THE CORRUPTING INFLUENCE OF SECRECY ON NATIONAL POLICY DECISIONS

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ABSTRACT

It is genuinely accepted that the withholding of sensitive information by the federal government, be it relating to intelligence, military or foreign policy matters, will invariably serve to preclude or minimize damage to our nation’s well-being. However, often overlooked is the impact that official secrecy has upon the decision-making process employed by national leaders. This overview examines the harm that official government secrecy can inflict upon our U.S. national security, through the corrupting influence it has on national policy decisions. Using the Constitutional Convention of 1787 as an apt lesson, this overview goes on to examine the impact that official secrecy had on many of the post-9/11 decisions made by U.S. national leaders.

Keywords: classified national security information; government secrecy; national policy decision-making; homeland security; Iraq War; interrogation techniques; terrorist surveillance.

Secrets can be the lifeblood of nations. Both treasure and blood of a nation’s citizenry are readily spent to steal another nation’s secrets and to safeguard
its own. Yet, individuals also die—adversaries and citizens alike—simply because governments have secrets.

When employed by national governments, secrecy is a two-edged sword. Denying information to the enemy on the battlefield also increases the risk of a lack of awareness on the part of friendly forces, contributing to the potential for fratricide or other military failures. Strict compartmentalization in recruiting spies increases a nation’s vulnerability to deception as a consequence of using sources that ultimately prove to be unreliable. Making purely bureaucratic policy decisions in secret such as which organizations to include within a larger agency devoted to countering terrorism can result in mission failure for an organization primarily devoted to responding to natural disasters. Simply put, official secrecy comes at a price—sometimes a deadly price—oftentimes through its impact on the decision-making process employed by national leaders.

Whether seeking advances in science and technology, formulating government policy, developing war plans or assessing intelligence, the end product can always be enhanced as a consequence of a far-reaching give and take during which underlying premises are challenged and alternate approaches are considered. As such, official secrecy just about guarantees the absence of an optimal decision by our government leaders. The challenge is ensuring that this tradeoff—that is, accepting a less than optimal decision in exchange for denying information to a potential national security adversary—is taken into account when making a decision to cloak certain information in secrecy. The consequences of not doing so is evidenced by many of the momentous decisions made by Federal government officials over the past decade that turned out to be exceptionally flawed due, in large part, to the fact that the process for making these decisions was shrouded in excessive and often needless official secrecy.

What I learned as the top classification overseer in the executive branch as Director of the Information Security Oversight Office, commonly known as ISOO, is secrecy can act like a toxin in the body politic. Much like chemotherapy in the human body, it can have beneficial results when used in an extremely controlled and limited manner. However, neither should be employed lightly as they can easily produce outcomes worse than the illness they are attempting to cure. In government, as in other institutions, excessive secrecy ultimately makes for flawed decisions. It undermines our constitutional form of government, weakens the rule of law, and facilitates actions inconsistent with our nation’s core values and beliefs. It can contribute to the squandering of American blood and treasure and aid our adversaries in the recruitment of future extremists. Official government
secrecy is in many regards a relic of the Cold War that has long outlived its usefulness.

As such, what is the proper role of secrecy within government today? What do we gain and what do we lose when our government conducts so much of its business in secret, especially when it comes to formulating national security policy? Our Declaration of Independence states, in part, that “Governments are instituted among Men, deriving their just powers from the consent of the governed.” This strongly implies that for our nation’s citizens to provide the consent upon which our government is based, it must be an informed consent, an increasingly difficult end to achieve when the government restricts the dissemination of information while making the most profound decisions possible, such as unleashing the brutality of war and sending our nation’s youth to sacrifice life and limb for “the larger good.” Absent the free flow of information, absent the ability of the citizenry to provide an informed consent, the Declaration implies that the exercise of power by the government through its decision-making process will inevitably become flawed. Yet, when many of the same individuals who helped frame such a bold and revolutionary declaration met 11 years later to draft a more effective framework for a new government, they would themselves produce a product whose flaws, in many ways, can be directly attributable to the framers desire to shroud their deliberations in official secrecy.

