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Intellectual Freedom and U.S. Government Secrecy¹

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The idea of intellectual liberty is under attack from two directions. On the one side are its theoretical enemies, the apologists of totalitarianism and on the other its immediate, practical enemies, monopoly and bureaucracy.

~George Orwell (1946)

Intellectual freedom assumes a free press, access to libraries, transparency of laws and regulations, open records and archives, and a social world that provides a foundation for exploration, expression, discussion of diverse perspectives, and the protection of rights. This rich climate potentially molds individual thought and action, but also civic participation, as “people do need novels and dramas and paintings and poems, ‘because they will be called upon to vote’” (Meiklejohn 1961, 263). Intellectual freedom implies potential empowerment through information and communication regarding common life, for without knowledge there is no chance to exercise power (Bok 1989b). Through intellectual freedom, individuals are better able to come to terms with the times in which they live and the history they inherit. Essential for the creation of trust and confidence so critical in addressing issues of mutual concern, intellectual freedom is also related to a reduction of uncertainty, for in accessing certain kinds of information,² individuals as well as governments are able to assess risk and security (Daase and Kessler 2007; Edelman 2004).

In this chapter, I investigate intellectual freedom in the United States within the confines of government secrecy. First, I discuss intellectual freedom through a lens of law and human rights, and in the following sections,

- 1 The author thanks Mark Alfino, Ivan Greenberg, and Mickey Huff for their feedback on this chapter.
- 2 Information as intended here means “knowledge communicated” (Capurro 2003).

I utilize political scientist Carl J. Friedrich's models of functional and dis-functional secrecy and tampering with communications in assessing "what is and is not discreditable by examining particular practices of secrecy" (Book 1989b, 9). Friedrich's modes of secrecy not only illustrate the demands secrecy places on intellectual freedom, but allow for the discussion of secrecy's close cousins, propaganda, censorship, and surveillance.

Intellectual Freedom—A Global Right

The cornerstones of intellectual freedom, the ability to access and communicate information, including the "right to speak anonymously, the right to use encryption tools and the right to be free from unwarranted monitoring and surveillance" (Article 19 2003; United Nations General Assembly 1966) establish the power to research, write, publish, affiliate, protest, and assemble. Furthermore, intellectual freedom is the right to hold beliefs, express opinions, and share information "regardless of frontiers" (United Nations General Assembly, 1948). Simply, intellectual freedom is defined as the "freedom of the mind and as such it is both a personal liberty and a prerequisite for all freedoms leading to action" (American Library Association 2010, xvii).

The Bill of Rights of the U.S. Constitution (1789) and laws such as the Administrative Procedure Act P.L. 79-404 (1946), Freedom of Information Act P.L. 89-487 (1966),³ Federal Advisory Committee Act P.L. 92-463 (1972), the Government in Sunshine Act P.L. 94-409 (1976), Paperwork Reduction Act Amendments of 1996 P.L. 104-13, Electronic Freedom of Information Act Amendments of 1996 (P.L. 104-231), and Open Government Act of 2007 (P.L. 110-175) extend political rights and civil liberties associated with intellectual freedom.⁴ In addition, rights associated with intellectual freedom in the United States are affirmed through a variety of international declarations and conventions.⁵

³ The Act was perceived by many in Congress and in federal agencies that administered FOIA as a way to allow the release of legitimate secrets (Mackenzie 1997, 12) and also began a longstanding "collision course" with the National Security Act and its provisions for secrecy (MacKenzie 1997, 12-13). FOIA was substantially amended in 1974, and de facto modified in 1984 by the CIA Information Act, which exempts operational files of the Agency from release.

⁴ A case can be made that intellectual freedom is furthered by environmental laws such as the Emergency Planning and Community Right-To-Know Act (P.L. 99-499), the National Environmental Protection Act of 1969 (P.L. 91-190), called the ecological *Magna Carta* (Auerbach 1972), and the Occupational Safety and Health Act of 1970 (P.L. 91-596), which mandates a worker's right to know of chemical and radiation hazards in the workplace.

⁵ Such as the Universal Declaration of Human Rights (1948), particularly Articles 18, 19, 26, and 27, the International Convention on the Elimination of All Forms

Intellectual freedom is also tied to the right to know (RTK) by way of an open media, of which Kent Cooper of the Associated Press observed that "a citizen is entitled to have access to news, fully and accurately presented. There cannot be political freedom in one country or the world, without respect for 'the right to know'" (*The New York Times* 1945, 18). It is with Cooper we witness the birth of the contemporary RTK movement in the United States during the 1940s, in part based on the ideal of an informed citizenship made possible through access to information. The RTK movement gained further ground with the work of Harold L. Cross, counsel to the *New York Herald Tribune*, who was enlisted by the American Society of Newspaper Editors (ASNE) to compile "a comprehensive report on customs, laws and court decisions affecting our free access to public information whether it is recorded on police blotters or the files of national government" (Cross 1953, xv). Among the rights identified by Cross is the "right of inspection," traced to English Common Law, where

Every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action in which the document or record sought can furnish evidence or necessary information. (Cross 1953, 26)

In *The People's Right to Know: Legal Access to Public Records and Proceedings*, Cross reviewed statutes on the definition of a public record, privacy laws, and identified five "non-inspection doctrines" that outline instances where records can be withheld (1953, 203-213). In this work, Cross also argues for the addition of a constitutional amendment to clarify the First Amendment on access to information. Cross' book remains a groundbreaking early inventory of freedom of information laws and a measure of U.S. government secrecy and was an inspiration for the creation of the Freedom of Information Act of 1966, or FOIA (Lemov 2011). Both Cooper and Cross suggest that the RTK is best realized by an investigative press and media, coupled with publicity and transparency of government policies and actions.⁶

of Racial Discrimination (1969), the International Covenant on Civil and Political Rights (1976), the International Covenant on Economic, Social and Cultural Rights (1976), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987). The Rio Declaration on Environment and Development, especially Principle 10, also reinforces the need for information in decisionmaking (United Nations Conference on Environment and Development 1992).

