the horizon": the review of classified information contained in electronic records.

**Multiple Equities Documents—Problems Continue**

Classified documents are not meant to be declassified and released to the public until all the agencies that have "equities" in the classification of the documents have had an opportunity to review them and authorize their release. To be declassified, documents that contain multiple equities have to be circulated and reviewed by each agency thought to have such equity. Usually, these documents go to the end of the queue at each agency, often languishing for months or even years before they are reviewed. An additional problem is that the department or agency that originally created the record, in conducting its own declassification review, often has failed to identify the classified equity information of other agencies. As a result, no referral is made. If the document is then released to the public, those other agencies may designate the records as being declassified improperly. As in the case exposed in 2006 at the National Archives (discussed below), some of the agencies with asserted equities in records took steps to remove the records from public access, in effect reclassifying them.

In recognition of this problem of referrals for equity review, the deadline for automatic declassification review of classified documents involving multiple equities was delayed for three additional years (until December 31, 2009) to allow time for this multiple agency review. The volume of referrals requiring action by December 31, 2009 is approximately 51 million pages, with the majority of these located at the National Archives facility in College Park, MD. Coordination of referrals at the National Archives Record Administration (NARA), though, has proven difficult for agencies to accomplish: a single box of records, containing approximately 2,500 pages, could contain referrals to ten or more agencies.

Based on data ISOO received in previous fiscal years, they conclude agencies by and large have referred records to other agencies as required by E.O. 12958. As ISOO noted in its 2007 Report, though, in many cases, "agencies have simply referred any and all information from other agencies to other agencies, without discrimination," leading to a "mountain" of records requiring

40 Public Interest Declassification Board. "Improving Declassification: A Report to the President," December 2007. http://www.archives.gov/declassification/pidb/improving-declassification.pdf

unnecessary review—as the information was either not sensitive in the first place, or is no longer sensitive.

Agencies have developed some tools[41] to manage the referral process. An example is the Interagency Referral Center (IRC),[39] which has had some success in reviewing approximately 200,000 documents (approximately 5.6 million pages) since its inception. ISOO is not confident, however, agencies will be able to meet the initial December 31, 2009 deadline. A central problem is that agency participation in the various tools and efforts[39] is entirely voluntary and not all agencies participate consistently.

The issues of equities and referrals in declassification create serious problems for public access—and for the ability of the public, historians, and the press to be assured that they can reliably use information declassified and released by an agency. Addressing them should be a high priority in the National Declassification Center that President Obama supports.

**Reclassification**

More than three years ago, the ISOO conducted an audit based on suspicions that previously-public documents had been removed from the shelves of the National Archives. The audit, which examined all re-review efforts since 1995, found that ten unrelated efforts had resulted in the withdrawal of at least 25,315 publicly available records from the shelves of the Archives. At that time, the agencies were directed to work with NARA to restore the withdrawn materials to the shelves.

In its 2007 report to the President, ISOO notes that at the end of FY 2007 "some agencies, including the CIA and the Air Force, had yet to complete their reviews and return their decisions to NARA." Additionally, more than 5,000 referrals had yet to be adjudicated. In discussions with ISOO, the agencies indicated that they hope to have finished this process by the end of FY 2008. Despite progress, this did not occur.

ISOO reports[42] that the agencies doing the bulk of the work (CIA and Air Force) have finished their work and returned their decisions. Approximately 500 "hard problem" adjudications wait further processing by NARA and the agencies. NARA has indicated it will strive to resolve these by the end of FY 2009.

Separately, starting in April 2006, NARA began reporting quarterly on withdrawals of previously declassified records. The reports provide information—including number of records and number of textual pages withdrawn—about records formally withdrawn in accordance with the "Interim

41 CIA and NARA collaborated to develop the Remote Archives Capture (RAC) program so that multiple equity documents in the Presidential libraries could be identified, referred to the departments and agencies with equities in them, and reviewed in a center in the Washington, DC, area. The CIA also led the establishment of an informal body of agency declassification personnel known as the External Referral Working Group (ERWG), which meets on a periodic basis. NARA created an Interagency Referral Center (IRC), where Federal records containing information with multiple equities could be referred and reviewed onsite by the participating agencies. The CIA created an automated system known as the Document Declassification Support System (DDSS) that permitted departments and agencies to alert other departments and agencies of classified records believed to contain their equities and require their review. Many departments and agencies also began to offer periodic equity recognition training for their own reviewers and for other department and agency reviewers. Most recently, as part of efforts related to the IRC and the National Declassification Initiative (NDI), NARA has put together "equity training labs" to ensure that all departments and agencies have the opportunity to review and declassify their equity information before it becomes public. Source: PIDB Report to the President, p.23.

42 Telephone conversation with William J. Bosanko, 28 July 2009.

Guidelines Governing Re-review of Previously Declassified Records at the National Archives," issued by ISOO in April 2006. Through 2007, seven records and fifteen textual pages were formally withdrawn; there were no withdrawals in 2008.

We continue to be unable to update information on the work conducted by the Department of Energy under the 1998 Kyl-Lott amendments. We have not been able to obtain final cost numbers for 2006–2008 (and for the review overall) from DOE.

**Mandatory Declassification Review**

The Mandatory Declassification Review (MDR) process under E.O. 12958 permits individuals or agencies to require the review of specific classified national security information for declassification. MDR can be used in lieu of litigation of denials of requests under the FOIA, and to seek declassification of Presidential papers or records not subject to FOIA. In 2008, the number of new initial requests continued to grow, as did the carryover from the year before.

In 2008, agencies received 8,264 new initial requests and processed 90% (7,407). Three agencies received the highest numbers of executive branch initial requests: DOD received 60% (5,076); NARA 16% (1,301); and CIA 13% (1,096).

MDR activity in 2008 involved the review of 261,283 pages:

- 73% (190,291 pages) declassified in full;
- 19% (50,219 pages) declassified in part; and
- 8% (20,774 pages) remained classified in their entirety after review.

***MDR Carry-Overs and Backlog***

Agencies processed a slightly higher percentage of cases in 2008 than in 2007 (90% and 88%, respectively). The number of cases carried over into the next fiscal year, however, increased almost 23% (5,843 in 2008 as opposed to 4,986 in 2007). NARA, DOD, and CIA also accounted for the majority of the cases carried forward (with NARA alone accounting for more than 40%)—and for 95% of the backlog of initial requests.

**Mandatory Declassification Review Appeals**

Agencies processed 178 appeals of agency decisions to deny information under the MDR process in 2008 (as compared with 104 in 2007, and 67 in 2006). ISOO notes this is the largest number of appeals processed in a single fiscal year since the issuance of E.O. 12958 in 1995. Not surprisingly, the same three agencies accounted for 91% of appeals: CIA (90), DOD (69), and NARA (20). Of the other agencies, only State (15), NASA (1), and Energy (1) reported receiving new appeals.

Agencies reviewed 6,472 pages in 2008, a 20% decrease from the 8,122 pages in 2007. The 2008 reviews resulted in the declassification of information in 41% (2,690) of the pages reviewed:

- 18% (1,189 pages) declassified in full;
- 23% (1,501 pages) declassified in part; and
- 59% (3,782 pages) remained classified in their entirety after agency review.

### *MDR Appeals Carry-Overs and Backlog*

As with initial requests, agencies face a continuing and growing backlog of MDR appeals: 105 appeals cases were carried forward into 2008 and 183 appeals into 2009—a 71% increase. After being cited by ISOO for a growing backlog and low productivity, NARA adjudicated and processed 55 MDR appeals in 2008. NARA's backlog continued to grow, however, from 42 in 2007 to 47 in 2008. The CIA remains a major problem in this area: the backlog at the CIA also grew from 33 appeals in 2007 to 90 for 2008, accounting for 49% of the executive branch total.