By 1787, the nation had divided into two ideological frameworks not much different from those in existence today; those who believed in a strong national government and those who favored the preponderance of political power being vested in either the States or in individual citizens. Many favored the continuation of the status quo under the Articles of Confederation, principally because the weak central government did not have the ability to tax. Others favored a strong national government with the ability to raise revenues on its own, free of the singular power of any State to effectively veto an enhancement of centralized government. Both sides feared tyranny; either emanating from a strong national government or from state legislatures who showed a willingness to usurp the rights of minorities. On the basis of subsequent history, both sides had a valid reason to be concerned and thus neither side had a monopoly on the truth.

By the time the delegates to the Philadelphia Convention met in 1787, the nationalists were in ascendancy. All recognized that momentous decisions upon which the fate of the young nation rested had to be made. Some, such as James Madison, believed that the most propitious decisions could be made in secret. Thus, notwithstanding temperatures as high as 94 degrees in
June, 96 degrees in July, and 95 degrees in August (Vile, 2005), the delegates decided their four months of meetings in Philadelphia during the summer of 1787 would take place behind closed doors and windows. They opted to endure the fetid air of an isolated room to conduct their debates in official secrecy. No reporters or visitors were permitted at any session, and not one word of its historic deliberations was permitted to be disclosed to anyone who was not a delegate.¹

Years later, Madison stated that he believed “no Constitution would ever have been adopted by the convention if the debates had been public.”² In a contemporaneous letter to his son, George Mason wrote,

> It is expected our doors will be shut, and communications upon the business of the Convention be forbidden during its sitting. This I think myself a proper precaution to prevent mistakes and misrepresentation until the business shall be completed, when the whole may have a very different complexion from that in which the several crude and indigested parts might in their first shape appear if submitted to the public eye.³

An example of how seriously official secrecy was taken at the Convention is provided by no less an authority figure than General George Washington, who presided over the Convention. When the Convention first opened, the delegates were provided a copy of a number of propositions brought forward as guiding principles for a new government. As recounted by William Pierce, a delegate from Georgia, one morning, one of the delegates to the Convention dropped his copy of the propositions. It was picked up by General Mifflin, a delegate from Pennsylvania, who then gave it to Washington, who proceeded to put it in his pocket and continued with business as usual. At the end of the day, after a motion for adjournment was made, Washington rose from his seat and said,

> Gentlemen: I am sorry to find that some one member of this Body, has been so neglectful of the secrets of the Convention as to drop in the State House a copy of their proceedings, which by accident was picked up and delivered to me this Morning. I must entreat Gentlemen to be more careful, least our transactions get into the News Papers, and disturb the public repose by premature speculations. I know not whose Paper it is, but there it is (throwing it down on the table), let him who owns it take it.⁴

With that, Washington bowed, picked up his hat, and left the room with, as recounted by Pierce, “a dignity so severe that every Person seemed alarmed.” No one ever came forward to collect the paper.⁵

And what did all that official secrecy succeed in facilitating? Some readily point out that the world’s oldest democracy, the United States of America, was, in essence, “born behind closed doors” (Berenson, 2008). But was it?
When they reflect on American democracy and what it all means to their everyday lives, most Americans today frequently think about the liberties that are guaranteed by the Constitution—freedom of religion, of speech, and of the press; the right to be secure against unreasonable search and seizure; the right to not be deprived of life, liberty or property, without due process; and so on. What is important to acknowledge, however, is that by conducting business in such secrecy, even individuals as brilliant as our Constitution’s framers came up short and made what proved to be extraordinarily faulty decisions. For what emerged from the locked doors of the Convention hall proved to be an exceedingly flawed product—one which failed to contain the basic limits to government authority, which we take for granted today but which were not codified until passage of what we know as the Bill of Rights—the first 10 amendments to the Constitution designed to protect the “unalienable” rights our Declaration of Independence recognizes we all possess.

