On Secrecy and Transparency: Thoughts for Congress and a New Administration

By Geoffrey R. Stone

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The actions of the George W. Bush Administration over the past several years have raised serious concerns about the appropriate level of government secrecy. The Administration has attempted to shield from public and even congressional scrutiny a broad range of controversial government decisions, including, for example, the secret creation of the National Security Agency (NSA) surveillance program, the secret authorization of the use of torture and rendition, the secret approval of the incommunicado detention of American citizens, and the secret establishment of prisons in Eastern Europe.

To achieve an unprecedented level of secrecy, the Bush Administration has promulgated secret policies, narrowly interpreted the Freedom of Information Act, broadly interpreted its power to classify government documents, closed deportation proceedings from public view, redacted vast quantities of "sensitive" information from government documents and websites, fired and otherwise punished government whistleblowers, jailed journalists for refusing to disclose confidential sources, threatened to prosecute the press for publishing confidential information, and aggressively invoked both executive immunity and the state secrets doctrine.[1]

To some degree, the Administration's emphasis on secrecy is an understandable consequence of the distinctive nature of the war on terror. In most circumstances, threats to the national security, like threats to the public safety, can be addressed through the conventional policies of deterrence and punishment. During the Cold War, for example, the Soviet Union was deterred from launching a nuclear attack against the U.S. in part because of its fear of a retaliatory counter-strike. In the war on terror, however, the enemy is not a nation state against which the U.S. can retaliate. Moreover, the enemy's "soldiers" have convincingly demonstrated their willingness to commit suicide for their cause. Deterrence and punishment are largely ineffective against such an enemy.

Adding to the danger, for the first time in human history a relatively small group of individuals has the potential to wreak large-scale havoc and destruction through the use of chemical, biological, nuclear or (as illustrated by September 11, 2001) other unconventional weapons. Because there appears to be no effective way to protect the nation by deterring or punishing this enemy, prevention becomes all-important.

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[1] *See* John Podesta, *Need to Know: Governing in Secret*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 220, 221-225 (Richard C. Leone and Greg Anrig Jr., eds, 2003); Richard C. Leone, *The Quiet Republic: The Missing Debate about Civil Liberties after 9/11*, *in* WAR ON OUR FREEDOMS at 9 (cited in this note); John F Stacks, *Watchdogs on a Leash: Closing Doors on the Media*, *in* WAR ON OUR FREEDOMS at 237 (Leone & Anrig eds.)(cited in this note); MEMORANDUM FOR ALBERTO R. GONZALES RE: STANDARDS OF CONDUCT FOR INTERROGATION (August 1, 2002).

Jack Goldsmith, who served a stint as head of the Justice Department's Office of Legal Counsel, has vividly described the mindset within the Administration in his 2007 book, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION.[2] In 2004, after Goldsmith informed David Addington, the Special Counsel to the Vice-President, that the Administration could not lawfully implement a potentially important counterterrorism measure, Addington responded: "'If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands.'"[3]

Addington's response speaks volumes about the pressure felt by the Bush Administration to keep America safe. According to Goldsmith, every morning the White House received a "'threat matrix'" that listed every threat directed at the U.S. in the preceding 24 hours. The matrix might be dozens of pages long. As Goldsmith notes, "It is hard to overstate the impact that the incessant waves of threat reports have on the judgment of people inside the executive branch who are responsible for protecting American lives."

One of Goldsmith's colleagues in the Administration analogized "the task of stopping our enemy to a goalie in a soccer game who 'must stop every shot,'" for if the enemy "scores a single goal," the terrorists succeed. To make matters worse, "the goalie cannot see the ball -- it is invisible. So are the players -- he doesn't know how many there are, or where they are, or what they look like." Indeed, the invisible players might shoot the ball "from the front of the goal, or from the back, or from some other direction -- the goalie just doesn't know."[4] With such a mindset, it is no wonder that the war on terrorism has generated a "panicked attitude" within the White House.[5]

In such an environment, it is easy to understand why the Bush Administration has been so focused on gathering huge amounts of information, using aggressive methods of interrogation, and preserving secrecy. In an atmosphere in which prevention is critical, and the failure to prevent even a single attack can lead to the deaths of thousands of Americans, the control of information is essential. The more we know about the enemy, and the less the enemy knows us, the better. This mindset is a natural and understandable product of the need to find every needle in every haystack, without fail.

