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TRANSCRIPT

"WHISTLEBLOWING, CLASSIFICATION, AND THE U.S. PUBLIC INTEREST: WHAT REFORMS ARE POSSIBLE?"

A conversation with Steven Aftergood, Beatrice Edwards, Morton Halperin, Bill Leonard, and Anna Myers

Moderator: Sandra Coliver

ANNOUNCER:

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SANDRA COLIVER:

Let me start by introducing the people who are in front of us. And-- then I will-- ask a couple of questions to get the conversation up here. (CLEARS THROAT) So to my far left-- is Steve Aftergood, who is the director of the Program on Government Secrecy-- at The Federation of American Scientists.

Bill Leonard, the former director of The Information Security Oversight Office-- with a-- distinguished and-- lengthy career in the Defense Department-- the Pentagon and several-- advisory positions, now with The National Endowment for Democracy. To my right is Bea Edwards, the current director of The Government Accountability Project. And-- also with quite a-- long background here in Washington D.C.. Bea can explain more about government accountability projects. One of the leading organizations working to defend and represent whistleblowers.

In New York-- our moderator is Lisa Mackerel (PH), who is with the U.S. Programs head of our national-- security and-- human rights campaign. And-- she'll be with us for the first hour or so. And to the extent that-- people in New York have questions, Lisa or Joel, please raise-- you know, wave your hands.

And-- I will-- start with kind of just-- a brief introduction (CLEARS THROAT) to note that one reason for convening this discussion now is the fact that, on June 23rd, the parliamentary assembly of The Council of Europe rendered a vote-- reached a decision that-- called for increased protection of national security whistleblowers. And in particular, called upon all of the countries-- member states of The Council of Europe, to grant asylum to whistleblowers who were not afford an opportunity to raise a public interest defense, and also, called on the U.S. (CLEARS THROAT) government not to prosecute Snowden unless he is afforded the opportunity for a public interest defense.

So that was quite a-- dramatic decision. The parliamentary assembly is comprised of 316 parliamentary-- parliamentarians from across the 48 states of The Council of Europe. They passed this resolution-- with very few dissents. (COUGH) And-- reflecting quite a consensus among the lawmakers in Europe that the public interest defense is an important ingredient of democratic accountability.

So my first question goes to Anna in London, to give us some background as to how did the parliamentary assembly-- get to this point? And-- a question that is on everybody's minds, the parliamentary (NOISE) assembly has-- reached this resolution-- (NOISE) what is the practice of the Council of Europe member states?

So-- Anna Myers is currently the expert coordinator of the Whistleblowing International Network and the incoming director of the Government Accountability Project. A long background-- defending and representing whistleblowers, and also, providing advice (NOISE) to governments in Europe on improving their laws and-- improving their practice. So Anna, let's hear from you.

* * *TRANSCRIBER'S NOTE: THIS VIRTUAL ATTENDEE IS DIFFICULT TO HEAR AND

UNDERSTAND.

ANNA MYERS:

It's a real pleasure to be here with you today. (CLEARS THROAT) And I am-- really delighted to-- to talk about what happened a bit last week to give you some background to how we got to this-- point. I-- first of all, to say that I think that-- in Europe, in some ways, and-- in terms of the debates and the discussions, is very open, and it is very much-- talking about these issues in terms of a human rights and democratic accountability framework.

In terms of actual pace of change and reform, is probably not so-- creative and not so advanced yet. I would say that, in Europe-- the issue of whistleblowing protection really took off in the anticorruption-- area. And the Council of Europe-- had two treaties, the convention-- the criminal and civil law conventions on-- against corruption. And in there, started to collect, and I think this is something that-- (UNINTEL) work, which is the U.K. N.G.O. that I was then the director of, had to implement-- over and with P.I. (PH), pushed this agenda in Europe.

And it was looking much more in the public sector, that's how they picked it up, and looked at as a matter of good governance. And putting a duty (?) on the rights of civil servants to speak up about malpractice-- (UNINTEL) not so (UNINTEL) as to whether or not they have the power to refuse an unjust order. So-- it was starting to say a civil service in Europe-- and started building capacity particularly in new-- in new-- members of both the E.U. and old members of The Council of Europe, to try and build up a duty to serve the public.

But I think also was being picked up at the same time as a very natural (UNINTEL) to access to information-- and the right to free expression. So there have been cases (CLEARS THROAT) (UNINTEL PHRASE) forward to human rights all through this period. I would say those two trajectories (?) in-- were brought together in The Council of Europe. But they were separated in other parts of Europe. So they were separated and not talked as much about in the European Union context, which of course is a (UNINTEL) national organization and it has-- obviously more binding-- orders on member states, do things in the Council of Europe.

But I think that the latter is becoming incredibly important now in Europe, that-- that the idea, and this is where the Council of Europe's work over the last, I would say since 2008, has been incredibly important (UNINTEL PHRASE) the committee on legal (UNINTEL) and human rights has been in the (UNINTEL) for three-- reports that I've had some-- links with.

The first in 2009-'10, which put whistleblowing very much within this-- accountability framework, and also started to talk about how important it was culturally when you deal with-- member states that have dealt with war and dictatorship and-- fascism to understand whistleblowing (UNINTEL) is informing and also talking about it as very important even within national security fields.

So it's always sort of been-- a niche or fit on things (?). And talking about it, again, this is within the human rights and the-- (CLEARS THROAT) and the-- democratic accountability framework at the Council of Europe. And I think those-- those things have come together, the work that-- that O.S.J.I. and others have done on The Tshwane Principles (PH), that they're picked up looking at rights information, picked up on the whistleblowing.

And then I think-- the Council of Europe did pick up on the report that the Parliamentary Assembly had done in (COUGH) 2010 and-- four years later, came up with their recommendation, which is a legal instrument-- that put (UNINTEL PHRASE) much more within the framework of both public and private sectors-- but carved out-- basically, carved our or made-- didn't really focus on the national security-- issues.

And that's often been the tradeoff in the European-- context, that we'll do (UNINTEL) protection sort of in this other area, and (UNINTEL) protection, but we will-- we will leave the national security piece-- on the side. (CLEARS THROAT) And with the Snowden disclosures, which really pushed the-- the agenda and The Tshwane Principles-- which came at the-- you know, almost-- were published then

(UNINTEL) simultan-- or very close to that-- that-- that moment, there was a real-- debate about privacy-- and the issue of surveillance.

And so I think probably-- Parliamentary Assembly wasn't necessarily going to look at this again so soon after having done the first report after the committee ministers had done a recommendation, which is being rolled out in Europe, and it is being picked up by the European Commission in Technical Projects. It does have a lot of (UNINTEL) in terms of actually supporting change and getting some reforms in place for (UNINTEL PHRASE)-- and to-- to not have to feel that that confidentiality-- is greater than the public interest.

And when these things came together, the report then, what the committee decided to do, was separate. And they've done two reports, one on that surveillance, and one on improving (CLEARS THROAT) the protection of whistleblowers. And they definitely wanted to pick up on this issue of really focusing in on those who work with them in the national security space-- and to really say that this is important.

And it-- in terms of the mood in Europe, in terms of the-- the popular mood and the mood with (UNINTEL) certainly within The Council of Europe, what was fascinating about-- the debate was how positive-- it really was. It was (CLEARS THROAT) really only the U.K. that-- tried to get some last minute amendment in, wording like-- you know Edward Snowden should "surrender" himself to U.S. courts-- rather than return with the possibility of having a public interest defense.

And the interesting bit in the debates were-- the report was very much broadly supported. And this was an amendment that was actually classified that the wider committee in the morning, there's a very short period of debate in the Parliamentary Assembly. And Peter Onsay (PH) got up and spoke even against his own committee on this amendment, because he said that just goes to the heart of this issue, surrendering himself to the courts-- in the-- (UNINTEL) time to make sure that he had the ability to have a public interest defense, and to allow him to return.

