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Secrecy in an Open Society

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Submitted in partial fulfillment

Of the requirements for

Honors in the Departments of Political Science and Philosophy

UNION COLLEGE

June, 2011

Abstract

POLI, NICK Secrecy in an Open Society. Departments of Political Science and Philosophy,
June 2011

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This thesis explores the difficult task of finding a balance of secrecy and openness in America. The common notion is that America is an open society; however, with an intelligence community predicated upon secrecy, an imbalance of power between the Executive and Congress, a media which does not always report objective news, and a complacent American public, openness ultimately becomes more difficult to maintain. To find a balance, I propose a hypothetical spectrum of openness in which there is a straight line with two endpoints- one endpoint representing complete secrecy, the other complete openness. I argue that both ends of the spectrum are extreme and undesirable and that America's goal should be to err on the side of more openness while maintaining responsible secrecy. By responsible secrecy, I mean secrecy that is justified under legitimate national security grounds whereby if the secret is leaked, American security interests are in jeopardy. To find the right balance, a number of factors must work together to promote openness: Congress, the Executive, the media, the intelligence community, and the American people.

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Chapter 1

Karl Popper's Open Societyⁱ

The United States asserts that it is an open society and that such a characteristic is both a necessary feature of democracy and a good characteristic to possess. While such assertions may have merit, it is important to discuss what an open society is, what its fundamental characteristics are, and why it is a good thing. This chapter will examine these key issues and propose problems faced by any democracyⁱⁱ trying to find a proper balance between openness and secrecy.

To discuss an open society one may benefit from reviewing the notions proposed by Karl Popper in *The Open Society and its Enemies*. Published at the tail-end of World War IIⁱⁱⁱ, this piece of literature is fundamental in both defining an open society and assessing how a given culture fits Popper's conception of the open society. One of Popper's central arguments is *that an open society is one which ensures that leaders can be overthrown without the need for bloodshed*.¹ Essentially, if in an open society the worst possible person were to be elected to rule, the people and society as a whole would still be more protected than in a non-open society. For example, consider the differing political atmospheres in hypothetical Country A and Country B. Country A is reminiscent of a liberal democracy and Country B resembles more of a dictatorial society in which the President does not have to answer to anyone. Both Country A and Country B, let us suppose, have experienced poor leadership in the past decade. In Country A, President X saw his approval ratings plummet towards the end of his administration and the

ⁱ I use Popper because of the time in which he published- right in the middle of the debate for an intelligence community. Other thinkers such as Montesquieu could have been used to discuss the open society.

ⁱⁱ This opening section will only discuss what an open society is, not why it is a good thing. Certain arguments and assertions made will become clearer in the following section in which I will explain why the open society and its essential elements are good.

ⁱⁱⁱ Right before the CIA and the intelligence community began to develop.

majority of citizens in Country A have expressed disappointment and disapproval. Similarly in Country B, President Y has faced great opposition and criticism of his policies and his actions as president. The key difference is the state of both countries: President Y has been called a dictator, he overcame a coup attempt, and there is an opposition movement in Country B that is intent on removing him from power. It seems President Y will have to die or be killed for his presidency to come to an end. Such occurrences do not transpire in Country A. Opposition does exist; however, there are clearly less violent means used by the people who are opposed to the administration. Country A does not have a ruler who has absolute power and cannot be removed from office with a popular vote. That is not to claim that a country like Country A is open (this argument will come later in the chapter); however, it does demonstrate Country A to be more open in the sense related to Popper's definition of the open society discussed above.

The closed (or tribal, or collectivist) society is recognized by Popper as a society in which a bloody revolution is needed to change leaders. Popper targets Plato's conception of the perfect society in *The Republic*. Popper argues that Plato has created a totalitarian regime dominated by master-race rhetoric and a lack of concern for democracy and individual freedom. The closed society has a "magical attitude towards social custom and tradition"; thus those who live in a closed society will rarely find themselves in a position debating how to act as the right way is always determined for them.² Changes can occur in such a society; however, they are infrequent and do not come from rational attempts to improve societal conditions (as these changes are merely based on the introduction of "new magical taboos"). This conception of the closed society provides a foundation for Popper's second essential element of the open society: *individuals are confronted with personal decisions- providing for an increase in personal responsibility and accountability for moral choices.*

In the closed society individuals are unlikely to challenge accepted ideas and traditions which they have become accustomed to.³ The closed society makes it difficult for citizens to question or change accepted practices and thus diminishes the significance of personal decisions and creativity. This is not to assert that our own world is not marked, in some way or another, by taboos that Popper criticizes in the closed society. Our own ways of life are beset with food taboos, taboos of politeness, and many others. The key difference that marks the open society is that there is an “ever-widening field of personal decisions, with its problems and responsibilities...Personal decisions may lead to the alteration of taboos...The great difference is the possibility of rational reflection upon these matters.”⁴ To further understand this point, consider the following example: in society X Jon is able to participate in political elections, have voice concerning potential legislation, etc. This is significant to understanding this second aspect of Popper’s open society because Jon is able to make decisions based upon “an estimate of possible consequences”.⁵ Jon can deliberate and rationalize about the consequences of his decisions and have a conscious preference for them. Thus, Jon recognizes rational personal responsibility and is accountable for such choices. The open society, therefore, is in part marked by the ability of individuals to distinguish between natural and man-made law; which, in turn, provides for an increase in personal responsibility and accountability for moral choices.

The importance of personal decisions, accountability, and personal responsibility help to foster certain important characteristics of the open society: individualism and the ability to criticize accepted practices. As opposed to the closed society where individuality and the ability to criticize are replaced with adherence to tradition, the transition to the open society “can be described as one of the deepest revolutions through which mankind has passed”.⁶ This leads to the third essential element of Popper’s notion of the open society: *once a society has become*

open, it cannot digress all the way back to a closed society. The supposed innocence and beauty of the closed society in which no one questions the world around them can never be returned to^{iv} because

“Once we begin to rely upon our reason, and to use our powers of criticism, once we feel the call of personal responsibilities, and with it, the responsibility of helping to advance knowledge, we cannot return to a state of implicit submission to tribal magic.”⁷

From the three essential characteristics of Popper’s open society, one can deduce a fourth essential component: *the open society must be concerned with the search for truth and acquiring knowledge.* Popper’s own critiques of the magical, tribal closed societies which try to impose knowledge on the citizens demonstrate that knowledge itself is merely provisional and fallible and ought to be challenged. Criticism and the ability to challenge what is accepted are essential to the open society because it involves a search for truth. The repeated, never-ending criticisms, ideas, and challenges need not produce inviolable truths; however, they serve as a reminder that truth and knowledge are not stagnant. The open society permits the freedom to think critically and freely, and to express these thoughts in a manner that fosters the development of knowledge. In Popper’s criticism of Plato’s authoritarian Philosopher-King dominated society, truth and reason are suppressed. Popper argues that “Beginning with the suppression of reason and truth, we must end with the most brutal and violent destruction of all that is human...If we turn back, then we must go the whole way-we must return to the beasts.”⁸ This is significant because it attributes the closed society as unsuitable for humans. Humans have essentially lost their ‘humaneness’ in the closed society because they are unable to carry out the tasks of being human: to reason, to assume responsibility, to criticize, and to search for truth. If humans forgo

^{iv} This does not mean that a given society cannot take steps in the wrong direction. Society cannot go back fully, but it need not always move forward.

such responsibilities then they are mere beasts; however, if we wish to remain human, then the open society is the only means by which humans can achieve such a goal.

While Popper does present insightful arguments concerning the facets of the open society, it is beneficial to subject them to scrutiny and criticism. I concede that much of Popper's conception of the open society is correct. However, there is one specific notion that needs further examination. Popper claims that the once the people reach an awareness of their individuality, criticism, etc. it cannot be suppressed and the open society cannot revert back to a closed society (we can move in a direction closer to the closed society, but not completely).⁹ This assertion is fine; however, Popper only maintains that society must *reach* an awareness to be called open, not that this awareness must be put to use. Simply because a society may have ultimately reached the awareness that Popper discusses, it does not entail that society will put this awareness to use. Acceptance of traditions and lack of criticism or search for truth may still occur which would seem to leave a society ultimately more closed than open. The key to an open society is not merely awareness; it is the awareness in conjunction with action. Simply having the ability to criticize and engage actively within a society is not enough in itself if such abilities are not put to use. Essentially the issue need not be suppression of such abilities by the government or government entities, the issue may lie in the actions of citizens. The alternative which I seek to propose holds that a societies' openness can (and likely will) be challenged if certain conditions prevail. The conditions I am referring to are as follows: secrets are kept from the people, the people do nothing about such secrets, and the secrets become so damaging as to severely affect the people's perception of its government. When such conditions do prevail, we have diverted from the search for knowledge and truth which Popper proposes to be essential for an open society.

A second criticism of Popper's argument about the open society concerns his views on class struggle. Popper argues that "in an open society, many members strive to rise socially and to take the places of other members. This *may* lead, for example, to such an important social phenomena as class struggle."¹⁰ I do not disagree with this notion; however, I propose that such a condition is *inevitable* in an open society which Popper discusses. Essentially the ability to speak freely, criticize, and engage in critical thinking causes humans to desire success- naturally, some humans succeed more than others. The liberal democracy by definition allows its citizens to seek prosperity. Prosperity, I would argue, is desirable by all humans. That is not to argue that each person wants immeasurable wealth; however, all persons want, in their own sense of the word, to succeed. For some individuals, this means immense wealth and a desire to dominate the political arena, for others it could be simply to teach and mold young minds. Regardless of one's own personal definition of success, we are all in competition with other individuals who want to succeed. The poor are trying to amass some degree of wealth (they may choose to mold young minds as a professor or help children who have been mistreated as a social worker), the rich are trying to maintain their prosperity or gain more prosperity. Certainly some individuals may be content with whatever level of success they have achieved; nonetheless, numerous individuals will never be satisfied and will constantly desire more wealth. This desire for wealth, I propose, is analogous to class struggle and is not merely a possibility, but an inviolable truth, that will permeate in any open society.

Additionally, one may critique Popper's argument that the open society need not be a liberal democracy as other forms of government could be open. One could imagine a society in which the enlightened dictator rules. The enlightened dictator would control the government and have more power than any other individual; however, he would recognize the need for the people

to be able to challenge, criticize, think freely, and express their opinions. It would seem that such a person would satisfy Popper's criteria for the open society. Furthermore, because the ruler recognizes the importance of the people's right, it would appear that violent overthrow of the government. While I concede that such a ruler would satisfy the necessary characteristics fundamental to Popper's open society, it does not follow that such a society would be acceptable to the people. The main reason is that they are at the whim of the enlightened dictator. They must hope that he remains open to free expression and the ability of citizens to engage in rational critical thinking does not diminish. The dictator, by definition, has the power over the citizens and it seems unlikely for individuals to accept such a system of government. The citizens of a country certainly wish to occupy a position in government such that they are not at the mercy of the 'good' in a dictator. The government owes the citizens an element of respect, which the dictatorships, monarchies, etc. cannot be relied upon to satisfy.

The Open Society

I will now put forth what I believe to be essence of an open society. I find Popper's insights regarding the open society useful and I am inclined to agree with him on a significant portion of his definition; however, I shall emphasize and add certain features which I believe to be of importance. This section will not explain why the open society is good (this will happen in the following section); therefore, for the remainder of this section let us assume that openness is a good thing.

With respect to the government, it should be both responsive and tolerant and the people should not be kept in the dark about government activities. A society that wishes to adopt openness as a value of overarching significance will not merely allow its citizens a wide range of individual expressive freedom, "but will go one step further and actually open up the deliberative

process of government itself to the sunlight of public scrutiny”.¹¹ In an open culture the government does not conduct the business of the people behind closed doors. While the impulse of government may be to exert control, the government of the open society must devise rules that are deliberately tilted in favor of openness to counteract the inherent proclivity of governments to engage in control, censorship, and secrecy.

The arguments in the preceding paragraph will benefit from an examination of esoteric morality. Esoteric morality was originally proposed by Utilitarian philosopher Henry Sidgwick and holds that

“...on utilitarian principles, it may be right to do and privately recommend, under certain circumstances, what it would not be right to advocate openly; it may be right to teach openly to one set of persons what it would be wrong to teach to others, it may be conceivably right to do, if it can be done with comparative secrecy, what it would be wrong to do in the face of the world; and even, if perfect secrecy can be reasonably expected, what it would be wrong to recommend by private advice and example.”¹²

Essentially this directly opposes my assertion that a society should err on the side of openness. Peter Singer and Katarzyna de Lazari-Radek defend Sidgwick’s arguments that the rightness of an act may depend on secrecy and some people know what is better to do in certain situations than others. Singer and Lazari-Radek provide a number of examples in which they aim to demonstrate that secrecy, if perfectly maintained in each scenario, would be better (in the utilitarian sense) and thus the right decision for a given person in a specific scenario or in a relevantly similar circumstance. One of these examples concerns a surgeon who is confronted with a difficult medical decision.¹³ The surgeon is about to perform a brain operation on a patient who happens to be the ideal donor for four other patients in need of a heart, a liver, and for two of them-a kidney. The patients will shortly die if they do not receive the organs and the doctor is highly skilled and able to perform the operation. Many would find it immoral for the surgeon to kill her patient in order to save the four other patients; however, not utilitarian’s like

Singer, Sidgwick and Lazari-Radek. They would hold that not only killing the patient is an inevitable consequence of being a utilitarian, but that it is the right thing to do if perfect secrecy is maintained. Clearly to make such a rule public would be met with widespread opposition; yet Singer and Lazari-Radek contend that the ability of the doctor to maintain secrecy of his actions affects whether his actions were right in this scenario.

The arguments proposed by Singer and Lazari-Radek are ultimately flawed. I may concede that, at times, secrecy may certainly be better than if the information were made public; however, this does not mean that esoteric morality would be beneficial to a society. Consider the following example; the U.S. government has detained a known terrorist who is responsible for a number of brutal killings. He has valuable information that will help the security interests of the U.S. and we decide to torture him for the information. Let us assume that torture is effective in this case and we do not receive false information. I agree that torturing him and keeping it secret is ultimately more beneficial than making such news public; however, this does nothing to prove that torturing the detainee was right. I am not proposing that any secrecy used by the government is wrong; the issue is that esoteric morality is vague and it is uncertain where we are to draw the line with secrecy-which should make a society nervous.

Singer and Lazari-Radek provide a number of examples; nonetheless, they do not provide much guidance as to how we should implement such a notion into society. They claim that society as a whole will benefit (on utilitarian grounds); however, the concept of esoteric morality has implications that have the potential to undermine the principles upon which American democracy was founded- namely the notion that the government should be responsive to the people and not hide secrets without justification (secrets should be used to protect national security, not cover government slip-ups). In an open society secrets can damage the people's view of the

government and can simply embarrass a society; thus, drawing a line or providing more guidance as to when secrecy is acceptable is essential- esoteric morality does not provide this line.

Additionally, esoteric morality hinges on the ability of all persons involved to maintain secrecy- not an easy task. A look at America's own history of leaks (Pentagon Papers, Family Jewels, etc.) demonstrates the unlikelihood of complete secrecy in any given scenario. Additionally, I propose that esoteric morality is simply dangerous. Recall the torture example. Such practices would be justified according to esoteric morality; however, the potential to abuse what esoteric morality permits is a looming threat. The threat I am referring to is an abuse of power. Esoteric morality privileges certain individuals with the ability to know what is best in certain scenarios. I have no issue with this notion; however, I am concerned that abuses of power and unnecessarily using secrecy may occur in a society which values esoteric morality as a fundamental principle. This clearly would not be beneficial for society. Esoteric morality has the potential to ironically do more harm than good for a given society and it is not compatible with the principles of an open society.

Along with a responsive and tolerant government that does not keep the people in the dark about its activities, the open society must also include elevated protections on freedom of speech- from both the government and written constitutions. While elevated protections on freedom of speech are rather easily understood to be important, it is challenging to ensure these protections. We are challenged by events around the world to re-evaluate what is meant by freedom of speech in an emerging international community. Such challenges stem from "breathtaking developments in communications technology...and we are challenged by the great questions of philosophy, as we ponder when it is appropriate for the state to control public discourse for the perceived greater good".¹⁴ To illustrate the significance of free speech as a

fundamental characteristic of an open society consider the following metaphor advanced by author John Milton and cited by U.S. Supreme Court Justice Oliver Wendell Holmes : “the best test of truth is the power of the thought to get itself accepted in the competition of the market”.¹⁵ The “marketplace of ideas” is perhaps the most powerful metaphor with respect to free speech and thus it is significant in the discussion of the open society. The model serves an important function within society as it advances the important search for truth. The marketplace may experience both positive and negative cycles; just as there are both good ideas and rather detrimental or irrational ideas. The model is imperfect and constantly in flux, reflecting Popper’s vision that the open society is constantly evolving and changing so as to demonstrate the various ideas, critiques, and opinions of individual citizens.

To sum up both my own arguments and those of Popper, the open society contains six essential characteristics that are necessary for a society to be called open^v:

1. The government and its agencies and organizations must be responsive to the people and tolerant of criticisms, critiques, and the expressions of ideas and views.
2. Political change can occur without violent revolution.
3. Freedom of speech must be protected to the utmost degree. Restrictions may be necessary; however, if restrictions do occur they should be for just causes and acceptable to the general public. For example, to prohibit an individual from protesting or speaking out against a government action or policy, the government must in some way show a compelling reason that would justify censorship (it is

^v I recognize that here are other important characteristics of an open society- such as separation of powers, checks and balances, etc. I am choosing these six to develop my argument, but the list of characteristics for a society to be open is longer than merely six characteristics.

- somehow more dangerous to permit certain speech than it is to infringe upon individual liberty).
4. The marketplace of ideas metaphor must be recognized. That is, the free flow of opinions and ideas must be exchanged within society (regardless of whether such ideas are good or bad).
 5. Society as a whole must become aware of the significance of individuality and the ability to criticize. Furthermore, the people must utilize such notions so as to question accepted practices in the search for truth. To be unaware and to not question or criticize would be to leave society more susceptible to manipulation, corruption, and injustice. George Orwell's book *1984* provides an insightful lens from which to view this point. Orwell depicts a society controlled by secret police and a government which controls communication. Criticisms and challenges to governmental policy are absent. This is not to argue that America will degenerate into such a society; rather, it is intended to emphasize the importance of critical thinking and freedom of expression. Living in a society which, in some ways, mimics Orwell's *1984* authoritarian regime is a detriment to such important aspects of the open society.
 6. The society is transparent- that is, the government does not keep secrets from the people and conduct business in private and the government exchanges and provides information to the people and other countries. Such a characteristic, I shall argue helps to promote security, improves agency coordination, and holds leaders accountable for their actions.

Why Openness is Good

With the open society defined it is necessary to demonstrate its benefits and why such a society is ultimately good. By good I mean to suggest that openness is desirable and beneficial to the overall standing of a society and its citizens. I contend that each of the six elements I have laid out contribute to an understanding of why the open society is good.

The first reason openness is desirable hinges on the marketplace metaphor and the importance of free speech. To begin, it is imperative to understand that this theory, just like all theories, does not come through perfectly unscathed when subject to rigorous analysis. The marketplace metaphor does have certain aspects that some may find troubling. First, the marketplace of ideas will inevitably be biased in favor of those who are wealthy and powerful.¹⁶ People with such economic, political, or social standing will undoubtedly have greater access to the market than those individuals who are poor, disenfranchised, and (potentially) uninterested. Additionally, the marketplace of ideas presents a rationale that, at times, contradicts its ultimate goal. The ultimate goal is to produce truth (as a living thing) for the open society; however, there are numerous questionable, prejudiced, biased, and simply bad ideas; just as there are quite useful positions and ideas. Thus, the marketplace metaphor does not seem to produce consistent truth and we are then left with “the nagging suspicion that good ideas have precious little capacity to drive out bad ones”.¹⁷ Such suspicions are further illustrated by the extreme and irrational ideas that have permeated throughout society and lead to violence and destruction. Racist organizations such as the KKK and the Nazi Party represent what can happen when the marketplace is open to all ideas. Hence, even if we are to accept the notion of the marketplace of ideas model, it remains to be decided what should count as an idea.

Despite some obvious uncertainty the marketplace rationale has many benefits that will ultimately outweigh the negatives and demonstrate that such a rationale is admirable and that the open society is good. So long as humans exercise their capabilities of critical thinking, rational discourse, and criticizing concepts and ideas, the search for truth will always be alive. Certainly humanity may be fallible and unable to discern truth from irrational idea as evidence by prior practices of racial segregation in schools; however, truth has prevailed, practices have been modified and policies have been responsive to the evolution of truth. This demonstrates that truth will not dissipate; it will be rediscovered and rejuvenated until it is able to flourish. Additionally, the marketplace is not designed to produce inviolable truth. Oliver Wendell Holmes explains that the benefit of the marketplace is not that it has the capacity to arrive at final and ultimate truth; the value was to provide the best test of truth”.¹⁸ The integrity of the process is what is to be valued. Furthermore, while some may view the leap of faith previously described as a weakness, I propose it to be a great strength of the marketplace rationale. This requirement forces us to never stop searching; to never simply accept what is traditional as what is right. We are forced to question, criticize, and inquire endlessly; fostering an intellectual search for truth. As John Stuart Mill articulated in *On Liberty*, “if it is not fully, frequently, and fearlessly discussed, it will be held as dead dogma, not a living truth”.¹⁹ Therefore, the marketplace metaphor holds great relevance with respect to the modern world because even if we are confident in the truth of a given opinion or idea, we must subject them to scrutiny and revision as our own experience and intuition may reveal the truth to lie elsewhere. Hence, while the marketplace theory is not perfect, it is superior to a system of regulated expression and makes an excellent case for a position in the open society.

The concept of free speech is essential to the open society and should be considered valuable and good for reasons that have nothing to do with the search for openness or truth. Freedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment.²⁰ Some may criticize this as hedonistic in simply speaking for the sheer pleasure of speaking. However, such a criticism can be quelled rather quickly when one considers Mill's harm principle. Essentially the freedom to speak one's mind should not be intruded upon unless the government can demonstrate compelling justifications that are necessary to prevent one individual from harming another.²¹ Moreover because it would be absurd for the government to regulate freedom of thought, which is connected to speech (because our thoughts come out in the form of speech), it follows that "Because speech is connected to thought in a manner that other forms of gratification are not, it is proper to place special burdens on the state when it ventures to regulate speech that would not exist when it regulates other aspects of human activity."²² Free speech is an indispensable tool of self-governance in any democratic (and supposedly open) society as free speech acts as a restraint on tyranny and corruption. The United States, for example, was founded upon the principle that ultimate sovereignty rests with the people; it is through speech that the people are able to keep the government within the boundaries of the social contract which the people first brought into existence.

The arguments presented above are intended to capture the benefits of elements three-five of the open society. Elements one and two are indirectly discussed; however, the following should serve to further demonstrate the significance of the first two elements and of openness. Recall the first element which states that "the government must be responsive and tolerant." Put another way, this entails that government practices are open to criticism and (if necessary)

change. Essentially “There is a public interest in assuring that established practice is always open to challenge, reconsideration, and change.”²³ This enables bad policy that has been implemented to change- maintaining the people’s faith in government. To further demonstrate why a responsive and tolerant government is good I will describe the closed society and show why this is not desirable and beneficial. First, the closed society would entail an unresponsive, intolerant government and require bloody revolution for the transition of power and is clearly the opposite of the open societies’ responsive and tolerant government. First, the intolerant, closed society not only lacks stability, but also lacks freedom of thought and speech. With respect to stability, the closed society’s need for bloody revolution to initiate change reflects political, social, and potential economic instability. While free speech has already been argued for, there is the additional aspect of free speech (and also thought) that serves as a means of participation- it is the vehicle through which individuals debate the issues of the day as well as join in on the process of decision-making that shape the political and social arena. The people are not simply passive spectators, but actively playing a role in decision-making. A responsive and tolerant government that enables free thought and speech produces stability and serves as a means of individual fulfillment. This stability and individual fulfillment thus creates an atmosphere that ensures violent overthrow of a person from power is unnecessary as the people are able to participate in a government that does not ignore their voices.

The closed society also fosters an environment which may entail another significant negative feature which could be avoided in the open society: excessive secrecy^{vi}. This is not intended to argue that a closed society needs to entail excessive secrecy or that all closed

^{vi} I will attempt to justify what types of secrets are justified in my final chapter. For now it will suffice to say that some secrets (those that protect national security for example) are permissible within the framework of an open society.

societies are identical; rather it is aiming to demonstrate that the open society simply cannot entail excessive secrecy by the very fact that it is open. Additionally, I am not trying to show that any secrecy within a society is a bad thing. A certain level of secrecy is essential to protect American security interests. Complete openness would compromise efforts to collect intelligence about looming threats and to plan for national defense or investigate criminal behavior. Nonetheless, this should not imply that national security claims of excessive secrecy should simply trump demands for openness.

Officials often argue that national security claims should take precedence, and that officials can be trusted to exercise power responsibly behind a wall of complete secrecy.²⁴ However, an environment of total secrecy can foster an environment in which power is abused, and civil and political rights undermined. Consider, for example, the Pentagon Papers which revealed how several administrations had escalated U.S. involvement in the Vietnam War while publicly exaggerating the threat to the U.S. and the effectiveness of the American intervention.²⁵ Such a notion relates directly to esoteric morality discussed earlier in this chapter. The ability to enable certain individuals with the ability to keep certain acts secret is a slippery slope and one that is simply too dangerous to accept. Secrecy can also undermine the right of citizens to participate in public affairs. A democratic nation should foster an environment in which citizens actively participate because it is fundamental to the human rights of all individuals. Article 21 of the Universal Declaration of Human Rights says that individuals have the right to take part in the government of their country, and that the government should exercise authority on the basis of the will of the people.²⁶ Participation is obviously compromised if citizens lack access^{vii} to

^{vii} Again, this does not mean that citizens must have access to all our government does. However, for secrecy to be maintained within the government, the government must justify why information must be kept secret and it must be subject to scrutiny.

information needed to make informed decisions about national or public policy. Secrecy may simply encourage the public to defer to the judgment of a narrow elite on such matters. The open society as I have presented it holds that this excessive secrecy cannot take place for a society to be called open (element six). While clearly the abuse of power and disenfranchisement from national policy decisions are clearly at odds with the ideals of an open society, it remains to be demonstrated that transparency/lack of secrecy (a characteristic of the open society) is good.

I shall argue that improving transparency is good because it helps societies to improve the capacity to promote security. The first reason transparency helps to promote security is that transparency leads to better policy decisions. Look back to any governmental/intelligence failure in the United States (Pearl Harbor, Vietnam, etc.). Many will wonder how “men of superior ability, sound training, and high ideals” could have made decisions that were “regularly and repeatedly wrong.”²⁷ The answer can be largely found in the process of decision-making itself. The concentration of responsibility at the top led to executive fatigue and an inability to respond to new information. Additionally, there was a lack of expertise within key agencies, and “closed politics” of policy making on sensitive issues.²⁸ Concentration of authority at the top levels of a bureaucracy means leaders and advisors are overwhelmed with information and dealing with problems that may lie outside of their expertise. Ignorance of the facts or misinformation may also occur which can create flawed decision-making with substantial negative impacts. Increasing transparency can help solve such problems. By providing access of internal government documents to nongovernmental organizations (or other individuals) the potential to spot bad analysis or contribute valuable data is certainly increased.²⁹ Additionally, such organizations can share the burden of synthesizing information and helping to reach policy

conclusions. Of course such a policy may be met with criticism as it makes information that would be otherwise kept secret in the name of national security open to other individuals and organizations. However, not only does this increase in transparency avoid the costs of flawed policy decisions, there is still a question of whether much of the information that the U.S. government has kept classified needs to be hidden from the public (this issue will be discussed later in the chapter).