Once the shackles of secrecy surrounding the framing of our Constitution were removed, a true national debate ensued over the future of our country. Out of this public discourse arose the recognition that the Constitution required explicit safeguards against tyranny. If not for the public commitment made in reaction to this debate to introduce and support during the First Congress under the new Constitution amendments providing a bill of rights, our government, which has proved to be the world’s oldest democracy, would most likely have not even come into being, at least not as we know it today.

The arguments used at the time to justify the omission of recognized civil liberties have proven hollow in view of our nation’s history. For example, Alexander Hamilton (1788) in Federalist No. 84 expressed the fear that protecting specific rights might imply that any unmentioned rights would not be protected:

I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted.

For why declare that things shall not be done which there is no power to do?

Yet, even with the explicit incorporation of a Bill of Rights into our Constitution, the recognition of the full extent of individuals’ civil liberties and the limits of Federal and State government authority has steadily evolved over the last two and a quarter centuries as evidence by the 2010
U.S. Supreme Court decision in *McDonald v. Chicago* (see SCOTUS wiki, 2010) applying the Second Amendment to the states.

What lessons do we take from the experiences of the Framers?

The United States has assembled the most massive capability to steal other countries’ secrets the world has ever seen. Exactly what we spend upwards of $66.5 billion dollars a year is itself a secret (Globalsecurity.org, 2009). And it is the conventional wisdom in almost every corner, both to the right and to the left of the political spectrum, that the withholding of “national security information” from public disclosure is essential to our nation’s well-being. No less of an advocate for openness in government than Senator Russ Feingold (2008) (D-WI) stated,

> Through the classification system and the common law, we’ve carved out limited exceptions for highly sensitive factual information about military operations, intelligence sources and methods, nuclear programs, and the like. That is entirely appropriate and important to protecting our national security.

Somehow as a nation, we have developed an almost all reflexive posture whereby we consistently genuflect at the altar of “national security” and accept as given that the withholding of sensitive information, be it relating to intelligence, military, or foreign policy matters, will invariably serve to preclude or minimize damage to our nation’s well-being. In fact, as with the founding of our form of government, within the recent past, some of the most exceptionally grave instances whereby our nation’s well-being has been severely damaged can be directly attributable to our government’s withholding from public disclosure information, to include “sensitive” national security information relating to intelligence, military, or foreign policy matters. Classification of national security information, unless applied in a deliberative, thoughtful and informed manner, can actually cause the damage to our nation’s security it is intended to preclude. Reflexive classification can actually advance, rather than retard, the objectives of our nation’s adversaries.

The litany almost goes without saying. First and foremost, our nation chose to unleash the unimaginable brutality of war when we optioned to invade Iraq, over eight years ago on March 19, 2003. Much has been written and said about how faulty the original rationale was for that decision. However, it is useful to also review the role that secrecy played in that tragically flawed commitment of national might and prestige.

To better inform their deliberations before their October 2002 vote to authorize the use of military force against Iraq, some members of Congress requested that a National Intelligence Estimate (NIE) (see Bruno and
Otterman, 2008) be prepared on Iraq’s programs for weapons of mass destruction. The NIE and its key judgments, in addition to being wrong, were classified. The NIE was delivered to Congress the week before its vote and, because it was classified, to read it, members had to go to a special room and sign a log. It is been variously reported how many senators actually read the classified report before authorizing the President to take our nation to war, but the publication *The Hill* quoted one senior congressional intelligence staffer as saying that “You can say with 100 percent certainty it’s less than 10” (Raju, Schor, & Wurman, 2007). How many more would have read it had it not been classified is impossible to say – but we can only hope that it would have been more than 10.

