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Before You Reboot the NSA, Think About This

The paradox of reforming the secrecy-industrial complex

By Eric A. Posner

Photo: Ulrich Baumgarten/Getty Images

The government classifies too much information. It comes down too hard on leakers and whistle-blowers such as Chelsea Manning and Edward Snowden. It has launched an unprecedented "war on the press" by subpoenaing records of journalists and threatening to jail them if they do not reveal their sources. As a result, Americans do not know what the government is doing, and thus cannot exercise control over elected officials, as is required by democracy. These efforts by government officials to protect themselves from government accountability must be stopped. And it would not be hard to do so. Certain information, such as troop movements, should perhaps be kept secret, but most information—such as the nature of surveillance programs—need not be. To ensure that the government does not classify too much information, there should be vigorous congressional oversight of secret executive-branch activities, and also judicial review. Executive privilege, the state secrecy privilege, and the classification system can all be cut back with little or no harm to national security and immense benefits to democracy. Whistle-blowers should not be prosecuted when they mean well and disclose wrongdoing. The Founders themselves understood the risk of abuse of secrecy by government and responded to it by designing a constitutional system that subjects the executive to the

oversight of Congress and the judiciary.

It would be hard to overstate the conviction with which nearly all members of the intelligentsia—journalists, pundits, university professors—hold the views stated above. They are repeated every day. But are they true? In his new book, Rahul Sagar suggests not.

The Founders were practical men, and they understood that the government requires secrecy in order to function, especially in foreign affairs. Foreign affairs powers were given to the executive branch because the Founders believed that it would be better able to keep secrets than Congress—a multi-membered body, where political divisions would lead to leaks, and responsibility could never be clearly located. It seems to follow from this view that congressional oversight of the executive branch must be limited. After all, if the executive were required to reveal its secrets to Congress, and Congress leaks, then the executive would not be able to keep secrets. Yet the Founders also gave significant foreign affairs powers to the Senate, and expected the Senate to put a check on the president. They never explained how the Senate could perform this checking power if it was not privy to the executive's secrets. Maybe they believed that the Senate, at the time a small body, could keep secrets and work with the president, but events—going all the way back to George Washington, who learned that Senate participation could only disrupt treaty negotiations—have falsified their expectations. Thus, no one—neither the government nor its critics—can take much comfort from the wisdom of the Founders.

The Founders faced a paradox at the heart of democracy. For the government to be effective, it needs to be able to act secretly—in some cases, to protect democracy from its enemies, both external and internal. But if the government can act secretly, then the public lacks information it needs to impose democratic oversight. Until the twentieth century, the paradox could be ignored because the executive branch was so weak—it did not contain a centralized civilian intelligence agency until after World War II. But during the cold war the intelligence apparatus became so big that abuse was inevitable. When the media and Senator Frank Church's investigative committee revealed the extent of domestic spying in the 1970s—much of it directed against political opponents of President Nixon—the paradox, which had been swept under the rug, had to be confronted, and Congress

imposed some legal constraints on intelligence gathering, emphasizing restrictions on intelligence gathering from American citizens on American soil while preserving a free hand for foreign activities. But the distinction between here and there is not easy to maintain—the reason that foreign threats are threatening is that they penetrate the American homeland. Intelligence agencies have not been able to live with these rules since September 11, violating them at first and then lobbying for statutory changes, which they then interpreted as expansively as possible. This set the stage for Snowden's explosive revelations of the NSA's pervasive monitoring of American citizens.

The natural reaction to all this is that we should "strengthen" the legal regime, but after September 11 the previous legal regime was blamed for being too strong—for preventing our spies from following Al Qaeda onto American soil. With Snowden's revelations, the pendulum has swung in the opposite direction. But tinkering with the law will get us nowhere if we cannot resolve the conceptual problem that defeated the Founders: how to allow the government to engage in secret activity without compromising democracy.

