

Executive Secrecy: George W. Bush and Beyond

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Abstract: This paper explores the development of executive secrecy from an ethical, historical, and legal perspective. It then uses this framework to examine secrecy in the George W. Bush administration. It finds that this administration has expanded executive secrecy and discusses some of the associated dangers. It concludes with a recommendation that in the interest of protecting the democratic process, the U.S. government and the American people need to work toward limiting executive secrecy, and urges further study on how this might be done.

This paper explores secrecy in the executive branch, focusing on the current George W. Bush administration. This issue has been explored from many different angles – the constitutionality of secrecy, secrecy under the rubric of lying, and as a footnote in discussions of presidential power. Yet there has been little discussion of executive secrecy’s inherent good or bad qualities, and the effect it has on decision-making, accountability, and the general health of American democracy. This paper takes a more holistic approach to executive secrecy from the varied standpoints of prescriptive theory, history, and constitutional practice. Most importantly, it argues that uses of secrecy require critical scrutiny.

Secrecy Theory

The presence of secrecy in a decision-making process has a decided effect on what decisions are made, and how those decisions are made. This paper will use the neutral definition of secrecy as “intentional concealment” given by ethicist Sissella Bok and closely approximated by other social scientists (Tefft 14, Bok 6). Executive secrecy, the topic of this paper, has different characteristics than other forms of secrecy. For one, executive secrecy is almost never limited to one person – secrets are shared with close advisors, and often among a massive bureaucratic network. Thus, executive secrecy is also collective. In addition, the executive secrecy to which this paper refers is state secrecy, which differs in important ways from private-sector executive secrecy. References to executive secrecy should be understood to mean the executive branch of government.

Collective secrecy in itself “is not bound to be any more corrupting than that exercised by individuals in positions of power. It is often legitimate, and at times indispensable... Yet such secrecy brings added opportunities for abuse and calls, therefore, for special safeguards.” (Bok, 108) One distinction between individual and collective secrecy is as important as it is obvious: it is harder for a group of people to keep a secret than for one person. For this reason, “Control over shared secrets may require inducements of a different character, and sometimes coercion.

The very act of sharing sometimes makes betrayal possible” (Bok, 108). In addition, collective secrecy has a different psychological component than individual secrecy. Studies have shown that in collective decisions made under conditions of decreased individual responsibility, groups are willing to take greater chances than each member would take individually.

Executive secrecy constitutes a special class of collective secrecy because of historic reverence for the executive. In ancient times the principle of *arcana imperii* was invoked to transfer the cloak of sacredness from religious leaders to secular leaders. It was often used to defend 17th century absolutist monarchs. Because monarchs had a divine right, by extension, secrecy “was given a sanctity of its own” (Bok 172).

Another principle that underlies some arguments for executive secrecy is the “reason of state” rationale, which holds that rulers are justified in any behavior to ensure survival of the state (Bok 173). Neither of these doctrines is often cited explicitly as justification for secrecy because they are so ripe for abuse, but “the primordial sense of government secrecy and power that these doctrines expressed has not diminished” (Bok 173).

When is Secrecy Acceptable?

Most reasonable people agree that there are circumstances in which collective and state secrecy is necessary or desirable. Bok gives three criteria for supporting state secrecy: firstly, when full transparency would cripple choice and policy making. Policy-makers ought to be able to start from scratch, trying out unpopular ideas and considering a variety of choices. But, “even temporary secrecy can block citizens from knowing about critical phases of the process in which the policy is adopted and thereby diminish both accountability and consent” (Thompson 184). A second acceptable circumstance is when surprise is necessary, such as a criminal investigation or the devaluation of currency. The third possibility is when publicity could result in injury to innocent people. For example, a tax audit leading to information about someone that isn’t relevant to that particular investigation (Bok 176).

Moderating Secrecy

Although certain instances may require secrecy, scholars agree that there must be checks on this power. One check is to establish a time frame for the secret.

Long-term group practices of secrecy... are especially likely to breed corruption and to spread....The burden of proof is on those who would deny them such control. But when those who exercise power of the kinds discussed above claim control over secrecy and openness, it is up to them [the people] to show why giving them such control is necessary and what kinds of safeguards they propose.” (Bok 110)

There are times when keeping a secret briefly is beneficial, such as not immediately releasing exit poll results so as not to influence later voters. However, even when secrecy is temporarily necessary, it is just as necessary that the secret in question be revealed in time for decision-makers to be held accountable for their actions (Thompson 184). Another important check on secrecy is “second-order

publicity” (Thompson 185). In other words, the reasoning behind the necessity for secrecy should never itself be secret; if the reason something has to remain secret is because it would not stand up to a test of democratic popularity, then it ought not to be done in secret either. Bok posits that when it is not possible to submit a decision to public debate because of time or circumstance, at the least the decision-maker ought to do a “thought experiment” to imagine what the outcome of such a debate would be. However, such an experiment will only be useful if there is a chance that the decision could actually be subject to debate. “Otherwise self-serving rationalization and bias can sneak back in” (Bok 112). Theorists have generally found that because of the corrupting potential of secrecy and its ripeness for abuse, it must be used only in certain circumstances and even then, with accompanying checks of publicity.

