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Access to Government Information Is a Foundation of American Democracy—But the Courts Don't Get It

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ACCESS TO GOVERNMENT INFORMATION IS A FOUNDATION OF AMERICAN DEMOCRACY—BUT THE COURTS DON'T GET IT*

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The availability of government information is one of the foundations of American democracy. However, the courts have unfortunately failed to recognize this part of America's creed. Moreover, the courts have consistently failed to recognize the danger of the overuse of government secrecy.

Before delving into these two subjects, it might be helpful to describe how I first became aware of the overuse of government secrecy and of the harm this does to America. In 1975—at the age of thirty-nine and not knowing a single Senator—I was lucky to be appointed as the Chief Counsel of a Senate committee, popularly known as the Church Committee for its Chair, Senator Frank Church of Idaho.[1] Before the Committee's work in 1975-76, there had never been such a broad investigation—and disclosure—of secret governmental intelligence information in America or anywhere else.[2] There has not been one since.[3]

What did we learn and disclose? Six Presidents, Democrats and Republicans, from Franklin Roosevelt through Richard Nixon, had abused

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1. The formal name of the Committee was the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Operations (hereafter referred to as Select Comm.).

2. *See* Christopher Hayes, *The Secret Government*, NATION (Aug. 26, 2009), http://www.thenation.com/article/secret-government.

3. *Id.*

the powers of their secret intelligence agencies and had hid behind secrecy in doing so.[4]

As for the agencies themselves, just a few examples. Millions of law-abiding Americans were spied upon.[5] The Federal Bureau of Investigation attempted to drive Martin Luther King to suicide, infiltrated many law-abiding organizations including the NAACP and those associated with the Women's Liberation Movement, sought to break up marriages of civil rights workers, and incited beatings and even killings.[6] The Central Intelligence Agency hired the Mafia to attempt to assassinate Fidel Castro, overthrew democratically elected governments, experimented with dangerous drugs on unwitting Americans, and violated its charter by spying on dissident Americans at home.[7] Both agencies opened mail illegally.[8] Both engaged in warrantless wiretapping and use of listening bugs.[9] For decades, the National Security Agency received copies of millions of telegrams leaving America.[10]

Why did the Church Committee succeed? Most importantly, by discovering and revealing that the government had acted secretly and illegally, as well as inconsistently with American values. But fundamental to those disclosures was that the Committee was remarkably non-partisan. In 1975-76, the partisan climate in America was far, far different than now.[11] Keeping partisanship at bay was also surely helped by the fact that the Committee criticized secret acts of administrations of six Presidents from both political parties. Beyond these big-picture points, there are some details relating to access to and handling of information that help explain the Church Committee's success.

Focus. One of my early roles was to push to center the Committee's work on previously secret information relating to "the extent, if any, [of]

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4. *See* SELECT COMM., FINAL REPORT, BOOK II: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 9-10 (1976) [hereinafter SELECT COMM., BOOK II].

5. *See id.* at 6.

6. *See id.* at 7, 10-11, 13, 15.

7. CTR. FOR NAT'L SEC. STUDIES, THE ABUSES OF THE INTELLIGENCE AGENCIES 108-09, 121, 130-31 (Jerry J. Berman & Morton H. Halperin eds., 1975); Hayes, *supra* note 2.

8. SELECT COMM., FINAL REPORT, BOOK III: SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 561 (1976) [hereinafter SELECT COMM., BOOK III]; *see also* SELECT COMM., BOOK II, *supra* note 4, at 6, 12.

9. CTR. FOR NAT'L SEC. STUDIES, *supra* note 7, at 160-61.

10. SELECT COMM., BOOK II, *supra* note 4, at 6.

11. *See* DAVID BOREN, A LETTER TO AMERICA 43-54 (2008).

illegal, improper, or unethical activities."[12] Some thought we should instead emphasize "wise men" opining on what was wrong with the intelligence agencies and what reforms were needed. My instinct was that unless we showed shocking secret abuses to the American people, there would be no impetus toward reform.

Senator Church sided with an aggressive investigation.

Even after the Ford Administration began to cooperate with the Church Committee, I believed we *still* had to press for information—for details and documents. This is how we started our hearings when CIA Director William Colby appeared to testify about CIA assassination attempts. That day I pushed Director Colby to produce specific categories of documents relating to the assassination attempts, believing that testimony without documents risked being shallow.

Care and Responsibility. Of course, there are legitimate secrets as well as illegitimate secrets. I believe one reason the White House agreed to provide us with sensitive information was that we recognized the need to protect legitimate secrets.

The Committee's reports and hearings were enormously detailed, revealing gobs of secret information.[13] No improprieties were withheld. But sensible limits were placed on the details disclosed. For example, the actual names of lower-level undercover agents who had been tasked to do unseemly or illegal acts were not used; their bosses' names, however, were included.

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12. S. Res. 21, 94th Cong., 121 CONG. REC. 839 (1975) (enacted).