One answer considered by Sagar is to give the oversight job to the courts. Proponents of this view argue that the courts can be trusted with confidential information, which they can use to block the executive if it acts improperly. The courts have discharged this function from time to time. When plaintiffs seek information from the government under the Freedom of Information Act, judges examine classified information outside the plaintiff's presence in order to determine whether disclosure of the information would harm national security; and when the executive branch prosecutes people for espionage or other national security crimes, the courts will not accept its say-so, and usually require that secret evidence be disclosed to the defendant or at least his lawyer so that a defense can be mounted. But in other respects the courts defer to the executive branch. Victims of secret government action such as torture and surveillance often cannot obtain the classified information that they need to sue the government. The courts recognize a state-secrecy privilege, which enables the government to withhold national security information, and courts do not review the government's reasons for withholding this information.

One might criticize the courts for failing to be more aggressive, but Sagar approves of their

deferential attitude. Judges have pled time and again that they lack the training and knowledge to second-guess soldiers and spies. Moreover, judicial proceedings take place in the open, which is in large part the source of their legitimacy. If courts tried cases in secret, their reputation for neutrality might be injured—as the mounting suspicions over the impartiality of the secret FISA court have recently demonstrated.

Sagar next turns to Congress. Congress exercises oversight over the executive's secret activities, including military and intelligence actions. But it cannot do so publicly without compromising those very activities, and so instead a limited number of lawmakers receive secret briefings on a regular basis. Thus, a few members of Congress knew about Bush-era torture, and knew about the NSA activities that are currently the subject of heated debate. Yet they did nothing about them. The problem, it turns out, is that members of Congress cannot effectively challenge the executive's action. They can lodge objections with the executive branch, but the executive can ignore them. They cannot reveal their concerns to the public without breaking the law themselves—unless possibly they do so on the floor of Congress, but in any event they do not do so, probably because they fear that the executive will not share classified information with them if they disclose it.

We might criticize Congress for failing to exercise oversight more aggressively, just as we might criticize judges. Sagar is skeptical of this criticism. Lawmakers routinely leak secret information in order to undermine policies they disagree with or to curry favor with journalists. Sagar argues that even if lawmakers could exercise oversight without leaking classified information, the secrecy / transparency paradox would just be reproduced because then the public would not know whether to trust members of Congress. Moreover, Congress lacks the resources of the executive branch, and so in exercising oversight it cannot avoid relying on the executive branch for information, which can thus selectively disclose whatever information is most favorable to it.

So we cannot rely on the courts or Congress to oversee the executive's secret activities. The Founders' bag of tricks is exhausted. But another institution—a post-founding institution—could potentially check secret executive action. That is the bureaucracy. As the examples of Manning and Snowden show, members of the bureaucracy (or outside contractors, in Snowden's case) can leak secrets too. If the executive engages in secret activities that are abusive, then it faces the risk that those activities will be disclosed by its own agents, leading to a public outcry and political damage—not to mention the collapse of covert actions that depended on secrecy for their effectiveness.

Employees could hardly be given a license to disclose information whenever they believe that disclosure is appropriate; such a rule would end secrecy even when it is warranted. But they could be permitted to disclose secrets that the public should know about. Congress itself has seemingly endorsed this idea by enacting whistle-blower statutes, but the statutes are weak. Executive-branch whistle-blowers are not allowed to disclose classified information to the public. They are protected from gross forms of retaliation from their government employer if they register complaints (secretly) with their superiors and sometimes with Congress. They can do nothing if their superiors or Congress disregard their complaints.

Why not expand the scope of whistle-blower protections? One could imagine, for example, a law that excuses government employees from criminal prosecution for public disclosure of secrets if their disclosures of classified information advanced the public interest—if they revealed illegality, for example, or the existence of a clearly harmful program. Snowden's defenders say that such a standard should be applied to him. But no such law exists. The problem is that such a law would throw back to the courts the responsibility of determining whether the leaker acted in the national interest. But if, as Sagar suggests, courts lack the capacity to make such evaluations, then they would not be able to enforce the law in the public interest. Other internal executive-branch-checking mechanisms can be imagined—and many people place hope in inspectors general, which have proven to be quite independent—but these checks do not depend on democracy but on good faith and impartiality, which are sometimes in short supply.