Against this backdrop, I want to consider the issue of secrecy in the realm of national security. What is the right approach to this issue? The government often has exclusive possession of information about its policies, programs, processes, and activities that would be of great value to informed public debate. In a self-governing society, citizens must know what their representatives are doing if they are intelligently to govern themselves. But government officials often insist that such information must be kept secret, even from those to whom they are accountable – the American people.

The reasons why government officials demand secrecy are many and varied. They range from the truly compelling to the patently illegitimate. Sometimes, government officials rightly

[2] JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007) .
[3] *Id.* at 71.
[4] *Id.* at 73-74.
[5] *Id.* at 74.

fear that the disclosure of secret information might undermine the national security (for example, by revealing military secrets). Sometimes, they are concerned that the revelation of secret information would betray the confidences of citizens or other nations who provided the information on an assurance of confidentiality. Sometimes, they want to keep information secret because disclosure would expose to public view their own incompetence or wrongdoing.

The value of such information to informed public discourse may also vary widely. Sometimes, the information is extremely important to public debate (for example, the disclosure of unwise or even unlawful government programs or activities). Sometimes, the information is of no real value to public debate (for example, the disclosure of the identities of non-newsworthy covert agents).

The most vexing problem arises when the public disclosure of a government secret is both harmful to the national security and valuable to self-governance. Suppose, for example, government officials conduct a study of the effectiveness of security measures at the nation's nuclear power plants. The study concludes that several nuclear power plants are vulnerable to terrorist attack. Should this study be kept secret or should it be disclosed to the public? On the one hand, publishing the report might endanger the nation by revealing our vulnerabilities to terrorists. On the other hand, publication would alert the public to the situation, enable citizens to press government officials to remedy the problem, and empower the public to hold accountable those public officials who have failed to keep the nation safe. The public disclosure of such information could both cost and benefit the nation. Should the study be made public?

In theory, this question can be framed quite simply: Do the benefits of disclosure outweigh the costs of disclosure? That is, does the value of the disclosure to informed public deliberation outweigh its danger to the national security? Unfortunately, as a practical matter, this simple framing of the issue is not very helpful. It is exceedingly difficult to measure in any objective, consistent, predictable, or coherent manner either the "value" of the disclosure to public discourse or the "danger" to national security. And it is even more difficult to balance such incommensurables against one another.

Moreover, even if we were to agree that this is the right question, we would still have to determine who should decide whether the benefits outweigh the costs of disclosure. Should this be decided by public officials whose responsibility it is to protect the national security? By public officials who might have an incentive to cover-up their own mistakes? By low-level public officials who believe their superiors are keeping information secret for inadequate or illegitimate reasons? By reporters, editors, and bloggers who have gained access to the information? By judges in the course of criminal prosecutions of leakers, journalists, and publishers? Ultimately, someone has to decide whether public officials can keep such information secret.

In this essay, I will briefly address these questions both from the perspective of the First Amendment and from the broader perspective of public policy. My conclusions, though, are clear: the Bush Administration has tilted too far in the direction of secrecy at the expense of accountability and informed self-governance. Although the danger to the United States is quite real and not to be underestimated, so too is the danger of an overly aggressive insistence on

secrecy. As James Madison observed: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[6]

I. The Right to Publish Secrets

Suppose the press obtains information that the government would prefer to keep secret. May the press publish the information? This issue arose during the war on terror after the *New York Times* publicly disclosed President Bush's secret directive authorizing the National Security Agency to engage in warrantless electronic surveillance of international communications. Several Republican members of Congress accused the *Times* of "treason," and 210 Republicans in the House of Representatives supported a resolution condemning the *New York Times* for putting "the lives of Americans in danger." Attorney General Alberto Gonzales went so far as to suggest that the *Times* might be prosecuted for publishing "information relating to the national defense" with "reason to believe" that the information could be used "to the injury of the United States."[7]

Perhaps surprisingly, in the entire history of the United States there has never been a criminal prosecution of the press for publishing confidential information relating to the national security. It may be that the press has exercised great restraint and has never published confidential information in circumstances in which a prosecution would be constitutionally permissible. Or, it may be the government has exercised great restraint and has never prosecuted the press even though such prosecutions would have been constitutionally permissible. Whatever the explanation, because there has never been such a prosecution, the Supreme Court has never had occasion to rule on such a case.