13. *See Federal Bureau of Investigation: Hearings Before the Select Comm., Vol. 6*, 94th Cong. (1975); *Covert Action: Hearings Before the Select Comm., Vol. 7*, 94th Cong. (1975); *The National Security Agency and Fourth Amendment Rights: Hearings Before the Select Comm., Vol. 5*, 94th Cong. (1975); *Mail Opening: Hearings Before the Select Comm., Vol. 4*, 94th Cong. (1975); *Internal Revenue Service: Hearings Before the Select Comm., Vol. 3*, 94th Cong. (1975); *Huston Plan: Hearings Before the Select Comm., Vol. 2*, 94th Cong. (1975); *Unauthorized Storage of Toxic Agents: Hearings Before the Select Comm., Vol. 1*, 94th Cong. (1975); SELECT COMM., BOOK III, *supra* note 8; SELECT COMM., BOOK II, *supra* note 4; SELECT COMM., FINAL REPORT, BOOK I: FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 94-755 (1976); SELECT COMM., INTERIM REPORT, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465 (1975) [hereinafter SELECT COMM., INTERIM REPORT]; *see also* LEROY ASHBY & ROD GRAMER, FIGHTING THE ODDS: THE LIFE OF SENATOR FRANK CHURCH (1994); LOCH K. JOHNSON, A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION (1985); FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007); FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947-1994 (2d ed. 1994).

Another part of being responsible with secrets is avoiding leaks. We did that—with two exceptions, neither of which remotely affected "national security."[14]

Fairness and Understanding. My job was to help obtain secret information—clear information about wrongdoing, and the consequent harm to the nation—and then to put the information before the Senators and the public. But, at the same time, fairness required empathy for the men and women working in intelligence. During the Cold War, facing a ruthless enemy, Presidents and other high-level officials gave these men and women assignments that were in many ways impossible to fulfill. They were expected to predict or prevent every possible crisis, respond immediately with information on any question, and anticipate and respond to the incessant demands of Presidents. Under that pressure, it is no wonder that some cut corners.

Nonetheless, it seemed to me that while empathy was appropriate, distance was also required. Many oversight bodies stumble by becoming too close to the agencies they oversee. Both empathy for, and distance from, the agencies and their people are needed.

To sum up, the big lessons I learned during the Church Committee about openness and secrecy were: First, far too much is kept secret not to *protect Americans*, but to keep embarrassing and improper information *from Americans*. Second, secrecy, plus lack of oversight, inevitably leads to abuse.

I. American Democracy Grew From the Seed of Openness

Jefferson, Madison, and Lincoln all saw openness as necessary for a functioning democracy. And, looking for new traditions of openness to escape from British aristocratic hierarchy, our fledgling democracy had a second revolution—an information revolution—that helped the new nation progress and grow.

A. Jefferson, Madison and Lincoln

Jefferson's *Declaration of Independence*, Madison's *51st Federalist Paper*, and Lincoln's *Gettysburg Address* each foresaw an America that depended upon the informed consent of its people.

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14. See JOHNSON, *supra* note 13, at 99, 123-25. This article's author's recollection is that one leak was likely from a Senator; the other leak was from a staffer who leaked information that a Senator not on the Committee had previously been given about the CIA.

The Declaration planted the seed of openness. Although its long litany of complaints against King George III did not mention secrecy, support for openness is implicit in one of the most eloquent parts of the Declaration's creed: Governments "deriv[e] their just powers from the consent of the governed."[15] Beneath this simple statement lays the truth that, unless the governed are informed about their government and their leaders, their consent cannot be meaningful.

Thomas Jefferson, the Declaration's principal author, later made explicit the implications of his earlier eloquence. "The basis of our governments being the opinion of the people," he explained, the people must have "full information."[16]

In *The Federalist Number 51*, Madison, supporting ratification of the Constitution, pointed out that "[a] dependence on the people is, no doubt, the primary control on the government."[17] Where, however, secrecy conceals acts of our government and obscures the character of our leaders, the "people's" use of the vote as their "primary control" on government is uninformed. We risk becoming a democracy in the dark.

In his *Gettysburg Address*, Abraham Lincoln called for "a new birth of freedom," so "that government of the people, by the people, [and] for the people, shall not perish from the earth."[18] But if government is truly to be "*by*" the people, necessary information cannot be hidden *from* the people.

B. What About the Original Constitution?

Of course, given the new nation's radical changes from Great Britain, there were growing pains. One was when the Constitutional Convention met in Philadelphia during the spring and summer of 1787. There, the delegates passed a "Secrecy Rule," binding them not to release even a whisper of their deliberations.[19] Although the Constitution and its authors generally hold a sacred place in America, the tale of the 1787 Constitutional Convention does *not* make a broad case for limiting information to the public. For one thing, many of the harmful handmaidens of secret decision-making were absent.

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15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

16. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* 11 THE PAPERS OF THOMAS JEFFERSON 48, 49 (Julian P. Boyd ed., 1955).

17. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

18. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 536, 536 (Don E. Fehrenbacher ed., 1989).

19. *See* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 134-35 (1928).

