

United States Senate

WASHINGTON, DC 20510

Mark Bradley, Director
Information Security Oversight Office, National Archives and Records Administration
700 Pennsylvania Ave, NW, Room 100
Washington, DC 20408-0001

Cc: Public Interest Declassification Board

Attached:

- (1) Supporting Information*
- (2) June 2020 War Powers Appeal and supporting documents*
- (3) August 2020 NIE PIDB Request*

Director Bradley:

In May 2020 the Public Interest Declassification Board described its vision for a “security classification system that protects national security interests and instills confidence in the American people.” To this end, I write to request an inquiry into misuse of the classification system. Based on classified records I was authorized to review, public statements, and media reporting, I believe the Trump Administration is systematically, purposely, and illegally misclassifying information in order to conceal it from public scrutiny.

Few government powers are more sacred than the ability to decide which information should be withheld from the public. To be sure, the balance between secrecy and the public right to know is complex. However, the pattern detailed in this letter suggests a disequilibrium. It appears that under the pretense of protecting national security, the Trump Administration has defied the national security standards outlined in Executive Order 13526 to protect its political fortunes.

Although denying access is the primary tactic, I suspect the Administration is content with delay. The consequential practices and documents I describe below relate to decisions to go to war, abuse of executive power, and our relationship with a key foreign nation. As rapid news cycles and key moments of decision pass by – including upcoming elections - it does not serve the public interest for these documents to be declassified long after they are relevant. In short, information delayed is information denied.

Pursuant to Section 5.2b(6) of E.O. 13526, which empowers the Information Security Oversight Office (ISOO) to “consider and take action on complaints and suggestions from persons within or outside the Government,” I request that ISOO:

- (1)** Investigate and report on whether the Trump Administration is systematically defying security classification rules codified by E.O. 13526.
- (2)** Audit a sample of White House classified files to assess the extent of the abuse.
- (3)** Provide recommendations to improve Congress’ ability to expeditiously challenge classification decisions on pressing policy matters.

Pursuant to Section 703b(5) of P.L. 106-567, which empowers the Public Interest Declassification Board (PIDB) to conduct declassification reviews requested by Congress, I request that the PIDB:

- (4)** Review the classification of documents I believe are classified for political reasons.

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The attachment provides detailed supporting information.

I fear that failing to respond to this abuse would greatly harm our national security and trust in government for decades to come. I request a preliminary report by October 15, 2020 and a full report by January 21, 2021. I understand that COVID-19 has complicated ISOO's work and am open to a dialogue on scope and timing.

Thank you for your vital work to protect both national security and public confidence in government,

A handwritten signature in blue ink, appearing to read "C. Murphy".

Christopher S. Murphy
United States Senator

SUPPORTING MATERIALS – Senator Murphy Letter to ISOO
9/1/2020

This document provides supporting materials for the following requests:

- (1) Investigate and report on whether the Trump Administration is systematically defying security classification rules codified by E.O. 13526.
 - (2) Audit a sample of White House classified files to assess the extent of the abuse.
 - (3) Provide recommendations to improve Congress' ability to expeditiously challenge classification decisions on pressing policy matters.
 - (4) Review the classification of documents I believe are classified for political reasons.
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(1) Investigate and report on whether the Trump Administration is systematically defying security classification rules codified by E.O. 13526.

I have the following systemic concerns with how information has been classified by the White House during the tenure of President Donald J Trump:

1. There appears to be a misunderstanding about the legal authorities and process that allow information to be legally classifiable.
 - a. During the pre-publication process of John Bolton's memoir, where certain White House official, namely the President and Senior Director of Intelligence Programs Michael Ellis, suggested blanked authority to declare information was classified.
 - i. "The decision to classify material here appears to be highly irregular. The career official responsible for prepublication review at the National Security Council determined after a long process that Bolton's manuscript contained no classified information. A political appointee who had only recently become a classifying authority, [Michael] Ellis, then arrived at a different conclusion after only a brief review. It is even possible that Ellis classified information in Bolton's manuscript for the first time after Bolton was told by [Ellen] Knight that the manuscript contained no classified information. At a minimum there were clearly process irregularities in the prepublication consideration of Bolton's manuscript."
<https://www.justsecurity.org/70897/questions-for-the-government-in-the-bolton-book-tro-hearings/>
 - b. President Trump has claimed on multiple occasions that all conversations with him are classified in the run-up to the publication of John Bolton's memoir. This is concerning because this argument stands in stark contrast to the four month prepublication review by seasoned White House professionals that was ongoing and included a point-by-point, exhaustive process to classify and protect sensitive secrets. At best, this provided mixed messages; at best it was an order for

professionals to disobey the stipulations of EO 13526.