Executive Secrecy in Recent Political Theory

There is surprisingly little research on the uses of secrecy in the presidency, or comprehensive analysis as to when and why secrecy is used. Nonetheless, several theories exist that together provide a more holistic understanding of executive secrecy.

The personality-private theory of executive secrecy is derived largely from the work of political psychologist Harold Lasswell. In this model, the president’s personality and motives strongly affect their decisions, though decisions are later rationalized in the public interest. Certain personality types, like paranoids, tend toward secrecy more than “normal,” adjusted personality types. Though difficult and imprecise in its application, this theory nonetheless offers a viable means of understanding secretive or deceptive presidential actions (Orman 12-14).

A second way of understanding executive secrecy is that it is primarily the result of government bureaucracy. The bureaucratic politics theory argues that “what a government does in any particular instance can be largely understood as a result of a bargaining process between the president, his top national security advisors, the director of Central Intelligence, other national security bureaucrats, and actors from other nations”(Orman 16). In analyzing covert actions, this theory focuses on “who plays” and “what determines each player’s stand.” Secrecy arises out of this bargaining process, sometimes as a result of rogue agencies trying to maximize their own power. This interagency one-upmanship in classification and secretive programs is alarmingly common in agencies like the CIA and FBI (Gup 28).

A third way of understanding presidential secrecy is through the pragmatic calculations approach. In this theory the president is a rational, national actor who weighs the costs and benefits of secrecy versus openness when making decisions, including: (1) the need to promote national security (2) the strategic advantages gained from secrecy (3) the ongoing foreign policy commitments (4) the domestic political environment; and (5) the need to conceal incompetence, inefficiency, wrongdoing, personal embarrassment, national embarrassment, and/or administrative error. This theory is inherently subjective (Orman 20).

The fourth model is institutional. This theory argues that presidents resort to secretive and deceptive programs because their predecessors have institutionalized these policies. Arthur Schlesinger, posits that the presidency has been aggrandized through “various unusual exercises of presidential power, the advent of crisis diplomacy, the emergence of the United States as an industrial-military power in the twentieth century, and congressional abdication of their oversight responsibilities.” Under this theory, the imperial presidency arose out of “belief in permanent and universal crisis, fear of communism, [and] faith in the duty and right of the United States to intervene swiftly in every part of the world” (Orman 22). Over the 1960s and 1970s the centralization of power applied to questions of war and peace began to extend to the domestic sphere. This theory falls short of explaining why the practice of secrecy developed in the first place (Orman 22).

None of these models alone satisfactorily explains the prevalence of secrecy in the executive branch today. However, in combination, they create a theoretical framework to begin unraveling the web of secrets spun around the presidency.

Executive Privilege and State Secrets

Two privileges are cited as the main justifications for executive secrecy. The first is the state secrets privilege, applied to information related to national security. The second is executive (or presidential) privilege, which covers communications between presidents and their advisors. It is widely accepted that the executive must not divulge some information for reasons of security. It is also generally accepted that presidents require some confidentiality in order for them to receive candid advice from advisers. The controversy surrounding these privileges tends to arise from the question of from whence they are derived.

Executive privilege

The executive privilege debate centers on Congress’s desire for executive branch information, and the executive branch’s desire to keep this information secret. The constitution does not explicitly grant either branch these respective privileges, but the Supreme Court has recognized the constitutional power of Congress to investigate, and of the executive to withhold information. The reconciliation of these powers has significant implications for the ebb and flow of presidential secrecy (Fisher Executive Privilege 3).

Mark Rozell argues that the Constitution must be understood in light of the founders’ influences. He emphasizes that both John Locke and the Baron de Montesquieu saw the need for a powerful executive, especially in war, or other emergencies where there is either no time for Congress to act or no rule to govern the situation. Rozell emphasizes the framers’ desire for an energetic and efficient executive (Rozell, 22). Constitutional scholar Edward S. Corwin agrees, saying that Locke and Montesquieu understood executive power as “a broadly discretionary, residual, power available when other governmental powers fail” (Rozell 22).