- The participants in the Convention were not a narrow coterie of like-minded thinkers—they had different interests, and there were energetic debates and shifting coalitions.[20]

- The decisions of the Convention were publicly released as soon as the document was finished. Indeed, the Constitution was already set in type the day the Convention adjourned; it was printed in newspapers in all thirteen states as rapidly as possible in the late eighteenth century.[21]

- And, most importantly, before the proposed new Constitution could go into effect, it was publicly and vigorously debated in ratification campaigns and conventions in the states.[22]

Indeed, as Madison put it, the Constitution itself was "of no more consequence than the paper on which it [was] written, unless it [was] stamped with the approbation of those to whom it [was] addressed."[23]

Subsequent constitutional amendments have been formulated and extensively debated in public. These include the Bill of Rights, which in 1789 was publicly debated in the House, although passed by the Senate behind closed doors.[24] Some eighty years later, the Civil War Amendments were all debated in public.[25] So was the Nineteenth Amendment, granting women the right to vote.[26] That these, and other, momentous changes were developed in the open undermines any assumption that public scrutiny of such deliberations stymies progress or inhibits candor.

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20. *See* DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 27-47 (2007) (describing individual participants in the convention).

21. *See* JÜRGEN HEIDEKING, THE CONSTITUTION BEFORE THE JUDGMENT SEAT: THE PREHISTORY AND RATIFICATION OF THE AMERICAN CONSTITUTION, 1787-1791, at 83, 454 n.130 (John. P. Kaminski & Richard Leffler eds., Rector & Visitors of the Univ. of Va. trans., Univ. of Va. Press 2012) (1988).

22. *See id.*

23. THE FEDERALIST NO. 40, *supra* note 17, at 252 (James Madison).

24. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 206-12 (Bicentennial ed. 1991).

25. *See* GEORGE THOMAS, THE MADISONIAN CONSTITUTION 40 (2008).

26. *Landmark Legislation: The Nineteenth Amendment to the Constitution*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/generic/NineteenthAmendment.htm (last visited June 11, 2013).

In any event, the secrecy surrounding the Constitutional Convention at most supports the argument that there are some circumstances where meetings considering public policy issues ought not be held in the open. This can be correct—though not as uniformly as some secrecy advocates have contended.

As for the Constitution itself, the first three words of its Preamble—"We the People"—make the People (not the States) the ultimate sovereign which will "ordain and establish" the Constitution.[27] To be truly sovereign, the People require information.[28]

C. A Second Revolution: More Democracy, More Education, More Information, and More Openness

As powerfully put by one of the Founders, Dr. Benjamin Rush, while the Revolution had "changed our forms of government," doing so had been only "the first act of the great drama."[29] The new nation still needed "a revolution in our principles, opinions, and manners so as to accommodate them to the forms of government we have adopted."[30]

As the new nation developed, there was, in fact, such a second revolution. It was, most of all, an *information* revolution. Timeless traditions were turned upside down. Throughout history, governments had gathered information about their subjects but kept secret most information about themselves. In early America, however, the government strove not only to increase citizens' knowledge about government, but also to foster the ability of citizens to talk to each other. This was demonstrated, for example, in the growth of the postal system and subsidization of newspapers.

Similarly, the Census changed from the traditional role of census taking, which had been—at least since Caesar Augustus—to provide government with information about *individual* subjects for tax or military purposes.[31] But in America, the Census made no individual information available to the

27. U.S. CONST. pmbl.

28. Admittedly, the body of the Constitution does not have much bearing on openness, though it did expand congressional openness as compared to colonial and British precedents. *See id.* art. 1, § 5, cl. 3; *see also id.* amend. I.

29. Benjamin Rush, Letter to Richard Price (May 25, 1786), *in* 1 LETTERS OF BENJAMIN RUSH 388, 388 (L.H. Butterfield ed., 1951).

30. *Id.*

31. *See* Frank C. Bourne, *The Roman Republican Census and Census Statistics*, 45 CLASSICAL WKLY. 129, 129-35 (1952).

government.[32] Instead, *aggregate* statistical information was made available to the public and the government to be used for allocation of representatives.[33]

In the late eighteenth century, the Senate opened its doors to the public—and to reporters.[34] In the early nineteenth century, post offices, newspapers, schools, and voluntary associations all proliferated. This created new avenues for the exchange, dissemination and understanding of information. "[D]iffusion of information"—which, in his first Inaugural Address, Jefferson called one of "the essential principles of our Government"—became a norm that breathed life into the newborn American democracy.[35]

The Senate Opens Its Doors. The Senate—in contrast to the House—began in 1789 by continuing the colonial and British practice of meeting secretly.[36] Indeed, the Senate went so far as to bar House members from its sessions.[37]

Closing the Senate's doors prompted the first serious national debate about secrecy.[38] It was a political issue, but the issue went far beyond short-term politics. It was an early skirmish over the nature of the American nation. Was America to keep British hierarchical habits where members of the public were merely bystanders between elections? Or would America chart a new course where the public was regularly informed about government affairs? Was America to be only a republic or also a democracy?

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32. *Frequently Asked Questions: Can the U.S. Census Bureau Help Me Find Information About My Family's History?*, U.S. CENSUS BUREAU, https://ask.census.gov/faq.php?id=5000&faqId=427 (last visited June 10, 2013).