And what would they have learned if they had read the original NIE rather than rely on the unclassified white paper (see National Security Archive, 2008), which was released by the Director of Central Intelligence at the same time and which was intended as an unclassified version of the NIE? According to the senate report on prewar intelligence on Iraq (U.S. Senate Select Committee on Intelligence, 2006), they would have learned of the State Department’s Bureau of Intelligence and Research alternative view on whether Iraq would have a nuclear weapon this decade and that the dismissed attempts by Iraq to obtain high-strength aluminum tubes as being part of Iraq’s effort to reconstitute its nuclear program. They would also have learned that while the key judgments were almost identical in layout and substance in both papers, the key judgments of the unclassified paper were missing many of the caveats that were used in the classified NIE. As concluded by the report, removing caveats such as “we judge” or “we assess” changed many sentences in the unclassified paper to statements of fact rather than assessments – an egregious act because a cardinal rule of the declassification process is to ensure that it does not alter the substance of the information released (U.S. Senate Select Committee on Intelligence).

What is equally disturbing is the rationale offered by drafters of the classified NIE as to why the unclassified paper omitted the fact that the intelligence community’s own nuclear experts at the Department of Energy did not agree with the NIE’s conclusion regarding the aluminum tubes, even though the allegation was being used by some of our leaders to stir up images of mushroom clouds appearing somewhere over the United States. Again according to the Senate Select Committee on Intelligence (2006), officials at the National Intelligence Council indicated that they did not refer to disagreements between intelligence agencies in unclassified documents out of concern that the country being discussed would be “tipped off to a potential cover story.” Such a concern can understandably justify classification in
some instances. However, to use it as a rationale for a decision that ultimately led to the production of a paper that has been judged as being misleading to both the Congress and the American people, in as grave a matter as a decision to go to war, is a perfect example of how the failure to balance the damage that results from disclosure, with the damage that results from classifying, can have exceedingly tragic consequences for our nation (U.S. Senate Select Committee on Intelligence, 2006).

The lead up to the Iraq War provides another excellent example of how even our own intelligence community can be hampered by excessive and needless classification and compartmentalization. Again, it is well known now that when Secretary of State Colin Powell spoke to the U.N. Security Council in February 2003 just before the war, the most impressive part of his presentation which talked about eyewitness accounts of mobile biological labs and an accident that killed a dozen people was a fraud, based on debriefings by German intelligence officials of a human source aptly codenamed “Curveball.” What is truly noteworthy, however – according to Los Angeles Times reporter Bob Drogin who wrote a book on Curveball – is that at the time of the U.N. presentation, and even not until well after the war had begun, the CIA did not even know the name of the source whose fabrications served as the basis upon which our nation chose to go to war. And, according to Drogin, the reason why is that German intelligence refused to share his name. They did so simply because they could; it was “pride of service,” a form of one-upmanship (Koppelman, 2007).

There are yet other examples of how excessive classification can harm our national security. For example, even during the administration of George W. Bush, our national security strategy recognized that we are engaged in an ideological struggle against many forms of extremism. In fact, the first pillar of that strategy as articulated by the prior administration was in promoting freedom, justice, and human dignity, which includes offering people throughout the world a positive vision rooted in America’s beliefs, thereby isolating and marginalizing violent extremists (see National Security Strategy of the United States of America, 2002). This strategy reflected our success in ending the Cold War, not by defeating the Soviet Union militarily, but rather by promoting American ideals and values that ultimately led to the demise of the most formidable foe our nation has ever confronted.

So how have we done over the past decade – how successful have we been in isolating and marginalizing violent extremists and offering the world’s populace a positive vision of our society? Even many of our government’s leaders acknowledge that we are not doing very well, and this perspective is supported by empirical evidence. For example, toward the end of the Bush
administration, in June 2007, the Pew Global Attitudes Project released the results of a worldwide public opinion survey that focused on global unease with major world powers. Among other results, this poll revealed that widespread anti-American sentiment had significantly deepened since 2002. Specifically, in virtually every area of the world – Western Europe, Eastern Europe, Latin America, and Asia – overwhelming majorities of people viewed the United States favorably before 2002. But in virtually every single country in each of those regions, the percentage that viewed the United States favorably significantly decreased in 2007. The notable drop in U.S. credibility was as pronounced among America’s traditional allies as it is in less friendly regions. More significantly still, significant majorities in Europe and Latin America who supported the United States in its war on terrorism in the immediate aftermath of 9/11 had notably reversed their positions (Pew Global Attitudes Project, 2007).

