PRESIDENTIAL ADDRESS

Building Our Own "Iron Curtain": The Emergence of Secrecy in American Government

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Editor's Note:

President Timothy L. Ericson presented an abbreviated version of this address at the opening plenary session of the sixty-eighth annual meeting of the Society of American Archivists in Boston, Massachusetts, on 5 August 2004.

On 5 March 1946, Winston Churchill delivered a famous speech that many say signaled the beginning of the Cold War. Addressing an audience at Westminster College in Fulton, Missouri, Churchill spoke about the deteriorating relationship between the Soviet Union and the Western allies less than one year after the defeat of Nazi Germany and Japan. In a now famous quote, he warned, "From Stettin in the Baltic to Trieste in the Adriatic an *iron curtain* has descended across the Continent."[1] The metaphor caught the imagination of Americans and it was used thereafter to describe the divide that separated the West from the East

This metaphor is useful because it also conveys a sense of the divide that now separates Americans from their government because of the latter's increased use of secrecy to shroud, in the name of national security, many of its actions and decisions. State and local officials have followed the federal government's example, and today the tilt toward secrecy permeates our entire system of government from the White House to the local school board.

There are many ways to make curtains. The Russians did so in 1946 with tanks and barbed wire, but ours is a curtain of our own design, woven with executive orders, legislation, and most of all, the system of classifying sensitive

[1] Winston Churchill, "Iron Curtain Speech," 5 March 1946. Available at http://www.nationalcenter.org/ChurchillIronCurtain.html.

information. Secrecy separates us from our fundamental right as citizens to know how decisions and policies are made, and to hold our elected officials accountable for their actions. This curtain of secrecy even separates our government agencies from one another and inhibits their ability and willingness to share the information they need to make informed decisions. We see examples of this curtain on an almost daily basis.

Recently declassified documents dating back to 1942 confirmed that U.S. intelligence officials had been warned about the coming Holocaust in Europe through interviews with Jews who had immigrated during 1941 and 1942. The officials had later recruited former Nazis as intelligence sources, shielding them from prosecution as war criminals. These documents remained classified, presumably in the interest of our national security, for more than sixty years.[2]

A Georgia man attempting to locate and retrieve a live atomic bomb, jettisoned after a mid-air collision over the Atlantic Ocean off Savannah in 1958, was hindered for years from learning much about the bomb itself or details of its possible location because "many of the details remain classified."[3] Reference to the collision that forced the pilot to jettison the bomb was not even mentioned in a published history of the Strategic Air Command. Only recently, after seawater from the area showed abnormally high levels of radiation, did the federal government take a more active interest in the search.[4]

During Iraqi Ahmad Chalabi's fall from influence with the American government in 2004, it was revealed that there had been suspicion about his reliability for some time. In fact, the Defense Intelligence Agency had concluded that some of Chalabi's information was suspect and attached a warning notice to one of its assessment reports. Unfortunately, according to *Newsweek*, the warning was so highly classified that even other intelligence officers were not permitted to see it and so it went unheeded.[5]

As the Iraqi prisoner abuse scandal broke in spring 2004, the *Des Moines Register* cited a *Wall Street Journal* report that lawyers for the president argued secretly that he "did not have to follow laws prohibiting torture, and explained how his subordinates could get away with it, in a classified draft report in

[2] Richard Willing, "Scholars: U.S. Tipped to Holocaust in '42." *USA Today*, 14 May 2004. An extensive, excellent source for other information collected during the Second World War and classified for many years is Richard Breitman, Norman J. W. Goda, Timothy Naftali, and Robert Wolfe, *U.S. Intelligence and the Nazis* (Washington, D.C.: National Archives Trust Fund Board, 2004).

[3] Chelsea J. Carter, "Searchers Press Lonely Hunt for H-Bomb Lost off Georgia," *Milwaukee Journal Sentinel*, 9 May 2004.

[4] J. R. Rosenberry, "Radiation Level Prompts Search," *Washington Post*, 1 October 2004; Larry Copeland, "Interest in Lost H-Bomb Resurfaces," *USA Today*, 19 October 2004; Hans M. Kristensen, "Nuclear Bomb Dropped in Georgia; No Nuclear Capsule Inserted, Documents Show," Nuclear Information Project, 2004, http://www.nukestrat.com/us/afn/savannah.htm.

[5] Evan Thomas and Mark Hosenball, "The Rise and Fall of Chalabi: Bush's Mr. Wrong," *Newsweek*, 31 May 2004, 26–27.

March 2003."[6] One wonders whether the national embarrassment that resulted once the abuse became known might have been avoided had the discussion of the country's legal obligations been made in a public forum.

The *New York Times* reported in July 2004 that the Senate Select Committee on Intelligence discovered that the CIA had undertaken a series of pre-war interviews with relatives of Iraqi scientists, who informed them that programs to develop weapons of mass destruction had been abandoned. Unfortunately, the program was secret, so nobody outside the CIA, *including the president of the United States*, had the chance to consider this information prior to the decision to invade Iraq.[7]

As one *Washington Post* reporter noted, "The way things are going, it's getting to where even The Shadow won't know 'what evil lurks in the hearts of men.' " Characterizing the recent government mania for secrecy as a "substantial surge in the urge to submerge," he reported that agencies in the executive branch of government "discovered more than 14 million new secrets last year." That represented "a 25 percent increase over the prior year." He cited a March 2004 report from NARA's Information Security Oversight Office that observed, "Many senior officials will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own."[8]

A similar curtain of secrecy has descended at state and local levels of government as well. In Florida, the Tallahassee correspondent for the Lakeland *Ledger* reported:

> In a time when terrorism, privacy and identity theft are at the forefront of public debate, it may come as no surprise that state lawmakers often cite those as reasons when imposing a new shroud of secrecy on government records.
>
> But, as with many issues in the Legislature, there is often more to the story.
>
> In 1998, lawmakers exempted rabies vaccination records from public scrutiny, citing the privacy concerns of pet owners. But it turns out it was the veterinarians who wanted the records closed to prevent them from being used by major pet care companies to market their products directly to pet owners. . . .
>
> [E]ach year . . . state lawmakers . . . advance a new round of bills seeking to close public records. . . .
>
> Up until 1985 . . . Florida had 250 exemptions in its public records laws. Since then, the number of exemptions has grown to nearly 900 . . . .[9]

[6] "Shocking Defense of Torture," *Des Moines Register*, 12 June 2004; Matt Kelley, "Early Complaints of Abu Ghraib Abuse Went Nowhere, Records Show," *Des Moines Register*, 12 June 2004.

[7] James Risen, "CIA Didn't Tell Bush of Doubts over Iraqi Arms, Officials Say," *New York Times*, 6 July 2004.

[8] Al Kamen, "Millions of Secrets," *Washington Post*, 3 May 2004.

[9] Lloyd Dunkelberger, "More Records Now Kept Secret." *Lakeland (Fla.) Ledger*, 14 March 2004.

Where have the archivists been? Our SAA *Code of Ethics* clearly speaks to the issue of access to records. But the language of the code is interpreted by many as applying mostly to manuscript curators who deal primarily with private donors rather than archivists who deal with public government agencies. Why have we not been more zealous in embracing our ethical responsibility to "discourage unreasonable restrictions on access" with respect to government records that are being unreasonably restricted by the millions?[10]

Our literature abounds with statements that suggest we should be doing more. In 1986, SAA's Task Force on Goals and Priorities identified as an objective that archivists should "initiate and/or support legislation, regulations, and professional practices which allow maximum access to public and private archival records while protecting individual and organizational rights and interests." The report went on to assert that archivists must

- take a leadership role in fostering legislation that increases access and protects rights;
- be prepared to make the case for appropriate legislation;
- build coalitions with other affected professional groups; and
- monitor laws, regulations, policies, and practices affecting access to archival records.[11]

Mary Jo Pugh's 1992 manual on reference echoes similar sentiments. She says, "Archivists seek to make as much information as possible available to users as soon as possible," and includes the following recommendations in a list of "Archival Responsibilities Regarding Access":

- Negotiate clear and responsible agreements with private donors and originating agencies
- Strive to open as much material as possible
- If necessary, advocate legislation or institutional policy that clarifies archival issues in the creation, preservation, access, and use of records.[12]

F. Gerald Ham's 1993 appraisal manual says, "Severe and long-term restrictions on access greatly diminish the research value of records. Archivists find that legal and administrative restrictions on access have limited or prohibited the use of important documentation. . . . Where legal and administrative restrictions are unreasonable, archivists need to work for revision."[13] In his *Understanding*

[10] Society of American Archivists, "*A Code of Ethics for Archivists with Commentary*, (Chicago: Society of American Archivists, 1992). This language on "unreasonable restrictions" has been dropped from the revised Code of Ethics approved by SAA council in February 2005.

[11] SAA Task Force on Goals and Priorities, *Planning for the Archival Profession* (Chicago: Society of American Archivists, 1986), 25–26.

[12] Mary Jo Pugh, *Providing Reference Services for Archives and Manuscripts* (Chicago: Society of American Archivists, 1992), 56.

[13] F. Gerald Ham, *Selecting and Appraising Archives and Manuscripts* (Chicago: Society of American Archivists, 1993), 57.

Archives and Manuscripts, James O'Toole writes, "The archivist's general interest is in making the maximum amount of information available to users."[14] Yet despite these and other pronouncements, our advocacy against unnecessarily restricting government records has been sporadic and uncoordinated.

Perhaps the first step in learning how we have come to the place where we find ourselves today is to better understand some of the historical background about the development of our system of government classification and secrecy. With this knowledge, we will be better informed about some of the adverse effects that many believe have resulted from secrecy run amok, and we will have a better sense of what we ought to do as a profession, as individual archivists, and as American citizens to move toward a more rational system.

Our curtain of secrecy has been a long time in the making, and some of its threads date back to the very founding of our country. The situation today has resulted, in part, because of the historically indifferent attitude Americans have had toward issues related to records since the early days of the republic. This has made us vulnerable to panic in times of national duress and caused us to lurch from one crisis to another. As a result, much of our secrecy apparatus has been cobbled together quickly, rather than wisely. The USA PATRIOT Act is only one of the latest in a series of "quick fix" responses to problems, enacted without close examination or debate about the long-term cost to our civil liberties.

How did we get into this situation? One can divide an overview of the history of our secrecy apparatus into three approximate time periods. The first from 1774 to 1870; the second from 1870 to 1940; and the third from 1940 to the present.