### Interagency Security Classification Appeals Panel (ISCAP)

A requester may appeal directly to the ISCAP any final decision made by an agency to deny information during an MDR appeal. The ISCAP exercises Presidential discretion in its decisions and it serves as the highest appellate authority for MDR appeals.[43, Endnote A]

Accompanying the increase in MDR requests noted above, ISCAP has received a far larger number of appeals in recent years (57 in 2007 and 58 in 2008, as compared with 26 in 2005 and 34 in 2006). The ISCAP decided on 90 documents that had remained fully or partially classified under MDR appeals. The Panel declassified information in 87% (78) of these documents:

- 32% (29) in their entirety;
- 55% (49) in part (some portions were declassified by the Panel while other portions remained classified); and in
- 13% (12) the Panel affirmed the agency decision (full or partial classification).

As with other parts of the declassification process, a backlog has developed. ISOO notes that in 2004, the ISCAP backlog was 55 appeals; by the end of 2008, it had increased to 144 appeals.

## NATIONAL SECURITY LETTERS

The Justice Department's "2008 Annual Report Regarding FISA and USA Patriot Act"[44] indicates that the government made 24,744 NSL requests in 2008 for information pertaining to 7,225 different United States persons.[45] Of the 24,744 requests, 4,929 requests were "corrective" NSLs that sought information regarding 1,643 different phone numbers. Taking the corrective NSLs into account, the 2008 numbers reflect an 18% increase from 2007 to 2008 in reported NSL requests.

43 The original E.O. 12958 provided agency heads with the ability to appeal the ISCAP's decisions to the President through the Assistant to the President for National Security Affairs. From May 1996 through the amendment of E.O. 12958 in 2003, this authority had not been exercised by any agency head, and the same was true for 2004–2008.

44 U.S. Department of Justice. "2008 Annual Report Regarding FISA and USA Patriot Act," May 2009. http://www.usdoj.gov/nsd/foia/reading_room/2008fisa-ltr.pdf

45 The report notes the final statistics for 2008 could change slightly if additional data regarding previously issues NSLs is reported by field offices.

| Specific numbers detailed in the Inspector General's 2009 reports include: | |
|---|---|
| 2000* | 8,500 |
| 2003 | 39,346 |
| 2004 | 56,507 |
| 2005 | 47,221 |
| 2006 | 49,425 |
| 2007 | 16,804 |
| 2008 | 24,744 |

** Total number in 2000 prior to passage of the USA PATRIOT Act*

| Percentage of NSL requests generated from investigations of U.S. Persons: | |
|---|---|
| 2003 | about 39% |
| 2004 | about 51% |
| 2005 | about 53% |
| 2006 | about 57% |
| 2007 | about 26% |
| 2008 | about 30% |

In somewhat good news, the Obama Justice Department let expire its opportunity to ask the Supreme Court to review a decision that struck down, as unconstitutional, USA PATRIOT Act provisions allowing the government to impose gag orders on recipients of national security letters.[46]

## Information Disclosure Outside the Classification System

### *THE FREEDOM OF INFORMATION ACT (FOIA)*

Both the total number of public requests (506,471) and the total spent processing those requests ($338,677,544) dropped from 2007 to 2008. This is largely attributable to a change in how agencies classify Privacy Act (PA) requests for information about one's self: previously, some agencies had included PA requests in their total number of requests received and the cost of processing PA requests in their total of the cost of FOIA.

In 2008, most agencies followed guidance from the Department of Justice Office of Information Policy (OIP) directing agencies to only account for FOIA requests in the reports. The number of FOIA requests received and the total spent on FOIA requests are not comparable from year to year due to this change in agency reporting. The change does, however, create a common standard for annual reports across the agencies and will improve the ability to make valid comparisons in the future.

46 A lower court ruled in 2007 that the gag order provisions were unconstitutional, and the U.S. Court of Appeals for the Second Circuit upheld that ruling in 2008. The government's time for petitioning the Supreme Court for review expired. http://www.aclu.org/safefree/nationalsecurityletters/39605prs20090518.html

| Public Requests under the Freedom of Information Act* | | |
|---|---|---|
| Year | # of FOIA Requests Received | Total Cost of FOIA |
| 1999 | 1,908,083 | $286,546,488 |
| 2000 | 2,174,570 | $253,049,516 |
| 2001 | 2,188,799 | $287,792,041 |
| 2002 | 2,429,980 | $300,105,324 |
| 2003 | 3,266,394 | $323,050,337 |
| 2004 | 4,080,737 | $336,763,628 |
| 2005 | 19,950,547 | $334,853,222 |
| 2006 | 21,412,736 | $304,280,766 |
| 2007 | 21,758,628 | $352,935,673 |
| 2008 | 605,471 | $338,677,544 |

*Source: Calculated by OpenTheGovernment.org from individual agency Annual FOIA Reports*

**During the time span covered by this chart, several agencies have included Privacy Act (PA) requests in the totals reported in their annual reports. Under OIP guidance, agencies excluded PAs from both the number of requests received and total costs. As a result, numbers from year to year in this chart are not comparable.*

### Backlogs Slightly Reduced

The federal government processed 17,689 more FOIA requests than it received in 2008. The net improvement is in part the result of significant backlog progress on the part of a few agencies: the Department of Health and Human Services, Department of Justice, Office of Personnel Management, and Securities and Exchange Commission account for about 96% of the government-wide progress. Adding to the good news, few agencies added a significant number of requests to their backlog during 2008: the agency that fell the furthest behind, the Department of Veterans Affairs, added about 800 requests to the backlog.

In 2007, the Department of Justice directed[47] the agencies to include a listing of the 10 oldest pending FOIA requests in their annual FOIA reports (this requirement was codified in the OPEN Government Act)—to focus agency attention on, "one aspect of FOIA backlogs that frequently receives a great deal of attention."[48] Last year, OpenTheGovernment.org review of agencies' 2007 FOIA reports found the oldest pending case to be a request at the Department of Energy pending since December 1991. According to the 2008 FOIA reports, that request has been closed, and the oldest pending request reported is at the CIA; it has been pending since May 1992.

## *PRESIDENTIAL SIGNING STATEMENTS*

Prior to 2000, Presidents had issued fewer than 600 signing statements that took issue with the bills they signed. The number of constitutional objections in the signing statements by the Bush Administration marked a qualitative difference from those of previous administrations: President Bush's signing statements were "typified by multiple constitutional and statutory objections, containing challenges to more than 1,000 distinct provisions of law."[49]

47 Department of Justice, Supplemental Guide for Preparation and Submission of Section XII of Agency Fiscal Year 2007 Annual FOIA Reports, FOIA Post, October 16, 2007. http://www.usdoj.gov/oip/foiapost17.htm

48 Department of Justice. "Attorney General's Report to the President Pursuant to Executive Order 13,392, entitled 'Improving Agency Disclosure of Information'" May 30, 2008.

49 Halstead, TJ "Presidential Signing Statements: Constitutional and Institutional Implications" Congressional

| Years or Presidencies | Statements Challenging Provisions of Laws |
|---|---|
| 1789–1980 | 278 |
| Reagan | 71 |
| G.H.W. Bush | 146 |
| Clinton | 105 |
| G.W. Bush | 161 |

*Source: Presidential Signing Statements, http://www.coherentbabble.com/listGWBall.htm; Accessed July 31, 2009.*

President George W. Bush's use of signing statements decreased significantly after 2006; almost 92% of his signing statements were issued during his first six years in office.

| Year | Number of Signing Statements |
|---|---|
| 2001 | 24 |
| 2002 | 34 |
| 2003 | 28 |
| 2004 | 25 |
| First Term Total | 111 |
| 2005 | 14 |
| 2006 | 23 |
| 2007 | 8 |
| 2008 | 5 |
| Total | 161 |

## *EXECUTIVE PRIVILEGE*

Executive Privilege refers to the assertion made by the President or, sometimes, other executive branch officials when they refuse to give Congress, the courts, or private parties information or records which have been requested or subpoenaed, or when they order government witnesses not to testify before Congress.[Endnote B] A CRS Report updated in August 2008[50] provides a summary recounting of assertions of presidential claims of executive privilege from the Kennedy Administration through the G. W. Bush Administration.

| Assertions to Congress of Presidential Executive Privilege Claims | | | |
|---|---|---|---|
| Kennedy | 2 | Reagan | 3 |
| Johnson | 3 | G.W.H. Bush | 1 |
| Nixon | 4 | Clinton | 5 |
| Ford | 1 | G.W. Bush | 6* |
| Carter | 1 | | |

**Through August 21, 2008.*
*Source: Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments: Updated August 21, 2008," Congressional Research Service. http://www.fas.org/sgp/crs/secrecy/RL30319.pdf*

Research Service. Updated September 17, 2007.