⁶ Note the distinctions between publicity and transparency as Daniel Naurin (2006) observes: "accountability is primarily a function of publicity rather than transparency. Publicity, one can say, is a causal mechanism linking transparency and accountability." (91).

Secrecy: Functional or Disfunctional?

Limits on intellectual freedom are associated with shades of government secrecy, as the secret is "the ultimate sociological form for the regulation of the flow and distribution of information" (Hazelrigg 1969, 324). Secrecy may include the use of codes, disguises, markings, costumes, and specific colors (Bok 1989a; Simmel 1906) and is connected to the clandestine, or "any activity or operation sponsored or conducted by governmental departments or agencies with the intent to assure secrecy and concealment" (Department of Defense 2012). But it is secrecy as the *consciously willed concealment of information* (Simmel 1906, 449) with sanctions for disclosure (Shils 1956) employed from the establishment of the United States across branches of government as a weapon, technique,⁷ strategy, and policy that involves "conflicts of power that come through controlling the flow of information" (Bok 1989b, 18–19).

As Cass Sunstein observes, our current understanding of the Jeffersonian model of freedom of information, with its emphasis on the ability of citizens to make informed decisions by way of access to a wide variety of information, "oversimplifies the constitutional system, which delegates authority to representatives as well as to citizens" (1986, 891). Sunstein notes that political decisions are not always made by individuals but their elected representatives, who themselves are under legal and administrative constraints (1986, 894). What the Jeffersonian philosophy does accomplish, according to Sunstein, is something interdependent, for if information "is kept secret, public deliberation cannot occur; the risks of self-interested representation and factional tyranny increase dramatically. The Jeffersonian model thus calls for substantial limitations on governmental secrecy" (1986, 894). While this may be so in a general philosophical sense, as this chapter indicates, throughout U.S. history, government secrecy is often at odds with the rights associated with access to information.

Given this résumé, Friedrich's model of functional and disfunctional secrecy is of value in examining government secrecy (Friedrich 1972, 175–176; Merton 1940, 561). First, Friedrich observes that in specific circumstances, secrecy can be system-developing, "system-maintaining and like conflict, may even be needed for the functioning of the system" (1972, 5). Friedrich associates official secrets, especially concerning foreign or military matters that are "subject to the strictest secrecy" with some functional secrecy, even though such secrecy "conflicts with the principle of popular control and related freedom of the press and generally of expression" (1972, 177). In this way, specific conditions are reported in the research literature where secrecy

⁷ Technique as employed here reflects Merton's description of Ellul as "any complex of standardized means for attaining a predetermined result" (1964). Technique as used in this chapter may perhaps be extended to Foucault's (1972) "discursive practices."

is deemed protective and necessary, which fall into Friedrich's typology of the functional use of secrecy (Aftergood 1999; Blanton 2003; Commission on Protecting and Reducing Government Secrecy 1997; Hoffman 1981; McDermott 2011; Powers 1998; Schoenfeld 2011; Sunstein 1986; and Thompson 1999). To further support this view, historically, secrecy was frequently employed by the Framers during the establishment of the United States government to protect policies against foreign influence (Hoffman 1981; Halstuk 2002). Moreover:

Publicity was never opposed in principle; rather it was seen as unworkable in certain contexts or spheres of activity. As a result, the values of effective government and accountable government had to be balanced and reconciled. The favored device for accomplishing this was institutional pluralism. (Hoffman 1981, 19)

The Framers' functional use of secrecy is perhaps an early form of deliberative privilege, which protects internal discussions as they are shaped by legislators and policymakers before opened for public discussion (Department of Justice 2009). For example, *The Resolution of Secrecy* adopted by the Continental Congress called for members

Not to divulge, directly or indirectly, any matter or thing agitated or debated in Congress, before the same shall have been determined, without leave of the Congress; nor any matter or thing determined in Congress, which a majority of the Congress shall order to be kept secret. (Continental Congress 1775)

Historian Daniel N. Hoffman believes the Framers "made it clear that the Constitution had a place for secrecy, specifically with respect to the national security functions of the executive branch. No suggestion was made that secrecy would or should be practiced in other spheres, or that it would be absolute even as to these" (1981, 34). In this vein, Article I, Sec. 5, Cl. 3, of the U.S. Constitution offers Congress guidance for secret keeping (Amer 2008, 1)⁸ and Article II Sec. 2 suggests a basis for executive secrecy, or "the right of the president and high-level executive branch officers to withhold information from those who have compulsory power" (Rozell 2002, 403). This right is not viewed as "absolute, as executive privilege is often subject to the compulsory powers of the other branches" (Rozell 2002, 403).⁹ However, as Friedrich

⁸ "Injunction by secrecy," Standing Rule 36 (paragraph 3) of the U.S. Senate, authorizes publication of treaties after completion of secret negotiations. See Amer (2008) and Manley O. Hudson (1929) for a fascinating historical look at Rule 36.

⁹ *United States v. Nixon* (1974) recognized executive privilege, but declined to apply it to protect the Watergate tapes. The concept of the "unitary executive theory," held by the second Bush administration, holds that the president has authority over the Executive branch. For an extended discussion see Rosenberg (2008).

points out, the "functionality of secrecy is often too readily assumed with adequate proof." In his discussion of official secrecy, Friedrich observes that "many of the matters secreted by such agencies as the CIA and the FBI could just as well be a matter of public record, and other such matters subject to scrutiny by Congress and other administrative agencies" (1972, 190).

