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Americans for Less Secrecy, More Democracy

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report card

2010

INDICATORS OF SECRECY

IN THE FEDERAL GOVERNMENT

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The authors of this report are Patrice McDermott and Amy 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, and Steven Aftergood of the Federation of American Scientists. We are grateful to the Information Security Oversight Office at the National Archives for their help in preparing the discussion of information and costs in the system of security classification.

## About OpenTheGovernment.org

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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](http://www.OpenTheGovernment.org).

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## BY THE NUMBERS

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### ASSERTIONS OF EXECUTIVE PRIVILEGE

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As with Presidents G.H.W. Bush and Clinton, Obama did not assert Executive Privilege in response to congressional requests in his first year in office.

### FREEDOM OF INFORMATION ACT (FOIA)

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- **FOIA Requests Decline by 8%; Costs Increase by 12%**

Governmentwide, public requests (557,825) dropped while the total spent processing those requests (\$382,244,225) rose from 2008 to 2009.

- **FOIA Backlogs Reduced by 40%**

The federal government processed 55,000 more FOIA requests than it received in 2009 and reduced backlogged pending requests by almost 56,000. The net improvement is in part the result of significant backlog progress on the part of a few agencies.

### WHISTLEBLOWERS LAWSUITS RECOVER BILLIONS FOR TAXPAYERS

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In FY 2009, suits brought by whistleblowers accounted for 83%—almost \$2 billion—of the \$2.4 billion the United States obtained in settlements and judgments in cases involving fraud on the United States.

### FEDERAL ADVISORY COMMITTEE ACT (FACA) MEETINGS LARGELY CLOSED TO PUBLIC

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In 2009, governmentwide more than 73% of FACA committee hearings were closed to the public; a record 22% of those closed were held by groups advising the three agencies that historically have accounted for the majority of closed meetings.

### “STATE SECRETS” PRIVILEGE — OBAMA CONTINUES BUSH INVOCATIONS

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President Obama invoked the state secrets privilege in 4 known cases in 2009. All the instances were continuing cases from the Bush Administration.

### CLASSIFIED INFORMATION

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- **One-half Cent of Every Secrecy Dollar Spent on Declassification**

Expenditures on declassifications in 2009 were .5% of security classifications costs overall. The government spent \$196 maintaining the secrets already on the books for every one dol-

lar the government spent declassifying documents in 2009 and declassified 8% fewer pages than were declassified than in 2008. Overall, expenditures to maintain secrecy increased 2%.

- **National Intelligence Budget Approximately \$75 billion**

The FY2009 budget for the National Intelligence Program was \$47.5 billion, a 5% increase over 2008. In September 2009, the Director of National Intelligence (DNI) described the “national enterprise in intelligence budget”—incorporating both the National Intelligence Program and the Military Intelligence Program—as \$75 billion.

- **Derivative Classifications Count Skyrockets**

In 2009, the Information Security Oversight Office (ISOO) began counting derivatively-classified e-mails containing new original or derivative classification decisions, leading to a 135% increase in actions reported.

- **Declassifications Drop**

In 2009, fewer pages (28.8 million) were declassified governmentwide and the declassification rate fell significantly—from 61% of all material reviewed in 2008 to 55% in 2009.

- **Original Classifications Drop, but Classification Activity Remains High**

In 2009, the number of original classification decisions decreased to 183,224, a 10% drop from 2008, but the numbers remain high.

- **Mandatory Declassification Review Process Yields Information, But Backlogs Growing**

In 2009, agencies received 7,843 new initial requests for Mandatory Declassification Review (MDR), which led to 69% of pages reviewed being declassified in full; 24% in part. More than 6,000 initial requests were carried over into 2010.

- **16% OF DOD FY 2009 Acquisition Budget Is Classified or “Black”**

“Black” programs accounted for about \$35 billion, or 16 percent of the (FY) 2009 Department of Defense (DOD) estimated acquisition funding.

## INVENTION SECRECY

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In 2009, the federal government imposed secrecy orders on 103 new patents, and lifted orders on only 45. Overall, the total number of inventions kept under “secrecy orders” is 5,081.

## NATIONAL SECURITY LETTERS

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The Department of Justice (DOJ) reports 14,788 requests pertaining to roughly 6,114 different U.S. persons were made in 2009, an 40 percent decrease over requests in 2008.

## FOREIGN INTELLIGENCE SURVEILLANCE COURT (FISC)

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The DOJ reported that, in 2009, the FISC approved 1,320 orders — rejecting one in whole, one in part, and making modifications to 14 of the government’s proposed orders.

## INTRODUCTION

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This report on trends in secrecy and openness in Fiscal Year 2009 covers the last three months of the G.W. Bush administration and the first nine months of the Obama administration. It should not be read, therefore, as a full reporting on trends in the new administration. The elections of 2008 were viewed by many as a referendum on the secrecy and unaccountability of the Bush administration, and the country elected a president who has promised the most open, transparent and accountable federal Executive Branch in history. The record to date is mixed, but some indicators are trending in the right direction. Some changes, which may result in trends, have been made since the beginning of calendar year 2009. Among these are:

- The setting up of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA); this office provides services to mediate disputes between FOIA requesters and federal agencies. Beginning with January 2010, OGIS releases a weekly update of its [Case Logs](#).
- A new [Executive Order \(EO\) on Classified National Security Information](#) (E.O.13526), which mandated the creation of the [National Declassification Center](#).
- Changes in the agencies' reporting on their Freedom of Information Act (FOIA) compliance, including use of a new machine readable XML template. This will not change the numbers but it will make them easier to compare agency-to-agency and to spot trends in particular areas.
- A change by the Information Security Oversight Office (ISOO) in the counting of classification actions to include derivatively classified e-mail messages that contain new original or derivative classification decisions. Not including derivatively classified e-mail messages in past reports greatly understated the amount of classified material in the federal government, and the future challenges for declassification.

