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MAKING GOVERNMENT SECRECY AND COUNTERSUBVERSION SAFE FOR DEMOCRACY

M. Elizabeth Sanders*

ALEX GOODALL, *LOYALTY AND LIBERTY: AMERICAN COUNTERSUBVERSION FROM WORLD WAR I TO THE MCCARTHY ERA* (UNIVERSITY OF ILLINOIS PRESS 2013). PP. 325. HARDCOVER \$ 57.00.

MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* (STANFORD UNIVERSITY PRESS 2013). PP. 336. PAPERBACK \$ 29.95.

RAHUL SAGAR, *SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY* (PRINCETON UNIVERSITY PRESS 2013). PP. 304. HARDCOVER \$ 35.00.

The three greatest problems facing American democracy today, it might be argued, are wars that have been poorly conducted or should not have been fought; a massive surveillance state threatening privacy, dissent, and relationships with allies; and growing economic inequality. These three books primarily address the second, but counterinsurgency and the building of a massive surveillance state are clearly related to the conduct of national security policy and, in particular, to World Wars I and II, Vietnam, Afghanistan, and Iraq, along with the Cold War of 1947-89. Without much of a stretch, one might argue that the costs of war and the great expense of the counter-subversion bureaucracy, which is in large part related to wars, are major contributors to declining social investment and rising inequality. That assumption, of course, is not the focus of the three books reviewed in this essay.

Alex Goodall's *Loyalty and Liberty: American Countersubversion from World War I to the McCarthy Era* and Mariano-Florentino Cuéllar's *Governing Security: Hidden Origins of American Security Agencies* describe past war-linked countersubversion policies and concomitant threats to civil liberties.¹ Both give attention to presidents who led the framing of threats to the nation and their proposed solutions. In *Governing Security*, Cuéllar

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1. ALEX GOODALL, *LOYALTY AND LIBERTY: AMERICAN COUNTERSUBVERSION FROM WORLD WAR I TO THE MCCARTHY ERA* (2013); MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* (2013).

lar dissects the national institution-building that took the country from the remarkably diverse New Deal welfare and regulatory policies designed to conquer the Depression, to a disguised effort for war preparedness folded into a new Security Agency in 1939 that combined New Deal social and consumer protection programs with war preparedness functions. “Dr. New Deal” was already becoming “Dr. Win the War,” without taking off his white coat.²

I will have less to say about the Cuéllar book, since it can fit into the larger historical account of American countersubversion offered by Goodall, though the two books were published in the same year and so missed the chance to take account of each other.

Cuéllar’s *Governing Security* tells an interesting, little known story about New Deal countersubversion and war preparation initiatives through the creation of the odd bureaucratic conglomerate called the Federal Security Agency (FSA). Roosevelt created the FSA after finally winning his long battle with Congress for executive reorganization powers. He used his new reorganization power to pack into one cabinet department the existing Social Security Board, the Public Health Service, the Office of Education, the U.S. Employment Service, the National Youth Administration, and the Civilian Conservation Corps. Had the merger stopped there, it might have been called a Department of Welfare, but Roosevelt did not like the connotations of “welfare” and had already shown a proclivity for redefining a variety of social programs as modes of family and individual security.³ The Farm Security Administration of 1937, for example, was one of the most radical New Deal agencies. It bought up failing plantations and other land holdings and parceled them into farms to be sold to former tenants and sharecroppers on long-term, low-interest government loans, providing farming advisers and home demonstration agents to help the new farm families become self-reliant commercial farmers while feeding themselves from kitchen gardens. Though Cuéllar does not dwell on rhetorical functionality in the New Deal, one imagines that an agency soon to be attacked as communist by southern elites was labeled “farm security” as a hopeful disguise.