And so he argued against his own committee and The Parliamentary Assembly voted against the U.K. amendment to the text. So you can see that there is-- there is very much that (UNINTEL) in there. And there-- whether it's reaching all the-- the lawmakers in the ministries of justice-- and the national security-- people around Europe-- we'll-- we'll-- wait to see.

But I think that it keeps the issue very much on the agenda and pushes the boundaries of the discussion much farther much faster than they were even three years ago. And it's really interesting in the-- in the European context how much the idea that-- other-- national security agencies are able to spy on citizens of other states-- is taken very, very, very seriously here and is-- (NOISE) is considered the real-- breach of privacy and rights.

That gives you some of the flavor is what has been happening. It does (UNINTEL PHRASE) society is very-- allied to these issues. And I think it's (CLEARS THROAT) reopening-- I think what's happening, and I would say in the U.K., which is interesting, is-- there isn't a public interest defense in the Official Secrets Act. But

there's still debate is that somehow there's a couple of words in there that allow it.

The public interest, as a legal principle, and the test of assessments, are used in so many other-- legal-- in so many other legal ways. They're used to the Public Interest Disclosure Act, which is (UNINTEL) employment protection for whistleblowers. It's-- their (UNINTEL) public interest defense in the Data Protection Act in the U.K.. It just says the public interest.

And if you think about what is involved in that, it's very much what the Tshwane Principles have highlighted, and that also goes on-- European (COUGH) court-- case-- case law of (UNINTEL PHRASE) when you protect people who (UNINTEL PHRASE) disclosures.

I think what the debate does, and I think why it's so important that this is (UNINTEL PHRASE)-- not only (CLEARS THROAT) because me and the whistleblower protection community will pick it up and push it and talk about it, is because it really gets the discussion about proper oversight on the table. Because if (CLEARS THROAT) you're talking about a public interest defense, then you're talking about when that comes up and how it works.

And it's prompting, I think-- a greater look at proper oversight and proper channels for national-- those working in national security to raise issues. And one final point I would say about the recommendation, which, as I said, was very weak on the national security bit-- did say quite clearly that you couldn't carve out the actual people. There were-- (COUGH) they very much focused on there are many situations in which you would very much limit-- information. It wasn't (UNINTEL) saying that people who worked in a particular place could be exempted from laws. They weren't (UNINTEL) recommendation. But there might be more than limit protection for those working with classified information in various (INAUDIBLE PHRASE).

And that was what-- the report last week really drew out and started to develop much more clearly. So it gives us a lot in Europe-- different jurisdictions to work with and to make connections with principles that are already made-- applied in Europe, perhaps in different contexts.

SANDRA COLIVER:

Great. And-- thanks very much. And-- you talked about the Official Secrets Act from the U.K., (COUGH) which has had quite an impact around the world and the commonwealth. Up until 1989, I-- I think-- the case was, in fact, that there was a public interest defense-- in common law. And the-- Official Secrets Act of 1989 then said expressly there is no public interest defense.

But it does include a requirement that the government proved that the disclosure was damaging-- at least concerning civil servants other than those (CLEARS THROAT) in the intelligence agency. (COUGH) And-- that has given an opportunity for lawyers to bring in the countervailing-- weight of the information versus the secrecy. And it's-- put the information in front of juries, and juries, in fact-- have refused to convict-- in

cases where the information's of high public interest.

So it's-- it's an interesting dynamic (NOISE) to look-- at the countries where there still are jury trials versus those that are not-- where prosecutors-- have to bear in mind some of those considerations. The other point-- (NOISE) from Europe that's very exciting, it's the number of decisions of the European Court of Human Rights, which have affirmed the rights (NOISE) of whistleblowers-- in the national security area, intelligence area, (CLEARS THROAT) as well as-- in other areas, (CLEARS THROAT) saying that there is a free speech right (CLEARS THROAT) of the whistleblower, and that there is also a right of the public to receive information of high public interest, setting out a task as to what needs to be established.

And it's-- it's-- quite a good-- set of considerations that have also been reflected in the law of Canada-- and in sort of the-- practice of-- of The Netherlands and a f-- a few other places. So-- with that overview of what's happening-- in Europe especially, I'd like to turn to the panel-- here in Washington, recognizing that what happens in (COUGH) Europe is not-- (COUGH) much weight here in discussions with decision makers, but that-- we might benefit from-- some of the experiences-- overseas, and perhaps might think about-- conversations which we can facilitate.

Also Anna, thanks, you mentioned the Tshwane Principles on National Security and Right to Information. I do have copies of those here. These were the outcome of conversations in 14 cities around the world, involving more than 500 people, civil society experts, (COUGH) activists, government officials, security professionals-- law enforcement-- coming up-- with consensus on 50 principles (CLEARS THROAT) about the kinds of information that should be proactively disclosed, the kinds of information that are at the core of-- national security secrecy. And-- procedural ways, and substantive ways to-- to balance those-- two sometimes competing interests.

So I'd like to-- turn to Bill Leonard, and to ask you, Bill, (COUGH)-- what trends have you seen in-- classification, declassification decisions? Have there been changes regarding classification since Manning and-- Snowden? And have there been changes-- regarding whistleblowing in the U.S.?

BILL LEONARD:

Thanks, Sandy. Broadly, if-- if you take a look at the-- re-- annual report issued by-- the office I was formerly-- affiliated with, there have been-- some noticeable trends as of late in terms of-- you know, for example-- original classification decisions over the past several years are-- are markedly down. And even-- derivative classification decisions have reflected-- a decrease, as well.

You know, in terms of trying to discern-- a reason why, it's-- it's-- it's rather difficult. Just like so many other things, there's probably multiple reasons why. But one (CLEARS THROAT) of the things that I think is-- is clearly-- is clearly-- I-- I think-- undisputable is that-- over-classification still persists as-- as-- almost an intractable

problem.

You know, as a matter of fact, one of the things I did in preparing for-- for-- our discussion this afternoon was take-- take a look at the most recent report issued by-- my former office, and-- and taking a look at, for example, declassification decisions. And-- and-- and-- and I think the numbers there are rather detelling-- telling.

There's a-- there's a provision in the executive order known as a mandatory declassification-- review request. And basically, that's where anyone can-- make an access demand for a particular record. And if the government-- says, "Well, you can't have that record because it's classified," the individual can say back to the government, "Well, are you sure?" And-- and the government is required then to do a classification review of that. Mostly it's done for-- historical records, old records. But-- but there-- there's really no time limit assigned to it. (NOISE)

And if you take a look at the-- at the numbers-- government-wide-- over the past-- fi-- almost 20 years-- they've been rather consistent. So for example-- 92% of the time, when somebody asks the government, "Are you sure that record is really classified," the government comes back and says, "Well, golly gee whiz, you're right. You know-- at least-- either all of it or some of it is no longer classified."

But nonetheless, 32% of the time-- there's an overlap between these two categories. 32% of the time, the government will say, "But we're gonna hold back either the entire document or some of the document, because, yes, some of it is still classified. Well, there's a provision in the order that says, "Well, you can appeal that decision."

So once somebody asks the question is told, "Yes, we're sure it's classified,"-- they can appeal the decision. And when they appeal the decision, the agency itself comes back and sa-- and 75% of the time says, "Well, you know what? Golly gee whiz, you're right. That stuff really is no longer classified-- either in whole or in part."

But yet, nonetheless, either-- either affirming the decision in whole or in part, 60% of the time they nonetheless restrict some additional information. And-- and yet, there's still one more appeal left. The individual can go to what's known as The Interagency Security Classification Appeals Panel. And they can say, "Hey, I've asked this agency twice whether or not this stuff is really still classified. Twice they've come back, either whole or in part, and said, 'Yes it is.' We want this interagency panel to look at it."

And guess what? They come back 75% of the t-- 70% of the time and said, "You know what? Golly gee whiz, this stuff really shouldn't be classified anymore." And so-- and the important thing to keep in mind are these are current decisions using current standards being made by professional people trained in the-- in the standards.