This brings us to the final institutional check that Sagar considers: the press. Journalists claim that they provide the crucial checking function that prevents the executive from abusing its control over information. Let leakers leak as long as they leak to the press; then let the press exercise discretion, publishing only when publication reveals illegality or wrongdoing. The press can be trusted to keep secrets when national security is at stake.

Indeed, the major press organs do exercise discretion as to which leaks to publish and which not to publish. Most famously, *The New York Times* delayed publication of NSA surveillance activities in 2005 for a year. The government persuaded the *Times* that publication would compromise legitimate surveillance activities. In numerous other cases, mainstream publications have delayed reporting—although usually only a few days or weeks—so that agents can escape before their identities are revealed or so that a continuing operation is not disrupted.

Journalists contend that they should never be liable for disclosing leaks, even when a non-journalist could be sent to jail for aiding and abetting a government leaker under our criminal law. They further argue that the government should be forbidden to subpoena journalists in order to uncover their sources—a process that exposes the journalist to no legal liability. Indeed, as the recent AP scandal shows, journalists do not even believe that the government should be allowed to investigate journalists who aided illegal disclosures so that it can identify the leaker. The government has met journalists partway. It never prosecutes journalists for disclosing secrets, but it does subpoena and monitor them on occasion.[1]

CREDIT: Illustration by Señor Salme

Sagar puts no more trust in the press than he does in Congress, the judiciary, and the bureaucracy. He points out that journalists face incentives that do not line up with the public interest. They are rewarded with prizes and lavished with attention when they disclose government secrets, and they are never punished for disclosures that cause more harm than good. Meanwhile, traditional press institutions such as *The New York Times* worry that if they do not publish leaks, leakers will go to their competitors or to non-traditional outlets such as WikiLeaks. The *Times* finally published the NSA story because the journalist who broke it was planning to put it in a book.

Yet Sagar does believe that the publication of leaks by the media serves an important function, and so while the executive should pursue leakers, we should hope that it does not fully succeed. His book thus amounts to a defense of the status quo—where there is an equilibrium between government efforts to stop leaks and press efforts to spring them, one that happily results in neither too many disclosures nor too few. This "unruly contest" between the executive and the press, in Alexander Bickel's words, is far from perfect, but in Sagar's view it seems to balance secrecy and transparency in the best way imaginable under current conditions. Sagar says that he would urge changes in the law regulating the contest between the executive and the press when one "is able to prevent the other from carrying out its core function"—if disclosure completely stopped because of an executive crackdown on leakers or the media, or if the government begins "to hemorrhage state

secrets." Yet at the same time, Sagar says, lawmakers should not intervene if a disclosure reveals merely "a terrifying abuse of power" or causes a "terrible loss of life and property."

But it is hard to parse exactly what all this means. One person's hemorrhage is another person's trickle, as is clear from the conflicting reactions to Snowden's disclosures. How does one tell whether disclosures are excessive unless one knows the damage that they do to national security—and how does one know that, if the government will not tell us because it believes that further damage would be done if it told us? One possible answer—which Sagar flinches from—is that we don't know, and can't know, whether leaks are excessive or insufficient from the standpoint of the public good.[2] The normal means for deterring government abuse—oversight, transparency, institutional competition—are inconsistent with the premise that secrecy is necessary. Abuse or the risk of abuse is, therefore, the price we pay for whatever security that secret government activity brings with it. As a result, the public will be able to discipline the executive only on the basis of extremely broad judgments about the state of the nation (have we been attacked recently? are our neighbors being picked up by agents at night and never seen again?), and otherwise we lack any basis for judging whether secrecy and disclosure exist in the proper balance.