The second important aspect of transparency is that it leads to improved agency coordination. Within American government bureaucracies such as the CIA rules designed to protect sensitive information have the ability to sometimes impede the flow of information within the Agency. Many times this may lead to disastrous consequences. For example, The United States' Congressional Joint Inquiry in to September 11 concluded that such impediments contributed to the country's inability to prevent the terror attacks in New York and Washington.³⁰ This has been a classic issue within the intelligence community since Pearl Harbor: lack of coordination and the tendency to overproduce classified information while imposing excessively strict limitations on its circulation. In order to better protect national security, the government needs to "reduce the incentives for overproduction of classified information and liberalize rules on the distribution of classified information within government" (making it easier for nongovernmental organizations to argue the benefits of public disclosure of information outweigh the potential harm to national security).³¹ Essentially this transparency can effectively circumvent information blockages within government bureaucracies. Officials in government agencies will no longer rely on solely on internal sources for information on how to effectively do their jobs; they will rely on public sources as well.³² This can help to maintain organization effectiveness and thus improve their ability to promote security.

A final aspect of transparency that helps contribute to the argument that the open society is good concerns the ability of transparency to hold leaders accountable for their actions. A society in which leaders are held unaccountable for mistakes, abuses of power, violations of human right means that the people are at the whim of their leader(s). Such power in the hands of individuals presents a great opportunity for corruption and a society which diminishes the rights of the people to have a say within their government (again related to esoteric morality). It has already been demonstrated that esoteric morality is too dangerous for society to implement as a fundamental principle. Transparency helps to eradicate this problem because it provides citizens and organizations the ability to monitor the powerful and to expose corruption and abuse.³³ The people are presented with political power and the ability to fight oppression as they are not deprived of significant information about their government's actions and policies. Essentially transparency takes power from the strong and gives it to the weak and disenfranchised because it gives the weak access to sensitive information; which can be wielded to promote and initiate political change.

Some may argue, however, that transparency is not as beneficial as I have described. It can be asserted that "the state is inherently fragile if information flows freely."³⁴ The classic example is the 1989 revolutions in Eastern Europe in which populations realized that their governments' performance was much poorer than previously imagined and their quality of life was substantially lower than comparable societies. This information was then used to mobilize political support for change. Essentially transparency not only can make citizens aware of the freedoms they lack, but it enables them to realize that their dislike is shared by a broad spectrum of society. Dissenters' views are thus legitimized and the violent overthrow of a regime may

ensue.³⁵ Hence, this argument proposes that the transparency aspect of the open society can actually cause a problem that it is designed to control.

While this criticism is creative and the Eastern European revolutions do demonstrate a potential downfall of transparency, it need not pose a problem for the open society as a good thing. First, the Eastern European revolutions in 1989 are synonymous with the fall of communism. Karl Popper attempted to demonstrate that the liberal democracy is the only suitable candidate for the open society. The theory I am advancing for the open society will be used in the following four chapters to evaluate American Democracy. The adoption of openness as a value in the communist countries of Eastern Europe simply highlighted the many issues with communism. If anything, the fall of communism alludes to Popper's notion that communist regimes cannot be open societies. The people became aware of the significant issues within their society and change was deemed necessary. Simply because transparency led to the dissolution of the existing regime in these current countries does not show openness to be bad or undesirable. Furthermore, transparency is merely one aspect of the open society. I have listed five other elements of the open society, all of which are essential if a society wishes to be deemed open. Transparency is simply one characteristic that makes the open society desirable and good, and while the revolutions in Eastern Europe highlight a potential issue, critics must remember that transparency itself has the potential to promote security, improve agency coordination, and ensure leaders are held accountable for their actions. Transparency clearly can do a significant amount of good within the open society.

The above case for openness is surely easier to argue for than to implement. Democratic values and openness values may at times conflict. While openness does serve as an aid to democracy, the democratic process will on occasion produce majority decisions that "squench the

speech of the minority”.³⁶ Such a notion need not reflect a negative light on openness; it merely demonstrates that when this conflict of values does occur (its occurrence seems inevitable), a society will be more stable and more free if openness does prevail as a value (especially when thinking long-term). The words of Supreme Court Justice Louis Brandeis serve to illustrate this point as he claims the framers of the Constitution

“knew that order cannot be secured through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression, that repression breeds hate; that hate menaces stable government, that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones”.³⁷

Tensions within a society seem not only inevitable, but healthy for the flow of ideas and arguments. If such tensions are not to become a negative influence on society, the people must have a means to blow off steam. This is significant because it reflects the notion that openness fosters resiliency within a society and free debate displaces more hate and violence than it stirs. Freedom of thought, conscience, and expression are significant values that are inextricably linked to the defining characteristics of a person. Societies around the world should embrace the idea of an open culture as a value of the utmost importance.

The United States: an Initial Response to the Question of Openness

The previous discussion of what characteristics comprise an open society and why it is a good thing serve as a unit of analysis for the United States democracy. America presents itself as an open and free society in which free speech, individuality, and the ability to criticize are prevalent throughout society. This section will assess the ‘openness’ of American political and social culture and answer two important questions: is the U.S. an open society? How is America living up to the conditions set forth by Popper as necessary for a society to be open?

I would like to propose that at a fundamental level, the United States is an open society. Free speech protections are valued at a high level, ideas are exchanged freely and openly, the government does not need bloody revolution to initiate political change, criticism is permitted, individuality is held as an important value, etc. The six elements which I have presented appear to be satisfied. Therefore, I will call the U.S. an open society. Popper himself would likely have agreed that at the time of the publication of *The Open Society and its Enemies* America was an open liberal democracy. However, there are two significant issues which must be addressed; both of which challenge the notion that the United States will remain an open society (recall that I disagree with Popper that once a society becomes open it can never revert back towards a closed society). The first issue, which will be discussed for the remainder of this section, concerns whether America is diverging from the search for truth due to political deception. The second issue, which will be discussed throughout the following four chapters, concerns balancing secrecy and openness within the United States

The United States continues to be a democracy governed by a constitution and the rule of law; however, there are various disheartening signs that techniques of deception have increased as a result of politicians concerned with policy agendas. Popper's conception of the open society stresses that while perfect knowledge is unattainable, critical thinking serves as a tool enabling people to attain a better grasp on reality (truth). Unfortunately, the political professionals seeking results not only take pride in their accomplishments, but also are able to garner the support of a populous that admires such success regardless of the means used. While Popper's insights are important in describing the open society, "Popper failed to recognize that in democratic politics, gathering public support takes precedence over the pursuit of truth".³⁸ Essentially this means reality can be relatively easily manipulated and political discourse (even

in the liberal democracy) does not necessarily lead to a better understanding of truth. This concern was raised earlier in the paper as a potential cause for concern; however, today's political arena is home to such an unfortunate reality. It is often asserted that politicians do not aspire to or truly care about the truth. They want to win elections, push for certain policies, and advance their own distinct political agendas. The best means of achieving such results is to skew reality and alter the public's perception in the process.

Such notions are troubling because they could lead one to abandon the notion of the open society. I propose that we merely revise Popper's conception. Earlier I argued that merely having the ability to speak freely and criticize would not be enough and that Popper failed to recognize that action is essential. George Soros, a student of Popper, recognizes this shortcoming of Popper's analysis and recommends that

“We need to introduce new ground rules for political discourse... enshrining the pursuit of truth as the criteria on which political views are to be judged. Politicians will respect, rather than manipulate, reality only if the public cares about the truth and punishes politicians when it catches them in deliberate deception.”³⁹

There is good reason to be cautious and to care about the effects of deception because it has the ability to mislead people in choosing representatives, it undermines accountability, and it destroys the trust essential in an open democracy. One of the most basic examples of such distortion is the President Bush-led war on terror in which any criticism was treated as both wrong and unpatriotic. First, treating criticism at any time as unpatriotic is wrong simply because it contradicts the openness principles which America was founded upon- free speech should always be absolute. Additionally, while Bush undoubtedly succeeded in garnering support, the results of the war on terror have clearly been the opposite of what the Bush Administration intended (or at least what the administration claimed to have intended). The

policies of the Bush Administration during this time of crisis distorted reality and serve as evidence of a divergence from openness in America.

While the President Bush example presented above does serve as a sufficient example of a significant problem with openness and political agendas, there is still great practical difficulty in recognizing when political professionals are engaging in such behavior and attempting to distort reality. It is easy to criticize years later; the difficulty is picking up on such trends. The solution to such a problem lies in a number of sectors of society: the political elites, the public, the intelligence community, and the media. These groups must serve as guards against techniques of deception. The obvious next step is to identify the techniques and explain how to defend the open American democracy.

According to Soros, the most effective techniques operate at the subconscious level and “When emotions can be aroused by methods that bypass consciousness, the public is left largely defenseless”.⁴⁰ Awareness of these techniques would seemingly make the public likely to reject them and to prevent the aspects of a closed society from permeating throughout an open society. The techniques described by Soros are rather simple to understand and quite sensible; however, the majority of the public seem to be unaware when such techniques are being used. The first technique simply involves reversing meaning and thus turning reality upside-down (portraying Bush, who avoided military service, as a true patriot while at the same time calling John Kerry, a highly decorated Vietnam War Veteran, a coward). The second technique, according to Soros, is called transference: accusing an opponent of using methods or having motives that characterize the accuser himself. The public, who it can be argued is largely uneducated about political deception, has proven to be quite susceptible to manipulation and deceptive techniques. What is needed in American society, to eliminate political deception and a deviation from the pursuit of

truth, is a concerted and coordinated effort to identify the aforementioned techniques- and to name and punish those who use such techniques. To simply accept the current political climate as ‘the way it is’ is unacceptable and an insult to the insightful arguments of Popper which clearly demonstrates the importance of critical thought in political discourse. To not address such significant issues on a national level is an absurdity and it is up to an American public that respects reality and truth to hold those who engage in deception accountable for their actions.

Secrecy

The second issue that is of overwhelming importance in modern American culture is secrecy. The previous section briefly mentioned secrecy and its effect on the standing of an open society. This section will address the origins of secrecy: why we use secrets, and what makes them necessary in political culture. Ultimately, there will be a number of reasons that secrecy has become an important part of the political and social spheres of American life. The reasons, good or bad, serve as a reminder that secrecy is not used aimlessly and simply without an ultimate goal; secrecy, like deception, has very specific and useful purposes in American society. It should be understood that when I speak of secrecy, I do not simply mean the government not telling the people what is occurring within their own society. More specifically, when I use the word secrecy I will be referring to not only secretive governmental actions that invade individual privacy and are questionable on ethical grounds, but also the use of secret tactics that would embarrass the American public such that it would cause a great distrust and shame at the American government and its officials.^{viii}

^{viii} It should be understood that while I present a few arguments against secrecy in this section, I am not advocating that all secrecy is a bad thing. There is certain inevitability with respect to secrecy- at times it does protect national security and should be used for such reasons provided that the reasons are justified. Too much secrecy is bad; however, too little will prove damaging as well.

Secrecy and secret conspiracies involving silence and denial are not a novel idea as our own government has been involved with secret operations dating back to the middle of the 20th century. It would appear that the fundamental reasons for secrecy in operations and maintaining a code of silence among government officials stems directly from fear and embarrassment. Quite simply, secrets help the government avoid damaging, painful situations. The vast majority of secrets involving privacy violations, or human rights violations (such as the torture used at Abu Ghraib prison) are certainly discussed and suspected by scholars, the media, and ordinary individuals simply engaging in intellectual conversation; however, verifiable proof is unlikely for most individuals. Such veil of secrecy that the government uses stems from power. Power is the “ability to control the scope of the information others can access as well as what they pass on...”⁴¹ While fear and embarrassment are the obvious sources of secrecy, the power of controlling what others can know and pass on is also significant in the discussion of secrecy.

Power involves control over the bounds of acceptable discourse. Political superiors are able to determine what is and is not discussed and presented to the public. Elites control the political agenda, the scope of others attention, and the damaging secrets that are supposed to be done in the name of ‘National Security’. Blocking such access to information is one of the hallmarks of a police state: such characteristics do not embody an open society; but rather an authoritarian regime able to control what is and what is not true. Additionally, secrecy has another compelling benefit that directly relates to power: controlling the argument. The ability to restrict direct access to raw materials is the ability to ensure that one side of the political agenda dominates the internal policy debates and enables secrecy to prevail.⁴²

Breaking such conspiracies of silence is not easily accomplished. Moreover, the dissolution of secret conspiracies requires overwhelming public knowledge and it appears must

end in embarrassment for those involved. For example, many Americans must have been personally aware of George W. Bush's poor judgment, insensitivity, and remarkable lack of accountability in the aftermath of the 2003 invasion of Iraq; however, it was not until the flooding of New Orleans during Hurricane Katrina that the silence surrounding those blatant features of presidency was publicly broken by the media.⁴³ This reflects the notion that breaking conspiracies of secrecy must involve making the secret a part of public discourse. While I am not advocating an elimination of secrecy from American culture, the key task of the government will be to find a proper balance between openness and secrecy.

The Spectrum of Openness

Consider the following: picture a straight line with two endpoints- at one end is a police state which values complete secrecy, while the other end entails a completely open and transparent society (call it the spectrum of openness). I will argue for the remainder of the paper that neither type of society (completely open or closed) is good or practical for a world power such as the United States (and probably any culture); however, I believe that America claims to be an open society and thus should err on the side of openness. America has wavered on both ends of the spectrum. For example, during a significant portion of the Cold War (late 1940's to roughly 1972) America was leaning towards the side of secrecy and lack of accountability and oversight. However, During the Church and Pike Committee's investigations (which will be discussed in depth in chapter 4) and subsequent attempts at reform it can be argued that the U.S. was wavering on the side of openness. The task at the hands of Congress, the executive, the intelligence community, the media, and the American people is to find a means of balancing two seemingly diametrically opposed notions- openness and secrecy.

Chapter 2

America as a World Power

The previous discussion of openness in American society proposed that America is, at fundamental level, an open society. At the time of the ratification of the United States Constitution the framers attempted to create a society receptive to the will of the people, and with a government that would be both responsive to the people's interests and tolerant of individual rights. The American people had just finished a bloody revolution defending their basic rights and they were wary of an intimidating national government that would impede on such rights. Thus, the Bill of Rights was created to suppress such worries and provide for a society which would reflect the notions of limited government and protection of individual freedoms. Over the course of the next century the United States did not have to work as hard to balance openness and secrecy; however, at the end of the nineteenth century, this balance has become harder to achieve. I shall argue that one of the key reasons for this difficulty lies in the emergence of the United States as a world power.

By referring to the U.S. as a world power I mean that it has a profound interest and rather significant impact politically, socially, and economically, on the global stage. American interests and influence stretches far beyond its borders and, I shall argue, that this has had a significant impact on finding a proper balance between openness and secrecy. An infamous argument which directly relates to this notion is the Turner thesis, advanced by Fredrick Jackson Turner in 1893. According to Turner, the forging of the unique and rugged American identity had to occur precisely at the juncture between "savagery and civilization".⁴⁴ These diametrically opposed conditions engendered a process by which citizens were made- citizens with the power to tame the wild and upon whom the wild had conferred strength and individuality. Turner focuses on

the territorial conquest of the newly formed American republic and the efforts to subjugate Native Americans. The first settlers of America in the 17th century thought like Europeans according to Turner; however, each successive generation essentially became more individualistic, more distrustful of authority, and more dependent on ad-hoc organizations they formed themselves.⁴⁵ Turner's thesis essentially predicted the beginning of a new stage in America: the expansion of the United States overseas and the subsequent ascent to world power status. I shall argue that the roots of the United States emergence as a world power and expansion overseas can be attributed to a significant debate occurring in the latter part of the nineteenth century- should the U.S. join the imperialist rush or should it remain isolationist? Some argued that the U.S. should focus all of its resources into advancement within its own borders while remaining at peace with foreign countries and avoiding all entanglements with other countries. The other side of the debate, largely due to a feeling of superiority and that the U.S. was a country of exceptional status, argued that the U.S. needed to expand its empire and its values to other countries. Three key issues at the center of this debate which demonstrated a tilt toward the expansionist side of the debate were the emergence of the United States Navy, the Cuban rebellion against oppressive Spanish control, and the involvement of the United States in World War I.

The Spanish-American War was one of the most important factors contributing to the growth of the U.S. as a world power. Between 1870 and 1900 (and the end of the Spanish American War, the United States share of world manufacturing climbed from 23.3 percent to 30.1 percent; making the United States the supreme industrial nation in the world.⁴⁶ The U.S., during this time frame, had claimed an increasing status among world powers; with national interests growing at the expense of other interests. The overwhelming notion was that the great

industrial growth over the past 3 decades had sparked expansion abroad while producing foreign interests. These interests, it was widely believed, needed to be protected from threats facing the United States economic interests. Essentially it was at this time that the United States, which had previously been isolationist and virtually unthreatened from any enemies outside its borders, felt a sense of urgency to keep up with the great power game that other countries (such as China in the West) were playing. Fearful that the U.S. would lose out on or be left out of the international race for territory and that other countries would cut them off from economic markets necessary to the economic health of the U.S., President McKinley decided that the United States needed to get involved in the Cuban struggle for freedom from Spanish control. Additionally, with the newfound industrial success in America, pressures from the business community to economically expand, and the desire to be seen as a great power, Americans sought recognition of their first-class status.⁴⁷ To remain inactive on a global scale was essentially seen by Americans as admitting to an inferior, second-class status.

While the industry in the United States had greatly increased, prior to the Spanish American war the United States economy was in a state of depression. To secure a status of world power and to help the troubled economy, the United States needed to protect economic and political interests. This is fundamental with respect to the Cuban rebellions and U.S. involvement because the Cuban wartime economic devastation hurt the already depressed U.S. economy. Trade between the United States and Cuba had previously been 100 million dollars per year and the warring Cuban population caused more than a two-thirds drop in trade between the two countries.⁴⁸ By returning to increased trade relations business recovery would be encouraged and the depression could be resolved. Additionally, Senator Redfield Proctor provided the Senate with a report on his recent travels to Cuba which further influenced the

business industry to support U.S. involvement in Cuban affairs. This report detailed the appalling conditions in Cuba, the devastated economy, and the stalemated war.⁴⁹ Essentially Spanish rule was condemned in this report, garnering public support, and showing a need for U.S. involvement both on humanitarian grounds (saving the Cuban people from oppressive rule) and American business interests.

With respect to political interest, the U.S. involvement is less humanitarian and more selfish and concerned with increasing America's status as a world power. After failed attempts to reach a peaceful, nonviolent settlement with the Spanish, the Americans entered the war and sought to remove Spain from its oppressive dominance over the Cuban people. However, it is important to mention that after expelling Spain from the island, President McKinley and members of Congress believed that the United States would only be able to secure peace throughout Cuba by disarming the Cuban insurgents and holding the island in trust until it could establish a responsible government with which Washington could enter into a permanent treaty relationship.⁵⁰ This shows the United States early attempts foster democracy and constitutional government in other countries while creating allies with which it could use for the United States' benefit. Clearly, the United States ascent to world power status had begun and would continue to expand over the next century.

Another significant force which helped the United States emerge as a world power was the modernization of the United States Navy in the from the 1880's to the onset of World War I. The United States was significantly behind naval powerhouses such as France and Britain. This is important because as the United States sought to become a world power and major player around the globe, a strong navy was essential as a Navy can provide security to United States

interests and provide political leverage in conflicted areas (to take a modern example, consider United States Aircraft Carriers located off the coast of Egypt).

Prior to the Spanish-American War, the strong Navy that the United States currently boasts was not only non-existent but also unnecessary as the United States had not been involved in serious overseas conflict. However, with the Spanish forces sinking the *Maine*, Assistant Secretary of the Navy Theodore Roosevelt sought to increase the United States naval forces. It was argued that by strengthening the United States Navy, the U.S. would be able to deter Spanish forces (Spain had a rather weak Navy) and lead to a peaceful Cuban settlement.⁵¹ Obviously such efforts did not succeed; however the Navy was strengthened and was successful in defeating the Spanish fleet during a number of naval battles during the Spanish American War (e.g. Battle of Manilla Bay and Battle of Santiago de Cuba). Additionally, while it was obviously a god thing that the United States succeeded in defeating the Spanish fleet, the fact that the enemy was so weak and that the operations were quite risky lead to the further development the U.S. Navy. This development greatly influenced foreign policy in the years to come and played a significant role in the United States role in World War I.

World War I was the final piece of the puzzle which led to the development of the United States as a world power. Prior to United States involvement, President Woodrow Wilson had worked steadily to maintain American neutrality towards both the Allies and Central Powers.⁵² However, with the notions of Americans emerging as a world power, this position of neutrality could not be maintained throughout the duration of the war. First, the United States had both economic and emotional ties toward Britain and France (part of the Allies), making suspension of trade unlikely. This alludes to the idea of continuing economic prosperity and remaining a global competitor. Second, the sinking of the *Lusitania* and the significant loss of American

lives helped to further establish the significance of a strong Navy within the United States. The German and British Navy's were engulfed in naval warfare with new (at the time) submarines and battleships. Additionally, the German Navy had cruisers set up around the globe which were used to attack Allied merchant ships while the British attempted a naval blockade of Germany. Moreover, the Germans, using U-Boats, had worked to cut supply lines between Britain and Germany.⁵³ While the United States (despite the sinking of the *Lusitania*) still maintained a non-interventionist stance for two additional years, after the Germans resumed unrestricted naval warfare the United States entered the war on the Allied side. The significance of World War I and the entry of the United States was that the side with the strongest Navy, able to control the war overseas, would be successful during the war. This forced further development and modernization of the United States Navy as a significant portion of the war was fought at sea and the Navy proved to be one of the most important keys to success for the Allies: it not only helped to win the war and to maintain access to the Allied markets, but it further established the United States a world power and a significant force in the global community.

America is a World Power...What's Next?

America, purporting to be an open society, is tasked with finding a proper balance between openness and responsible secrecy. However, the American republic of the 1700's is not the same as the American republic after its ascent to world power status- there are pressures from the business industry to expand, developments within the armed forces community, and arguments from expansionists. Essentially the 1900's fostered an environment in which America confronted a number of new policy issues and this made finding a proper balance increasingly difficult. In principle, open is still what America purports to be; however, there are policy

problems associated with the responsibilities that a world power has to deal with. The key policy issue that I am referring to is the development of the intelligence community.

The initial development of the intelligence community is derivative of the creation of the FBI in the early 20th century. During the early 20th century America was skeptical about governmental power and sought to protect against abuses and a divergence from the constitutional principles which had governed the American republic for the past century. However, with the emergence of the United States as a world power and with real threats present both within the country's borders and internationally, the need for federal investigative capability became a pressing issue. Specifically, there were huge immigration flows to the U.S. during this time period- non-English speaking immigrants. Irish, Greeks, Italians and Southern Europeans were making their way to America. They were not well-educated- some Americans worried about criminal actions, and many worried about foreign ideologies influencing the American way of life. Additionally, there were war dissidents that angered the American government, as well as a spike in organized crime. The question was could the local and state governments (principle of limited government) handle the pressing law and order issues? The answer, in the modern world, was no- not with the crossing of state and other borders.

From a congressional standpoint, the attitude was, and for several decades had been, strikingly ambivalent.⁵⁴ They wanted criminals to pay for their crimes and for the violations of federal law to be brought to light; however, they did not want the very department to which they had assigned the task of bringing them to light to have an investigative a capability equal to this assignment lest states rights be infringed or police-state procedures develop. The job of ensuring criminals paid for the crimes committed fell to the Attorney General of the United States (this position was created in 1870 along with the creation of the Justice Department). In 1896,

Attorney General Judson Harmon reported to Congress that he did not have the men to do his job.⁵⁵ He was complaining of a lack of investigative, preemptive force; thus, his work could only be effective in a prosecutorial manner. The ability to detect and prevent, according to Harmon, should have gone to some other agency. The overwhelming notion within the Justice Department was that America needed to implement a better means of equipping the justice Department to effectively manage its obligations.

The issue that Bonaparte had to effectively manage was the concern held by the majority of Americans, both in and out of government, that the creation of such an organization would undermine the principles upon which America was founded. From its beginnings in 1908, the FBI was immersed in states' rights controversies. Federalism (with its elaborate systems of deference to state and local authorities) confined law enforcement to local and state police organizations and the creation of this type of agency was a scary notion to the American people.⁵⁶ Additionally, the American people were concerned that such an organization, granted power that had long been denied to the federal government, would abuse the power which it had been granted. Additionally, the public's view of American detectives (who were doing work that would be analogous to the FBI) was quite negative. Many detectives were perceived in a negative light because the men who had been attracted and appointed to such positions were not rigorously chosen and they were not perceived to be intelligent, high-class, or morally acceptable for a position which required obvious respect for the law and adherence to its principles.

The key figure who took on the task of creating the FBI (it was called the Bureau of Investigations until 1936) was Attorney General Joseph Bonaparte. Prior to the work of Bonaparte (who worked in conjunction with President Theodore Roosevelt) all investigative work was done at the state and local levels. American democracy was founded upon the

principles of limiting federal government power and notions of small government; thus, such an organizational structure made sense.

Prior to the creation of the FBI efforts had been made to create an organization with predicative capability (by this I mean to detect and prevent criminal activity). By 1906 Congress was authorizing as many as 32 Secret Service Operatives for temporary assignments; however, it was not written into law and it depended on the House Appropriations committee to keep this going each year. If funds were not granted, then this function provided by the select few operatives would cease to exist. Essentially the Justice Department (more specifically the U.S. attorneys and marshals) was “required-with never enough resources- to do everything that their counterparts had done in early America, plus various chores not assigned to anyone else.”⁵⁷ Bonaparte sought to rectify this problem with the creation of a federal investigative agency.

Creation of the FBI was not an easy task. The tension between the president and Congress and the negative view of investigative work reflected in the people’s views about American detectives made for significant wariness with respect to the Government’s investigative work. Additionally, there was a sentiment throughout Congress that the Roosevelt was using Secret Service operatives to serve as a secret police force. This caused Congress to go on the defensive and rumors began circulating throughout the American political arena that Roosevelt was using the Secret Service operatives to “get something” on members of congress opposed to Roosevelt’s legislative program. This made Bonaparte’s job significantly more difficult as the atmosphere with which he took office was quite inhospitable to federal investigations. Regardless, Bonaparte initiated a tenacious campaign to create the first federal agency which would legally be able to engage in investigative work.

Congress provided the impetus for Bonaparte to create this agency. Previously, the Department of Justice most frequently called upon Secret Service "operatives" to conduct investigations; however they did not report to the attorney General- rather, they reported to the Chief of the Secret Service. Bonaparte hated this as he wanted control of investigations under his jurisdiction. Then, On May 27, 1908, Congress enacted a law preventing the Department of Justice from using Secret Service operatives. Thus, to circumvent the legislation, Bonaparte appointed a group of Special Agents within the Department of Justice. Accordingly, ten former Secret Service employees and a number of Department of Justice investigators became Special Agents of the Department of Justice.⁵⁸ On July 26, 1908, Bonaparte ordered them to report to Chief Examiner Stanley W. Finch- this action is celebrated as the beginning of the FBI. Both Bonaparte and President Roosevelt, who completed their terms in March 1909, recommended that the force of 34 Agents become a permanent part of the Department of Justice.⁵⁹ Attorney General George Wickersham, Bonaparte's successor, named the force the Bureau of Investigation on March 16, 1909.

It remained for George Wickersham to manage the new unit. However, Bonaparte left a lasting impact: he was the first Attorney General to reject the view that investigative work was subordinate to prosecutorial work and the first to specify in detail what would constitute professional standards for an investigative body. Without standards for such an agency, the potential for abuses would have been greater. Bonaparte recognized the significance of having chosen officials with the utmost care- subject to strict supervision, educated, given proper training, and imbued with the conviction that all federal statutes are to be impartially enforced. It is clear that Bonaparte had intended for his agency to be a safeguard against abuses of power and serving to balance openness and secrecy in America as he argued

“...there are two essential elements in all good administration upon which one must rely as a safeguard against abuse; first a centralized and accurately ascertained authority and responsibility; and second, such a system of record as will enable the legislative branches of the government, the head executive, and possibly the courts to fix responsibility for anything that goes wrong”.⁶⁰

A proposed agency of this sort does seem to be in line with the notions of an open society.

Bonaparte’s thinking was in line with the notions of the American people and he knew what characteristics must comprise an organization of such a sensitive nature (sensitive given the sentiments of the American people during the early 20th century).