And yet, still, the vast majority of the time, they gettin' the answer wrong. Because all they have to be able to demonstrate is that this material still (COUGH) meets (CLEARS THROAT) the standards for classification. There-- it's not the question is, "Should this stuff be classified anymore?" The question is, "Can this stuff be classified still after all these years?"

And the vast majority of the time, these trained professionals get it wrong. And if these trained professionals get it wrong, you can imagine what the rank and file millions of people with every-- you know, who-- with-- with-- day to day clearances, how often they get it wrong. So the trends are undeniable. The trends are still there. They've been sis-- been persistent. And it's almost intractable. (CLEARS THROAT)

SANDRA COLIVER:

Okay. Thank you. Steve-- anything to add? And can you also-- talk about the Public Interest Declassification Board and what its-- mandate and powers are?

STEVEN AFTERGOOD:

First of all, I would-- I would agree with-- with what Bill just said. Bill is one of my mentors who I've learned a lot from. And I also bugged (CLEARS THROAT) him when he was in office, to take action. And-- and he-- he really did. He was a great public servant.

I would te-- change the tone of his comments slightly. Instead of-- "Golly gee whiz," I would say, "Hooray." It's not that, oh, you know, they were classifying wrong. It's, "Hooray, they were fixing the problem." You know, someone's goin' to 'em and say, "This shouldn't be classified." And they said, "You know, you're right, it shouldn't be. And-- and we're gonna remove the classification." That's good news. That means there is a mechanism in place to fix erroneous classification decisions.

I would also say, about the reduction in the number of original classification decisions, a lot of us are in the habit of mocking the Obama administration for its-- its initial promise to be the most transparent administration ever, and-- and how-- you know, how-- all the ways that it has fallen short. One of the ways it has not fallen short is in the reduction in-- in creating new secrets.

The number of new secrets that are being created has dropped drastically year after year for the last four years, to a historically low level. When Bill was the ISOO director, they were generating approximately 350,000 new secrets each year. Last year, in the Obama administration, they generated 46,000. So a dramatic reduction, not just for one year, but for year after year.

Again, that's good news. (CLEARS THROAT) The subject of our-- of our-- of our panel, Public Interest-- the term "public interest" appears in only one provision of the executive order on classification. It says that most information that fits the criteria for classification should be classified.

However, even if it fits the criteria for classification, but there is a public interest in its disclosure, then it should-- it-- lemme get it pro-- properly, "in these cases, the information should be declassified." So there is recognition in the executive order of the possibility that the public interest would trump classification requirements.

And in fact, that provision has been invoked by the intelligence community in the post-Snowden era, where they released-- thousands of pages of records pertaining to intelligence surveillance. They didn't say this stuff is-- you know, didn't need to be classified. They said, "It was properly classified, in fact, it is properly classified, but we're gonna release it anyway because of the public interest in this disclosure." So-- it's an interesting footnote.

Now, at the same time, and I should caution I'm not a lawyer, there is no such thing as a public interest defense in U.S. law, as far as I know. And-- and so I think the-- the-- parliamentary resolution was not properly expressed in an idiom that it can be understood in the U.S.. I think we all intuitively believe that the public interest context should be considered in-- in any-- resolution of the Snowden case. But there isn't a-- what you would call a public interest defense.

What there is, is a defense of necessity. What that means is that, regardless of what the letter of the law is, sometimes the right thing to do is to violate it. You might-- you might need to take a critically ill person to the hospital and run through a red light. You violated the law when you did that. But the defense of necessity was you had to do it to save a life. You might have to break into somebody's house, which is against the law, in order to put out a fire.

And so there is-- such a thing as a defense of necessity. And I think if you were to translate the parliamentary resolution into the American legal idiom, it would be to say-- Snowden should be permitted to present an argument of-- of a necessity defense. And the government should not object. They can argue against it, as they surely would. But-- they-- they should-- they should permit such a-- such a defense to be advanced.

I don't think that would solve all of his problems. I think there's a-- there's a-- a necessity or a public interest argument to be made clearly with respect to-- the-- telephony meta data disclosure. It's much harder to think of a public interest defense in some of the other disclosures. (CLEARS THROAT)

You know, the-- the-- the-- interview in *The South China Morning Post* where he said that, "Yeah, N.S.A. is hacking China up and down," or the various disclosures of intelligence collection techniques that are now presumably reduced in-- in effectiveness. So-- you know, I think a-- necessity defense or a public interest defense won't solve all of his problems, but it-- it is-- something that-- that could and should be considered. I could go on, but why don't I turn it over?

SANDRA COLIVER:

Well, and Steve, I just wonder-- what are your thoughts as to the explanation as to this drop in the number of classification of new categories?

STEVEN AFTERGOOD:

I-- I agree with Bill that there are likely to be multiple factors. I-- discussed this question with-- with Bill's successor, John Fitzpatrick the current director of The Information Security Oversight Office. And he said (NOISE) that one of the factors he believes (NOISE) is the implementation of what was called The Fundamental Classification Guidance Review, which was performed under the Obama executive order in-- between 2010 and 2012 to eliminate obsolete classification requirements and to clarify the classification guidance that is-- that agencies produce.

And so his hypothesis was that, by generating clearer classification guidance-- that led to the production of fewer new secrets. (CLEARS THROAT) If that's true-- which I would love to believe, then that is good news, because there is another fundamental classification guidance review coming up next year to be completed by 2017. And it means that this process can be pushed further, and more can be done to-- improve the clarify of classification guidance, and to (CLEARS THROAT) reduce the resulting production of new secrets.

SANDRA COLIVER:

Let me turn to Morton Halperin, who-- has just joined us-- having given apologies previously for having been-- on an emergency phone call, senior advisor to the Open Society Foundations. Mort, you've been--

MORTON HALPERIN:

But I'm gonna start with a cynical comment. I think-- (CLEARS THROAT) part of the explanation-- sorry-- part of the explanation for there being fewer original classification decisions is what seems to be a change in the definition of when a classification is derivative or not. And the classification guidelines seem to say that if-- if they explained the reason and the process for classifying, say information from foreign governments, and then you classify information from a foreign government, relying on the guidance in the classification guideline, that is then treated as the derivative classification rather than original classification.

STEVEN AFTERGOOD:

Mort, let-- let me quickly interrupt you. I-- I don't think it's cynical, but I do think it's mistaken, because, in the last report, not only have original (CLEARS THROAT) classifications gone down, so have derivative classifications. And that means, if it were-- it's a-- it's a brilliant speculation. But I think it's correct. If the original classifications has been moved over--

MORTON HALPERIN:

Yes.

STEVEN AFTERGOOD:

--into the derivative category--

MORTON HALPERIN:

And we know that they haven't?

STEVEN AFTERGOOD:

We-- well, we know that the derivatives are also going down. In other words, there really is a net reduction in new secrets.

SANDRA COLIVER:

Okay.

MORTON HALPERIN:

I withdraw the comment. (LAUGHTER)

SANDRA COLIVER:

Well, moving on to Bea-- comments about trends, but also perhaps you could address the-- implications of public interest defense politically.

BEATRICE EDWARDS:

Thank you, Sandy and-- and the panel and Open Society Foundation. I did-- wanna back up-- a little bit away from the courtroom and the classification and-- discussions specifically of put interest in a-- in a legal sense, and-- talk of-- and-- and talk about this-- from the point of view of whistleblowing-- more specifically. Because-- my organization does represent whistleblowers. And so we are concerned from that point of view.

For us, the issue of classification over classification, or whether the trends go up or down, is significant because if information is classified, then it is a crime to disclose

it. And when-- (COUGH) excuse me, when a whistleblower-- discloses classified information, then that person could be and is exposed to criminal prosecution. And so what-- what we've seen at G.A.P. in the-- in the last, say-- I wanna say, say, 10 years, is a (NOISE) a trend toward the criminalization not just of national security whistleblowing, which has-- always been a crime, but of-- of whistleblowing in general, that we-- we've seen that disclosing information from different sectors, not just the national security sector, has become-- criminal. (NOISE)

And-- and we have a big poster on the wall in the conference room, which is a statement of principle, which is that it should never be a crime to report a crime, and that confidentiality or classification should not be a legitimate reason-- to maintain something as a secret. Because I think we have seen that, when you combine secrecy and power, you often get-- (CLEARS THROAT) corruption and-- and malfeasance.