In December 2009, the Office of Management and Budget (OMB) issued a Directive to agencies instructing them to prepare and submit open government plans.<sup>1</sup> One objective of the plans is to embed openness, participation, and collaboration into the agencies. The Directive included very detailed instructions to increase transparency in some regards, including agency attention to compliance with the FOIA. Aside from asking agencies with classification authority to describe their declassification programs, however, the Directive makes no mention of looming secrecy problems created, in part, by inadequate guidance, training and resources in the areas of classification/ declassification. In reading the 2009 ISOO Report to the President, we identified some areas that should receive attention in the openness plans of those agencies with classification and declassification authority and responsibility. One of these has to do with the need, as noted by ISOO, for senior management to create plans and provide resources

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<sup>1</sup> For links to the plans and evaluations of them by a group of volunteers with experience working with agencies and evaluating information policies from nonprofit groups, academia, and other organizations that serve the public interest, see <https://sites.google.com/site/opengovtplans/>

for agencies to effectively implement and comply with all the requirements of both the FOIA and Mandatory Declassification Review.<sup>2</sup> A second area is the clear need for greater senior management commitment and improved means for alerting and reminding authorized holders of classified information that challenges to the classification status of information are not only allowed but expected.

The first Secrecy Report Card was issued by OpenTheGovernment.org in 2004, chronicling the trends 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 that Administration, we charted a significant increase in secrecy which led to a decrease in accountability—especially to the public, but also to Congress. Going forward, we will be looking at how, and if, that trend changes in the Obama Administration.

Creating and maintaining an open and accountable government requires the committed focus of both the public and the government. What follows is a brief look at how the main indicators we examine have changed over time.

## 2009 Highlights

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- The government spent only .5% of security classifications costs overall on declassification. That is equivalent to one-half of one cent of every dollar spent on maintaining secrecy. Looking at it from another angle, the government spent \$196 maintaining the secrets already on the books for every one dollar it spent declassifying documents in 2009. Overall, expenditures to maintain secrecy (\$8.81 billion) increased 2%. At the same time, agencies declassified 8% fewer pages than were declassified than in 2008.
- FOIA backlogs were reduced by 40% governmentwide in 2009. The federal government processed 55,000 more FOIA requests than it received in 2009 and reduced backlogged pending requests by almost 56,000.
- In 2009, the number of original classification decisions decreased to 183,224, a 10% drop from 2008 and the fewest since 1999. Fewer pages (28.8 million) were declassified governmentwide, however, and the declassification rate fell significantly—from 61% of all material reviewed in 2008 to 55% in 2009.
- The Director of National Intelligence (DNI) for the first time revealed the National Intelligence Budget—the “national enterprise in intelligence budget,” incorporating both the National Intelligence Program and the Military Intelligence Program—as \$75 billion. Of this, \$47.5 billion was for the National Intelligence Program, a 5% increase over 2008.
- Mandatory Declassification Review yields information. The new initial requests agencies received (7,843) and processed in 2009 led to 69% of the pages reviewed being declassified in full; 24% in part. More than 6,000 initial requests were carried over into 2010, however, adding to a growing backlog (see footnote 2).

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<sup>2</sup> ISOO noted that agency representatives have “informally pointed to the focus on the requirements of FOIA when speaking to their compliance with MDR requirements.”

- The number of new invention secrecy orders in 2009 (103) increased by 51% from 2008 when new secrecy orders (68) fell back below pre-2001 levels. The number of secrecy orders rescinded continued to decrease – to just 45 in 2009.
- In FY 2009, suits brought by whistleblowers accounted for 83%—almost \$2 billion—of the \$2.4 billion the United States obtained in settlements and judgments in cases involving fraud on the United States.

## **A Note on the Indicators**

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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 adjust the indicators as they fit the focus of this report.

## 2009 TRENDS IN SECRECY AND OPENNESS

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### Presidential Signing Statements

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President Obama has issued [eight](#) signing statements through the end of calendar year 2009.<sup>3</sup> A few of these statements are merely ceremonial, but most challenge specific provisions of the law.

Years or Presidencies	Statements Challenging Provisions of Laws
1789 - 1980	278
Reagan	71
G.H.W. Bush	146
Clinton	105
G.W. Bush	161
Obama	8

Source: *Presidential Signing Statements*, <http://www.coherentbabble.com/signingstatements/signstateann.htm>; Accessed July 29, 2010.

George W. Bush issued 24 signing statements during his first year in office. President Bush’s use of signing statements dropped significantly after their use received extensive attention towards the end of his Administration. During his final year in office, President Bush issued 5 signing statements.

### Executive Privilege

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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. A CRS Report updated in August 2008<sup>4</sup> provided a summary recounting of assertions of presidential claims of executive privilege from the Kennedy Administration through the G. W. Bush Administration. According to congressional staff with access to updated information from CRS, President Obama has not asserted the privilege to Congress since taking office. Similarly, neither President Bill Clinton nor President George H. W. Bush asserted the privilege during his first year in office; Presidents George W. Bush and Reagan each asserted the privilege once during his first year in office.

<sup>3</sup> <http://www.coherentbabble.com/listBHOall.htm>

<sup>4</sup> 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>



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	Obama	0

\*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/secretcy/RL30319.pdf>. Source for Obama number, conversation with congressional staff person conveying information from CRS.

## The Freedom of Information Act (FOIA)

The total number of public requests received by departments and agencies (557,825) declined by almost 8% from FY 2008 to FY 2009<sup>5</sup>. The total spent processing those requests (\$382,244,225) increased by 12% in the same period.

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
2009	557,825	\$382,244,225

Source: [Summary of Annual FOIA Reports for Fiscal Year 2009](#)

### BACKLOGS SIGNIFICANTLY REDUCED

Federal departments and agencies overall processed 612,893 FOIA requests during FY 2009, down from the 623,186 processed in FY 2008. Government-wide, however, the federal government processed 55,000 more FOIA requests than it received in FY 2009. Overall, 77,377 FOIA requests (approximately fourteen percent of the requests received during the fiscal year) were pending as of the end of Fiscal Year 2009. While the number remains significant, agency backlogs were reduced by almost 56,000 in FY 2009, a reduction of more than 40 percent from the previous year. A significant portion of the drop can be accounted for by the Department of Homeland Security, which went from 74,879 backlogged requests in 2008 to 18,918 in 2009.