The Birth of Secrecy

With an understanding of how the first American intelligence agency surfaced following America’s ascent to world power following the Spanish American War, it is beneficial to view how the shift in American society politically and socially helped foster an environment conducive to the birth of secrecy. I shall argue that there are two important pieces of legislation that were passed following World War I which both fostered and caused secrecy within America’s government: the Espionage act in 1917, and the Sedition Act in 1918. Both of these pieces of legislation were reflective of the notions that America was a world power and needed to protect its country from both domestic and foreign threats; and both helped to create secrecy and cause a shift in the behavior of FBI officials in the first half of the 20th century.

In 1913, U.S. President Woodrow Wilson inherited an American system of government that valued openness over secrecy; nonetheless the American Constitution (which had actually been drafted in secret sessions) did recognize the need for secrecy in some matters. Article 1 Section 5 states that “each House shall keep a Journal of its Proceedings...excepting in such Parts as may in their Judgment require Secrecy.”⁶¹ Thus, the practice of closed deliberations was not a novel or new idea in America; however, it quickly lost its luster when a 1794 resolution

was passed creating public galleries that were to remain open “so long as the Senate shall be engaged in their legislative capacity, unless in such cases as may, in the opinion of the Senate, require secrecy, after which they said galleries shall be closed.”⁶² Openness in deliberation was essentially seen as a virtue and an important facet of American democracy. In 1860, President Andrew Jackson, when asked about a servant who might be smuggling presidential papers and providing it to Jackson’s opponents, Jackson replied

“They are welcome...to anything they can get out of my papers...Let them make the most of it. Our government, sir, is founded upon the intelligence of the people; it has no other basis; upon their capacity to arrive at the right conclusions in regard to measures and in regard to men; and I am not afraid of their failing to do so from any use that can be made of anything that can be got out of my papers.”⁶³

Jackson’s quote echoes the notion that American democracy entails, as a fundamental characteristic, openness with respect to government. The people cannot be kept in the dark about activities and policies occurring within a government without justification (legitimate national security concerns). Balancing openness and secrecy is not easily accomplished- the Espionage Act of 1917 served as a reminder of this fact.

The Espionage Act was passed just after the United state Entered World War I in 1917. The reason this piece of legislation was proposed was to attempt to prohibit any attempt to interfere with military operations, to support U.S. enemies during wartime, to promote insubordination in the military, or to interfere with military recruitment. During the eleven weeks of debate over the Espionage Act, I shall argue, the element of secrecy was able to develop and manifest within American society. Two of the main provisions of the Espionage Act were intended to manage the unlawful obtaining of national defense information, and the unlawful disclosure of information to a foreign government or its agents. Additionally, in 1918, the government passed the Sedition Act which was added to the Espionage Act and prevented

disloyal, profane, or abusive language about the U.S. government, the American flag, or the military. This was the first time that publication of ‘sensitive information’ was deemed punishable by long prison sentences (the Espionage Act even entailed the death penalty as a punishment). Thus, if individuals wanted to publish literature which portrayed the government in an unfavorable light, they needed to be sure that such a publication would be within the confines of federal legislation.^{ix}

Unfortunately, such legislation was merely the beginning of the invasion of secrecy in America. The FBI’s involvement following World War I and leading up to World War II symbolizes an increasing use of shady practices, secrecy, and questionable means by which to conduct business within an open society. While it is relatively clear that Bonaparte was genuinely concerned with such an agency not abusing power and merely doing a solid job of protecting the people, Bonaparte’s successors did not necessarily echo such sentiments. Between 1917 and 1921 a significant number of agents engaged in controversial activities. Bonaparte had denied that the FBI would spy on American dissidents; however, this changed as the political climate changed. Exploiting the crisis of WWI and the Red Scare, agents engaged in slacker raids in 1918, arrested alien radicals in 1920 during the so-called Palmer Raids, and, more generally monitored a significant number of radical and liberal activists and officials. Such activities conducted by the FBI had clearly moved outside the scope of the law and with the appointment of J. Edgar Hoover as the director of the Bureau in 1924, the authority for such questionable investigations derived from executive directives (many times secret), or Bureau officials made the semantic distinction that they were merely collecting information on (not investigating) political activists and prominent citizens.⁶⁴ Additionally, despite executive order

^{ix} The Sedition Act was eventually repealed by Congress in 1920.

preventing the FBI from installing wiretaps or monitoring political activities, the Bureau, under the close supervision of Hoover, continued to monitor dissident activities.⁶⁵

The issues associated with such practices cannot be overlooked as they directly challenge the notion of an open society. Recall the fourth element of the open society: 'The marketplace of ideas metaphor must be recognized. That is, the free flow of opinions and ideas must be exchanged within society (regardless of whether such ideas are good or bad)'. The practices of the FBI during the first part of the 20th century are clearly in violation of such a principle. By monitoring and ultimately condemning those who held certain viewpoints is an unacceptable practice in an open society. Granted the political and social conditions at the time hinged on the end of a bloody international war and strong anti-communist feelings, and thus both the government and its people may be less concerned with openness and more concerned with national defense, such practices are violations of the fundamental human right to think and express oneself freely. Furthermore, such practices clearly violate element 5 of the open society which argues that the ability to criticize is essential so as to not leave society susceptible to manipulation, corruption and injustice. Hoover and his men (whether or not this was their intention) were manipulative and unjust in their practices as those who criticized or deviated from what the Bureau believed to be right were deemed wrong, dangerous, and worthy of monitoring. It is quite possible that some of the men monitored may have been, in some way or another, dangerous to American national security interests; however, to illegally monitor and invade upon other individuals in such a fashion calls into question whether a society can be called open. American society was founded upon principles corresponding to openness and transparency within society; however, deviations in the 20th century were significant because

they call into question whether such values were being exhibited in practice (and not just merely in principle).

FDR Takes Over

In 1932 former Governor of New York Franklin Delano Roosevelt defeated Herbert Hoover to become the 32nd President of the United States. While many remember FDR for his indisputable contributions helping to bring the United States out of the Great Depression which plagued the country during the 1930's, his role in helping further develop secrecy with respect to government activities cannot be understated. From his work with the FBI to his illegal dealings with British Prime Minister Winston Churchill, FDR played a role in keeping information from Congress and the public. This section will examine his actions and their ultimate effects on America's balance of openness and secrecy.

To begin consider FDR's relationship with the FBI. The President viewed communism and fascism and symbolizing the increasing notion that the world was getting more dangerous. American, in FDR's opinion, needed to be able to protect against such influences. Thus, after executive orders attempting to limit FBI powers, FBI officials received needed encouragement to expand their political surveillance activities from Roosevelt himself. This was done at a secret meeting between FDR, Hoover, and Secretary of State Cordell Hull in August of 1936.⁶⁶ It was during this meeting that FDR authorized FBI officials to compile a report on extremist political activities, namely fascists and communists, and to determine if they were being directed from abroad. Additionally, in 1940 FDR secretly authorized FBI wiretapping during "national defense" investigations.⁶⁷ These two secret directives were quite significant because they not only provided authority for FBI investigations of "subversive" actions, but FDR was successful

in lobbying for increased appropriations to the FBI. This led to a fivefold increase in personnel and inevitably aided the agency in conducting larger operations with greater ease.

To authorize and promote the aforementioned FBI actions again places constraints on maintaining openness as the balance struck by FDR erred on the side of more secrecy. More operations, larger operations, and the use of wiretaps further limit the ability of individuals (many of whom the FBI and FDR were uncertain were a threat to national security) to criticize and freely express their views. This poses a direct challenge to element 5 of the open society (the ability to freely criticize). FDR's appreciation of the value of the political intelligence provided by the FBI, and his great interest in secrecy, resulted in the emergence of a more powerful and autonomous agency. This increase in autonomy helped create an agency with its own political agenda, willing to act purposefully (and covertly) to define the limits of permissible political conduct. Individuals, agencies, and organizations that develop political agendas seek to advance such agendas. For the FBI, this meant using illegal means to achieve their goals and implement their policies. While this did not create the feared American Gestapo, this did have effects on the future of American political culture. FDR's lobbying for the increase in power and appropriations on behalf of the FBI did serve to "poison the American political climate during the Cold War years and transform the American political culture" (the Cold War will be discussed in depth later in the chapter).⁶⁸ However, FDR's influence on secrecy in American society was not limited to his secretive dealings with FBI officials. Of probably greater significance was FDR's illegal dealings with Winston Churchill, and his withholding of information from the American public so as to garner support and involve the United States in World War II.

While FDR's did withhold information from the Public and Congress, it is imperative to understand that he was facing the rise of Adolf Hitler and a largely isolationist Congress and American public. By the time FDR became reached office in 1933, Hitler was consolidating power and showing his true color- Hitler's Germany posed quite a complicated problem for Roosevelt for one key reason: *WWI was still fresh in the minds of the American public*. Merely two decades earlier America was involved in one of the bloodiest and costly wars in history and the notion of entering another conflict was unacceptable to the vast majority of Americans. This was a significant sentiment as FDR knew that to get involved again would simply aggravate isolationists in Congress and the American public. FDR, however, was well aware of and apprehensible towards Nazi Germany and he sought to cooperate with threatened nations in containing aggressors and attaining peaceable solutions to such a problem.⁶⁹

Isolationist America was no doubt a concern for FDR; nonetheless, sitting and doing nothing while Hitler simply did as he pleased meant watching the world grow more dangerous. The American public and Congress essentially said 'Do nothing', and this causes a significant bind for a man tasked with protecting American interests. The generation of the thirties simply embraced pacifism and isolationism as a noble and workable ideal. Furthermore, while the State Department pressured FDR to remain silent on the Nazi issue and not worry the American people that the U.S. would soon get involved, the media furthered such sentiments by arguing that Hitler should not be worried about. FDR, however, feared Hitler. Thus, FDR decided to meet with both French and British officials in 1933 to discuss how to effectively deal with Hitler-without informing the State Department.⁷⁰ While not informing the State Department of his actions, FDR was not (at this point) thinking of entering the United States into war because of the isolationist sentiment present throughout America- he was merely seeking an effective means

by which to commit Hitler to disarmament. FDR certainly understood that the problem facing him was how, as the president of a largely isolationist nation, could he ensure the collective security of a world power nation without involving the country in war? The quick answer- couldn't.

British Prime Minister at the time Neville Chamberlain continued to try and work on a settlement with Hitler, making a visit to Berchtesgaden in August of 1938; however this visit merely helped to foster the notion in FDR's mind that settlement was out of the question:

“Chamberlain's visit to Hitler today may bring things to a head or may result in a temporary postponement of what looks to me like an inevitable conflict within the next five years.

Perhaps when it comes the United States will be in a position to pick up the pieces of European civilization and help them to save what remains of the wreck- not a cheerful prospect.”⁷¹

It is evident that FDR was already preparing what he would need to do in case of the outbreak of war. With the invasion of Poland in 1939, FDR, still keeping the U.S. out of the war, also continued sell massive arms to countries fighting with the Nazis. Nonetheless, FDR, during his campaign for re-election (in which both he and Republican candidate Wendell Willkie based their campaigns on keeping the U.S. out of the war), told the American people that “I have said this before and I shall say it again and again: your boys are not going to be sent into any foreign wars.”⁷² However, politics played a vital role- events change things. The easy and quick fall of France and the almost collapse of England were two catastrophic events which made war simply imminent.

William Stephenson, Pearl Harbor, and the Development of the Intelligence

Community

With the outbreak of War in Europe, and America looking as if it was soon to join the efforts against Hitler, FDR sought to increase public support for the war. One of the key means of garnering such support was the use of British spymaster William Stephenson (Codename: Intrepid). Stephenson was sent to the U.S. by Churchill in 1940 to establish British Security Coordination in New York City. While his unofficial mission was to create a secret British intelligence network throughout the western hemisphere, and to operate covertly on behalf of the British government and the Allies in aid of winning the war, his greatest impact was on the U.S. media and the American public. Under the direction of Stephenson, BSC directly influenced the U.S. media toward pro-British and anti-Axis views. This helped to further cement the notion that the Axis was an alliance of evil and that the U.S. was needed, as a world power, to enter the war on behalf of the Allies. Furthermore, Stephenson can be credited with help setting the foundation for the United States intelligence community. To understand the context, the U.S., in 1940, had almost no intelligence capabilities (except in the military). Secrecy and covert operations were simply not engaged in because the United States viewed itself as open, and to engage in such actions was deemed detrimental to openness. Thus, when Stephenson arrived the question was 'would the U.S. do what others do?' The answer was yes- America is a great power, and a war is going on which is challenging United States interests. With Stephenson's help, Camp X in Whitby, Ontario was created. This was the first training school for clandestine operations in Canada and North America. Roughly 2,000 British, Canadian, and American covert operators were trained there from 1941 through 1945, including some from the ISO, OSS,

FBI, U.S. Navy and Military Intelligence, and the U.S. Office of War Information (among them, five future directors of what would become the CIA).⁷³

While FDR's perception was that war would be inevitable, on December 7, 1941 it became certain that the United States would enter the war on the side of the Allies. It was not because of the fall of France, or England's troubles, rather it was due to an act by Japanese forces. While the number of Americans killed during this attack was well into the thousands, the attack came as a complete and utter surprise to the American people and led directly to the U.S. involvement in the war efforts. Aside from the obvious devastation at losing an immense number of American lives, the most significant aspect of the attack on Pearl Harbor was that it represented a catastrophic intelligence failure- which ultimately won overwhelming public support for American entry into World War II. The carrier-based Japanese airplanes killed 2403 Americans and destroyed a considerable number of U.S. fighting ships and warplanes.⁷⁴ On December 7 the Japanese Navy sent 353 Japanese fighters, bombers and torpedo planes to attack the United States Naval base at Pearl Harbor. While previously largely isolationist, the attack forever shattered the American peoples' sense of geographic seclusion and security. If, as a world power we were unable to effectively protect ourselves then clearly large-scale changes needed to be made.

The new perception of international danger heightened Americans' appreciation of the fact that their nation had been essentially sleeping on the intelligence front. Sure there was the FBI; however, their mission was of a domestic nature- there was no agency or organization protecting America internationally. After sifting through the evidence surrounding the attack, it was revealed that there was intelligence failure of two types. First, the U.S. had no spy network in Japan, in spite of the potential recruits who were available among the West Coast Japanese-

American population.⁷⁵ Second, the failure was largely due to a lack of coordination and analysis. America had been, for a long time, able to decode some of Japan's secret cables; however, the warning signals supplied by these cables were never properly evaluated as the Army Air Core (there was no Air Force at the time) and the Navy had different information and failed to coordinate with one another.

Pearl Harbor and the failure of intelligence at the time lead to increased debate about an intelligence agency to protect America. The man who played the most significant role in echoing these sentiments of to ensure that there was never a repeat of Pearl Harbor was William "Wild Bill" Donovan. Donovan's relationship with FDR and his dealings with William Stephenson in the year prior to Pearl Harbor made him an ideal candidate for the job. Donovan and FDR had known each other since their days at Columbia Law School and in June 1940, FDR had sent him on a mission to assess Britain's chances of surviving the Nazi onslaught.⁷⁶ Donovan, similar to FDR, had wanted to support the British, and wanted Americans to believe that the British were worth supporting. Additionally, while Stephenson was becoming closer and closer to FDR and acting as a close advisor to the president, Stephenson actually recommended that FDR place Donovan in charge of all U.S. intelligence services. With support from both the president and his close advisor and head of one of the most successful intelligence agencies at the time, it was only a matter of time before Donovan helped establish a United States intelligence community. The challenge for Donovan was how to establish such a community within the framework of American Democracy. Donovan knew that, in the context of an open society characterized by debate on all important issues, he had to publicize his case for a new agency (with strong opposition, both public and otherwise, from J. Edgar Hoover, the FBI, and ambivalence from the military).⁷⁷ He resorted to headline-grabbing tactics and arguments that

furthered American support for the cause and was effective in achieving his goal in the form of a military order.

On June 13, 1942 President Roosevelt established the Office of Strategic Services (OSS). The OSS operated under the authority of the Joint Chiefs of Staff (JCS) and was charged with the collection and analysis of “strategic information” and with the planning and direction of “special services” requested by the JCS.⁷⁸ Recall that America was quite behind on the intelligence front prior to the formation of the OSS. American intelligence had been conducted on an ad-hoc basis by the various departments of the executive branch, including the State, Navy, and War Departments. They had no overall direction, coordination, or control and were simply unable to effectively provide the intelligence needed to protect the national interests of a world power such as the United States. The OSS was created to help deal with these problems. Reflecting the American people’s long-standing fears of an American police state, the OSS was strictly confined to foreign enterprises-with the FBI managing the domestic sphere. One of the more important aspects surrounding the creation of the OSS was that it occurred during a time of war; thus, there was a real threat and the OSS needed to boost its own prestige early during Donovan’s campaign to demonstrate that it will be effective and necessary tool in protecting American interests (especially since its entire reason for existence was, in one way or another, against openness). However, the OSS faced a number of enemies within the government bureaucracy. When the OSS was established, it was not only responsible to the

President^x, but also a part of the JCS- meaning that there were a number of military overseers of OSS activities. Incorporation into the JCS meant that OSS personnel had to work hard to justify to their military superiors their organizations' continued existence. The chance to make such justification arose late in 1942 with Operation Torch.

The OSS proceeded to justify its existence by providing the JCS every assistance they could in the planning and execution of the operation. On November 8, 1942 approximately 90,000 Allied troops, mostly American, began America's first major offensive action of World War II. The operation was conducted in French-controlled Morocco and Algeria and these 90,000 troops, who were trained over the past 3 months by OSS agents, represented a new dimension of American military operations. This new dimension ranged from guerilla activities, to extensive intelligence and espionage work, as well as the conducting of secret negotiations aimed at creating pro-Allied forces in either enemy or neutral countries.⁷⁹ Essentially Operation Torch represented the first intelligence experience with covert operations. More importantly, the OSS was lying about secret operatives and what they were doing during the operation.⁸⁰ The OSS was secret- what they did was camouflaged. Its main tool was the use of black propaganda in which everything the agency did was done to confuse, mix people up, or simply get stuff. The key element to understand from Operation Torch was that it helped set the precedent for swashbuckling and superficially impressive schemes that were not always based on realistic

^x Prior to the Creation of the OSS, its predecessor organization, the Coordinator of Information (COI) was created in 1941. FDR appointed Donovan to this position to collect and analyze all information and data, which may bear upon national security. The COI also made information and data available to the president. This constituted America's first peacetime, non-departmental intelligence organization. The key differences between the COI and the OSS was that the COI was only responsible to the president and had limited goals and means.

premises. The public and Congress are unaware of the secrecy involved in the operation and the only means of learning about activities are through leaks (or simply lies). The invasion of secrecy into covert operations within the intelligence community adds to the difficulty in balancing openness versus secrecy. Furthermore, due to the U.S.'s lack of experience in the first half of the twentieth century with secret intelligence agencies there was little consensus or know-how with respect to managing secrecy.

After the war ended in 1945, American experience with foreign intelligence in an open society was still quite limited in several respects. There was no precedent for systematic peacetime analysis of the military and economic strength of potential foes or U.S. capabilities to resist attack. There was no corpus of intelligence theory to deal, for example, with the relationship of evaluation to decision making. The U.S. had not built a worldwide spy network to mount a lookout for trouble. America was not yet sure of the limits of intelligence (can't warn about every crisis and save every situation).⁸¹ Peacetime covert operations had never been used in the first century-and-a-half of the United States existence. The OSS merely represents a first attempt at forming an intelligence agency to protect U.S. interest; nonetheless, it was short lived and did not represent much of a precedent. Following the end of World War II, the OSS was disbanded largely due to President Truman hating the idea. Truman didn't buy the secrecy argument- he was isolationist and to him, war was war and peace was peace. Additionally, many Americans viewed the OSS as a Gestapo. Thus, when the OSS was disbanded at the end of World War II, it testified to the fact that there existed no ready-made, widely acceptable model for a peacetime central intelligence agency.

After 1945, the emergence of the Soviet threat and the inability of a war-weakened Britain to do much about it convinced an even greater number of Americans that their nation

would need a peacetime intelligence agency. It is important to note that the Soviet Union had been a previous ally of the United States and thus probably made it more difficult for some individuals to grasp the concept that such a useful ally was becoming a potential threat to America. Additionally, Gestapo fears caused a number of Americans to resist the idea of a peacetime intelligence community altogether, while those who did agree that such a community was necessary debated the form it should take.⁸²

Despite the lack of a cohesive agreement on the form of such an agency, there was significant support for the creation of a central intelligence agency from a number of prominent figures within the government and armed forces. Senior figures in the U.S. Navy as well as the Navy Department formed a cohesive group behind the plan for a central intelligence agency, and they supplied a number of blueprints that guided thinking on the shape the agency should take.⁸³ Rear Admiral Sidney Souers, who was previously deputy chief of naval intelligence during WWII, received significant backing from a number of naval men- this strong backing was key in helping Souers play a key role in the birth of the CIA. The Navy was not the only agency who searched for constructive guidelines for a peacetime agency. George Pettee, who served in the Office of War Information and in the intelligence unit of the Foreign Economic Administration, went on to argue that the U.S. “needed to meet the needs of a world power, correct past ignorance of world politics, and provide a service that academia could not supply.”⁸⁴

The competing interests and visionaries within the intelligence community produced (as one might expect) a number of distinct plans for peacetime centralization. One of the plans was a simple extension of Donovan’s OSS.⁸⁵ A second plan was to expand the FBI- which ultimately failed as the notion of keeping foreign and domestic activities separate was quite popular. A third idea, endorsed by the Truman Administration, endorsed a revival of State

Department coordination. This experiment of Truman's actually gave way to a final notion with the establishment of the Central Intelligence Group (CIG) - the immediate precursor to the CIA. The CIG was tasked with two basic missions, strategic warning of imminent threats and the coordination of clandestine activities abroad. However the CIG, which was in its essence merely a compromise, existed for only two years and it bequeathed both of its missions to its successor- the Central Intelligence Agency (CIA).

Prior to discussing the relevant secrecy issues facing the CIA during its early stages, it is relevant to discuss the significant, somewhat vehement, opposition that proponents of the CIA faced. The strength of the initial opposition to the creation of a central intelligence agency may be gauged from the fact that opposition began at the top. President Truman (who is responsible for both disbanding the OSS and establishing the CIA) never declared unequivocal or unwavering support. Truman was worried that the creation of such an agency would challenge the fundamental principles upon which the United States was founded. Truman himself remarked that "we have to guard against a Gestapo... You must always be careful to keep national defense under the control of officers who are elected by the people, then you won't have any trouble in the future."⁸⁶ First, Truman never had a good relationship with William Donovan. Truman previously accused Donovan of being 'rash' and 'egotistical'.⁸⁷ Truman had just entered office after the untimely death of FDR and wanted to establish his presidential authority and felt the need to block the ambitions of Donovan. Additionally, Truman was concerned about America's image abroad- U.S. intervention in the affairs of foreign countries had not always been met with support. However, the single most important factor which directly influenced Truman's concerns about a peacetime intelligence agency was the fear of the development of an

American police state. Just as the creation of the FBI was met with such fears, the creation of the CIA was no different.

While Truman had a number of concerns about Donovan, the creation of a peacetime intelligence agency, establishing his own presidential authority, etc., the charge that resonated with the vast majority of Americans concerned the Gestapo American police state. The popularization of this charge was due largely to the work of *Chicago Tribune* Journalist William Trohan. Trohan represented the isolationist, conservative viewpoint that many of his readers shared and used this to fuel opposition and fear of the creation of the intelligence community. Trohan used headlines such as “New Deal Plans Super Spy System” and “New Deal Plans to Spy on World and Home Folks; Super Gestapo Agency is Under Consideration”.⁸⁸ Such headlines were effective tools to grab the attention of the American people to warn them that certain freedoms and liberties may be in jeopardy if the agency were to be created. With the horrible images of World War II still fresh in the people’s minds, the Gestapo metaphor stood out against the traditional antiauthoritarian U.S. rhetoric. Americans were essentially worried about granting power to such an agency for fear of the means in which the agency would use its power.

A breakthrough for proponent of an intelligence community came when President Truman signed the National Security Act of 1947. The main reason Truman finally gave in and changed his mind about an intelligence community was due to the fear of Stalin, communism and the Soviet Union. Truman’s isolationist inclinations were replaced by an internationalist position as the Soviet Union boasted the biggest land army in the world and had still not removed their troops from Germany and Poland after World War II. Furthermore, there were immense amounts of intelligence but no means of evaluating or coordinating intelligence in Washington. Thus, the CIG effectively became the Central intelligence Agency (CIA) which

was made responsible to the newly founded National Security Council (NSC). The CIA was given a number of responsibilities: advise the NSC on intelligence activities; make recommendations for coordinating intelligence activities; and to correlate, evaluate and disseminate intelligence.⁸⁹ Moreover, the National Security Act restricted the CIA to foreign work only. The question still remains, however, (aside from Truman's shift in policy) why did the proponents of the CIA win out after extensive debate?

First, there were limitations to the CIA's abilities. The restriction of the CIA to foreign work was wise because it made the CIA more acceptable to the American voter helped acquiesce fears of an American Gestapo. The second and probably more important reason concerns the emergence of the Soviet Union as a real threat to the security of the United States. By the end of World War II there were only two superpowers (the U.S. and the Soviet Union), able to shape and influence the international environment. After the Allies' victory, there were different visions as to how Europe should be divided. Given the Soviet Union's immense death toll (estimated at 27 million) and the destruction the Soviet Union sustained during World War II, the Soviet Union sought to increase security by dominating the internal affairs of countries that bordered it.⁹⁰ Additionally, during the final stages of World War II, the Soviet Union laid the foundation for the Eastern Bloc by directly annexing several countries as Soviet Republics. The issue was that the Soviet-style regimes in the Bloc not only reproduced Soviet command economies, but also adopted the brutal methods employed by Joseph Stalin and Soviet secret police to suppress real and potential opposition. The key here is the overwhelming fear of communism. The United States government was ardently opposed to its ideology-which included a lack of openness and a destruction of all private property, which is the basis of

individual liberty. Furthermore, the Soviet Union was on the march, strong, and could invade into Europe and spread communist values.

The Early CIA

The initial mission of the CIA was to confront the emerging threat of the Soviet Union and to ensure that America would be protected from foreign threats. While such goals are understood given the high status of the United States among the rest of the world, the creation of the CIA and the American intelligence community has created a number of significant problems that must be addressed if America is to remain an open society. This section of the paper will address what I believe to be three of the most significant challenges that the CIA poses to America's open society: the censorship of publications, the use of secrecy contracts within the Agency, and the effects of secrecy on decision making with respect to covert operations.^{xi}

The early CIA worked to keep virtually all aspects of intelligence secret. Thus, it comes as no surprise that secrecy contracts that were used to keep CIA officials from discussing their experiences with the Agency. This issue had a profound effect on the numerous former agents who attempted to publish books detailing their experiences, jobs, views, and conclusions about the CIA. One of the earliest and most controversial examples concerns former CIA official Victor Marchetti. It was no secret to the Agency that Marchetti was planning to write a book exposing past CIA deceptions. Marchetti was privy to some of the most carefully guarded CIA information (called Sensitive Compartmented Information or SCI). Over time, Marchetti had become bothered by the Agency's role in the overthrow of democracies on behalf of dictators and by CIA manipulation of other nations' internal policies because of the ethical and moral issues that confronted him.⁹¹ Marchetti disliked the notion that the CIA as secretive mandated

^{xi} I will discuss each of the three issues and at the end of the section provide the reasons why each individually challenges the open society

secrecy from employees after their retirement. CIA officials were obligated to sign secrecy contracts which created rules and guidelines for what could and could not be divulged to the public arena. Marchetti was no exception and he himself did sign such a contract. The idea of a former CIA official publishing a book was not what troubled CIA officials; it was the possibility of Marchetti exposing the special operation known as MHCHAOS- a domestic espionage project which contained files on thousands of Americans and organizations which were believed to have communist preferences and Vietnam War dissidents.