So-- as we've worked with whistleblow-- it's-- it's interesting, because in the last-- since the year 2000, we have-- here in the United States, achieved or-- a passage of a number of new whistleblower protection laws. We go kind of sector by sector. They're not freestanding pieces of legislation, but there is a whistleblower protection provision, (CLEARS THROAT) for example, in Dodd Frank, to protect whistleblowers in the finance sector. And that was added-- after the-- the financial crisis of 2008-2009.

Sarbanes Oxley also, of course, includes whistleblower protection provisions. (CLEARS THROAT) And it was-- adopted after the 2001-- crisis in-- in-- in the U.S. economy. And-- we are now confronting-- as-- as we-- as we strengthen whistleblower protections from the legislative point of view and a legal point of view, we also see an increasing-- attack on whistleblowers and a tendency to criminalize-- whistleblowing in-- in more and more cases.

So, for example, beyond national security-- a whistleblower in finance or in-- in-- the corporate world, can be charged with theft for revealing proprietary information. There's a-- there's a well known case in Europe right now of Antoine Deltour, who revealed-- financial information about tax deals that multinational corporations had struck with the government of Luxembourg. And this is potentially-- the-- the conflict there is a crime that's being revealed, possibly, and Antoine Deltour himself has been charged with-- with a crime.

At-- at G.A.P.-- one of our big programs that we have a couple of representatives here is the Food Integrity Campaign. And a number of states in the United States are criminalizing the unauthorized recording either audio or video of-- of the practices of a private corporation, a food production plant. So as-- as the protections strengthen, also it seems the-- the-- the attack or the offense against-- whistleblowing is-- is also-- is also in-- increasing.

Having said that, then, the P.A.C.E. resolution, the-- the European Parliament Resolution, is a very-- encouraging development, because it shows the extent to which European governments are-- are acting to protect-- national security whistleblowers. And we were talking about the panel-- and I just wanna kinda throw

this out there-- when we were talking about the panel, and-- and how-- what we should-- (CLEARS THROAT) address, we did discuss this kind of odd-- situation that is Europe has stronger-- laws now to protect national security whistleblowers, or certainly-- a popular support of them.

But there aren't any national security whistleblowers in-- in Europe. (CHUCKLE) Whereas we have a-- a-- a long trail of them-- but we are-- we are not able to-- we're not able to protect them very well. We were encouraged, though, when we saw that Eric Holder, in the last-- week or so, suggested that Eric Snowden could come home, and that perhaps there would be-- some kind of a deal for him.

And at G.A.P. (CLEARS THROAT), we're talking about maybe asking Mr. Holder to represent Edward Snowden (LAUGHTER) pro bono-- since I'm snor-- I'm sure Edward Snowden cannot afford the services of-- of-- of a former attorney general. Which brings me to the last point about (CHUCKLE) public interest defense and-- and criminalization of-- of disclosing information.

And that is that, when we talk about this conflict in a courtroom, we're really already at the end of the story. There's a lot of theater in the courtroom to promote the impression that there's an equality of-- of power there, that there's a balance of power. So there's a judge that sits in the middle, wears an outfit, everybody has script. You have your attorney, if you're the defense. The state prosecutor represents the state.

The charging document says, "The government of the United States versus Edward Snowden." If you're on the wrong side of that controversy, you are in a world of pain. And we have clients who can testify to that, that is, when the apparatus of a criminal prosecution starts rolling at you-- even if you are reasonably affluent and middle class, you do not have the resources to defend yourself as an equal player on that-- on that playing field.

And that's why-- this question of the public interest defense is so important, because it does go a long way, or it goes a certain way, toward equalizing-- (NOISE) the players in the-- in the-- in the-- in the conflict. (CLEARS THROAT) However-- it also poses, I think in answer to your original question, the implications politically, it poses a very serious question for a democratic government.

That is, the government is supposedly the apparatus of the people. It makes laws and regulations in the interests of the public. If you admit a public interest defense into a criminal prosecution, then you're flipping the-- the conflict, and-- and posing the question to the public that it's possible their government is guilty of a crime, and the person represented as a criminal is actually acting in the public interest.

So that a public interest defense can, in this larger sense, represent a fundamental challenge to-- a government that presents itself as democratic, or as a democracy. And it-- it-- it throws into question whether the government is what it claims to be. And I think the case of Edward Snowden really highlighted that very-- very dramatically.

SANDRA COLIVER:

Bea, thanks for-- bringing-- to-- to-- to-- bear on particular examples of the lives of whistleblowers-- the importance of-- of the discussion about public interest. Lisa, let me turn to you in New York. I know that you don't have-- you need to be leaving shortly. And I-- wondered if you had any questions for us, or if anybody in New York had any questions.

SANDRA COLIVER:

Let's see (UNINTEL PHRASE) if anyone wants to jump in here. (INAUDIBLE PHRASE)

HENRY:

Hi, Henry (UNINTEL) from Human Rights Watch. (NOISE) I just wondered if you could tough on the retroactive application of that defense-- and how that's being used to-- again, criminalization whistleblowing. Because it's then classified.

SANDRA COLIVER:

Great. Thanks. I think I'll turn that to-- to Bill. And I think-- the next round of questions, broadly, are-- looking at ways in which the public interest is recognized in U.S. law, how it could be-- more-- recognized in U.S. law, both in declassification and classification decisions-- and also-- possibilities, perhaps, for bringing it into-- some kind of a defense. So Bill, if you'll respond to the question about retroactive classification, as well as to-- creative uses of the public interest.

BILL LEONARD:

Sure. You know, with respect to-- retroactive classification, in a sense, that was probably something that was-- a key element, at least from my perspective, in the Thomas Drake-- prosecution. In-- in that instance, I served as an expert-- consultant for the defense, and was prepared to serve as-- an expert witness, had it gone to trial.

One of the-- items that-- Thomas Drake was accused of being-- criminally in possession of and, in fact, served as the first-- count of his felony indictment, was-- an e-mail that-- that F.B.I. agents found in his basement.

It's an e-mail that-- was in a trove of unclassified-- material that-- Thomas Drake had compiled when he was cooperating with-- D.O.D.I.G. in terms of his whistleblower complaint. The-- the e-mail had no-- absolutely no classification markings on it whatsoever. But after it had been confiscated from-- Drake's possession and subjected to review by the-- by-- by the N.S.A., the government then asserted that it

was, in fact, classified, and, as I said, served as the first-- count for his-- felony indictment.

I was-- perfectly prepared to-- to-- testify to a-- (NOISE) a group of-- 12 peers of Thomas Drake that they could just use their common sense and-- and read that e-mail and see that there was absolutely positively nothing, nothing within that document that could be used to-- harm na-- the national security. And in fact, if you're interested, you could see it yourself. It's on Steve Aftergood's website. He-- he submitted a F.O.Y.A. request after the-- the trial. And it is, in fact-- you know-- acknowledged-- by the government, at least at this point in time, to be unclassified. So you could read yourself and come to your own conclusion.

Nonetheless, you know, I was so taken aback by the government's action in this case, I would-- I had since been retired, that-- I-- went-- so far as to seek-- release from my (PHONE RINGS) secrecy-- confidentiality-- agreement-- in terms of accessing-- evidence-- as an expert consultant. And the judge granted that. So that I could file an official complaint with my former office.

And after-- reviewing the-- the-- the matter for well over a year, my former office came to the conclusion that, "Well-- we all have differences of opinion, and this is nothing more than just a difference of opinion. So I remain very much still troubled by-- by this-- by this fact. I-- believe me, when I retired from the federal government, I, in no-- make, shape or form, in-- just-- intended to embark on a-- even a part-time career of defending individuals accused of mishandling classifieds. Matter of fact, the first time I was asked to do that, I told the defense attorney, "You got the wrong guy. You don't understand what I've done for my entire career."