<sup>5</sup> All years are Fiscal Years unless otherwise indicated or a specific date is given.

<sup>6</sup> 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 have 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.

With Health and Human Services (17,470 backlogged requests) and the Defense Department (11,505), the three agencies accounted for nearly 60 percent of the entire backlog.

In 2007, the Department of Justice [directed](#)<sup>7</sup> 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.”<sup>8</sup> OpenTheGovernment.org’s review of agencies’ 2007 FOIA reports found the oldest pending case to be a request at the Department of Energy pending since December 1991. For 2008, the oldest pending request reported is at the Central Intelligence Agency (CIA) and has been pending since May 1992. The oldest pending request in FY 2009 was at the Department of Defense—pending since December 1, 1992.

### Federal Advisory Committees: Information for Public Closed Off

During FY2009, more than 73% of the 7,721 full committee meetings of the 925 active federal advisory committees that fall under the Federal Advisory Committee Act (FACA) were completely closed to the public. 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.

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.”<sup>9</sup> Congress allowed certain exceptions but wrote directly into the law its assumption that “(e)ach advisory committee meeting shall be open to the public.”<sup>10</sup>

According to the General Services Administration (GSA) the active Federal Advisory Committees, with nearly 81,000 total members, provided advice and recommendations to 50 federal agencies. The total operating costs for these committees in FY2009 was \$361.4 million.<sup>11</sup>

Year	Total # of Mtgs.	% of Mtgs. Closed	Year	Total # of Mtgs.	% of Mtgs. Closed
1997	5,698	51	2004	7,045	64
1998	5,898	50	2005	7,449	61
1999	6,256	53	2006	7,189	63
2000	6,211	56	2007	7,067	64
2001	5,872	58	2008	6,840	65
2002	6,281	61	2009	7,221	73
2003	6,799	61			

Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, [www.fido.gov/facadatabase/](http://www.fido.gov/facadatabase/); accessed August 4, 2009

<sup>7</sup> 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>

<sup>8</sup> 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.

<sup>9</sup> 5 USC Sec. 5(b) (3)

<sup>10</sup> 5 USC Sec. 10(a) (1)

<sup>11</sup> All FACA committee totals and costs are supplied by the U.S. General Services Administration’s FACA Database, <http://fido.gov/facadatabase/>.

The Department of Defense, Department of Health and Human Services and National Science Foundation historically account for majority of the closed committees. With these excluded, the percentage of meetings completely closed has ranged from 6% in 2001 to a 2009 record high of 22%. Prior to 2009, the highest percentage of closed meetings was 17% in 2004 and in 2008.

Closed Meetings of Remaining Agencies												
1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
240	233	257	255	130	262	318	396	149	271	338	338	433

(Excluded: Dept. of Defense, Dept. of Health & Human Services, National Science Foundation)  
 Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, [www.fido.gov/facadatabase](http://www.fido.gov/facadatabase); accessed August 4, 2010

## Whistleblowers Recover Billions for Taxpayers

In FY 2009, suits brought by whistleblowers under the False Claims Act *qui tam*<sup>12</sup> provisions accounted for almost 83% of the \$2.4 billion in settlements and judgments in cases involving fraud on the federal government. Since 1986, when Congress strengthened the civil False Claims Act, the federal government has recovered more than \$24 billion overall.

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
		2009	2,400,000,000

(Source: [US DOJ Press Release, 19 Nov 09](#))

<sup>12</sup> 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>

## Classified Information

### STATE SECRETS PRIVILEGE

In 2009, the federal government invoked the “state secrets” privilege four times. In each instance, the assertion was in a case that began in the G.W. Bush administration.

Years (inclusive)	1953–1976	1977–2000	2001–12/2008	2009
Times Invoked in Cases	6	59	48	4
Period (in years)	24	24	8	1
Yearly Invocations (avg.)	0.25	2.46	6	4

### SHRINKING SOURCE OF SECRETS? 2,557 “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 hovering around 4,000 for more than a decade, the number of OCAs in the federal government plummeted from 4109 in 2008 to 2557 in 2009.

According to the ISOO 2009 Report to the President,<sup>13</sup> “almost all of this decrease comes from the Department of State.” State reduced its number of OCA in anticipation of President Obama’s December 29, 2009 [Executive Order \(EO\) on Classified National Security Information](#). Now that the EO has been released, it will be informative to see if the total number of OCAs continues to fall.

Persons in Government with Original Classification Authority			
Year	# of Persons	Year	# of Persons
1993	5,661	2002	4,006
1994	5,461	2003	3,978
1995	5,379	2004	4,007
1996	4,420	2005	3,959
1997	4,010	2006	4,042
1998	3,903	2007	4,182
1999	3,846	2008	4,109
2000	4,130	2009	2,557
2001	4,132		

Source: Information Security Oversight Office (ISOO). [2009 Report to the President](#).

<sup>13</sup> Information Security Oversight Office. 2009 Report to the President. <http://www.archives.gov/isoo/reports/2009-annual-report.pdf>. All information in this section is derived from this report.

## CLASSIFICATION DECISIONS

In FY 2009, the number of original classification decisions, the “sole sources of newly<sup>14</sup> classified information,” decreased almost 10% to 183,224—down from 203,541 in 2008. ISOO reports that, for the fifth year in a row, the majority (67%) of original classifications decisions have been assigned a declassification date of ten years or less.