The First Period: 1774–1870

It is tempting to think about the early years of our nation as an "Age of Innocence," when pure democracy flourished and all business was conducted in the open with free discussion and debate. But secrecy in matters of national defense and diplomacy has been part of American government since the beginning. In fact, between 1774 to 1870, much of the foundation on which our present system is built was put into place. These practices included withholding information from the public, secret government committees, curtailing civil rights in time of conflict, establishing penalties for releasing secret information, and support by the Supreme Court for the executive branch's right to keep its secrets, even in response to subpoenas or requests for "discovery" and even if it meant denying justice to an American citizen. It was also during these early years

[14] James M. O'Toole, *Understanding Archives and Manuscripts* (Chicago: Society of American Archivists, 1990), 66.

that the power of executive orders was established, as well as the idea that some information may be restricted without any formal review or action—that it is "born classified," a term that is more commonly associated with information relating to atomic energy.

Withholding information from the public was deemed necessary from the second day of its business in 1774, when the First Continental Congress met to discuss the "Intolerable Acts." To thwart agents for the British who were present in great numbers, the delegates "Resolved, That the doors be kept shut during the time of business, and that the members consider themselves under the strongest obligations of honour, to keep the proceedings secret, untill [*sic*] the majority shall direct them to be made public."[15] Their caution was understandable and the practice was continued. They were, after all, in the beginning stages of plotting a revolution, something to which the British authorities could not have been expected to respond well. As David McCullough reports in his biography of John Adams, "All sessions of Congress were conducted in strictest secrecy behind closed doors because of the number of British agents in and about Philadelphia and . . . [delegates wanted] to convey an impression of unity, that all members were perfectly agreed on the results of their deliberations."[16]

Even so, the scope was limited. The First Continental Congress published its proceedings almost immediately, withholding from the public only a few of the more sensitive details. A committee from the Second Congress, preparing its official 1775 journals for publication, was asked to "examine whether it will be proper yet to publish any of those parts omitted in the journal of the [1774] session."[17]

Even the signing of the Declaration of Independence in 1776 was shrouded in secrecy. As McCullough notes in his Adams biography, "Indeed, to all appearances, nothing happened in Congress on July 4, 1776." The formal signing of the "authenticated," "engrossed" copy would not take place until August 2, again without the fanfare that we commonly associate with the birth of American Independence.[18]

[15] *Journals of the Continental Congress, 1774–1789* (Washington, D.C.: U.S. Government Printing Office, 1904–37): 1:26, quoted in Arvin S. Quist, *Security Classification of Information*, vol. 2, *Introduction, History, and Adverse Impacts*, rev. ed. (Oak Ridge, Tenn.: Oak Ridge Classification Associates, LLC, 2002), chapter 2. Available at http://www.fas.org/sgp/library/quist/chap_2.html.

[16] David McCullough, *John Adams* (New York: Touchstone Books, 2001), 88.

[17] *Journals of the Continental Congress, 1774–1789*, 3:393.

[18] McCullough, *John Adams*, 136–37. McCullough writes of the August 2 signing, "Nothing was reported of the historic event. As with everything transacted within Congress, secrecy prevailed. To judge by what was in the newspapers and the correspondence of the delegates, the signing never took place."

> The fact that a signed document now existed, as well as the names of the signatories, was kept secret for the time being, as all were acutely aware that by taking up the pen and writing their names, they had committed treason, a point of considerably greater immediacy now, with the British army so near at hand.[19]

The time when Independence Day would be "solemnized with pomp and parade, with shows, games, sports, guns, bells, bonfires, and illuminations from one end of this continent to the other" would have to wait until later years.[20]

The precedent of secret government committees was established by Congress in September 1775. A "Secret Committee" was charged to deal with matters pertaining to the purchase of munitions and was authorized to do its business privately in order to protect the safety of those who were providing arms to the Continental Army. The same Congress also established the "Committee of Secret Correspondence" to communicate with "friends" in other countries in matters relating to alliances and other diplomatic relations. The committee's efforts paid off when France was convinced to enter into a long-term treaty of commerce that would provide American armies with needed munitions. Although the French agreed, one of their top diplomats cautioned that France needed to protect itself and demanded that the treaty be kept secret.[21] In retrospect, some might argue that this was a perspective that Americans learned all too well. But it was not immediately so. During 1777, an American diplomat used information from the Committee of Secret Correspondence to publish a series of open letters to the press discussing French aid to the American military. The French were furious over this breach of confidence and strongly protested the indiscretion. Doubtless it struck many as ironic that the American diplomat, Thomas Paine, was also the author of the pamphlet *Common Sense*.[22]

It is clear that from the beginning our government understood the need to keep secret some information concerning military and diplomatic activities. To facilitate this, Congress kept a separate secret journal to record certain votes and actions, so a small amount of information was kept from the public. Even the Articles of Confederation and the United States Constitution were both drafted in secret.[23] When the Articles of Confederation were being written, some chafed

[19] McCullough, *John Adams*, 138.

[20] McCullough, *John Adams*, 130.

[21] "Intelligence Operations," in *Intelligence in the War for Independence* (Washington, D.C.: Public Affairs, Central Intelligence Agency, n.d., ca. 1998). Available at http://www.cia.gov/cia/publications/warindep/intro.shtml.

[22] "Intelligence Techniques," in *Intelligence in the War of Independence*. In response, Congress fired Paine and passed a public resolution, essentially lying about the incident, saying, "His Most Christian Majesty, the great and generous ally of the United States, did not preface his alliance with any supplies whatever sent to America."

[23] McCullough, *John Adams*, 146; Quist, *Security Classification of Information*, 1:chap. 2.

that with "the theory [of democracy] now so eloquently proclaimed, practice [should] be attended with equal diligence."[24] The Articles of Confederation permitted matters pertaining to "treaties, alliances, or military operations" to be kept secret.[25] The Constitution mentions secrecy only once, in article I, section 5, in which Congress was authorized to continue the 1775 precedent and omit from the publications of its proceedings "such Parts as in their Judgment require Secrecy."

"Born classified," the idea that a certain kind of information may be restricted without any formal review or action, is a concept that is generally associated with the Atomic Energy Act of 1946, but the precedent was set in the time of George Washington with respect to diplomatic information. In 1784, Congress ruled that all diplomatic correspondence was automatically considered secret. President Washington used this power in 1790 when he communicated in a "confidential" letter to Congress concerning negotiations with Native American nations. During that same year he sent to the Senate a "secret" article of a treaty being negotiated with the Creek Indian Nation.[26]

Although Congress had passed the first espionage act in August 1776 to better protect the national security, the precedent for curtailing civil rights in time of danger was not set until 1798 when war with France, our former ally, seemed likely. Congress then passed the Alien and Sedition Acts. These legislative actions restricting civil liberties represented "the nation's first experience with how war or the threat of war changed the balance between private liberty and public order." They forced Americans to rethink the extent to which ideals needed to be balanced against reality in times of crisis. They also were an early example of "knee-jerk" legislation, passed hurriedly in the face of a perceived threat. Although the acts were repealed or allowed to expire, they established an unfortunate pattern that would be repeated too often in later years.[27] Supreme

[24] McCullough, *John Adams*, 146.

[25] Articles of Confederation, art. 9, par. 7.

[26] Quist, *Security Classification of Information*, 1:chap. 2.

[27] Daniel Patrick Moynihan, *Secrecy: The American Experience* (New Haven, Conn. & London: Yale University Press, 1998), 85; Commission on Protecting and Reducing Government Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy*, (Washington, D.C.: Government Printing Office, 1997), A-7–A-8. Under the Naturalization Act, an alien had to be a resident of the United States for fourteen years before he could become a citizen. Therefore such persons could not vote for fourteen years. The act was repealed in 1802. The Alien Act allowed the deportation of aliens, during peacetime, who were considered a threat to the United States (the act expired in 1800). The Alien Enemies Act allowed the imprisonment or deportation during wartime of male aliens over the age of fourteen who were accused of engaging in activities that were contrary to the interests of the government of the United States in time of war (the act expired in 1800). The Sedition Act ("An Act for the Punishment of Certain Crimes against the United States") was "a broad proscription of spoken or written criticism of the government" (the act expired in March 1801). The passage of these acts by the Federalist Party sparked the Kentucky and Virginia Resolutions, which obligated states to nullify within their own borders laws that they considered unconstitutional. "The John Adams Administration: Alien and Sedition Acts," http://www.u-s-history.com/pages/h463.html.

Court Justice William Brennan noted almost two hundred years later "the unfortunate American tendency to panic in the face of national crisis and to countenance infringements of civil liberties that would appear intolerable during times of repose."[28]

The Supreme Court affirmed the right of the executive branch to keep its secrets during the treason trial of Aaron Burr in 1807. Burr's attorneys requested access to a letter written to President Thomas Jefferson from a General Wilkinson, one of the primary witnesses against Burr. The government responded that is was "improper to call upon the president to produce the letter . . . because it was a private letter, and probably contained confidential communications. . . . It might contain state secrets, which could not be divulged without endangering the national safety." The government's argument prevailed and the letter remained private.[29]

The point was reaffirmed in an 1875 case in which a former Union agent sued the government for compensation earned while he was under contract as a spy for President Lincoln. In that case the court ruled that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." Both precedents were cited in a 1953 case in which two civilians were killed in the crash of a B-29 bomber which was on a "highly secretive mission" testing secret electronic equipment.[30] It was also during these years that the power of executive orders was established and Congress adopted the first constitutional oath of allegiance and secrecy path.[31] (Executive orders will be discussed later in this article.)

The irony of all this secrecy was not lost on the early champions of democracy. In the *Federalist*, no. 8, Alexander Hamilton warned of the inherent tension between freedom and the measures sometimes needed to remain free, writing, "The continual effort and alarm attendant on a state of continual danger will compel nations the most attached to liberty to resort for repose and security

[28] Quoted in Joel Dresang, "A Man without a Country," *Milwaukee Journal Sentinel*, 4 July 2004.

[29] Quoted in *Sibel Edmonds v. United States Department of Justice, et al.*, 323 F. Supp. 2d 65 (D.D.C. 2004). Chief Justice Marshall called this a "delicate matter" and noted, "nothing before the court . . . show[ed] that the letter in question contain[ed] any matter the disclosure of which would endanger the public safety," but "[i]f it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." The text of the memorandum opinion in this case is available at http://www.fas.org/sgp/jud/edmonds070604.pdf.