But I've been involved in three instances now. And that's exactly what the government has done in those three instances. They have abused their classification authority, in essence, to deny due process to individuals that they accused of crimes. And-- and-- and-- to this day-- if you ask a very simple question, if you look at the executive order, the executive order treats-- improper disclosures of classified information and improper classification of information that shouldn't be classified in the first place, it treats them equally as egregious acts, subject to the same administrative sanctions that's provided for in the executive order. There's no distinction between the two. Among, they're-- they're-- contained in the same prohibition.

And yet, if you ask the question, "How many individuals have been held accountable by the government for improperly handling or disclosing classified information," you know, the number is countless. Because it's in the-- thousands, tens of thousands, who knows? If you ask the question, "How many people have been held accountable within the government for improperly classifying information in the first, or asserting that information was classified when it really wasn't," the answer is-- is likewise you can't-- is-- is incalculable. And the reason it's incalculable, 'cause the answer is zero.

And so, as far as I'm concerned, that's the first question that any defense attorney should ever ask a government wish-- witness who gets on a stand and asserts that this

information-- is-- is classified and could damage the national security, is to simply ask that question, "Well, can you tell me, how many times has the government ever sanctioned someone for improperly making that assertion?"

And when the person has to truthfully answer, "Never," that-- in my mind, significantly undermines the credibility of a classification marking in the first place. Which is, quite frankly, the reason why I have gotten involved in those three cases, not because I was-- focusing on the individual, I was actually focusing on the integrity of the classification process. And as far as I was concerned, the government was identifying what I fervently believe is a critical national security tool required to keep this nation safe. But by the government's own actions, it has-- repeatedly-- undermined-- the-- the-- the ability of-- of the system to do that.

And with regard to the larger question, you know, in terms of-- you know, the public interest and-- and-- and-- and the political to-- context and whatever, I-- I-- I agree with Sandy that there is really no appetite for that within this-- this country and-- and more specifically, within the Congress and what have you. And I think, to look at that, we have to look no further than the recent debate over the classification of the Senate Select Committee on Intelligence-- report on the C.I.A. interrogation program, i.e. "The Torture Report." And there was back and forth for years over the classification of information associated with that.

And-- and-- and one of the things that had-- was never discussed, and a hat tip to Burt Wise (PH), who's in the audience here, who-- who reminded me of this, is-- is that the Senate actually always had the unilateral authority on its own to release any information from that report that they deemed appropriate.

Because, back in 1974, when the Senate initially established the Senate Select Committee on Intelligence, and the basic rule that established that committee-- and this is a quote, that-- that, "The committee may disclose publicly any information in its possession after the committee determines that the public interest would be served by such disclosure." And then it included provisions requiring action by the full Senate, should the-- president object.

That was never even discussed during the time. And the reason why is because there has been this history-- especially since 9-11, but even pre-dates that, in terms of our two co-equal branches of government, the judiciary and the legislature. They unfortunately genuflect, from my perspective, at the altar of national security, and they defer to the-- to the executive in this regard.

Which, when you think about it, as ba-- as Bay said-- Bea said there's-- you know, power and secrecy is the recipe for corruption. And, you know, yes, the executive should have the ability to define and interpret the laws in terms of what the president's-- authorities are and things along those lines. But yet, our system of government is very clear. That-- that ability to interpret the laws and define-- his authority as-- as-- president is circumscribed by our two co-- other coequal branches of government, the-- the courts and-- and the Congress, to limit that.

But of course-- for the-- other two branches to exercise that authority, they have to

know what the executive is asserting in the first place. And they can't do that, as we've seen in the C.I.A. interrogation, as we've seen in wireless wiretaps and whatever, they can't do that when the-- when the executive unilaterally determines that-- that-- that-- that it-- it's secret.

But yet, nonetheless, even with this history, and even with the-- most ardent critics we saw-- over the-- this most recent report-- the-- the-- the sissy (?) was-- there was never even discussion of exercising this so-called nuclear option that they had all along. Leave it at that.

SANDRA COLIVER:

Great. Mort, comment?

(OFF-MIC CONVERSATION)

MORTON HALPERIN:

Lemme just say the--

SANDRA COLIVER:

Oh.

(OVERTALK)

SANDRA COLIVER:

I'll take Mort, and then-- Lisa, I'll get back to you.

MORTON HALPERIN:

I'll be very short. Contrary to what is widely believed, there is no crime in the United States of revealing classified information. Just simply isn't any such crime in the books. There is a crime which is-- called espionage, which is about espionage. But it refers to information relating to the national defense. There's no crime of revealing classified information.

And I think it is-- was clear to the government when they finally looked. I was also a consultant to the defense in the Drake case, and was about to testify. And I believe that count would have been thrown out, because it is-- it can't be a crime to reveal information that the government has already made public and that it's failed to declassify. And there is case law that-- that supports (COUGH) that.

It is an example, and we have many others, of the abuse by the government of-- of the

criminal laws that do exist in order to (CLEARS THROAT) try to intimidate people not to release information that they don't want to disclose.

SANDRA COLIVER:

Lisa, do you have a follow-up question?

LISA:

Yeah. I just wanted to raise a question-- and maybe this is-- a difficult one to answer, because it could be all of the above. But I mean if we're looking at all these different elements, there's the whistleblower-- protections, and how to strengthen that, there's the potential-- power in Congress to-- make public information in the public interest. There's ideas about how they strengthen the defenses available to-- people who are-- charged with some kind of crime in relating to revealing secrets. And then there's the pressure on government to classify (UNINTEL) documents in secret or to-- to provide more appeals to challenge those decisions.

But-- where do we look to really see some change? And-- and what is the-- you know, is there a best hope for how to see-- if-- if you're thinking about this from a human rights angle, how to see that we can know sooner and know more about-- what the government may be trying to cover up-- because these are embarrassing, or because these are-- acts of malfeasance on the part of government officials. How can we best-- move that agenda forward with this array of-- of problems and-- and fairly-- unsuccessful solutions, if we could say-- there's no-- no clear path to me. So I'm just curious what people see as the way to-- to make a real change in the United States.

SANDRA COLIVER:

So, Steve?

STEVEN AFTERGOOD:

I-- I-- I think the-- the answer is-- is an "all of-- all of the above" answer. I mean we have to try all of the things we are trying. (COUGH) But I-- I think there are-- some-- approaches that have been tried less, that have been less fully exploited, than others. Certainly-- Snowden, you know, Snowden broke the rules to tremendous effect. The reverberations of his actions are still propagating through the system in-- in interesting ways. Others are challenging the system in-- in presenting frontal challenges through Freedom of Information Act lawsuits and other forms of-- what you might call "confrontational approaches."

The-- the third kind of basket of-- of approaches that I think has been less fully

(COUGH) exploited is-- a kind of insider approach-- that attempts to work within the system to-- to-- to loosen it up and to free it up. There's-- there's actually a tremendous amount of ferment within the-- within the national security bureaucracy right now (NOISE) that you would miss if you think that-- that everybody's a little Nixon or a little Dick Cheney. (LAUGHTER) 'Cause they're not.

They're actually people who are thinking hard about these issues, who want to be regarded as public servants-- who-- and who see themselves as such. So what-- what am I talking about? The-- the latest report of the Information Security Oversight Office-- noted that there were 813 classification challenges last year brought by authorized holders of classified information.

In other words, these were not Freedom of Information Act requests, or as these were not civil society people. These were people within the system who already had access, who said, "Wait a minute, this stuff is classified, and it shouldn't be." That's a very high number. And it's much higher than it has been in the past.

Of the 813 challenges, 453 of them were granted in whole or in part, or slightly more than half. That's-- that's-- a phenomenon that we don't really understand or appreciate. The-- I-- I mentioned earlier the executive order only mentions the public int-- the Executive Order on Classification only mentions the public interest in one passage. It doesn't say anything about including a public interest in classifying-- when you're classifying information.