33. *Congressional Apportionment: Historical Perspective*, U.S. CENSUS BUREAU, http://www.census.gov/population/apportionment/about/history.html (last visited June 11, 2013).

34. *1787-1800: December 9, 1975: The Senate Opens Its Doors*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/The_Senate_Opens_Its_Doors.htm (last visited June 11, 2013).

35. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* THOMAS JEFFERSON: WRITINGS 492, 494-95 (1984).

36. ROBERT MOON, CONG. RESEARCH SERV., 93-790 GOV, SECRET SESSIONS IN THE U.S. CONGRESS 8 (1993).

37. *See 1787-1800: April 18, 1792: Chamber Access*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/Chamber_access.htm (last visited June 12, 2013).

38. *See* SAMUEL E. FORMAN, THE POLITICAL ACTIVITIES OF PHILIP FRENEAU 63 (1902), *reprinted in* 20 JOHN HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE (J. M. Vincent et al. eds., 1902).

The most impassioned case for openness was made by a journalist, Philip Freneau, a Princeton classmate of James Madison.[39] In 1791, Secretary of State Thomas Jefferson appointed Freneau as a State Department translator.[40] Even though Freneau was working for the government, Jefferson and Madison persuaded him—and paid him—to work simultaneously as the editor of the *National Gazette*, a new newspaper created to attack the Federalists.[41]

In numerous articles, Freneau advocated ending the Senate's secrecy which, he said, adopted "the secret privileges of the [British] House of Lords."[42] Some of Freneau's arguments were frenetic and colorfully phrased: "[S]ecrecy in your representatives is a worm which will prey and fatten upon the vitals of your liberty."[43] "Secrecy is necessary to design and a masque to treachery; honesty shrinks not from the public eye."[44] At the core of Freneau's stance in favor of openness, however, was an argument about the American people's role in public affairs: "Are you freemen who ought to know the individual conduct of your legislators, or are you an inferior order of beings incapable of comprehending the sublimity of senatorial functions, and unworthy to be entrusted with their opinions?"[45]

In 1794, after five years of criticism, the Senate voted to open its doors in its next session.[46] Although Freneau had by then closed the *National Gazette*, his broadsides stoked the debate.[47] The free press-fueled discussion resulted in an increase in government openness. In addition, some New England Federalist Senators switched sides to support openness because they concluded, "[T]he old, elitist style in politics was obsolescent."[48] Power in the new America was based on publicity and openness, not the closed style of aristocratic England.

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39. *See id.* at 9-10, 63.

40. *Id.* at 29-32.

41. *See id.* at 29-36. For more information on Freneau and the opening of the Senate, see JAMES MELVIN LEE, HISTORY OF AMERICAN JOURNALISM 127-28 (1917).

42. Philip Freneau, NAT'L GAZETTE (Feb. 1792), *reprinted in* FORMAN, *supra* note 38, at 63, 64.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* MOON, *supra* note 36, at 8-9.

47. *See* FORMAN, *supra* note 38, at 73-74.

48. DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 88 (1981).

The Postal Service and Newspapers. At the start, the postal system was the biggest part of America's new government.[49] It grew rapidly. In 1788, there were sixty-nine post offices.[50] Congress created a national postal system in 1792.[51] By 1820, there were more than four thousand post offices.[52]

Expansion of the postal service coincided with, and indeed helped drive, the proliferation of newspapers. Madison had argued that the "real sovereign in every free" government was "public opinion."[53] Moreover, in large countries such as the United States, "a free press, and particularly a *circulation of newspapers through the entire body of the people*" was necessary for a republican government and, indeed, for liberty.[54] The next year, Congress subsidized newspaper distribution in the Post Office Act of 1792.[55]

Discounted delivery costs coupled with Americans' hunger for information drove huge increases in both the number of newspapers and their circulation.[56] This accelerated the spread of information. The number of newspapers transmitted through the postal system more than tripled in the 1790s.[57] There were about two hundred papers by 1801, and 1250 by 1834.[58] By the early 1830s, more than 90% of the mail (by weight) consisted of newspapers.[59] But newspapers accounted for less than 15% of postal revenue.[60]

Thomas Jefferson viewed newspapers as vital, once proclaiming that "were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a

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49. *See* RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 3-4 (1995).

50. Richard R. John, *Expanding the Realm of Communications*, *in* 2 A HISTORY OF THE BOOK IN AMERICA: AN EXTENSIVE REPUBLIC 211, 212 (Robert A. Gross & Mary Kelley eds., 2010).

51. *See id.* at 212-13.

52. *Id.* at 216.

53. James Madison, *Public Opinion*, NAT'L GAZETTE (Dec. 19, 1791), *reprinted in* JAMES MADISON: WRITINGS 500, 500 (1999).

54. *Id.* at 501.

55. JOHN, *supra* note 49, at 36; *see also* Act of Feb. 20, 1792, ch. 7, § 22, 1 Stat. 232, 238.

56. JOHN, *supra* note 49, at 37-38.

57. *See id.* at 4.