50 Morton Rosenberg, Specialist in American Public Law, American Law Division, "Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments: Updated August 21, 2008," Congressional Research Service. http://www.fas.org/sgp/crs/secrecy/RL30319.pdf

## *INVENTION SECRECY*

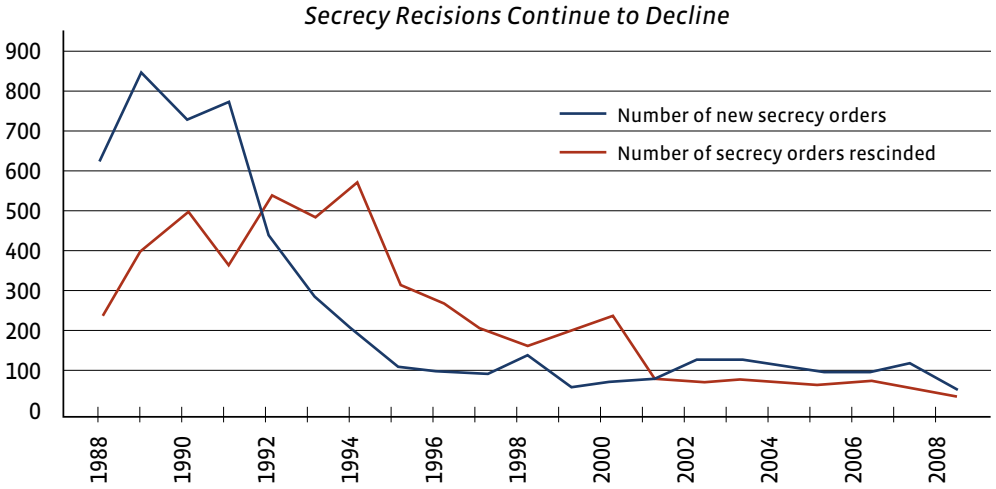
**Patent "Secrecy Orders"**

The federal government can impose secrecy on any new patent by issuing a "secrecy order" under federal law (35 USC 181). After more than a decade of fewer and fewer new secrecy orders imposed on new patents, the number of new secrecy orders jumped just after 9/11 from 83 in 2001 to 139 in 2002. New secrecy orders in 2008 fell below pre-2001 levels, dropping to 68.

At the same time, however, the number of secrecy orders rescinded continued to dramatically decrease—to just 47 in 2008, compared to 68 in 2007. As a result, there were 23 more secret inventions on the books in 2008 than in 2007.

| Year | # of New Secrecy Orders | # of Secrecy Orders Rescinded | Total # of Secrecy Orders in Effect |
|---|---|---|---|
| 1988 | 630 | 237 | 5,122 |
| 1989 | 847 | 413 | 5,556 |
| 1990 | 731 | 496 | 5,791 |
| 1991 | 774 | 372 | 6,193 |
| 1992 | 452 | 543 | 6,102 |
| 1993 | 297 | 490 | 5,909 |
| 1994 | 205 | 574 | 5,540 |
| 1995 | 124 | 324 | 5,340 |
| 1996 | 105 | 277 | 5,168 |
| 1997 | 102 | 210 | 5,060 |
| 1998 | 151 | 170 | 5,041 |
| 1999 | 72 | 210 | 4,903 |
| 2000 | 83 | 245 | 4,741 |
| 2001 | 83 | 88 | 4,736 |
| 2002 | 139 | 83 | 4,792 |
| 2003 | 136 | 87 | 4,841 |
| 2004 | 124 | 80 | 4,885 |
| 2005 | 106 | 76 | 4,915 |
| 2006 | 108 | 81 | 4,942 |
| 2007 | 128 | 68 | 5,002 |
| 2008 | 68 | 47 | 5,023 |

*Source: United States Patent and Trademark Office via Federation of American Scientists, www.fas.org/sgp/othergov/invention/stats.html; and USPTO accessed 7/02/2009*




## CLOSING OFF PUBLIC INFORMATION ABOUT SCIENTIFIC AND TECHNICAL ADVICE THROUGH FEDERAL ADVISORY COMMITTEES

During FY2008, the General Services Administration (GSA) reported a total of 917 active Federal Advisory Committees, with nearly 64,000 total members, that provided advice and recommendations to 50 federal agencies. The total operating costs for these committees in FY2008 was $344.3 million.[51] More than 65% of the 6,840 meetings of federal advisory committees that fall under the Federal Advisory Committee Act (FACA) were completely closed to the public. Moreover, far fewer meetings were open to the public in 2008 than in 2007: the total number of meetings held dropped while the percentage of closed meetings rose.

In passing FACA in 1972, Congress intended for the federal government to receive open scientific and technical advice, which is free from the undue influence of "any special interest."[52] Congress allowed certain exceptions but wrote directly into the law its assumption that "(e)ach advisory committee meeting shall be open to the public."[53]

A separate but related issue has to do with the use of subcommittees and informal working groups, which can make suggestions to the full Committee. Meetings conducted by subcommittees and informal working groups are not subject to the public participation and public notice requirements of the FACA. The GSA FACA database does not track subcommittees and informal working groups, so the numbers below do not fully reflect the exclusion of the public from the working of Advisory Committees.

51 All FACA committee totals and costs are supplied by the U.S. General Services Administration's FACA Database, http://fido.gov/facadatabase/.

52 5 USC Sec. 5(b) (3)

53 5 USC Sec. 10(a) (1)

| Year | Total # of Meetings | % of Meetings Closed |
|---|---|---|
| 1997 | 5,698 | 51 |
| 1998 | 5,898 | 50 |
| 1999 | 6,256 | 53 |
| 2000 | 6,211 | 56 |
| 2001 | 5,872 | 58 |
| 2002 | 6,281 | 61 |
| 2003 | 6,799 | 61 |
| 2004 | 7,045 | 64 |
| 2005 | 7,449 | 61 |
| 2006 | 7,189 | 63 |
| 2007 | 7,067 | 64 |
| 2008 | 6,840 | 65 |

*Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, www.fido.gov/facadatabase; accessed July 14, 2009*

The Department of Defense, Department of Health and Human Services and National Science Foundation historically account for majority of the closed committee. With these excluded, the percentage of meetings completely closed has ranged from 6% in 2001 to a high of 17% in 2004 and in 2008.