The standard interpretation of Locke and Montesquieu differs from that of Rozell. Raoul Berger emphasizes the importance these thinkers placed on limiting executive power. Robert M. Pallitto and William G. Weaver also believe Rozell mischaracterizes Locke and Montesquieu’s influence on executive privilege today:

“It is far from clear that a given idea circulating in the political theory discourse of eighteenth-century Europe found its way into the governing document of the newly created United States of America” (Pallitto & Weaver, 196).

The Constitutional basis for executive privilege is also disputed. Berger asserts that since the Constitution explicitly grants the legislative branch the privilege to keep secrets, and there is no such explicit grant to the executive, the founders did not give the executive this privilege. However, Rozell notes that the powers given the legislature are constructed with a “herein granted” clause, and are likely meant to be more specific. Article II, addressing executive power, is a general grant of power with less specifics. He argues that legislative secrecy was addressed only because such a large body would not be assumed capable of keeping secrets. The founders saw executive secrecy as such an obvious necessity that there was no need to enumerate this power. Numerous federalist papers support this, including John Jay’s assertion in Federalist 64 that “secrecy” and “despatch” are characteristic of the executive branch (Rozell 24). Further, the Constitutional Convention itself was held under conditions of strict secrecy (Rozell 23).

A critical case in defining executive privilege was *U.S. v. Nixon*. At issue was whether President Nixon was required to turn over tape recordings of meetings in his office. Nixon claimed that “any effort to subject the President to the orders of the court ‘would effectively destroy the status of the Executive Branch as an equal and coordinate element of government,’ and that in the exercise of his discretion to claim executive privilege the President ‘is answerable to the nation but not the courts’” (Fisher National Security 159). The court disagreed. It held that in matters of criminal prosecution, the courts decide what information was released or withheld, not the president (Fisher National Security 159). However, the court also validated a broader definition of executive secrecy by writing, “communications made by presidential advisors in the course of preparing advice for the president come under the presidential communications privilege, even when these communications are not made directly to the President.” The court upheld the constitutionality of executive privilege, but also required a balancing test against the need for disclosure (Pallitto, 199). The importance of the case is magnified because the materials over which Nixon was claiming executive privilege did in fact reveal wrongdoing.

State secret privilege

‘For those of us defending the government from the range of legal assaults, openness is like AIDS.... One brief exposure can lead to the collapse of the entire immune system.... [But] we can always play the trump card – state secrets – and close down the game.

- Anonymous U.S. government attorney (Pallitto 84)

Though often cited in conjunction with executive privilege, the state secrets privilege is a distinct doctrine. The state secrets privilege is applied to information that could potentially harm national security. While executive privilege is considered to be qualified,

The state secrets privilege is universally recognized in law as an *absolute* privilege and mainly relies on practicality more than constitutional principle for its justification. Once it is determined that the privilege is asserted over properly classified information, no amount of demonstrated need on the part of a litigant will overcome the operation of the privilege; no balancing can occur, as with executive privilege” (Pallitto, 93)

How this definition of the state secret privilege gained legitimacy is not altogether clear. Partly it lies in its historical entanglement with executive privilege. It has been in the executive’s interest to confuse the two powers, to “infect all withheld information, where possible, with allusions to national security” (Pallitto, 94). Unlike executive privilege, which is considered to be supported by the constitution and common law, the state secrets privilege arose mostly from practical necessity. Echoing the “reason of state” doctrine, “The state secrets privilege is the most basic of government privileges – it protects survival of the state, from which all other institutions derive” (Pallitto 94). While executive privilege is intended to protect the office of the presidency, the Supreme Court has ruled that the state secrets privilege belongs to the *government* (Pallitto, 99). Although the state secrets privilege is neither constitutionally based nor recognized by statute, the courts consistently have recognized it over citizens’ constitutionally based claims. “The privilege seems to be ultra-constitutional, for courts have never forced the government to disclose classified information in any case where the privilege has been asserted, even when the basis for compulsion is the claim of plain constitutional right (Pallitto, 87).

The most significant case in defining the state secrets privilege was the 1953 Supreme Court case of *United States v. Reynolds*. The trial was brought by three widows against the U.S. government for negligence in the explosion of a B-29 bomber over Waycross, Georgia (Fisher, Reynolds 386). Five of the eight crew members on board were killed, and four of five civilian engineers. The local newspaper reported that the men had been testing secret equipment. The widows requested the accident report and the survivors’ deposition. The government refused their request, claiming it would harm national security. When the judge requested the documents so as to decide whether the material was too sensitive to disclose, the government attorney argued that this judgment fell solely to the executive branch.