Conversely, secrecy is identified as "dysfunctional" by Friedrich when functionality "declines to a point where the particular part hurts and destroys the system" (1972, 7). In this way, disfunctional secrecy no longer includes and sustains an "adequately informed public opinion" (Friedrich 1972, 177). Historical and contemporary examples of disfunctional secrecy are plentiful in the scholarly and popular literature, ranging from subjects such as the overclassification of information, leaks and national security, intelligence budgets, trade policies, to confidential business information, covert actions, surveillance of U.S. citizens, dual-use technology, the environment, international relations, and military matters (Aftergood 2000; 2009; *American Civil Liberties Union and the American Civil Liberties Union Foundation v U.S. Department of Justice* 2013; Bok 1989b; Colby 1976; Cole 1987; Felbinger and Reppy 2011; Fisher 2006; Foerstel 1991; 1992; Gibbs 1995; 2011; Gravel 1972; Hinson 2010; Hook 1988; House Special Investigations Division 2004; House Subcommittee on National Security, Emerging Threats, and International Relations 2006; Johnson 2000; Lutter 2013; Mendelsohn 1996; *New York Times Co. v Department of Justice* 2013; Piltz 2011; Reporters Committee for Freedom of the Press 2005; Roberts 2006; Rourke 1957; 1960; Rozell 2002; Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities 1976; Senate Subcommittee on Constitutional Rights 1972; Shane 2006; Shils 1956; Thompson 1999; Turner 1994; Welsome 2000; Wise and Ross 1964).

The abundant literature on disfunctional secrecy also includes analysis of the state secrets privilege, a creature of judge-made law under the *Federal Rules of Evidence*, which lacks grounding in federal statutes and, many have argued, any grounding in the Constitution. Its use has frustrated judicial redress for constitutional wrongdoing, including "government assassination, torture, kidnapping, illegal surveillance" (Open the Government 2012, 17).

Disfunctional secrecy is associated with what might be considered "secret laws" such as classified National Decision Directives, which "do not appear to be issued under statutory authority conferred by Congress and thus do not have the force and effect of law" (General Accounting Office 1992, 1) and Presidential Study Directives (Federation of American Scientists 2011). In this way, disfunctional secrecy can exemplify sociologist Georg Simmel's "sociological expression of moral badness" (1906, 463) when it is utilized to restrict and rearrange information of a potentially embarrassing nature and to cloak corruption, abuse, and misconduct (Adams and Balfour 2011; Aftergood

1999; Bok 1989b; Blanton 2003; Cook 1996; Friedrich 1972; Gibbs 2011; Gup 2000; Halperin, et al 1976; Halperin and Woods 1990-1991; Kerry 1997; Leonard 2011, Olmsted 1996; Wise and Ross 1964).

The Moynihan Commission and Government Secrecy

Referred to as the Moynihan Commission for its chairman, Senator Daniel P. Moynihan, the Commission on Protecting and Reducing Government Secrecy applied sociologist Max Weber's analysis to dissect the "onion structure" of the bureaucracy, a system that is "organizationally shock-proof against the factuality of the real world" (Arendt 1968, 100). What Weber offers to the study of U.S. government secrecy is a description of a specialized, disciplined "power instrument of the first order" (1978, 987) highly dependent on control of information. The bureaucracy, according to Weber, is naturally secretive regarding knowledge and intentions whether out of functional or pure power motives (1978, 992-93). But there is more—a bureaucracy

that uses its knowledge and capacity for concealment to escape inspection and control jeopardizes legal domination by usurping the rule-making or decision-making powers that should ideally result from the political and legislative process. (Bendix 1962, 452)

In his historical-sociological analysis, Weber identified rationality, technical superiority, reliance on "calculable rules" (1958, 215), and the "quantitative extension of administrative tasks" at the foundation of bureaucracy's inner workings (1968, 969). Bureaucracy, although "among those social structures which are the hardest to destroy" is also an "instrument for 'societalizing' relations of power" (Weber 1958, 228). Of deep relevance to the discussion of intellectual freedom and government secrecy, the bureaucracy's

secretive tendency exists even in the absence of plausible justifications. Every bureaucracy will conceal its knowledge and operation unless forced to disclose them, and it will, if need be, simulate the existence of hostile interests to justify such concealment. (Bendix 1962, 452)

Although the finer aspects of Weber's work were not expressly discussed by the Moynihan Commission in its study, they nevertheless are essential to analyzing information practices and policies of U.S. federal agencies, for it is *the files*—the records of the bureaucracy, archives, all of it, print and digital, past and present—that are subject to secrecy, power, authority, rules, privilege, territory, and compartmentalization. Weber writes:

Management of the modern organization is based upon written documents ("the files"), which are preserved in their original or draft form, and upon a staff of subaltern officials and scribes of all sorts. (1978, 957)

Increasingly all order in public and private organizations is dependent on the system of files and the disciplines of officialdom, that means, its habit of painstaking obedience within its wonted sphere of action. (1978, 988)

Utilizing Weber's sociological investigation into the nature of bureaucracy, the Commission describes secrecy in government in the following way:

A form of government regulation. There are many such forms, but a general division can be made between regulations dealing with domestic affairs, and those dealing with foreign affairs. In the first category, it is generally the case that government prescribes what the citizen may do; in the second category, it is generally the case that government prescribes what the citizen may know. (1997)

These distinctions led Senator Moynihan to remark that two regulatory "regimes" exist in the United States: the first regime allows for freedom of information through public disclosure, discovery, and due process, and is under public scrutiny. The second regime is "concealed within a vast bureaucratic complex," wherein "some congressional oversight may take place and some presidential control" (1997). In this latter regime, the public is not excluded altogether, but the system is fraught with "misadventure." Misadventure, where limited oversight and public review takes place, also suggests possibilities for betrayal and corruption (Friedrich 1972, 175), ethical failures (Bean 2011; Colby 1976; Farrall 2011; Leonard 2011; and Piltz 2011) and administrative evil (Adams and Balfour 2009; 2011).