I would suggest our continuing failure to isolate the extremists is due, in part, to the worldwide perception that we continue to violate our own values and ideals, especially as they relate to human dignity and the rule of law. This perception was fostered by some of our own government officials when they refused during the Bush years to plainly state that physically restraining an individual and forcing his lungs to slowly fill up with water constitutes torture. They did this, in part, by hiding behind the classification system – by stating that to acknowledge limits to interrogation techniques used by our intelligence services (but not our military) would somehow disclose classified information – and thus harm our national security.

While a case may be made that the unauthorized disclosure of specific interrogation techniques can reasonably be expected to result in damage to the national security (a basic standard for classification), a far more compelling case can be made that greater harm to national security results by not unequivocally acknowledging whether specific techniques are consistent with American values and our commitment to preserving human dignity and the rule of law. Such evasion, rather than isolating and marginalizing violent extremists, instead provides them with fodder for their web sites and other mass media to further inflame passions and recruit new members to their cause.

In fact, the argument for classification of specific interrogation techniques has already been rejected by our military’s combatant commanders. When releasing the Army’s revised interrogation techniques in September 2006, Lt. Gen. John Kimmons, then Army Deputy Chief of Staff for Intelligence, acknowledged the Army considered classifying some of the techniques to keep them out of the hands of the enemy. Instead, they opted for
transparency, in part to be, as General Kimmons stated, “as clear as we can be in the training of these techniques to our own soldiers, sailors, airmen and Marines” (DoD News Briefing with Deputy Assistant Secretary Stimson and Lt. Gen. Kimmons from the Pentagon, 2006).

In that vein, the young men and women that we send into combat every day understand that if in the heat of battle they make a split-second decision that involves the indiscriminate use of force, it can result not only in the loss of innocent life but can also undercut our national security by feeding a negative vision of our nation to the rest of the world. As such, like the dozens of service members criminally charged to date for unlawful killings, they know that they can and will be held accountable. Indiscriminate government secrecy can have an equally deleterious impact on our national security strategy. Yet, we are a long way from instilling the same sense of discipline and accountability for all government officials who wield the critical national security tool of classification.

A prime example of indiscriminate secrecy was revealed a few years ago by Jack Goldsmith, the former head of the Office of Legal Counsel (OLC) in the Department of Justice during the Bush administration. Goldsmith wrote that senior officials within the government

blew through [the Federal Intelligence Surveillance Act] in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations. (Rosen, 2007)

Goldsmith further recounted one of his first experiences with such extraordinary concealment, in late 2003 when, as he recalls, David Addington of the Office of the Vice President angrily denied a request by the National Security Agency’s (NSA) Inspector General to see a copy of OLC’s legal analysis supporting the oft-discussed secret NSA terrorist surveillance program. Goldsmith reported that “before I arrived in OLC, not even NSA lawyers were allowed to see the Justice Department’s legal analysis of what NSA was doing” (Rosen, 2007).

I cannot recall a more blatant example of using classification not for its intended purpose of denying information to our nation’s adversaries but rather to use it as a bureaucratic weapon to blunt potential opposition. The NSA lawyers had the highest of clearance levels and already knew the substance of NSA’s surveillance program, the very information most of value to our nation’s adversaries. Yet, when it came to being afforded access to pure legal analysis, they were treated as if they were legal counsel for Al-Qaeda and rather than for the Director of NSA who was responsible to ensure the legality of his agency’s actions. Such antics give yet more fodder to our nation’s adversaries to represent the United States as having nothing
but contempt for the rule of law. Much like the 18-year-old soldier who indiscriminately fires his weapon, such conduct severely undermines our national security strategy of providing the world populace with a positive vision of the United States and thereby isolating and marginalizing violent extremists. The only difference is the 18-year-old soldier, who literally risks his life for his nation, would be held accountable.