At this refusal, the judge ruled in favor of the widows. The government appealed the decision, arguing that “disclosure” of the information was not in the public interest (equating a judge’s inspection with public exposure)(Pallitto 81). The appeal lost, and the case went to the Supreme Court. Although the government had hinted at a state secrets privilege, it was not until this case that they claimed this privilege as grounds for not releasing information, continuing to insist that there was secret and harmful information in the requested documents. The Supreme Court declined to examine the documents, and ruled six to three in favor of the government on March 9, 1953. The court held that “it is proper to prevent disclosure of information in court proceedings when ‘there is a reasonable danger that compulsion of the evidence will expose matters which, in the interest of

national security, should not be divulged” (Pallitto, 86). Its reasoning was that, “The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect (Fisher, Reynolds 397).” This time the court seemed to agree with the government in equating in camera inspection with public disclosure. The court followed up with the warning that judicial control “over the evidence of a case cannot be abdicated to the caprice of executive officers” (Fisher, Reynolds 397). However, the judiciary cannot know whether the executive is acting capriciously if it does not inspect the questionable evidence. The court gave up its oversight powers and allowed the executive branch to self-regulate, in spite of the clear conflicts of interests that could arise.

It is ironic that the *Reynolds* case is taken as the basis for subsequent claims of state secret privilege. A half century later, the daughter of one of the crew members who died in the crash discovered the disputed accident report on the internet. Surprisingly, it contained no secrets that had not been immediately revealed in newspaper reports. Instead, the report revealed gross negligence on the part of the Air Force. The report summed up, “the aircraft is not considered to have been safe for flight” (Gup 107). The families of the deceased again took the government to court, this time for fraud against the court. The Supreme Court refused to hear the case, and lower courts decided in favor of the government. By allowing the *Reynolds* case to stand, the government got away not only with lying to the judiciary, but also earned a powerful precedent still being invoked. There is no less incentive today to use the state secrets privilege to protect undeserving and possibly incriminating information than there was in 1953. While between 1954 and 1973 the U.S. government invoked the state secrets privilege only four times, “in the five years since 9/11, it has been invoked at least 23 times, including cases involving allegations of unlawful detainment by the CIA and illegal domestic surveillance” (Gup 109).

Secrecy in the George W. Bush Administration

The administration of George W. Bush is the most secretive in recent history.¹ Its secrecy encompasses everything from national security, to budgets, to how it makes policy, to half-century old documents. It has been successful in shutting out major news sources that have historically informed the public. It also has kept Congress in the dark on a variety of issues traditionally overseen by the legislature. This section discusses the administration’s approach to secrecy.

The government’s Information Security Oversight Office estimates that at present, the U.S. has about a billion secrets (Gup 34). After 2002, the number of classification actions undertaken annually nearly doubled. In 2004, the government reached an all-time high of 15.6 million classification actions (Gup 100). Much of the proliferation of secrets is due to derivative classification decisions. Only about a

¹ Senator Patrick Leahy is quoted as saying of the George W. Bush administration, “Of the six administrations I’ve worked with, this is the most secretive. In Green, 22. Also See Waxman Report, 81.

thousand officials are authorized to make original classifications, the first decision about whether a piece of information is classified. However, 1.8 million federal employees are allowed to classify secrets derivatively, meaning that if all or part of an originally classified secret appears in another document, that document must also be classified (Gup 35). Traditionally, documents have been classified as “Top Secret,” “Secret,” or “Confidential,” which respectively signify that the public release of the information would cause exceptionally grave damage, serious damage, or simply damage to national security interests. The number of officially classified documents is already enormous, but to add to the protected documents, the Bush administration has introduced a new classification: “Practically any federal employee has the authority to designate documents ‘sensitive but unclassified,’ or SBU. There are no uniform rules about when or how to remove these designations, and there are few checks in place to prevent abuses” (Leone 101).

Traditionally, classified documents are re-evaluated after a period of time and declassified. Under Bush, declassification has slowed down, because the presumption has moved in favor of keeping documents classified. This means that every document eligible for declassification must be examined carefully before being declassified. If a declassifier is unsure whether or not to release a document, the culture of secrecy in this administration will generally sway them towards continued classification. There are no punishments for the unnecessary classification of information, but the sanctions for releasing information the administration deems sensitive can be severe. Thus, the incentives for secrecy outweigh the incentives for openness, even at the lowest levels of government. Perhaps this explains why for every dollar the federal treasury spent in 2005 releasing old secrets it spent \$148 defending current ones and creating new secrets (Gup 106).