The operation dates back to the late 60's when the CIA was attempting to control the anti-Vietnam War press. Ober, who was responsible for the *Ramparts* operation^{xii} was to lead MHCHAOS as well and to ensure that the operation was hidden. Discovery of such an operation would lead to the end of careers, congressional inquiries, and perhaps prison.⁹² Very few officers knew of the operation and Ober kept a list of each person who had been given any access. The cause for concern over Marchetti's decision to write a book was inevitable. Marchetti had already printed an article blasting the CIA director and his actions, and the book was to simply expand upon the article. CIA officials had no means by which they could discover what secrets Marchetti would divulge. CIA deputy general counsel John Warner took what he deemed to be the necessary step to save the CIA its credibility by asking the courts for prepublication censorship. Warner concluded that the secrecy contract could be considered analogous to a private corporate contract that prohibits employees from revealing trade secrets. However, there was no legal precedent for such a case as the validity of the CIA secrecy contract had yet to be held up by any court.

^{xii} *Ramparts* was a left-wing publication, an early opponent of the Vietnam War, and responsible for leaking questionable CIA actions such as conspiracy theories surrounding the Kennedy assassination and the CIA backing of the National Student Association as part of its Cold War strategy.

One would likely expect such a case to be decided based upon interpretations of the First Amendment which would allow censorship only if there was “an immediate, direct, and inseparable effect upon the security of the U.S.”⁹³ CIA officials cleverly attempted to demonstrate the Marchetti case was outside the scope of the first Amendment by arguing the U.S. was simply seeking specific performance of a contract. To the dismay of proponents of constitutional rights of free speech the court determined the secrecy contract to take the case out of the First Amendment’s scope and grant the injunction that CIA officials were pushing for. Marchetti would have to submit all writing to CIA censors. Such a holding is of immeasurable significance because it effectively nullified the First Amendment rights of any government worker who submits to a secrecy contract. In an appeal of a later suit involving Marchetti and the CIA, the court ruled that by submitting to a secrecy contract one effectively relinquishes their First Amendment rights.⁹⁴ Such a decision holds that CIA officers have ‘different’ First Amendment Rights than ordinary citizens- a conclusion that some find acceptable given the nature of their work and troubling for those who believe freedom of speech to be absolute. The key principle the courts maintained was that as a secret organization, information within the Agency needed to be kept secret to protect national security interests.

A second challenge balancing open openness and secrecy which surfaced during the early years of the CIA were the means by which the use of covert operations was reached. When one considers covert operation, it is important to understand that few officials had access to the necessary intelligence clearances.⁹⁵ High ranking intelligence officials, the President, and the President’s closest advisors want to involve people sympathetic to their own personal viewpoint. During the early years of the CIA, covert operations⁹³ were not only popular, but the early years were known as the “Golden Age of Covert Operations”. Thus, those who were arguing for the

use of covert operations and supporting the views of those in positions of power were more likely to be involved in the decision making process and have knowledge of the operations- those who were critical of a preferred program simply were left out of the loop. This alludes to the issue of who controls the clearances? The people who are able to grant clearances are those who manage the programs; thus they can prevent access to people who may be critical of the operation. For example, if the director of the CIA, the President, and the military decide they wish to invade Turkey (or any country), those who will provide intelligence and support for this operation are likely to be involved in the inner-workings of the operation; hence, debate from the opposite side is stifled. Essentially a vicious circle is present in which the people who are critical and may be able to provide an objective viewpoint from which to view a given operation are denied the ability to present what may be helpful perspectives.

Additionally, secretive action avoids the fight over the means and ends which erupts when other audiences discover an ongoing operation and it prevents multiple audiences from seeing and knowing about the action in question. The mechanism of decision-making is huge because covert operations are not discussed openly at meetings as are other problems that face America. They are considered separately at meetings from which both advocates of other proposals and critics of covert operations are excluded.⁹⁶ Thus the extreme secrecy with which secret operations are conducted increase the probability that such operations will be poorly designed and implemented with little regard for the realities of the external world. The circle of people who know about the operation are quite small and it is limited to people who tend to be sympathetic to such operations.

The third issue that challenges the open society concerns the CIA censorship of publications. One of the more controversial examples of censorship involves the left-wing

Ramparts magazine and its quest to expose the CIA's violation of the 1947 National Security Act. Stanley K. Sheinbaum was the first person to go public with his experience of CIA activity in the United States. Sheinbaum landed a position at Michigan State University as coordinator of a \$25 million government project to advise South Vietnamese President Ngo Dinh Diem.⁹⁷ Sheinbaum, merely seeking to help the economies of underdeveloped nations expand, was unaware that his project staff included CIA officers; however, once he found out he deemed it inappropriate that legitimate academic advisers were being used as a cover for U.S. government manipulation. By the time of his resignation in 1963, the buildup of U.S. troops in Vietnam and the assassination of Diem had already occurred and Sheinbaum decided it was his duty to publicize his confidential information. The story was to appear in the June 1966 issue of *Ramparts* magazine. As one would expect, word of the article reached the CIA a few months prior to June. CIA director William Raborn Jr. decided that he wanted a "run down" on *Ramparts* on a "high priority basis" (such a strongly worded order would prove to be a turning point for the CIA).⁹⁸

To carry out such an order on a domestic news publication would clearly violate the National Security Act of 1947's prohibition on domestic operations and meant that the CIA would have to somehow engage in a cover up of its actions. CIA Director of Security Howard Osborn and his deputies were able to assemble dossiers on twenty-two of the fifty-five *Ramparts* writers and editors demonstrating the early penchant of the Agency for collecting information on American critics of government policies. The publication of Sheinbaum's article resulted in a storm of protests from legislators who viewed the CIA's infiltration of a college campus as a threat to academic freedom. This prompted President Johnson to assemble a task force to review government activities that might endanger the integrity of the educational community. However,

some members of the task force, such as future CIA director Richard Helms, had dealt with political espionage in the past. Helms, additionally, organized an internal task force to examine all CIA relationships with academic institutions; “but that review, from all appearances was designed only to ensure that these operations remained secret”.⁹⁹

Additionally, *Ramparts* magazine leaked another controversial story concerning CIA activities. The National Student Association was being funded by CIA as a means of countering the Moscow-dominated student groups around the world and to assist in recruiting foreign students. Counterintelligence specialist Richard Ober became the new operative responsible for *Ramparts*. The task of stopping publication was quite difficult as there was no legal precedent for halting publication. Moreover, Ober was unable to demonstrate evidence of foreign influence over the magazine and was thus barred by the National Security Act of 1947 from pursuing the *Ramparts* staff.¹⁰⁰ Instead of aborting the operation, Ober went on the offensive: news stories meant to discredit *Ramparts* were to be planted and a propaganda campaign was launched. The actions of the CIA in the *Ramparts* case demonstrate the struggle that a free society inevitably encounters when agencies grounded in maintaining secrecy interact among a free and open society. The reason for the propaganda campaign against *Ramparts* and the attempt to halt publication were clearly attempts to cover up questionable practices containing damaging information (such grounds, many would argue, are unacceptable in an open society).

Each of the aforementioned issues within the CIA affects the notion of America as an open society in a distinct manner. With respect to the decision-making process in covert operations, the key issue is that it challenges the marketplace of ideas metaphor and hinders the ability of criticism. By excluding people from clearances simply because their views may conflict with a given officials’ policy agenda not only makes for a potentially ineffective policy,

but also limits the free flow of ideas and takes away the ability to criticize policies. The open society's goal is to produce truth- how can truth surface if we are excluding worthy opinions simply to foster a policy goal which may have been misguided in the first place? While it is true that the CIA is a governmental organization with sensitive information that does sometimes pertain to national security interests, it does not follow that secrecy is necessary in every aspect of the organization. By permitting clearances to individuals who may not support a given policy, it is quite conceivable that this persons' opinion may help to adjust the policy for the better.

Censorship of publications provides a slightly different challenge to openness. First, it diminishes the notion that speech should be protected to the utmost degree. To censor publications simply because they represented the agency in a negative light is not sufficient enough to limit a fundamental right. Such restrictions were not generally acceptable to the public and this directly contradicts with element three of the open society. Moreover, this represents the government in a manner that speaks quite negatively of its ability to remain tolerant o criticism and responsive to the people. Similarly, the use of the secrecy contracts in the case of Marchetti and other former CIA officials represents an unjustified limit on freedom of speech and also demonstrates an intolerant governmental organization. Additionally, the secrecy contracts affect the transparency of American society. The government should not hide or keep secrets from the people and the authors of the CIA novels and books are simply sharing their experiences. It must be recalled that the previous chapter showed that secrecy denies the people vital information about the functioning of their own government and damages the popular trust that is necessary for the effective functioning of a democracy.

What does this Mean for the Open Society?

In the first chapter I proposed that a balance needs to be struck between openness and secrecy in American society. I still maintain that at a fundamental level the U.S. is open; however, the ascent of America to a world power during the first half of the twentieth century has made it more difficult to find the proper balance. The censorship of publications, the use of secrecy contracts within the Agency, and the effects of secrecy on decision making with respect to covert operations each increase the difficulty in finding the balance this paper I intend to propose. This is what American society faced during the creation of the intelligence community. Freedom of speech was lessened without just cause, criticism was curtailed, the free flow and exchange of ideas was not well- respected, the government and its agencies were not responsive and tolerant to the people, and the transparency within society diminished to an extent (the only element of the open society that remained entirely in tact was that political change was able to occur without violent revolution). Thus, on the hypothetical spectrum of openness was clearly on the side of more secrecy.

Chapter 3

The Intelligence Debate

In its turbulent and controversial history, the intelligence community has been given the responsibility to protect American national security interests. There are two fundamental tasks of the intelligence community that are of particular importance to balancing openness and secrecy in American society: the covert collection of intelligence and covert operations (both successes and failures). In terms of covert collection, I am referring to two types. The first concerns agents and agent networks gaining information from foreign nationals whom intelligence officials attempt to persuade to betray their home country (America wants the secret and the foreign government does not want the U.S. to know). Second, I am referring to illegal operations conducted within the United States to conduct surveillance on American citizens.^{xiii} These are the secrets that the government does not want the American public, the media, and at time Congress to know about and the rationale behind the secrecy is derivative of the term “sources and methods”. By sources I mean the actual individual agents who are gaining valuable information; methods refers to the means used to acquire the intelligence (blackmail, deep cover, etc.). This concept enabled the government and intelligence community to avoid revealing secrets because the dissemination of the sources and methods used is deemed to be detrimental to the interests of the U.S. Additionally, agents have people feeding them information and betraying their country- if they are discovered they will be shot. If such information is made public, U.S. intelligence agents could be killed and intelligence sources and methods would be endangered. Essentially the argument is that America needs inside (or secret) information to assess it and then provide good information to U.S. policymakers.

^{xiii} This will be a major component of the following chapter.

While not an easy task to gather, analyze, and effectively use information to protect such interests, the intelligence community has seen its share of successes both in terms of covert operations and in providing intelligence to policymakers. However, it has also been involved in embarrassing operations and politicizing intelligence- such that some individuals question the place of an intelligence community within American society. The debate will persist for years to come as there is likely no efficient means that has been discovered to satisfy proponents of each side. Some believe the intelligence community is a necessary facet of American society, essential to protecting Americans and assisting policy-makers. Such individuals argue that an intelligence community provides long-term expertise, avoids unwanted surprises, supports the policy process, and maintains the necessary secrecy of the sources and methods of its operations. On the other side, there are those who are quite concerned that the intelligence community has diverged from simply protecting national security interests and digressed to an agency responsible for violating the fundamental principles upon which America was founded. Such proponents argue that clandestine organizations not only contradict the principles of an open society, but also are neither efficient nor successful in their operations.

To understand the debate on the subject one would benefit from an examination of the relevant literature. This chapter will examine the views, arguments, and proposals of proponents from both side of intelligence community argument. The literature on those who oppose the intelligence community and view it as an imminent threat to America's open society that will be examined are Daniel Patrick Moynihan, Mel Goodman, and Michael Turner. The literature that will be reviewed from the opposing side will consist of former CIA Director Allen Welsh Dulles, Mark Lowenthal, Roy Godson, and Ernest Lefever. I shall present the arguments of each of these individuals and then provide my own position as to which side has the stronger argument.

Literature Review-Pro-Secrecy

To begin this discussion on the intelligence community one will benefit from examining the views of the longest serving Director of Central Intelligence, Allen Dulles. In 1963 Dulles published *The Craft of Intelligence* in which he presents the numerous benefits that secrecy provides and why such a concept is essential to American society.^{xiv} Dulles argues that while questioning the creation of the CIA in a free society is understandable, the value of a good intelligence agency ultimately provides enough justification for secrecy within the intelligence community and the government. One of the main arguments for secrecy centers on the notion of the world being an arena of conflict.¹⁰¹ According to Dulles, it is impossible to predict where the next danger spot may develop and it is the duty of intelligence to forewarn of such dangers-and the dangers only get worse with the rapid growth of technology. Merely a few decades earlier America was largely isolationist, largely uninvolved on a global scale. By the 1960's nuclear missiles capable of crossing the oceans in a matter of minutes had been developed.¹⁰² Thus, the distance that separated conflicting countries has become significantly less important (a major strength of the U.S. prior to the 1960's). Dulles is concerned with imminent threats posed by enemies of the U.S. and the function of intelligence is to provide necessary preemptive action/information that will protect the vital interests of the U.S. and provide good information to policymakers. Intelligence, Dulles argues, cannot be limited to merely a few countries. We want our intelligence to be alert, and the best means of staying alert involve knowing a little bit about everything. Dulles claims that friends in recent history rather quickly became fierce enemies (Germany, Italy, and Japan) and that "it is always useful to have in the bank a store of

^{xiv} While this book was written at a time when there was a heightened concern about communism and foreign threats that no longer exist, the relevance of Dulles arguments is still present given the current situation between the U.S. and the Middle-East

basic intelligence...about all countries.”¹⁰³ According to Dulles, because history has demonstrated that allies do not necessarily remain allies, this intelligence should be collected in secret and remain secret in case the intelligence collected can aid in the protection of national security.

One of the reasons Dulles is concerned with effective intelligence is that America in the 1960s was engaged with a perceived imminent threat posed by the Soviet Union and communism. Dulles maintains that the communist threat has undermined the security of free countries and “As this is carried out in secret, it requires secret intelligence to ferret it out and to build up our defenses against it.”¹⁰⁴ For Dulles, this means both clandestine operations and covert collection which will help identify the threat and effectively manage it. Yes, there are ethical and moral questions raised; however, the issue is essentially settled for Dulles because the secret means used by the intelligence community is the best way to protect national security interests. Clearly, Dulles is a proponent of secrecy within the intelligence community despite the looming concerns of the American people and their ‘right to know’ what type of business the government and its organizations are conducting that may undermine fundamental rights. Dulles asserts that this is a concern of many Americans worried that an organization which is predicated upon clandestine collection and operation will challenge the fundamental principles upon which the American republic was founded. Dulles certainly anticipates such objections. The notion of the public’s right to understand what the government is up to is rather unspecific. Dulles’ idea of the public right to know would entail telling Americans that the U.S. is in a superior or inferior position with respect to U.S. intelligence versus Soviet intelligence (quite unspecific). Dulles does concede that while having an informed public opinion backed up by facts is a good characteristic of any society this does not necessarily mean that this requires detailed information

as to where every missile site is located, the exact number of bombers we have, or the details of their performance.¹⁰⁵ Essentially, Dulles is proposing that the notion of a powerful intelligence agency should not be kept secret by any means, it is a tool; however, the sources and methods of which should be kept secret^{xv}.

One of the chief concerns for Dulles deals with the American media and the dissemination of information to the American people. Dulles reasons that what the press (or the government for that matter) tells the people, it also automatically tells its enemies. Thus, any person through carelessness or malice may be betraying to the Soviets just as clearly as if he secretly handed it to them.¹⁰⁶ The government spends a significant amount of money to protect itself against espionage and this does no good if American secrets, such as the identity of an agent or important details of an operation, simply leak away. Dulles argues that to divulge such secrets is an impediment to any intelligence agency trying to protect national security interests. Additionally, Dulles challenges the First Amendment claims that have been used to ground the argument that censorship of the press is unacceptable. Dulles starts from the premise that nothing should be attempted which would affect the freedom of the press; however, “Freedom...does not necessarily mean complete license where our national security is involved and the First amendment of the Constitution never intended this.”¹⁰⁷ Dulles does not suggest that the United States deal with the issue through legislation, rather he proposes that an understanding by the executive and Congress be reached followed by seeking the voluntary cooperation of the press. Essentially Congress and the executive would determine what should

^{xv} Dulles’ argument is a classic red herring. While he says that an informed public is a good thing, the essence of his argument is that a lot of information should be secret. What should the public know? Covert operations, the attempted overthrow of foreign governments, assassination attempts? Dulles would argue that secrecy should be maintained with respect to each. If one had to articulate where Dulles falls on the hypothetical line of openness, he would err on the side of extreme secrecy.

and should not be kept secret and the decisions should be an agreement between both branches of government. The executive would start by trying to prevent the publication of secrets valuable to U.S. enemies and to deal more effectively with leaks from the executive. Then, in conference with Congressional leaders and in agreement with them, additional steps should be taken to restrict the publication of sensitive information. Additionally, there should then be discussions between selected government officials most immediately concerned and leaders of the press and media to determine the extent of mutual agreement for keeping secrets essential to U.S. security confidential.

While secrecy is ultimately necessary according to Dulles, he does understand that in a free society, such an organization will be met with opposition. However, he argues that the historical examples of security services that exercised some intelligence functions which people use to argue against intelligence organizations are misguided. Dulles proposes that the functions of these security services were advance the agenda of a dictator, most of which converted authentic intelligence services into private Gestapos for maintaining their rule.¹⁰⁸ This warped use of intelligence agencies has confused many people about the true functions of an intelligence service in a free society. Due to the nature of these examples which functioned in a fashion contradictory to many principles which America maintains, the people are more likely to oppose the creation of such an agency- unfortunately for the wrong reason. Americans do not oppose according to Dulles because they believe an intelligence agency will fail and is unnecessary- the American people are unsympathetic because they mistakenly believe a Gestapo will form. According to Dulles, the U.S. government in its very nature- and our open society in all its instincts- under the Constitution automatically outlaw the type of intelligence organizations that have developed in police states. Dulles argues that the CIA is the server, not the maker of

policy, and it cannot act without the authority and approval of the highest policymaking organizations of the government.¹⁰⁹ Thus, the Gestapo fears are simply misguided for Dulles. Additionally Dulles argues that to assume that Congress exerts no power over the CIA is mistaken. The CIA cannot simply be deemed a Gestapo for carrying out secretive actions when the highest levels of government are aware of what the agency is doing.

Dulles' arguments for the intelligence community and secrecy are echoed by the views of Ernest Lefever and Roy Godson in *The CIA and the American Ethic*. Written during the latter part of the Cold War, Lefever begins the argument with the premise that the U.S. needs a highly effective foreign intelligence service because the U.S. is vulnerable abroad. Lefever is concerned that the Soviet Union is armed with massive nuclear and conventional military power and is supported by growing numbers of allies in the Middle East and Southeast Asia. However, he does argue that the intelligence community should operate in accordance with the American ethic and the concept of responsible government. The agencies should be accountable to the President and their activities and financing should be subject to congressional oversight. According to Lefever, "The foreign intelligence service of any state is an instrument of foreign policy that supplements and assists the military, diplomatic, economic, and informational components."¹¹⁰ Essentially as a world superpower with global responsibilities, the United States is especially vulnerable to the enemies of freedom and self-determination and it is up to the intelligence community to provide policy-makers with preemptive actions that can protect American interests.

With respect to secrecy, Lefever is on the side of Dulles and those who argue for erring on the side of secrecy within the intelligence community. Lefever breaks up those who oppose the use of intelligence agencies in a free society into two camps: those who view the CIA as a rogue

elephant (out of control and needing to be restrained in its activities) and those who view the CIA as an agency that has made mistakes that needs correcting so that it can work more effectively.¹¹¹ Those that view the CIA as having made mistakes that need correcting have pushed for legislation to correct the alleged abuses- with this argument, Lefever is less concerned. The key concern for Lefever is the notion that the CIA is simply out of control that it must be controlled because, according to Lefever, those who criticize the CIA and the intelligence community in this fashion do not understand the principal task of the CIA.

According to the CIA act of 1947, the CIA is exempted from any “law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency.”¹¹² Additionally, the National Security of 1947, which created the CIA, permits the CIA to carry out functions and duties related to intelligence which affect national security. From these two pieces of legislation, Lefever proposes three tasks of the CIA: (1) to produce intelligence judgments for the benefits of policymakers, (2) to develop advanced technological equipment to improve collection and processing of intelligence, and, most relevant to the current discussion (3) to carry out clandestine operations to collect foreign intelligence (and when they are instructed, to conduct covert foreign political or paramilitary operations). Thus, secrecy is embedded into intelligence agencies’ nature and Lefever believes that an effective and responsible foreign intelligence establishment is wholly compatible with the American ethic and the principles of democracy. Lefever argues that it is both politically necessary and morally right to engage in clandestine collection, counterintelligence, and covert political action.¹¹³ The only caveat provided by Lefever is that the activities must meet the following standards- if the ends are just, the means are just, and the likely consequences of success would advance the cause of security.

Another significant area of concern for Lefever is the media's portrayal of the CIA as a secretive organization which threatens the liberties and fundamental rights of the American people. Lefever argues that the negative, one-sided presentation of the CIA's activities abroad failed to provide detailed, unbiased accounts of the reasons for the CIA activity. The American public is largely uninformed of the circumstances that gave rise to the CIA activity being reported and interpreted by the newsmaker. Lefever proposes that the one-sided portrait of the CIA emerged from the tendency to stress the negative and downplay the positive. For example, in 1,079 stories on the CIA carried by the networks during 1974-78, almost 90 percent were either a negative or neutral reflection on the agency.¹¹⁴ Between 1974-and 1978 can be referred to as some of the most important years in America in terms of creating an environment of greater openness (this will be a major topic of the next chapter). These years sparked reform of the intelligence community, as a large number of illegal and questionable actions conducted by the intelligence community were leaked to the American public. Prior to the reforms, namely the years between the inauguration of Eisenhower in 1953 and the Bay of Pigs invasion in 1961, the intelligence community enjoyed a "Golden Age of covert operations". Some were successful; however, operations such as the Bay of Pigs Fiasco left the American public largely troubled. Lefever is concerned that the negative perception of the intelligence community can largely be attributed to media's portrayal of the U.S. intelligence community's involvement in covert political operations as unethical and without proper grounds. Ultimately, Lefever argues that the media failed to provide the millions of impressionable viewers with the facts, background, and perspective they needed to understand the role of intelligence in the U.S. In Lefever's opinion, the American people were denied an adequate picture of the dangers facing the U.S. from the Soviet Union and its allies. Lefever proposes that the public never understood

the fundamental importance of U.S. intelligence and covert activity and ultimately the media fell far short of what a free and democratic society has a right to expect of its communications media.¹¹⁵

Roy Godson, who co-authored *The CIA and the American Ethic*, proposes arguments that nicely complement the points made by Lefever. As expected, he views intelligence as invaluable to protecting the U.S. from foreign threats and prefers to err on the side of more secrecy (as opposed to more openness) in American society. Godson, like Lefever, examines the groups (such as liberals and radicals) who are hostile to major aspects of U.S. intelligence (he refers to them as the anti-intelligence lobby. I will use this term and the anti-secrecy lobby throughout the remainder of the paper). Each group and individual within the anti-intelligence lobby effort share one common characteristic according to Godson: they are all openly dedicated to the abolition of virtually all clandestine intelligence capabilities. Essentially, these groups want Congress to make it a crime for the United States to engage in covert action and to abolish clandestine human intelligence collection. Godson argues that the chief rationale for such a position is derived from a concern with human rights- namely, that the U.S. intelligence community's past activities have violated the rights of U.S. citizens at home, as well as the legitimate aspirations of people in the Third World.¹¹⁶ To respond to such criticisms of the intelligence community, Godson proposes that the anti-intelligence lobby either forgets or does not see any danger to American civil rights or to Third World aspirations from the intelligence services of the Soviet Union or other communist countries. The Soviet secret services are probably the largest in the world according to Godson and, while public information about KGB

(Soviet Union's version of the CIA) activities is limited^{xvi}, enough has been written that those concerned with lying, secrecy, blackmail, covert action, etc. must be aware of the dangers they pose to the U.S.¹¹⁷

For Godson, the elimination of secrecy and clandestine operations and tactics would be a devastating blow not only to the intelligence community, but also U.S. security. To deprive the intelligence community of such activities would be to remove valuable methods of operation and sources of information. Additionally, it would make it significantly easier for foreign governments to identify and target U.S. agents and activities. Godson goes even further arguing that to impose stringent restrictions on the surveillance of Americans and foreigners residing in the U.S. would impose serious limits on positive U.S. collection and counterintelligence. He does not deny that there are valid reasons to tighten surveillance to avoid abuses; however, by barring surveillance and other clandestine methods unless "probable cause" can be demonstrated in a court of law, the ironic effect is that we restrict U.S. operations while allowing foreign agents to go freely about their business. While Godson does acknowledge that there are valid reasons proposed by the anti-intelligence lobby to limit secrecy so as to avoid abuses, the benefits of secrecy ultimately outweigh the costs and to diminish secrecy would place American interests in jeopardy.

A final viewpoint that will be addressed with respect to the pro-secrecy campaign is Mark Lowenthal's arguments in *Intelligence: From Secrets to Policy*. Lowenthal begins his argument with the premise that governments have intelligence services because they seek information

^{xvi} This assertion by Godson is simply untrue. There are a number of books published detailing KGB activities such as: *Soviet Defectors* by Vladislav Krasnov (1985), *KGB: The Secret Work of Soviet Secret Agents* by John Barron (1974), *The KGB: The Eyes of Russia* by Harry August Rositzke (1981), *Russia: The People and the Power* by Robert Kaiser (1984), *KGB* by Brian Freemantle (1984), and many others.

others would deny them.¹¹⁸ Thus, secrecy is inherent not only in what your intelligence service is doing (collection and covert action) but also in the information others withhold from you. The U.S. wants to know what other countries are up to and presumably the opposing countries know, or at least presume, that the U.S. is interested in such information. Lowenthal recognizes, however, that beyond the motivations for secrecy are the significant costs it potentially imposes. The issue, echoed especially by those in the anti-intelligence lobby, is that operating in secret affects the people in a negative, somehow un-American fashion.¹¹⁹ The main concern is with two aspects of intelligence-covert action and collection- and the tendency of intelligence officials to abuse their powers and use means that challenge the fundamental principles upon which America was founded. Lowenthal nonetheless finds himself on the side supporting the use of secrecy for two key reasons: the American people as well as government officials misunderstand the true nature of intelligence, and the manner in which the media has spun the intelligence issue creates a skewed perception of what the people's right to know actually entails.

With respect to the media influence, Lowenthal maintains that reporters and their media outlets exist to publish stories. The government and the intelligence community have no means by which to prevent the media from reporting information that it has obtained. However, the freedom to publish is not the same as the people's right to know.¹²⁰ While this is an enticing catchphrase according to Lowenthal, "the right to know" does not appear anywhere in the U.S. Constitution or the First Amendment. Additionally, the press' fundamental right to report what is occurring in the world does not obligate government officials to provide information- especially information that is classified and a major national security interest. Lowenthal then considers the scenario in which the press obtains information with national security implications. What should its obligations be? According to Lowenthal, just as ethics and morals change in

other areas, they change in the media as well. In the past the press has stumbled upon intelligence activities and agreed not to publish for the sake of national security; however, at times the failure to adhere to such a principle has cost agents their lives. For example, Richard Welch, a CIA agent working in Athens, was killed by a radical Marxist organization. He had been returning from a Christmas party in 1975 while four men followed him home and shot him with a .45 colt pistol at close range.¹²¹ The death was significant because prior to the shooting, the radical quarterly *Counterspy* named Welch as a CIA agent and also gave his Athens Address (other publications such as Mader's *Who's Who in CIA* did the same thing).¹²² Many^{xvii} have blamed the death of Welch on the press divulging secrets that they stumbled upon. Thus, Lowenthal is concerned that reporters concerned will potentially put their professional career interests above the larger interest of preserving the secrecy of some intelligence activity or information.