58. THE AMERICAN ALMANAC AND REPOSITORY OF USEFUL KNOWLEDGE FOR THE YEAR 1835, at 266 (Charles Bowen ed., 1834).

59. JOHN, *supra* note 49, at 38.

60. *Id.*

moment to prefer the latter."[61] (Of course, Jefferson—as is no doubt true for all political figures—occasionally lamented and lambasted some of what was said about him in the papers of the day, including rumors of his liaison with Sally Hemmings, one of his slaves.[62])

Outside observers also noted the importance of newspapers to democracy. When the young French aristocrat Alexis de Tocqueville wrote his *Democracy in America* in the mid-1830s, he expressed wonder at the vitality of American democracy—despite its exclusion of blacks, American Indians, and women.[63] In Tocqueville's view, newspapers were particularly necessary in nations where the old bonds of aristocracy had been cast off.[64] In aristocracies, men were "strongly held together" by loyalty to their lords; but, in democracies, "men are no longer united among themselves by firm and lasting ties."[65] Therefore, in a democracy, you must "persuade every man whose help you require that his private interest obliges him voluntarily to unite" with others.[66] Only newspapers do this "habitually and conveniently," as "nothing but a newspaper can drop the same thought into a thousand minds at the same moment."[67] And in America, there was "scarcely a hamlet" without a newspaper.[68]

The Rise of Political Parties. Madison's concept of what we now call separation of powers—or checks and balances—was that all the "parts" or "departments" of the government—the Congress, the Executive and the Courts—would "be the means of keeping each other in their proper places."[69] Furthermore, "the great security against a gradual concentration of the several powers in the same department consists in giving to those

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61. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 35, at 879, 880.

62. Letter from Thomas Jefferson to Marc-Auguste Pictet (Feb. 5, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, 355, 357 (Andrew A. Lipscomb ed., Library ed. 1903); Letter from Thomas Jefferson to Thomas McKean (Feb. 19, 1803), *in* 9 THE WORKS OF THOMAS JEFFERSON, 449, 451-52 (Paul Leicester Ford ed., Federal ed. 1905); *see also* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 215-20 (1998).

63. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., Henry Reeve & Francis Bowen trans., McClelland & Stewart Ltd. 7th prtg. 1957) (1840).

64. *Id.* at 111-14.

65. *Id.* at 107, 111.

66. *Id.* at 111.

67. *Id.*

68. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 186 (Phillips Bradley ed., Henry Reeve & Francis Bowen trans., McClelland & Stewart Ltd. 9th prtg. 1963) (1840).

69. THE FEDERALIST NO. 51, *supra* note 17, at 320 (James Madison).

who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[70]

Put more pithily, "Ambition must be made to counteract ambition."[71]

However, with the development of political parties in early America, loyalty to a public official's own "department" was diluted by party relationships between members of Congress and Presidents. Separation of powers—which Madison had referred to as only an "auxiliary precaution[]"—became even less of a bulwark against "encroachments."[72] The People's vote remained "the primary control on the government."[73] Indeed, as Jefferson commented, "Perhaps this party division is necessary to induce each to watch & delate to the people the proceedings of the other."[74]

Thus, the rise of political parties made public access to information even more necessary to support our constitutional system and our democracy.

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For a century and a half after the victory for openness led by Jefferson and his followers, there were periodic clashes about particular acts of governmental secrecy. But the culture of openness remained largely unchanged until the mid-twentieth century. At that point, there was an enormous increase in presidential power—leading to what Arthur Schlesinger, Jr. called the "Imperial Presidency."[75] More presidential power was coupled with the growth of huge bureaucracies, including a mighty military and intelligence establishment.[76] Most importantly, there was also an accompanying atmosphere of permanent fear stemming from Pearl Harbor, the atomic bomb, the Cold War, and the 9/11 terror attacks.

All of these changes and challenges led to the Secrecy Era, during which a culture of secrecy came to dominate America. During this period, the

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70. *Id.* at 321-22.

71. *Id.* at 322.

72. *Id.*

73. *Id.*

74. Letter from Thomas Jefferson to John Taylor (June 4, 1798), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 35, at 1048, 1049. "Delate" derives from the Latin "dēlāt-": "to bear or bring away or down, convey, deliver, report, indict, accuse, etc." 4 OXFORD ENGLISH DICTIONARY 408 (J. A. Simpson & E. S. C. Weiner eds., 2d ed. 1989). It was used before Jefferson by, among others, Samuel Johnson. *See id.* Jefferson concluded his letter to Taylor with a "caution" to "let nothing of mine get before the public" for if "the Porcupines" got hold of a "single sentence" they would "abuse & persecute me in their papers for months." Letter from Thomas Jefferson to John Taylor, *supra*, at 1051.

75. *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

76. *Id.* at 164-68.

government switched its position. It increasingly strove to *limit* the availability of information about itself—and, at the same time, to take more information *from* the people.

Today, we are left with a sharp debate about the harms and the benefits of secrecy and openness. And so now I am going to shift gears and discuss how the Courts have—and have not—contributed to that debate.

II. Blinded by Deference: The Courts and Secrecy

Of course, the debate between openness and secrecy has two sides. There are legitimate secrets that need protection. Arguments by the executive branch for secrecy, based upon "national security," are entitled to weight.

