To: Interested Persons
From: Mike German, Policy Counsel, American Civil Liberties Union
Date: April 15, 2010
Re: ISOO Report for Fiscal Year 2009 and Derivative Classification
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I. Introduction

The National Archives and Records Administration's Information Security Oversight Office (ISOO) released its annual report on the government's security classification programs today, revealing useful statistics about how much information the government hid from public view for national security reasons in 2009.[1] The American Civil Liberties Union offers this memo to highlight the importance of this new data and to call for more significant reform of a bloated secrecy regime that kills public accountability and cripples our constitutional system of checks and balances.

Typically ISOO's annual reports are useful in determining whether the government is classifying more or less information than in previous years.   For 2009, however, ISOO changed the way it counts classified electronic records – making comparisons to previous years impossible but providing a clearer picture of the amount of classified information the government actually produces. The result is startling. Under the new counting system, ISOO determined the government made over 54 million classification decisions in 2009, which is well more than double the previous record 23 million decisions ISOO reported for 2008.[2] Because ISOO changed its methodology it is impossible to know whether this number reflects an actual increase in classification decisions over the previous year. Nevertheless, ISOO's new report is important because it highlights the growing problem of derivative classification; information that is deemed secret not by high ranking officials specially trained in classification policy, but by unaccountable and often untrained government employees and contractors. We hope will spark greater public discussion about who is actually deciding what information will be hidden from public view.

II. The Good News

The good news in the ISOO report is that the number of original classification decisions is down considerably, continuing a trend that started in 2005. Original classification decisions are the initial determinations made by original classification authorities (OCA) who are specifically designated by the President or agency heads and trained to judge what information absolutely must be safeguarded to protect national security. Only 183,224 original classification decisions were made in 2009, and a record number of those (67%) assigned declassification dates of ten

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[1] Information Security Oversight Office Report to the President for Fiscal Year 2009, (Mar. 31, 2010) (*hereinafter* ISOO Report 2009).
[2] *See*, ISOO Report 2009, at 9; and Information Security Oversight Office Report to the President for Fiscal Year 2008, at 7, (Jan. 12, 2009) (*hereinafter* ISOO Report 2008).

years or less, which is on the shorter end of the spectrum of possibilities.[3] One might think that this downward pressure on original classification decisions, combined with choosing to classify information for shorter periods of time, would lead to shrinking amounts of classified information, but overall classification has gone up precipitously, even before ISOO's counting methodology changed. The problem lies not with original classifications, but rather with the unregulated growth of derivative classifications.

II. The Problem of Derivative Classification

The vast majority of classification decisions, 99.66% of them in 2009, are made by government employees and contractors who may have had little or no training in classification policy, yet have the authority to wield classification stamps with little oversight and virtually no accountability. Derivative classification, the ISOO report explains, is "the act of incorporating, paraphrasing, restating, or generating in new form information that is already classified and, therefore, not considered new 'secrets.'"[4] For example, when a CIA analyst writes a report that includes information from another document that is already marked secret, or which references a program or operation that an OCA has declared classified, the CIA analyst will "derivatively" mark the new document at the same classification level as the source material. ISOO suggests that derivative classification, therefore, creates no "new secrets." In theory that might be true, but in practice when derivative classifiers are creating 99.66% of the classified information the government produces each a year they are most certainly creating many "new secrets."

The problem of derivative classification was highlighted in a 1997 study of government secrecy conducted by the Commission on Protecting and Reducing Government Secrecy, better known as the Moynihan Commission after its chairman, Senator Daniel Patrick Moynihan. The study revealed the then-startling fact that only 6% of classification actions were taken by trained OCA.[5] The Moynihan Commission reported that any of the over 3 million security clearance holders in government and private industry, ranging from entry-level soldiers to government contractors to political appointees, could derivatively classify information.

> Many of the individuals who classify derivatively remain unfamiliar with the proper procedures and even are unaware that it is something in which they are engaged, raising fundamental questions about the accountability, oversight, and training of those making the majority of all classification actions. When there is little chance anyone will be able to determine the source of a classification action and hold the classifier accountable for it, the derivative classifier has little reason to think seriously about whether classification is really justified.[6]

A 2003 FBI memorandum obtained by the New York Civil Liberties Union pursuant to a Freedom of Information Act request offers an example of faulty and confusing instructions given to government employees or contractors who derivatively classify information. The

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[3] ISOO Report 2009, at 3.
[4] ISOO Report 2009, at 7.
[5] Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2, at 30 (1997) [hereinafter Moynihan Commission Report], *available at* http://www.fas.org/sgp/library/moynihan/index.html.
[6] Id., at 31.