The question whether the government should have the authority to control the press in this way arose rather dramatically in World War I during the debate over enactment of the Espionage Act of 1917. It is useful to consider that debate, because it shows both that this is not a new issue and that we have a long tradition of respecting the freedom of the press.

As initially presented to Congress, the bill drafted by the Wilson Administration included a "press censorship" provision, which would have made it unlawful for any person in time of war to publish any information that the president had declared to be "of such character that it is or might be useful to the enemy."[8]

This provision triggered a firestorm of protest from the press, which objected that it would give the president the final authority to determine whether the press could publish information about the conduct of the war. The American Newspaper Publishers' Association objected that this provision "strikes at the fundamental rights of the people, not only assailing their freedom of speech, but also seeking to deprive them of the means of forming intelligent

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[6] JAMES MADISON, THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., G. P. Putnam's Sons 1910) (1822).

[7] 18 U.S.C.§793(e). *See* Walter Pincus, "Senator May Seek Tougher Law on Leaks," *Washington Post* (Feb. 17, 2006), A1; Michael Barone, *Blowback on the Press*, U.S. NEWS & WORLD REPORT, May 8, 2006; Rick Klein, *House Votes to Condemn Media Over Terror Story*, BOSTON GLOBE, June 30, 2006, at A1; David Remnick, *Nattering Nabobs*, NEW YORKER, July 10, 2003, at 33, 34. The NEW YORK TIMES won the Pulitzer Prize for journalism for publishing these stories.

[8] H.R. 291 tit. I § 4, 65th Cong., 1st Sess., *in* 55 Cong. Rec. H. 1695 (1917).

opinion." The Association added that "in war, especially, the press should be free, vigilant, and unfettered."[9]

Many in Congress supported the proposed legislation. Representative Edwin Webb of North Carolina argued that "in time of war, while men are giving up their sons and while people are giving up their money," the press should be willing to give up its right to publish what the president "thinks would be hurtful to the United States and helpful to the enemy." Webb added that, in time of war, "we have to trust somebody," and just as we trust the president, as Commander in Chief, with the fate of our boys in uniform, so too must we trust him to prescribe what information "would be useful to the enemy."[10]

Opposition to the legislation was fierce, however. Representative Simeon Fess of Ohio warned that "in time of war we are very apt to do things" we should not do.[11] Senator Hiram Johnson of California reminded his colleagues that "the preservation of free speech" is of "transcendent importance" and that in times of stress "we lose our judgment."[12] Describing the provision as "un-American," Representative Martin B. Madden of Illinois protested that "while we are fighting to establish the democracy of the world, we ought not to do the thing that will establish autocracy in America."[13]

When it began to appear that the press censorship provision would go down to defeat, President Wilson made a direct appeal to Congress, stating that the "authority to exercise censorship over the press . . . is absolutely necessary to the public safety."[14] Members of Congress were unmoved. The House defeated the provision by a vote of 184 to 144, effectively ending consideration of the "press censorship" provision for the duration of the war.

Although the Supreme Court has never had occasion to rule on a criminal prosecution of the press for publishing classified or other confidential government information, it ruled on a related issue in *New York Times v. United States*,[15] the Pentagon Papers case. In 1967, Secretary of Defense Robert McNamara commissioned a top-secret study of the Vietnam War. That study, which filled forty-seven volumes, reviewed in great detail the formulation of United States policy toward Indochina, including military operations and secret diplomatic negotiations. In the spring of 1970, Daniel Ellsberg, a former Defense Department official, gave a copy of the Pentagon Papers to the *New York Times*. After the *Times* began publishing excerpts from the papers, the United States filed a complaint for injunction. The matter quickly worked its way to the Supreme Court, which held that the *Times* could not constitutionally be enjoined from publishing the information. The Court held that the publication of even classified information