By far the most noteworthy of the Commission's contributions to advancing theory, secrecy by regulation acts as a barometer of sorts for gauging secret keeping in government. While Weber never expounded on the uses of secrecy and its forms in relation to the files, he brought together the essential ingredients for the Moynihan Commission's model of secrecy by regulation, or "'government secrecy,' which more properly could be termed 'administrative secrecy.'"¹⁰ That is, secrecy by regulation provides a means to study those techniques that establish norms for secrecy through custom, law, regulation, politics, and specific techniques, and/or administrative tools such as nondisclosure agreements, compartmentalization, over-classification and reclassification.¹¹ In characterizing government secrecy as a form of regulation,

10 Political scientist Frances E. Rourke (1957; 1960), the Moynihan Commission, and Friedrich all refer to government secrecy as "administrative secrecy" following Max Weber (1968, 993).

11 Reclassification is also termed "retroactive secrecy." See *United States of America Plaintiff v. The Progressive Inc., Erwin Knoll, Samuel Day, Jr., and Howard Morland Defendants*, where the plaintiff "advanced the concept of retroactive secrecy

the Commission's historical review reports an almost cyclical use of secrecy that includes the use of propaganda, censorship, and surveillance by the U.S. government in response to concerns over national security, conspiracy, and domestic subversion.¹²

For example, the Commission drew parallels between the Alien Sedition Act of 1798, where "John Adams could say that 'a free press maintains the majesty of the people' and champion the Sedition Act that threatened five years in prison to anyone whose opinions besmirched the good name of a government official or sowed confusion among the people" and the Espionage Act of 1917 that quelled political speech and public protest over the World War I (WWI) draft as the "United States Government grew reckless in its infringement of liberty" (Schultz 2003, 39). The conviction of Charles Schenk under the Espionage Act for distributing anti-draft pamphlets during WWI—the "peoples' war" as Woodrow Wilson termed it—led the Supreme Court to deny Schenk's argument that his activities were protected by the First Amendment. Writing the opinion for the Court, Justice Oliver Wendell Holmes proposed distinctions for speech rights in the concept of "clear and present danger":

Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. (Schenck v. United States 1919)

Moreover, the Committee on Public Information (CPI), or Creel Committee, played a significant role in shaping public opinion shortly after America's entry into World War I. In 1917, eighteen categories of information were published in *The New York Times* and proposed for restriction via "voluntary censorship" by the Committee on grounds of providing information to the enemy. The list of categories, from boat schedules, battle plans, and "technical inventions," were disclosed by the Committee after Washington correspondents "declined to consider them" (*The New York Times* 1917, 4). One reason offered for rejection of the regulations by the press is that they "would

declaring that previously published articles contained secrets" (*The Progressive* 1979).

12 For example, see the Central Intelligence Agency's *Dispatch: Countering criticism of the Warren Report*, which sought to "provide material for countering and discrediting the claims of the conspiracy theorists, so as to inhibit the circulation of such claims in other countries (1967, 1). The *Dispatch* contains a lengthy analysis of books written on the assassination of President Kennedy. Also see Chang (2002) and Greenberg (2012).

bar speculation about possible peace or differences of opinion with allies or neutrals" (*The New York Times* 1917, 1). Through its domestic and foreign divisions, the CPI placed the press and movie industry "upon their honor, and made them partners of Government in guarding military information of tangible benefit to the enemy" (Committee on Public Information 1920, 10). These features of the National Security State (NSS) suggest great opportunities for "misadventures" as observed by Senator Moynihan. They also imply opportunities for disfunctional secrecy, which endanger the very enjoyment of rights that sustain intellectual freedom, including the ability of elected representatives to provide oversight and individuals to exercise the responsibilities of citizenship and assume a right to privacy. As a side note, these voluntary press restrictions are similar to those proposed by President John F. Kennedy in 1961 to the Association of Newspaper Editors during the Cold War, and in more recent times, information was voluntarily withheld by *The New York Times* regarding an American drone base located in Saudi Arabia (Fresh Air 2013). Cases of dual-use research where "journal editors screen, review, and potentially reject manuscripts on the basis of their weapons potential" such as H5N1 influenza research (Gottron and Shea 2012, 8; Felbing and Reppy 2011) have also been proposed for informal press restrictions on the basis of harm to national security.

Secrecy by Regulation and the National Security State

A combination of Executive Orders (EOs) and legislation further institutionalizes the use of secrecy by the U.S. government. The Roosevelt administration's 1940 EO 8381 built on an 1869 Army order concerning forts to allow the "Secretary of War or the Secretary of the Navy as 'secret,' 'confidential,' or 'restricted' and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President (Quist 2002, 46; Committee on Government Reform, 2004). Issued in 1942, EO 9182, "Consolidating Certain War Information Functions into an Office of War Information" outlined the security categories of SECRET, CONFIDENTIAL, and RESTRICTED (Executive Order 1942). Truman Executive Order 10290 further formalized the security classification system with the creating of TOP SECRET, SECRET and CONFIDENTIAL classifications (Executive Order 10290 1951). The EO also defined classified security information as "official information the safeguarding of which is necessary in the interest of national security." This same Order moved philosophy into policy by defining information as "knowledge which can be communicated, either orally or by means of material" (Part III. Definitions). Legislation such as the Atomic Energy Act of 1946 (P.L. 79-585) and 1954 (P.L. 83-703) especially placed protections on "atomic" information and created security categories such as Restricted Data (RD), Formerly Restricted Data (FRD), and "born classified" (Commission on