**Closed Meetings of Remaining Agencies**

*(Excluded: Dept. of Defense, Dept. of Health & Human Services, National Science Foundation)*

| Meetings Completely Closed | |
|---|---|
| 1997 | 240 |
| 1998 | 233 |
| 1999 | 257 |
| 2000 | 255 |
| 2001 | 130 |
| 2002 | 262 |
| 2003 | 318 |
| 2004 | 396 |
| 2005 | 149 |
| 2006 | 271 |
| 2007 | 338 |
| 2008 | 338 |

*Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, www.fido.gov/facadatabase; accessed July 14, 2009*

## *"SENSITIVE BUT UNCLASSIFIED" CONTROLS ON INFORMATION*

In our 2007 report, we highlighted the fact that 81% of the more than 107 unique markings agencies place on "sensitive but unclassified" information (now called by "Controlled Unclassified Information" by the executive branch) are based not on statute or approved regulations, but are the product of department and agency policies. As noted by the Information Sharing

Environment Program Office, these policies were created "without attention to the overall Federal environment of CUI information sharing and protection."[54]

Readers can find some of the "Sensitive but Unclassified Designations in Use at Selected Federal Agencies"[55] in our 2006 and 2007 reports. Some "protections" listed are unnecessary for unclassified information, such as personal privacy information or trade secrets, which are protected by statutes and exemptions to the FOIA that openly cover them. Ultimately, these efforts to control and restrict information make it harder for authorities to inform the public about potential dangers in their own communities and block the free flow of information necessary in a democratic, open society. Since last year's report, both the executive (see page 9) and the legislative branches (see page 41) have addressed this issue.

In May 2008, President Bush issued a Presidential Memorandum[56] creating a tiered system of designations that relate primarily to the allowable dissemination of documents and establishes a framework for designating, marking, safeguarding, and disseminating designated information. It does not address limiting the use of such designations.

The Executive Agent for implementing the Framework for unclassified information is the National Archives' Information Security Oversight Office (ISOO), an office whose mission encompasses classified information.

# The Courts

## *THE FOREIGN INTELLIGENCE SURVEILLANCE COURT*

The Foreign Intelligence Surveillance Court is responsible for reviewing and approving government applications under the Foreign Intelligence Surveillance Act for domestic electronic surveillance and physical search of suspected foreign intelligence agents or terrorists. The FISC does not reveal much about its activities and also reinterprets the terms of the Act in an undisclosed fashion, producing, in effect, a body of "secret law."[57] In a December 2007 ruling, Judge John D. Bates, a member of the FIS Court, observed,[58] "The FISC has in fact issued . . . legally significant decisions that remain classified and have not been released to the public," when he denied an ACLU motion for disclosure of portions of those decisions.

During calendar year 2008, the FISC approved 2,083 applications for authority to conduct electronic surveillance and physical search (two applications filed in calendar-year 2007 were not approved until calendar-year 2008). The FISC denied one application filed by the government and made substantive modifications to the government's proposed orders in two of the applications.

54 "Background on the Controlled Unclassified Information Framework" May 20, 2008. http://www.fas.org/sgp/cui/background.pdf

55 GAO: March 2006: Information Sharing: The Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information: GAO-06-385. http://www.gao.gov/new.items/d06385.pdf

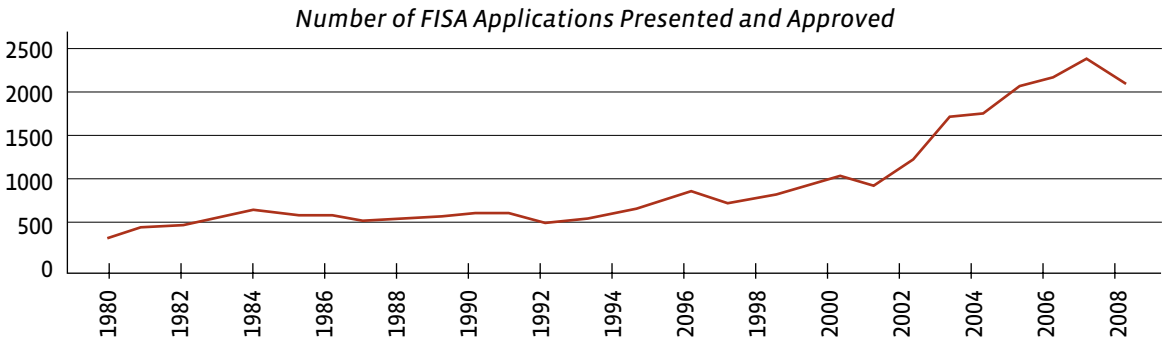
56 "Designation and Sharing of Controlled Unclassified Information," May 9, 2008. http://www.archives.gov/cui/documents/designation_cui.pdf

57 Statement of Steven Aftergood, Federation of American Scientists. Hearing on Secret Law and the Threat to Democratic and Accountable Government, April 30, 2008. Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate. http://www.fas.org/blog/secrecy/2008/04/secret_law_deb.html

58 http://www.fas.org/irp/agency/doj/fisa/index.html

| Year | # of FISA Request Applications | Year | # of FISA Request Applications |
|---|---|---|---|
| 1980 | 322 | 1994 | 576 |
| 1981 | 433 | 1995 | 697 |
| 1982 | 475 | 1996 | 839 |
| 1983 | 549 | 1997 | 748 |
| 1984 | 635 | 1998 | 796 |
| 1985 | 587 | 1999 | 880 |
| 1986 | 573 | 2000 | 1,012 |
| 1987 | 512 | 2002 | 1,228 |
| 1988 | 534 | 2003 | 1,724 |
| 1989 | 546 | 2004 | 1,754 |
| 1990 | 595 | 2005 | 2,072 |
| 1991 | 593 | 2006 | 2,176 |
| 1992 | 484 | 2007 | 2,371 |
| 1993 | 509 | 2008 | 2,083* |

*Numbers Source: Electronic Privacy Information Center *from 2009 DOJ Report to Congress posted on Wired*




*Numbers Sources: Electronic Privacy Information Center and 2009 DOJ Report to Congress posted on Wired*

## *STATE SECRECY: THE EXECUTIVE BRANCH'S TRUMP CARD*[59]

Between 2001 and 2008, the federal government invoked the "state secrets" privilege at a rate equal to 8 times the number of invocations over the 24 years from 1953 to 1976. Since 2001, the state secrets privilege has been invoked at least 48 times.[60] Between 1977 and 2000, administrations invoked the privilege 59 reported times (a rate of 2.46 times per year).

| Use of State Secrecy Privilege | | | |
|---|---|---|---|
| Years (inclusive) | 1953–1976 | 1977–2000 | 2001–12/2008 |
| Times Invoked in Cases | 6 | 59 | 48 |
| Period (in years) | 24 | 24 | 8 |
| Yearly Invocations (avg.) | 0.25 | 2.46 | 6 |

*Source: National Security Archive*

59 The executive branch has broad, near unilateral authority to declare information a "state secret." In 1953, the U.S. Supreme Court allowed the executive branch to keep secret, even from the Court, details about a military plane's fatal crash. This ruling, *United States v. Reynolds*, gave the executive branch power to impose secrecy with little opportunity for appeal or judicial review when the information at issue would pose a "reasonable danger" to national security. The privilege, which has its roots in common law, has become a popular tool for the executive branch to shield itself against inquiries and litigation. Moreover, the trend is toward the government claiming this privilege earlier in civil litigation, to block discovery. The end result is often the complete dismissal of cases, denying both judicial review of alternative methods of presenting the information needed by the litigants and the possibility of adjudication on issues not related to the claim of state secrets.

60 The numbers of invocations during the George W. Bush administration vary according to the counting method used. We believe this number to be the most current count of invocations in cases at the trial and appellate levels, based on judicial decisions and news reports about specific cases. In some cases, the assertion in a reported case at trial and in a reported opinion on appeal, if there is one, for the same case are counted as two assertions.

# 2008 Money Trends

## Expenditures on Secrecy

### *NATIONAL INTELLIGENCE PROGRAM BUDGET*

On 28 October 2008, the Director of National Intelligence declassified and released the 2008 budget for the National Intelligence Program: $47.5 billion, a 9.2% increase over the fiscal 2007 budget of $43.5 billion. The disclosure marks only the fourth time that the intelligence budget has been officially disclosed. The aggregate intelligence budget figure (including national, joint military and tactical intelligence spending) was first released in 1997 ($26.6 billion), in response to a FOIA lawsuit filed by the Federation of American Scientists. It was voluntarily released in 1998 ($26.7 billion). The National Intelligence Program budget was next disclosed in 2007, in response to a Congressional mandate,[61] based on a recommendation of the 9/11 Commission.

