The Century Foundation

The AGENDA

Reinventing Transparent Government

By Patrick Radden Keefe

Introduction

"I'll be dead before the true history of the Bush administration is written."

—President George W. Bush, January 2, 2008[1]

I. The Problem

The first years of the twenty-first century appeared to set the stage for an era of more perfect information. Stunning technological innovations, from Google to Wikipedia, and the ever-expanding technical capacity to aggregate, store, and distribute huge volumes of information, meant that any American citizen with an Internet connection could access a wealth of data—from movie showtimes to consumer reports to the blogs of U.S. soldiers stationed abroad. The farthest ends of the earth were suddenly a mere mouse click away, and for the U.S. government, these new technologies might have represented an opportunity to create a level of transparency—in which taxpayers could truly apprehend the decisions and expenditures that are being made in their name—like none the country had seen before. "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both," James Madison observed, in 1822. The advent of the Internet, and sophisticated search engines, should have represented an efficient means of making available precisely the types of vital popular information that Madison had in mind.

But in a lamentable irony, this historic democratization of information coincided with the presidency of George W. Bush, an administration bent not on empowering citizens to learn about their government—but on preventing them from doing so. Whereas the default question at the heart of both the American way of government and the Internet revolution was, "Why shouldn't citizens have access to information?" the consistent retort of the Bush administration has been, "Why should they?"

The past seven years have witnessed a dramatic increase in the amount of secrecy across the federal government. Classification policy, which is determined by executive order,

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has grown out of control, with the number of combined classifications growing from 14.2 million classification actions in 2005 to 20.5 million in 2006 (or some 56,000 each day). This devotion to secrecy does not come cheap. The financial costs of protecting classified information grew to a record high of $9.5 billion in 2006.[2] In fact, as of 2006, the United States spends $185 to create and secure secrets for every $1 it spends on declassification.[3]

The staggering financial cost of all this secrecy, and the costs in liberty exacted by denying citizens access to information, could be justifiable if the huge swaths of government activity that are being classified needed to remain secret for national security reasons, but there is almost universal agreement that this is not in fact the case. According to William J. Leonard, former director of the Information Security Oversight Office (ISOO), in the National Archives, "We spend billions of dollars every year to classify information which . . . should never have been classified in the first place." Lee Hamilton, vice-chair of the 9/11 Commission, estimates that 70 percent of the classified material he saw in the course of that inquiry was "needlessly classified." Former CIA director and current secretary of defense Robert Gates has said, "We over-classify badly."[4]

Table 1. Recent Classification Activity

Fiscal Year	Original Classification Decisions*	Number of Pages Declassified
1995	167,840	69,000,000
1996	105,163	196,058,274
1997	158,733	204,050,369
1998	137,005	193,155,807
1999	169,735	126,809,769
2000	220,926	75,000,000
2001	260,678	100,104,990
2002	217,288	44,365,711
2003	234,052	43,093,233
2004	351,150	28,413,690

Source: "Secrecy Report Card 2007: Indicators of Secrecy in the Federal Government," OpenTheGovernment.org, 2007.

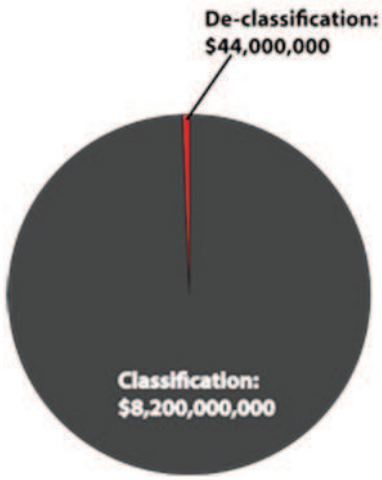
The Bush administration has issued executive orders limiting the Freedom of Information Act. It has created a whole new category of "sensitive but unclassified" records, which not only prevents information from being shared with the citizenry, but often prevents it from being distributed efficiently between agencies and offices of the federal government. President Bush signed an executive order limiting future access to presidential records, and thus undermining the Presidential Records Act of 1978.[5] Scores of White House officials, including senior adviser Karl Rove and chief of staff Andrew Card, violated the letter of that act by using Republican National Committee e-mail accounts for official business. (Many of those e-mails were subsequently destroyed.)[6] The administration has made unprecedented

use of the "state secrets" doctrine to get legal challenges to administration activity thrown out of the courts.[7] The White House has grown so devoted to secrecy that, when the Information Security Oversight Office, which serves as a federal watchdog on secrecy policy, inquired recently about how many secrets Vice President Cheney had made, his office refused to furnish the information, claiming it did not have to, because the vice president was not a part of the executive branch. For good measure, the vice president then tried to have the Information Security Oversight Office abolished, for having the temerity to make the request.[8]