But, in almost all cases, the courts have given *conclusive* weight to claims of "national security." This is true in cases where the government moves to dismiss cases because it claims the litigation will expose a "state secret."[77] It is also true in Freedom of Information Act (FOIA) cases where the government resists production of documents on "national security" grounds.[78]

But it is not just the uniformity of the ultimate result that is revealing. It is also what the courts do *not* do in the course of deciding these cases.

Courts do not look behind government officials' assertions of national security harm. While a court's job *is* to decide individual cases, it is striking to see the narrow lens the courts use to examine secrecy cases. Courts pay no attention to the fundamental importance of openness to American democracy.[79] And they pay no attention to the long-lasting and overwhelming evidence that secrecy has been overused—and misused.[80] This has even included false representations to the courts themselves.[81]

Moreover, the courts do not consider ways to protect asserted national security interests and still allow disclosure of important information. They do not consider redacting portions of documents in FOIA cases.[82] And, in "state secrets" cases brought against the government or its agents, the courts

77. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1076, 1083-84 (9th Cir. 2010) (en banc); El-Masri v. Tenet, 437 F. Supp. 2d 530, 535, 537-38 (E.D. Va. 2006), *aff'd sub nom*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

78. *See, e.g.*, Larson v. Dep't of State, 565 F.3d 857, 863-65 (D.C. Cir. 2009); Maynard v. CIA, 986 F.2d 547, 553-56 (1st Cir. 1993).

79. *See* cases cited *supra* notes 77-78.

80. *See* cases cited *supra* notes 77-78.

81. *See infra* Part II.B.

82. *See* Azmy v. U.S. Dep't of Def., 562 F. Supp. 2d 590, 599-600 (S.D.N.Y. 2008); *see also* cases cited *supra* note 78.

do not allow cases to continue by providing for careful treatment of particular "secret" evidence.[83] Instead, more and more, courts dismiss the entire case.

This is not the place to overwhelm with citations or close analysis of cases. Rather, I want to make some more general points.

A. Failure to Recognize How Openness Is a Pillar of American Democracy.

The history described earlier does not provide conclusive answers for a court contending with the struggle between openness and secrecy. But it *is* relevant. Surely, a fundamental principle of openness should, for example, be used to construe FOIA to provide for rigorous de novo review of secrecy claims. In fact, this is what Congress said should be done.[84] But, in the teeth of Congress's guidance, it is not what the courts *have* done.

Where the executive branch turns ever more toward secrecy and away from sharing information with the people, we should be able to count on the courts to weigh in the balance the core values of American democracy. Their failure to do so is even more unfortunate and surprising because of the courts' failure to recognize the extensive history of overuse (and misuse) of secrecy.

B. Failure to Learn From or Refer to Experience

There is overwhelming evidence about secrecy's overuse. While there are genuine secrets that must be defended, it is clear that far too much government information is kept secret.

For decades, bipartisan blue ribbon commissions and experts from both political parties have concluded that much more is classified than should be classified and then this information is kept classified for much too long.

Estimates of overclassification made by top ranking military and intelligence professionals range from 50% to 90%.[85] Yet courts do not refer to this huge body of evidence when they supinely accept executive branch secrecy claims.

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83. *See* cases cited *supra* note 78.

84. *See* Dep't of the Air Force v. Rose, 425 U.S. 352, 379 (1976) ("Congress vested the courts with the responsibility ultimately to determine 'de novo' any dispute as to whether the exemption [from release of information] was properly invoked in order to constrain agencies from withholding nonexempt matters."); *see also* 5 U.S.C. § 552(a)(4)(B) (2012).

85. *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, & Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. 120-21 (2005) (statement of Thomas S. Blanton, Nat'l Sec. Archive, George Washington Univ.).

There is also ample evidence of classification being used to hide embarrassment and illegality. This was shown immediately after President Truman's Executive Order in 1951 that created an expanded classification system.[86] President Truman claimed that by segregating security from non-security information, his order would provide Americans with "more, rather than less, information about the Government."[87] This dubious assertion was not bolstered when, just two days later, President Truman had to rescind an order of the Office of Price Stabilization that employees were not to disclose information that "'might prove embarrassing to the O.P.S.'"[88]

The overuse of secrecy to hide embarrassing and illegal conduct has been shown repeatedly and comprehensively ever since.

Again, courts have ignored this body of evidence when they have decided FOIA and state secrets cases. Similarly, courts have not learned any lessons from the sad story that courts themselves have been repeatedly misled by claims of national security risks that later turned out to be false.

A few examples:

Korematsu. In *Korematsu*, during World War II, a divided Supreme Court upheld military orders of General John DeWitt that had forced some 117,000 Japanese Americans on the West Coast to leave their homes for "relocation centers."[89] The Court relied on General DeWitt's report of dangers posed by Japanese Americans.[90]

But decades later, facts were uncovered that showed the government had knowingly concealed from the Court vital facts that undermined General DeWitt's report.[91] The Federal Communications Commission and the FBI had both "directly contradicted" General DeWitt's report that Japanese Americans were communicating by radio with Japanese navy vessels.[92] Indeed, Department of Justice lawyers had drafted a footnote to their

86. Exec. Order No. 10,290, 3 C.F.R. 471 (1952).

87. Memorandum on the Executive Order Prescribing Regulations for Classifying and Protecting Security Information, PUB. PAPERS 536 (Sept. 25, 1951).