But the intelligence community issued a statement of principles on-- (NOISE) on transparency last-- February. (COUGH) And they actually said that you should consider the public interest to the (COUGH) maximum extent feasible when making classification determinations. That goes beyond what the executive order says. There's no such requirement in the executive order.

Now, it's not (COUGH) legally enforceable. It's not something that someone can say, "Well, we-- we expect-- you know-- we demand that you do this." But it is a reflection of-- of a genuine soul searching that's going on within the-- executive branch. I think it is part of the-- the-- response to Snowden, which has gone in two directions. One is improved security so there can't be anymore Snowdens. That's the insider threat approach, when they're-- they're monitoring people, monitoring their activities, and so on.

The other (COUGH) is the-- what can we do (COUGH) to increase transparency? And there's actually an intelligence community transparency working group that no one has ever heard of, because they're not-- they're not-- they're not-- they're not public facing. They're not trying to engage the public, they're trying to figure out what they think is the right way to go on transparency. Because they (COUGH) recognize that it is a problem. (COUGH) And I think that-- that is a-- a phenomenon that has potential for people to work with and to take advantage of.

SANDRA COLIVER:

Great. Mort?

MORTON HALPERIN:

So I think the--

(OVERTALK)

MORTON HALPERIN:

--intelligence community's now far ahead of the rest of the government in its interest and commitment to trying to figure out how to declassify more. And I think that the president has pushed them very hard. But there really is-- again, I would suggest two things. And Bill-- (CLEARS THROAT) it's already been said.

The passage in the-- executive order on-- declassification in-- in taking account of the public interest, not only does not apply to classification, but it's also written in-- it's written in a convoluted form for the purpose of keeping it from being subject to judicial review and requests are made under the Freedom of Information Act. And that was not an accident, it was done intentionally for that.

So what needs to be done is to pull that provision out, make it a-- requirement for both classification and (CLEARS THROAT) declassification. But-- an actual requirement of the classification order. And then it would become subject-- to-- to Freedom of Information Act requests. And judges could then make a decision as to whether not only-- not-- so judges would not have to rule-- overrule (COUGH) the government on whether something would cause harm, which is what they now have to do.

They would be able to do the balancing test and say, "This should be made public 'cause the public interest-- is greater." And it would be-- a relatively small change consistent with what the intelligence community is saying. And the other thing is to take the provision in the executive order which says you can't classify things for the purpose of covering up embarrassment and crime, and just change the words to say, "If it," (CHUCKLE) rather than, "For the purpose of."

Because that's what everybody thinks it means. People say what-- you can't-- cover up crimes. And it's no, you can only cover if that's the purpose. And of course if you ask the classifier, he says, "No, I covered up 'cause, if we reveal that we tortured people, people will riot outside embassies." And so-- the provision doesn't-- re-- really say what everybody thinks it says. So I would make those two changes.

STEVEN AFTERGOOD:

And-- and just get a--

FESTEVEN AFTERGOOD:

Just-- can I just ask to clar--

SANDRA COLIVER:

Yes.

FESTEVEN AFTERGOOD:

--just to clarify, was that-- are you talking about more changes in the executive order language?

MORTON HALPERIN:

Right.

FESTEVEN AFTERGOOD:

Or do you recognize-- okay. Thank you.

MORTON HALPERIN:

Well, changes in-- but changes in the executive order then become changes in the Freedom Information Act, 'cause the Freedom Information Act says, "Information-- properly classified pursuant to an executive order." So it then gives the court the ability to say, "This is torture, it has to be public. The public interest overrides here and should be made public."

STEVEN AFTERGOOD:

The political difficulty is you're asking the executive branch to lower its shield, state, "Remove this-- this shield against litigation." And it's not clear under what circumstances they would ever do it. They might do it in the Mort Halperin administration. (CHUCKLE) But I don't think, you know, I don't know who else would do it.

BILL LEONARD:

And that's why-- and that's why, from my perspective, it needs to be-- legislative base. You know, that Congress needs to do it. You know-- getting to my fundamental point, that-- you know, judges-- court-- the courts and the Congress need to be much more assertive in this area. They can't be a deferential.

You know, from a Congressional point of view, there is a president already-- imbedded in statute. We're all familiar-- with the-- with the-- JFK assassination-- records-- act that was passed back in-- the 1990s. And that actually has a higher standard for continued classification than-- than-- than the-- than the executive order. And it's based-- on-- in law.

And it can be just as applicable to-- original classifications and-- decisions. And it says-- specifically, it says that-- the inf-- all these records must be fully disclosed unless, number one, continued-- classification is necessary by identifiable harm to the military, defense, intelligence operations, et cetera, and two, the identifiable harm is of such gravity that it outweighs the public interest in disclosure. And that's-- a basis of-- in war right now. And that's just one example of how, you know, if there was an assertive Congress-- in this area-- you know, things could be done.

SANDRA COLIVER:

Great. Burt Wise and Ian take-- take the-- microphone to him. And-- and please identify yourself. (CLEARS THROAT)

BURT WISE:

Burt Wise-- just a pro bono advocate, but I've worked in this area, in the executive and in the legislature. One, just-- a quick point on the-- provision that Bill referenced, allowing the intelligence committees, there's an identical one in both the House and Senate resolutions creating them, which Mort played a big role, along with some of us, on the Church Committee in getting put in.

And that is that, when I alerted the media to that, they all-- the ones I knew who wrote back, "Well, it's-- nice in theory, would never happen." And the fact is that, when Carter, quote, "Gave away the Panama Canal," there was such a (CLEARS THROAT) firestorm that it-- the Republicans on the committee were able to get a majority in the committee and in the Senate, utilizing that provision, to make public stuff that the administration insisted was far soo-- too incentative-- too-- too sensitive.

And on the committee, in fact-- eventually at least Weiden (PH) and some of the others were aware of it, I think with the leadership on the Democratic side-- and in general, they didn't think they had the votes. So they tried (CLEARS THROAT) to use it as leverage for the bargaining over what could be done.

But going back to Mort, and I probably-- this is-- an act that makes me certifiable to question Mort. (COUGH) But I would disagree with you on F.O.Y.A., because, in 1974 or so-- Phil Hart, when I was his counsel, got an amendment to F.O.Y.A., to the national security exemption. It is still the law.

And it says that, "If there is an appeal in court, the judge is to make a De Novo determination balancing the security claimed-- threat claimed by the executive against not the public interest, but the purpose of F.O.Y.A., which is very close. Unfortunately, in the statement of managers of the conference, which is the equivalent of the committee report, they slipped in words about deference to the executive agency's expertise.

So except for a few of the younger judges, in rare occasions, it's been a dead letter. But actually, it's there-- for defense attorneys who know about it, and-- and argue it, and-- (CLEARS THROAT) are lucky enough to get a judge willing to-- be responsible on it.

But I had a question. And that is the following. With regard to the appeals that go up and the percentages where they say, "Gee, (CLEARS THROAT) whiz, Bill, but you-- can it eventually, from the-- the-- mandatory declassification review, go to court? And if so-- there's no basis for that.

BILL LEONARD:

No. As a matter of fact, and maybe Steve can throw me (INAUDIBLE PHRASE)-- just the opposite. If it had-- if the issue had been subject to a-- a-- F.O.Y.A.-- request, and-- and court decision, what, two years prior?

STEVEN AFTERGOOD:

Yes.

BILL LEONARD:

That-- that the-- that the panel wouldn't even consider it. It wouldn't even be considered for (UNINTEL) for reconsideration. So-- so the-- they are totally separate and distinct. (CLEARS THROAT) And because what that panel is doing is fundamentally the panel is exercising-- the ultimately prerogative of the president. He's delega-- he's a busy man. He can't entertain these requests, or he's delegated it to this interagency panel to exercise his prerogative as-- as commander-in-chief--

BURT WISE:

But then you would have to flip over to a F.O.Y.A. request.