One traditional rationale for government secrecy, which has often been invoked to defend the government-wide ratcheting up of secrecy policy in the wake of the terrorist attacks of September 11, is that secrecy is necessary for national security; that the government should limit public access to a range of sensitive information, lest it fall into enemy hands. While the problem of over-classification is hardly new, and the Clinton administration was also responsible for a notable up-tick in executive secrecy, the Bush administration has turned secrecy into a kind of default setting, refusing to disclose a broad array of information, and referring, in a manner which seems more cynical with every passing year, to the attacks of September 11 and the ongoing specter of terrorism as a catch-all justification. To be sure, in many instances, the instinct to shield information in this manner is undoubtedly prudent; in a hostile world, and perhaps especially in an age when information from American newspapers or government agencies can be accessed remotely, from any Internet café in a foreign country, some measure of official secrecy is a necessary prerogative of the executive branch. But this rationale has grown increasingly stale and unpersuasive in recent years. Classification has become uncoupled from any consideration of the sensitivity of the information that is being classified, and morphed instead into a kind of bureaucratic reflex. Moreover, in cases ranging from the warrantless wiretapping of American citizens to the use of torture and coercive interrogation, secrecy has been used to paper over corruption, bureaucratic bungling, mismanagement, and actual violations of the law.

"Everybody knows that corruption thrives in secret places," President Woodrow Wilson remarked in 1913. More importantly, perhaps, incompetence does as well. In an important upending of the timeworn correlation of secrecy and security, many observers who have assessed official decision-making leading up to the attacks of September 11 and the invasion of Iraq have noted that too much secrecy can actually be dangerous for national security. Secrecy prevents cooperation and information-sharing between government offices and agencies. It is too often employed for competitive advantage by rival elements of the federal bureaucracy. What's more, secrecy is a reliable abettor of ill-considered policy decisions. The original decision to invade Iraq in 2003 and much of the planning for that invasion were orchestrated by a small number of policymakers in an atmosphere of heightened secrecy. Perhaps the chief virtue of a transparent decision-making process is that truly bad decisions have trouble surviving the kind of rigorous scrutiny it entails. "Secrecy stifles oversight, accountability, and information sharing," the 9/11 Commission concluded. "All the current organizational incentives encourage over-classification. This balance should change."[9]

Figure 1. Amount Spent on Classification and Declassification



Source: "Secrecy Report Card 2007: Indicators of Secrecy in the Federal Government," OpenTheGovernment.org, 2007.

Perhaps the gravest danger of secrecy, however, is that it leads, inexorably, to a loss of faith in government. From one crisis to the next, the current administration has been afraid to show its hand to the American people, and that reluctance has led to charges from both sides of the political spectrum that the executive branch is insulating itself from scrutiny, abrogating power by undermining the important checks exercised by the legislative and judiciary branches, and, ultimately, masking its own incompetence. A great deal of analysis from both liberal and conservative commentators has focused on the current administration's apparent aspiration to an "imperial presidency"—a unitary executive that need not answer to the legislative or judiciary branches, nor adhere to the constraints laid down in statutes, international treaties to which the United States is a party, or even the U.S. Constitution. Less seldom remarked is the fact that each manifestation of this audacious agenda has taken place, at least initially, behind the veil of secrecy. "[T]he secrecy system," Arthur Schlesinger, Jr., remarked as far back as 1987, is the "indispensable ally and instrument of the Imperial Presidency." If the current administration has succeeded in its promotion of the idea of unchecked executive power, it has done so through the promiscuous use of classification and official secrecy.

II. A Return to Transparency and Accountability

Whichever candidate, Democrat or Republican, wins the election and assumes the presidency in 2009, he will want to signal a departure from the precedent established over the past seven years. A broad effort to scale back official secrecy across the offices and agencies of the federal government will represent a return to accountability, transparency, and the notion that our democratically elected officials operate a government that is for the people, by the people, and of the people. As a symbolic gesture, an inaugural pledge to restore integrity to the American way of government by striving for a greater degree of transparency would serve the vital purpose of assuring the American people that the next administration will truly turn the page on a period of rampant official hubris and incompetence, and not just offer more of the same. It would also serve as a wake-up call to the federal workforce—an announcement that where graft, corruption, illegality, and basic mismanagement are concerned, there is no longer any place to hide.