memorandum, from the FBI's Counterterrorism Division to all bureau field offices, pertains to a national security investigation that required interviews of thousands people across the country in a relatively short period of time. Many FBI agents work primarily on criminal matters, as opposed to national security investigations, and have little experience with classified documents. No doubt as a result, there appeared to be some confusion regarding how FBI headquarters (FBIHQ) expected field agents to mark their reports of the interviews, known as FD-302s. The memo clearly set forth the problem it was attempting to address:

> It is important that documents are not unnecessarily classified when they do not contain information of a classified nature. The FBI was criticized after "Desert Storm" for classifying interviews and other documents that did not contain classified material. This required the needless expenditure of resources to declassify said documents.

But the directions it provided the agents for marking unclassified interview reports could only lead to befuddlement:

> Some field offices have contacted FBIHQ and voiced confusion over this guidance. The confusion involves referring to FD-302s with a classified case number as an "unclassified 302" or referring to the subfile containing the classified 302s as an unclassified subfile. It was not the intension [sic] of FBIHQ to suggest that the FD-302 would not be "classified" or that the subfile containing classified documents is "unclassified." Due to the classified file number on the FD-302, it would be a "classified document", however, the body of the FD-302 can and should contain unclassified information, thus the FD-302 was being referred to as the "unclassified FD-302". More appropriately, the FD-302 should have been referred to as the "classified FD-302 with the unclassified body". To ensure that FD-302's are handled properly, the following additional guidance is provided: the FD-302 should be classified appropriately ("secret" due to the 199E field number) as well as have the following caveat: "All information contained herein is unclassified except where shown otherwise." This renders the information unclassified, but the file number renders the document itself classified.

The core of this guidance, which was undoubtedly as confusing to field agents as to anyone else, is that agents should mark their interview memos as "secret" but note that the information within it was unclassified. It is hard to imagine how this would resolve criticism that the FBI was improperly classifying interviews that did not contain classified information. Such poor advice, combined with the serious penalties associated with unauthorized releases of national security secrets, tends to make government employees and contractors err on the side of caution and mark every potentially classifiable document at the highest level of safeguarding, which is what drives the explosion of over-classification.

Indeed, confusion seems to be the norm for classified information. Document reviews conducted by ISOO discovered errors in 65% of the documents examined, with several agencies posting

error rates of more than 90%.[7] Errors which put the appropriateness of the classification in doubt were seen in 35% of the documents ISOO reviewed in 2009, up from 25% in 2008.[8] Assuming ISOO reviewed a statistically significant sample, it's likely that over 19 million classification decisions made in 2009 were unjustified. Safeguarding this unnecessarily classified information simply wastes public resources.

Fortunately, an Executive Order President Barak Obama issued in December 2009 implemented many of the Moynihan Commission recommendations for addressing the problems associated with derivative classification.[9] For the first time the E.O. requires that derivative classifiers identify themselves by name and position, or personal identifier, on each document they classify, and list the source materials justifying classification.[10] It also requires that derivative classifiers use classified addenda whenever classified information constitutes only a small portion of an otherwise unclassified document and mandates they receive training every two years or face suspension of their authority to mark documents.[11] These are all positive measures that will bring needed accountability over derivative classification.

III. New Data Raises New Questions

Unfortunately, however, the problems identified in the ISOO report are so large that more drastic measures are required to bring government secrecy under control. In particular, new data released in the 2009 ISOO report, which had not been included in other recent reports, raises questions about whether the reduction in original classification decisions has any bearing at all on reducing overall classification and whether the government's classification system is simply in an irretrievable state of disarray.

A department-by-department breakdown of original classification activity in 2009 reveals that the number of *original* classification decisions made at a particular agency appears to bear little relationship to its *total* classification activity. The Department of the Army, for example led every other agency by far, with 75,080 original classification decisions. Original classification decisions at the Department of State (State) and the Department of Justice (DOJ) were also significantly higher than the remaining agencies. By comparison, the CIA made 4 original classification decisions and the Office of the Director of National Intelligence only 2.[12]

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[7] ISOO Report 2009, at 18.
[8] Id. See also, ISOO Report 2008, at 22.
[9] Executive Order 13526 Concerning Classified National Security Information (Dec. 28, 2009). It is, of course, unlikely that an EO issued so late in the year would have had any effect on classification decisions made in 2009.
[10] Id, at Sections 2.1(b)(1) and 2.1(b)(3)(B).
[11] Id., Section 2.1(c) and (d).
[12] ISOO Report 2009, at 3.