[30] Quoted in *Sibel Edmonds v. United States Department of Justice, et al.*

[31] The secrecy oath adopted by the First Continental Congress on 12 June 1776 was "I do solemnly swear that I will not directly or indirectly divulge any manner or thing which shall come to my knowledge as [clerk, secretary] of the Board of War and Ordnance for the United Colonies . . . So help me God." "Intelligence Techniques," in *Intelligence in the War of Independence*. The loyalty oath was, "I do solemnly swear that I will support the Constitution of the United States." "Oath of Office," http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

to institutions which have a tendency to destroy their civil and political rights. To become more safe, they at length become less free."[32] In a 1798 letter to Thomas Jefferson, James Madison observed, "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."[33]

It was also during these early years that our disinterested attitude toward records became evident. Although we like to compare our archival traditions and values with those of the French Revolution era, the fact remains that the French established the *Archives Nationales* in 1790 but Americans never got around to it until 1934.

But we did at least talk about it. On 21 February 1810, the Honorable Josiah Quincy of the Commonwealth of Massachusetts moved that the House of Representatives form a committee to "inquire into the state of the ancient public records and archives of the United States, with authority to consider whether any, and what, provision be necessary for a more safe and orderly preservation of them." A committee was duly appointed and soon issued the *Report of the Committee Appointed to Inquire into the State of the Ancient Public Records and Archives of the United States of America.* Its findings were that the "ancient" records (less than fifty years old!) were in "a state of great disorder and exposure; and in a situation neither safe nor convenient nor honorable to the nation." There were numerous problems that sound familiar to later generations of archivists. Records from the State Department, the War Department, and the Navy Department were all stored in an attic in a public building "west of the President's house." Quincy's committee further reported that the building, consisting of twenty-five rooms, not counting the attic, "does not contain sufficient room [for] a safe and orderly disposition of the public records, so long as it is permitted to be occupied as it is at present." Because a post office, "open at almost all hours of the night," was located in the same building, the committee warned that "the public papers and records of the other departments, are much exposed both to fire and to robbery; the dangers of which are also greatly augmented by the total want of watchmen for that building." Correspondence addressed to the committee from the Department of State, the War Department, and the Navy Department expressed no concern for security or secret information. They were more concerned about fire and the inadequate space in which they were forced to work. The committee's eventual recommendations were modest, including only the construction of three additional fireproof rooms within the existing building and construction of a new

[32] Alexander Hamilton, James Madison, and John Jay, *The Federalist: The Famous Papers on the Principles of Government*, ed. Benjamin Wright (New York: Barnes & Noble Books, 2004), 120.

[33] Quoted in Moynihan, *Secrecy*, 101.

building into which the post office could be moved, thus reducing traffic in the area housing the "ancient public records and archives."[34]

Our disinterest in the records of government certainly made an impression on the French visitor Alexis de Tocqueville when he toured the United States in 1831 and 1832. The young Frenchman was surprised about American attitudes toward records generally, but especially when some government officials actually gave him original documents in answer to questions he posed! He observed, "No methodical system is pursued; no archives are formed; and no documents are brought together when it would be very easy to do so. Where they exist, little store is set upon them. I have among my papers several original public documents which were given to me in the public offices in answer to some of my inquiries." Tocqueville concluded that American society "seems to live from hand to mouth, like an army in the field," and also wrote, "I am convinced that in fifty years it will be more difficult to collect authentic documents concerning the social condition of the Americans at the present day than it is to find remains of the administration of France during the Middle Ages."[35]

One of Andrew Jackson's early biographers reported that when Jackson was notified that one of his servants was smuggling documents from his presidential papers to his political enemies, his response was,

> They are welcome, sir, to anything they can get out of my papers. They will find there, among other things, false grammar and bad spelling; but they are welcome to it all. . . . Our government, sir, is founded upon the intelligence of the people; . . . upon their capacity to arrive at right conclusions in regard to measures and in regard to men; and I am not afraid of their failing to do so from any use that can be made of any thing that can be got out of my papers.[36]

The lack of concern about records extended even into the Civil War years, at which time, by some accounts, the need for barracks, hospitals, and storage space for munitions was solved by simply dumping great quantities of records from warehouses into the Potomac River, apparently with no concern that rebel spies might be waiting downstream to salvage any soggy secrets the documents might contain.[37]

[34] Percy Scott Flippin, comp., *The Archives of the United States Government: A Documentary History, 1774–1934*, vol. 3 (Washington, D.C.: Division of Research, National Archives, 1938); *Annals of Congress*, 11th Cong., 2d sess., 1427, 1633; *Report of the Committee Appointed to Inquire into the State of the Ancient Public Records and Archives of the United States* (Washington City: R. C. Weightman, 1810), 1–12.

[35] Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, revised and corrected (1839), see chapter 13 at http://xroads.virginia.edu/~HYPER/DETOC/1_ch13.htm.

[36] James Parton, *Life of Andrew Jackson* (New York: Mason Brothers, 1860), 3:607, quoted in Moynihan, *Secrecy*, 82.

[37] The author clearly remembers reading this fact in one of Bruce Catton's Civil War histories, but has not been able to find the precise citation.

During the Civil War, the federal government still had not developed a formal system of protecting sensitive information. Significant controls occurred primarily in the war zones and these were directed primarily at the press. Even then, Lincoln, who would later suspend habeas corpus and authorize censoring mail, cautioned one of his generals:

> You will only arrest individuals and suppress assemblies or newspapers when they may be working palpable injury to the military in your charge, and in no other case will you interfere with the expression of opinion in any form or allow it to be interfered with violently by others. In this you have a direction to exercise great caution, calmness, and forbearance."[38]

But two significant developments in the evolution of government secrecy did occur during the 1860s. The first was that concerns for maintaining secrecy began to extend to technology. This was primarily related to the development of advanced weapons systems such as armored warships, the use of the steam engine, the improvements in explosives, and the development of new weapons systems such as naval mines. The need for better weaponry led, in part, to the establishment of the National Academy of Sciences (NAS) in 1863. One of the Academy's responsibilities was to "expedite the evaluation of . . . approvals" of "inventions and related proposals" submitted by citizens to the government "to contribute to the war effort." The War Department used the NAS regularly. For example, among the first projects were two that related to the increased use of iron warships. The secretary of the navy requested the formation of a "Committee on Protecting the Bottoms of Iron Vessels" and another "Committee on Magnetic Deviation in Iron Ships." The establishment of the NAS marked the first time that the United States actively used scientists to help win a war.[39]

The second significant development during the 1860s was the issuance in 1869 of the first peacetime military regulations dealing with the protection of documents and sensitive information. Under General Orders no. 35, issued by the army in an attempt to restrict access to information about forts and other military installations, people were forbidden to take photographs or make drawings of military installations: "Commanding officers of troops occupying the regular forts built by the Engineer Department will permit no photographic or other views of the same to be taken without the permission of the War Department."[40]

[38] J. G. Randall, *Constitutional Problems under Lincoln*, rev. ed. (Gloucester, Mass.: Peter Smith, 1963), 508, quoted in Quist, *Security Classification of Information*, 1:chap. 2.

[39] Quist, *Security Classification of Information*, 1:chap. 2. The National Academies, "Founding of the National Academy of Sciences," http://www7.nationalacademies.org/archives/nasfounding.html; "Compass Committee Report," http://www7.nationalacademies.org/archives/ironcladpic.html.

[40] General Orders, no. 35, Headquarters of the Army, Adjutant General's Office, Washington, D.C., April 13, 1869, quoted in Quist, *Security Classification of Information*, 1:chap. 2.

The Second Period: 1870–1940

During the next phase in the development of our "curtain of secrecy," most of the activity that would eventually shape our own system actually took place overseas, particularly in Great Britain. Beginning in 1853, the British War Office adopted a formal system of classifying and handling sensitive documents during the Crimean War. Later developments included the introduction of "secret" and "confidential" as official classification categories. This was the first time that any governmental agency had adopted a formal classification system. It was also the beginning of an era in which the military took the lead in developing systems to restrict access to information. This was a significant development for the American system of classifying and handling secret information because the British procedures were almost all adopted as models by the United States War Department decades later, and most are still in use today.[41]

As an international confrontation with Spain loomed in 1897, the U.S. War Department, using an 1889 British regulation as a model, updated its 1869 orders by limiting who could visit coastal or lake defenses and adding restrictions and penalties for taking photographs or causing damage. When Congress passed a law in 1898 establishing penalties for "violating any War Department Regulations made for the protection of fortifications or harbor defense systems," it marked the first time that regulations imposed by the military were made applicable to civilians.[42]

With the assassination of President William McKinley in September 1901, the nation was gripped by a wave of hysteria against "terrorists" and the threat they posed to the country, but we then called them "anarchists." This fear led to the passage in 1903 of the Alien Immigration Act and then to the Immigration Act of 1907, which prohibited alien anarchists from entering the United States and thus in turn led to the creation of secret files relating to immigrants.[43]

The development of a formal secrecy apparatus took a giant step forward in 1907 when the chief of artillery in the U.S. Army sent a letter to the adjutant general noting the considerable confusion among army officers concerning the use of the word "confidential." The result was that officers had to rely on their own judgment to interpret how "confidential" the information was. He suggested a three-step change to previous practice that included classifying documents "according to the nature of their contents," including a time period after which the information would no longer be classified, and a process by

[41] Quist, *Security Classification of Information*, 1:chap. 2. The information in this source is excellent and very detailed.

[42] Quist, *Security Classification of Information*, 1:chap. 2.

[43] *Immigration Act of March 3, 1903*, *U.S. Statutes at Large* 32 (1903): 1213; *Immigration Act of February 20, 1907*, *U.S. Statutes at Large* 34 (1907): 898.

which officers in possession of classified documents accounted for them annually.[44] After some discussion the acting secretary of war issued a memorandum with recommendations on 12 November 1907. Designating a time after which a document could be "declassified" was considered impractical, and an annual inventory of confidential documents was considered to be unnecessary and time-consuming. Beyond these reservations, many of the original suggestions were adopted, including an early form of declassification and an order that represents an endorsement of the idea of bulk declassification. Thus the first rudimentary official American document classification system was adopted. The navy followed suit with a similar system in 1909.[45]

Perhaps it was the combination of a lingering fear of anarchists and a sense of the worsening situation in Europe that led Congress to enact the Defense Secrets Act of 1911. Similar to previous acts and to the British Official Secrets Act, and narrowly focused on defense installations, it provided for penalties on anyone attempting to obtain "information respecting the national defense, to which he is not lawfully entitled" including taking unauthorized photographs or making sketches of harbor or other military defense facilities. The act also covered making such information available to unauthorized persons. The War Department followed soon thereafter with additional regulations to protect documents containing information about coastal defenses and fortifications. On 19 May 1913, the Judge Advocate General's Office issued regulations for

[44] Quist, *Security Classification of Information*, 1:chap. 2. The same 1907 letter suggested four "classes of sensitive information." Class I: "For the sole information of the person to whom it is addressed, unless some military necessity should exist for its being communicated to others, in which case the person to whom it is addressed assumes responsibility for such communication." Class II: "For the sole information of commissioned officers of the Army, Navy, and Marine Corps, unless some military necessity should exist for its being communicated to others, in which case the person to whom it is addressed assumes responsibility for such communication." Class III: "For the sole information of officers, enlisted men of the Army, Navy, and Marine Corps and civilian employees of the United States, unless some military necessity should exist for its being communicated to others, in which case the person to whom it is addressed assumes responsibility for such communication." Class IV: "Semi confidential, the only restriction being that it will not be given to the public or to the press." The British Army continued work on its own system as well, adding in 1909 the classification of "For Official Use Only": "The information contained in a document or map marked 'for official use only' is not to be communicated to the press nor to any person not holding an official position in His Majesty's Service."