Sagar does make two proposals for reform. First, he suggests that the president should be encouraged to take steps to persuade the public, as well as potential leakers in the executive branch, that he uses secret information responsibly. A number of possible routes are available—for example, by bringing into the government, and sharing classified information with, people who do not share his partisan interests. Franklin Roosevelt did this by employing the Republicans Henry Stimson as secretary of war and Frank Knox as secretary of the Navy at the outset of World War II. The public then can be sure that when the president keeps secrets, he will do so only when it broadly serves the public interest, and not partisan interests or self-aggrandizement. But there are obvious limits to this approach: the president will lose some control over policy, and the people he hires to enhance his credibility may be regarded as compromised by suspicious members of the public.

In any event, this is less a proposal for reform than a reason for complacency with the

status quo. If a savvy executive understands that excessive secrecy will undermine public support for him and hurt him at the polls, then he will use secrecy only when necessary and establish appropriate safeguards where he can. The key assumption here is that even if the public cannot punish the executive at the polls for engaging in bad activities of which it is unaware, it can punish the executive at the polls for asserting an excessive level of secrecy that makes abuse possible—a kind of meta-oversight that replaces actual oversight.

Second, Sagar argues that public-spirited individuals should start an organization devoted to monitoring the media and criticizing reporters who publish leaks that harm the nation or otherwise misuse classified information. Perhaps, if such an institution obtained a large enough public profile, it could embarrass media outlets, and discourage them from behaving badly despite the competitive pressures to do so. And if such an organization were effective, then we might agree that the government should go easier on the media, because the media could be trusted to publish only those leaks that advance the public interest.

Given the enormity of the dilemma that Sagar identifies, these proposals may seem inadequate. But it is Sagar's point that there is no way out of the dilemma, which is at the heart of political organization. Indeed, the dilemma of secrecy and transparency is a corollary of the ancient question, Who guards the guardians? If the public gives the government power, then this power may be abused—whether the power comes from the authority to use guns or the authority to act in secret. Institutions can only imperfectly respond to this problem. In Sagar's view, our institutions do the best that can be expected of them.

This is an excellent book that comes at an essential time. Snowden's leaks, which took place after Sagar finished the book, have focused public debate on the secrecy/transparency paradox, and Sagar's book is infinitely superior to the sloganeering that dominates the media.[3] This does not mean, of course, that it cannot be criticized. Consider again the accepted practice that the government may not use secret information in order to prosecute Americans who violate secrecy law. As Sagar points out, this rule greatly limits the government's ability to prosecute leakers, which means that the

government will often be unable to maintain important secrets. While he generally supports executive-branch secrecy, Sagar does not object to this rule. Yet Sagar supports the state-secrecy privilege and other rules that make it impossible for victims of government malfeasance—including people illegally tortured and spied on—to obtain a remedy from the government, because of his skepticism about judicial oversight. But if courts can legitimately block secret prosecutions, why shouldn't they be able to block secret surveillance? It may be possible to reconcile these positions, but one suspects that the weight of a historically contingent status quo plays a greater role in Sagar's analysis than he realizes or at least acknowledges.

Yet this status quo bias is understandable. The United States remains a pretty safe place and a pretty free place—one where the pervasive social control of *1984* is as remote today as it was twenty-nine years ago. Although the NSA has recently admitted certain illegalities, the flood of disclosures has not yet revealed concrete abuses—the spying on political opponents or the harassment of dissenters—comparable to those of the 1970s. So what would be our basis for reforming the law, given that so many of the costs and benefits of secret government activities are secret?

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(Oxford).

[1]But the government sometimes holds a journalist in jail until he or she reveals sources.

[2]It turns out to be exceptionally difficult to prove that disclosures cause harm because one can rarely rule out the possibility that the enemy already has the information.

[3]Sagar mentions Snowden only in a brief footnote, presumably because the full picture of the Snowden affair did not emerge until after he finished the book.