The second major point advanced by Lowenthal concerns the nature of intelligence and the misperceptions that a significant number of Americans, both in and out of government, maintain. In terms of balancing openness and secrecy, understanding the nature of intelligence (which is predicated upon secrecy) will aid in securing such a balance. Lowenthal holds that one of the most common descriptions of intelligence is that it is telling truth to power. However, this is mistaken according to Lowenthal because intelligence is not about truth.¹²³ Lowenthal asserts that the problem with truth as a goal is that it has a relentless quality-most of us understand the importance of being honest most of the time; however, if an analysts' goal is to tell the truth (especially to those in power who may not wish to hear it) then there is no room for compromise or admission of alternative views. Essentially if one has the truth, those who disagree must have

^{xvii} The Welch assassination is a disputed case and the arguments presented by Lowenthal merely represents one means of viewing the significance of the assassination.

a falsehood. Thus, truth telling poses too many problems according to Lowenthal in an already complex process of analyzing and utilizing intelligence. For Lowenthal, the goal of intelligence is to provide informed analysis. Intelligence analysts may be convinced of their findings and the issue is what they should do if they are rejected. The dynamic between intelligence officer and policy maker then become a central issue because the policymaker wants intelligence supportive of policy. Thus, compromises may be in order which concern Lowenthal because it creates the question of how many small compromises add up to large ones that politicize^{xviii} intelligence?¹²⁴ In such instances we have strayed from the goal of producing informed analysis and providing policymakers with the necessary information to effectively use the intelligence that officers have compiled. Essentially many games are being played simultaneously within the intelligence process of compiling, analyzing, and using intelligence. In the abstract, Lowenthal acknowledges that it is easy to declare that integrity and honesty is primary; however, practically speaking such a declaration is not always appealing.

Lowenthal recognizes that there are both ethical and moral dilemmas within the intelligence debate. The dilemmas mere existence alludes to the notion that policy makers have a choice to make that will have ethical and moral dimensions.¹²⁵ Additionally, intelligence operates on the edge of acceptable morality, occasionally dealing in techniques that would not be acceptable elsewhere in government or in private life. However, the trade-off for Lowenthal between ethics and security is acceptable provided that the intelligence community operates with rules, oversight, and accountability.^{xix}

^{xviii} This will be expanded upon in the following section

^{xix} The notions of accountability and oversight will prove to be pivotal in both the next chapter in which I will address the attempts at reforming the intelligence community in the 1970's as well as in my conclusion addressing how to properly balance secrecy and openness.

Literature Review- The Anti-Secrecy Campaign

In America's liberal democracy, some argue that secrecy is at odds with some of the fundamental principles of openness and transparency as discussed in the first chapter. Thus, a significant number of scholars, academicians, and former intelligence officials have raised important concerns with the notion of secrecy within the framework of the (supposedly) open American political system. This section will examine some of the key arguments surrounding this side of the debate and provide insight as to why secrecy is such an important concern if America is to be an open society.

The first argument which will be discussed is that of former CIA analyst Michael A. Turner. Turner's central thesis holds that we use secret intelligence because we want to know what other governments are up to as we would like to be in a position to influence the behavior of other governments towards them.¹²⁶ Such a notion is not necessarily at odds with an open society according to Turner; however the problem derives from the scenarios in which the uses of intelligence surface in a domestic context and infringe upon the rights of the American people. It has already been mentioned that the CIA was given absolutely zero domestic responsibilities and was to operate within an international framework only. Turner argues that to political leaders, secret intelligence may be a political asset if the information helps the fulfillment of political goals. Most times it exists to serve political objectives "whether they are the discrediting of a political opponent or buttressing a politician's credentials as a "hawk" or a "dove."¹²⁷ However, intelligence agencies, according to Turner are supposed to serve two purposes: to serve as a safety valve that will help to reduce uncertainty about potential threats and to provide a source for identifying opportunities to promote the national interests.

One of the main issues Turner has with intelligence concerns the manner by which intelligence is collected and processed (covert collection). It goes deeper than the potential abuses of power and infringement upon human rights (covert action as opposed to covert collection); his main concern is that secret intelligence ultimately is ineffective and fails significantly more often than it succeeds. The root of the problem for Turner comes from within the structure of the intelligence cycle (which can be briefly described as the direction, collection, processing, analysis, dissemination, and feedback that occurs within the intelligence community) and can only be addressed by measures that confront specific dysfunctions within the intelligence process. For example, consider the collection process. Collection, according to Turner, can contribute to intelligence success if intelligence agencies know what they need to collect and then use their resources to get information in a timely manner to answer the key questions of decision makers.¹²⁸ Thus, it would be reasonable to assume that within the intelligence community, officials coordinate. However, a study prepared by the staff of the House Select Committee on Intelligence in 1996 found that there is a widening lack of coordination among collection disciplines.¹²⁹ This is quite problematic because operating in isolation then causes each agency to develop its own idiosyncratic system of acquiring and sending information, thereby creating a less effective process in that acquiring and sending information between agencies becomes significantly more difficult to accomplish. Additionally, rectifying this system is not an easy task according to Turner. Establishing greater linkage would be difficult given the entrenched cultural and legal imperatives of each of the major intelligence agencies. Moreover, it would also be quite expensive and would defeat the purpose of “competitive intelligence” as it now exists in the U.S. whereby each of the agencies competes with the others to produce and disseminate the best intelligence available.¹³⁰

Another significant issue that Turner discusses is the abuse of secrecy within the intelligence community. Intelligence work takes place in relative secrecy, and secrecy is the glue that binds the U.S. intelligence community with those whom it is supposed to serve. Turner concedes that certainly there are national security interests; however, the potential for abuse (as well as the past abuses that have surfaced in recent history) should caution Americans of the seemingly inherent proclivity for injustice within intelligence agencies and the government. Furthermore, Turner argues (directly opposing the arguments of Dulles and Godson in particular) that secrecy has often been used to keep the public from knowing what it is reasonably in the public's interest to know. For instance, former DCI George Tenet refused to classify some information even for use by members of Congress who, as members of the Joint Intelligence Inquiry, were investigating the 9/11 attacks.¹³¹ Turner and his supporters additionally contend that secrecy comes into conflict with the democratic tradition of transparency in government. The main reason is that the debate between openness and secrecy has created a long series of compromises that satisfied neither those who support secrecy in government nor those who oppose it.

To further understand the second point raised by Turner, consider the problem surrounding the term Originator Controlled (ORCON). ORCON is the most restrictive and controversial means of controlling the distribution of intelligence. The agencies intend, from an official standpoint to protect the "sources and methods" (this is the standard legal mantra for justification of classifying documents and preventing their disclosure).¹³² The rationale used to justify this argument is that it protects the source of information and the method by which it was gathered. The problem is that this power has been abused. The sources and methods justification, according to Turner, has been used to hide embarrassing secrets or information that

might cause intelligence officials (or agencies) damage. The reality as Turner views it is that ORCON endows the internal segments of agencies with significant power that places America's open society in jeopardy.

Daniel Patrick Moynihan's book *Secrecy: The American Experience* echoes some of the sentiments proposed by Turner. Moynihan is concerned with the use of secrecy within American society and its effects on the American people, the government, and openness. According to Moynihan, departments and agencies hoard information, and the government becomes a kind of market.¹³³ Essentially secrecy has become an organizational asset- with organizations trading secrets for other secrets. However, the costs of such a system can, and have been, enormous. Moynihan argues that in the void created by absent or withheld information, decisions are made either poorly or not at all. The problem, Moynihan argues, has only gotten worse as time has gone on. By the late 1990's, the reported number of documents which had been classified because they incorporated, paraphrased, restated, or otherwise referred to classified information increased by 2.2 million and the total of all classification actions reported for the fiscal year 1996 increased by 62 percent.¹³⁴ This of course raises the question as to how much information actually does affect national security versus how much information is classified because the government, CIA, NSA, etc. does not want to the people to know (for reasons that may embarrass or diminish the standing of such entities in the eyes of the American people)? There are national security secrets that need protection; however, when something is deemed top secret because it would cause "exceptionally grave damage" to national security, the line is quite vague and thus classification becomes subjective. Therefore, classification can be used to protect individuals or agencies from leaks of personnel incompetence, mistakes, ethical or moral issues, and to ensure the American public is kept in the dark. Moynihan is essentially concerned that

secrecy not only is at odds with the principles of an open society, but that secret intelligence many times causes poor intelligence and, therefore, poor decision making by policymakers, government officials, political figures, etc.

To further understand this notion, Moynihan considers the misperception of Soviet capabilities during the latter part of the Cold War. General George Lee Butler was commander of the U.S. Strategic Command from 1990-1994. As the man responsible for drafting the overall U.S. strategy for nuclear war, Butler had studied Soviet capabilities intensely during this time frame and was well-versed in what the abilities of the Soviets were. At first, he was concerned about the dangers posed by the Soviet Union to American national security; however, Butler began to have significant doubts about his initial estimates following his first visit to the Soviet Union in 1988. When he landed on the outskirts of Moscow, he noticed that dozens of runway lights were broken and that the taxiways were still covered in snow from two days earlier.¹³⁵ Roads were ragged and massive government buildings were crumbling-not what Butler expected. After studying Soviet satellite photos and thirty years worth of classified reports, Butler expected to find a modern, industrialized, and functional country. Instead, he found “severe economic deprivation.”¹³⁶ Then, in an article published in *Foreign Affairs* in 1991, Butler’s doubts had been confirmed by the collapse of the Soviet Union. However, never did the CIA or any other intelligence arm of the Department of Defense or State Department allude to the possibility of the Soviet Union enduring systemic economic problems.¹³⁷ Additionally, those analysts who may have predicted the collapse of the Soviet Union were filtered out in the bureaucratic process according to Moynihan. They were filtered out in favor of the dominant view that the Soviet Union was dangerous and a looming national security threat with extremely powerful nuclear weapons and capabilities. While the example presented is one faced by any bureaucracy, secrecy

increases the harm of a groupthink mentality. The principle of secrecy is to keep information from others-that is simply the definition of secrecy. In the U.S. (or any bureaucracy) the question is who should be let in on the secret? Government officials are inclined to limit the secret to as few people as possible to prevent leaks. Furthermore, the inclination is that when the secret is shared, it should be shared with like-minded individuals supportive of whatever policy the secret entails because sharing the secret with someone who disagrees will not only foster debate, but this person may share the secret with someone who also disagrees with the initial policy. Thus, in the U.S. we end up with a group of like-minded individuals not engaging in healthy debate; rather, we have a group of people who come in with a similar view on a subject and likely leave the discussion with an even more extreme view. When individuals with a different view are not informed of a secret, there is no question that policies will not be subject to adequate scrutiny; thus, secrecy increases the harm of groupthink mentality. Additionally, the reason that the U.S. was insensitive to the inevitable collapse of the Soviet Union has to be, according to Moynihan, at least in part due to the fact that too much of the information was secret and not open to critique by analysts outside government. Moynihan argues that within the intelligence community, great attention was paid to hoarding information, defending boundaries, securing budgets, and other matters of corporate survival.¹³⁸ Such principles actually forced the break-up of the Soviet Union as well as the decline of Marxist-Leninist beliefs within the Soviet population according to Moynihan.

A final issue that Moynihan proposes with respect to secrecy concerns the attempts of the intelligence community and the government to curtail the publication of embarrassing information without any existing laws granting such authority. The prime example of such activity is the attempt to curtail the publication of the *Pentagon Papers* in 1971. Former

Secretary of Defense Robert S. McNamara had ordered an investigation into the American intervention in Vietnam and as the story made its way to the *New York Times* and the *Washington Post* (both of which decided to publish), Nixon decided to go to court to prevent its publication. Although the documents were historical and lacking any operational value, they were deemed top secret and withheld from the public, press, and Congress.¹³⁹ Ultimately, Nixon failed in his attempts to curtail publication; however, the significant aspect was the attempt to withhold the information from U.S. citizens when there was no law which prohibited the publication of documents such as these.¹⁴⁰ Such a law had been proposed by Wilson in the early 20th century; however, Congress had decided against it. More importantly, Moynihan (and also the courts in the *New York Times Co. v. United States* in 1971) argued that the attempt to stop the publication was done to prevent government embarrassment, not for the sake of national security. In a 6-3 decision, the Supreme Court agreed with the two lower courts which had originally decided that the government had not met its "heavy burden" of showing a justification for a prior restraint. The Court issued a brief *per curiam* opinion, stating only that the Court concurred with the decisions of the two lower courts to reject the Government's request for an injunction.¹⁴¹

Mel Goodman's book *Failure of Intelligence* presents another significant argument into the anti-secrecy lobby: politicization. Politicization has been alluded to earlier in the chapter regarding the demise of the Soviet Union (recall General George Lee Butler's findings); however, Goodman attributes politicizations as the main reason for the failure of intelligence, the increase in secrecy, and, ultimately, the embarrassment and attempted cover-ups of government activity. Politicization can be described as efforts to slant analytical conclusions, skew estimates, and repress evidence that challenged a particular policy or point of view.¹⁴² The most likely

occurrence of politicized intelligence is when a policy is flawed or failing and political pressure is placed on the CIA to shape the finished intelligence product to support the legitimacy of the policy in question.

The roots of politicization can be traced back to the nature of the CIA's mission: to provide intelligence to policymakers. This mission renders the Agency vulnerable to political pressure, especially when policies fail and policymakers are tempted to control the flow of intelligence. Goodman argues that the CIA was created with the intention of forming an independent, non-departmental agency precisely because its founders recognized the need for an intelligence service that was not part of a policy department. Thus, it would be less susceptible to manipulation in support of policy preferences. However, over the course of the CIA's roughly 65-year history, the political pressure placed on the Agency has rendered a significant portion of intelligence skewed. Earlier in this chapter I demonstrated that one of the fundamental functions of intelligence is to provide good and useful information to policymakers. If a significant portion of intelligence has been skewed or formulated in such a manner that is simply supportive of a given policy or agenda, then the best information is not being provided to policymakers. Thus, policymakers are unable to make the most informed decisions. One of the prime examples of politicization within the intelligence community concerns former CIA Director Porter Goss. According to Goodman, Goss emphasized that he would be tailoring intelligence on behalf of the White House. Two weeks after the re-election of George Bush, Goss sent an internal memorandum to all employees of the Agency telling them it was their job to "support the administration and its policies in our work. As Agency employees, we do not identify with, support, or champion opposition to the administration or its policies."¹⁴³ While this example

presents direct orders to tailor intelligence, Goodman maintains that politicization rarely involves the direct order to skew intelligence; rather, slower, less detectable processes are used.

Regardless of the type of politicization, the policy pressures placed on the intelligence community are quite problematic because they cause intelligence organizations to lower their standards of intelligence. The problem of increased policy pressures has only worsened over the past decade according to Goodman. Goodman argues that as a result of considerable policy pressure the intelligence community in 1998-1999 began to lower its standards for judging strategic threats, describing known missile programs as more immediate threats than previous assessments indicated. The countries that were deemed possible threats were North Korea, Iran and Iraq in the late 1990's and the assessment emphasized who potentially 'could' test a long-range missile over the next five to ten years, not who 'would'.¹⁴⁴ Additionally, Goodman explains that a decade after these assessments were produced, there are still no long-range missiles in the inventories of North Korea, Iran, and Iraq. Why did the sudden change from 'would' to 'could' occur? The answer lies in the policy pressures put on the intelligence community by George Bush Sr. Bush essentially tried to create a new intelligence order in which he asserted that most of the world is good but there are a few rogue states. By rogue state I mean 'does not play by the rules set by the U.S.'. Now this does not necessarily mean democracy or values of openness, it means no nuclear weapons, no attempts at finding nuclear weapons, and no terrorism. If a state adopted such principles they were deemed rogue. In terms of the shift from 'would' to 'could', Bush Sr. defined North Korea, Iran, and Iraq as rogue states and was concerned that each country 'could' engage in such actions. Goodman explains, however, that a decade after these assessments were produced there are still no long-range missiles in the inventories of North Korea, Iran, and Iraq.

Goodman argues that one of the most remarkable features of the Bush Administration was its politicization of virtually every agency in the national security arena (not merely the CIA).¹⁴⁵ In support of the war on terror in the early 2000's, intelligence was slanted in order to make the case for war against Iraq. However one of the most serious concerns for Goodman was the development of an illegal and unnecessary intrusion into the privacy of all Americans with a program of warrantless eavesdropping. The wiretapping program, beginning in 2002, was conducted without congressional or judicial approval and was established by a secret executive order that ignored the criminal prohibitions against such surveillance in the FISA Act^{xx} of 1978.¹⁴⁶ The spying done by the NSA, according to Goodman, has presented the FBI with a significant number of potential "leads", with thousands of them turning out to go nowhere.

The problem worsened with the passage of the Patriot Act following the terrorist attacks on the Pentagon and the World Trade Center in 2001. Goodman argues that the Patriot Act has been used to issue more than 30,000 national security letters every year to individuals and businesses across the country that require telecommunications companies and financial institutions to disclose information about their customers.¹⁴⁷ The letters are issued without judicial review and prohibit the recipients from disclosing the request. Additionally, Goodman argues that the Pentagon played a major role in politicization by falsifying intelligence to make the case for a war on terror. Moreover, Goodman explains that the Pentagon created a number of organizations to engage in illegal spying on Americans: (1) the Counter Terrorist Evaluation Group was responsible for circulating intelligence the intelligence community considered

^{xx} The Foreign Intelligence Security Act was passed in 1978 and prescribes procedures for the physical and electronic surveillance and collection of "foreign intelligence information" between "foreign powers" and "agents of foreign powers." This can include American citizens/residents who may be suspected of engaging in activities detrimental to the U.S. Surveillance without a court order is limited to foreign powers only.

worthless, (2) the counter Intelligence Field Activity was created to conduct surveillance against American citizens near U.S. military facilities or in attendance of anti-war meetings.¹⁴⁸ The issue for Goodman is quite clear: the actions of the government and the intelligence community are illegal and the root of the problem is politicization. The spying and intelligence collection on individuals without the consent of Congress and the courts raises the issue of invading the constitutional right to privacy of Americans.^{xxi} Goodman is concerned with the direction of the intelligence community, and the evidence he presents makes the argument that things are getting worse- in the 1980's Casey and Gates made sure that the Soviet Union was presented as a ten-foot tall giant and evidence of Soviet weakness and decline was suppressed. Prior to the Iraq war, the assertion from the CIA was that Iraq had a substantial amount of weapons of mass destruction despite a lack of credible evidence. Thus, Goodman concludes that if reform does not occur, the problem of politicization and secrecy will continue to plague the U.S.

Goodman's arguments allude to a deep issue with respect to balancing secrecy and openness: the legitimacy of secrecy following 9/11. Consider secrecy in the Cold War era: the Soviet Union had numerous nuclear weapons and wanted to destroy the United States be it through covert operations, spy networks or whatever means were at the Soviet Union's disposal. The Soviet Union certainly had the means to destroy the U.S.; thus, the secrets during the cold War era can be (for the most part) deemed good secrets in the interest of protecting national security. Fast-forward to the 21st century and the merit of secrecy is much more questionable. After 9/11 secrecy increased to an unprecedented level; however, the argument that Al-Qaeda possesses the means to destroy the U.S. is absurd. Al-Qaeda does not have weapons- it merely

^{xxi} The next chapter will focus on the intensification of surveillance and the issue of privacy. For that reason, I will not provide an intricate definition of privacy and what the responsibility of the open society is to protect such a right.

has bodies that it's willing to sacrifice. The Bush classification efforts were essentially a throwback to the Cold War era at its worst moment- that is, when the Soviet Union was depicted as a 10 feet tall imminent threat to U.S. security. This is not the case with the "War on Terror"; the American government needs to be proportionate on what should be secret. To simply stamp "top secret" on information without justification does nothing to balance openness and legitimate secrecy, it simply fosters illegitimate governmental practices damaging to notions of openness.

Research Proposal

The previous two chapters provided a definition of the open society- from its key functions to why such a society is a good thing. These chapters assessed both philosophically and politically, why and how secrecy develops both at a fundamental level and in American society. The arguments for and against secrecy have now been presented- those who are in favor of government secrecy generally ground their arguments in the protection of national security interests, the misleading portrayal of the intelligence community by the media, the lack of the American public's understanding of the nature of intelligence work, and the notion that the benefits of government secrecy ultimately outweigh the costs of decreased liberties; those who oppose the use of government secrecy argue that the burden on individual liberties and the challenge to the open society are unacceptable on the grounds that it contradicts the fundamental principles upon which America was founded, on the historical evidence which suggests that secret intelligence fails most of the time, and the costs of secrecy are not worth the perceived benefits. Additionally, those against secrecy are concerned with the power placed in the hands of a few and the inherent proclivity of humans to abuse power when given too much.

Based on both the arguments and the historical evidence presented I will argue the remainder of the paper from the stance that too much secrecy is detrimental to finding a proper

balance between openness, and those secrets that are legitimate and necessary. There are national security interests that need to be protected; however, I am proposing that government officials and intelligence officials abuse secrecy and find means around facing legal consequences such that the open society as it was presented in the first chapter of this paper is being significantly challenged. One of the main reasons I tend to be more sympathetic towards the anti-secrecy side of the debate is that the opposing side has a hypocritical element.

Lowenthal, Lefever, and especially Godson contend that the American public does not understand the role or function of intelligence or intelligence agencies and that their opinions have been manipulated by the media. While the media may present a slanted picture of the intelligence community by reporting the failures of secret intelligence significantly more than the successes, there does appear to be a remedy to the problem of an uninformed public: reduce government secrecy. Lefever and Godson's book discusses in depth the "uninformed viewers" (the American public) and their lack of understanding. Thus, a reduction in secrecy to an extent would ameliorate this problem in the sense that the "uninformed viewers" will now have the opportunity to be adequately informed. To criticize the public for being uninformed while also going through great lengths to keep the public uninformed for reasons other than legitimate national security interests is a contradiction. Essentially I am concerned about placing the power in the hands of a few (recall the esoteric morality discussed in the first chapter) lest they abuse their power and unnecessarily diminish openness in American society. This is where those in favor of secrecy argue that we need to trust the good intentions of the intelligence officials; however, it has already been argued in the first chapter (enlightened dictator example) that to leave the openness of America up to the good intentions of a few individuals and organizations is quite risky and ultimately unacceptable.

The final two chapters will assess secrecy in American society from the beginning of the so-called CIA reforms^{xxii} in the 1960's and then provide for the necessary steps that need to be taken to bring America closer toward the conception of an open society. I will describe the attempts to limit secrecy through statutes, as well as the growing perception in American society that the government and the intelligence community were conducting illegal and embarrassing activities. The main focus of the next chapter with respect to the intelligence community has already been alluded to in the work of Mel Goodman: invasions of privacy. I will examine what this means in terms of openness and how the evolution of technology has made this a prominent issue.

^{xxii} I refer to the reforms as 'so-called' because I am not convinced that these reforms met the goals they set out accomplish. This point will become more clear in the following chapter.

Chapter 4

An Era of Reform

The previous chapter detailed the creation of the CIA and the issues that challenged openness in American society. To recap, the three issues discussed were secrecy contracts, the censorship of publications, and decision-making in covert operations. Ultimately, during the first twenty years of the CIA, the agency engaged in large scale covert operations (some of which were successful), enjoyed a lack of congressional oversight, and was able to use the perceived threat of communism to its advantage. During these two decades the CIA was essentially given free rein to handle situations in their own ways while maintaining plausible deniability lest other organizations or the American public learns of CIA actions which may have been questionable on both moral and ethical grounds. During this time there were relatively few concerns raised and little efforts at reform. Those who did question the actions of the intelligence community were unable to gain a majority of support in either chamber of Congress.¹⁴⁹ Sure there were significant failures, such as the Bay of Pigs invasion in 1961, which caused a major stir in the United States; but overall the intelligence agencies were perceived to be doing their jobs and protecting American national security interests.^{xxiii}

However, the 1970's changed this perception drastically. Enter 1974- one of the most pivotal years to this date in American politics. America had just withdrawn from Vietnam and the ensuing Watergate scandal produced the first ever resignation of an American president, Richard Nixon. Thus, the time period of the mid 1970's can be categorized as a time of great

^{xxiii} It is important to note that the *perception* of the agency is what is significant- regardless of whether the CIA was engaging in illegal or unethical actions was not as important as the American people's perception that the agency was a successful agency or the fact that Congress was uninvolved.

turmoil during which Americans' confidence in their government began to sharply dissipate. One of the most significant and ultimately damaging (in terms of secrecy in an open society) events was the accusation by the *New York Times* that the CIA was illegally conducting spying operations at home. In December 1974, the *Times*' allegations produced immense public outrage as congressional offices received thousands of letters from American citizens condemning the alleged actions of the intelligence community. "Watergate might only be a prelude" to an even deeper assault on democracy, argued a citizen from Minnesota- a common theme in these mailings.¹⁵⁰ Within Congress, the sentiments were quite similar and a common notion was that the CIA was not held to sufficient accountability standards so as to prevent such abuses. It can be argued that this problem was a long time coming. By this I mean to argue that the National security Act in itself is a vaguely-worded statute which set up a foundation that could easily be taken advantage of given certain circumstances. The Act grants the CIA authority to "perform such other functions and duties related to intelligence affecting the national security as the President or National Security Council may direct..."¹⁵¹ The legislative leash was quite loose (which may have been the original intentions) and the opportunity for abuse was embedded into the Act itself.

The Hughes Ryan Amendment

By the early years of the 1970s, the unpopular war in Southeast Asia and the unfolding Watergate scandal brought the era of minimal oversight to a screeching halt. Congress was determined to investigate the Nixon administration and to discover the extent to which the intelligence community had been involved in questionable (and possible illegal) activities. The beginning efforts were congressional hearings (due to the nature of intelligence these hearings were held in secret). During these hearings, abuses were discovered and witnesses were

questioned so as to gather as much information as possible prior to taking further action. The issue in these hearings was discerning where did abuses come from? Part of the answer lies in the vague wording of the original law which set up the CIA (The national Security Act of 1947), part comes from the executive seeking to hide things from Congress and make their own decisions thus damaging the principle of checks and balances, and part comes from a lack of initiative on the part of Congress. The hearings were held from 1972 and 1973 hearings of the Senate Armed Services Committee, provoked by Senator Hughes. Hughes was a member of the committee and sought to investigate covert military operations in Cambodia, Laos, and North Vietnam in the early 1970s. The committee had found that Air Force and Navy air elements had conducted secret air strikes and falsified after-action reports to conceal the activity. Hughes and several other senators deemed that such the military activity represented a secret war conducted through back-channel communications from the White House directly to field commanders during the Vietnam War.¹⁵²

A major impetus for the passage of the Amendment was a *New York Times* editorial by Seymour Hersh explaining that the CIA had used burglary, telephone tapping, and mail opening in pursuit of its counterespionage duties (the operations engaged in by the CIA were dubbed “Family Jewels”). The Hersh story, which focused heavily on the Nixon administration, shocked the public and played right into the hands of those who were concerned about secret CIA covert activity. Americans worry significantly more when the actions of the intelligence community affect American citizens; thus, once they were alerted, Americans worried not only about domestic actions, but also those conducted abroad. The writing of Hersh can be credited with sparking the passage of the Hughes-Ryan Amendment.

The Hughes-Ryan Amendment was the first major congressional attempt to curb excesses of covert operators. The legislation was added to the Foreign Assistance Act and essentially required the president to report any non-intelligence CIA operations to relevant congressional committees, including Foreign Relations (Senate) and Affairs (House) “in a timely fashion”.¹⁵³ This statute marked a new era in intelligence accountability and eliminated the president’s use of plausible deniability which had been a fundamental tool of both the president and the intelligence community to avoid responsibility for questionable actions. The Amendment demonstrated to a severely disillusioned American public that it may be possible for America “to lay down secret-operations guidelines in the interest of probity”.¹⁵⁴ Additionally, the legislation established eight committees which would be privileged to oversee the intelligence community. Despite the efforts of those who helped pass the Hughes-Ryan Amendment, the legislation turned out entail a rather limited effect as the act did not stifle the CIA on the covert operations side. For example, the Henry Kissinger-inspired supply of clandestine aid to Kurdish rebels in Iraq. The left-wing government in Iraq was both unpalatable to Washington and in dispute with Iran (America’s ally at the time).¹⁵⁵ The CIA therefore funneled secret aids to rebels in Iraq via the Shah of Iran’s officials. However, the “nation-building” effort failed as the Shah cut off aid (he was fearful of a Kurdish rebellion in his own country). Another Kissinger lead endeavor occurred in the CIA mission to ensure a conservative victory in the developing Civil War in Angola in 1975. This operation was again a failure as “the CIA-backed factions were losing their war by the end of the year, and the CIA intervention was becoming a potent source of black African anti-Americanism”.¹⁵⁶ Thus, the effects of the Hughes-Ryan Amendment were limited in terms of stopping illegal covert operations.