The current administration has also reclassified many declassified documents. A report of the National Security Archive at George Washington University found that the Bush administration has reclassified 9,500 documents, from as far back as World War II (Leone 90). The reclassification program was so clandestine that even the U.S. Archivist had to find out about it through a *New York Times* exposé. The program was put on hold in 2006 after the *Times* article stirred up protest, but potentially could start again without public knowledge (Gup 102). Reclassification is not only labor and resource intensive, but challenges common-sense assumptions. Can a half-century old document that was previously in circulation really contain secrets that would currently harm national security? If a document has been made public, can it be made secret again?

The classification of a 2001 study related to the Gulf of Tonkin incident suggests a different explanation for information being aggressively classified and reclassified. The study found, based on classified materials, that some of the main intelligence used to justify the Vietnam War had been falsified (Gup 103). Though historically significant, the study was classified, likely because of the inevitable parallels that would be drawn to the Iraq war intelligence. This decision exemplifies the effort to rewrite the past so as to avoid debate in the present. As George Orwell

observed in 1984, “Who controls the past controls the future; who controls the present controls the past.”

Not only is the administration classifying studies, it is making it harder to do those studies in the first place. Congress passed the Presidential Records Act in 1978 in response to the Watergate scandal. The act asserted that “the records of a President relating to his official duties belong to the American people” (Waxman 31). It gives the Archivist of the United States custody of these records and imposes a duty to make the records public as quickly and fully as possible. In spite of the Act’s clear intentions, on November 1, 2001 President Bush issued executive order (EO) 13233, allowing a former president to unilaterally assert executive privilege over a document, even if neither the archivist nor the current president agrees that the privilege is applicable. It also flouts the Act’s assertion that the presidential papers belong to the American people by making the deceased president’s family the default representative of their papers; previously it had been the head archivist (Waxman 34). In protest, historian Richard Reeves sent President Bush a copy of two of his books, one on President Kennedy, the other on President Nixon. His comment: “I said they might be worth something someday as artifacts because it would be impossible to write them under his new order” (Gup 119).

The trend toward overclassification and reclassification is not only an affront to the public’s right to know, but poses a danger to the very system of classification. As Supreme Court Justice Potter Stewart said: “when everything is classified, nothing remains classified” (Leone 101). If frivolous information consistently receives classified status, it erodes respect for the title. Insiders then feel justified in leaking such information. Says a member of the press, “When it’s not clear what is secret, that’s when you start getting leaks that are damaging.”² This difficulty was illustrated when an high-up Bush official outed CIA operative Valerie Plame in retaliation for her diplomat husband’s disagreements with the administration. (Shane A1). This is an example of the bureaucratic politics theory coming into play, in which various agencies and actors use secrets (kept or revealed) as the currency of power. Power is not only derived from keeping secrets at the upper levels of government, but also from ordinary citizens, as with the current treatment of the Freedom of Information Act.

Freedom of Information Act

The Freedom of Information Act (FOIA) was designed to provide public access to information held by the Executive branch. Passed in 1966, “It established that any individual has a right to information held by the government unless the government proves that there is a specific reason to withhold the information. That reason must fall under one of the specific exemptions that FOIA provides to the disclosure requirements”(Waxman 3). There are nine such exemptions. In general they protect information that is classified, was collected for law enforcement purposes, or documents that would be privileged in case of litigation (Waxman 4).

² Scott Armstrong, National Security Archive founder and investigative reporter, in Jennifer LaFleur, *Federal Officials and Media have Dialogue over secrecy*. The News Media & The Law Winter 2003 p. 8

The implementation of this law is essentially up to the executive. Traditionally, attorney generals issue a statement as to how agencies ought to handle requests under FOIA. The Clinton administration instructed that there should be a “presumption of disclosure” even for exempt materials: “where there would be no foreseeable harm in releasing a document, an agency should do so, even if there were technical grounds for withholding it under FOIA” (Waxman 3). The Bush administration instructed the opposite: to consider any possible negative consequence of releasing a document, even if it does not fall under the exemptions.

The administration has also created practical obstacles using tactics such as delaying and denying fee waivers for FOIA searches, for highly technical and frequently nonsensical reasons (Waxman 3). As Jane Kirtley, a professor at the University of Minnesota, explained, “it means delay, obfuscation, and frivolous denials will be commonplace” (Waxman 4).