[9] Resolutions of the American Newspaper Publishers' Association, 65th Cong., 1st Sess. (1971), *in* 55 Cong. Rec. S. 1861 (1917).
[10] 65th Cong., 1st Sess., *in* 55 Cong. Rec. H. 1590-91 (1917).
[11] *Id.* at 1591.
[12] 65th Cong., 1st Sess., *in* 55 Cong. Rec. S. 2097 (1917).
[13] 65th Cong., 1st Sess., *in* 55 Cong. Rec. H. 1773 (1917).
[14] *Wilson Demands Press Censorship*, NEW YORK TIMES 1 (1917) (quoting a letter from Woodrow Wilson to Representative Webb).
[15] 403 U.S. 713 (1971).

cannot constitutionally be restrained unless the government can prove that the disclosure would "surely result in direct, immediate, and irreparable damage to our Nation."[16]

Against this background, it is not surprising that, despite all the saber-rattling following the disclosure of the Bush Administration's secret NSA surveillance program, the government has not prosecuted the *New York Times* for its disclosure of the NSA program. Clearly, the government could not prove that that disclosure of a probably illegal program caused "direct, immediate, and irreparable" harm to the national security.[17] Although the Pentagon Papers case dealt with a prior restraint rather than a criminal prosecution, it seems likely that the standard for a criminal prosecution would be similarly demanding on the government. Although the precise boundaries of this doctrine are undefined, it seems clear that the right of the press to publish even classified information is generally well-protected by the First Amendment.

II. The Right to Know Secrets

The result in the Pentagon Papers case gives rise to an interesting question. If the press has a First Amendment right to publish classified information unless that publication will cause "direct, immediate, and irreparable damage" to the national security, does it follow that the public has a First Amendment right to such information? We protect the right of the press to publish confidential information because the publication of that information serves the public interest. That being so, it would seem that the ultimate right being protected is not the right of the press to publish, as such, but the right of the public to know. And, if that is so, then it would seem that citizens should have a First Amendment right to insist that the government must disclose information to the public, unless the disclosure would result in "direct, immediate, and irreparable damage" to the nation.

Although this reasoning seems logical, the Supreme Court has never interpreted the First Amendment in this manner. Rather, the Court has construed the First Amendment as protecting a right to speak and a right to publish, but not a right to information. On this view, individuals have no First Amendment right to insist that the government must reveal information that the government would prefer to keep secret. Put differently, a citizen has no constitutional right to knock on the president's door and demand information about the president's decisions. The Court has rejected the idea that the First Amendment is a constitutional Freedom of Information Act. For practical, historical, and textual reasons, the Court has drawn a sharp distinction between the right to communicate what one knows and the right to learn what one wants to know.[18]

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[16] *Id.* at 730 (Stewart, J., concurring). Although the Pentagon Papers case involved a prior restraint, it seems reasonable to conclude that essentially the same standard would apply in a criminal prosecution of the New York Times for publishing the information. *See* GEOFFREY R. STONE, TOP SECRET: WHEN GOVERNMENT KEEPS US IN THE DARK (2007) at 22-24.

[17] The NSA surveillance program involved an additional twist, for there is good reason to believe that the program itself was unlawful. Although the issue has never arisen, it is difficult to believe that the Supreme Court would ever sustain a criminal prosecution for the public disclosure of *unlawful* government actions. *See* GEOFFREY R. STONE, WAR AND LIBERTY: AN AMERICAN DILEMMA (2007) at 143-163; STONE, TOP SECRET, *supra* note 16, at 24-26.

[18] *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974) (no right of the press to interview prisoners); Houchins v. KQED, 438 U.S. 1 (1978) (same). *See* Lillian BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980).

