Why classify legal memos?

By Louis Fisher

O n March 14, 2003, John Yoo of the U.S. Department of Justice issued a memo explaining the legal principles for interrogating suspected terrorists.

On March 31, 2008, it was declassified and publicly released. It consisted of legal reasoning alone, why was it classified? A society cannot remain faithful to legal reasoning alone, why was it classified?

Yoo's memo was entitled: "Military Interrogation of Aliens Unlawful Combatants Held Outside the United States." At the bottom of the first page appears this notation: "Declassify under authority of Executive Order 1958" By Acting General Counsel, Department of Defense By Daniel J. Dell'Orto, 31 March 2008." What is "Executive Order 1958?" The series of numbered executive orders currently exceeds 13,000. Is 1958 a date? A typo? Was it supposed to be 12958, the executive order that covers classified national security information? The notation is remarkably casual and shallow.

Who originally classified the memo, and why? Without the name of the classifier there is no accountability. Executive order 12958, as amended, states that part of the steps in classifying a document is to provide "a concise reason for classification that, at a minimum, cites the applicable classification categories." Identified in the order was that ever done? If so, who did it?

The agency originating the document "shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified." Nothing in the Yoo memo indicates compliance with that requirement. The director of the Information Security Oversight Office (ISOO) "may grant waivers of this requirement." Was there a waiver? Did the director even know of the Yoo memo? Decisions to classify and declassify require accountability, and thus far we have no evidence of how and why the classification was made.

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Louis Fisher is a specialist in constitutional law at the Law Library of Congress and author of the forthcoming The Constitution and 9/11: Recurrent Threats to America's Freedoms. The views expressed here are personal, not institutional.