Bok also addresses the need for quality freedom of information legislation:

I believe that a guarantee of public access to government information is indispensable in the long run for any democratic society. When such a guarantee is enforced, it changes the public’s view of what it has a right to expect and reduces the hesitation that government officials otherwise feel about whether or not to disclose information. (Bok 179)

Such laws only work if the exceptions are kept to a minimum. Otherwise, they may reinforce government secrecy rather than reduce it (Bok 179).

Federal Advisory Committee Act

Transparent policymaking keeps the public informed and builds trust in government. However, the Bush administration has codified the practice of keeping the public uninformed about who is influencing key policy. The Federal Advisory Committee Act (FACA) was created by Congress in 1972 to regulate how the Executive branch gets advice from parties not employed by the federal government. The act “applies to any advisory group that is established or used by a federal agency and has at least one member that is not a federal employee.” Its purpose is to prevent secret advisory bodies from unduly influencing government policy (Waxman 36). The Bush administration’s use of exemptions and exploitation of violate the spirit of the law and the weaken the Act.

Vice-president Cheney’s Energy Task Force, established shortly after Bush entered office, was charged with developing “a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future” (GAO 1). Officially, the task force was made up of heads of various federal agencies and high-ranking White House officials. However, a General Accounting Office investigation revealed that “the task force engaged in extensive consultations with key representatives of the energy industry, particularly with coal, oil and gas, and nuclear interests” (Waxman 38). The task force consulted environmental and consumer advocates only minimally. The Sierra Club and Judicial Watch sued for task force records in order to illuminate the extent of the consultations. Their

request was initially granted, but denied on appeal based on “separation of powers” concerns (Waxman 38).

The Energy Task Force demonstrates how claims of executive privilege can clash with another requirement of democracy, publicity. It is clear that the law did not intend this committee to fall under executive privilege. In general, there should not be secrets about the identity of the parties in a negotiation. “Whether they be individuals or companies or representatives of the state, it is important for the public to have knowledge of who they are and what they represent.” (Bok 186) Important decisions such as the national energy policy should be made with contributions from a wide range of perspectives. Making such decisions under a veil of secrecy prevents the public from holding government accountable and the government from making the best possible decisions.

The bureaucratic politics theory helps explain the task force’s actions – by keeping proceedings exclusive, it was possible for certain interests to gain an edge over others. Secrecy was used to divide the insiders with power from the outsiders without influence.

The PATRIOT Act

The terror attacks of September 11, 2001 changed the landscape of national security dramatically and resulted in extensive reforms. Some of these reforms were probably needed updates to an antiquated and disorganized system. However, a dark side emerged of this push for better security, in the form of greater secrecy.

The USA PATRIOT Act was passed on October 26, 2001 after little congressional deliberation. The law “made sweeping changes in many law enforcement areas, including interception of communications in criminal investigations, domestic investigation of foreign intelligence activities, and detention and removal of illegal immigrants” (Waxman 57). Much ado has been made about the loss of civil liberties as a result of the PATRIOT Act, but less about the expanded ability of the Executive branch to act in secrecy (Waxman 57). Civil liberties and secrecy are intimately connected because openness and accountability are major forces in safeguarding civil liberties, while the erosion of rights tends to happen under cover of darkness.

Obtaining Records in Secret

Section 215 of the PATRIOT Act increases the Justice Department’s (DoJ) power to secretly obtain library and other private records through the Foreign Intelligence Surveillance Act (FISA). Not only can the DoJ require the production of “any relevant tangible item (including books, records, papers, documents, and other items),” it can do so in investigating an American citizen not suspected of working for a foreign power. This brings secret surveillance out of its traditional use for foreign intelligence collection and into the domestic sphere. Furthermore, the organization or person asked to release documents is barred from telling anyone of the request, effectively preventing public outcry since no one discovers the invasion of privacy. Congress is being kept in the dark as well. When the house Judiciary Committee questioned the DoJ as to whether the power was being used to access library records, it responded that, “[t]he number of times the Government

has requested or the Court has approved requests under this section since passage of the PATRIOT Act, is classified, and will be provided in an appropriate channel” (Waxman 58). Classified information must be able to cause foreseeable harm to the public interest if released. It is stretching credibility to suppose that knowing the *number* of times the DoJ has requested library records could be of use to a terrorist. Rather, it appears to be an abuse of the state secret privilege to avoid examination of a favored intelligence practice. It also may be calculated to test Congress’s will, with the goal of expanding executive power.