The Church and Pike Committee

On January 21, 1975 senators voted overwhelmingly in support of a resolution that called for an investigation into the CIA actions. If the Orwellian charges made by the *New York Times* were true, change was necessary. Two investigative panels were created- one in the House and one in the Senate. The name of the investigative panel created by the Senate was the Church Committee (after its chairman, Frank Church) while in the House, it was referred to as the Pike Committee (led by Representative Otis Pike).

While the charges of intelligence abuse during the 1970's were quite significant, it is important to recall that lawmakers were aware of problems that had surfaced from time to time within the intelligence community. FBI Director Hoover had been accused of keeping extensive databanks on U.S. citizens, as well as files on government personnel which he would use to "encourage" their support of his programs. The Family Jewels operation was released to the public as well as numerous other revelations. However, even with the accusations against the FBI and its director as well as the failed Bay of Pigs invasion over a decade earlier, there were few efforts at reform. The reason for lack of reform can be attributed to the United States' involvement in the Cold War, an overwhelming consensus within the realm of foreign policy, the collapse of Separation of Powers, as well as the simple fact that no one blew a whistle and instead let the intelligence community carry on with little congressional oversight.

The Pike Committee report suggested that the CIA covert operators were propping up dictatorships, listed CIA intelligence failures, claimed congress had been misled about the total cost of foreign and domestic intelligence, and included an attack on Kissinger under the heading "SALT-Political Control of Intelligence".¹⁵⁷ The Pike Committee; however, attracted enormous criticism and was dubbed as irresponsible by many. By the spring of 1976, it appeared as though

Pike was thoroughly discredited as many condemned him for the leak-prone nature of his inquiry- his final report fell into the hands of Manhattan journalists and was later published. However, the real reason for the bitter reactions was not the actual leaks, but the nature of the subject matter.¹⁵⁸ Pike was both uncompromising and had a partisan agenda which made him “unpopular in Washington while also helping to broaden the CIA debate and to focus attention on vital matters such as the manipulation of intelligence”.¹⁵⁹ Additionally, Pike made aggressive informational demands and made public part of a secret study of the 1973 Yom Kippur war. Thus, the confrontational style of the Pike Committee led to bitter disagreements with the CIA. Ultimately, the House refused to accept Pike’s final report as the House was unable to determine who had leaked the Pike Report to the *Village Voice* (published under the title "The Report on the CIA that President Ford Doesn't Want You to Read.")

While Pike was obviously upset over the House’s vote, the recommendations of his committee are noteworthy. The committee recommended prohibiting assassinations, opening the intelligence community’s budget, allowing Government Accountability Office audits of the CIA, and introducing stricter oversight of covert actions. Furthermore, the committee recommended the establishment of a Standing Committee on Intelligence. Unlike its Senate counterpart (the Church Committee), the House committee would have exclusive jurisdiction over budget authorization for all intelligence activities and for all covert actions. Thus, despite the obvious failure of having the House accept the report, the Pike Committee inquiry was a dramatic break with the past. This marked the first significant House investigation of the intelligence community since the creation of the CIA. The CIA and the committee were caught in a power struggle to gain control over intelligence activities and foreign policy. This inquiry did foreshadow (which

at the time was not clear) that Congress would become more of a consumer of the intelligence product.

Senator Church sought to take a nonpartisan stance, and had the backing of the entire Senate for his committee. The scope of the Church Committee's investigation was staggering to say the least. The original plan was to engage in an eight-month investigation of the alleged abuses; however, the committee eventually needed an eight-month extension to fully complete their work. The initial focus of the committee was on a master spy plan prepared for President Nixon by Tom Charles Huston, a White House aide from Indiana. The Huston Plan recommended using the nations' secret agencies to spy on Vietnam War dissenters, despite laws to the contrary. FBI Director Hoover, Huston, the intelligence chiefs who signed on to the plan, and DCI Richard Helms portrayed the country as a nation under siege by student radicals. Essentially they were trying to create the perception of a nation under significant threat and to manipulate a fear of radicals so as to justify circumventing the United States Constitution during a time of a (perceived) significant threat. Initially the executive branch thought the dissenters were in fact agents of Moscow; however, it turned out this was not the case.¹⁶⁰ Thus, the executive branch needed to move outside the legal framework provided by the U.S. Constitution as it was too constraining in the struggle against communism. Moreover, the perception within the executive branch and the intelligence community was that 'our enemy is sinister and lawless, and the only way to defeat such an enemy is to become that same way'. The actions of the executive branch during this time period highlight the distinct difference between the executive and legislative branches of the United States- a difference so significant that had it not existed, the Huston plan would likely have not left the ground stages. The difference I am alluding to concerns the fact that Congress is divided, whereas the executive branch is significantly more

unified. The reason this is of such great importance is that it enables the executive branch to rather easily manipulate- whether it is the media, the American people, or Congress itself (this was especially important in the manipulation of the perception of the American people regarding the situation in the Middle-East).

The Huston Plan was merely the first of many significant wrongdoings. In the following months the American public discovered:

1. The FBI had created files on 1 million Americans and carried out over 500,000 investigations of “subversives”. Not one of these was with a court order.
2. NSA computers monitored every cable sent overseas, or received from overseas, by Americans from 1947-75.
3. The IRS allowed tax information to be misused by intelligence agencies for political purposes.
4. FBI agents had conducted a campaign to incite violence among African Americans.
5. The CIA engaged in drug experiments against unsuspecting subjects.
6. The CIA manipulated elections (even in democracies like Chile).
7. The CIA plotted both the failed assassination attempt of Fidel Castro and Patrice Lumumba as well as the successful assassination attempts of Rafael Trujillo and Ngo Dinh Diem.
8. A FBI counterintelligence program (codenamed Cointelpro) had harassed civil rights activists and Vietnam War dissidents, in an attempt to break apart family and friendship ties.¹⁶¹

The Church Committee came to the conclusion that the vast majority of men and women in the U.S. intelligence community did consistently carry out their duties to the best of their abilities in

an ethical and honorable fashion. For the most part intelligence officials were devoted to the law and to American constitutional principles. America owed its freedom in part to their work and their struggle against the real threats to American security. However, despite this part of the Church Committee's conclusion a much larger debate was present. The key issue was accountability and oversight of an organization which was founded upon the principles of secrecy. Some argued that secret operation were too sensitive and thus should not be treated as normal government activity. The nation would have to rely upon the good intentions and sound judgments of its intelligence officers. Civil libertarians, however, that an open and transparent society has no room for secret intelligence- especially when the aforementioned violations were taking place with little congressional oversight and few means of forcing upon the intelligence community a strong sense of accountability for its actions. The Church and Pike Committee's felt impelled to make changes and adopt measures that would rectify the aforementioned injustices as well as protect against future abuses.

In 1975, the Church Committee made its first significant impact on intelligence oversight and accountability with the creation of a permanent Senate Select Committee on Intelligence. The Committee's central conclusion was quite clear: in each of the cases where the secret agencies of America violated the law, there were legal means available to protect national security interests. Security need not be incompatible with openness in a democracy, and it was certainly possible to defend the country without adopting measures reminiscent of a police state. This conclusion is significant because it recognizes that the principle of accountability (element one of the open society) is valid even with respect to the hidden, secretive side of government. The Senate and House Intelligence Committees would now ensure that American civil liberties were not violated and the creation of such committees also better defined the limits and

responsibilities of the intelligence community and tied such agencies closer to the principles of openness which the American public and Congress valued.¹⁶²

As for how the Church Committee fared in the terms of long-lasting impact, the intentions of the committee were admirable, but ultimately provided little efficiency. It can be argued that to protect openness and to protect freedom requires daily attention- these two committees became the first-ever permanent, well-staffed committees concentrating solely on intelligence operations. The Church Committee's work was also vital because it helped to establish safeguards which attempted to ensure that Congress provides a check against the abuses by the *secret* agencies of government. This is not to articulate that the Church committee ended all problems within the accountability realm of the intelligence community- the Iran Contra affair of 1986-87 served as a reminder that even strong legislative safeguards are not a guarantee against the misuse of power by determined conspirators in the executive branch (the sale of arms to the contras continued secretly without congressional approval).¹⁶³ Certainly structure and legal means are fine means of preventing abuse; nonetheless, a means that must be understood and valued if America is to avoid future abuse, is placing individuals of the highest integrity in positions of power with the lawmakers maintaining a close watch over the programs and operations of the intelligence community.

In terms of the failures of the Church Committee, it must be understood that the power of committees in Congress is rather limited in general and significantly less powerful than the executive. First, when Pike and Church were preparing their investigations (before the permanent committees were created) the initial plan was for eight committees on intelligence, not two. Why such a drastic decrease? If one understands the debate between Congress and the Executive, then the reason is clear. The issue is the number of people that will be privy to what

are supposed to be secrets- that is, the executive and the intelligence community is concerned with who is trustworthy (and who will be more supportive of secret actions). Congress and the American people want accountability; however, does this mean that all of the House and Senate should be privy to secret intelligence information? The Executive surely did not believe so and it is able to put limits on committees. Members could not be anyone; they needed to be trustworthy in the eyes of the Executive.

Additionally, committees are held to secrecy. This is not what Church and Pike envisioned; in fact it was rather far from it. How does one do accountability in such an environment? The short answer is they cannot, not completely. Members can express their disagreement or dismay, but power is limited. Additionally, the fact that members are held to secrecy prevents them from sharing information with the rest of Congress. Congress has what they are told by the Executive and what they may discern from viable leaks or other sources. The relationship between Congress and the Executive is simply unequal- the principle of Separation of Powers means nothing if the Executive dominates.

The Foreign Intelligence Surveillance Act

The efforts of the Church and Pike Committee were one of a few attempts at reform during the 1970's. While the Church and Pike Committee focused on rectifying past injustices and working to prevent future ones through greater accountability standards, the Foreign Intelligence Surveillance Act sought to regulate and proscribe procedures for when the government and intelligence agencies are permitted to use electronic surveillance for collecting information from foreign powers and agents of foreign powers (this included American citizens and those who were suspected of espionage against the United States). To understand why the passage of this act was necessary and approved by Congress one must understand the time frame

in which it was passed. It was already known that intelligence agencies had abused their powers and spied on American citizens without warrant or sufficient reason (both the FBI and CIA were guilty of such acts); however, what became more important as new technologies were developing was the notion that spies and terrorists use home phones, public pay phones, and workplace telephones to communicate with one another and share secrets.¹⁶⁴ While protecting national security interests and learning of terrorists' intentions is an efficient means to ensure sufficient pre-emptive action is taken, it is significant to articulate that the underlying reason for the inspiration and ultimate passage of this act was largely due to the work of the Church Committee a few years prior. As previously mentioned the Committee investigated the usage of federal resources to spy on political and activist groups, the FISA was created to provide both congressional and judicial oversight of the government's covert surveillance activities of foreign agents and individuals in the United States (while maintaining the secrecy needed to protect national security).

The purpose of the FISA was person-focused; that is monitoring the "who" and "where" of the individual monitored. The sentiment throughout Congress was that some potential threats should be monitored with traditional criminal warrants; some should require a special national security warrant; while other suspected individuals should require no warrant at all.¹⁶⁵

Essentially the FISA banned the government from conducting electronic surveillance without a FISA warrant, subject to some exceptions- electronic surveillance without a court order could be conducted for the period of one year provided it is only for foreign intelligence information targeting foreign powers (as defined by the United States Code) or their agents; and there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party.¹⁶⁶

According to the FISA there were four types of electronic surveillance; the first and most straightforward was wiretapping telephone lines inside the U.S. Under this statute, the government needs a FISA warrant to wiretap a phone call from within the U.S. if the call was to or from a person within the U.S. and the person had not consented to the wiretap. The other categories are more complicated and applied only when a person monitored had a reasonable expectation of privacy and a Title III warrant would have been required in an analogous criminal investigation.¹⁶⁷ In circumstances such as these, the government needed a warrant to install a surveillance device inside the U.S., to intercept a call over the airwaves if the participants to the call were in the U.S, and to intentionally target the phone calls of a particular United States person who is in the U.S. from either outside or within the U.S.¹⁶⁸ It should be noted that reasonable expectation of privacy test is quite context sensitive and whether a warrant would be required could depend on where the person made the call from (home or work) or whether long-distance fees were involved.

One of the fundamental principles of this statute that directly relates to openness was the requirement that the government establish probable cause that the person whom the surveillance was being used against was a foreign power or an agent of a foreign power. Lastly, but perhaps most significantly the FISA established a United States Foreign Intelligence Surveillance Court (FISC). The function of the FISC was to oversee all requests for surveillance warrants against those suspected foreign intelligence agents. The days in which the CIA, FBI, military, etc. were able to monitor war dissidents or civil rights activists simply because they were paranoid were over and the FISA attempted to provide specific guidelines for surveillance. The statute essentially sought to maintain the balance of secrecy within an open society as it allowed secret agencies to conduct secret operations within the framework of the Constitution as well as

principles of openness. However, its effectiveness in maintaining a more open American society was ultimately limited by two factors: a shift in policy towards the end of the Carter Administration, and the complete shift in policy with the inauguration of Ronald Reagan into the White House.

The election of Carter alarmed individuals who believed that the CIA was already too tightly controlled as a result of reform efforts. Carter initially viewed Washington's bureaucracy and secrecy with suspicions and was carried into office following the wave of disillusion created by Watergate, Vietnam, and the CIA. Carter later recalled that he had been "deeply troubled" by governmental deception about foreign policy, and by the "CIA's role in plotting murder and other crimes".¹⁶⁹ Additionally, on January 24, 1978 Carter issued an executive order which added numerous restrictions affecting the intelligence community. The order gave CIA Director Stansfield Turner stronger authority over the intelligence community while also listing specific prohibitions-on assassination, drug experiments, and other malpractices- which were not new, but "their restatement served notice to the CIA that restraint was still required".¹⁷⁰ However, a major shift in public opinion was taking place during the years 1974-78 in terms of how the public viewed covert operations. Whereas previously the CIA's covert operations had been a major driving force behind the need for reform, its present inability to launch such operations began to surface as a significant weakness.

Upheaval in Iran added fuel to the fire. The Shah fled the country in 1979 and the revolution that ensued sparked criticism of the CIA for mainly two reasons: intelligence had not been good enough to warn U.S. policymakers of the impending crisis, and the CIA lacked the credibility to prevent the fall of an important ally or to limit the damage to American interests following the Shah's departure.¹⁷¹ Oil-rich Iran was a great source of wealth to many American

corporations and the U.S. also had two separate radar installations tracking Soviet missile testing in northern Iran. American was forced to abandon both of these due to the revolution and had ironically damaged rather than helped U.S. intelligence.

In 1979, attitudes toward the CIA continued to change, both in Congress and among the American public. Opinions essentially began to support a CIA that was able to effectively carry out covert operations and protect American interests. In 1979, the U.S. Embassy was stormed in Tehran, and then on Christmas day, the Soviet Red Army poured into Afghanistan and occupied the capital. Both events sharply reminded the nation of the need to retain at some level and in whatever form, a type of covert operational capability. Additionally, there was the threat of Communism engulfing not only Afghanistan, but also Angola, Ethiopia, and South Yemen.¹⁷² This affected Carter's stance on policy significantly as the image of a weak president with an incapable and restrained CIA was surfacing.

This caused a fundamental shift in the policies of President Carter during the final two years (1980-81) of his presidency. The Intelligence Oversight Act of 1980 required the CIA to notify only the Senate and House intelligence committees of proposed covert actions, not the eight which were privileged under the now repealed Hughes-Ryan amendment. This can be viewed in one of two fashions: it did reduce leaks and confirm oversight by making it more respectable; however, it also alludes to the notion that Congress was becoming more security minded and thus more likely to defer to the intelligence community and the executive. Carter essentially began to move with the conservative tide and authorizing action of precisely the type that he initially sought out to defend against.

Whereas Carter won support by promising to tighten the leash on the CIA, Ronald Reagan ascended to the presidency by promising to loosen restrictions. Reagan can be said to

have “unleashed” the CIA and covert operators against a background of sympathetic public opinion while attempting to bolster the Agency’s status in the intelligence field. The appointment of Reagan to the presidency and the subsequent policy changes that followed (namely, the notion of “unleashing” the CIA) took the initial steps made by Carter towards the end of his presidency and further shifted reform efforts in a direction diametrically opposed to the efforts made in the mid-late 1970’s. Thus, it can be argued that while the period from 1974-1981 was a period in which American policies alluded to a more open society, by the beginning of Reagan’s administration, signs were pointing to a shift in policy erring on the side of increased secrecy in government.

In terms of what this means for the FISA, while the intentions and motivations behind those Senators which cosponsored the bill (Ted Kennedy in particular) were admirable and sought to balance openness and secrecy in American society, the success of this piece of legislation is rather questionable. I have already demonstrated that following the passage of the FISA (which ultimately aimed to move the U.S. towards greater openness), America moved in a direction of greater secrecy. The balance of openness and secrecy erred on the side of greater secrecy during the next two decades; however, a fundamental shift toward even greater secrecy can be attributed to the passage of two pieces of legislation: the Patriot Act of 2001 and the FISA Amendments Act of 2008. Both pieces of legislation (especially the Patriot Act) were the direct result of the September 2001 terrorist attacks against the World Trade center and the Pentagon and the resulting fear and paranoia that America was vulnerable to future attacks. However, with the terrorist attacks of 2001 the vast majority of Americans were in favor of increased secrecy in the name of national security.

What does this mean? One common sentiment among scholars is that at times the American public is more inclined to accept secrecy, while at other times the public wants openness and does not trust government. When the public perceives that America is in danger and the government, the president, the media, etc. can paint a picture that echoes such notions, the people and Congress are more likely to agree to anything the executive wishes to do. This can be seen in the wake of 9/11 or during the beginning of the Cold War- Congress took a hands-off approach and the public believed their enemy was ten feet tall and the epitome of evil. However, when the government abuses the wide latitude provided by Congress and dabbles with shady and possibly unethical practices, the situation changes. Leaks of all the activities that Congress previously wanted to know nothing about occur; thus, outrage and reform efforts follow. This has occurred in the in the 1970's with reform efforts and public disdain with government activities, as well as in the last few years with the leaks of torture prisons, illegal detainments, and intrusive surveillance practices. Historically, finding a balance between openness and secrecy has not been easy; furthermore, the United States' tendency to dabble on the sides of both secrecy and openness has proved to be quite cyclical. Following the Cold War the mantra was 'national security'; therefore, the U.S. leaned towards secrecy; then leaks occurred and reform efforts followed. Then 9/11 occurred; increase secrecy for a few years and then Congress pushes back and the American people become enraged. In defense of Congress, they got the picture much quicker with the second wave of secrecy following 9/11. Maybe the images of a hands-off congressional approach form 1947-1974 were in their minds or maybe they got smarter. Either way a balance must be found. Prior to addressing this balance which will be the subject of my conclusion, I shall address legislation following the events of 9/11.

The Patriot Act, passed in October of 2001 following the 9/11 terrorist attacks and it amended the FISA. To understand the amendment to the FISA it is important to understand the time frame in which the FISA was up against. Technology in general and technology communications have advanced greatly and the person-focused FISA rests on assumptions about technology and constitutional law that are often no longer valid.¹⁷³ The technology and constitutional law of intelligence investigations has become heavily data focused and internet technologies key significantly more to information collected and less to who sent or received it. Essentially location and identity have become less important; what has come into play is relevance.¹⁷⁴ The FISA legislation was challenged by the Bush Administration because of the changing technology. In 1978, most foreign intelligence was gathered overseas by tapping communications that occurred outside of the U.S. However, today, much of the worlds electronic communications

“Passes through fiber-optic networks (switches) located in the United States, even in cases where both parties to the communication are located outside the country. Because the 1978 FISA was understood to require the government to obtain a court warrant whenever the communication was routed through the United States, this meant that such foreign communications also require a warrant. So, proponents of FISA reform argued that existing law needed to be changed in order to permit warrantless surveillance of foreign communications routed through the United States.”¹⁷⁵

Thus the Patriot Act sought to rectify this issue and enable significantly looser restrictions on law enforcement agencies' ability to search telephone, e-mail communications, medical records, as well as other records as well as ease restrictions on foreign intelligence gathering within the U.S. With respect to FISA directly, the Patriot Act includes terrorism on behalf of groups that are not specifically backed by a foreign government (recall that the FISA does not entail this provision).

With respect to the Foreign Intelligence Surveillance Amendments Act of 2008, the story is quite similar. Congress passed the Foreign Intelligence Surveillance Amendments Act to

amend the 1978 FISA which had required a warrant in order to conduct electronic surveillance. This 2008 act essentially amended this and permitted warrantless surveillance.¹⁷⁶ Quite simply, 9/11 changed the game. It was revealed in 2005 that the NSA had been monitoring all communications inside the U.S. since at least 2002. Additionally, the NSA had kept a file on every American citizen, and each file contained not only communications data but also credit card information and other financial data.¹⁷⁷ The messages collected by the NSA were then subjected to complex algorithms so as to gain insightful details about the messages—“anything from credit card and bank records to movie rentals”.¹⁷⁸ Unfortunately, these complex algorithms used to sift through electronic messages do not have to pass through and be approved by the FIS court.

Thus to characterize the FISA as an ultimately successful reform, which certainly sought to limit warrantless surveillance and to protect the privacy rights and fourth amendment rights of United States citizens, would be incorrect. The FISA did provide limited success during the time frame during which it was passed and through the early 1990's; however, the technological advancements and the development of the internet changed the means by which electronic surveillance was conducted. Thus, much of the success of the FISA back in the late 70's and early 80's was simply no longer as effective because the act itself had essentially become outdated. Nonetheless, the issue that still remains, and an issue that will be addressed later in this paper, is the notion that despite the technological changes that ultimately required amending the FISA, could such a rationale support the mass, warrantless surveillance that was to follow?

The Freedom of Information Act

While the previous sections alluded to the Patriot act and the amendments to the FISA, it is important to understand the conditions which helped to foster such increased secrecy. Prior to the new millennium, all signs pointed towards a push for openness, not just in the United States, but internationally as well. At the forefront of this push towards openness was legislation that predated both the FISA and the Church Committee- the Freedom of information Act (FOIA) of 1966.^{xxiv} The creation of an FOIA can be attributed to Harold Cross, the former counsel of the *New York Herald Tribune*. He had harshly criticized FDR and his propensity for secrecy and power during the New Deal era and, in 1950, he was commissioned by the American Society of Newspaper Editors to write a report on the problem of government secrecy.¹⁷⁹ Cross operated under the presumption that citizens have a right to know and should have access to government records^{xxv}. Cross' ideas ultimately became rather popular among the American population and gained favor with both the press as well as democrats. During this time period there was rather fervent debate between those who wanted government information to be made available to the public. This was due to the ongoing stress on both constitutional and inherent rights of American citizens as well as the added assertion that government should be subservient to the individual. Furthermore, those in support of such arguments believed that an act enabling American citizens to gain access to government documents would act as a safeguard against corruption. Thus, such individuals thought it was necessary for government information to be

^{xxiv} The previous sections described the efforts at reform of the intelligence community from the Church Committee to the FISA. I now examine the FOIA as it relates to a late 20th century push for openness in the U.S. and internationally as well. While I mention the FOIA after the Church Committee and the FISA, the FOIA does predate both pieces of legislation and it should be understood that the FOIA functioned as the starting point for the later efforts at CIA reform which took place in the 1970's. I do not include this as the starting point of the CIA reform because this did not deal with the management of CIA abuses, but rather an inherent right of the people to know what the government is up to.

^{xxv} I am not asserting that Cross is right; I am merely explaining how the FOIA legislation passed.

available to the public. On the other side of the debate were those who, due to the sensitivity of some government information and private interests, believed that much of government information should remain secret.

Ultimately, the Freedom of Information Act passed in 1966 and it established an effective statutory right of access to government information.¹⁸⁰ However, this act only applied to executive branch agencies. Moreover, those on the side of more secrecy did manage some exemptions within the legislation. The FOIA guarantees to Americans the right to government information so long as it does not contain matter specifically excluded under one of nine exemptions. The nine exemptions are as follows:

1. (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
2. related solely to the internal personnel rules and practices of an agency;
3. specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; FOIA Exemption 3 Statutes
4. trade secrets and commercial or financial information obtained from a person and privileged or confidential;
5. inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;
6. personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
7. records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or

prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

8. contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
9. Geological and geophysical information and data, including maps, concerning wells.¹⁸¹

Thus, transparency did not prevail without restriction; and what will become the topic of controversy are these nine exemptions- especially the first one which states that information that relates to national security or foreign policy may be withheld so long as they are properly classified under an executive order. Classification within the United States is determined according to how sensitive the information in question is. Determining sensitivity is simply a rough calculation of the damage that would be done to national security if information were to be leaked. In the U.S. there are three levels of classification: confidential, secret, and top secret. In terms of how to calculate the differences between the three levels, top secret=exceptionally grave damage to national security, secret=serious damage, and confidential=damage to national security. Thus, classification under an executive order is subject to the discretion of the president as there is no strict guideline for how one should go about classifying or not classifying material.

While the FOIA did provide a victory in some sense for those in favor of increased openness and transparency within government, the exemptions within the FOIA did prove to be significant obstacles to accessing information. On the positive side, in 1980 the Center for National Security Studies made available to interested researchers a list of CIA documents released through the FOIA. This included the “Family Jewels” study on CIA domestic spying, as well as documents on mail-opening programs and various CIA “Studies on Intelligence”.¹⁸² In essence, the FOIA worked to open up substantial quantities of CIA information. Despite such

successes, the federal judiciary was reluctant to enforce the FOIA and eventually created huge exemptions that thwarted the intent of the statute. For example, in the 1950s and 1960s, the CIA was involved in financing a psychological research program (code-named MKULTRA). Researchers administered drugs such as LSD to unwitting human subjects in which at least two persons died while others suffered impaired health. To cover up this operation Director of Central Intelligence Richard Helms ordered the records to be destroyed in 1973.¹⁸³ In the late 1970's following an investigation, financial records related to the operation were discovered and a federal suit ensued. The court, however, determined that "Congress vested in the Director of central Intelligence very broad authority to protect all sources of intelligence information from disclosure".¹⁸⁴

Presidents could permit the disclosures of sources and methods to be authorized when public interest outweighs the harm to national security. President Clinton passed up an important opportunity to address this problem. Clinton issued a new executive order redefining standards that govern classification and declassification of information; such an order could ensure disclosures of many historical records of the Pentagon, the State Department, and the CIA.¹⁸⁵ However, as long as the *Sims* decision stands, Clinton's order may be irrelevant to the FOIA's application to the CIA. Clinton's order only addresses the standards for classification and declassification of information, which falls under the jurisdiction of Exemption 1 of the FOIA. Through the expansive interpretation for the "sources and methods' exemption, which comes into play under Exemption 3, CIA officials have continued to withhold information. The Clinton order essentially does nothing to limit the CIA's reliance of such an approach.

Additionally, the CIA has employed numerous obstacles to frustrate FOIA requesters. At times, officials claim that they cannot find any pertinent documents. Incredibly, in May 1996,

CIA officials informed a requester that they could not find any after-action reports, schedules, descriptions of routes, or flight folders from any U-2 flights over the Soviet Union between 1956 and 1960.¹⁸⁶ When requesters ask for records on a general subject, sparing CIA personnel from looking for specific items, CIA officials have rejected the request on the grounds that it would produce a vast quantity of material and cause an excessive and unreasonable burden on the Agency. At the same time, however, if the request is too specific, it may also be rejected if it specifies the name of a foreign national or foreign event.¹⁸⁷ To put this in more general terms, many times it comes down to priorities, personnel, and budgets. For example, when an individual makes a FOIA request, the government may claim that, due to other important priorities, the search cannot be conducted. For example, 'national security' can be argued to be significantly higher on the governments priority list; and thus, having individuals previously focused on national security working on making copies for a FOIA requester can be rejected or the requester may be told that they will not receive the request for a number of years. Additionally, it may be asserted that the government is short on personnel, or that there has not been enough money allotted in the budget to process FOIA requests. If the requester is unhappy they could of course sue; however, most individuals do not have the time or resources to be dragged through tedious litigation to achieve what they are statutorily guaranteed. Moreover, while President Clinton did issue an executive order mandating that records over twenty-five years old be declassified over five-year period, CIA officials have proposed exempting well over half of the agency records that are over twenty-five years old.