The $47.5 billion amount includes most of the 16 components of the intelligence community, such as the National Security Agency (NSA) and CIA, and also encompasses supplemental spending. The figure does not include spending for the Military Intelligence Program, which is at least another $10 billion, according to *Secrecy News*.

### *SPENDING ON CLASSIFICATION DIPS IMPERCEPTIBLY; SPENDING ON DECLASSIFICATION DECLINES*

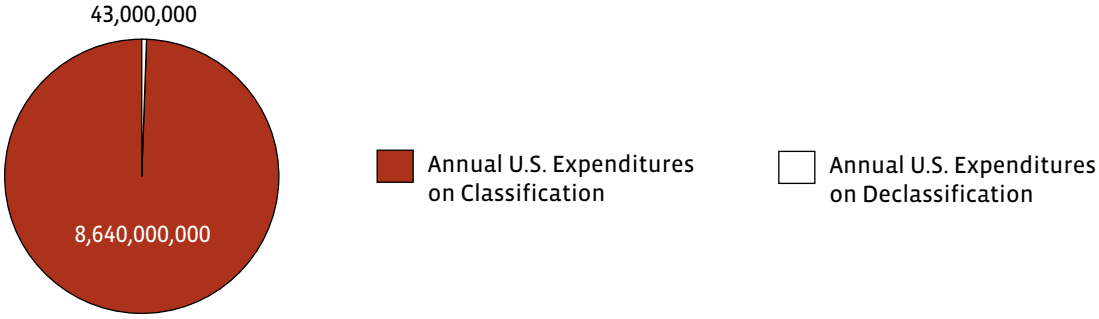
The chart and the accompanying table below show the amount of money spent on the entire classification system. These costs include the costs associated with training, technology investments and declassification efforts, as well as securing facilities and personnel in the United States and abroad that hold classified information. The total expenditure figure includes estimates from 41 federal agencies, including the Department of Defense. It excludes the Central CIA, the National Geospatial Intelligence Agency (NGA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office (NRO) and the NSA, as their cost estimates are classified.

**Costs of Securing Secrets**

After years of rising, the amount of money government agencies spend to secure classified documents dipped slightly in 2008. The 2008 estimate of $8.64 billion is $13 million less than in 2007—a decrease of not quite .2%. Spending on professional education, training, and awareness increased by 15.4% in 2008; ISOO attributes this cost increase to the development by many

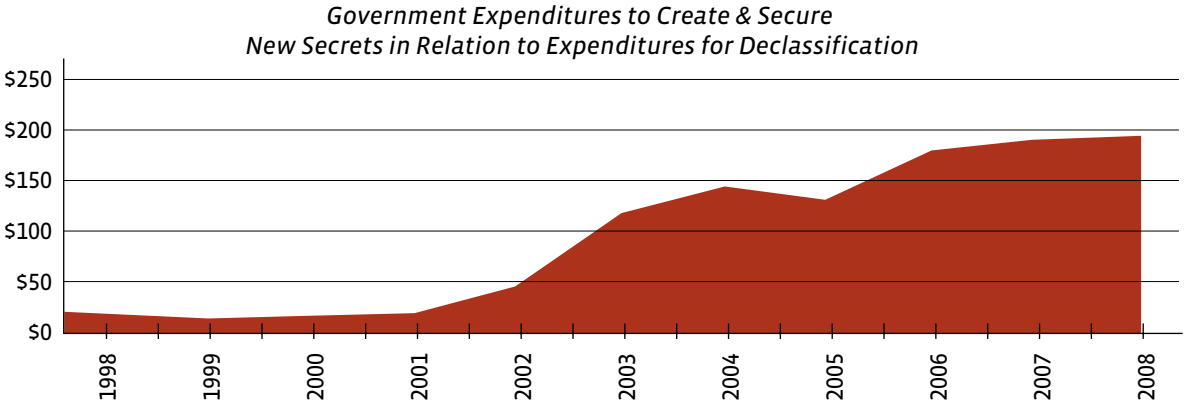
61 Under Public Law 110-053, the "Implementing Recommendations of the 9/11 Commission Act of 2007, "signed by President Bush on August 3, 2007, the Office of the Director of National Intelligence was required to release the budget total at the conclusion of the fiscal year. However, under a deal reached between Congress and the Bush administration, which opposed declassifying the budget total because officials said they feared giving too much information about spending patterns to the nation's enemies and rivals, the next president will have the option to waive the disclosure requirement if he explains to lawmakers that declassification would jeopardize national security.

agencies of aggressive web-based training programs. Since 2006, declassification costs have accounted for the smallest share of the amount spent on classification.




**$200 Spent Creating and Securing Old Secrets for Every Tax Dollar Spent Declassifying**

For every one dollar the government spent declassifying[62] documents in 2008, the government spent almost $200[63] maintaining the secrets already on the books, a 2% increase from last year.




62 The data on expenditures does not include data from the Central Intelligence Agency (CIA), the National Geospatial Intelligence Agency (NGA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office (NRO) and the National Security Agency (NSA). Their expenditures are classified and not publicly reported.

63 Figure calculated by first subtracting declassification cost from total classification cost to arrive at the total cost of classification not related to declassification; we then divide this figure by expenditures on declassification.

| Federal Expenditures on Classification and Declassification in Millions (excluding CIA, NGA, DIA, NSA and NRO) | | | |
|---|---|---|---|
| Fiscal Years | Cost of Securing Classified Information | Portion Spent on Declassifying Documents[64] | Classification Costs Per $1 Spent on Declassification |
| 1997 | $3,380,631,170 | $150,244,561 | $22 |
| 1998 | 3,580,026,033 | 200,000,000 | 17 |
| 1999 | 3,797,520,901 | 233,000,000 | 15 |
| 2000 | 4,270,120,244 | 230,903,374 | 17 |
| 2001 | 4,710,778,688 | 231,884,250 | 19 |
| 2002 | 5,688,385,711 | 112,964,750 | 49 |
| 2003 | 6,531,005,615 | 53,770,375 | 120 |
| 2004 | 7,200,000,000 | 48,300,000 | 148 |
| 2005 | 7,700,000,000 | 57,000,000 | 134 |
| 2006 | 8,200,000,000 | 44,000,000 | 185 |
| 2007 | 8,650,000,000 | 44,000,000 | 195 |
| 2008 | 8,640,000,000 | 43,000,000 | 200 |

*Source: OpenTheGovernment.org calculations based on data from the Information Security Oversight Office (ISOO). 2008 Cost Report to the President.*

# Other Money Flows

## *BLACK BUDGET PROCUREMENT AND R&D*

**Classified Budgets Skyrocket**

Classified or "black" programs account for about $34 billion, or 19%, of the acquisition funding included in the FY 2009 Department of Defense (DOD) budget. This total does not include war-related funding appropriated through emergency supplemental spending bills.

Procurement funding accounts for $15.1 billion of this total, and research and development (R&D) funding accounts for $18.9 billion. These figures represent 14% and 24%, respectively, of the total funding requested for procurement and R&D.