Warrants for Secret Investigations

Wiretapping is a very invasive practice. In the past, an officer of the Attorney General has had to prove to a Foreign Intelligence Surveillance Act (FISA) judge that there is probable cause that their intended target is a foreign power or agent of a foreign power to be granted a warrant to wiretap. This is different than a Title III warrant, which is used in ordinary domestic criminal surveillance, and which requires a showing of probable criminal activity. The PATRIOT Act has blurred the distinction between these two warrants by asserting that “the certifying official need only to certify to the FISA court that ‘a significant purpose’ of the surveillance is to obtain foreign intelligence information” (Waxman 59). The implications are that, “[a] FISA warrant has become little more than a regular Title III warrant issued secretly with no required showing of probable cause of criminal activity.”³ Also troubling is an absence of judicial review: the 2006 FISA report revealed that during 2005 the government made a record-high 2,072 requests to conduct secret surveillance; a handful were modified but none were denied.

Apparently, even these guidelines proved too binding for the Bush administration. On December 16, 2005, the *New York Times* broke the story of “one of the government’s most closely-held secrets in the war on terrorism” (Yoo 100). The report revealed that the government had engaged in wiretapping on U.S. soil without even a FISA warrant. The influential DoJ lawyer John Yoo defends this policy on the grounds that the Constitution grants the executive war powers to do as he pleases. However, Yoo fails to explain why, if the President has the powers he believes him to have, he needs to exercise them in secret. Secondary publicity is needed to justify first-order secrecy.

Destruction of Interrogation Tapes

In the spring of 2002, the C.I.A. began videotaping interrogations of an Al Qaeda operative. Officials’ logic was that the tapes would enable them to defend themselves to critics if the prisoner, who was wounded during capture, should die in custody. The tapes also were useful because they allowed more experts, than could be present for the interrogations, to view the tapes. The agency even sought an endorsement from Congress, soliciting advice from the House Intelligence Committee (C.I.A. Tapes 1).

Top Bush administration officials and lawyers also weighed in on the matter, with John B. Bellinger, top lawyer for the National Security Council, recommending that the tapes not be destroyed. However, confidence that tapes

³ Nola K. Breglio quoted in the Waxman Report, 59

would vindicate the agency waned when it began employing harsher techniques like waterboarding. (C.I.A. Tapes 2) In November 2005 Jose Rodriguez, Jr., head of the agency's clandestine branch, ordered the tapes destroyed. While it is reported that the agency's director, Porter Goss, advised against this move, Mr. Rodriguez received no sanctions for his actions.

The tapes provide a case study of the benefits of publicity versus secrecy. They were created to allow for secondary publicity, if it was called for. Congress was told of their existence, and as such they could have provided a means of accountability, allowing Congress to see exactly what they were authorizing. The destruction of the tapes, though the agency claimed they were destroyed to protect national security (a familiar claim), served to eliminate accountability.

The Bush administration claims it needs discretionary power for, as Vice President Cheney puts it, "particularly tough customers" (Myers A14). It claims that it has the authority to implement these methods. If this is so, then their methods should stand up to a test of publicity. As Dennis Thompson says, "If one of the reasons that a policy cannot be made public is that it would be defeated in the democratic process, then the policy should be abandoned" (Thompson 183). Former Deputy C.I.A. director John C. Gannon echoes this, saying of the tapes, "To a spectator it would look like torture. And torture is wrong" (Shane A1).

Secret Detentions and Deportations

One of the communities hardest hit after 9/11 was the immigrant community, especially those of Arab descent or Muslim faith. Following the attack, the government detained and deported many of these people. For the most part, it did not do so in a public manner, but rather in extreme secrecy. It has taken years for some of these secret practices to become known to the public. Since 9/11, "the U.S. military and CIA have operated a worldwide network of detention centers, many of them secret, holding an estimated 9,000 prisoners" (Waxman 62). The administration refuses to reveal how many individuals are being detained or what legal status they've been given, or to discuss the process used to determine their status (Waxman 62). Yet there is a group with even less recourse than the Guantanamo prisoners: "ghost detainees". The CIA has been detaining people "without accounting for them, knowing their identities, or even the reason for their detention." (Waxman 63) Orders for this type of action have come from as high up as Secretary of Defense Donald Rumsfeld (Waxman 63). The number of ghost detainees is difficult to ascertain, since no records were kept of them. Using secrecy to avoid revelations that the U.S. may not be abiding by international rules weakens trust in international institutions.

The administration has also increased the use of military tribunals to try any non-citizen believed to have been involved with or aided international terrorism, and has made greater secrecy available to these tribunals. "In these proceedings, the government will have broad discretion to close proceedings to the public, to civilian defense counsel, and even to the defendant" (Waxman 64). A trial in which the prosecution can use secret evidence and the counsel for the defense must sign away their right to be present at trial is little more than a charade.