But as crucial as such rhetoric is in signifying a clean break from the Bush years, it is not enough. Because this issue reverberates throughout the federal government, a real commitment to transparency and accountability will entail not just a change in the general posture of the government, but many more precise policy changes at the agency level, as well. This brief proposes five concrete changes that the next president can make that will roll back official secrecy, embrace transparency, and signal a new era of broad-based confidence in—and engagement with—the United States government. This is by no means an exhaustive list, but could represent a critical opening volley.

III. Recommendations

1. Create a National Declassification Center and Database

On January 1, 2007, some seven hundred million pages of secret documents were declassified, pursuant to a 1995 executive order by President Bill Clinton, which mandated that any government files more than twenty-five years old should be automatically declassified, unless they were exempted for national security or other specific reasons. This was a laudable initiative, and one supported by George W. Bush. But in reality only a fraction of the material in question has become available to the public. Much of it remains in the files of the National Archives and the FBI, awaiting further processing.[10] Because classified information is scattered throughout the federal government, there is no central, searchable repository where members of the public and the press can access material once it is declassified—or even be alerted to the fact of declassification.

Declassification of material that no longer needs to be classified (or should never have been classified in the first place) is a good thing. But it is only half the solution. If the declassification of historically significant documents goes unannounced, and the location of the documents in question remains obscure, then the fact that these materials are theoretically available will be of little consequence to researchers.

In order to harmonize the often fragmented declassification process, and create a central record of material that has been declassified, the next president should create a National Declassification Center within the National Archives and Records Administration. This new center would coordinate with various government agencies in their efforts to declassify material that becomes automatically declassified due to age, or is deemed to have been classified unnecessarily. In so doing it would rationalize what is currently an ad hoc process, establishing guidelines for the review of material, and procedures for reporting what material of potential historical interest has been declassified. The center would establish a National Declassification Database, listing all newly available material and the location where it can be retrieved by the public and the press.

As it happens, this sort of centralized mechanism has a long pedigree. A 1995 Executive Order by President Bill Clinton calls for "a Government-wide database of information that has been declassified."[11] (The order was amended by President Bush in 2003.)[12] The Commission on Protecting and Reducing Government Secrecy, chaired by Senator Daniel Patrick Moynihan, also called for the creation of a National Declassification Center, in 1997.[13] More recently, Steven Aftergood, of the Project on Government Secrecy at the Federation of American Scientists, has called for the creation of a national declassification database.[14] And in a 2007 report to the president, the Public Interest

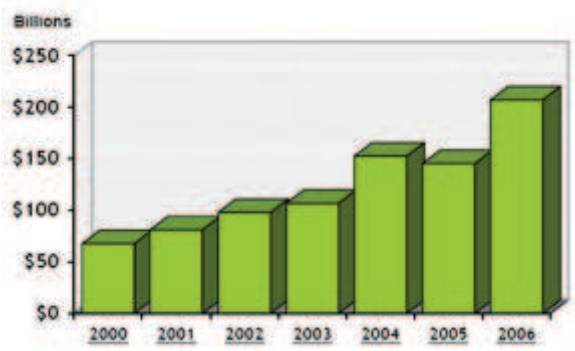
Declassification Board endorsed the creation of a National Declassification Center, and suggested that, "All departments and agencies should be required to record declassification decisions on a single computerized system, regardless of the avenue by which declassification occurs, and within five years to make databases available to the public."[15]

The National Declassification Center and National Declassification Database truly represent an idea whose time has come. The next president should heed the advice of these various experts and advisory panels and see that these proposals become a reality.

2. Establish Transparency and Oversight in Government Budgets and Contracts

Secrecy has had an especially pernicious effect on the integrity of federal spending. The shroud of secrecy surrounding appropriations for intelligence and defense contracts is so complete that until last year even the top-line, aggregate annual budget of the intelligence community was highly classified. (The number was finally revealed in 2007, over the fierce resistance of the White House.)[16] Where there is no transparency, there is no accountability, and recent years have witnessed a rise in the number of no-bid contracts to favored intelligence and defense industry providers, and the unrestrained use of "earmarks" by lawmakers who spend federal money to curry favor in their personal constituencies. Classified acquisition funding has more than doubled in real terms since fiscal year 1995, and the extent of the so-called "black budget" allows not just for the kinds of conflicts of interest characterized by earmarks, but for no-bid contracts to suppliers who may not always be the best, lowest cost, or most efficient company for the job.[17] A report by the House Committee on Oversight and Government Reform found that in 2006, the federal government spent some $200 billion, or roughly half of its procurement budget, on contracts that lacked "full and open competition"—a 43 percent increase from 2005 (see Figure 4). About half of that amount, $103 billion, was spent on no-bid contracts, which have no competition at all. Noncompetitive contracts are a recipe for careless or corrupt government spending. The House report identified 187 contracts that were "plagued by waste, fraud, abuse, or mismanagement." These contracts alone amounted to $1.1 trillion.[18]