There is an intermediate case, however. Consider a public employee who discloses confidential information to the press. The Pentagon Papers situation illustrates the issue. In the Pentagon Papers case, two things were clear: First, the government could not constitutionally restrain the *New York Times* from publishing the Pentagon Papers. Second, neither the *New York Times* nor any member of the public had any First Amendment right to demand that the government must disclose the Pentagon Papers. What, then, of Daniel Ellsberg, who unlawfully turned over the Pentagon Papers to the *New York Times*? Could the government constitutionally punish Ellsberg for leaking the Pentagon Papers to the press and the public?

The government filed criminal charges against Ellsberg, but the prosecution was dismissed because of government misconduct, so the issue was never resolved. But it seems clear under current law that a public employee who leaks classified information ordinarily can be discharged and/or criminally punished for his conduct, even if the press has a First Amendment right to publish the information he unlawfully disclosed.

The doctrine that the government can constitutionally punish public employees for disclosing classified information is premised largely on the intersection of two considerations. First, there is the principle of waiver. Constitutional rights can be waived. A criminal defendant can waive his right to jury trial, a citizen can waive his right not to be searched, a litigant can waive his right to counsel. Similarly, public employees can waive their First Amendment rights.

But the government's authority to compel a waiver of constitutional rights as a condition of government employment is not unbounded. It would clearly be unconstitutional, for example, for the government to insist that public employees must agree never to vote for a Democrat, never to have an abortion, or never to practice the Muslim faith. Such waivers would be unconstitutional and unenforceable. Thus, waiver is relevant, but not necessarily dispositive. We need to decide when the government can constitutionally insist upon such waivers.

This brings us to the second consideration – the legitimate interest of government in being able to function effectively. Although the government cannot automatically require individuals to waive their constitutional rights as a condition of public employment, it can require them to waive those rights insofar as the waiver is reasonably necessary to enable the government to fulfill its responsibilities. As the Supreme Court explained in *Pickering v. Board of Education,* the government

> has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services its performs through its employees.[19]

[19] 391 U.S. 563, 568 (1968).

Applying this reasoning, the Supreme Court held in *Snepp v. United States*[20] that a former employee of the CIA could constitutionally be held to his agreement not to publish "any information or material relating to his Agency, its activities or intelligence activities generally, either during or after the term of [his] employment, [without] specific prior approval by the Agency." The Court emphasized that a "former intelligence agent's publication of . . . material relating to intelligence activities can be detrimental to vital national security interests."[21]

In light of *Snepp* and *Pickering*, it seems clear that public employees can be required as a condition of employment to agree not to disclose classified information to the press or the public – in at least some circumstances. The critical question is to identify the circumstances in which such a compelled waiver would be valid. Under existing law, the prevailing presumption is that public employees can constitutionally be discharged and/or criminally punished for leaking classified information if the disclosure could *potentially harm the national security*.[22]

Now, here lies the puzzle. Except in rare instances, the press will not be in a position to publish classified information that is relevant to public debate unless a public employee reveals it to them. Giving the press the protection guaranteed in the Pentagon Papers case is of limited value to the public if the press can almost never gain access to the information. If the Pentagon Papers decision states the proper standard for reconciling the interests of an informed public with the needs of national security, shouldn't that same standard protect the right of public employees to disclose such information to the press?

The conventional answer to this puzzle was offered by the Yale law professor Alexander Bickel, who aptly characterized this as a "disorderly situation." Bickel argued that if we grant the government too much power to punish the press, we risk too great a sacrifice of public deliberation; but if we give the government too little power to control confidentiality "at the source," we risk too great a sacrifice of secrecy.[23] The solution, he concluded, was to reconcile the irreconcilable values of secrecy and accountability by guaranteeing both a strong authority of the government to prohibit leaks and an expansive right of the press to publish them.

I recently wrote that this state of affairs "may seem awkward in theory and unruly in practice, but it has stood the test of time."[24] Upon further reflection, I have come to doubt the wisdom of this conclusion. The power we have given the government to control confidentiality "at the source" is simply too great. Even if one accepts both *Pickering* and *Snepp*, it does not necessarily follow that the government should have the authority to prohibit the disclosure of classified information whenever the disclosure might "potentially harm the national security." A more appropriate constitutional standard might be whether *the potential harm to the national security outweighs the value of the disclosure to public discourse*. Under this approach, a public employee who reveals classified information in circumstances where the value to public discourse outweighs the harm to national security would be protected by the First Amendment.