[45] Quist, *Security Classification of Information*, 1:chap. 2. Soon thereafter the War Department issued a circular that outlined regulations to confidential documents. The use of the term "confidential" was restricted to communications that were intended for the recipient only and others could see the document only if some military necessity demanded it. This circular was issued mainly to restrict who could see documents rather than to classify the contents of documents. In 1909, the U.S. Navy issued a general order covering "the care, distribution, and disposition of the confidential publications relative to target practice and engineering instructions." Such publications were to remain in the custody of naval officers and "under no circumstances" be revealed to anyone not "regularly connected" with the navy. The general order also covered "all features of the present system of training." Naval officers were required to sign when they received such publications and to return them when they left the service. Such publications, if mailed, were required to be sent registered mail. In this case, however, the use of the term "confidential" did not mean a formal classification—the word was used in its generic sense.

protecting confidential communications while they were being sent from one place to another.[46]

America's entry into World War I in 1917 prompted hurried legislation that condoned greater secrecy in government. The seeds for hasty action had been sown a year earlier by the Black Tom Railroad Yard explosion in which a munitions dump had been destroyed by saboteurs. This terrific explosion made headlines across the country and heightened fears of terrorism by leftist labor organizations, anarchists, and enemy saboteurs as well. Congress passed the Espionage Act of 1917 and the Trading with the Enemy Act shortly after the U.S. entered the war in April. Unlike the Defense Secrets Act of 1911 that it replaced, the 1917 act allowed for the death penalty. It prohibited anyone from obtaining national defense–related information and making national defense–related information available to a foreign government. The Espionage Act prompted government offices to begin creating dossiers with information on suspicious persons and organizations. These dossiers were assigned different levels of secrecy, depending on the information they contained. To aid in this purpose, government officials borrowed the classification framework that the U.S. military used—one that it had adapted from a system being used by the British military forces fighting in France.[47]

Section 4 of the Espionage Act of 1917 would have given the president extraordinary power to "by proclamation, prohibit the publishing or communicating of or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy." This section was strongly opposed by many in Congress who viewed it as censorship and in violation of the Constitution's freedom of the press guarantees. The censorship provision was eventually stricken from the bill but only by a vote of thirty-nine to thirty-eight.[48]

The Trading with the Enemy Act of 1917 followed shortly thereafter. It allowed "the president to designate as secret certain patents whose publication might 'be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war.' " Such authority had previously been given to the commissioner of patents, but this marked the first time

[46] Quist, *Security Classification of Information*, 1:chap. 2. The official title of the act was "An Act to Prevent the Disclosure of National Defense Secrets." The War Department regulations specified that such documents be numbered, kept locked up, and periodically inventoried. Under the judge advocate general's order, classified documents being transferred were to be placed in a sealed envelope that was marked "Confidential." This envelope was to be placed within an outer envelope which contained standard address information. Thus there was nothing on the outside of the envelope to indicate that a confidential communication was within. These instructions were further defined by the War Department in 1916.

[47] Quist, *Security Classification of Information*, 1:chap. 2; "Primary Documents: U.S. Espionage Act, 15 June 1917," http://www.firstworldwar.com/source/espionageact.htm; Moynihan, *Secrecy*, 101–3.

[48] Moynihan, *Secrecy*, 92, 95–96.

that such authority had been given to the executive branch of government to declare a type of information as secret without putting restrictions on what types of information could be so declared. It also was the first time that any branch of government had been given the authority to declare privately developed information as secret.[49]

On 21 November 1917, the American Expeditionary Force issued General Order no. 64 which mandated "extreme care" with respect to "Confidential" and "Secret" matters. It noted "carelessness in the indiscriminate use of the terms 'Confidential' and 'Secret,'" the same problems that had been identified by the chief of artillery back in 1907. General Order no. 64 outlined in considerable detail the levels of secrecy, marking classified documents, storage of such documents, and who would have access to classified material.[50] Shortly thereafter, the War Department, citing as its authority both the Articles of War and the Espionage Act of 1917, adopted a similar classification marking system. This constituted the first formal classification system in the history of the United States government and the "first time that the War Department invoked a statute as authority for regulations to protect 'defense information.'"[51]

President Woodrow Wilson played a confusing role in all of this. Among his Fourteen Points was a call for "open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view."[52] Yet he lobbied

[49] Quist, *Security Classification of Information*, 1:chap. 2.

[50] Quist, *Security Classification of Information*, 1:chap. 2. Making the case for the order, one officer wrote, "These words sometimes appear on official publications which are common property to our officers, but documents properly bearing these words sometimes are seen on desks in the several offices convenient of access to visiting officers, to clerks, orderlies and in some cases to the employees who clean and care for the building." The general order also described what was "official information." General Order no. 64 also identified three markings: "Secret," which was to be seen only by the person to whom it was addressed and/or to a confidential clerk if necessary; "Confidential," which identified documents with information that was to be revealed to a minimum number of AEF members or employees; and "For Official Circulation Only," to be used for documents with information not to be revealed to the general public (including the press) but which would not adversely affect the mission of the AEF if it fell into enemy hands. The order was modeled after similar British and French orders.

[51] Quist, *Security Classification of Information*, 1:chap. 2. The 1917 War Department regulations specified (a) "A document marked 'Secret' is for the personal information of the individual to whom it is officially entrusted and of those officers under him whose duties it affects"; (b) "A document or map marked 'Confidential' is of less secret a nature than one marked 'Secret,' but its contents will be disclosed only to persons known to be authorized to receive them or when it is obviously in the interest of the public service that they receive them"; (c) "The information contained in a document or a map marked 'For Official Use Only' will not be communicated to the public or to the press, but may be communicated to any person known to be in the service of the United States, simply by virtue of his official position." The regulations also stated that officers could neither disclose the existence of secret documents nor refer to them "in any catalogue or publication" without proper authorization. The navy implemented a similar classification system in February 1918. Its three classes were "Secret," "Confidential," and "Nonconfidential." The definitions of the three classes were roughly the same as the army regulation.

[52] Moynihan, *Secrecy*, 84.

strongly for the censorship authority in section 4 of the Espionage Act of 1917 and on April 7 of that year, he signed a confidential executive order regarding the loyalty of government employees. The order required all government employees to "support government policy; both in conduct and in sympathy."

Confidential

> In the exercise of the power vested in the President by the Congress and the resolution of April 6, 1917, the following order is issued:
>
> The head of a department or independent office may forthwith remove any employee when he has ground for believing that the retention of such employee would be inimical to the public welfare by reason of his conduct, sympathies, or utterances, or because of other reasons growing out of the war. Such removal may be made without other formality than that the reasons shall be made a matter of confidential record subject, however, to inspection by the Civil Service Commission.
>
> This order is issued solely because of the present international situation, and will be withdrawn when the emergency is passed.[53]

Unfortunately, the executive order was not withdrawn when the war ended. It was still being used to deny "disloyal" people from taking civil service tests as late as 1921.[54]

The 1917 legislation that established "much of the structure of secrecy now in place in the U.S. government" was rushed through Congress in just under eleven weeks, similar to the way in which the USA PATRIOT Act was hurriedly approved in response to the terrorist attacks of 11 September 2001. As one writer later lamented, "At this time the United States possessed only one genuine defense secret: that the American military was in no sense prepared for a major war with powerful adversaries."[55] The Espionage Act was amended many times over the years, but the first serious suggestion that the law be considered afresh was not made until 1955 by Hubert Humphrey. The first conviction under the Espionage Act would not come until 1986 when Samuel Loring Morison, a civilian employee at the Office of Naval Intelligence, was

[53] Commission on Protecting and Reducing Government Secrecy, *Report*, A-15.

[54] Moynihan *Secrecy*, 91, 100, 110. Perhaps his position on these events is best explained in a speech promoting the League of Nations. Wilson acknowledges that the commander-in-chief needs to be ready when the nation is threatened and that this cannot be accomplished using "free debate" and "public counsel." "Plans must be kept secret. Knowledge must be accumulated by a system which we have condemned, because we have called it a spying system. The more polite call it a system of intelligence and you can't watch other nations with your unassisted eye. You have got to watch them by secret agencies planted everywhere. Let me testify to this, my fellow citizens. I not only did not know it until we got into this war, but I did not believe it when I was told that it was true, that Germany was not the only country that maintained a secret service." Quoted in Moynihan, *Secrecy*, 100. "The Sedition Act of 1918," http://www.lyceum.org/events/HD2003/2100/1918.htm.

[55] Moynihan, *Secrecy*, 84, 103–4.

found guilty of providing *Jane's Defense Weekly* with photographs showing the construction of a nuclear powered Soviet aircraft carrier and sentenced to two years in prison.[56]

The Sedition Act of 1918, similar to its 1798 counterpart, made it a crime to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States." Like its predecessor, it was passed and enforced. Socialist Party presidential candidate Eugene V. Debs was convicted and sentenced to ten years in prison for voicing antiwar sentiments. The Supreme Court reasoned that "Congress has the power to enact legislation that, under ordinary circumstances, might not be acceptable, when forced by a clear and present danger."[57]

There was little respite following the end of World War I. On May Day 1919, a series of thirty-six bombs were mailed to prominent government officials and judges causing another stitch on the curtain of secrecy to be sewn. The *New York Times* labeled it a "nationwide bomb conspiracy." As it happened, one of the targets of the bombers was Attorney General A. Mitchell Palmer, who shortly thereafter appointed J. Edgar Hoover as head of the newly formed Federal Bureau of Investigation to combat radical political activity. Hoover was zealous in promoting the idea of a vast Communist conspiracy whose tentacles stretched inside the federal government. By so doing he laid the groundwork for a continuing sense of fear and conspiracy that demanded a response in which speed was valued over careful consideration. The bombings also led to what became known as the "Palmer Raids" in 1920.