Classification Activity Declining		
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	44,65,711
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
2009	183,224	28,800,000

## DERIVATIVE CLASSIFICATIONS

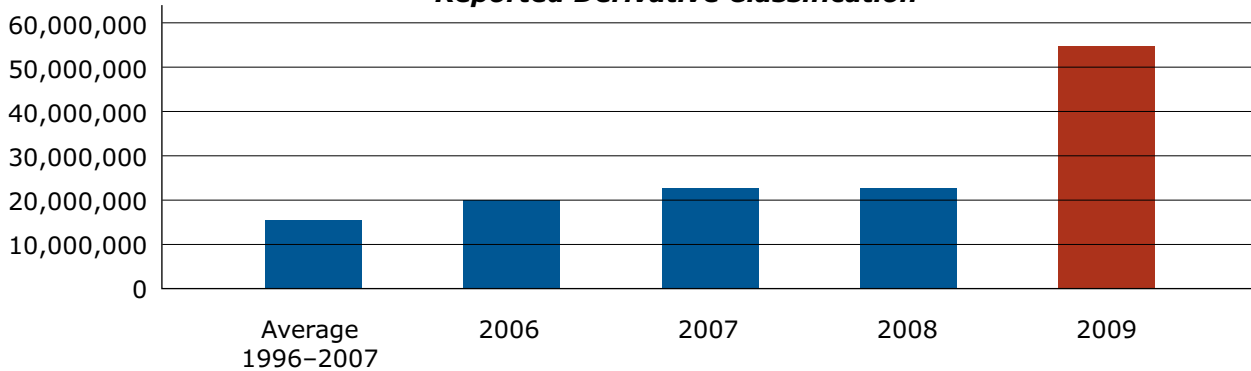
Once information is designated as classified by an OCA, it can be “derivatively classified”: used by many people in government in many different ways, creating new and possibly multiple forms of the information. Approximately 2.4 million people<sup>15</sup>—excluding some of those with clearances who work in areas of national intelligence—currently hold or are eligible for security clearances.<sup>16</sup>

14 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.”

15 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.

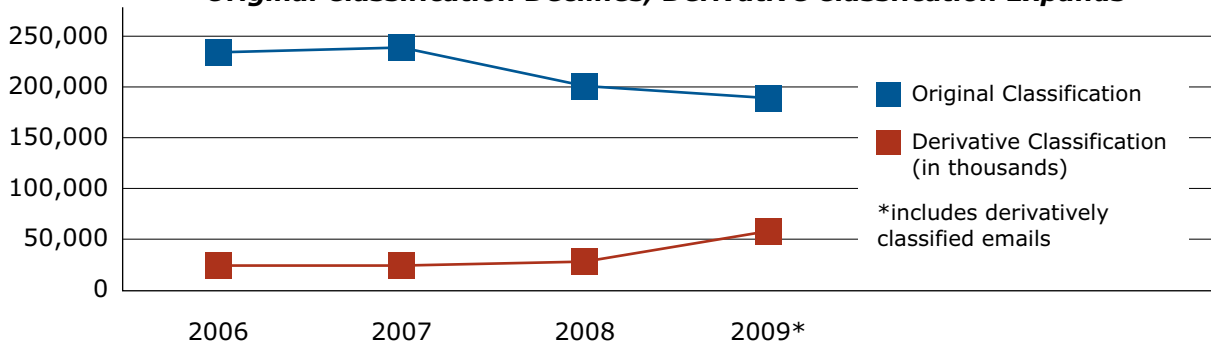
16 Government Accountability Office (GAO). “Personnel Security Clearances,” May 2009. <http://www.gao.gov/new.items/d09488.pdf>; Joint Security and Suitability Reform Team. “Security and Suitability Process Reform: Initial Report,” April 30, 2008. [http://www.whitehouse.gov/omb/assets/omb/reports/reform\\_plan\\_report\\_2008.pdf](http://www.whitehouse.gov/omb/assets/omb/reports/reform_plan_report_2008.pdf)

**Reported Derivative Classification**

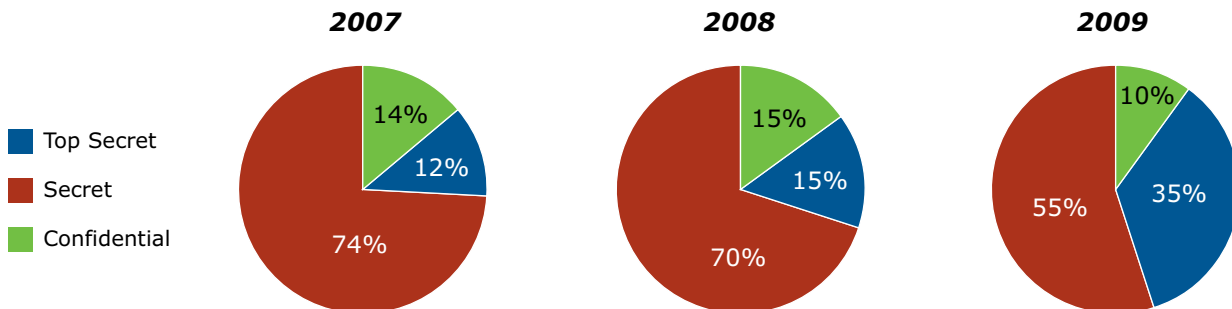


For the first time in 2009, ISOO counted derivatively classified e-mails containing new original or derivative classification decisions in its number, leading to a 135% increase in derivative classification actions reported.

**Original Classification Declines, Derivative Classification Expands**



Even taking into account the change in counting, a clear trend is evident: while the reported classification activity has declined over the past few years, reported derivative classification decisions have climbed.



As in years past, the majority of derivatively classified information is marked Secret. In 2009, the percentage of reported Top Secret derivative classification decisions more than doubled: from 15% in 2008 to 35% in 2009. Due to the inclusion of derivatively classified email in the numbers reported for 2009, it is too soon to determine if the increased percentage of Top Secret derivatively-classified information constitutes a trend.

## **CLASSIFICATION CHALLENGES**

Executive Order 13526, issued in December 2009, continues to encourage authorized holders of classified information to challenge the classification status of information that they believe, in good faith, to be improperly classified. The use of challenges remains minimal: agencies reported 275 formal classification challenges in 2007; 436 in 2008; 365 in 2009. Challenges are handled both informally and formally.