64 The publicly reported numbers on the amount spent on declassification include, for the most part, only the cost of the people engaged and the equipment, not the cost of physical security and personnel security. These overhead costs are shared, and agencies are not required to separate their figures. While the dollars attributable to declassification costs may be under-reported, they would still be extremely small compared to the costs of maintaining secrets.

| Department of Defense Classified "Black" Budgets | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Weapons Acquisition | | | | Procurement | | | Research & Development | | |
| Fiscal Year | Total DoD | Classified | % Classified | Total DoD | Classified | % Classified | Total DoD | Classified | % Classified |
| 95 | 77.7 | 11.7 | 15 | 43.2 | 7.1 | 16 | 34.5 | 4.6 | 13 |
| 96 | 77.4 | 12.6 | 16 | 42.4 | 7.3 | 17 | 35 | 5.3 | 15 |
| 97 | 79.7 | 13.2 | 17 | 43.2 | 6.1 | 14 | 36.5 | 7.2 | 20 |
| 98 | 82.1 | 14.9 | 18 | 44.9 | 6.8 | 15 | 37.2 | 8.1 | 22 |
| 99 | 88.7 | 15.8 | 18 | 50.6 | 7.5 | 15 | 38.1 | 8.3 | 22 |
| 00 | 93.2 | 15.4 | 15.4 | 54.9 | 7.5 | 14 | 38.3 | 7.9 | 21 |
| 01 | 103.9 | 18.1 | 17 | 62.2 | 7.5 | 10 | 41.7 | 10.6 | 25 |
| 02 | 110.9 | 18.2 | 16 | 62.2 | 8.9 | 10 | 48.6 | 9.3 | 19 |
| 03 | 137.9 | 26.1 | 19 | 79.6 | 13.2 | 17 | 58.3 | 12.9 | 22 |
| 04 | 147.5 | 27.6 | 19 | 83.2 | 14.5 | 17 | 64.4 | 13.2 | 20 |
| 05 | 167.8 | 29.8 | 18 | 98.5 | 16.3 | 17 | 39.3 | 13.5 | 20 |
| 06 | 178 | 31.5 | 18 | 105.3 | 16.6 | 16 | 72.7 | 14.8 | 20 |
| 07 | 212 | 34.5 | 16 | 134.4 | 17.7 | 13 | 77.6 | 16.7 | 22 |
| 08 | 203.2 | 31.9 | 16 | 126.4 | 14.5 | 11 | 76.9 | 17.3 | 23 |
| 09 | 183.8 | 34 | 19 | 104.2 | 15.1 | 14 | 79.6 | 18.9 | 24 |

**Numbers through 2007 estimate amount of funding executed, numbers for 2008 estimate funding appropriated, and numbers for 2009 estimate funding requested. 2008 numbers exclude emergency supplemental funding for the Global War on Terror (GWOT) passed by Congress after June 2008. Source: http://www.csbaonline.org/4Publications/PubLibrary/U.20080618.Classified_Funding/U.20080618.Classified_Funding.pdf*

According to the Center for Strategic and Budgetary Assessments[65]:

- Classified acquisition funding has more than doubled in real terms since FY 1995, when funding for these programs reached its post–Cold War low.
- Since FY 1995, funding for classified acquisition programs has increased at a substantially faster rate—approximately 115%—than has funding for acquisition programs overall, which has grown by about 76 percent.
- Restrictions placed on access to classified program information have meant that DOD and Congress typically exercise less oversight over classified programs than unclassified ones.

## *WHISTLEBLOWERS RECOVER BILLIONS FOR TAXPAYERS*

In 2008, suits brought by whistleblowers under the False Claims Act *qui tam*[66] provisions accounted for almost 78% of the $1.34 billion recovered from litigation concerning fraud on the federal government. Since 1986, when Congress strengthened the False Claims Act, the federal government has recovered more than $21 billion overall.

65 Steven Kosiak, "Classified Funding in the FY 2008 Defense Budget Request" The Center for Strategic and Budgetary Assessments (CSBA) http://www.csbaonline.org/

66 The False Claims Act allows a private individual or "whistleblower," with knowledge of past or present fraud on the federal government, to sue on behalf of the government to recover stiff civil penalties and triple damages. A suit initially remains under seal for at least 60 days during which the Department of Justice can investigate and decide whether to join the action. http://www.quitamonline.com/whatis.html

| Billions Recovered for Taxpayers | | | |
|---|---|---|---|
| Year | Savings in $ | Year | Savings in $ |
| 1989 | 15,111,719 | 1999 | 516,778,031 |
| 1990 | 40,558,367 | 2000 | 1,199,766,754 |
| 1991 | 69,775,271 | 2001 | 1,286,791,859 |
| 1992 | 135,093,903 | 2002 | 1,089,252,722 |
| 1993 | 177,416,383 | 2003 | 1,501,554,095 |
| 1994 | 381,468,397 | 2004 | 554,626,506 |
| 1995 | 247,276,827 | 2005 | 1,425,853,183 |
| 1996 | 138,598,636 | 2006 | 3,100,000,000 |
| 1997 | 629,882,525 | 2007 | 2,000,000,000 |
| 1998 | 462,038,795 | 2008 | 1,340,000,000 |

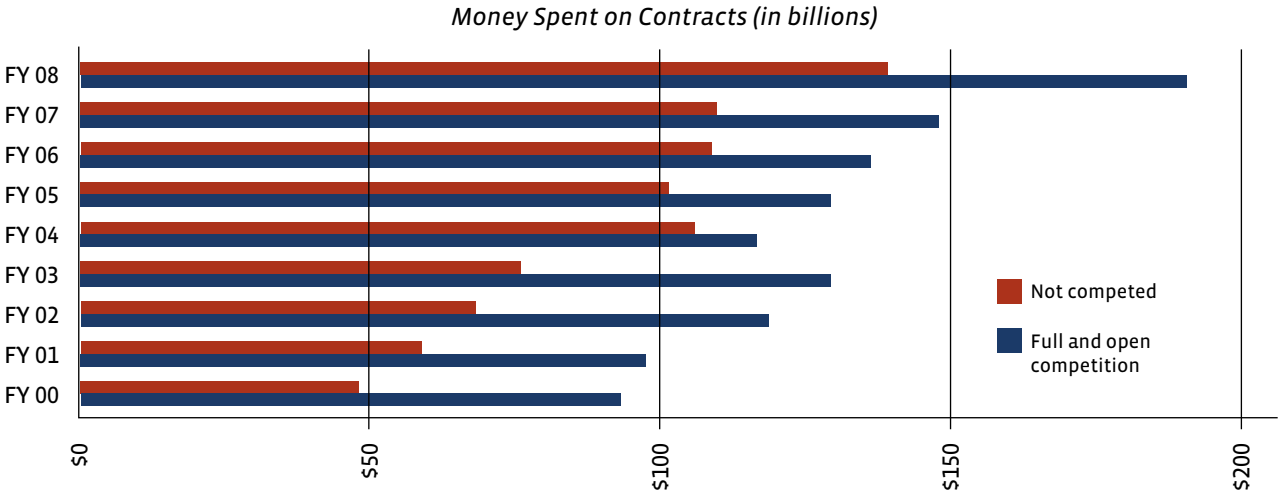
*Source: US DOJ Press Release, 10 Nov 08*

## *FEDERAL CONTRACTING*

**Gap between Competed and Non-Competed Contracts Grows**

In FY 2000, the government spent $208.8 billion on contracts. By FY 2008, it was spending $526.5 billion. During this same period of FY 2000–FY 2008, the government spent $1.9 trillion on contracts awarded with less than a full and open competition.