Figure 2. Non-competitive Contract Spending Has Increased



Source: U.S, House of Representatives, Committee on Oversight and Government Reform, Majority Staff, "More Dollars, Less Sense: Worsening Contracting Trends Under the Bush Administration," June 2007, available online at http://oversight.house.gov/features/moredollars/moredollars.pdf.

There are already encouraging signs of improvement in this area. Pursuant to the Federal Funding Accountability and Transparency Act of 2006, the White House Budget Office recently launched USASpending.gov, a Web site that allows taxpayers to track the allocation of their tax dollars, and trace which legislators, contractors, and regions benefit the most. This initiative should be a model of the new transparency. It represents a novel partnership between the government and a private watchdog group, OMBWatch, and it harnesses new technology to make critical information available to the public.[19]

The next president should continue to support this and other centralized disclosure mechanisms, and should take legislators to task for discretionary, pork-barrel spending. Certainly some proportion of the defense and intelligence budgets must remain highly classified, but the next administration must undertake a rigorous assessment of what precisely that proportion should be. Even in the case of highly classified contracts, a mechanism should be established whereby contracts that far exceed their initial cost projections, or fail to meet a set number of interim deadlines, trigger close scrutiny by legislators with the appropriate security clearance, such as the intelligence or armed services committees, in order to forestall runaway projects that cost taxpayers billions without delivering results. It may be that for security reasons the public at large is unable to review every contract, but members of Congress must be empowered to act as proxies for the public, and insure that big ticket public spending can withstand oversight and scrutiny.

3. Clarify a Uniform Set of Definitions for Sensitive but Unclassified Information

Even prior to September 11, federal officials were able to shield from the public certain information that did not fit the criteria for classification, by deeming that information "Sensitive but Unclassified."[20] But in the years since 2001, the Bush administration has dramatically increased the use of this sort of special designation to shield vast amounts of information from disclosure. The problem is that whereas the classification system, for all its faults, establishes a series of criteria for determining whether an item should be classified, what the level of classification should be, and who is in a position to classify or declassify that information, the more amorphous categories of Sensitive but Unclassified, For Official Use, and other designations do not. Whereas classification is at least nominally overseen by the Information Security Oversight Office at the National Archives, no similar oversight exists for these other categories of sensitive information. Because of their ambiguity with respect to information security procedures, documents that are Sensitive but Unclassified may actually be more difficult to obtain through the Freedom of Information Act than documents that have been classified and then declassified.

And it is not merely the public that finds its access to this new category of information frustrated. There is no uniformity across government agencies to the designation of this type of information. In fact, in 2006 the Government Accountability Office identified fifty-six different designations for Sensitive but Unclassified information that were in use by different parts of the government.[21] A more recent study found that some 81 percent of these designations are based not on any harmonized central standard, but on the internal policy of the department or agency in question, which is to say, "made up by the agencies as they go along."[22] This ad hoc, informal substitute for classification represents the worst type of secrecy trend: rather than centralized, it is decentralized;

and it shuts out not only the public, but makes it difficult for different offices and agencies within Washington to share information.

The next president should immediately seek to curb the future use of designations such as Sensitive but Unclassified. To the extent that they will continue, the president should seek to introduce a standardized set of designations, and determine who can declare information sensitive, how long that determination lasts, and how this process can be overseen.

4. Reinvigorate the Freedom of Information Act

One of the key instruments through which citizens are able to obtain information from the government is the Freedom of Information Act (FOIA). The legislation, signed by President Lyndon Johnson in 1966, epitomizes a healthy balance between the people and their government in a democratic system: individuals may approach the government and request any type of information, for any reason they so choose, and unless the government finds that the information in question falls into one of a series of stated exemptions, it is obliged to accommodate the request.