## **RECLASSIFICATION**

In its 2007 report to the President, ISOO noted 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 [about materials removed by several agencies in 2006] to NARA.” At that point, 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. In 2008, ISOO reported<sup>17</sup> that the agencies doing the bulk of the work (CIA and Air Force) had finished their work and returned their decisions. Approximately 500 “hard problem” adjudications awaited further processing by NARA and the agencies. By the end of FY 2009, forty-three adjudications were remaining.

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 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. In 2009, three documents were formally withdrawn, all by the Navy. At Archives II, two documents (totaling 36 pages) were withdrawn and replaced with photocopies including redactions on seven pages. From the Nixon Library, a single, 136-page document was withdrawn and replaced with a photocopy including redactions on 1 page. In total for 2009, portions of 8 pages (out of 172) are no longer in the public domain.

## **Declassification**

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### **AUTOMATIC AND SYSTEMATIC DECLASSIFICATION REVIEW**

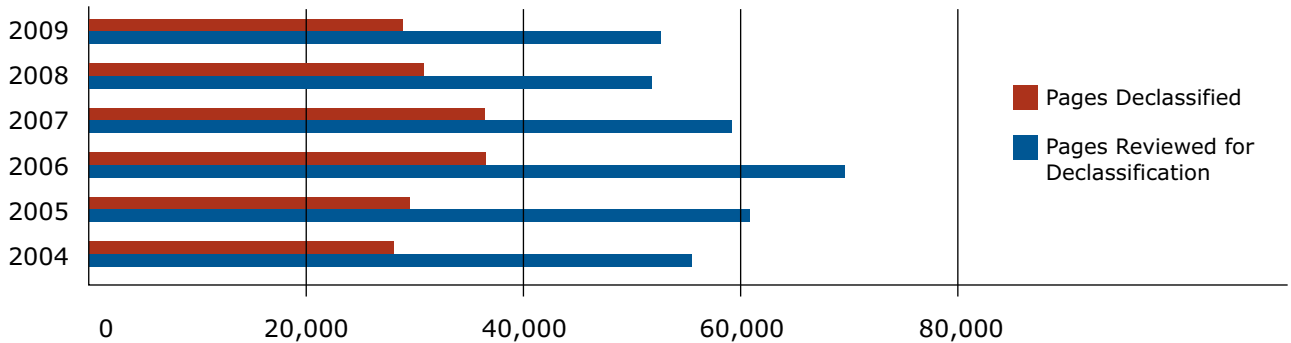
E.O. 13526 continues the requirement that all agencies automatically declassify information that has “permanent historical value,” unless the information falls under several limited exemptions allowing continued classification. After several deadline extensions, automatic declassification came into effect on December 31, 2009. 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 2009.

In 2009, agencies reviewed 51,983,587 pages and declassified 28,812,249 pages of historically valuable records—a 1% increase in pages reviewed but an 8% decrease in pages declassified compared to 2008.

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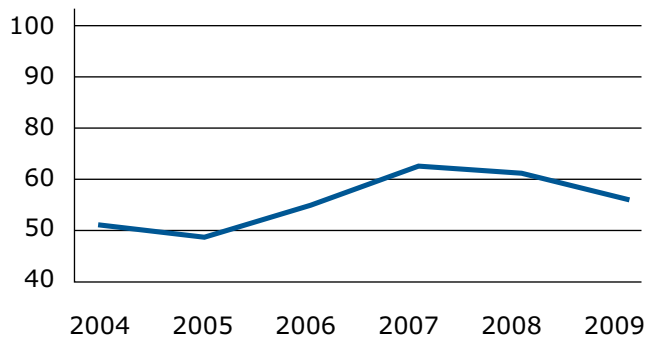
<sup>17</sup> Telephone conversation with William J. Bosanko, 28 July 2009.

**Automatic and Systematic Declassification Review**



The declassification rate fell significantly—from 61% of all material reviewed in 2008, to 55% in 2009. The rate of declassification peaked in 2007 with the declassification of more than 62% of pages reviewed.

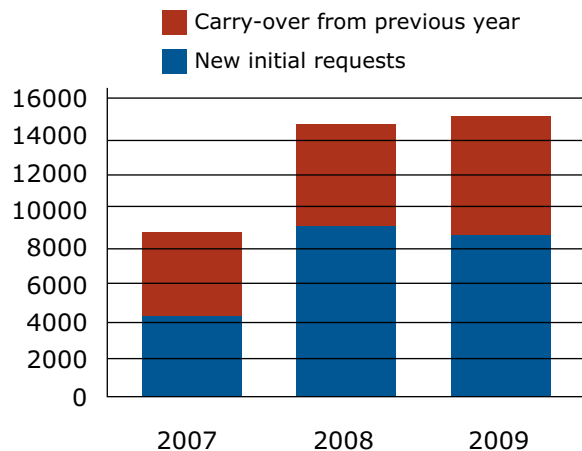
**Percent of Pages Reviewed Declassified**



**MANDATORY DECLASSIFICATION REVIEW**

The Mandatory Declassification Review (MDR) process under E.O. 13526 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 2009, the number of new initial requests decreased by 5% - from 8,264 in 2008 to 7,843 in 2009. However, the number of carry-overs to the next year continued to grow. ISOO noted that agency representatives have “informally pointed to the focus on the requirements of FOIA when speaking to their compliance with MDR requirement,” as justification for the growing backlog.

**Pending Mandatory Declassification Review Requests Continue to Rise**

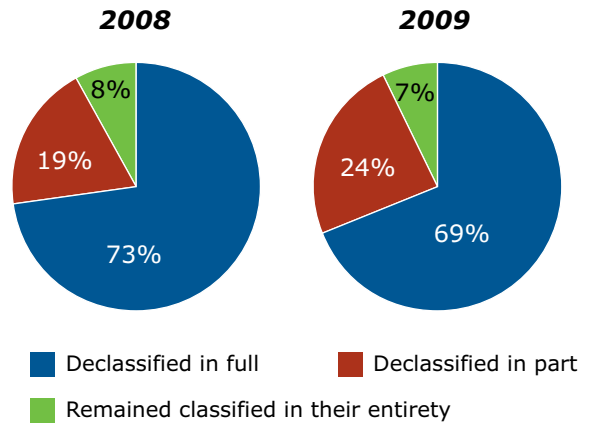




The percentage of pages declassified in full declined by 4%; pages declassified in part increased by 5%.