Original classification decisions bear little relationship to total classification activity	
Department or Agency	**2009 Original Classifications**
Department of the Army	75,080
Department of State	55,224
Department of Justice	48,950
Department of Defense	967
Department of the Navy	665
Department of the Air Force	502
CIA	4
Office of Director of National Intelligence	2

Yet this does not appear to jibe with these agencies' total classification activity. The Moynihan Commission measured each agency's relative portion of the government's total classification activity (original and derivative) from 1990 to 1995.[13] They found that the CIA accounted for 30% of the government's total classification activity during this period, while DOJ accounted for only 10%, and State 3%. DOD produced the most, 53% of the total. Assuming for argument's sake that the percentages have remained somewhat constant over time, it becomes difficult to understand how agencies applying the same classification rules could contrast so dramatically that one agency can make 4 original classification decisions that result in 30% of the government's total classifications (in the case of the CIA) while another can make 55,224 original classification decisions that result in only 3% of the government's totals (State). The idea that only 4 original classification decisions can cover the entire scope of the CIA's covert activity over an entire year – hiring agents, conducting operations, recruiting sources, interrogating suspected terrorist, developing technology, purchasing weapons, establishing safe houses, etc. – casts grave doubt on the suggestion that derivatively classified documents don't contain "new secrets."

Perhaps even more inexplicable is the inconsistency in original classifications in the military. The Army's 75,080 original classification decisions dwarf the Navy's (502), the Air Force's (665) and the DOD's (967) combined. If the military can't even apply the same rules and procedures among the different branches, it is difficult to imagine how the government can enforce uniform standards across all federal agencies.

ISOO suggests that, as a policy matter, agencies should make fewer original classification decisions and instead rely on written classification guides, which more effectively "facilitate the proper and uniform derivative classification of information."[14] Only 2,390 classification guides were in use in 2009, a tiny number compared to the 183,224 original classification decisions, much less the 54 million derivative classifications. Worse, ISOO found that almost half of the 2,390 classification guides the government used in 2009 (46%) had not been updated within the last five years as required, which raises questions about their effectiveness in both protecting

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[13] Moynihan Commission Report, at 31.
[14] ISOO Report 2009, at 20; see also ISOO Report 2008, at 23.

national security secrets and preventing unnecessary classification. The new Obama E.O. addresses this deficiency as well, requiring each agency to perform a "comprehensive review" of its classification guides within the next two years.[15]

In the end the new data, while it is a welcome contribution to the public debate, provokes more questions than it answers. ISOO should strive to resolve these lingering questions in future reports, perhaps by quantifying the number of total classification decisions by each department and agency, so the public can understand the interplay between original and derivative classification decisions. Quantifying the number of derivative classifications resulting from the classification guides would also be useful in demonstrating whether they are, as ISOO suggests, a more effective method for regulating derivative classification decisions. Finally, ISOO should identify the agencies' error rates in the document reviews. Error rates of 90% are simply unacceptable and "naming and shaming" the worst actors, while crediting the agencies with low error rates will create an oversight opportunity for Congress and an internal incentive to reform.

IV. Conclusion

ISOO deserves to be commended for continuing to produce informative statistical reports that help quantify how much of our government's business is taking place behind closed doors. While altering the methodology for counting electronic records obscures whether secrecy grew in 2009, it has produced a more accurate accounting of the true number of classification decisions for the public to contemplate and has highlighted the need for greater reform of derivative classification policies.

RECOMMENDATIONS

I. For the Obama Administration:

Monitor compliance with the restrictions Executive Order 13526 places on derivative classification to ensure the agencies are implementing them in an effective manner. With such high error rates in ISOO's document review it is clear that derivatively classified information needs more oversight. Require agencies, particularly agencies with particularly high error rates, to have all their derivative classified information reviewed by OCAs within a reasonably short period of time (perhaps 5 years) to ensure and certify that the information is properly classified. The administration should not spend any public resources safeguarding information that does not require protection.

II. For Congress

Excessive secrecy is the most significant menace to accountability in government today and Congress and the President must work together to address this problem in all its forms. Congress should begin vigorous and comprehensive oversight hearings to examine classification policy and explore legislative solutions to persistent problems. The Moynihan Commission provides a model for effective oversight but Congress must follow through by implementing recommended reforms through legislation. Where President Obama's E.O. is deemed effective,

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[15] Executive Order 13526, Section 1.9.

Congress should cement these policies in statute so they cannot later be reversed by the stroke of a pen. And where executive reforms fall short, Congress must restructure the law to ensure information is withheld from the public only when truly necessary to protect national security.