Two months after 9/11, the INS had detained more than 1,200 citizens and aliens, 762 of whom the FBI believed were connected to terrorism. Many of the detained, even after being cleared of suspicion for terrorism, were subsequently deported for violating immigration law. Immigration trials, which are generally required to be open to the public, are permitted to be closed for reasons such as protecting a witness, the involved parties, or the public interest. Following September 11, Attorney General Ashcroft instructed the Chief Immigration Judge, “to close the hearing[s] to the public, and to avoid discussing the case[s] or otherwise disclosing information about the case[s] to anyone outside the Immigration Court” (Waxman 66). Court cases challenging the legality of closed hearings and obscuring detainees’ identities have been largely unsuccessful; every ruling for openness has been overturned in higher courts. But the courts are not unanimous in their acceptance of administration policy. One court wrote:

Against non-citizens, it [the Executive Branch] seeks the power to secretly deport a class if it unilaterally calls them “special interest” cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors.⁴

It is undeniable that the events of 9/11 called for introspection on the part of the government, and all Americans. However, that soul searching seems to have been directed solely towards the question of “how can we make America safer?” A conspicuously missing modifying clause is, “while still upholding the values of liberty and democracy?” It is unclear that the forfeitures in transparency, a staple of democratic government, have made us safer. What is clear is that these forfeitures have hurt the democratic process and made Americans less free. In the words of Benjamin Franklin: “Whoever trades liberty for security deserves neither” (Gup 22).

Discussion and Conclusion

The foregoing review of the evidence, at best a partial task given the nature of secrecy, indicates that there are scant reasons to advocate for increased executive secrecy. Secrecy has decreased accountability and strained cooperation between the coordinating branches of government, and has quietly denied the electorate their role as guardians of their own democracy. In spite of this paper’s focus on the abuse of secrecy, it should be clear that it does not advocate complete transparency. However, in these times, secrets hardly seem to need defending.

The significance of this discussion rests on the simple fact that democracy is based on accountability, and accountability depends largely on publicity. President Bush, just before being inaugurated for his second term in office, was asked by a reporter why no one had been held accountable for the mistakes of the first term. He replied, “We had an accountability moment, and that’s called the 2004 elections” (Baker A01) But is being elected all that is required for presidents to be considered accountable for their actions?

⁴ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2003) in Waxman Report, 67

Secrecy can both help and hinder accountability. The president is accountable for keeping the nation safe. To achieve this, he may need to institute covert policies. However, in order for the public to judge the policies a president is implementing, they must know what those policies are. This paradox calls President Bush's reasoning into question: were the 2004 elections truly a moment of accountability if secrecy prevented informed choice by the voters?

Francis Rourke argues that fragmentation and pluralism are the definitive characteristics of democracy, and that this pluralism serves as a defense against excessive official secrecy (Rourke 216). However, all the checks and balances of our system mean little if the public and the coordinating branches of government lack sufficient and accurate information. Secrecy is the opposite of publicity, so we must consider carefully its use. How much secrecy can the U.S. employ before such practices destroy accountability? Is faith in the probity of leaders a viable alternative to openness and slow deliberation?

As Richard Neustadt says, presidents will always attempt to maximize their power. Often, secrecy serves this end, and so it follows that presidents will employ secrecy wherever they are able. Creating a clearer standard for its use and punishment for its abuse can only be beneficial. There are those who would argue that denying the executive free reign to keep secrets from Congress and the public undermines national security. But as Richard Posner says, "In conditions of great danger legalistic limitations fall by the wayside; officials act, leaving the legal consequences to be sorted out later" (Posner 4). That the executive branch will continue to use secrecy is inevitable from the perspective of institutional theory. Nevertheless, an environment in which secrecy is treated more critically will cause officials to hesitate before invoking its protection. On the other hand, if there is no chance that a secret decision will ever be discovered or evaluated, we create a temptation for abuse that may be hard to resist. It is crucial that we create a culture more critical of secrecy; yet there has been relatively little effort on the part of government officials or academics to develop innovative means of addressing this problem. More study must be done on ways to institutionalize greater openness in the executive and in government as a whole.

Implicitly, those who favor executive secrecy in wartime see democracy as a rubber band – however far one stretches it due to extenuating circumstances, it will bounce right back in better times. Unfortunately, democracy is not a natural state of equilibrium but rather a fragile balance which we must continually fight to preserve. Turning the tide against the recent excess of secrecy may prove to be one of the most critical things we can do to maintain a healthy society and democracy, while increasing our standing abroad.

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