**MANDATORY DECLASSIFICATION REVIEW APPEALS**

Appeals of agency decisions to deny information under the MDR process have continued to grow, as does the backlog of appeals. In 2009, agencies processed 177 appeals and carried 192 over to 2010. This compares with 178 and 183 in 2008, and 104 processed and 105 carried forward in 2007.

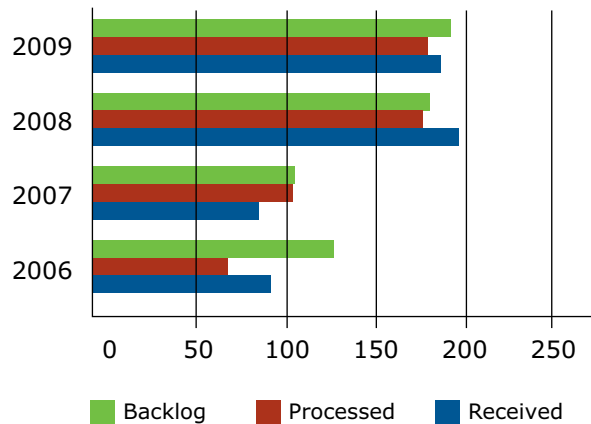


**INTERAGENCY SECURITY CLASSIFICATION APPEALS PANEL (ISCAP)**

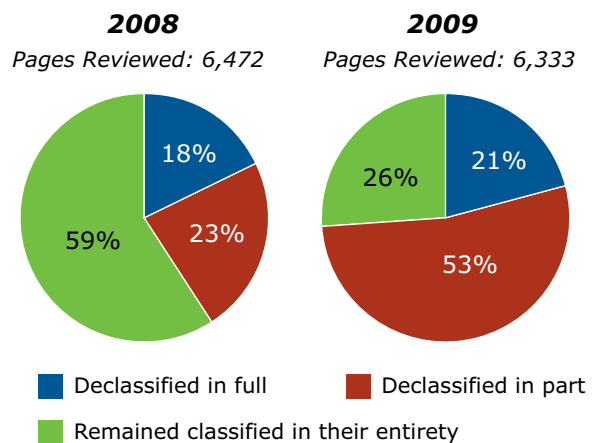
A requester may appeal directly to the ISCAP any final decision made by an agency to deny information during an MDR appeal. The ISCAP exercises Presidential discretion in its decisions and it serves as the highest appellate authority for MDR appeals.

In 2009, ISCAP received slightly fewer appeals (186) than in 2008 (196) and the panel processed almost as many appeals (177 in 2009 and 178 in 2008). The reported backlog of appeals continues to grow. Overall, the reported backlog of appeals has grown by 56% since 2006.

**Reported Backlog of MDR Appeals at Agencies Grows**



On appeal, ISCAP reviewed 6,333 pages for declassification in 2009, slightly fewer than the 6,472 pages reviewed in 2008. In 2009, the panel declassified in full or in part about 74% of the pages reviewed, with 26% remaining classified in their entirety. This is a significant change from 2008 when the majority (59%) of the pages reviewed remained classified in their entirety.



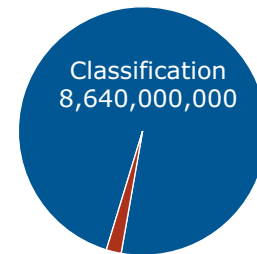
## Classified Dollars

### **COSTS OF SECURING SECRETS INCREASES AGAIN; DECLASSIFICATION .5% OF COSTS**

Government agencies spent \$8.81 billion in 2009 to secure classified documents.<sup>18</sup> Since 2006, declassification costs have accounted for the smallest, and largely declining, share of the amount spent on security classification.

Of the \$8.81 billion, \$44.65 million was spent for declassification in FY 2009, an increase of 4 percent (\$1.92 million) over the previous year. Despite this increase, however, declassification costs make up just over .5 percent of the total security classification costs—and the costs of maintaining secrecy continue to rise.

### **Annual U.S. Expenditure on:**

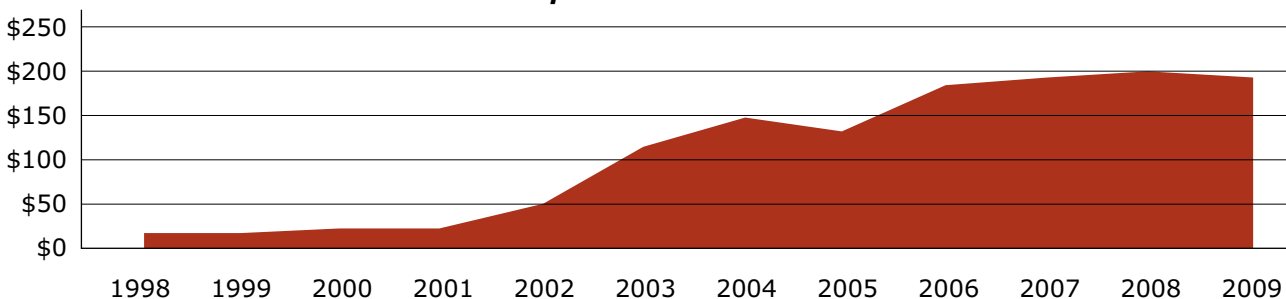


Declassification  
43,000,000

### **\$196 SPENT CREATING AND SECURING OLD SECRETS FOR EVERY TAX DOLLAR SPENT DECLASSIFYING**

For every one dollar the government spent declassifying documents in 2009, the government spent about \$196<sup>19</sup> maintaining the secrets already on the books, a 2% decrease from last year.