Protecting and Reducing Government Secrecy 1997, Appendix A).¹³ The National Security Act of 1947 (P.L. 80-253) advanced intelligence collection and analysis in creating the Central Intelligence Agency,¹⁴ the Department of the Army, Navy, and Air Force in the "coordination of the activities of the National Military Establishment."¹⁵

With this history in mind, Weber's "permanent character of the bureaucratic machine" (1958, 228) is melded to secrecy by regulation, and finds a home in the contemporary model of the national security state (NSS). The NSS model advances Weber's observations on the technical superiority of the bureaucracy in its ability to capture, analyze, manipulate, quantify, share, categorize,¹⁶ and preserve a variety of personal and public information. It also provides support for the Moynihan Commission's secrecy by regulation and post 9/11, the bureaucratic reorganization of U.S. government,¹⁷ and policies such as the Global War on Terror (GWOT)¹⁸ and secret cyber-warfare

- 13 "Born classified" or classified at birth protects "sensitive information which would not be divulged before the United States had an opportunity to assess its importance and take appropriate classification action" (DeVolpi et al. 1981, 59).
- 14 The National Security Act created the National Security Council, which provided for the supervision of the Central Intelligence Agency as an independent agency (Central Intelligence Agency 2008). The Act further mandated that the Director of Central Intelligence "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" (National Security Act 1947, Section 102 2 d (3)).
- 15 The National Security Act, Sec. 101 outlines "national security" and refers to all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that: A) pertains, as determined consistent with any guidance issued by the President, to more than one United States Government agency; and, B) that involves: 1) threats to the United States, its people, property, or interests; 2) the development, proliferation, or use of weapons of mass destruction; or 3) any other matter bearing on United States national or homeland security.
- 16 Such as CUI, or Controlled Unclassified Information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and government-wide policies. CUI excludes classified information (Executive Order 13556, 2009).
- 17 The creation of the Department of Homeland Security through the Homeland Security Act of 2002 (P.L.107-296) for example, was the largest reorganization of U.S. government since the Truman administration with its enactment of the National Security Act.
- 18 The GWOT is described as the "elements of war and non-war . . . an orchestrated mélange of combat operations, military operations other than war, and operations conducted by various nonmilitary departments of government (Record 2003, 6). O'Connell argues the GWOT does not meet formal definitions of war under international law (2005, 1).

(Sangar and Shanker 2013). The NSS is described as having the following elements:

- Control of the public sphere (Raskin and LeVan 2005)
- Covert actions and the rise of secrecy regarding state actions (Raskin and LeVan 2005)
- Federal (and local) law enforcement metamorphosing into security enforcement and surveillance (Raven-Hansen 2005)
- Limiting or undermining individual rights (Raskin and LeVan 2005)
- Nuclear weapons are a key component of the NSS (Dwyer and Dwyer 2005)
- Organizing for war, cold war, and limited war (Raskin and LeVan 2005)

These features of the NSS suggest great opportunities for "misadventures" as observed by Senator Moynihan. They also imply opportunities for disfunctional secrecy, which endanger the very enjoyment of rights that sustain intellectual freedom, including the ability of elected representatives to provide oversight and individuals to exercise the responsibilities of citizenship and assume a right to privacy.

Friedrich's "Tampering with Communications"

Friedrich, in addition to theorizing that secrecy has a functional use but may also be a disfunctional state, ties secrecy to the "tampering with communications" especially when it is coupled to propaganda. That is, as Friedrich observes, while secrecy withholds information, propaganda "distorts information or even adds misinformation" (1972, 176). For Friedrich, propaganda, like secrecy, seems to conflict with the norm of candor and sincerity, which are considered ethically good" (1972, 176). Friedrich also theorized the "crucial function of both political propaganda and secrecy is to manipulate men in relation to the political order" (Friedrich 1972, 176). As with secrecy, Friedrich is clear that propaganda can play a functional (1972, 230) or disfunctional (pathological) role in politics and political systems (1972, 192).

As one scholar writes of propaganda, there is a "lingering uncertainty" as to the concept's "definability and indeed, its very utility" (Cunningham 2002, 37).¹⁹ Categories range from agitation propaganda, black propaganda,

¹⁹ See Cull, Culbert, and Welch (2003) for multiple definitions of propaganda; while there is no set definition, propaganda generally, is a technique to influence public opinions.

disinformation (from the Russian, "dezinformatsia") to counterpropaganda (Cunningham 2002, 66-71) and been classed as a type of communication (Cunningham 2002, 77). While Friedrich never defines propaganda in his *The Pathology of Politics*, which makes it difficult to fully carve out its territory with secrecy, he does associate propaganda with manipulation of information and communication. The American Library Association's (2005) "Resolution on Disinformation, Media Manipulation, and Destruction of Public Information" comes close to suggesting Friedrich's intent in that propaganda is "Inaccurate information, distortions of truth, excessive limitations on access to information." Nevertheless, in connecting secrecy and propaganda, Friedrich opens the theoretical door to expand on additional, significant relationships secrecy has with censorship and surveillance. These specific conditions of information are discussed below as they relate to government secrecy and the tampering with communications.