<https://www.lawfareblog.com/assessing-governments-lawsuit-against-john-bolton>

- i. President's Twitter account
<https://twitter.com/cspan/status/1272629770795311105?s=20>
 - ii. Washington Post reporting that President Trump said "everything he uttered to [John Bolton] about national security is classified"
https://www.washingtonpost.com/politics/trump-wants-to-block-boltons-book-claiming-all-conversations-are-classified/2020/02/21/6a4f4b34-54d1-11ea-9e47-59804be1dcfb_story.html
 - iii. During a press inquiry "I told that to the attorney general before; I will consider every conversation with me as president highly classified. So that would mean that if he wrote a book, and if the book gets out, he's broken the law." <https://www.politico.com/video/2020/06/15/trump-i-will-consider-every-conversation-with-me-as-president-highly-classified-078094>
 - c. The administration, in particular the Declaration submitted by Michael Ellis on 6/17/2020 in reference to the civil lawsuit concerning the book, appears to have conflated "legally classifiable information" with "information that has been classified." In other words, just because information could be retroactively classified, if it was not *originally* classified, there must be a compelling reason to adjust: "Bolton's nondisclosure agreements only prohibit him from unauthorized disclosure of information that an authorized government classification authority *has actually classified*. It is not enough that the information might be "classifiable" if it hasn't been classified."
 - i. https://www.justsecurity.org/wp-content/uploads/2020/06/DOJ.Bolton.TRO_.pdf#page=40
 - d. We suspect the use of classified systems for "deliberative process" information which requires separate labeling and handling for controlled access. This practice predates the Trump Administration.
2. There appears to be systemic use of classified systems, including highly classified Codeword servers, without regard to the national security content of the material required by E.O. 13526. This appears to have happened multiple times relating to memos and phone calls with the leaders of Ukraine, Russia, and Saudi Arabia:
- a. A whistleblower complaint says classified systems were routinely used to hold records as a way to restrict access, not safeguard national security and that the subject of the complaint "was 'not the first time' under this Administration that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive – rather than national security sensitive – information." https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf;

<https://www.politico.com/magazine/story/2019/09/29/trump-white-house-ukraine-record-228757>; https://www.vice.com/en_us/article/zmky/whats-in-trumps-super-classified-server-and-why-is-he-hiding-things-there

- b. Transcripts of 2019 phone calls with leaders of Saudi Arabia and Russia were shunted to special systems without national security justification. I appreciate the need to have confidential conversations, but to be classified these conversations must be justified under the standards of E.O. 13256:
<https://www.cnn.com/2019/09/27/politics/white-house-restricted-trump-calls-putin-saudi/index.html>
- c. *Further examples detailed in section (4)*
3. It appears that meetings and associated documents related to the COVID-19 pandemic were classified to restrict access, not because of valid national security reasons.
 - a. I appreciate the need to protect some information relating to the deliberative process, but using the classification system is not the appropriate channel to do so. It appears various documents (notes, emails, readouts, etc.) relating to meetings about the pandemic were classified without respect to their content. The law is clear that “merely holding the meeting in a Sensitive Compartmented Information Facility (SCIF) does not automatically confer classified status on the information discussed.” In addition notes taken during the meeting or communications before or after, including readouts and summaries, the relate to unclassified matters cannot be “classified unless the information meets the legal requirements.”
<https://www.justsecurity.org/69237/the-legally-troubling-treatment-of-covid-19-meetings-as-classified/>
 - d. I understand that the content of meetings is not always known in advance and there are legitimate reasons to hold meetings in classified settings to allow for a free discussion. However, overclassifying COVID-19 meetings and holding them in SCIFs was apparently “a tool for the White House - for the NSC - to keep participation in these meetings low” and “hide what the government is doing, or not doing, just to satisfy domestic political concerns.”
<https://www.reuters.com/article/us-health-coronavirus-secrecy-exclusive/exclusive-white-house-told-federal-health-agency-to-classify-coronavirus-deliberations-sources-idUSKBN20Y2LM>

(2) Audit a sample of White House classified files to assess the extent of the abuse.

I understand that the Information Security Oversight Office’s (ISOO) conducts spot audits on agencies according to a fixed schedule. These audits help ensure compliance with classification protocols and that documents can be appropriately tracked and disposed of during their lifecycle. Given the pattern described in this letter, I believe it is vital to perform an extraordinary audit of the White House to assess whether documents are routinely classified according to E.O 13526

and include appropriate justification by Original Classification Authorities. In addition to the above reason, this audit would service two additional purposes:

First, given legitimate concerns about abuse of the classification system, an audit would address a key public confidence concern. I - and I expect others in the general public – worry about “unknown unknowns,” that is, information the public is not aware of expressly because it is classified to shield it from public scrutiny. An audit would *either* help understand the breadth and scope of the problem *or* absolve the administration of the fear that it is using classified systems to further hide damaging information. I would hope the administration would welcome the opportunity to provide ISOO with evidence of its adherence to E.O. 13526.