88. *O.P.S. Bans 'Embarrassing' News; Truman Quickly Rescinds Order*, N.Y. TIMES, Sept. 28, 1951, at 1.

89. *See* Korematsu v. United States, 323 U.S. 214, 215, 223-24 (1944). The order was issued based on broad discretion given to the military by President Franklin Roosevelt. *See* Exec. Order No. 9066, 3 C.F.R. 1092 (1943).

90. *See Korematsu*, 323 U.S. at 218; *see also id.* at 224-25 (Frankfurter, J., concurring).

91. Eric K. Yamamoto, Korematsu *Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 1-3 (1986).

92. *Id.* at 12.

Supreme Court brief referring to these "conflicts."[93] But this information was deleted by their Department of Justice superiors.[94] It was also later discovered that the original version of General DeWitt's report did not rely on any "military exigency," but instead on racial "traits peculiar to citizens of Japanese ancestry."[95]

Based on these discoveries, convictions for violating General DeWitt's order were reversed.[96] Then, in 2011, the acting Solicitor General took the unprecedented step of confessing his office's error in defending the internments.[97]

Reynolds. In 1953, in another seminal case, *United States v. Reynolds*, the Supreme Court created the modern "state secrets" doctrine.[98] An Air Force plane had crashed.[99] Three widows of civilian observers on the plane sued.[100] They sought to see the accident report.[101] The Air Force asserted privilege, claiming the report would risk national security.[102] The lower courts held that a judge should determine the validity of the claim by reviewing the report in camera.[103] A divided Supreme Court reversed, saying the report was privileged simply because the military claimed it contained sensitive material.[104] Moreover, the Supreme Court determined that no judge should look at the report to check the claim.[105]

Although no one outside the military knew this at the time, it was learned later that before the case reached the Court, the accident report was no longer classified as "secret."[106] Its classification level had been reduced to

93. *Id.* at 17-18.

94. *Id.* at 18. For a recital of these facts, see *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting Korematsu's petition for a writ of *coram nobis*).

95. Hirabayashi v. United States, 828 F.2d 591, 598 (9th Cir. 1987).

96. *Id.* at 608; *Korematsu*, 584 F. Supp. at 1420.

97. Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, JUST. BLOG (May 20, 2011), http://blogs.justice.gov/main/archives/1346.

98. United States v. Reynolds, 345 U.S. 1, 6-8 (1953).

99. *Id.* at 2-3.

100. *Id.* at 3.

101. *Id.*

102. *Id.* at 3-6.

103. Reynolds v. United States, 192 F.2d 987, 990-91, 997-98 (3d Cir. 1951), *rev'd*, 345 U.S. 1.

104. *Reynolds*, 345 U.S. at 6-12.

105. *Id.* at 10.

106. *See* BARRY SIEGEL, CLAIM OF PRIVILEGE: A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE, AND THE RISE OF STATE SECRETS 133 (2008).

"restricted."[107] Moreover, when the report was eventually publicly released, there was no apparent connection to any military secret.[108] Instead, if the Third Circuit appellate judges in the case had been allowed to review the report, they would have seen it contained evidence of the government's negligence in the plane crash.[109]

Pentagon Papers. Finally, in the Pentagon Papers case, a divided Supreme Court rejected the executive branch's effort to restrain the *New York Times* and the *Washington Post* from publishing portions of the history of America's involvement in Vietnam and its escalation of that war.[110] The issue for the Court was the constitutionality of a "prior restraint."[111] There was no meaningful analysis of the strengths or weaknesses of the government's case for secrecy.

In the lower courts, however, it was clear that the government had, once again, exaggerated the need for secrecy.[112] Indeed, in seeking to prove that national security was at risk, the government looked like a gang that couldn't shoot straight.[113] It had to start by conceding that two "top secret" volumes contained documents that had been in the public domain when the papers were compiled.[114] Moreover—proving the ship of state is the only ship that primarily leaks from the top—President Johnson's draft memoir had quoted extensively from the "top secret" documents in the Papers.[115] Finally, when pressed during a secret court hearing to describe any document in the Papers that was particularly harmful to national security, the government referenced a radio intercept.[116] But the *Post*'s Pentagon reporter "stunned everyone by pulling out . . . a verbatim record of the intercept, in an unclassified transcript of" a Senate committee hearing.[117]

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107. *Id.*

108. *See id.* at 297-98.

109. *Id.* at 210-11, 298.

110. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

111. *Id.*

112. *See* United States v. Wash. Post Co., 446 F.2d 1327, 1328 (D.C. Cir. 1971) (en banc) (per curiam), *aff'd sub nom. N.Y. Times Co.*, 403 U.S. 713; United States v. N.Y. Times Co., 328 F. Supp. 324, 330 (S.D.N.Y. 1971), *rev'd*, 444 F.2d 544 (2d. Cir. 1971) (en banc) (per curiam), *rev'd*, 403 U.S. 713.