Censorship

According to Cull, Culbert, and Welch (2003), censorship takes two forms: the selection of information to support a particular viewpoint, or the deliberate manipulation or doctoring of information to create an impression different from the original one intended. The latter issue of "doctoring" not only suggests Carl Friedrich's tampering but also a dynamic where secrecy, propaganda, and censorship work in tandem:

In order to conduct propaganda, there must be some barrier between the public and the event. Access to the real environment must be limited, before anyone can create a pseudo-environment that he thinks is wise or desirable. (Lippmann 1922)

Censorship is characterized as "not only a story that was never published, it is any story that does not get widespread distribution regardless of its factual nature and significance to the society at large and its systems of democratic government" (Phillips and Huff 2011, 156). Much like secrecy, censorship is intentional in prohibiting access to controversial works and/or materials characterized as "any expression or its author as subversive or dangerous" (American Library Association 2002).

Though "many forms of censorship are invisible and difficult to trace, since censorship normally takes place in an atmosphere of secrecy" (De Baets 2011, 54), we can identify the paths censorship may take. Recalling Weber's bureaucracy and the Moynihan Commission, censorship can be promoted through administrative-regulatory controls and techniques such as security classification and markings, historical engineering (Chomsky 1989; Patterson 1988), thought control (Patterson, 1988), redaction, or the blacking out or

exclusion of information,²⁰ and prepublication review. If we follow Friedrich, these activities can be functional or dysfunctional in nature; if we recall the Moynihhan Commission and its nod to Weber, secrecy by regulation allows for the very bureaucratic techniques and institutionalized controls that enable secrecy tied to censorship.

One particular institutionalized technique, prepublication review, regulates the communication and transmission of federal agency information. An example from the National Security Agency/Central Security Service describes the types of the materials that federal employees and contractors must submit for review:

Any Agency-related material that is intended for publication or dissemination must undergo pre-publication review. This includes, but is not limited to: books, biographies, articles, book reviews, videos, co-op reports, speeches, press releases, conference briefings, research papers and internet postings. (National Security Agency 2009)

Although Hedley describes prepublication review as a functional means to "assist authors in avoiding inadvertent disclosure of classified information which, if disclosed, would be damaging to national security—just that and nothing more" (2007), there are cases of former federal employees who followed agency prepublication review policies only to have it censored through redaction and in some cases, contested for public release. The first book published in the United States that contained 168 blank pages marked "deleted" by the CIA "to indicate portions censored by the government" was Victor Marchetti and John D. Marks' (1974) *The CIA and the Cult of Intelligence* (MacKenzie 1997, 51). Works by Phillip Agee (1975), Frank Snepp (1977), James Bamford (1982), Ralph McGehee (1983), T.J. Waters (2006), Ishmael Jones (2008), and Anthony Shaffer (2010)²¹ were contested in varying ways by U.S. intelligence agencies. These titles remain valuable documentary works in that they reveal the inner dynamics of the intelligence community, its successes and failings, and post 9/11, enhanced interrogation and extraordinary renditions.²² For example, Ali H. Soufan, a former FBI interrogator and counterterrorism specialist who authored *The Black Banners: The Inside Story of 9/11 and the War*

20 A simple perusal of the Declassified Documents Reference System will indicate the majority of declassified documents are redacted, some in sections of released records and others, entire documents. Public documents are also redacted, as in the case of the 9/11 Commission report with 28 missing pages (Elliott 2011).

21 On January 18, 2013, the Department of Defense declassified 198 redactions in the 2010 edition of Shaffer's book *Operation Dark Heart* (Department of Defense 2011).

22 See AccessInfo Europe and Reprieve (2011), Singh (2013) and the Rendition Project (n.d.).

Against Al Qaeda, revealed details about the USS Cole and 9/11 investigations in the book. Deletions

seem hard to explain on security grounds. Among them, according to the people who have seen the correspondence, is a phrase from Mr. Soufan's 2009 testimony at a Senate hearing, freely available both as video and transcript on the Web. (Shane 2011)

In another challenge, former FBI translator Sibel Edmonds submitted her book *Classified Woman: The Sibel Edmonds Story* twice to the FBI, which prolonged the review. In 2012, the National Whistleblowers Center (NWC) issued a statement documenting Edmonds' illegal termination from the FBI, continuing harassment, and censorship of her book (Boiling Frogs 2012). Although prepublication review implies a comprehensive review in terms of identification and removal of classified information before it is disclosed (e.g., published), Lt. Colonel Daniel Davis came under questioning for distributing an unclassified paper he wrote titled *Dereliction of Duty II: Senior Military Leader's Loss of Integrity Wounds Afghan War Effort*. Davis voluntarily submitted his report to an internal Army review for approval, but the Pentagon refused permission for Davis to publish the report (Hastings 2012). *Rolling Stone* eventually published *Dereliction* in February 2012, but without approval from the Army. Davis' disclosure offers insight into Friedrich's dysfunctional secrecy and tampering of communications:

What I witnessed in my most recently concluded 12 month deployment to Afghanistan has seen that deception reach an intolerable high. I will provide a very brief summary of the open source information that would allow any American citizen to verify these claims. But if the public had access to these classified reports they would see the dramatic gulf between what is often said in public by our senior leaders and what is actually true behind the scenes. (Davis 2012, 2)

Another example of prepublication review is reminiscent of the Creel Committee's attempt to restrict specific categories of information during combat, the Office of the Army Surgeon General's (2005) *Release of Actionable Medical Information Policy Memorandum*, which

sets forth procedures to review abstracts, manuscripts, journal articles, speeches, and other open source venue where professional medical activities, analyses, and/or research are reported using medical information derived from a combat Theater. This includes medical information on service members, civilians, and enemy combatants (in any status: enemy prisoner of war, retained personnel, etc.) injured in combat Theater but treated outside of the Theater. (Office of the Army Surgeon General 2010, 2)