Use of full and open competition has dropped from almost 45% of contract dollars in FY 2000 to 36% in FY 2008. At the same time, the percentage of contracts not competed at all has risen: from 23% in FY 2000 to almost 27% in FY 2008. An additional approximately 5% were also no-bid deals because of various requirements. These trends show no sign of reversing without a major intervention.



| Contract Competition Types by Year—In billions of dollars* | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Competition category | FY 00 | FY 01 | FY 02 | FY 03 | FY 04 | FY 05 | FY 06 | FY 07 | FY 08 | FY 00–08 |
| Full and open competition | 93.0 | 97.6 | 117.2 | 131.9 | 118.0 | 130.6 | 137.4 | 148.4 | 189.5 | 1,163.6 |
| Not competed | 48.6 | 57.2 | 64.6 | 75.5 | 106.9 | 101.2 | 112.6 | 116.2 | 140.0 | 822.7 |
| Competed after exclusion of sources | 20.2 | 24.5 | 29.2 | 35.3 | 49.0 | 66.1 | 76.8 | 90.0 | 98.8 | 489.9 |
| Full and open competition, but only one bid | 17.6 | 15.0 | 17.2 | 20.9 | 38.9 | 39.9 | 40.4 | 45.1 | 46.1 | 280.9 |
| Not available for competition | 17.6 | 15.6 | 24.1 | 19.7 | 15.6 | 20.1 | 22.9 | 22.6 | 24.8 | 183.0 |
| Unknown | 4.4 | 0.4 | 0.2 | 1.6 | 6.1 | 14.8 | 20.8 | 22.7 | 22.3 | 93.2 |
| Follow-on to previous contract | 6.9 | 8.9 | 6.6 | 12.9 | 8.7 | 12.5 | 12.6 | 12.2 | 4.9 | 86.2 |
| Total | $208.3 | $219.2 | $259.0 | $297.8 | $343.2 | $385.1 | $423.4 | $457.0 | $526.5 | 3,119.6 |

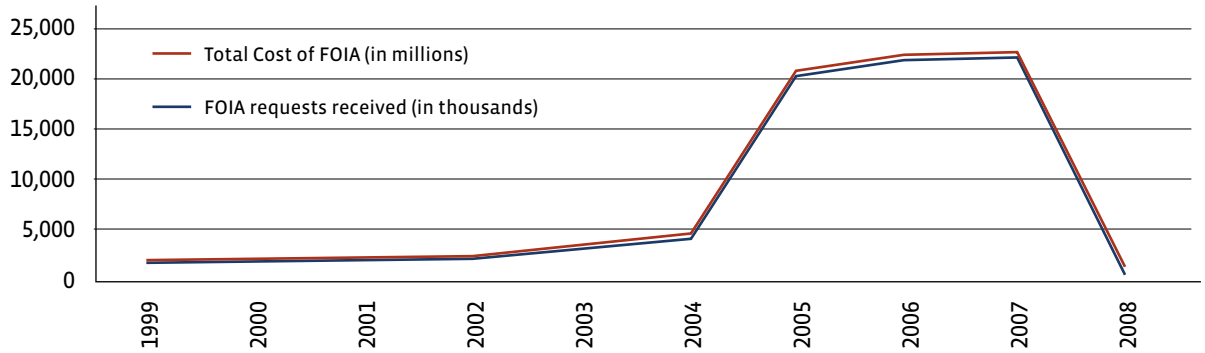
*Source: USASpending.gov *Numbers may differ from totals reported in past years due to updates and data quality adjustments.*

| Percentage of Contracts Competed by Type/Year | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Competition category | FY 00 | FY 01 | FY 02 | FY 03 | FY 04 | FY 05 | FY 06 | FY 07 | FY 08 | FY 00–08 |
| Full and open competition | 44.65% | 44.53% | 45.26% | 44.30% | 34.38% | 33.92% | 32.44% | 32.47% | 36.00% | 37.30% |
| Not competed | 23.33% | 26.09% | 24.93% | 25.35% | 31.15% | 26.27% | 26.59% | 25.42% | 26.59% | 26.37% |
| Competed after exclusion of sources | 9.70% | 11.18% | 11.26% | 11.87% | 14.27% | 17.16% | 18.15% | 19.69% | 18.77% | 15.70% |
| Full and open competition, but only one bid | 8.45% | 6.84% | 6.64% | 7.00% | 11.33% | 10.35% | 9.54% | 9.86% | 8.75% | 9.01% |
| Not available for competition | 8.45% | 7.12% | 9.29% | 6.62% | 4.55% | 5.22% | 5.41% | 4.94% | 4.72% | 5.87% |
| Unknown | 2.11% | 0.18% | 0.07% | 0.53% | 1.79% | 3.85% | 4.90% | 4.96% | 4.24% | 2.99% |
| Follow-on to previous contract | 3.31% | 4.06% | 2.56% | 4.34% | 2.53% | 3.24% | 2.97% | 2.67% | 0.93% | 2.76% |

*Source: USASpending.gov*

## *FOIA SPENDING TRACKS NUMBER OF REQUESTS PROCESS*

As noted previously, the number of FOIA requests received and the total spent on FOIA requests are not comparable from year to year due to changes in agency reporting. It is instructive, though, to compare the per-year total number of requests reported by agencies to the total per-year FOIA spending by agencies. As the chart below represents, the government has spent an extremely similar amount to process requests in relation to the number of requests reported.




Arguably, if the government spends money on FOIA in proportion to requests, the government would save money by reducing the number of requests made by the public. The fairest and most effective way to do so is by increasing the amount of material affirmatively released. There is a range of additional steps the government could take to reduce requests and, by extension, costs, including: increasing the availability of declassified records, making better use of electronic reading rooms, and reducing unnecessary classification.

## Legislative Initiatives toward Executive Branch Openness

### *REINING IN CONTROLS ON INFORMATION DISCLOSURE (SBU)*

Prior to President Obama's May 2009 Memorandum on Classified Information and Controlled Unclassified Information, the House of Representatives passed a bill to limit and standardize the use of control markings or CUI: H.R. 1323: Reducing Information Control Designations Act.

H.R. 1323, originally introduced during the 110th Congress as H.R. 6576, responds on a government-wide basis to both a 2008 White House memorandum directing the establishment of a Controlled Unclassified Information (CUI) framework for the Information Sharing Environment (ISE),[67] and to the proliferation of SBU-type markings within and beyond the ISE. The bill's intent is to reduce both the number of control markings and the number of marked documents. Its presumption is that these often vague and undefined markings can be used to needlessly prevent or delay both public access to information and information sharing with interested stakeholders. The bill directs the Archivist of the United States to develop a policy that minimizes the use of control markings in a manner narrowly tailored to maximize public access to information. It also requires the Archivist to: address the duration of the markings and set up a process for removing them; create a system for employees and contractors to challenge marking; establish random audits to ensure agencies are following the regulations; limit the number of people authorized to mark documents as controlled; and establish procedures for members of the public to challenge control markings.

67 http://www.ise.gov/pages/background.html

## FIXING ABUSE OF THE CLASSIFICATION SYSTEM

**Over-classification**

In its 2004 Final Report of the National Commission on Terrorist Attacks Upon the United States,[68] the 9/11 Commission cited the necessity of preventing over-classification by the Federal Government. Over-classification hinders information sharing and causes the government to needlessly spend billions of taxpayer dollars protecting information that should never have been classified. It also leads to disrespect of the system and leaks to the press, public suspicion, and incidents such as the reclassification of public documents taken from the shelves of the Archives in April 2006.

In early February 2009, the House of Representatives passed H.R. 553 addressing over-classification within the Department of Homeland Security. Another bill to address over-classification across the federal government, H.R. 854, the Over-Classification Reduction Act, was also introduced in the House.

Both H.R. 553 and H.R. 854 create a system of sticks and carrots to encourage employees and contractors to avoid over-classification. In particular, they each require an analysis of the benefits of the provision of an unclassified format of properly classified information; a process that rewards employees and contractors for successfully challenging improper original classification decisions, and institutes a series of penalties for employees and contactors who—after warning and retraining—fail to follow the policy; annual employee and contractor training for individuals with original classification authority; and a tracking system that will allow auditors to identify the person with original classification authority responsible for the decision to classify information.

H.R. 854 also contains a provision that the system for employee challenges should also ensure no retribution for such challenges.

## FEDERAL WHISTLEBLOWER PROTECTION

Bills to strengthen protections for public employees who speak out to protect against waste, fraud and abuse have been introduced in both the House (H.R. 1507) and the Senate (S. 372). H.R. 1507 has been referred to both the Committee on Oversight and Government Reform and the Committee on Homeland Security—neither of which has yet taken up the bill; the Senate Committee on Homeland Security and Governmental Affairs passed S. 372 prior to the August recess. The House bill has two key provisions missing from the Senate legislation: jury trials in federal district court to enforce paper rights, and full coverage for national security employees.