> On January 2, 1920, federal agents in thirty-three cities arrested more than four thousand Communists as undesirable aliens deserving of deportation. The *Washington Post* warned, "There is not time to waste on hair-splitting over infringement of liberty." J. Edgar Hoover . . . located a U.S. Army transport [vessel], nicknamed the "Soviet Ark," and sent a shipload of radicals home, inviting members of Congress to see them off at Ellis Island.[58]

Although the period between the two World Wars resulted in a lapse in military preparedness, the armed services updated their secrecy apparatus on a regular basis. In 1936, classifications were extended to nondefense information, and regulations first incorporated the term "national security." The 1936 revisions also introduced the term "reclassification" to describe the process of lowering the classification of a document and prohibited revealing information "about the contents of classified documents . . . in any other document unless

[56] Morison's "conviction was upheld in 1988 and the Supreme Court declined to hear the case." Commission on Protecting and Reducing Government Secrecy, *Report*, A-3, A-62.

[57] Moynihan, *Secrecy*, 97. Like its predecessor, however, the Sedition Act of 1918 eventually was repealed—in 1921.

[58] Moynihan, *Secrecy*, 23–24, 114–15.

that document was marked with the same or higher classification," the process we know today as "derivative classification." Finally, information was permitted to be classified if its release might be harmful to an individual or would damage the "prestige of the Nation."[59] This could be easily construed to mean "embarrassment," opening a Pandora's box for widespread abuse. The idea of classifying records on this basis was being used a decade later when Major E. M. Brundage of the Atomic Energy Commission overruled a decision to declassify records relating to human exposure to radiation related to the Manhattan Project because of "public relations" considerations. Another officer concurred, observing shrewdly "that any experiments involving 'unwitting subjects' should remain classified as they 'might have an adverse effect on the position of the Commission' in 'the eyes of the American people and the medical profession in general.'"[60]

Despite all this pre-war activity aimed at safeguarding American military secrets, possibly the most important secret—the plans for the Norden bombsight developed in the 1920s—was stolen by German spies in 1937.[61]

The Third Period: 1940–2004

The onset of World War II marked the beginning of the final phase in the development of our government secrecy apparatus. Conspiracy, loyalty, and secrecy became the forces that fed off one another and led to the establishment of the uncoordinated approach to information security that today is scattered throughout the federal government.[62] Although it has been widely criticized by Congress, government watchdog agencies, the press, and organizations devoted to safeguarding civil liberties, the system has remained essentially intact and resisted attempts to reform its power and breadth.

The use of executive orders has dominated this period. An executive order is simply "a written document issued by the President and titled as such by him or at his discretion." It requires no congressional approval. It is based on the

[59] Quist, *Security Classification of Information*, 1:chap. 2. The revision also extended the practice of stamping (previously required only for "Secret" and "Confidential" documents) to those that were "Restricted" as well. Registered documents were given added protection by requiring that they be kept in "locked safes or other suitable locked containers when not required for immediate use." Registered documents also were subject to a semiannual inventorying. When a classification of a document was changed, the creator was required to inform all recipients of the document of this change. Distribution of "Secret" documents was "confined to the absolute minimum," and officers were not entitled to know the contents of such documents "by virtue of [their] commission alone." Quist's account of our developing system of secrecy during the period between World War I and World War II is detailed and thorough.

[60] Advisory Committee on Human Radiation Experiments, *Final Report*, chap. 13, "The Practice of Secrecy." Available at http://www.eh.doe.gov/ohre/roadmap/achre/report.html.

[61] Commission on Protecting and Reducing Government Secrecy, *Report*, A-22.

[62] Moynihan *Secrecy*, 98–99.

authority of the president guaranteed by the U.S. Constitution and has the force of law. Executive orders may be revised or repealed by the president who issues them, or by later presidents. Unless otherwise specified, executive orders remain in effect indefinitely.[63]

In the early days, executive orders could be very informal—as simple as a president writing in the margin of a document, "Go ahead. [signed] George Washington." Some early executive orders were signed by other government officials, such as the secretary of state, by order of the president.[64]

Executive orders can deal with weighty matters of public policy, like President Harry Truman's 1948 Executive Order 9981, "Establishing the President's Committee on the Equality and Treatment and Opportunity in the Armed Forces," which ended official segregation in the American military.[65] Or they can be quite mundane, like Executive Order 8758, "Establishing Conversion Factors for Use in Administering Quotas on Imports of Coffee," signed by President Franklin Roosevelt on 21 May 1941. Executive orders can directly affect the lives of people, or segments of the population. For example, Executive Order 1090, signed by President William Howard Taft on 17 June 1909, took land from the Gila Bend Indian Reservation and returned it to the public domain.[66]

Executive orders do not always need to be called such. Sometimes they are termed "proclamations" (such as the Emancipation Proclamation), "presidential regulations," "directives," "administrative orders," "military orders," or "general orders." In earlier years, executive orders were sometimes simply conveyed by letter from the president to the person assigned to take a particular action.[67]

As further evidence of our casual attitude toward recordkeeping, nobody in government thought even to number or otherwise identify executive orders until around 1907 when the Department of State made an effort to locate past orders in its files and give numbers to new orders as they were issued. Under this new system, Executive Order 1 was signed by Abraham Lincoln on 20 October 1862 and provided for the establishment of military courts in the state of Louisiana. Executive Order 2 was signed by a cabinet member on 4 April 1865 and "offered a reward for the capture and conviction of certain felons and their

[63] Hugh C. Keenan, "Executive Orders: A Brief History of Their Use and the President's Power to Issue Them," revised February 26, 1974, by Grover S. Williams. Available at http://www.intermediamarketing.cc/liberty/executiveorders.htm.

[64] Keenan, "Executive Orders."

[65] "Truman Issues Orders Ending Federal Segregation," http://www.nps.gov/pwso/honor/order 9981.htm.

[66] See Executive Order 8758 at http://www.archives.gov/federal_register/executive_orders/1941.html; Executive Order 1090 at "The Donnelly Collection of Presidential Executive Orders," http://www.conservativeusa.org/eo.

[67] Keenan, "Executive Orders." There are many other names as well. See "Executive Orders: Additional Information," http://www.conservativeusa.org/execorderinfo.htm.

abettors." Although other federal agencies were urged to deposit their orders that predated 1935 with the Department of State and publish them in the *Federal Register*, this has never been completed. Today, some estimate that as many as fifty thousand unknown executive orders are filed with the records of various agencies.[68]

To frustrate still further any complete accounting for executive orders, they may be classified, as was the case with Woodrow Wilson's 1917 order permitting the firing of federal employees who were considered disloyal.[69] In such a case, the executive order may be neither numbered nor even officially announced, except to the person or persons responsible to implement the order. After the order has been declassified it can then be given a number, close to the chronological date when it was issued, but with a suffix such as Executive Order 23-1, or number $106^{1}/_{2}$ or number 130A. In other words, even today we may be living under executive orders about which we do not even know![70]

Franklin Roosevelt attempted to bring some consistency to the process of issuing executive orders—probably because he issued more of them than any president in history, before or after. On 12 March 1936, he issued Executive Order 7298. It brought, for the first time, some consistency to the process. But, inevitably, his order was eventually superseded in 1948 by Executive Order 10006, which was, in turn, superseded by Executive Order 11030 in 1962.[71]

Executive Order 8381, signed by Franklin Roosevelt on 22 March 1940, marks the beginning of the modern executive order era as it relates to classification of government information. It broadened the definition of "military installation" to include "any commercial establishment engaged in the development and manufacture of military or naval arms, munitions, equipment, designs, ships, or vessels of the United States Army or Navy." The order also established three levels of classification, "Secret," "Confidential," and "Restricted," and gave, for the first time, "civilian government employees the authority to classify information."[72] Along with Executive Order 9066, it gave the president authority to remove persons of Japanese descent from the entire West Coast. There was little protest at the time—even from California attorney general Earl Warren, who later became chief justice of the United States. It was another example of haste and fear trampling civil liberties in a time of crisis. The 1943 *Final Report: Japanese Evacuation from the West Coast, 1942* submitted

[68] Keenan, "Executive Orders."

[69] Commission on Protecting and Reducing Government Secrecy, *Report*, A-14–A-15.

[70] Keenan, "Executive Orders."

[71] Keenan, "Executive Orders."

[72] Quist, *Security Classification of Information*, 1:chap. 3.

by Lieutenant General John L. DeWitt stated, "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race. . . . The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."[73] Executive Order 9066 was not officially revoked until 1976. An official apology for the action taken in the aftermath of Executive Order 9066 did not come until 1988 when Congress passed a resolution stating that the forced relocation was "carried out without adequate security reasons and without any acts of espionage or sabotage documented . . . , and was motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[74]

Roosevelt issued Executive Order 9182, "Consolidating Certain War Information Functions into an Office of War Information," on 13 June 1942. It created an Office of War Information (OWI) and gave it the authority to issue regulations concerning classification of information. These applied to all government agencies and defined what information could be classified. OWI Regulation 4 broadened the scope to include any information "relating to the national defense" rather than simply to military information *per se* and established a "need to know" basis for access to classified information.[75] Later in 1942, War Service Regulation 11, using the authority of Executive Order 9182, "denied a civil service examination or appointment to anyone whose loyalty was 'in reasonable doubt.'"[76]

Since World War II, the trail of executive orders affecting the creation of secrecy files and the classification of information is extensive. They have become powerful tools. For example, Executive Order 9835, issued by President Truman in 1947, established the Federal Employee Loyalty Program, standardizing procedures for investigating and reviewing the loyalty of federal employees and applicants for employment as well as permitting denial of employment where "there is a reasonable doubt as to the loyalty of the person involved."[77] The mounting fear of disloyal employees who would reveal secrets resulted in more information becoming subject to classification and more confidential information being collected about government employees.

Two subsequent Truman orders, Executive Order 10104, issued in 1950, and Executive Order 10290, issued in 1951, expanded the government's

[73] Quoted in Commission on Protecting and Reducing Government Secrecy, *Report*, A-26.

[74] Commission on Protecting and Reducing Government Secrecy, *Report*, A-26; Keenan, "Executive Orders."

[75] Quist, *Security Classification of Information*, 1:chap. 3.

[76] Commission on Protecting and Reducing Government Secrecy, *Report*, A-46; Quist, *Security Classification of Information*, 1:chap. 3.