**Government Expenditures to Create and Secure New Secrets in Relation to Expenditures for Declassification**



<sup>18</sup> 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.

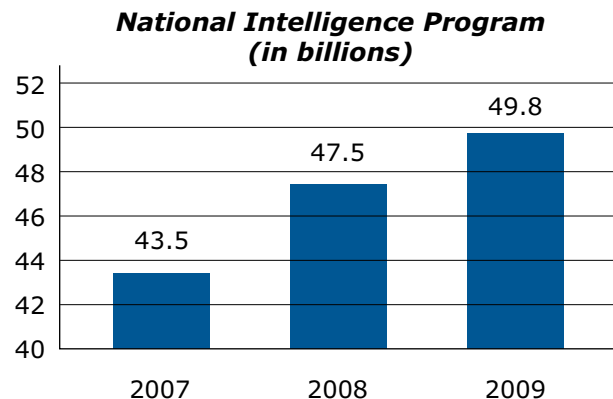
<sup>19</sup> Figure calculated by first subtracting declassification cost from total classification cost to arrive at the total cost of classification not related to declassification; we then divide this figure by expenditures on declassification.

Federal Expenditures on Classification and Declassification in Millions			
Fiscal Years	Cost of Securing Classified Information	Portion Spent on Declassifying Documents <sup>1</sup>	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
2009	8,813,475,271	44,650,000	196

(excluding CIA, NGA, DIA, NSA and NRO) Source: *OpenTheGovernment.org* calculations based on data from the Information Security Oversight Office (ISOO). [2009 Cost Report to the President](#).<sup>20</sup>

### NATIONAL INTELLIGENCE BUDGET

[Speaking to reporters](#) on September 15, 2009, about the release of the new National Intelligence Strategy, Director of National Intelligence Dennis C. Blair said “we’re talking about the very important business of a blueprint to run this 200,000-person, \$75 billion national enterprise in intelligence.” The DNI was describing a consolidated budget for both the National Intelligence Program (NIP), which supports national policy-makers, and the Military Intelligence Program (MIP), which supports military operations and activities. On October 30, 2009, he [released](#) the FY 2009 aggregate amount appropriated to the National Intelligence Program (NIP): \$49.8 billion.



The release of the 2009 NIP budget marks only the fifth time the number has been released. Since 2007, the number is required to be released under congressional mandate (Public Law 110-053, the “Implementing Recommendations of the 9/11 Commission Act of 2007”). The law also allows waiver of the disclosure requirement if the President explains to lawmakers that declassification would jeopardize national security.

### CLASSIFIED PROCUREMENT AND R&D BUDGETS REMAIN SIGNIFICANT

Classified or “black” programs accounted for about \$35 billion, or 16%, of the acquisition funding by the Department of Defense (DOD) for its FY 2009 budget. Procurement funding accounts for \$17.5 billion of this total, and research and development (R&D) funding accounts for \$17.7

<sup>20</sup> 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, though, they would still be extremely small compared to the costs of maintaining secrets.

billion. These figures represent 13% and 22 %, respectively, of the total funding requested for procurement and R&D.

This total does not include war-related funding appropriated through emergency supplemental spending bills.

Department of Defense Classified "Black" Budgets									
Weapons Acquisition				Procurement			Research & Development		
FY	Total DoD	Classified	% Classified	Total DoD	Classified	% Classified	Total DoD	Classified	% Classified
1995	77.7	11.7	15	43.2	7.1	16	34.5	4.6	13
1996	77.4	12.6	16	42.4	7.3	17	35	5.3	15
1997	79.7	13.2	17	43.2	6.1	14	36.5	7.2	20
1998	82.1	14.9	18	44.9	6.8	15	37.2	8.1	22
1999	88.7	15.8	18	50.6	7.5	15	38.1	8.3	22
2000	93.2	15.4	15.4	54.9	7.5	14	38.3	7.9	21
2001	103.9	18.1	17	62.2	7.5	10	41.7	10.6	25
2002	110.9	18.2	16	62.2	8.9	10	48.6	9.3	19
2003	137.9	26.1	19	79.6	13.2	17	58.3	12.9	22
2004	147.5	27.6	19	83.2	14.5	17	64.4	13.2	20
2005	167.8	29.8	18	98.5	16.3	17	39.3	13.5	20
2006	178.0	31.5	18	105.3	16.6	16	72.7	14.8	20
2007	212.0	34.5	16	134.4	17.7	13	77.6	16.7	22
2008	244.1	33.8	14	164.7	17.1	10	79.4	16.6	22
2009	215.0	35.2	16	133.3	17.5	13	81.7	17.7	22

*\*Numbers for 2008 and 2009 estimate funding appropriated, and 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.20090812.Classified\\_Funding/U.20090812.Classified\\_Funding.pdf](http://www.csbaonline.org/4Publications/PubLibrary/U.20090812.Classified_Funding/U.20090812.Classified_Funding.pdf)*

According to the Center for Strategic and Budgetary Assessments,<sup>21</sup> the share of overall acquisition funding directed to classified programs has fallen from its FY 2003 high of 19 percent, primarily due to the increase in acquisition funding for the wars in Iraq and Afghanistan, which have included a smaller share of classified funding as compared to the base budget.

