Secrecy and Hillary Clinton

Over-classification of documents is the weapon of choice wielded by the U.S. government to punish whistleblowers and keep the American people in the dark about its actions around the world. But the well-connected, like Hillary Clinton, get special forbearance, notes Diane Roark.

By Diane Roark

The system for classifying intelligence and other national security documents is broken in major respects. Increasingly, it is also manipulated to punish perceived critics or to protect agency reputations and high officials, both from adverse publicity and in the courts. Hillary Clinton's use of a private rather than State Department email service illustrates many of these issues. Her experience stands in stark contrast to treatment of national security whistleblowers, as illustrated in particular by variance in National Security Agency (NSA) communications intelligence policies.

—Culpability. Former Secretary of State Clinton clearly and knowingly mishandled classified information. As a U.S. senator, security clearances were required for her membership on the Senate Armed Services Committee from 2003 to 2009. Therefore, she knew the rules for handling classified information before she decided, at the outset when she became Secretary of State in early 2009, to use personal rather than secure email.

Hillary and Bill Clinton had suffered many political and public relations crises. She had already run for the presidency and likely would do so again. Rules for handling classified information were ignored, the effect being to hide records that could be used against her in a second presidential run.

It simply could never be argued plausibly that for four years, a person in the highest U.S. foreign policy slot had no classified or sensitive information in any business emails that she wrote or received over 30,000 of them. This defies the definition of the job.

The State Department is a primary user and a significant generator of classified information that bears on the great majority of issues coming before the Secretary. The State Department is also a profligate designator of "Sensitive But Unclassified" information.

—Overclassification. It is widely admitted that the intelligence classification system suffers from systemic over-classification. President Barack Obama has acknowledged the problem, and one review group even stated that almost every

item now labeled Confidential should be Unclassified. There is no penalty for playing it safe or playing it political by classifying at too high a level, but there are potentially severe repercussions for an individual who mistakenly classifies at too low a level, or who is known to mishandle or publicly reveal classified information.

It is most unlikely, however, that Hillary Clinton will fall victim to accusations that rely on improper overclassification. The State Department and White House, including President Obama himself, sought to protect her and to minimize the effects of her behavior.

The case is extremely high-profile, Democrats in Congress would attack any borderline classification, and a host of wellpaid lawyers would rise to her defense. Improperly classified items or those deemed Sensitive but Unclassified may be redacted from publicly released documents, but it is hard to imagine that Mrs. Clinton would be falsely accused of felonies.

Whistleblowers suffer a quite different fate. Intelligence agencies easily and repeatedly retaliate for the airing of their dirty laundry by accusing the whistleblower of improperly handling or revealing allegedly classified information. The Obama administration then prosecutes them under the Espionage Act, under which altruistic motivation is irrelevant and may not even be raised in court.

Former CIA official John Kiriakou revealed on television that post 9/11 torture was official U.S. policy, not just attributable to a few rogue agents. The CIA seethed, but the Justice Department would not prosecute. Unfortunately, Kiriakou erred in giving a reporter the business card of a man he thought had retired from CIA but was still an agent under cover. The agent’s name was not published, but CIA got its revenge when Kiriakou was indicted under the Intelligence Identities Protection Act of 1981. Left penniless with over $700,000 in legal bills even before trial, Kiriakou finally accepted a felony plea bargain and went to jail.

Thomas Drake and this author went through proper official channels in 20012002 to protest NSA’s surveillance of U.S. citizens. Along with colleagues Kirk Wiebe, William Binney and Edward Loomis, they also reported to the Defense Department Inspector General the waste of money on NSA modernization.

After domestic surveillance leaked to the New York Times four years later, the five became primary suspects, partly because the IG improperly offered their names to the FBI. All were raided, but no evidence was found because, as the reporter later stated publicly, he had not then met or communicated with any of the five.

Nonetheless, Drake was prosecuted under the Espionage Act for possessing five Unclassified NSA papers that NSA retroactively classified. He was threatened with 35 years in prison unless he pled guilty, but heroically resisted. Pretrial hearings proved all the information in the documents had been declassified by NSA. After a yearsold interview record was orally falsified, this author was asked to plead guilty to felony perjury, but also refused.

Section 1.7 of Executive Order 13526 governing classification stipulates that no information may be classified to conceal violations of law, inefficiency or administrative error; to prevent embarrassment; to restrain competition; or to prevent or delay release of information not requiring protection. This section is observed in the breach, as political considerations dictate.

For all the above proscribed reasons, unclassified parts of the NSA IG audit we requested are still withheld by NSA ten years after the audit was first published. Former NSA contractors Edward Snowden and John Kiriakou showed that illegal and unconstitutional activities were hidden from American citizens and others behind the veil of classification. For revealing material that never should have been classified in the first place, they are paying a very high price.

In Snowden’s case, many revelations about domestic surveillance still are treated as classified to keep them from U.S. voters, although every terrorist and every intelligence agency in the world has access to the documents and almost no ordinary person in any country of interest to the U.S. can function efficiently whilst avoiding NSA surveillance.

—Sensitive but Unclassified Material. Individual agencies claim an unsupervised right to withhold admittedly Unclassified information according to any criteria they see fit and for as long as they choose. In the Clinton email case, it is quite striking that not a word has been breathed about such Unclassified but Sensitive material. Her free pass in this respect is the envy of whistleblowers.

In our case, NSA initially refused to return any materials seized in the raids. When sued, NSA claimed that if a computer contained even one admittedly Unclassified document with material that had not been officially released by NSA, the Agency could retain and destroy the entire computer content. Courts eventually allowed NSA to keep such individual documents in their entirety and at their sole discretion, but required that others be copied and returned.

—With ordinary citizens or lower-level whistleblowers, Sensitive but Unclassified material is wielded as yet another weapon in the Executive’s arsenal of punishments. Even highlevel intelligence officials have had difficulty publishing their memoirs, partly because prepublication review

agreements routinely allow an agency to withhold unclassified information.

Since the 1950s, most judges refuse to review allegedly classified or sensitive material even to determine that it does not fall under the commonsense prohibitions of Section 1.7 of the Executive Order on classification. The Executive Branch has also been famously successful in promulgating a "state secrets" doctrine to avoid or indefinitely delay court scrutiny of important civil liberties issues such as domestic surveillance. It is now known, however, that the original state secrets precedent wrongly invoked intelligence sources and methods to cover up Air Force culpability for a plane crash.

In the author's case, even NSA's grossly inconsistent classifications got a free pass. A document that was released to Kirk Wiebe as Unclassified was branded Top Secret Compartmented when found on the author's computer. Confronted with this vast discrepancy, NSA alleged that it could neither confirm nor deny that the document had previously been released. It keeps no records of prior declassifications. Even in a related court case. Nor is it interested in an available system to compile and compare such records. But the judge let the classification stand.

Diane Roark retired in 2002 after 17 years on the professional staff of the House Permanent Select Committee on Intelligence and prior service on the National Security Council Staff, in the Office of the Secretary of Defense, and in the Intelligence section of the International division of the Department of Energy.

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