113. *See* BEN BRADLEE, A GOOD LIFE: NEWSPAPERING AND OTHER ADVENTURES 319-20 (1995) (detailing the government's courtroom activities aimed at protecting secrecy).

114. *See* DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 148 (1996).

115. *See* Leslie H. Gelb, *The Pentagon Papers and the Vantage Point*, 6 FOREIGN POL'Y 25, 31-32 (1972).

116. BRADLEE, *supra* note 113, at 320.

117. *Id.*

About twenty years after the Supreme Court allowed the newspapers to continue publication, former Solicitor General Erwin Griswold, who had argued the case for the government in the Supreme Court, admitted, "I have never seen any trace of a threat to the national security from the publication."[118] Griswold added: "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."[119]

United States v. Nixon. *Nixon* presents a different sort of problem. Rather than being misled or ignoring history, the Court itself simply *assumed* a theory to justify extensive future use of "executive privilege" claims by Presidents.[120] Of course, *Nixon* is famous because the Supreme Court forced President Nixon to turn over to the Watergate Special Prosecutor copies of secret White House tapes recording the President's meetings in the Oval Office.[121] Material on the tape—particularly President Nixon's effort to use fictitious claims of national security to get the CIA to stop the FBI's investigation of Watergate—were the last straw in President Nixon's struggle to keep his job.[122]

A more lasting impact of the *Nixon* decision, however, is the Court's statement that requiring President Nixon to turn over the tapes was an exception.[123] Generally, said the Court, conversations in the Oval Office should be presumptively and perpetually protected by "executive privilege."[124] This was pure dicta, unnecessary to the decision, and reached without any argument on the other side. The Court just *assumed* there should be a privilege. "Central to the Court's pro-secrecy reasoning was a highly contestable view of human nature, one for which neither the Court

118. Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

119. *Id.* At the oral argument of the Pentagon Papers case in the Supreme Court, Griswold expressed some doubts about the breadth of the government's claims of the need for secrecy, but without using the categorical and colorful language of his retrospective view eighteen years later. *See* Transcript of Oral Argument, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (Nos. 1873, 1885) *in* 71 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 213, 218-19 (Philip B. Kurland & Gerhard Casper eds., 1975).

120. *See* United States v. Nixon, 418 U.S. 683, 705-07 (1974).

121. *See id.* at 686-88, 712-14.

122. *See* Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A1.

123. *Nixon*, 418 U.S. at 712-13.

124. *See id.* at 708.

nor the president offered any evidence."[125] Unless there is a presumptive, perpetual privilege, said the Court, advisors in White House meetings "may well temper candor with a concern for appearances and for their own interests."[126]

As I have written elsewhere, the *Nixon* Court's assumption is dubious.[127] Moreover, the *Nixon* Court paid no attention whatsoever to the *harmful* impact an assumption of perpetual secrecy can have on the nature of White House meetings.[128]

So what explains the courts being so lax? Fear. Fear that the courts might turn out to be wrong. Fear that the courts may lack the competence to evaluate secrecy claims. In addition, there may be some institutional reasons relating to courts and judges themselves that help explain why judges tend to tilt towards secrecy.

Openness is a key to our democracy. It is unfortunate that the courts do not seem to appreciate this. Sometimes Congress also does not. But at times, it does.

* * * *

So let me conclude with some congressional rhetoric of which I am rather proud. The Church Committee proclaimed its belief that America would benefit from hearing the truth and confronting past mistakes:

> Despite our distaste for what we have seen, we have great faith in this country. The story is sad, but this country has the strength to hear the story and to learn from it. We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but, if we do, our future will be worthy of the best of our past.[129]

The Committee concluded with words that ring true decades later:

> The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make men free. But each time we

125. Eric Lane, Frederick A.O. Schwarz, Jr. & Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 GEO. MASON L. REV. 737, 744 (2010).

126. *Nixon*, 418 U.S. at 705.

127. *See* Lane, Schwarz & Berman, *supra* note 125, at 752-76.

128. *See id.* at 760-76.

129. SELECT COMM., INTERIM REPORT, *supra* note 13, at 285.

> do so, each time the means we use are wrong, our inner strength, the strength which makes us free, is lessened.[130]

130. *Id.* Although this Assassinations Report was the first issued by the Church Committee, its sentiments were echoed throughout the Committee's work. *See* sources cited *supra* note 13. While the author's drafts of the rest of this Assassinations Report had been reviewed by the Senators on the Select Committee, this epilogue was written just as the report was being sent to the printer. Senator Church approved it so long as Vice Chair John Tower's staff assistant did also, which he did.

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3. Maps
4. Play
5. YouTube
6. News
7. Gmail
8. Drive
9. More
    1. Calendar
    2. Translate
    3. Mobile
    4. Books
    5. Offers
    6. Wallet
    7. Shopping
    8. Blogger
    9. Finance
    10. Photos
    11. Videos
    12.
    13. Even more »

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