But in recent years the FOIA has come to represent a somewhat hollow entitlement. Almost from the outset, the Bush administration opted to have agencies view exemptions broadly.[23] An October 2001 memorandum by Attorney General John Aschroft encouraged all executive branch agencies to examine carefully any possible exemption that might enable them to reject FOIA requests; the memo essentially shifted the presumption from one of disclosure to one of secrecy.[24] A subsequent memo by White House Chief of Staff Andrew Card encouraged agencies to construe FOIA exemptions in such a way that they could withhold Sensitive but Unclassified information.[25]

This new effort to construe more narrowly the entitlements that FOIA gives to citizens was matched by an endemic lack of investment in the FOIA process. In practice, the FOIA system is characterized by serious delays. A recent study by the National Security Archive found that backlogs were nearly universal across government agencies. Twelve agencies had requests that have been pending for over a decade.[26] According to another study, over the past nine years, the number of FOIA requests processed has fallen 20 percent; the number of FOIA personnel is down 10 percent; the backlog of unfilled requests has tripled; and the costs of handling each FOIA request are up 79 percent. Two out of every five requests filed in 2006 were not processed that year.[27]

In a promising development, President Bush recently signed into law the OPEN Government Act of 2007, which aims to reform the FOIA process, by introducing better means of tracking requests, and by penalizing agencies for delays. The next president should continue the good work initiated by this legislation and reinvigorate the Freedom of Information Act, returning the executive branch's presumption vis-à-vis these requests to one not of secrecy, but of openness.

5. Rein in the Use of the State Secrets Doctrine

Perhaps the most pernicious tactic adopted by the Bush administration to stifle any efforts to challenge the conduct of the United States government has been the frequent use of the State Secrets Doctrine in American courts. First recognized by the Supreme Court in 1953, the doctrine allows the government to prevent the introduction in court of evidence that might jeopardize national security

if it were released. As numerous legal challenges have raised questions about the manner in which the administration conducts the War on Terror, from warrantless wiretapping to extraordinary rendition, the government's invocations of the State Secrets Doctrine have become more and more frequent. Whereas the doctrine was invoked some sixty-five times between 1953 and 2000, it has been invoked some thirty-nine times in the eight years since.

Table 2. Use of the State Secrets Privilege

(Years are inclusive)	1953-1976	1977-2000	2001-7/2007
Times Invoked in Reported Cases	6	59	39
Period (in years)	24	24	6.5
Yearly Invocations (avg.)	0.25	2.46	6

Source: "Secrecy Report Card 2007: Indicators of Secrecy in the Federal Government," OpenTheGovernment.org, 2007. The data are drawn from a study by Professors William Weaver and Robert Pollito of the University of Texas, El Paso.

Moreover, the privilege is no longer used simply to remove particular pieces of evidence or information from a case, but actually to euthanize legal challenges before they even begin, because the "very subject matter" of the cases is considered secret. This widespread and unchecked use of the doctrine by the Department of Justice has amounted to a get-out-of-jail-free card for the administration, and another means of preventing rigorous oversight and investigation of the legality of government activity. However illegal the behavior in question may or may not have been, the administration has been obliged merely to produce an official declaration suggesting that the issue impinges on national security secrets in order to indefinitely forestall any judicial determination of the legality, and constitutionality, of the conduct alleged. In many cases, in fact, a judge does not even examine the evidence in question in order to evaluate the government's claims about its sensitivity. Instead, judges take the executive branch at its word. If that seems like a sound decision on the part of the judiciary, it is worth considering that in United States v. Reynolds, the 1953 case in which the State Secrets Doctrine was recognized by the Supreme Court, the government actually lied about the supposed national security sensitivity of the evidence in question; in fact, the government lawyers were simply trying to cover up negligence by the United States.

Senator Ted Kennedy and Senator Arlen Specter recently have introduced legislation that would require judicial review of the underlying evidence in state secrets cases. This is a timely and critical piece of legislation, with solid bipartisan backing. It is unlikely that President Bush will sign anything of this sort into law before the end of his term, but the next president should make it a priority to see that this bill is passed and signed. Doing so would ensure that the United States government is once again subject to the crucial check represented by the peoples' ability to bring challenges to government activity in America's courts, and that the courts are once again able to issue definitive determinations on the legality of administration tactics, even in matters as exigent and sensitive as the War on Terror.

VI. Conclusion

These five measures will not, by themselves, be enough to reverse the great tide of secrecy that has characterized the past eight years of American government, but they represent an important—and achievable—first step. While some institutional resistance to change is inevitable, each of these

reforms would enjoy broad support, and set a new tone of responsibility and accountability throughout the federal government. They also would galvanize the federal workforce, the press, and the population at large, capitalizing on the widespread hunger for a new era of change, and a cleaner, nobler form of politics. After all, it is not so much for the American people to ask that their country not be governed through secret maneuvers and backroom deals. Transparency, and the accountability that comes with it, are at the heart of the great democratic experiment that is the United States. It is what the people want; and it is what they deserve.

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