## Invention Secrecy

### "SECURITY ORDERS" INCREASE MORE THAN 50%

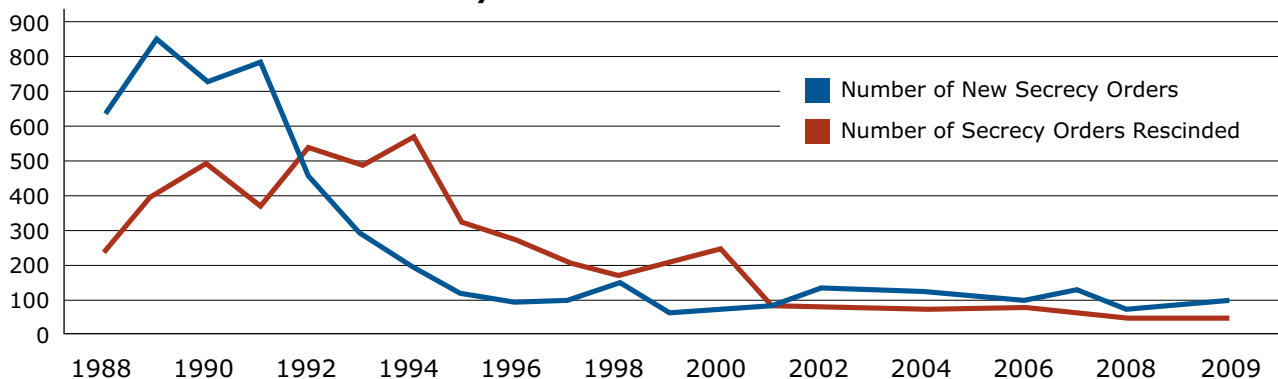
The federal government can impose secrecy on any new patent by issuing a "secrecy order" under federal law (35 USC 181). The number of new secrecy orders jumped after 9/11 from 83 in 2001 to 139 in 2002. The number of new orders in 2009 (103) was a 51% increase from 2008 when new secrecy orders (68) fell back below pre-2001 levels. The number of secrecy orders rescinded continued to decrease – to just 45 in 2009. As a result, the number of secrecy orders in effect has continually climbed since 2001.

<sup>21</sup> Todd Harrison, "Classified Funding in the FY 2010 Defense Budget Request" The Center for Strategic and Budgetary Assessments (CSBA) <http://www.csbaonline.org/>

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
2009	103	45	5,081

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

**Secrecy Rescissions Continue to Decline**



## National Security Letters

In an April 30, 2010 letter report, the Justice Department indicated<sup>22</sup> that the government made 14,788 NSL requests in 2009 for information pertaining to 6,114 different United States persons. The total reported number of NSL requests dropped by a little over 40% between 2009 (14,788) and 2008 (24,744). The reported number of NSL requests in 2009, while the smallest reported since 2000, is 75% higher than the number reported in 2000.

2000*	8,500	2006	49,425
2003	39,346	2007	16,804
2004	56,507	2008	24,744
2005	47,221	2009	14,788

\* 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%	2007	about 26%
2004	about 51%	2008	about 30%
2005	about 53%	2009	about 40%
2006	about 57%		

Source: [http://www.justice.gov/nsd/foia/reading\\_room/2009fisa-ltr.pdf](http://www.justice.gov/nsd/foia/reading_room/2009fisa-ltr.pdf)

## The Foreign Intelligence Surveillance Court

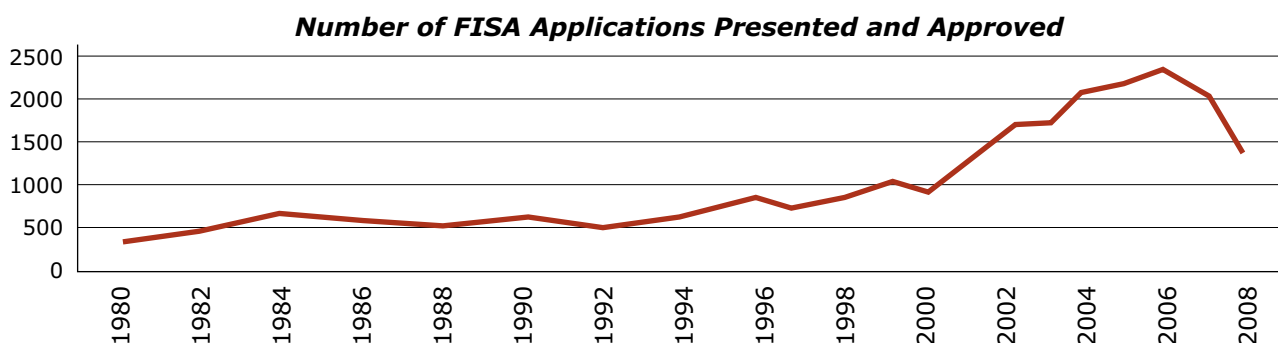
The Foreign Intelligence Surveillance Court (FISC) is responsible for reviewing and approving government applications under the [Foreign Intelligence Surveillance Act](#) for domestic electronic surveillance and physical search of suspected foreign intelligence agents or terrorists.

During calendar year 2009, the FISC approved 1,376 applications for authority to conduct electronic surveillance and physical search; of these, 1,329 applications included requests for authority to conduct electronic surveillance. Eight of the 1,329 applications were withdrawn by the government. The FISC approved collection activity in a total of 1,320 of the applications that included requests for authority to conduct electronic surveillance; it denied one application in whole, one in part, and made modifications to the government's proposed orders in fourteen of the applications.

<sup>22</sup> U.S. Department of Justice, April 30, 2010. [http://www.justice.gov/nsd/foia/reading\\_room/2009fisa-ltr.pdf](http://www.justice.gov/nsd/foia/reading_room/2009fisa-ltr.pdf)

FISA Applications Presented and Approved			
Year	# of FISA Request Applications	Year	# of FISA Request Applications
1980	322	1995	697
1981	433	1996	839
1982	475	1997	748
1983	549	1998	796
1984	635	1999	880
1985	587	2000	1,012
1986	573	2001	934
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
1994	576	2009	1,376

Numbers Source: [http://www.justice.gov/nsd/foia/reading\\_room/2009fisa-ltr.pdf](http://www.justice.gov/nsd/foia/reading_room/2009fisa-ltr.pdf)



The number of FISA applications made and approved fell almost 34% from 2008 (2,083) to 2009 (1,376). The number of reported applications made and approved has fallen over 40% since hitting the high-water mark in 2007 (2,371). The 2009 reported number, however, is still well above the average number of applications made and approved over the last 30 years (953).

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