Second, an audit is particularly vital at this juncture because two other mechanisms through which misclassified information could otherwise come to light are under attack. Whistleblowers have been repeatedly attacked by the President, making it clear that retaliation is likely. For example: <https://www.npr.org/2019/12/29/792222297/trump-comes-under-fire-after-sharing-name-on-twitter-of-alleged-whistleblower> and <https://www.forbes.com/sites/tomspiggle/2019/10/01/president-trump-just-showed-us-whats-wrong-with-a-federal-whistleblowing-law/#4b20e9044c2a> . Finally, a spate of Inspectors General firings has threatened their independence. For example <https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson>.

(3) Provide recommendations to improve Congress’ ability to expeditiously challenge classification decisions on pressing policy matters.

In many ways, information delayed, is information denied. Today’s rapid news cycles and moments of decision mean that access to information at the right moment is essential for meaningful debate about how to balance competing public interests. If information is purposefully classified to limit access during key moments of public debate, later declassification does not adequately meet the public interest. Current tools like FOIA, Mandatory Declassification Review, and ISCAP are lengthy process that are not designed with this urgency in mind.

Section (4) details three examples of this phenomenon. The classified War Powers Resolution Notification submitted after Soleimani strike was used to prevent a full debate on the merits of the attack. Classifying the document, I believe, served to conceal a weak rationale and suggest that there were additional reasons for the attack that, conveniently, could not be disclosed. Similarly, the Jennifer Williams supplemental materials to her impeachment testimony could have provided vital information to members of Congress as they took historic votes on impeachment. Finally, the Khashoggi report would have informed political consensus about repercussions against the Saudi government for the murder of Jamal Khashoggi.

In a world of limited resources and competing demands, I understand that Congressional oversight of the classification system will always be imperfect. More often than not, Congress must rely on a presumption of good faith on the behalf of executive branch Original Classification Authorities. However, I hope ISOO can provide recommendations for how Congress can exercise its oversight if and when it suspects critical information is being classified, not for valid national security reasons, but rather to hide politically damaging information during real-time decision-making moments.

(4) Review the classification of documents I believe are classified for political reasons.

Over the course of this administration, vital documents related to acts of war, oversight of the executive branch, and foreign relations were withheld from public scrutiny, ostensibly due to the classification of the content. Given the policy value of these documents, it is critical that the American public know if an error was made in classifying documents, as I believe is the case. Consistent with section 703b(5) of PL 106-567, I request the PIDB examine the classification of these documents and submit a recommendation for whether they should be declassified in part or in totality according to the standards of E.O. 13526.

(1) Iran War Powers Notification: In accordance with Section 1.8 of E.O. 13526, I challenged the White House's classification of this document and appealed to ISCAP in 2020. Given the unbroken history of War Powers Notifications being provided in unclassified form, allowing the classification to remain unchallenged could set a worrying precedent for future Notifications. I request an advisory opinion on the classification of this document, as well as War Powers Notifications in general, in parallel to the ISCAP appeal.

a. References included my June 24, 2020 ISCAP Appeal and supporting documents

(2) Pence-Zelensky call memo: As a complement to public testimony during the Impeachment proceedings, Jennifer Williams, Vice President Pence's Advisor for Europe and Russia, provided a supplemental submission to the Permanent Select Committee on Intelligence on November 26, 2019. The information in question concerns Vice President Pence's September 18, 2019 call with Ukrainian President Volodymyr Zelensky, including a letter written by Jennifer Williams to Vice President Pence shortly after the call and related records.

b. I suspect this information was classified to prevent public release due to the embarrassing nature of the content, rather than for valid national security reasons.

https://www.washingtonpost.com/politics/schiff-says-pences-office-may-have-purposefully-misled-panel-about-contents-his-zelensky-call/2019/12/17/aaea3526-20fd-11ea-86f3-3b5019d451db_story.html

(3) Report on Jamal Khashoggi's killing: The FY 2020 NDAA required the administration to provide an unclassified report on Jamal Khashoggi's murder. On February 20, 2020, the Administration submitted a classified report but refused requests from both chambers of Congress, without adequate national security justification, to declassify the report.

- a. Media reports suggest the report should be declassified because “there is a robust body of credible unclassified reporting” regarding Khashoggi’s killing, including a report by the United Nations special rapporteur on the murder. Further it is unlikely that E.O. 13526’s standard for grave or serious harm to national security “would result from declassifying the findings, with redactions as necessary” if disclosed. https://www.washingtonpost.com/national-security/lawmakers-want-the-dni-to-make-public-the-intelligence-communitys-assessment-of-whos-responsible-for-killing-jamal-khashoggi/2020/03/03/aafa70ee-5d07-11ea-9055-5fa12981bbbf_story.html, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24713>

(4) National Intelligence Estimates on election interference: On August 25, 2020, I asked the PIDB to investigate further declassification of the July 2019 and July 2020 National Intelligence Estimates on election interference.

- a. *Further information is included in my August 25, 2020 letter to the PIDB*