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[20] 444 U.S. 507 (1980).
[21] *Id*., at 511.
[22] *See* STONE, TOP SECRET, *supra* note 16, at 10-14.
[23] ALEXANDER BICKEL, THE MORALITY OF CONSENT 79-82 (1975).
[24] STONE, TOP SECRET, *supra* note 16, at 22.

Admittedly, this is a more difficult standard to administer than whether disclosure "might potentially harm the national security." The concept of "value to public discourse" is hardly self-defining, and it is always vexing to balance such incommensurable values. It is easy to see why the Court prefers to keep it simple. But recent experience suggests that the existing standard errs too much on the side of secrecy. We need a standard that better reflects the proper balance in a self-governing society between secrecy and transparency. Moreover, there is some evidence that a more even-handed standard would be manageable, because this was in fact the classification standard used during the Clinton Administration.[25]

In any event, it is improbable that the current Supreme Court would be inclined to embrace such a change. The very real difficulties of applying a more even-handed constitutional standard in the employment context would likely dissuade the Court from adopting such a test as a matter of First Amendment doctrine. Any change in this regard is therefore more likely to have to come from the executive and/or legislative branches.

Another First Amendment issue that affects the issue of real-world balance between secrecy and disclosure concerns the journalist-source privilege. This question came to public attention most dramatically in recent years in the controversy over the disclosure of Valerie Plame's identity as a CIA operative and the subsequent jailing for contempt of the *New York Times* reporter Judith Miller.

The argument for a First Amendment journalist-source privilege is relatively straightforward. It is often in society's interest to encourage individuals to reveal information to the press, but individuals may be reluctant to do so if they cannot retain their anonymity. The logic of the journalist-source privilege is therefore similar to the logic of the attorney-client privilege or the doctor-patient privilege.

In its 1972 decision in *Branzburg v. Hayes*,[26] the Supreme Court held that the First Amendment does not provide such a privilege. The four dissenting justices argued that "when a reporter is asked to appear before a grand jury and reveal confidences," the government should be required to "demonstrate a compelling and overriding interest in the information" before it can compel the reporter to disclose confidential sources.[27] But the majority disagreed. The Court held that the First Amendment protects neither the source nor the reporter from having to disclose relevant information to a grand jury.

The Court's decision in *Branzburg* was premised on two First Amendment principles. First, as a general matter of First Amendment jurisprudence, the Court is reluctant to invalidate a law because it has an incidental effect on free speech. Except in highly unusual circumstances, in which the application of the law would have a substantial impact on First Amendment freedoms, the Court routinely rejects such challenges. To avoid the complex balancing and line-drawing

[25] *See e.g.,* Executive Order 12958 (Clinton Executive Order). This Executive Order was revised by President Bush. *See* Executive Order 13292 (March 28, 2003).
[26] 408 U.S. 665 (1972).
[27] *Id.* at 743 (Stewart, J., dissenting).

that would be involved in invalidating laws that have only an incidental effect on speech, the Court presumes that such laws are constitutional.[28]

Second, the Court expressed concern that if it recognized a First Amendment-based privilege, it would have "to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan newspaper."[29]

When all is said and done, then, the First Amendment serves as an important but limited safeguard against undue government secrecy. As construed by the Supreme Court, the First Amendment gives strong protection to the press when it publishes even classified information relating to the national security, but it gives the press and the public essentially no constitutional right to demand such information from the government, it gives only minimal constitutional protection to public employees who disclose such information to the press, and it gives no meaningful protection to journalists who want to shield their sources from public disclosure. It is clear, then, that barring a revolution in First Amendment doctrine, what is needed to bring government secrecy into reasonable balance with the public's need to know is a significant change in public policy, either in the form of executive action or federal legislation.

III. Recommended Changes in Public Policy

Overbroad government assertions of secrecy can cripple informed public debate. It is impossible for citizens responsibly to consider the merits of the actions of their elected representatives if they are kept in the dark about their conduct. As Senator Daniel Patrick Moynihan once observed, "secrecy is the ultimate form of regulation because people don't even know they are being regulated."[30]

Because the First Amendment will not solve this problem, a careful redefinition of public policy is essential. Apart from a generally more open approach to executive transparency and accountability, which is essential, I have four specific policy recommendations.