BILL LEONARD:

Right. Or-- the-- the-- the-- only additional appeal after that is a member agency head-- the head of a member agency can appeal directly to the president to overrule a panel decision. And that was done-- once. And it took about-- four, five years for that overruling to take place. It took a change in administrations, and it took a lot of other stuff.

BURT WISE:

And-- and the other thing, quickly, which I wondered if anyone could discuss, the one area where Obama has clearly been worse than his predecessor is regarding the abuse of the State Secrets Act to block any litigation with regards to-- matters on the grounds that, even to entertain the suit would harm national security, which, to me, has been used by him-- outrageously-- in a way that cuts across all of the reforms that you're talking about. I wonder if anyone could comment.

BILL LEONARD:

Yeah, I mean on-- on that ca-- you know, the-- there was-- there was-- so-called (NOISE) reforms announced by Eric Holder and what have you. But if you take a look at some of the most recent cases, there was the case-- I guess a year or so ago out in-- California, a-- Ph.D. student at Stanford, I believe, who was-- placed on a new fla-- no-fly list. The government attempted to preclude it from-- from-- going to-- to-- you know, getting judicial relief from this.

This is a classic example why-- where you need assertive judges. Because, as it turned out, the state secret that the government is attempting to protect in that case was that the F.B.I. agent checked the wrong box. (CHUCKLE) And he meant to check another box. And that was the state secret that was being protected. And it was an assertive judge who made the decision against-- over the government's objection to release that-- that-- you know, the-- the-- the-- the statement of facts that came out of that case. (CLEARS THROAT)

MORTON HALPERIN:

A couple points. First, I think, by far worse even than the state secrets privilege is the Obama administration using the criminal statutes against people who disclose information. They've done now, (NOISE) I think, eight or nine. Every other president combined did three. On the state secrets process, Bush administration started it. Obama promised us he would reform it. And instead, he's gone far worse in the other direction. So I think it is--

(OVERTALK)

MORTON HALPERIN:

On the Freedom of Information Act--

(OFF-MIC CONVERSATION)

MORTON HALPERIN:

On the Freedom of Information Act, you're right that judges refuse to do what the law tells them to do, which is to make a De Novo review. But the De Novo review they're supposed to make is where the information was properly classified. And therefore, you have to look at the executive order, which says the only thing you can look at is harm.

So a judge now has to say, "I disagree with the government's assertion in that-- the release of this couldn't reasonably be expected to cause harm to the national security." If you amend the executive order in the way we suggested, then the judge would-- could go on to say, "I accept the government's harm, but it is outweighed by the public value of the information." And I believe judges are much more likely to do that than to second guess the government on the harm, even though the statute tells them they're supposed to.

SANDRA COLIVER:

I'd like to take a few more questions from the audience. Kate? And please identify yourself.

KATE MARTIN:

Hi, I'm Kate Martin from The Center for National Security Studies. And I was-- I have a question for those of you who worked in this field for a long time, to follow up on Lisa's question, which is-- what is your overall view about how much information the American public actually learns in a timely fashion about what our government is up to on national security matters?

And-- because it seems to me that there's two different things going on. One is, if you look at the press-- reporting on what the U.S. Government's done since 2001, it's-- extraordinary. What took a long time was to get official-- acknowledgement that the press (CLEARS THROAT) reports were correct sometimes. But I guess my question is do you think that there are terrible secrets that are being withheld that-- you know, to a greater extent than has been true, you know, in the last 50 years? Just--

BILL LEONARD:

I-- I just think that the American people get as much information as they demand. I mean it's as simple as that. They don't demand enough. And s-- and-- and that's the environment we're in. And so-- and it's not so much, from my perspective, it's not so much how many ugly-- additional ugly secrets are there out there, it's to what extent do we have an environment that is conducive to producing those ugly secrets? Whether it's through-- criminal intent, or whether it's just through malfeasance.

I mean the perfect example I-- I give is, you know, from a national security point of view, just compare the rhetoric that we hear from our government in terms of condemning the Snowden-- leads. And listen to what we hear from the government in terms of the O.P.M.. That O.P.M. hack, you know, from my perspective, you take every espionage case that has-- been involved in this country against this government, all the damage that's occurred because of those-- in the history of the republic and multiply it by a factor of ten, 100, 1,000, I don't know, maybe you'll begin to approach the implications to national security because of that O.P.M. hack. Compare the government's record to what's come out of that, to the-- to Snowden.

STEVEN AFTERGOOD:

I-- I thought you were gonna--

(OVERTALK)

STEVEN AFTERGOOD:

--ask a slightly different question-- about how the process processes-- information. I-- I think we do have a problem that is even larger than secrecy. And that is our ability to digest and deliberate over information. If you imagine (CLEARS THROAT) that the secrecy problem was suddenly solved, I think we would still have-- political problems as a society in the way that we deliberate over information. If you look at, you know, totally unclassified issues, whether it's health care or tax policy or education-- there's something broken in our deliberative process that is independent of secrecy, and is probably even harder to solve.

(OFF-MIC CONVERSATION)

SANDRA COLIVER:

Christina, I'll take your comment, and then I'd like to hear from Anna and-- and a-- round of-- closing comments. It's Christina.

CHRISTINA:

Thank you (CLEARS THROAT) for a very interesting panel. Two very little questions. One, the I.C.R.C. conducts missions on the basis of confidentiality. But in the past, this state used to be able to release reports if it's so decided. The U.S. doesn't. And somehow (CLEARS THROAT) now the I.C.R.C. says it cannot release them, even if the U.S. government were to-- were willing to release them. Are-- are these mechanisms of declassification useful for trying to get I.C.R.C. reports, by any chance? Has anybody tried it? Is anybody doing it?

BEATRICE EDWARDS:

So-- it-- in-- interesting suggestion. Something to note, I-- only know that-- they are-- subject to confidentiality by agreement. But I think that I.C.R.C. does go public, on occasion, when they feel that they're-- that the agreement with the host country has been breached.

CHRISTINA:

I-- I think they're only cases of I.C.R.C. delegates who have done that, at risk for their own job. But anyway, the-- the second question was--

STEVEN AFTERGOOD:

Unfortunately, I think the answer of the first question is no.

CHRISTINA:

No.

STEVEN AFTERGOOD:

That, because they're-- they're-- associated with-- their non-U.S. government information, it's-- it's considered presumptively classified. (CLEARS THROAT) And so you can't force the issue. What you can try to do is to elicit a voluntary-- disclosure, either working through members of Congress, or directly through the administration. But the legal tools, as they exist, can't be used to compel disclosure right now.

CHRISTINA:

And the second-- small question is about the P.A.C.E. resolution that you began the session with. That I understood you to say that it-- it now encourages states to offer asylum to whistleblowers. And has any other state (CLEARS THROAT) other than Russia offered Snowden asylum? Or has anything happened as a result of that resolution?

SANDRA COLIVER:

So Anna, I'd like to turn back to you, unless anybody has a specific answer-- as far as-- as-- we know-- I-- I don't think any other country has. But-- Anna, let's hear from you. And-- and if you have any-- concluding comments.

ANNA MYERS:

I'll combine them. I-- I guess a couple of things. One is that-- I-- I find myself nodding a lot to what Bill has been saying. And particularly when he said, you know-- even though (UNINTEL PHRASE) work very closely with individual whistleblowers and have for many years-- in different parts of the world, we're doing it because they reveal-- information that I want to know. And that, as a public-- member of the public, I should have probably known, or the fact that-- that is has to tell me, means that there's a real problem with the accountability mechanism.

So it is because of the information that they are-- having to report either internally or to a-- government agency, or wide-- more widely. And I think there's much more acceptance, at least in Europe. I mean, again, I put this in-- it's coming at it from a different point of view. There's a different debate. There's times in which-- we even look to the U.S. and say, "Oh my god, they're doing things," and we're just talking.