The Transition from Openness to Secrecy

The previous section discussed the function of the FOIA and assessed its effectiveness at providing the American people information about government actions. While I noted that there are significant issues and inconsistencies with respect to the FOIA, it is important to understand that this act was helped to foster greater openness not only in the United States, but internationally as well.^{xxvi} The FOIA articulated a presumption that government documents should be publicly accessible, and provided methods for compelling officials to comply with its requirements. However, at the time, this was still an oddity by international standards. While it did serve as a model for legislators in other countries, their governments were not quick to replicate the law.¹⁸⁸ By 1986, only eleven other countries had enacted statutes comparable to the FOIA.

However, after 1989, countries began to emulate American practices at a remarkable pace. This occurred because nations wanted to find a dramatic way to repudiate the secrecy of collapsed authoritarian regimes, and statutory recognition of a right to information was an effective means of doing so. Japan and the UK adopted disclosure laws first; followed by states in Central and Eastern Europe recently liberated from Soviet Union control. By the end of 2004, fifty-nine countries had adopted right to information laws.¹⁸⁹ Obviously this trend was a product of significant changes in the international political order in the 1990's. With respect to the U.S., new programs were established to declassify Cold War documents, and the Clinton Administration promised to reform policies that governed the classification of records in the future.¹⁹⁰ Additionally, many international organizations endorsed the right to information and advocated model laws built on principles articulated in the U.S. FOIA. Thus, the significance of

^{xxvi} While this paper is ultimately not concerned with the openness of other countries, I find the overwhelming acceptance of openness throughout the late 1980's and early 1990's on an international scale to be of value because it helps illicit the value placed on openness across a wide spectrum.

the FOIA was in the principle it established: citizens have a right to know about their government. It was therefore difficult under circumstances of increased openness to believe that the world was not on the cusp of an unprecedented era of openness. The movement towards openness was creating a new norm, a new expectation for any government that wanted to consider itself open and democratic- “The ideal openness regime would have governments publishing so much that the formal request for specific information...would become almost unnecessary”.¹⁹¹ However, despite the principle created by the FOIA and analogous statutes, the individuals most taking advantage of the statutes are scholars, journalists, businessmen, etc. The ordinary public is not the group exercising the right to know at a pace that would demonstrate an overwhelming interest in preserving openness. In the first chapter I argued that the people must not only be aware of their rights in an open society, but also exercise such rights. This principle has not yet been realized to a degree that would merit the conclusion that the public is utilizing the rights granted under the FOIA.

Thus, there are still important limits to the principle of openness in government. In the U.S., any hope of increased openness came to an abrupt halt with a dramatic change in the context of governance-triggered by the terror attacks of September 11, 2001. Following the attacks, worries about vulnerability to terrorist attacks led to an expansion of secrecy as government agencies reconsidered the wisdom of disclosing information that once had been made routinely available. Essentially the perception of new threats, whether accurate or overstated, has caused a fundamental shift in the manner in which the American government views openness and transparency. While 9/11 was undeniably a significant force in the increased secrecy, the process of rebuilding the walls of secrecy began even before the 9/11 attacks. In the early 90’s, defense and intelligence agencies resisted initiatives to reform

classification rules and declassify Cold War records- Congress and the President overruled them however.¹⁹² Nonetheless, by the end of the 90's, the issue was that the political climate had shifted with the appointment of President George W. Bush to the presidency. Declassification efforts were underfunded and former Senator Daniel Patrick Moynihan complained that the vast secrecy system "showed no signs of receding"¹⁹³ With 9/11, underfunded declassification efforts, and resistance from the intelligence community as well as the DOD, there is one key element that is at the foundation of the surging secrecy in American society- *technology*.

To argue that technology has become increasingly important in the United States and internationally and altered the manner in which people and governments live, communicate, gather information, and store vital data would be a gross understatement. The amount of personal data that can be acquired through the use of technology is alarmingly large. Vital records such as births, marriages, deaths, divorces, voter registration, party affiliation, property tax assessment info, features of one's home, vehicle registration, licenses, accident reports, traffic citations, business registrations, details on workers compensation, details on employment, arrest records, etc are all relatively easily accessible. In principle much of this data has been available for years; however, the ability to collect and use the information has been traditionally constrained because it has been recorded on paper and stored by a large number of state and local governments. Thus, the information that is both stored and, in principle accessible, has grown exponentially over the past decade and this has created challenges to the open society in two distinct areas- the right to information and the right to privacy. This is not to argue that both privacy and a right to information have not previously been challenged; I am merely arguing that with the significant technological advancements that have occurred in recent history, the

challenges presented are at an unprecedented level.^{xxvii} It is no longer just the CIA or the FBI that are the main culprits. Today we have the CIA, FBI, NSA, the rest of the intelligence community, the government, the military, and private corporations. The scope of agencies and organizations that are posing threat to American openness and transparency is growing and the need for reform and a better understanding of how each of these factors challenge openness is crucial to assess where America stands as an open society.

In the following sections I will provide a defense as to why the right to privacy and the right to information are good and how they fit into the open society. I will then examine how each is being challenged with the increasingly advanced technological capabilities of the U.S. government, intelligence agencies, private corporations, etc. I will examine the right to privacy and the right to information separately- I will begin with privacy and examine it in its entirety and then conclude this chapter with an examination of the right to information.

The Right to Privacy and the Open Society

Recall the first chapter in which I outlined the six essential elements of an open society. Again, these are not the only elements that are characteristic of an open society; however, for the purposes of this paper they will suffice as the six most important. The abbreviated version is as follows:

^{xxvii} It should be noted that this argument cuts both ways. While technology does challenge the right to privacy and the right to information, it has also been responsible for an increase in transparency in some sense. For example, consider WikiLeaks. WikiLeaks has brought insightful information to the public-information which diplomats simply stamped top secret on. The argument from government officials is that this will hurt national security; however, it can be argued that this is not necessarily the case. Information shared between officials has now been released and America is still doing fine in terms of national security. This alludes to the notion that maybe America need to re-think what should be secret and what should remain open to the public. Regardless, WikiLeaks is a prime example of technology adding to an environment that promotes openness. This paper is determined to demonstrate the negative effects that technology can have on an open society and finding a balance between secrecy and openness.⁴

1. The government and its agencies and organizations must be responsive to the people and tolerant of criticisms, critiques, and the expressions of ideas and views.
2. Political change can occur without violent revolution.
3. Freedom of speech must be protected to the utmost degree.
4. The marketplace of ideas metaphor must be recognized. That is, the free flow of opinions and ideas must be exchanged within society (regardless of whether such ideas are good or bad).
5. Society as a whole must become aware of the significance of individuality, the ability to criticize, and utilize such notions so as to question accepted practices in the search for truth. To be unaware and to not question or criticize would be to leave society more susceptible to manipulation, corruption, and injustice.
6. Society is transparent

Where does privacy fit within this framework? There is no explicit argument in the opening chapter which examines why the right to privacy is an essential element of the open society; however, I shall provide justification as to why the right to privacy is a fundamentally necessary right and does fit within the framework outlined in chapter 1.

Prior to providing a defense for why privacy is a good thing I shall explain its place within the open society. Elements three and five of the open society entail an element of privacy for a few reasons. Consider the third element- 'freedom of speech must be protected to the utmost degree'. This is significant with respect to privacy because of the effects reduced privacy will have on the manner in which people exercise freedom of speech. Consider the following example:

Imagine a 1984-type culture: privacy is nonexistent. All personal data is in a database somewhere. Every moment in the real world will cause a ripple in the digital one. The

environment is surrounded by millions of silicon eyes and ears filling institutional databases with copious amounts of information on the people's doings, whereabouts, and conversations. The data will feed an army of profiling engines engaged in guessing our opinions, and tastes.¹⁹⁴

The key element to take away from this hypothetical example is that people may curb what they feel, how they express themselves, whether they critique or simply endure- it is difficult to feel secure when one does not know if what they say or do will affect how they are treated.

Essentially it need not be explicit invasions of privacy; the looming threat of violations may affect freedom of speech. With respect to the fifth element of the open society- the utilization of criticism so as to protect against corruption, manipulation, and injustice- the argument is quite similar. Without privacy, the public is left significantly more susceptible to manipulation and corruption as they are less inclined to criticize certain practices or policies. Thus, privacy does have a place within the framework of the open society presented in the first chapter- it is an inherent component of both elements three and five as it helps to ensure that freedom of speech is not diminished and thus helps to ensure that corruption and manipulation is limited.

Why is Privacy a good thing?

While the previous section demonstrated that the notion of privacy has a place within elements three and five of the open society, it remains to be shown that the notion of a 'right to privacy' is a good thing in itself. I contend that there is no universal definition of privacy as it is primarily understood in terms of culture. However, in western democracies, privacy is centered on the following: (1) the right to be left alone, (2) limited access to the self, (3) secrecy, (4) the control of personal information, (5) personhood, and (6) intimacy.¹⁹⁵ Regarding why privacy is good, it can be argued that privacy serves personal ends which are beneficial to all persons in a society. Humans want to control who has access to them and who knows what about them.

Additionally, societies benefit from having untroubled citizens who can choose how much of

themselves to share with others. When people are able to pick the content and the timing of information that is released, a sense of self-security and self-control is created because people are able to form the belief that they are the masters of their own fate. This directly related to the open society because it creates a population that is more creative and productive as they are not forced to look over their shoulder (recall the hypothetical example of the 1984-type culture). When the people are more creative and know their privacy is protected, they may be more inclined to criticize and challenge accepted practices (element five of the open society).^{xxviii}

Another important aspect of the right to privacy is that it provides stability to any social system. Psychologist Barry Schwartz argues that

“Guarantees of privacy, that is, rules as to who may and who may not observe or reveal information about whom, must be established in any stable social system. If these assurances do not prevail-if there is normlessness with respect to privacy- every withdrawal from visibility may be accompanied by a measure of espionage, for without our rules to the contrary persons are naturally given to intrude upon invisibility”.¹⁹⁶

Moreover, privacy is an enabling right; by this I mean to assert that it is foundation for other rights. While the phrase ‘right to privacy’ appears nowhere in the United States Constitution, it nonetheless is inherent in many of the fundamental principles which we base our civil liberties upon. For example, the Fourth Amendment protects a person against a government intrusion and is the basis on which all other civil liberties, such as freedom of religion and speech, are built.¹⁹⁷

Privacy is certainly not mentioned explicitly; however, the protection against government intrusion or government actions which are detrimental to basic rights such as freedom of religion or speech entail an inherent component of privacy. Essentially while many will (rightly) assert that privacy is a modern invention, it is both an essential component and an intrinsic right in any democratic society because privacy protections are the bulwarks against encroachment against

^{xxviii} Thus, I am arguing that privacy is both instrumentally good and intrinsically good.

other rights.¹⁹⁸ Voting would be difficult without privacy because of the likelihood of retribution. Freedom of religion would be limited if details of religious observances were made public. In a democracy, privacy makes possible the freedom of expression, choice, association, mobility, and of thought.

With respect to privacy's importance, when one looks at the technological/communication advances that have been made in recent time there is no question that privacy is at the forefront- who has my information? How can it be gathered? Can databases be owned? There used to be domains of a person's life that was totally inaccessible. Home and bedroom, notebook and hard-drive, were all sanctuaries against the prying eyes and ears of others.¹⁹⁹ However, in the modern era, what is publicly available is dependent upon technology-telescopes, listening devices, and imaging sensors opening up information for public consumption what most would consider private domains. A promising line of argument for why privacy is a good thing concerns a combination of autonomy and respect for others. A basic principle of western democracies is that individuals, within certain limits, may set and pursue their own life goals and projects. Rights to privacy erect a "moral boundary that allows individuals the moral space to order their lives as they see fit".²⁰⁰ Additionally, second line of argument concerns the threat posed by oppressive governments. If oppressive regimes are to consolidate and maintain power, then privacy rights must be severely restricted and limited so as to keep tabs on the public and their actions, beliefs, and ideas. It seems unlikely that even a minority of the public would agree that oppression is desired or valuable and thus limiting such an aspect from society is a good thing- privacy helps foster such an environment.

Additionally, when privacy rights are violated when technology is given the power to make decisions based on people's rights to privacy, society itself is harmed. First, people

acquire labels based on personal information that is analyzed by machines, not human beings. Second, when people are under constant surveillance by machines that have the power to label them, they begin to conform to the rules the machines have been programmed to follow in making those decisions.²⁰¹ Why are such instances bad? Consider the modern-day example of labeling someone a ‘security risk’ or ‘possible terrorist’. It may be true that an Afghani male purchased a copy of the Koran; however, it does not follow that this person is a terrorist or an imminent threat to American security. Moreover, with respect to conformity, this has a negative effect on society because it makes it difficult for the super achievers to prosper- the Einstein’s, the Newton’s, etc. A conformist society creates a lack of initiative and unwillingness to take risks as people are simply going through the motions.²⁰² When this becomes the norm, the creative standouts would be subjected to more grief for their differences than they are in a society where privacy is valued. A society that makes it hard for individuals of this caliber to prosper will suffer.

Why Technology Affects Privacy

With the previous section detailing why privacy fits within the framework of the open society and why privacy is a good thing, it is now relevant to discuss how privacy is being challenged and how the technology/communication revolution is affecting this significant aspect of openness in American society.

In the past, controlling privacy was significantly easier than it is today. If one was alone in the privacy of his/her own home one could pull down the shades and do whatever one desired. If one did not want to be heard, they could stay out of earshot. This is the type of privacy that was challenged with rapid advances in technological capabilities. Some may argue that with the invention of the printing press in the fifteenth century and factory produced paper in the

nineteenth century which greatly increased the amount of information available that privacy challenges have been around for significantly longer than I am proposing. This claim is mistaken because the threat to privacy has always been limited for one key reason: it was incredibly difficult to sort through and store the massive amounts of material that we are capable of easily assessing today. Technological advancements have simply changed the game- storage, searches, and keeping track of vital information is stored and easily retrievable. Additionally, the cost of storage is low enough that it's easy to store multiple indices centered on any one field.²⁰³

One of the most fundamental issues affecting privacy is vastly improved internet searches. Twenty years ago such issues were not relevant; however, with the international use of Google and other public databases, the amount of information that can be returned during a search is staggering. This does not even begin to capture the capabilities of governments and the intelligence community; we are talking about ordinary people using the internet. During a simple search an individual can access email addresses, pictures, home addresses, and other personal information. This is not to argue that each item returned during a search is an invasion of privacy; however, the results are nonetheless impressive and allude to the notion that Americans have lost control of their selective information environment.²⁰⁴ Furthermore, since the 9/11 attacks the problem of labeling has become a significant privacy issue. In the days following 9/11, the FBI put together a list of individuals it was interested in questioning. The FBI sent the list to utilities, banks airlines, and many types of private businesses as part of Project Lockout. The vast majority of individuals on the list were not considered terrorist or even suspect; they simply might have been able to provide FBI agents with important information about the hijackers. The circulation of this of these lists has resulted in many people

being fired, denied jobs, and turned down for loans and apartments- others have been wrongfully labeled as terrorists.²⁰⁵

One specific challenge to privacy that has been developing in recent history is the use of data mining. Data mining essentially functions as a tool for discovery of meaningful patterns of data. Of particular importance to the discussion of privacy is the fact that data mining software, products, and services are being introduced into the marketplace by a large number of competing vendors.²⁰⁶ The consequences of such practices are troubling because with the greater focus on security after 9/11 an infusion of tax dollars for research and development will attract a swarm of competitors. This is problematic because these competitors will now likely create strategic intelligence from what would ordinarily be meaningless bits of data stored in remote computers around the globe.²⁰⁷ Additionally, following the 9/11 terrorist attacks, the Pentagon announced a major initiative designed to speed the development of technologies that could actually be deployed in the 'war on terrorism'. At the top of the governments' priority list was the use of this technology to identify and track down suspected terrorists and predict their future behavior:

“Ideally, the Pentagon sought a system that could efficiently scan data in the nation’s computer networks and if they discover that a member of an extremist group also bought explosives and visited a Web site about building demolition, they might be able to halt a potential attack.”²⁰⁸

The problem with this system and with data mining techniques in general is that this has resulted in blatant discrimination, false labeling of Middle-eastern individuals, and a general disregard for the privacy of the American population.

Another significant challenge posed to privacy is present in the Patriot Act. Earlier in this chapter I alluded to this legislation as passing during a time when the U.S. environment strongly valued secrecy following the 9/11 attacks. The Patriot Act essentially provides law enforcement as well as intelligence agencies with greater authority to track and intercept

communications. The legislation significantly lowered restrictions on law enforcement agencies' ability to search telephone records, e-mails, medical records, financial records etc. Additionally, the Patriot Act reduced restrictions on foreign intelligence gathering within the United States as well as expanded the Secretary of the Treasury's authority to regulate financial transactions (particularly those involving foreign individuals and entities).²⁰⁹ Moreover, it broadened the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism. The definition of terrorism was expanded as well to include domestic terrorism; thereby enlarging the number of activities to which the USA PATRIOT Act's law enforcement powers can be applied.

This act directly relates to my initial concerns about openness In American society because the wide latitude of the Patriot Act represents a surge in surveillance capabilities and a corresponding decrease in the importance of privacy concerns. In the aftermath of 9/11, Americans saw rapid and overt introduction new technologies with less public debate than usual, because they are perceived as necessary responses to a changed situation. Moreover, many argue that events like 9/11 legitimate existing trends, inventions, and legislation and allow their extension in ways that were often not intended and which furthermore may be ineffective.²¹⁰ This is significant because it contradicts specific elements of the open society- namely, the idea of criticism and rational debate. With respect to the Patriot Act and, debate was stifled and privacy concerns were essentially disregarded because of the government's notion that 'it is best for national security'.

The equation proposed by the Bush administration and the government (and echoed by the intelligence community) is that less privacy=greater security. That is, by sacrificing some of the fundamental liberties granted to all Americans we can better protect them from looming

threats. The rhetoric of such arguments proposed by a number of policymakers is worth considering as it had a powerful impact upon the American public in the immediate aftermath of 9/11. This was the basic argument used by American policymakers to rationalize the use of the Patriot Act. This act was described briefly in an earlier section, but for the purposes of the effects of technology on privacy it is important to note that the Patriot Act is unprecedented in granting new surveillance and investigative powers to the state. Sweeping changes were made to U.S. law, including amendments to the following acts: Wiretap statute, Electronic Communications Privacy Act, Computer Fraud and Abuse Act, FISA, Family Education Rights and Privacy Act, Pen Register and Trap and Trace Statute, Right to Financial Privacy Act, and many others.²¹¹ Clearly this fundamentally altered the scope and meaning of privacy in American society. Compromises were made in the name of national security; however, despite the overwhelming changes to United States privacy law, the public itself appears to be ill-informed about the nature of this act. A survey conducted by the University of Connecticut in August 2005 found that although 64% of Americans support the act and 57% said they are familiar with its contents, only 42% were able to identify its primary intent of “enhancing surveillance procedures for federal law enforcement agencies”.²¹² Thus, an act affecting potentially any American is understood by a minority of the population. Part of the open society as defined in chapter one mentioned an informed public able to utilize their notions of what is right and to criticize questionable practices (element 5). How can this element of the open society be recognized if the public is not even aware of the magnitude of challenges to individual privacy?

The ‘Right to Know’ in an Open Society

A second manner in which openness is being challenged on an unprecedented level concerns the American people's right to know. Again this phrase appears nowhere in the constitution; however, I shall argue that it has a place within the open society and that it is of fundamental importance. The right to know is the social value of open, individual/public access to information held and disclosed by centers of authority.²¹³ First, the notion of a right to know does, in some ways, directly relate to notion of a right to privacy. People do not want to be intruded upon in their private lives and have 'right to know' if the government is engaged in programs that are curbing privacy and other fundamental rights. However, the case for the people's right to know goes further and is intertwined with elements of the open society as I presented in chapter 1 and again in this chapter. The sixth element of the open society- that the society is transparent and does not keep secrets from the people- directly captures the notion of a right to know.^{xxix} Thus, just as transparency helps to promote security, improves agency coordination, and holds leaders accountable for their actions, I hold the right to know to support a similar function as it is inextricably linked to transparency. Second, the fifth element of the open society- that the public is aware and able to criticize- also entails an element of the right to know. If the people are unaware of what the government is doing then clearly they are incapable of criticizing the government and acting as a check against abuse and corruption.

The Benefits of the Right to Know

^{xxix} This is not to argue that every single governmental action must be made public knowledge. I do not intend to assert that every time the NAVY SEALS are sent on an operation that the public needs to know. There are matters of national security and I do not wish to dispute this fact. However, I do intend to demonstrate that the notion of 'national security' has been abused in the past and is continuing to be abused in the present. My goal, which will be articulated in the next chapter, is to try and strike some sort of balance between security and openness.

During the first chapter I described why transparency is a good thing for the open society. It should be clear that transparency and the people's right to know are related; however, I still intend to demonstrate why the right to know is a good thing for the open society. The main difference between transparency as I described it and the right to know is that transparency dealt with keeping both the people as well as allied governments informed about the U.S. government's activities on a broad scale. I described it as 'the government does not keep secrets from the people and conduct business in private and the government exchanges and provides information to the people and other countries'. I described the right to know in the previous section as more narrow- keeping the American people informed of government activities that are directly affecting their fundamental rights (privacy rights, limits to freedom of speech, etc.). I am going to argue that the right to know, although not present in the constitution, is nonetheless good for openness for two reasons: it provides for a system of accountability, and it creates an informed citizenry capable of challenging and criticizing government practices (thus, I am arguing that the right to know is an instrumental good).^{xxx}

One of the key facets of an open society as I outlined in the first chapter concerned accountability. I argued that systems of accountability are essential components of open democratic societies. The people's right to know directly relates to this notion of accountability because without knowledge of how the government is functioning to serve the interests of the American people there is no means of holding leaders or the government accountable. United States representative decision makers must be held accountable to those for whom they make decisions. This in turn means that citizens must be informed about the activities and decisions of their representatives and that they must have opportunities to provide input to these

^{xxx} I will not go into as much detail as I did in my arguments for privacy as the arguments making a case for transparency were rather detailed in the first chapter of this paper.

representatives.²¹⁴ This informed citizenry will thus act as a safeguard against corruption, manipulation, and oppression characteristic of oppressive, totalitarian regimes.

The second fundamental component of the people's right to know that is good for openness concerns the ability to challenge and criticize accepted government practices and policies. The fifth element of the open society is concerned with avoiding a 1984-esque culture in which the citizens are unable to challenge government-the right to know is a key safeguard against such an issue. However, even without resorting to theories or "Big Brotherist" visions, which have already been effectively criticized by various scholars, concerns about a growing tension between the people's right to know and the surveillance activity carried out by governmental agencies appear to be well founded.²¹⁵ An open society requires an informed citizenry capable of analyzing information, gathering knowledge, and understanding it. The understanding and the ability to gain knowledge help to foster a citizenry that can develop a frame of reference and evaluate a particular piece of information and determine whether it is true, false, good, bad, etc. Governments which are not subject to criticism by the citizenry and are able to function independently of the will of the people are in a position to undermine public policy and harm citizens.²¹⁶ The arguments made concerning esoteric morality in chapter 1 demonstrated that to subject the people to the will of an 'enlightened dictator' may end up working in conjunction with the principles of openness; however, the potential for abuse is great and to subject the people to such a whim denies the citizens an element of respect owed by the government- an element which the dictatorships, monarchies, etc. cannot be relied upon to satisfy.

Technology and the Right to Know

Just as was the case with privacy, the right to know has been challenged on an unmatched level following rapid developments in technology. These centers include governments, corporation, and other influential bodies. With the development of technology, however, a much broader and more powerful set of computer-based tools has been created for tracing and sorting individuals and regulating their behavior, including data-mining tools, biometrics, facial recognition, intelligent highways, cookies, etc.²¹⁷ Additionally, images of 9/11 put security back on the political agenda with a vengeance and a new acceleration and the government and intelligence community knew it would trigger immediate political action. This legislative activism was fuelled by the assumption that the intelligence and law enforcement agencies were unable to connect the dots to prevent the terrorist attacks.²¹⁸ Additionally, it was widely held that the existing legal framework contained serious deficiencies with respect to security. With the notion that sweeping changes needed to be made to combat the perceived threat of terrorism to national security, technology became the key to facilitating such changes.

The main issue with respect to technology that is affecting the people's right to know concerns the immense privatization of the internet over the past decade. Once hailed as a place where users could escape the hierarchical control of government, the internet is now subject to a movement wherein public "land" is being privatized and citizens' creative labor is appropriated to profit the corporations that administer these places.²¹⁹ The privatizing is being done by wealthy corporations, resulting in asymmetries between the corporations and the individual users. Essentially the corporations are granted with significant surveillance powers while their own actions are becoming increasingly opaque. Thus, it becomes difficult to hold these corporations accountable for their actions, contradicting one of the fundamental principles of the open society. Online corporations can track users' actions and browsing patterns using cookies,

even monitoring idle surfers who do purchase nothing. This data is then aggregated and compiled into profiles using sophisticated data-basing technologies.²²⁰ The issue is that the people being monitored and profiled are unaware of who and what is tracking their activities.

Furthermore, behavior and lives online are becoming increasingly connected to their offline identities, and users are cautioned to censor their behaviors and the information they reveal online. An example of such an instance is the use of Arab-Americans in the CIA, State Department, etc. working as translators, informants or agents. Certainly Arab-Americans have value to U.S. security interests; however, there is not widespread agreement on how to treat such individuals. Those who err on the side of civil rights (ACLU-types for example) would argue to leave them alone. Treat them as you would treat any other individuals working in government- run a background check and that is it. Those more concerned with national security are diametrically opposed to such arguments. Such individuals would propose more extensive surveillance and screening of Arab-Americans. While this obviously has elements of privacy, the notion that people do not have right to know who is monitoring them contradicts principles of openness. Many of the people being monitored are not terrorists but merely law-abiding U.S. citizens subjected to surveillance practices that would have never been accepted had 9/11 not shaken the political, social, and economic climate of the U.S. An open democratic society should represent a symmetrical relationship between the people and the government- the rulers provide the public with access to their deliberations and the policies they form. However, corporate rule is asymmetrical- decisions and actions remain opaque even as users are rendered increasingly transparent.

Since the early years of the Bush administration due largely due to the 9/11 terrorist attacks, laws that permit mass warrantless spying on Americans electronic communications

without adequate judicial oversight have been passed in an environment fuelled by perceived imminent threats.²²¹ One of the consequences of such perceptions is that the people's right to know has been challenged by a source that is supposed to act as a safeguard: the media. A few companies control all of cable and network TV (News Corp, GE, Viacom, Time Warner, and Disney) and each has lobbies in Congress and is thus prompted to hide news that strains their relationship with the government. For example, even the *New York Times* was relegated to quoting government spokespersons in making the case for the Bush Administration to go to war in Iraq.²²² While the *New York Times* has since apologized for such actions, examples like this challenge the right to know at a fundamental level as a vigilant media is needed to keep the people informed. However, failures such as these give the people no reason to assume that the media will act as this safeguard in the future. The degree to which the mass media are independent of government actually provides a useful index for gauging just how controlled or autonomous a culture really is.²²³ The less people know, the easier they are to manipulate and control; the more informed the public is, the more capable they are of making rational decisions. In dictatorships (closed societies) where civil liberties are nonexistent, the media are mouthpieces of government. Thus it can be argued that the U.S. may appear to be free and open; however, this may be more a matter of degree rather than kind.²²⁴

Corporate media consolidation has also played a role in the downsizing of independent, investigative-reporting divisions of the giant media corporations. The "single minded drive to reduce costs and increase profits has lead to reliance on government spokespersons as sources of news about government activities in lieu of more costly, independent, investigative reporting".²²⁵ The issue here is that these government spokespersons cannot be relied upon to be objective (politicization). When supposed experts are being interviewed about a specific issue, it is likely

that they will be crusaders of the current administration serving only to manipulate public perception. Statistics show that 40 percent of people receive most of their national and international news from the internet as of December 2008.²²⁶ Unfortunately, Americans were able to recognize that they have been caught in a web of deception promulgated by the government. However, those who did realize this were kept informed largely through news sources on the net, including alternative media and news from foreign websites.²²⁷ Thus, the American media has not been doing its job of acting as a safeguard and keeping the public informed about government activities.