[77] Commission on Protecting and Reducing Government Secrecy, *Report*, A-43; Moynihan, *Secrecy*, 159.

classification authority significantly. The first added the security level of "Top Secret" as a classification for government information and added the secretary of the air force as a classification authority, along with the president, the secretary of defense, the secretary of the army, and the secretary of the navy.[78] Executive Order 10290, in a major change from previous orders, opened the floodgates by expanding classification authority to include *seventy-two* civilian agencies, including the Department of Agriculture, the Department of Commerce, the Arlington Memorial Amphitheater Commission, the Missouri Basin Survey Commission, the Smithsonian Institution, the Tennessee Valley Authority, and the American Battlefield Monuments Commission![79]

President Eisenhower's Executive Order 10501, issued in November 1953, was significant primarily because it eliminated or curtailed by forty-five the number of federal departments that had been included in Truman's extremely broad classification authority.[80] Eisenhower's Executive Order 10450, issued in April 1953, also mandated a background investigation of each person being considered for appointment as a federal employee. It abolished, but broadened, the previous Truman order, making department and bureau heads responsible for ensuring that the employment of everyone in their unit was "clearly consistent with the interests of national security," which required "that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States." Of the Eisenhower executive order, the *New York Times* reported, "The new program will require a new investigation of many thousands of employees previously investigated, as well as many more thousands who have had no security check." Senator Joseph McCarthy, who had been invited to the signing ceremony, remarked, "Altogether, it represents a pretty darn good program. I like it."[81]

At its peak, the number of government employees who were permitted to classify records reached almost sixty thousand, but the number has gradually decreased as subsequent presidents began to see the relationship between the number of people authorized to classify information and the number of documents classified. Through the Carter, Reagan, and Clinton presidencies,

[78] Quist, *Security Classification of Information*, 1:chap. 3. Executive Order 10104, "Defining Certain Vital Military and Naval Installations Requiring Protection against the General Dissemination of Information Relative Thereto."

[79] Quist, *Security Classification of Information*, 1:chap. 3. Executive Order 10290, "Prescribing Regulations Establishing Minimum Standards for the Classification, Transmission, and Handling by Departments and Agencies of the Executive Branch, of Official Information Which Requires Safeguarding in the Interest of the Security of the United States," http://fas.org/irp/offdocs/eo/index.html.

[80] Executive Order 10501, "Safeguarding Official Information in the Interests of the Defense of the United States," http://www.fas.org/irp/offdocs/eo10501.htm.

[81] Commission on Protecting and Reducing Government Secrecy, *Report*, A-47.

the number has ranged from around 3,800 to 7,000. As of 2004, there are 3,978 federal employees with authority to classify information.[82]

It was not until Executive Order 12065, issued in 1978 by President Jimmy Carter, that an executive order mandating a balancing test that weighed the public's right to know against the government's need to protect national security was issued. The same order established the Information Security Oversight Office at the National Archives. The balancing test has since been rescinded.[83]

Early executive orders gave almost no criteria for classification at various levels. For many years, requirements for classification as "Top Secret" simply relied on "exceptionally grave damage" to the country. It was not until Executive Order 12958, issued in 1995 by President Clinton, that classifiers were required to "identify or describe" specifically what "exceptionally grave damage" meant![84]

Executive orders also have broadened the scope of information that can be classified, from strictly military information, to any "information or material . . . that is owned by, produced by or for, or is under the control of the United States Government." Executive orders have never specified sanctions for government officials who overclassify information.[85]

Congressional uneasiness over the increased power that classification authority gives to the executive branch of government has resulted in studies, committees, and recommendations for reform. But although some of these have brought good results, none have been very successful in slowing the juggernaut of government secrecy.

The Atomic Energy Act of 1946 was the first statute to deal with information classification. It formally introduced the term "born classified" into our vocabulary and added to the power of the FBI by directing the bureau to look into the "character associations and loyalty" of employees of the Atomic Energy Commission, thus creating dossiers with more secrets.[86]

The National Security Act of 1947 created the Central Intelligence Agency, complete with a budget that remained secret until 1997, and the disclosure of whose historical information has remained in dispute through 2004. The act provided that "the intelligence divisions in the armed forces and the civilian

[82] Commission on Protecting and Reducing Government Secrecy, *Report*, 30. There is excellent and detailed information on changes in the security classification system available in the annual reports of NARA's Information Security Oversight Office at http://www.archives.gov/isoo/reports/isoo_reports.html.

[83] Executive Order 12065, "National Security Information," http://www.fas.org/irp/offdocs/eo/eo-12065.htm.

[84] Executive Order 12958, "Classified National Security Information," http://www.fas.org/sgp/clinton/eo12958.html; Commission on Protecting and Reducing Government Secrecy, *Report*, 55–56.

[85] Quist, *Security Classification of Information*, 1:chap. 3.

[86] Moynihan, *Secrecy*, 156, 160.

departments . . . would remain independent of the CIA."[87] The Central Intelligence Agency was structured in this way because lawmakers were wary of creating an intelligence apparatus that had too much power. But in so doing, they gave the CIA an "ambiguous mandate." It was an independent, centralized foreign intelligence agency, "but not a controlling one; it would both rival and complement the efforts of the departmental intelligence organizations."[88] By structuring it as it did, Congress planted the seeds of rivalry and power struggles that have characterized American intelligence efforts since that time, most recently with the uncoordinated response and follow up to the September 11 attacks and the preparation for the war in Iraq. In the wake of the *9/11 Commission Report* and the U.S. Senate Select Committee's *Report on the U.S. Intelligence Community's Prewar Assessments on Iraq*, we are still living with the consequences of that decision made more than fifty years ago.

As early as 1954, only seven years after the creation of the CIA, a report warned of the agency's penchant toward overclassifying the information it developed. Unfortunately, the report itself was classified as "Secret," so nothing happened.[89]

The 1956 Coolidge Committee Report concluded that criteria governing what should be classified were too vague. It criticized the fact that no laws had established penalties for overclassifying documents and said this practice had undercut public confidence in the system by encouraging officials to err on the side of caution and classify any documents that seemed questionable.[90] Nothing happened.

The Wright Commission Report, issued in 1957, noted as others had before, the "dangers to national security that arise out of overclassification" and called for a system that would "protect the national security and preserve basic American rights."[91] Nothing happened.

The Gaither Report, also issued in 1957, marks a distinct low point in the adverse effects of secrecy. It coined the term "missile gap," the myth that drove American foreign policy for many years by badly overestimating the rate of growth of the Soviet economy and military. It caused considerable alarm among those who saw it, but since it was classified "Top Secret," few did. Although leaked to the press almost immediately, the report was not officially declassified until 1973.[92]

[87] Michael Warner, ed., *Central Intelligence: Origin and Evolution* (Washington, D.C.: CIA History Staff, Center for the Study of Intelligence, Central Intelligence Agency, 2001), 1. Available at www.cia.gov/csi/books/cia_origin/Origin_and_Evolution.pdf.

[88] Warner, ed., *Central Intelligence: Origin and Evolution*, 6.

[89] Moynihan, *Secrecy*, 187–88.

[90] Commission on Protecting and Reducing Government Secrecy, *Report*, G-1.

[91] Commission on Protecting and Reducing Government Secrecy, *Report*, A-61, A-50.

[92] Moynihan, *Secrecy*, 192–94.

But there was an occasional piece of important legislation, such as the 1966 Freedom of Information Act (FOIA) that worked against government secrecy. The FOIA evolved from more than a decade of work by the Special Government Subcommittee of the House Government Operations Committee. The Moss Subcommittee Report, issued in June 1958, noted a "lack of public confidence" resulting when information was needlessly classified. It urged marking documents with a date after which they would automatically be downgraded or declassified and urged a "minimum of exceptions." It was a significant document because the idea of a "minimum of exceptions"[93] eventually led to a series of legislative actions that resulted in the passage of the Freedom of Information Act that was signed into law by President Lyndon Johnson on 4 July 1966.

It is noteworthy that during debate in the House of Representatives, one of Representative Moss's colleagues, a young congressman from Illinois, spoke in favor of the bill, saying it

> will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that people should be denied access to information on the conduct of Government or on how an individual Government official is handling his job. . . . [P]ublic records, which are evidence of official government action, are public property, and there . . . should be a positive obligation to disclose this information upon request.

The name of that young congressman from Illinois was Donald Rumsfeld.[94]

In 1960, a report by the House Committee on Government Operations, *Availability of Information from Federal Departments and Agencies*, began bravely: "Secrecy—the first refuge of incompetents—must be at a bare minimum in a democratic society, for a fully informed public is the basis of self-government. Those elected or appointed to positions of executive authority must recognize that government, in a democracy, cannot be wiser than the people."[95] But no change in the system resulted from still another congressional initiative.

In 1970, the Department of Defense (DOD) Science Board formed a task force to address concerns that its security measures were not effective. The Seitz Task Force (named for its chair, Dr. Frederick Seitz) concluded that "major surgery" was needed to curb costs, to correct an "uncertainty in the public mind on policy issues," and to provide an improved free flow of information and estimated that 90 percent of classified technical and scientific documents could be declassified. It recommended a five-year-maximum period of classification for scientific and technical information (with a few exceptions), actively considering the benefits in technological progress that might be realized if

[93] Commission on Protecting and Reducing Government Secrecy, *Report*, G-1–G-2, A-59-A-60.

[94] Public Citizen, "Freedom of Information Act (FOIA)," http://www.bushsecrecy.org/.

[95] Moynihan, *Secrecy*, 168.

classified technical and scientific information was declassified, and a systematic review of classified DOD information within two years. Unfortunately, the report and its recommendations for declassification were themselves classified.[96]

In 1994, Senator Daniel Patrick Moynihan was appointed chair of the Commission on Protecting and Reducing Government Secrecy. The commission submitted its report in 1997, including an exhaustive history of the development of the government's secrecy apparatus, outlining the problems and negative effects that resulted from it, and recommending a number of actions that could make the system more manageable and effective. Unfortunately, few of the recommendations were acted upon, and then only halfheartedly.[97]

How has our system of classification and secrecy served us? Not very well. Anecdotal examples abound. In 2003, the annual report of NARA's Information Security Oversight Office noted that the "classification authorities" had made a combined total of 14,228,020 "classification decisions." Over the past decade, the number has been increasing steadily, even before September 11. The total over ten years is an astounding 133,043,903 decisions to classify information. That figure is not pages—just decisions. One decision might represent a document that is a hundred or more pages in length. Even conservative estimates of the number of pages of documents already classified and more than twenty-five years old are well up into the billions![98] Other government agencies avoid disclosure of information from their records by legislating exemptions to the Freedom of Information Act or simply by refusing to comply with FOIA requests. One 2004 study by the Reporter's Committee for Freedom of the Press revealed only a 50 percent rate of compliance with FOIA requests made in Ohio.[99]

Our secrecy apparatus comprises a hodgepodge of executive orders, legislative actions, and bureaucratic procedures that simply does not serve us in the way it was intended. It has promoted rivalry between government agencies, and secrets have become "currency" in their quest for power and influence. This has hindered policy making and has resulted in numerous ill-informed decisions that have had negative effects on domestic and foreign policy. For example, in 1960, Lloyd A. Free, working for the Institute

[96] Commission on Protecting and Reducing Government Secrecy, *Report*, G-2, A-61. The classification was "For Official Use Only."