So I-- you know, there's-- looking across-- the side of the Atlantic, and there is different pushes. And I think what's creative about this discussion across the Atlantic is how we can sort of start to talk about this. But-- but I think that whistleblowing is meant to be, and whistleblowers, are meant to be a last resort.

And right now, we're (NOISE) finding around the world that they're like the only resort. And if what you're saying is that there aren't-- you know, the accountability mechanisms, our deference is to hide any bit of our government, and our government and our-- our-- our-- our system (UNINTEL PHRASE) executive doesn't rely just on the legislative branch, doesn't rely just on the courts, it is a balance between those.

And when that balance is tipped in a-- in a direction that is overly deferential, and I would-- was saying you can't publicly-- there's over-deference to national security, not (CHUCKLE) necessarily to the executive-- then you've got a problem. And I think one of the things that we're all picking up on, and which has bec-- making the debates much more interesting, is actually why are we waiting for these people? And

why are we putting them in that position?

Because (CLEARS THROAT) what we're seeing more and more of is more whistleblowers come forward, even despite-- clearly facing some very, very difficult situations. And perhaps the reaction is even stronger than it used to be. But what they're starting to feel, a lot of them, is that there is more public support, because it just does-- the balance had-- (UNINTEL) tipped far beyond (CLEARS THROAT) what any of us thought was happening, or would like to have happened.

So I think that-- that in terms of the "no sooner, no more," I think there is a change in the mood music. And Snowden helped to push that. But those of us working in the-- this (UNINTEL) protection committee, Snowd-- at very first glance, it's like, "Oh my god." We're trying to normalize (UNINTEL PHRASE) all the other mechanisms work. And here's somebody in national security, and they're so-- you know, there's people who will work in a local authority or a local hospital, who will say, "That's not me."

But what, in fact, is happening is the way he's done it, and the fact that people are focusing on the information and-- the accountability mechanisms, it means there's a much longer tale than the actual individual whistleblower. And I think that's one of the things that I'm beginning to pick up on, is we don't-- we want our accountable mechanisms to work. And we want them to work because you can add (UNINTEL) them to work. And we don't just want to (UNINTEL PHRASE).

It just is starting to feel very deeply unfair on a whole series of levels, which means whistleblowing is being picked up in the national security area, it's being picked up on the locals government area, it's being picked up in the-- anti-corruption field. It's being picked up in the general sources-- much more. And it's being seen as linked to all of that in a way that hopefully those (UNINTEL PHRASE) or kept on saying it all along because it's always a public interest. (INAUDIBLE PHRASE)

SANDRA COLIVER:

Thanks, Anna. Bea, concluding thoughts?

BEATRICE EDWARDS:

I-- I just wanted to-- follow up a little bit-- about-- on what Anna was saying, that-- that-- part of why-- whistleblowing has moved center state I think is because-- in the United States, in the U.K., and-- and around the world, there-- there has been this-- this deregulation of-- of-- authority, so that, if-- and we saw it in the-- in the United States beginning-- under Reagan, where-- where-- essential services were privatized and regulation of them was also privatized, so that the public is no longer a factor in, say, the regulation of an essential service.

So it-- for example, in water services, there used to be a regulator who had state resources, state power, et cetera, to make sure that rates were not summarily raised, that pressure was maintai-- et cetera, and that's-- gone. (CLEARS THROAT) It's gone

in sector after sector. And we're seeing the cons-- we saw the consequence of that in the financial meltdown of 2008. And what that's done is put this huge burden on individual whistleblowers. And that is such an-- an-- a desperate-- imbalance of power. If an individual has to confront-- a corporation or a federal agency, they are going to lose, regardless of what the law says. (NOISE)

And so we're already, when we're talking about whistleblower defense, on our back feet. And we need to start moving back toward public sector responsibility for public sector-- services, I think-- equalizing-- it comes back to this balance of power. That, having said that, the-- the-- the fact is, what we have still are whistleblowers, and-- and-- and so we need to strengthen protections around them.

And I-- I just did wanna say one thing-- in response to Kate's question, and-- and Steve's answer-- are there terrible secrets-- still out there that we don't know? It's-- it's a very kinda creepy feeling. Because-- you know-- Snowden, for example, and whistleblowers generally, say their most-- their worst fear after going through what they go through is that nothing will change. Because what they regarded as a terrible secret, the public does not regard as a terrible secret. So-- so you kinda have to define "terrible."

And-- and--the-- the-- the gifted whistleblower is the person who knows how to make the public realize this is really terrible. So, for example-- and-- and I'll-- I'll wrap up with this, that-- that-- we know, for example, that force-feeding is going on at Guantanamo. But when you read that phrase, it doesn't really horrify you. But the government is trying to conceal the videotapes of what that looks like.

And the question is-- if we saw that, would we react to it? Would we want that to stop? Would we think that that was something the government should not do? So it-- it's-- it-- there are so many nuances-- to this. If we have a whistleblower who comes out of the force-feeding room and says, "You know, that was really terrible," that may be the-- the closest we're going to get to knowing what the government's doing in the absence of-- a structure that represents the public interest as-- as part of the state. And-- and someone did say once, you know, you can deregulate with the stroke of a pen. But it takes years and years to rebuild a regulatory structure. And-- and so we have whistleblowers. (NOISE)

SANDRA COLIVER:

Thank you. Well, I'll open for final comments. But I put together a list of-- at least six recommendations that have (CLEARS THROAT) been made. One is to-- more creative use of the defense of necessity. Two is sanctions for over-classification. A third, the insider approach, which could include encouraging-- more insider challenges to over-classification being brought to the-- I.S.O.O..

A fourth-- recognition that the House and Senate select committees have discretion to disclose even classified information, in the public interest. Fifth, that the-- executive order on classification-- should be amended to-- make consideration of the

public interest applicable to classification decisions, as well as to declassification. That would enable in cooperation into the F.O.Y.A. and consideration of a balancing of harm versus public interest, rather than just harm.

And a sixth-- the-- the executive order should be amended-- to prohibit the withholding of information if the purpo-- if-- if withholding would conceal a crime or-- other misconduct or-- other bad acts. I hope I got those right. Any additions? Any-- any final comments? Steve?

STEVEN AFTERGOOD:

I-- I don't have concluding remarks. But I do have-- something-- new that I just learned. If you had asked me how many whistleblowers there were in the Department of Defense in a recent six-month period, I would have-- said, "I don't know, I would guess dozens, maybe hundreds." But in the latest report of the D.O.D. inspector general, they say that they received 5,932-- hotline complaints of waste, fraud and abuse, which is-- just strikes me as an extraordinarily high number.

Not only that, but they also-- received 617 whistleblower reprisal complaints. In other words, approximately 10% of the number of people who were-- complaining about waste, fraud and abuse, said that they suffered rep-- reprisal as a result. And-- the inspector general didn't validate all of those, but said that 15% of those 600 were, in fact, verifiably reprised against. So this is a-- a-- a turbulent and extremely important area that I think can only benefit from our-- our attention and support.

SANDRA COLIVER:

Thank you. Bill.

BILL LEONARD:

Thanks, Sandy. The-- the only final point I-- I would make is just the-- a reiteration. And that is the fact that-- you know, again, I'm a firm believer in the criticality of-- classification as a-- as a national security tool to keep-- keep the nation safe and-- and things along those lines.

But I'm truly, truly concerned for-- for its-- inability to be self correcting-- when it comes to-- deliberate abuses by either individuals or agencies, and things along those lines. And until it can become self correcting, you know, I truly believe, then-- you know, especially since this is a process rooted in executive order, that it is going to require-- forces outside the executive branch, be it the Congress, be it the courts, to-- to-- impose some self correction-- on the system till it-- it proves-- its capability to do it itself.

SANDRA COLIVER:

Mort?

MORTON HALPERIN:

No, thanks.

SANDRA COLIVER:

Okay. Those were the last words. Thank you all. Thank-- and thanks very much to our panel. (APPLAUSE)

(OFF-MIC CONVERSATION)

* * *END OF TRANSCRIPT* * *