It is well-known that authorities tend to err on the side of more secrecy in times in times of insecurity, wars, terrorism, etc. The case of 9/11 and the subsequent war in the Middle-East are no different. The US, along with several other countries, has passed legislation intended to tighten security, to give police and intelligence services greater powers, and to permit faster political responses to terrorist attacks.²²⁸ It is no secret that recent legislation providing wide latitude to the FBI, CIA, and other government entities has resulted in the profiling of a along Arab lines and the unlawful detention of several thousand “suspects”.

The anxious American public is willing to put up with many more intrusions, interceptions, delays, and questions than was the case before- mainly because of the media polarizations painting a picture that we can either have security or liberty, but not both. However, this is a false dilemma: liberty and security can be reconciled and the open society need not be in jeopardy. With respect to security concerns, what needs to be done is to provide access to knowledge that can be used efficiently, hiding information from people is not the answer. Searchable databases and international communications interceptions were fully operational on September 10.²²⁹ However, they were present to no avail. While internal

surveillance and the use of new technologies will likely increase in the immediate future, it has not been demonstrated that if the intended goal is achieved (to protect national security and catch terrorists prior to striking) that it will not be due to other means.

This chapter was intended to demonstrate the current problems affecting the open society in America in the modern era. Technology has been a key influence along with the shocking events of 9/11 which have drastically changed government policies for the use of powerful technologies capable of challenging privacy and the right to know on levels that have never been seen in the U.S. I have not yet proposed where America stands currently as an open society and what changes are necessary to ensure openness is maintained but security is not sacrificed. I find the notion that security=less privacy to be somewhat of a false dilemma and the two values are not necessarily incompatible. In the following chapter I shall propose what changes need to be made to create a balance between openness and security in the U.S.

Conclusion

Thus far this thesis has described six essential qualities of the open society, the ascent of America to world power status, the development of secrecy within American government, and demonstrated the major challenges that affected openness prior to the Cold War as well as those that have challenged openness following the 9/11 attacks on the World Trade Center and the Pentagon. It should be clear that secrecy raises fundamental questions about the nature of America's status as an open society. To reiterate what I mean when I speak of secrecy, I am referring to not only the hiding of information by the government from the public, but also the use of tactics to secretly conduct actions that challenge the fundamental rights of American citizens. This chapter will address America's current status as an open society and recommend means by which to enhance openness while not sacrificing the protection of American security interests.

Where Does Secrecy Fit?

Prior to recommending potential changes to enhance openness within American society, it is important to briefly examine secrecy's importance because all open societies must reserve some form of protection from complete openness.²³⁰ A single, uniform model for transforming the idea of an open society will likely not exist. What can be agreed upon is that the open society stands for a balancing of values which include but are not limited to autonomy, accountability, privacy, and some type of *responsible* secrecy. Secrecy is, at times, necessary to the functioning of an open society. Philosopher/sociologist Georg Simmel regarded secrecy as one of society's most important achievements.²³¹ With respect to the intelligence community,

the ability to maintain an effective and legitimate veil of secrecy over certain types of information is certainly valuable. Those who prefer to err on the side of more secrecy argue that there are countries and organizations that simply do not like America or what the country represents. Proponents of this view claim there are those who want to hurt the United States and it is probably best that the government does not release every detail of information lest the information be discovered by the wrong person. Furthermore, names of agents, national security secrets, and preservation of sources and methods are each examples of secrets that may be essential to preserving national security. If a name is released by the press, an agent may be targeted and exterminated (recall the controversial assassination of CIA Station Chief Richard Welch); leaking an important secret may arm a potential enemy with information detrimental to the security of the U.S. (If an enemy were to discover the intricate details of a planned covert operation).

The arguments of those who advocate increased secrecy are not entirely without merit. Secrecy is at times necessary; however, secrecy has a great potential to be abused. This paper has demonstrated a number of such abuses that have occurred in the past and thus the potential for abuse must be taken seriously. Government vaults hold over 1 billion pages of classified information more than twenty-five years old and are thus unavailable to scholars, researchers, and the general public. Much of this information is kept secret to hide embarrassing political information, not responsible secrets.²³² Responsible secrets involve keeping information secret that is essential to protecting national security interests; hiding embarrassing information is simply keeping information without justification. Hiding such information from the public not only undermines accountability, but also harms debate on national security issues. Therefore, a

standard must be created so as to permit secrecy when necessary while helping to foster an environment in which such powers are not abused.

There have been at least two efforts in the recent past by international nongovernmental bodies to draft general principles which will permit a degree of secrecy while maintaining openness in all democratic societies (not just the U.S). In 1995, a group of leading experts on transparency met in Johannesburg and prepared what came to be known as the *Johannesburg Principles*- which sought to define the limits of secrecy in the security sector. This declaration, among other things, included the proposition that agencies within the security sector should be permitted to withhold only “specific and narrow” categories of information, enumerated in law, to protect national security.²³³ This document also held that justification for withholding such information must be placed aside if there is larger public interest in disclosure and that there should be independent review of government decisions to keep secrets (letting more people in on the secret). A second effort was made in 2001 by the freedom of expression group ARTICLE 19. This NGO proposed a model RTI law that would permit government agencies to withhold the disclosure of information if the disclosure would cause “serious prejudice to defense or national security”.²³⁴ The key difference between these two NGO’s is that the 1995 proposition is more specific and narrow with respect to categories of information that could be withheld for national security reasons, while in 2001 the proposition entailed a more general, albeit rigorous test. While the propositions made by both NGO’s differ, they allude to some fundamental principles which must be recognized if a balance is to be struck between openness and secrecy.

First, the standard for withholding information should be rigorous- we cannot create a vague standard that entails merely the ‘apprehension of possible harm’ as it will likely be abused. The second (and equally important) element that must be recognized is that the decision to

withhold information needs to be “subject to effective review by an independent office”.^{xxxii} This accomplishes several goals. In general, the threat of independent review encourages the decision making process about what to disclose to be more carefully deliberated in the initial stages. Second, this process of independent review encourages public discussion about how to balance secrecy and openness.²³⁵ This paper has already demonstrated that excessive, unchecked secrecy increases the likelihood of abuse and erodes accountability- there is no means of monitoring the government. Moreover, in recent history and with the further development of technology, we have seen the privatization of security functions and increasing concerns about terrorism leading to a deepened commitment to secrecy.²³⁶ Experience has confirmed that discretion given to government officials is easily misused to prevent accountability for abuses of authority and to block public participation in critical decision about government policy. Thus, the bar must be set high for withholding information and unqualified deference to government decisions regarding classification is unacceptable.

How can the United States Find a Balance between Secrecy and Openness

The key issue surrounding this entire paper has been trying to find a means of effectively balancing necessary secrecy with openness- protecting national security but not leaning towards the side of secrecy on the spectrum of openness. During the remainder of this chapter I will

^{xxxii} It is important that the independent office which engages in review not fall into the same positions as the courts and Congress. With respect to the courts, if there is a case dealing with national security before the court it will not be public *(due to the nature of the material) but there is the more important issue of who presides over the case. If we have a national security judge that is essentially an extension of the executive or subservient to the will of the current administration, then secrecy will likely dominate and the odds of making the process more open are slim. With respect to Congress, I have already articulated that it can become a part of the executive branch’s general game plan. Thus, the independent body of review must avoid such pitfalls. I will present some tools of Congress in the following pages that will help find the right balance.

examine some important steps that can be taken to manage this difficult situation. I do not believe that the following recommendations will solve the problem and that I will be able to find the exact point on this hypothetical spectrum of openness that will satisfy the many different ideologies about how to solve this issue; however, the following steps that I shall propose will provide measures that will bring America closer to the side of openness while still maintaining the important element of responsible secrecy.

Prior to engaging with what must be done to help find balance between openness and secrecy, it must be understood that the work of the intelligence community and the executive with respect to secrecy are derivative of the fact that intelligence agencies, by their nature, function in secret.²³⁷ While lack of accountability and the failure to effectively oversee secretive actions have consequences, so does the failure of the intelligence community and the executive to protect national security interests. Mark Lowenthal argues that Americans must understand that there is a need for an effective intelligence community just as there is legitimacy to the concern that the intelligence community not be permitted to function in ways that undermine civil liberties.²³⁸ If we can avoid the extremes (complete openness or complete secrecy), then we have chance to find solutions that satisfy both sides of the debate. Consider the framers of the United States Constitution: they started out with skepticism of those in powerful positions. Individuals, agencies, and organizations, it was presumed, are all tempted to maintain authority for as long as possible by using whatever measures are at their disposal. Thus, some foundational starting points are necessary to understand how to effectively manage secrecy in an open society.

First, the laws of the land (such as the Bill of Rights and the Constitution) must be applied to the intelligence community just as it is applied to other spheres of government. No

more Abu Ghraib or blatant racial profiling (such as that conducted by the FBI on Arab-Americans). A second important principle is that in a democratic society certain activities are simply ruled out (torture for example). These two principles are absolute because “they violate fundamental norms of the society and pose too great a risk to the liberty of citizens of that society and to society’s own perception of its moral worth”.²³⁹ Additionally, when proposing and designing rules pertaining to the intelligence community, policymakers must address not only what is appropriate given the situation but also what has the potential to be abused. The intelligence community is responsible for providing information to policymakers so that preemptive action may be taken. Why not should the same mentality not be adopted when designing rules applicable to the intelligence community? Essentially I am arguing that lawmaker should think about the potential for abuse prior to enacting legislation and granting powers.

Congress

Of fundamental importance to creating a balance between openness and secrecy is Congress. Congress alone has the formal legal authority within the U.S. system to establish rules of conduct within the intelligence community and doing so will help to ensure that changes are subject to scrutiny-mandating that both the needs of the intelligence community are met along with the needs of an open society. Thus, the way to find balance lies, in part, in the normal means by which a democratic society makes rules- the legislative process leading to the enactment of laws.²⁴⁰

While in principle such an idea is conceivable, there is some practical difficulty in utilizing this principle in the real world. The United States government is far from a monolithic organization and this is fundamental to understanding why Congress, the Executive, the

President, and the intelligence community often have different interests which often conflict. The President wants to advance his agenda, the intelligence community wants to influence policy, and Congress wants to be kept in the loop at all times. The concept of congressional oversight is found within the Constitution. Article 1, Section 8, paragraph 18, states:

“Congress shall have power...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof”.

The essence of congressional oversight is the ability to gain access to information relevant to the functioning of government (which lets more people in on secrets). However, this oversight is not always easy to achieve as demonstrated in the previous chapter. The executive branch ultimately speaks with one voice, while congress has 535 voices to manage. This significant difference leads some to question whether this constitutional authority of Congress works in reality.²⁴¹

Despite such legitimate concerns, Congress does have some tools at its disposal that can help maintain a balance between openness and secrecy. First, Congress has control over the budget for the entire federal government. This provides the most fundamental lever of congressional oversight. The process is rather complex; however, it is composed of two major activities: authorization and appropriation.²⁴² This process provides an important facet of oversight because technically, Congress cannot appropriate money for a program that it has not authorized. When funds are appropriated but not authorized, the agency receiving the money may not spend it until a bill is passed to authorize it. Thus, the budget gives Congress power over secrecy within the intelligence community because it is able to use the intelligence budget to restrict administration policies of presidents. For example, recall the Iran-Contra example in the previous chapter. Congress used the intelligence budget to restrict Regan Administration

policy in Nicaragua by passing the Boland Amendment. The Iran-contra affair surfaced as a result of efforts to circumvent such restrictions.

A second important tool in the oversight process is the ability to call hearings. Given the nature of intelligence, most of these hearings are closed. Hearings are essential to the oversight process because they are used as a means of requesting information from responsible officials and obtaining alternate views from outside experts.²⁴³ As Chapter 4 demonstrated, hearings have been used to uncover embarrassing and illegal actions pertaining to the intelligence community. These hearings lead to the creation of committees within the House and Senate to propose changes. While in principle, hearings and the creation of committees are important facets of oversight and maintain accountability within the other spheres of government, there are practical issues that must be addressed. With respect to the creation of committees, it is essential that the right questions are asked and that those being questioned provide detailed and truthful information to Congress. However, this means potentially divulging information that may be secret and those inside of the committees are held to secrecy standards that prevent widespread dissemination of information. Thus, it makes accountability difficult because while a member of Congress may claim that a given policy or future operation makes him uncomfortable and does not think it should occur, power is limited. Additionally, the executive has the power to not tell things to members of Congress. Congress merely has what they are told and what they may be able to ascertain as a result of leaks.

So what can Congress do to make sure accountability is not lost and to help effectively balance secrecy and openness? This is no easy task; yet Congress does have a few options. Members could break their secrecy oath and provide information to others, try diligently to make the President or the intelligence community reconsider their actions, or potentially resign from

the committee. Congress does maintain control over the intelligence budget and could potentially use this to its advantage. However, while Congress' control over the intelligence budget is an important means of control over the intelligence community (think Iran-Contra), it is also related to Congress' responsibility for how well the intelligence community performs. Recall earlier in the chapter I argued that as Americans we must recognize the need for an effective intelligence community; lack of funds and support from Congress are a factor. This issue became clear after the poor intelligence performance in the months leading up to 9/11. Mark Lowenthal argues that "Some people observed that Congress bore some responsibility for intelligence performance because of the steep decline in resources devoted to intelligence after the fall of the Soviet Union in 1991".²⁴⁴ Essentially while the aforementioned tactics may serve as useful tools in some instances, there are issues that affect efficiency; thus, other sectors of government, the media, and the American people must serve as a means of maintaining the balance.

The Executive

The president and the executive play an important role in maintaining a balance between openness and secrecy; however, at the source of the problem is that most presidents would prefer to err on the side of more secrecy. Party affiliation is irrelevant as presidents have their own agendas and would prefer to limit the dissemination of sensitive information to the public and to Congress. Despite the inclination of the American presidency to desire increased secrecy, there are steps that can be taken to help balance American government so that openness, fundamental liberties, and human rights are not trumped by unnecessary secrecy measures. It is not an outlandish assertion to hold that striking the right balance between secrecy and openness requires leaders who will know right from wrong; however, getting sufficient help in making decisions is

not always present. Presidents are inclined to choose advisors that think in similar fashions and view the world as they do- thus finding advisors with opposing viewpoints is unlikely. This has led to a phenomenon called *groupthink*. Essentially group members involved in the decision making process along with the President seek to minimize conflict and reach a consensus decision without critical evaluation of alternative ideas or viewpoints. Some of the initial research on groupthink was conducted by Yale University research psychologist Irving Janis who argued “Groupthink refers to a deterioration of mental efficiency, reality testing, and moral judgment that results from in-group pressures”.²⁴⁵ Due to the Presidents’ closest advisors viewing the world in the same manner, an environment conducive to groupthink is fostered and has affected the decision making process. Those who may raise objections to a particular policy or are not on board with the Presidents own inclinations will be filtered out- they may be present during an initial meeting, but after raising objections will find themselves not invited to the next meeting. All officials want to be invited back; thus, the sentiment is ‘fight once perhaps, and then keep your mouth shut’. A key step that the executive branch of government can take to help deal with this issue and ultimately foster an environment conducive to openness (while maintaining reasonable secrecy) is to ensure that “every administration has within its highest councils individuals who will ardently and credibly defend civil liberties”.²⁴⁶ This is particularly essential in wartime decision-making as public and governmental fears are high and decisive, immediate action is deemed necessary. Such individuals can help to temper the government’s response to wartime hysteria. When people are angry or frightened, as was certainly the case in the wake of 9/11, even a lone dissenter can play a crucial role.²⁴⁷ Those with the most power deserve the most scrutiny and individuals that can temper responses and foster debate will be essential to ensuring a proper balance.

The Media

The issue of the media not doing a sufficient job to inform the people has been discussed earlier in this paper. Secrecy in democracies is destructive as it hides abuses of power, robs citizens of their chance to have a voice in government, and prevents policymakers from having to defend their policies. For citizens to have a voice in government, they need to be informed and the task of the media is to keep the American public informed about important policy questions, new legislation, and anything else that pertains to how the government is serving the people. The media plays a central role in this issue because it has an incredibly powerful and immediate impact on the public's perception and response of specific issues. Panic can be created rather quickly with the angle displayed on a particular issue by the media as depicted by the American public responding to depictions of terrorism.

While in principle the media should serve as a valuable source of information helping to create an informed public, this is not always the case. Previously, I discussed the media acting as essentially an extension of the executive branch and the intelligence community following 9/11. It worked in fostering an environment of fear to garner support for the "War on Terror" and it raises the important question of how can citizens avoid being tricked by the media? The simple answer is making sure sufficient evidence is presented; however, what counts as sufficient? There are a number of independent media and online news sources that make it possible for the public to gather additional information and to corroborate stories prior to accepting them.²⁴⁸ There is the looming threat of corporate media working with the government to turn the internet into an extension of mainstream media; however, for the time being, the internet is still a great source of information. Thus, while the media does have the obligation to provide objective, informative, truthful news to aid the American people in deciphering how the government is

treating its citizens, some of the responsibility falls on the American people (unfortunately this is a rather uneven fight).

The American People

The American public need not be a helpless victim simply waiting for the government to figure out how to balance openness and secrecy and some would argue that the complacency of the American public is part of the disease. Americans must become aware of their dwindling rights and the balance of openness and secrecy. The power of the American public lies in their ability to organize and pool their numbers.²⁴⁹ The previous section mentioned the lack of reliability in the mainstream media and the importance of online sources-an informed public cannot be easily manipulated into surrendering civil rights. This not only means using alternative online sources, this means looking into activist organizations and looking underneath the superficiality of a government spokesperson quoted on CNN or Fox News sites. Succumbing to “War on Terror” rhetoric is unacceptable. The “War on Terror” cannot be used as a trump card to infringe upon the rights of American citizens. While most will argue that the Obama Administration has a duty to protect openness, everyone must realize that the American people also have an obligation to insist upon it.²⁵⁰

Part of the problem for the American people is that secrecy has become deeply entrenched in American culture following 9/11. In 2005, a survey of a large majority of Americans said that they were “somewhat” or “very” concerned about government secrecy and that this secrecy, according to the polls’ respondents, threatened to “undermine the functioning of good government”.²⁵¹ Why are citizens still detached? The answer may lie in the fact that current beliefs that government leaders cannot be trusted, that there is too much secrecy, and that the government is too complicated to be readily understood. This then combines to form a

powerful ethic of detachment. These forces acting together create and justify a lack of active engagement in political affairs; thus, a lack of initiative to insist vigorously on the accountability of the government and political leaders follows. Americans watch the political spectacle, and use the rhetoric of secrecy to justify their doing nothing more than watch.²⁵² Having an informed public is not only essential to openness, but is also beneficial because an informed public may observe actions that give evidence of looming threats. After all, it was an attentive citizen who alerted the FBI to the suspicious behavior of the alleged “twentieth hijacker” Zacarias Moussaoui.²⁵³

The Intelligence Community

While the media, the American people, Congress, and the Executive may be the four most important factors in ensuring a proper balance between secrecy and openness, the intelligence community plays an integral role as well. Mel Goodman proposes two key reforms that must take place to not only reform the intelligence community for the better, but also address the issue of secrecy in an open society: demilitarization and the elimination of politicized intelligence. Many argue that there should have been a major reform within the intelligence community and particularly the CIA following the end of the Cold War; however, there was none.²⁵⁴ What has occurred is the increasing militarization of the intelligence community- the current DNI, James R. Clapper, is a retired lieutenant general of the U.S. Air Force, and the Under Secretary of Defense for Intelligence, Michael G. Vickers, is a former Army Special Forces Officer. Additionally, the Pentagon controls more than 80 percent of the intelligence budget and more than 85 percent of all intelligence personnel.²⁵⁵ The problem with the increasing role of the Pentagon in intelligence activities is that the Pentagon has moved into the fields of clandestine collection and operations, without the constraints that limit the intelligence

community. Former Secretary of Defense Rumsfeld dispatched intelligence teams overseas, often without the knowledge of U.S. ambassadors and CIA station Chiefs, to gather intelligence for military and counterterrorist operations.²⁵⁶ The militarization of intelligence leadership is a blatant reversal of the kind of intelligence community created by Truman sixty plus years ago and will complicate efforts at balancing secrecy and openness. The NSA (controlled by the Pentagon) has been involved in warrantless wiretapping of American citizens and, according to Mel Goodman, must be taken from the Pentagon and transferred to a new office that reports directly to the DNI.²⁵⁷ Additionally, there is the threat posed by the DOD to American civil liberties with its enhanced role to gather and analyze intelligence within the U.S. The DOD has created new agencies, added personnel, and sought greater legal authority to conduct domestic security activities in the name of post 9/11 surveillance.²⁵⁸ Thus, to fix the problem and demilitarize intelligence, it is imperative that the command of the most important positions in the intelligence field (DNI, director of the CIA, and undersecretary of defense for intelligence) is not controlled by the military; but rather, such positions remain in civilian leadership thereby creating a national security policy that is not entirely militarized and erring on the side of increased secrecy.

The second issue within the intelligence community that must be addressed is the potential for politicized intelligence. Simply put, the CIA must learn to tell truth to power. The Iraq War revealed the lack of moral compass at the CIA. The Director, deputy director, several NIO's, and senior intelligence officials demonstrated no interest in the truth, and contributed to the politicization of intelligence supporting a phony case to go to war.²⁵⁹ It has already demonstrated that withholding information from the public is detrimental to openness; it is no different when it comes to politicization. The manipulation of the facts to support a policy

entails the same consequences- the truth is withheld from the American people as well as government officials who rely on such analysis and findings to make policy. Integrity is needed from top to bottom within the intelligence community. While some may propose that the problem lies more in the inexperience and relatively young age of analysts, this does not account for the groupthink mentality of tailoring the truth. By 2004, it had become clear the war in Iraq had been justified on the basis of intelligence that was badly flawed and twisted in its representation to the public.²⁶⁰ The problem should be attributed to secrecy within different sectors of intelligence thereby limiting a more complete view of the available evidence.

What about Times of War?

The previous arguments have addressed how to maintain a balance between openness and secrecy in American society. The executive cannot hide information from Congress, Congress must be vigilant in oversight and accountability procedures, the American people need to use their numbers to organize and demand openness, the media must provide objective information, and the intelligence community should be demilitarized while eliminating politicization. These suggestions have addressed openness in general; however, I have not addressed what should be done in times of war, when swift and decisive action is necessary. I draw the distinction between times of peace and times of war because historically, all branches of government as well as the American people can agree that times of war are not identical or analogous to times of peace. While there always (it seems) are people or organizations that do pose threats to America, there are very specific instances in which the perception of the American people as well as the government is that America is in a “state of emergency”.. I am referring specifically to times like the Cold War (not including the years of reform and increased openness between 1974-1981) and 9/11 where fear swept the nation and the overwhelming sentiment was that America

needs to act fast and to place constitutional restrictions on hold in favor of policies more reminiscent of a police state than an open society.

In emergencies, Americans do not have much of a choice other than to trust their government to effectively handle the situation. However, it does not follow that Americans must also leave it up to their leaders to balance liberty and security over the long term. Michael Ignatieff proposes a solution to the issue of balancing openness and secrecy during times of national emergencies which he refers to as the *lesser evil*. I subscribe to this view as well. A lesser evil position holds that in a terrorist emergency, neither openness nor secrecy should trump. A democracy is committed to protecting openness as well as security (which may be achieved through necessary secrecy). Within this theory, there are no trump cards: what works is not always right, and what is right does not always work.²⁶¹ Open societies may be forced to move towards the side of more secrecy; however, there must be sufficient reasons as well as limitations clearly defining how far the government can go in the abridgement of rights.

The war waged after 9/11 puts a strain on democracy itself because it is mostly waged in secret, using means that are both at the edge of law and morality. However, the lesser evil position maintains that so long as the decision for secrecy is not made in secret, secrecy can be controlled.²⁶² Congress can hold hearings on sensitive intelligence matters and judges can demand the justification of secrecy. However, if the American people are not engaged, if the judges simply provide undue deference to the executive decisions and if the government refuses to adhere to open review of its measures then the lesser evil position will not succeed and the balance will not be maintained. Additionally, it is imperative to understand that the lesser evil position is not a perfect solution: choosing a lesser evil may bring a greater evil in the future.²⁶³

Essentially bad consequences are not always predictable and choosing the lesser evil does have the potential to be a shot in the dark that simply fails to solve the problem.

The war on terror is not about avoiding evils; the question is can America choose a lesser evil and keep it from becoming a greater one? Ignatieff provides a few starting principles that will help solve the problem. The principles are as follows: the conservative principle (maintaining the free institutions we have) and the dignity principle (protecting individuals from significant harms).²⁶⁴ With these two principles laid out, the next step is to be predictive- that is, to reason out the consequences of various courses of action, and then, after deliberating, coming to a reasonable judgment of which action will inflict the least damage on the two principles. Once the given course of action is justified, the lesser evil position holds that Americans maintain it even if the price is higher than originally anticipated. However, the position cannot be indefinite- at some point the America must come to the realization that the lesser evil may become the greater. In such instances the only solution is to make a change

In the case of 9/11, it is true that these terrorist attacks may have illuminated alarming shortcomings in America's national defense system. I have already argued that reform is necessary; however, it is important for government to understand that such attacks, while immensely devastating, do not threaten America with defeat or collapse. Exaggerating the threat posed by terrorists was not and will never be the proper way to manage the situation. Such fabrication is reminiscent of the Red Scare of 1919- it turned out that Communist radicals did not pose a clear and present danger to the U.S. In any situation of factual uncertainty about risk, we need to "discipline our justified fears with commitments to respect equality and dignity standards and to make the fewest possible changes to our tried and tested standards of due process".²⁶⁵

The American government must learn from history and make the connection that the roundup of Arab-Americans is analogous to the Palmer Raids of the early twentieth century.

For the lesser evil position to work, the American government must understand that openness requires a limit to the measures and policies implemented lest America finds itself on the side of secrecy (recall the hypothetical line example). Constitutional commitments oblige the government to respect the right of enemies who do not respect us, and to use lawful methods against those who, in reality, may deserve no rights at all.²⁶⁶ Yes terrorism does present a problem and yes it is possible that WMD's are developed in the future; however, Americans care about an open liberal democracy because the procedures protect the rights of each individual that belongs. The obvious difficulty is living within the constraints of the open society and the values America has. Fear is an appropriate response to events such as 9/11 and dangers in general.²⁶⁷ However, the concern is what happens when fear runs out of control and makes Americans do things that are illogical. If America did not purport to be an open society (which no one can deny is the overwhelming sentiment proposed by the American government), then it would not be a major concern to invade human rights and engage in actions reminiscent of a police state. However, this is not the case and while individual actors may have strong political, moral, ethical, etc. notions as to how to handle terrorism (targeting Arabs, keeping closer tabs on war dissenters, squelching dissenters, fabricating evidence), the openness advanced by America is constraining in what courses of action are appropriate.

A Final Thought

The proposed changes that must be made so as to maintain the balance of openness or secrecy do not solve the problem- a key factor is where do people place openness on their own personal agendas. There are a number of concerns for legislators, the president, the intelligence

community, the media, and the American people; thus, maintaining a position on the spectrum of openness which errs on the side of openness may not be at the top of everyone's agenda. Earlier, when discussing the efforts of the House and Senate Select Committees on Intelligence, I mentioned that members of such committees must be on constant guard to prevent abuses within the intelligence community. The same holds true for all sectors of government, the media, and the American people in terms of openness- all actors need to be on constant guard to ensure that America does not slip.

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