This policy was issued during a period of increasing concerns that medical information "provided in a variety of forums (professional journals, national meetings, discussed in the media) was "aiding the enemy" (Cordts, Brosch, and Holcomb 2008, S16). However, the use of prepublication review in this case raises concerns related to censorship as a tampering: first, the restriction of "actionable medical information" has not been subject to open debate in Congress, the press, or in public venues. Secondly, if freely reported and discussed in the peer reviewed medical literature and at medical conferences, emergency medicine/trauma techniques devised in the field and in DOD facilities have the potential ability to benefit society at large.²³ Lastly, as actionable medical information is restricted, there remain questions as to the veracity of existing public information, including government generated statistics, on "service members, civilians, and enemy combatants (in any status, enemy prisoner of war, retained personnel, etc.)"²⁴

Censorship as a tampering of communications also extends to regulation of speech by federal agency employees. In one example, a NOAA climate research scientist "whose published modeling research suggested the likelihood of increased hurricane intensity under projected future global warming was kept away from the [Katrina] briefing" (Piltz 2011, 228). In addition, James Hansen, Director of NASA's Goddard Institute for Space Studies, reported that NASA officials at headquarters ordered the public affairs staff "to review his coming lectures, papers, postings on the Goddard Web site and requests for interviews from journalists" (Piltz 2011, 229). The suspension and reinstatement of wildlife biologist Dr. Charles Monnett by the Bureau of Ocean Energy Management, Regulation & Enforcement (BOEMRE, formerly the Minerals Management Service) raises continuing concerns as to the ability of scientists in federal employ to freely conduct scholarly research, as well as interpret and communicate their results to the large scientific community (Barringer 2011; PEER 2010; 2012; and Union of Concerned Scientists 2009).

Censorship also can be thought of as regulative, where information "can be amended or revolutionized in ways that raise or lower body counts, number of books banned or citizens ghettoized or 'gulaged'" (Jansen 1991, 8). Regulative censorship is illustrated by techniques used by the U.S. government to "limit and shape news coverage" during the Vietnam, Grenada, Panama, and the Gulf Wars (Sharkey 1991, 1). Images of war were "sanitized,"

23 For additional cases of military secrecy, see Maret (2011c) on the manipulation of Sarin research at Rocky Mountain Arsenal, Coser on the Cold War (1963), and photos of U.S. military casualties obtained through FOIA by The Memory Hole (Carter 2004).

24 For example, the Congressional Research Service report on military casualties (Fischer 2013).

and "control is exercised over journalists, restricting their access to theaters of operation, misinforming about specific military operations, concealing information, and minimizing discussion of causalities" (Sharkey 1991, 23-26). During the invasion of Grenada in 1983, the Pentagon applied the British media model utilized during the 1982 Falklands War with Argentina (Sharkey 1991, 4). During Operation Desert Storm, or the First Gulf War (1990-91), the Pentagon "was unwilling to disclose what it knew about the likelihood of civilian casualties caused by the U.S. and allied bombing" (Sharkey 1991, 3). Discrepancies in reported numbers of Iraqi civilian deaths beginning with the 2003 invasion and into the Iraqi occupation by coalition forces continue. In 2010, Wikileaks released the Iraqi war logs, which document approximately 109,000 deaths in the Iraq war; the Opinion Research Business study reported at least one million Iraqi deaths (Phillips and Huff 2011). A recent investigation approximates "half million deaths in Iraq could be attributable to the war" between 2003-2011 (Hagopian et al. 2013).

Two additional cases illustrate the link between secrecy and censorship as a tampering with communications. First, the President John F. Kennedy Assassination Records Collection Act of 1992 (P.L. 102-526), or the JFK Act, legislated the "opening of the files [that] would quash unmerited speculation and paranoia that was having a corrosive effect on faith in our government's institutions" (Horne 2009, 18). However, per the JFK Act, release of assassination records can be postponed beyond the year 2017 if "the President certifies" that: 1) "continued postponement is made necessary by an identifiable harm to the military, defense, intelligence operations, law enforcement, or conduct of foreign relations;" and, 2) "the identifiable harm is of such gravity that it outweighs the public interest in disclosure" (Assassination Records Review Board 1998, 8).

The second case concerns release of records from the National Commission on Terrorist Attacks Upon the United States (P.L. 107-30) hearings, hereafter referred to as the 9/11 Commission. The Intelligence Authorization Act for Fiscal Year 2003 (P.L. 107-36) Sec. 602 (3) (4) directed the Commission to "make a full and complete accounting of the circumstances surrounding the attacks" (2003). The 9/11 Commission encouraged the release of records after its investigation for those records "not already publicly available should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning on January 2, 2009 (National Commission on Terrorist Attacks upon the United States 2004). However, only 35% of the Commission's archived textual records are presently declassified (National Archives and Records Administration n.d.) and many are redacted. As legislative branch records are exempt from FOIA, the Act cannot be utilized by researchers to obtain the remaining 526 cubic ft. of 9/11 Commission records, which include a thirty page summary of an April 29,

2004 interview by the Commission with former President George W. Bush and Vice President Dick Cheney (Paltrow 2011). As in the case of the JFK records, there are stipulations placed on the release of records:

Records should not be disclosed if they (a) contain information that continues to be classified; (b) disclose private information that the Commission agreed to protect from public disclosure; or (c) are otherwise barred from public disclosure by law, as determined by the Archivist. (National Commission on Terrorist Attacks upon the United States 2004)