[97] Commission on Protecting and Reducing Government Secrecy, *Report*. The report itself has obviously been a core source for this article. See especially chapter 3, "Common Sense Declassification and Public Access."

[98] Information Security Oversight Office, *Report to the President 2003*, http://www.archives.gov/isoo/reports/2003_annual_report.html; Commission on Protecting and Reducing Government Secrecy, *Report*, 58.

[99] Reporters Committee for Freedom of the Press, "Open Records Audit Shows 50 Percent Compliance," http://www.rcfp.org/news/2004/0610ohioau.html.

for International Social Research, conducted a poll of Cuban citizens to determine the extent of their support for Fidel Castro and their optimism about the future. Of the results, a colleague of Free's later noted that the "study on Cuba showed unequivocally not only that the great majority of Cubans supported Castro, but that any hope of stimulating action against him or exploiting a powerful opposition in connection with the United States invasion of 1961 was completely chimerical, no matter what Cuban exiles said. . . ."[100] Despite Free's report, which was widely known and available to government officials, the United States backed an invasion of Cuba in 1961 in the hope of raising an insurrection against Castro. Later that year, the CIA published a secret report titled "Survey of the Cuban Operation." It was highly self-critical, noting that the agency "failed to collect adequate information on the strengths of the Castro regime and the extent of the opposition to it; and it failed to evaluate the available information correctly." Ironically, many speculated that the Free Report was discounted because it was *not* secret. The follow-up CIA report was not declassified until 1997![101] Our recent history is rife with other examples of policy being made in secret or without pertinent information being passed along to the president of the United States and to other decision-makers.[102] These examples will certainly not be the last if the present system continues.

The secrecy machine is a bloated system that costs taxpayers enormously for its maintenance, with millions of closely guarded secrets reportedly dating back to 1917 and the number of pages estimated to be in the billions. For 2002, NARA's Information Security Oversight Office (ISOO) estimated these costs at $5,688,385,711. Only two years later, the estimate has risen another billion dollars, a figure that does not even include the Central Intelligence Agency, whose budget is classified, and four other agencies who submitted cost figures too late for publication in the ISOO report.[103] Costs continue to rise, even as programs such as the National Historical Publications and Records Commission are imperiled.

The secrecy system is as often misused as it is employed to protect national security or the national interest. In 2004, Republican senator Trent Lott complained that the CIA had wanted to redact approximately half of the Senate's

[100] Moynihan, *Secrecy*, 222–23.

[101] Moynihan, *Secrecy*, 223 n.

[102] Michael Isikoff, "The Dots Never Existed," *Newsweek*, 19 July 2004, 36–38; James Risen, "CIA Didn't Tell Bush of Doubts over Iraq Arms, Officials Say," *Milwaukee Journal Sentinel*, 6 July 2004 (reprinted from the *New York Times*).

[103] Information Security Oversight Office, *Report to the President 2002*, 15, http://www.archives.gov/isoo/reports/2002_annual_report.html; J. William Leonard, "Report on Cost Estimates for Security Classification Activities, July 2004,http://www.archives.gov/isoo/reports/2003_cost_report.html.

Report on the U.S. Intelligence Community's Prewar Assessments on Iraq, and it took months of negotiation to reduce the restrictions to the point where the report was actually readable.[104] The 9/11 Commission fought the same battle, both attempting to see documents needed for its report and in fighting against efforts to classify much of its findings.[105] Of course, in both cases the release of the reports to the public was delayed while negotiations dragged on. Questioned during a Senate hearing in August 2004, Deputy Undersecretary of State Carol A. Haave was asked a question concerning what percentage of classified documents were wrongly classified. Her response: "How about if I say 50-50?"[106]

Secrecy sometimes infringes on the civil rights of individual citizens. In July 2004, a whistleblower lawsuit filed by Sibel Edmonds, a contract linguist for the FBI, was dismissed on grounds that it could not be litigated without compromising sensitive information that had been classified by the FBI. The Aaron Burr case was cited as a precedent for this ruling. This is justice denied–especially when we remember that for the past fifty years, no major study has disputed that far too many records are classified.[107] Writing in 1997, George F. Kennan concluded:

> It is my conviction, based on some 70 years of experience, first as a government official and then in the past 45 years as an historian, that the need by our government for *secret* intelligence about affairs elsewhere in the world has been vastly over-rated. I would say that something upwards of 95% of what we need to know about foreign countries could be very well obtained by the careful and competent study of perfectly legitimate sources of information open and available to us in the rich library and archival holdings of this country.[108]

Secrecy also promotes the idea of conspiracy. How else does one explain the July 2004 story that senior Medicare officials "intentionally withheld data from Congress showing that drug benefits under the [reimbursement] program would probably cost much more than the White House acknowledged?"[109]

[104] "Report of Select Committee on Intelligence," 108th Cong., 2d sess., *Congressional Record* 150 (13 July 2004): S7951–52; Isikoff, "The Dots Never Existed."

[105] Philip Shenon and David E. Sanger, "Bush Aides Block Clinton's Papers from 9/11 Panel," *New York Times*, 2 April 2004; Dan Eggen and Steve Coll, "Final Report from 9/11 Committee Coming This Week," *Washington Post*, 18 July 2004.

[106] FAS Project on Government Secrecy, *Secrecy News*, no. 75, 25 August 2004.

[107] FAS Project on Government Secrecy, *Secrecy News*, no. 62, 7 July 2004. The court ruling can be seen at http://www.fas.org/sgp/jud/edmonds070604.pdf.

[108] Moynihan, *Secrecy*, 227.

[109] "Medicare Officials Kept Data from Congress," *Milwaukee Journal Sentinel*, 7 July 2004; Robert Pear, "Inquiry Confirms Top Medicare Official Threatened Actuary over Cost of Drug Benefits," *New York Times*, 7 July 2004.

As barriers are erected to the release of information in records, people ask why and it is easy to find sinister motives. Why else would access be denied? Richard Gid Powers asserts, "[Joseph] McCarthy would have been nothing without government secrecy. He was able to gain hearing for his fantastic charges only because he could claim that the evidence to support them was kept hidden by the executive branch [of government]."[110] At a seminar in 2004, the director of the Information Security Oversight Office remarked that disclosures on classified information in "newspaper headlines over the past several months . . . feed the perception that the security classification system is used to conceal violations of law."[111] Commenting on the Abu Ghraib prison scandal, he wondered

> "[E]xactly from whom are we keeping the information secret?" In the case of detainee abuse, we are obviously not keeping it secret from the detainees . . . And I assume we do not expect them to sign a nondisclosure agreement upon their release from custody based upon the premise that they had been exposed to classified information when they are subjected to abusive techniques.
>
> And what is gained by classifying such activity?

And some actions in the name of secrecy are just silly. One of the censored portions of a 1994 published history of the CIA's early involvement in Guatemala was a passage from President Dwight Eisenhower's published memoirs.[112]

In the aftermath of the 1971 Pentagon Papers court case, Erwin N. Griswold, solicitor general for President Nixon, admitted

> I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]. Indeed, I have never seen it even suggested that there was such an actual threat . . . I doubt if there is more than a handful of persons who have ever undertaken to examine the Pentagon Papers in any detail—either with respect to national security or with respect to the policies of the country relating to Vietnam.[113]

Griswold further suggested that the reason was to prevent "governmental embarrassment of one sort or another." He concluded that "apart from details of weapons systems, there is very rarely any real risk to current national security

[110] Richard Gid Powers, "Introduction," in Moynihan, *Secrecy*, 27.

[111] J. William Leonard, "The Importance of Basics," Remarks at the National Classification Management Society's Annual Training Seminar, 15 June 2004, 2. Available at www.fas.org/sgp/isoo/leonard061504.pdf.

[112] Moynihan, *Secrecy*, 177.

[113] Moynihan, *Secrecy*, 205.

from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience."[114]

More recently, the *Washington Post* reported the efforts of two reporters to obtain biographical information about Augusto Pinochet, who overthrew the Chilean government in a 1973 coup. The first request resulted in a largely uncensored document, but a later request brought significantly different results. "Both versions describe him as a 'Caucasian' with an 'oval face and a mustache,'" who wore reading glasses and was quiet. But one version had blacked out that he was "mild mannered; very businesslike. Very honest, hard working, dedicated. A devoted, tolerant husband and father; lives very modestly. Drinks scotch and pisco sours; smokes cigarettes; likes parties. Sports interests are fencing, boxing and horseback riding . . . enjoys discussing world military problems."[115]

Wisconsin congressman F. James Sensenbrenner, that champion of the USA PATRIOT Act making it easier for the government to access information about American citizens, has donated to the Wisconsin Historical Society papers related to his service in the Wisconsin Legislature from 1967 to 1978. All of these papers were at least twenty-five years old in 2004 and restricted from all use until the year 2027. When asked whether he might consider releasing some of the material (such as press releases, newsletters, and public statements) for use by students doing National History Day projects, Sensenbrenner declined, saying that "it is appropriate that this restriction remain in place."[116]

Perhaps the most important point to remember is that this program, designed to protect the nation's genuinely confidential records, is driven by an executive order system that is prone to changing the rules of the game every four years or so, and that the culture of secrecy is growing. For example, Executive Order 13233 issued by President George W. Bush on 1 November 2001, made it more difficult to access the records of former presidents by allowing the

[114] Moynihan, *Secrecy*, 206. On 13 June 1971, the *New York Times* began publication of a series of articles concerning a "Top Secret" government study of the decision-making process that guided the United States' increasing involvement in the Vietnam War over the course of four presidential administrations. The report, completed in 1969, had been leaked by a former civilian Defense Department analyst named Daniel Ellsberg who had served in Vietnam. He took this action because he was convinced that the government was not being truthful about the war. The articles, known collectively as *The Pentagon Papers,* created an immediate furor, and the governments sued to have publication of the report suppressed in the name of national security. Ultimately, the court ruled in favor of Ellsberg, the *New York Times,* and the *Washington Post* because there was no law on the books that prohibited the publication of such material. One had been proposed by Woodrow Wilson back in 1917, but it failed on a roll call vote. Supreme Court Justice Hugo Black wrote for the majority, "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for the republic." See also Vietnam Veterans of America, "The Pentagon Papers and Their Continuing Significance," http://www.vva.org/pentagon/history/history.html.