## TRANSPARENCY AND ACCOUNTABILITY IN MONETARY POLICY

H.R. 1207, the Federal Reserve Transparency Act of 2009, and the companion bill in the Senate, S. 604, the Federal Reserve Sunshine Act, direct GAO to complete an audit of the Board of Governors of the Federal Reserve System and of the federal reserve banks, followed by a detailed report to Congress. Although neither bill has been taken up, they have gained extensive lists of bi-partisan co-sponsors.

68 Final Report of the National Commission on Terrorist Attacks Upon the United States, July 22, 2004. http://govinfo.library.unt.edu/911/report/index.htm

S. 513, also called the Federal Reserve Transparency Act, directs the Board of Governors of the Federal Reserve System, for all loans and other financial assistance it has provided since March 24, 2008, to publish on its website (and update at least once every 30 days): (1) the identity of each business, individual, or entity to which the Board has provided such assistance; (2) the type of financial assistance provided; (3) its value or amount; (4) the date on which it was provided; (5) the specific terms of any repayment expected, including the repayment time period, interest charges, collateral, limitations on executive compensation or dividends, and other material terms; and (6) the specific rationale for providing assistance in each instance.

Two amendments calling for increased transparency of the Federal Reserve were attached to the FY 2010 Budget Resolution in the Senate and included in the final bill. One amendment simply calls on the Fed to increase transparency and the other asks the Fed to publish on its website the names of every financial institution that received assistance from the central bank, and how much they received. As the budget is a non-binding resolution, however, the Fed is under no obligation to do either.

## *STATE SECRETS*

Legislation to provide guidance to the Federal courts in handling assertions by the Executive Branch of the state secret privilege in civil cases, and to restore checks and balances by placing constraints on the application of state secrets doctrine has been reintroduced in both the Senate (S. 417) and the House (H.R. 984). The House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on the bill and forwarded it to the full Committee for consideration; the Senate has yet to act on S. 417.

The Senate bill would amend the federal judicial code to: (1) require a federal court to determine which filings, motions, and affidavits (or portions) shall be submitted ex parte; (2) allow a federal court to order a party to provide a redacted, unclassified, or summary substitute of a filing, motion, or affidavit to other parties; and (3) require a federal court to make decisions, taking into consideration the interests of justice and national security. It allows a federal court to conduct hearings (or portions) ex parte if the court determines, following *in camera* review of the evidence, that the interests of justice and national security cannot adequately be protected through attorney security clearances, protective orders, sealed opinions or orders, and special masters; and authorizes the United States to intervene in any civil action in order to protect information that may be subject to the state secrets privilege, but declares that the state secrets privilege shall not constitute grounds for dismissal of a case or claim. It also requires the court to give substantial weight to an assertion by the United States relating to why public disclosure of an item of evidence would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States.

The House bill declares that, in any civil action brought in federal or state court, the government has a privilege to refuse to give information and to prevent any person from giving information only if the government shows that public disclosure of the information that the government seeks to protect would be reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States. It provides that once the government has asserted the privilege, and before the court makes any determinations, the court shall: (1) undertake a preliminary review of the information in question; and (2) provide the government an opportunity to seek protective measures under this Act. It also establishes procedures and a standard

for assessing the privilege claim and provides for court-ordered presentation of adequate or non-privileged substitutes for privileged information.

## *SIGNING STATEMENTS*

As a candidate, Senator Obama opposed President Bush's use of signing statements to reject provisions of the law as intrusive on Presidential authority, and promised he would not follow the practice. Once in office, however, President Obama pivoted on the issue—issuing several signing statements that have rankled Members of Congress and the public.

In response to President Bush's use of signing statement, H.R.149, the Presidential Signing Statements Act of 2009, would require the President to: transmit to the Speaker of the House of Representatives, the chairmen of the House and Senate Committees on the Judiciary, and to the Senate Majority Leader each signing statement that declares or insinuates the President's intention to disregard provisions of any bill he has signed into law because he believes it is unconstitutional; and to transmit it on the same day it is signed to the Librarian of Congress to be placed on Thomas with all other such statements during that Congress. It would require the Attorney General, Deputy Attorney General, or White House Counsel to testify before such congressional committees at the behest of any single Member of either committee to explain the meaning and justification of every presidential signing statement covered by this Act, and prohibit executive privilege from being recognized as a valid basis for refusing to appear or refusing to answer a question pertinent to the legal reasoning behind a signing statement or its legal ramifications. Finally, the bill would bar authorization or expenditure of federal funds to implement any law accompanied by a presidential signing statement noncompliant with the Act.

In response, at least in part, to President Obama's use of signing statements, S.875, also named the Presidential Signing Statements Act of 2009, would: prohibit any state or federal court from relying on or deferring to a presidential signing statement as a source of authority when determining the meaning of any Act of Congress; and require any federal or state court, in any action, suit, or proceeding regarding the construction or constitutionality, or both, of any Act of Congress in which a presidential signing statement was issued, to permit the Senate, through the Office of Senate Legal Counsel, or the House, through the Office of General Counsel for the House, or both, to participate as an amicus curiae, and to present an oral argument on the question of the Act's construction or constitutionality, or both. It would further: authorize the full Congress, in any such suit, to pass a concurrent resolution declaring its view of the proper interpretation of the Act of Congress at issue, clarifying Congress's intent or its findings of fact, or both; and require the federal or state court in question to permit Congress, through the Office of Senate Legal Counsel, to submit any such passed resolution into the record of the case as a matter of right; and make it the duty of each federal or state court, including the U.S. Supreme Court, to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this Act.

# Endnotes

**A.** From May 1996 through the amendment by President Bush of the E.O. in 2003, no agency head exercised this authority. Nor did they exercise it during FY 2004–FY 2007. In 2003, however, the amendment authorized the Director of Central Intelligence (DCI) to block declassification by the ISCAP of certain information owned or controlled by the DCI. During FY 2003, the DCI blocked the declassification of two documents that the ISCAP had voted to declassify. Members of the Panel appealed the blockage to the President, as authorized by the Executive Order. One appeal was rendered moot in 2004, when the DCI declassified the document in its entirety; the second appeal remains pending—with the document still classified in its entirety. The authority to block such declassification now resides with the Director of National Intelligence (DNI).

**B.** The Constitution does not expressly mention executive privilege, but presidents have long claimed that the constitutional principle of separation of powers implies that the Executive Branch has a privilege to resist disclosing information, such as presidential communications, advice, and national security information, in judicial proceedings, congressional investigations and other arenas. Presidents argue that some degree of confidentiality is necessary for the Executive Branch to function effectively: key advisers, they say, will hesitate to speak frankly if those advisers must worry that what they say will eventually become a matter of public record. [A Brief History of Executive Privilege, from George Washington Through Dick Cheney. By Michael C. Dorf FindLaw's Writ. http://writ.news.findlaw.com/dorf/20020206.html] The Supreme Court considered the argument about confidentiality in the 1974 case of *United States v. Nixo*n, and recognized "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." It noted that '[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.'" The Justices concluded, however, that the executive privilege is not absolute: "where the President asserts only a generalized need for confidentiality, the privilege must yield to the interests of the government and defendants in a criminal prosecution. Accordingly, the Court ordered President Nixon to divulge the tapes and records. Two weeks after the Court's decision, Nixon complied with the order."

On August 1, 2008, U.S. District Judge John D. Bates wrote "The Executive cannot be the judge of its own privilege. . . ." in a 93-page opinion for the U.S. District Court for the District of Columbia. Judge Bates said that while he is not ruling on the matter of "executive privilege," if the Executive and Legislative Branches cannot resolve this matter, then the Judicial Branch can and will.

1742 Connecticut Avenue, 3rd Floor
Washington, DC 20009
(202) 332-OPEN (6736)
info@openthegovernment.org

OPENTHEGOVERNMENT.ORG
Americans for Less Secrecy, More Democracy