Surveillance

Secrecy and censorship take on new ground through watching and spying, especially when the latter is considered as a form of surveillance (Jansen 1991: 14). Censorship then becomes a “bad police measure, for it does not achieve what it intends, and it does not intend what it achieves” (Marx 1842). In recent times, revelations by former NSA contractor Edward Snowden of the National Security Agency (NSA) secret global surveillance exemplifies Friedrich’s disfunctional secrecy and tampering with communications. The Snowden leak of NSA documents present a case where secrecy, censorship, and surveillance intersect not only in terms of the range and depth of spy programs by federal agencies, but public understanding of government surveillance of personal communications. As shocking as the Snowden disclosures are, they also call into question the integrity of government information used by the public, the media, and researchers as critical oversight tools. For example, the nonprofit “Open the Government” reported its disillusionment with government generated information, which the organization analyzes in its annual Secrecy Report. Open the Government’s concern with the veracity of data from federal agencies is worth reporting in full below as it exposes how government generated information may not be an accurate portrayal of federal policies and programs (emphasis added):

For the last few years we have been reporting on the use of National Security Letters (NSLs) and on the government’s applications to the Foreign Intelligence Surveillance Court (FISC). Now, however, we have to question the accuracy and meaningfulness of such numbers and are not including them in this year’s Report. Our distrust of the government’s reported numbers is focused in four areas: demands for records under Section 215 of the USA PATRIOT Act; the applications made to the FISC under Section 702 of the FISA Amendments Act of 2012; the failure of congressional oversight; and our new understandings of the interactions between the FISC and the intelligence community, and the expanded role of the Court. (2013, iii)

Previous to the Snowden leaks of NSA records, Senators Ron Wyden and Mark Udall questioned Agency officials on the widespread surveillance of

U.S. citizens, whose communications were collected or reviewed under Section 702 of the Foreign Intelligence Surveillance Act of 1978 (P.L. 95-511) or the FISA Amendment. The Senators were informed by the NSA Inspector General that “he and NSA leadership agreed that an IG review of the sort suggested would itself violate the privacy of U.S. persons” (Ackerman 2012; Webster 2012). This is not only a significant finding in terms of the reaches of government secrecy; it is also a serious affront to intellectual freedom and privacy, particularly in terms of past reports by the press and whistleblowers of domestic warrantless wiretapping and global surveillance of communications by the NSA and the FBI, with the assistance of telecommunications carriers and contractors (Bamford 2012; Cohn 2010; Cole 2011; Gorman 2008; Government Accountability Project n.d.; Markey 2012; Greenwald 2013; Risken 2006).

NSA surveillance, coupled with compilation of secret watchlists (e.g., the Terrorist Identities Datamart Environment, Investigative Data Warehouse, Secure Flight, No Fly List and Selectee List), Suspicious Activity Reporting (Farrall 2011), the InfraGard program²⁵, and the RIOT or Rapid Information Overlay Technology program (Gallagher 2013), often implemented with assistance from contractors in the “privatization of national security” (Monahan and Palmer 2009; Bean 2011) indicate the reach of the national security state bureaucracy where information is mined, classified, shared, and restricted by federal agencies, national and regional Joint Terrorism Task Forces (JTTF), fusion centers²⁶, the private sector²⁷, and international law enforcement and intelligence agencies. While the public is left to speculate as to the criteria for such secrecy, censorship, and spying, Friedrich reminds us that if “secrets

²⁵ Infragard is a “partnership” between FBI Field offices and “businesses, academic institutions, state and local law enforcement agencies, and other participants dedicated to sharing information and intelligence to prevent hostile acts in the United States.” See <https://www.infragard.net>.

²⁶ According to *Washington Post* reporters Dana Priest and William M. Arkin (2010) there are 1,271 government organizations and 1,931 private companies working on programs related to counterterrorism, homeland security and intelligence, and an estimated 854,000 people hold top-secret security clearances. The exact number of individuals who hold clearances is “murky” (Open the Government 2013, 21).

²⁷ See *Summary and Recommendations*, Secretary’s Advisory Committee on Automated Personal Data Systems *Code of Fair Information Practice* or FIPS, especially: 1) There must be no personal data record keeping systems whose very existence is secret; and, 2) There must be a way for an individual to find out what information about him is in a record and how it is used (U.S. Department of Health and Human Welfare, 1973).

are suspected on all sides, confidence vanishes and political life becomes a nightmare of terrorized suspicions" (1972, 233).

The Tragedy of Democracy

The tampering with communications through secrecy, propaganda, censorship, surveillance, or all techniques working as a complex of information control, influences historical understanding, social memory, and the fulfillment of human rights that support intellectual freedom. Leaving researchers with an incomplete understanding of events and actors, and individuals with a less than ideal toolbox to form judgments regarding policies, tampering has the potential to erode trust in government. In his observations on the influence of bureaucracy in society—perhaps anticipating secrecy by regulation by several decades—Max Weber made a remarkable statement: democracy, he wrote, is “defeated not so much by conditions external to itself but by its own inner tendencies. The tragedy of democracy occurs when it cannot defeat the organizational forces that evolve, quietly, and almost invisibly to take possession of it” (quoted in Diggins 1996, 85).

Through Thomas Emerson’s First Amendment “possibilities,” perhaps we can judge the weight of secrecy on intellectual freedom. Emerson’s four possibilities, which mirror the outcomes of the numerous civil and human rights declarations and laws mentioned earlier in this chapter, consist of “individual self-fulfillment, advancement of knowledge and discovery of truth, and participation in decision making by all members of the society.” Emerson suggests that a “more adaptable and hence stable community” is attainable through these values (quoted in Baker 1989, 47). As guiding principles, Emerson’s utopian principles are a means to evaluate the avenues to which both functional and disfunctional secrecy may curb intellectual freedom in the lives of individuals and broadly in the social world. Whether functional or disfunctional secrecy or the tampering with communication utilized in the drive to protect national security, all of these conditions of information may carry the seeds of disfunction within.

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