[115] Kamen, "Millions of Secrets."

[116] Timothy L. Ericson, e-mail message to F. James Sensenbrenner, 4 July 2004; Sensenbrenner, letter to Ericson, 22 July 2004. When the papers are scheduled to be released, Sensenbrenner will be eighty-four years old.

incumbent president to continue restrictions on records even if the former president allowed for their release.[117] Less than two years later, Executive Order 13292 tightened several aspects of the 1995 executive order governing classification of information, strengthening the executive branch's authority to restrict access to information from foreign governments by "presuming" that it might "cause damage to the national security" and eliminating the provision from the 1995 executive order that prohibits classification of records when "significant doubt" exists as to whether this should be done. The new executive order also makes it easier for the government to classify information for longer periods of time and easier for departments and agencies to exempt their records from automatic declassification. It permits the executive branch to again classify records that were previously declassified, exempts the records of the Office of the Vice President from automatic declassification review, and eliminates all references to the Information Security Policy Advisory Board that was established to advise on matters related to declassifying records.[118]

We also see the results of the increased use of secrecy regularly in the news. Documents related to the Abu Ghraib prison scandal were initially denied to investigators, and only enormous public indignation and pressure forced their grudging release.[119] In November 2004, the Department of Homeland Security announced that it would force "employees and others to sign legally binding non-disclosure agreements as a condition of access to certain categories of *unclassified* information [emphasis added].[120] Our growing and ever-changing system of secrecy is simply overused and it is wasteful of time and resources. Ultimately, it is also insecure because people do not take it seriously.

The federal system of classifying information may have blazed the trail, but state and local governments have followed close behind. They might not have a convenient classification system to justify their actions, but they find other ways. Secrecy is an *idea*. It is a *mindset* that people adopt as a method of doing business. It becomes an attitude. As secrecy permeates governmental actions at the federal

[117] Executive Order 13233, "Further Implementation of the Presidential Records Act," http://www.fas.org/sgp/ news/2001/11/eo-pra.html.

[118] Executive Order 13292, "Further Amendment to Executive Order 12958, as Amended, Classified National Security Information," http://www.fas.org/sgp/bush/eoamend.html; Public Citizen, "Analysis of Executive Order 13292," http://www.bushsecrecy.org.

[119] Shannon McCaffrey, "Ashcroft Won't Turn Over Memos on Torture," *Milwaukee Journal Sentinel*, 9 June 2004; Kelley, "Early Complaints of Abu Ghraib Abuse Went Nowhere;" Judy Keen, "White House Responds to Critics with Policy Disclosure," *USA Today*, 23 June 2004; Mike Allen and Susan Schmidt, "Memo on Interrogation Tactics is Disavowed," *Washington Post*, 24 June 2004; Toni Locy and John Diamond, "Memo Lists Acceptable 'Aggressive' Interrogation Methods," *USA Today*, 28 June 2004.

[120] FAS Project on Government Secrecy, *Secrecy News*, no. 98, 8 November 2004. Additional background on this issue is available in United States House of Representatives Committee on Governmental Reform–Minority Staff, Special Investigations Division, *Secrecy in the Bush Administration*, 14 September 2004, 53–55. The report, prepared for Rep. Henry A. Waxman, is available at http://www.fas.org/sgp/library/waxman.pdf.

level, officials at other levels of government are emboldened. The tiny rural township of St. Germaine in northern Wisconsin is far removed from the corridors of power in Washington and little concerned with national security and terrorism, but secrecy is employed here as well. A zoning and appeals board was asked to grant a zoning variance for constructing a residence closer to the road than the code allowed. The board consulted the township attorney for advice. The attorney wrote a letter and board members read it silently at a public meeting after which they voted on the variance without one word of public discussion that might explain why they were taking the action. When asked about the reasons for its decision, the board claimed attorney-client privilege. Thus the township residents who elected the town board and who paid the lawyer for the advice had no right to know what advice was given or whether it was even followed in making the decision. An open records request was appealed all the way to the Wisconsin Supreme Court where a three to three deadlock struck another small blow for secrecy in government.[121]

Conclusion

Nothing has been able to slow the growth of secrecy in government. Many suspect it serves the interests of politics, malfeasance, misdeeds, and potential embarrassment more than our national security. The 1995 *Advisory Committee on Human Radiation Experiments* revealed a long pattern of classifying information, including that "hundreds of intentional releases [of radiation into the environment] took place in secret, and remained secret for decades," not because of national security interests, but because of public relations considerations and possible liability. The report cited the following concerns voiced by researchers at Oak Ridge in 1947:

> Papers referring to levels of soil and water contamination surrounding Atomic Energy Commission installations, idle speculation on future genetic effects of radiation and papers dealing with potential process hazards to employees are definitely prejudicial to the best interests of the government. Every such release is reflected in an increase in insurance claims, increased difficulty in labor relations and adverse public sentiment.[122]

In many respects, the situation seems to be getting worse rather than better. As Oregon senator Ron Wyden described it in July 2004, "[F]ederal, state, and local governments are shutting down access to public records in what some experts say is the most expansive assault on open government in the nation's

[121] Don Behm, "State Supreme Court Splits on Public Records Case," *Milwaukee Journal Sentinel*, 23 June 2004.

[122] Advisory Committee on Human Radiation Experiments, *Final Report*, "Executive Summary" and chap. 13, "The Practice of Secrecy," available at: http://www.eh.doe.gov/ohre/roadmap/achre/report.html.

history."[123] A state lawmaker complained, "Our public records law is suffering a death by a thousand paper cuts."[124]

The situation has resulted, in part, because of the casual attitude Americans have taken with regard to the growing trend toward secrecy—but also because of the lackadaisical attitude that the archival profession has taken. Collectively we have acquiesced uncritically to those who call for patriotism, national security, loyalty, terrorism—whatever the word. Archivists should be acquiescent no more! We should instead begin to be aggressive as professionals and as citizens to fight this unprecedented tilt toward secrecy.

We need to act in concert with one another, as members of professional associations—not just SAA, but the other national, regional, and local associations to which most of us also belong. We need to act as individual archivists who encounter or read about access to public records threatened or denied. Archival educators need to instill in our students an ethic of activism that will start them thinking in proactive terms.

As a first step, we need to begin educating ourselves. Individual archivists can ensure that we include sessions in our professional association meetings and articles in our journals and newsletters that will help to keep us abreast of the latest developments in the culture of secrecy.

Individual archivists also can become better acquainted with the resources of organizations that share our interest in access to public records and that have extensive and up-to-date information on government secrecy on their Web sites. They would doubtless welcome new allies in the battle against secrecy. Some of these include the American Civil Liberties Union, the National Archives Information Security Oversight Office, the National Security Archive, OMB Watch, Public Citizen, Reporters Committee for Freedom of the Press, and the Federation of American Scientists.[125]

The second step is for archival organizations to establish more formal working relationships with these allies who share our concern for democratic values and our rights as citizens to hold government officials accountable for their actions and decisions through access to records.

The third step is to begin taking action as individual archivists wherever we live and work. Archivists have much to offer in this effort. We deal with records issues every day. We are accustomed to making decisions regarding access and

[123] Senator Ron Wyden, testimony to introduce legislation to establish an independent National Security Classification Board, 108th Cong., 2d sess., *Congressional Record* 150 (15 July 2004): S8234–S8237. Wyden was quoting from an article in the *Atlanta Journal-Constitution.*

[124] Dunkelberger, "More Records Now Kept Secret."

[125] American Civil Liberties Union, http://www.aclu.org/safeandfree/; Information Security Oversight Office, http://www.archives.gov/isoo/; National Security Archive, http://www.gwu.edu/~nsarchiv/; OMB Watch, http://www.ombwatch.org/; Public Citizen, http://www.citizen.org/; Reporters Committee for Freedom of the Press, http://www.rcfp.org/; and the Federation of American Scientists, http://www.fas.org/main/home.jsp.

balancing privacy against the right to know. We have a good sense of what constitutes a reasonable restriction. We know the problems, administrative, political, and otherwise, that can result when records are restricted without reason. So why do we sit back watching idly as government officials work to further restrict access to records—records whose restrictions many of us will eventually be obligated to enforce? We have been promoting access with donors of manuscript collections for decades. We have declared it our duty to do so. Why not take it one step further and become more active with administrators and public officials? We need to become advocates for open records and speak out against abuses.

The fourth step is to make activism a priority and position ourselves as a profession that really is interested in and knowledgeable about issues such as access to government records and their value to maintaining our civil liberties. Unfortunately, this interest frequently lies dormant until a threat appears; and once it does, people do not associate archivists with those who are knowledgeable in this area and who can be of help. We need to change that. We need to stop being content with the occasional "soft news" feature that highlights how we document America's heritage. We need to move to page one and the editorial page where people read about hard news and current issues. Sometimes it is surprisingly easy to do. Early in 2004, there was a series of articles concerning a controversy between a local newspaper and a county board over access to e-mail records. It made for great classroom discussion, so I wrote a personal e-mail to the reporter to encourage and thank him for pursuing this story. Shortly thereafter, I received an e-mail from the reporter's editor asking if I would be willing to revise my letter and have it published in the next Sunday edition. It was published the next week. A few days later, I received a telephone call from the local public radio station asking if I would be willing to do a half-hour program on the subject of access to public records in electronic form. I agreed and also brought two graduate students along to give them some "real-life" experience. A few days later, I received a telephone call from a reporter at the university's news services division who had heard the radio broadcast. She asked whether I would do an interview for a feature article on the subject of citizen access to public records. It hasn't turned the tide on government secrecy yet, but it's a start. People are interested in these issues—we need to take advantage of that fact and use it to spread our message and weigh in on the side of access to public records.

In closing, what we must do is well stated in another part of Churchill's "Iron Curtain" speech, but less well known. He concluded by observing, "What is needed is a settlement, and the longer this is delayed, the more difficult it will be and the greater our dangers will become." I agree. The same is true today. So the next time you read the newspaper and see an article on some new effort to shroud the workings of our government, look for a chance to strike a small blow against secrecy. Write a letter to the editor.