The damage to the national interest as a consequence of excessive secrecy is not relegated solely to the national security arena; for example, the administration’s decision to create the Department of Homeland Security in the wake of the attacks of September 11, 2001, the most massive reorganization of the Federal government since 1947, was cloaked in secrecy for purely bureaucratic reasons. One Homeland Security official was quoted at the time as stating that “the bureaucracy would have smothered this in its infancy if the White House had let it out” (Michael, 2002). Once again, however, excessive secrecy came at a price and there were consequences to be paid.

Harold Relyea formerly of the Congressional Research Service wrote of the consequences of the Bush administration developing somewhat hastily and in complete secrecy its proposal for a Department of Homeland Security. Specifically, Relyea (2003, p. 617) writes that “available reorganization expertise was not utilized and support from agencies and professional constituencies directly affected was not sought.” Relyea (2003, p. 617) went on to point out that the president’s proposal failed to address a definition of the organizing concept – that is, “a Department of Homeland Security was proposed but what was homeland security?” Absent such a common understanding, Relyea highlights that there was no standard for determining which existing agencies, programs, and functions merited transfer to the new department and, even more importantly, what should be done with the non-homeland security programs and functions of an agency being transferred (p. 617).

At the time, many were concerned that non-homeland security functions transferred to the new department, that is, those programs not directly related to countering terrorism, would become the victims of benign neglect; that programs not focused on the terrorist threat would be regarded as having a lower priority and would be allocated insufficient resources for their full and effective execution. For example, the House Committee on the Judiciary recommended transferring only the Office of National Preparedness of the Federal Emergency Management Agency (FEMA) to the new department, not the entire agency (Relyea, 2003, p. 618). Nonetheless, these and other voices of concern were drowned out and in the end the administration pretty much got what it wanted. Unfortunately, a little over two years later, the citizens of New Orleans and coastal Louisiana and
Mississippi would discover the hard way that such concerns were well-founded. Had such a massive bureaucratic undertaking as the creation of the Department of Homeland Security not been undertaken in such secrecy, the lives of tens of thousands of Americans may not have been upended to the extent they were and continue to be as our government still struggles to meet its most basic commitment to provide for the common welfare of its most needy citizens.

Notwithstanding the above examples, one thing needs to be perfectly clear. Government secrecy is an essential national security tool that must be preserved. I make this observation having spent my 34-year federal career immersed in the arcane world of official government secrecy. The government’s system of secrecy has had more than a theoretical application for my family. In service to their country, my two sons placed themselves in harm’s way – one through overseas travel in support of our nation’s intelligence efforts and the other as a combat infantry platoon leader in Iraq. Thus, their well-being was dependent, in part, on effective government secrecy. I know the value of government secrecy in an uncertain world.

The ability to surprise and deceive the enemy can spell the difference between life and death on the battlefield. Certain intelligence methods can work only if the adversary is unaware of their existence. Similarly, it is nearly impossible for our intelligence services to recruit human sources who often risk their lives aiding our country or to obtain assistance from other countries’ intelligence services, unless such sources can be assured complete and total confidentiality. The successful discourse between nations often depends on constructive ambiguity and plausible deniability as the only way to balance competing and divergent national interests.

However, much the same way our nation’s military leaders – in developing and implementing a new counterinsurgency strategy – have come to the conclusion that the more force you use, the less effective it can be, our nation’s bureaucracies must similarly use government secrecy more selectively and recognize that in today’s environment, less secrecy and increased transparency can, at times, be more effective in denying adversaries the ability to harm our nation.

NOTES

1. As recorded in Madison’s notes of the Federal Convention, the following additional rules were recorded for Tuesday, May 29, 1787: “That no copy be taken of any entry on the journal during the sitting of the House without leave of the
House. That members only be permitted to inspect the journal. That nothing spoken in the House be printed, or otherwise published or communicated without leave.”


REFERENCES


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