First, either by executive order or congressional amendment of the Freedom of Information Act (FOIA),[31] the executive should no longer be authorized to classify information merely because its disclosure has the potential to harm the national security. This practice, which dates back to an October 2001 directive from then-Attorney General John Ashcroft, does not balance security interests against open society interests.[32] The proper standard for classification should be "whether the potential harm to the national security outweighs the value of the disclosure to public discourse." This standard has been used by past administrations, and there is

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[28] *See* STONE, TOP SECRET, *supra* note 16, at 50-52.
[29] 408 U.S., at 704.
[30] John Podesta, *Need to Know*, *supra* note 1, at 220, 227.
[31] 5 U.S.C. § 552 *et seq.* (last amended 2007). While the recent passage of the OPEN Government Act of 2007 made some laudable changes to the current FOIA framework, certainly more improvements could be made.
[32] Memorandum from John Ashcroft, Att'y Gen., to Heads of All Fed. Dep'ts & Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/oip/011012.htm (establishing "sound legal basis" standard for DOJ defense of FOIA non-disclosure decisions, replacing stricter "foreseeable harm" standard).

no reason why it cannot be imposed either as a matter of executive order or congressional action. The solution to overclassification is simple: less classification.

Second, Congress should enact the pending Federal Employee Protection of Disclosures Act, which would provide greater protection to national security whistleblowers. Perhaps most important, this legislation would offer express protection to public employees who disclose unconstitutional or otherwise unlawful government actions.[33]

Third, Congress should enact the proposed State Secrets Protection Act,[34] which would clarify and limit the use of the state secrets privilege, a common law privilege designed to allow the government to protect sensitive national security information from disclosure in litigation, whether or not the government is a formal party to the litigation. The Bush Administration has inappropriately invoked the privilege, repeatedly using it to block judicial review of questionable constitutional practices, including the secret NSA surveillance program, the secret rendition of alleged terrorists, and challenges to the legality of the dismissal of government whistleblowers.[35]

Fourth, Congress should enact the Free Flow of Information Act, pending legislation that would recognize a qualified journalist-source privilege. The privilege established by the legislation could be overcome if disclosure of the protected information is necessary to prevent significant harm to the national security that would "outweigh the public interest in newsgathering and maintaining the free flow of information to citizens."[36]

Enactment of these four laws would go a long way towards redefining the balance between secrecy and accountability. Some measure of secrecy is, of course, essential to the effective functioning of government, especially in wartime. But the Bush Administration's obsessive secrecy has effectively and intentionally constrained meaningful oversight by Congress, the press, and the public, directly undermining the vitality of democratic governance. As the legal scholar Stephen Schulhofer has noted, one cannot escape the inference that the cloak of secrecy imposed by the Bush Administration has "less to do with the war on terrorism" than with its desire "to insulate executive action from public scrutiny."[37] Such an approach to self-governance weakens our democratic institutions and renders "the country less secure in the long run."[38] This is an area in which serious reconsideration of our laws is necessary.

[33] *See* S. 274, 110th Cong., 1st Sess. (2007).
[34] *See* S. 2533, 100th Cong., 1st Sess. (2007).
[35] *See* ACLU v. NSA, 467 F. 3d 590 (6th Cir. 2006) (surveillance program); El-Masri v. Tenet, 479 F. 3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007) (rendition); Edmunds v. U.S. Department of Justice, 323 F. Supp. 65 (D.D.C. 2004), aff'd 161 Fed. Appx. 6 (D.C. Cir. 2005) (whistleblower).
[36] *See* S. 2035, 100th Cong., 1st Sess. (2007).
[37] Stephen J Schulhofer, *No Checks, No Balance: Discarding Bedrock Constitutional Principles, in* WAR ON OUR FREEDOMS, *supra* note 1, at 91 (Leone and Anrig, eds.).
[38] Podesta, *Need to Know*, *supra* note 1, at 225.