The new FSA, however, hid more sinister objectives. Besides helping the social policy agencies to transition toward war duties (at a time when the public was strongly opposed to involvement in World War II), the administration eventually packed into its innocuous-sounding labyrinth a new Office of Community War Services, a War Research Service that focused on biological weapons, and a unit managing the resettlement of interned Japanese-Americans. The ever-critical *Chicago Daily Tribune* greeted the creation of the FSA with “a rhetorical boomerang . . . turning the president’s own allusions to external threats against his reorganization plan.”⁴ On April 27, 1939, its editorial observed that “[a] Nazi or Fascist could look at the three new agencies and their component parts and find something very familiar in them. This is the story of a totalitarian state.”⁵

Unfortunately, there is no consistent theory or theme in the Cuéllar book, and its organization is somewhat erratic, moving across time and purpose. It juxtaposes the creation of the huge and diverse Homeland Security Department in the Bush administration

2. See generally CUÉLLAR, *supra* note 1.

3. *Id.* at 63.

4. *Id.* at 67.

5. *Id.*

with the creation of the FSA, and one wishes for an analysis of how the component agencies of both departments functioned in their new homes and evolved toward presumably more effective national security coordination. More questions are asked than answered here.

Alex Goodall's *Loyalty and Liberty* finds the first solid manifestations of the national security state in the Wilsonian counterespionage episode and the postwar Red Scare, but delves below the federal level to chronicle countersubversion efforts carried out by substate governments and business and civic voluntarism (which often degenerated into crude vigilantism). He reveals the ease with which elite-led and politically opportunistic antiradical campaigns could be embraced by local violence-prone men with economic and other grievances.⁶ Ironically, these excesses would then be used by federal officials to justify more centralized institutional responses. The centralizing solution was particularly attractive to Democrats who dominated the executive branch for most of the years from 1933 to 1980.⁷ But as William Keller has argued in *The Liberals and J. Edgar Hoover*, bureaucratizing countersubversion did not prevent extremism and illegality in the prosecution of the loyalty and security agenda of the national state.⁸

Sagar's *Secrets and Leaks: The Dilemma of State Secrecy* focuses not on the more distant history of countersubversion efforts, but on the present and future internal controls available to the national government to counter threats by foreign enemies.⁹ Are there ways in which such threats can be discovered and contained without unacceptable burdens on constitutional freedoms? That, of course, is a very big and important question, and its answer depends on knowing exactly what the government is doing. Can we find out what the government is doing without undermining the state's useful protective efforts? Can we realistically insist that the state act according to the law, even when operating behind a veil of secrecy? Should we punish those who pull the veil aside, if that reveals illegal activities (a crime diluted by revelation of a larger crime)? Sagar's answers to these questions are serious and thorough, though he sometimes appears overly deferential to state officials and overly skeptical of the power of institutional checks and balances, individual leaking, investigative journalists, or group demands to redress the harm caused by executive abuses.¹⁰ Here he might find argument in Goodall's book where eventual push-back by civil libertarians against the state's control efforts is assumed (and assumed to be a good thing).

This is not to say that Goodall is optimistic. Rather, he might be characterized as cynical about the recurring cycles of multifunctional antiradical campaigns, yet optimistic that no cycle lasts too long and that civil libertarians recover their voices even as cultural communities have second thoughts. Goodall relies on a vast secondary literature as well as primary sources to describe in fascinating and minute detail the cycles of "red scares" or "fascist scares" that wind through modern American history from World War I to the McCarthy period. This evolution (not to be confused with political development) generates a set of antisubversion tropes that recur again and again, sometimes switching sides, as

6. See generally GOODALL, *supra* note 1.

7. *Id.*

8. See WILLIAM W. KELLER, *THE LIBERALS AND J. EDGAR HOOVER: RISE AND FALL OF A DOMESTIC INTELLIGENCE STATE 190-99* (1989).

9. RAHUL SAGAR, *SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY* (2013).

10. *Id.* at 115-16.

when people who campaigned against the first Red Scare (Al Smith, for example) find themselves at a later point using very similar arguments and strategies in the service of anticommunist politics. The creative name-calling and charges of disloyalty Goodall chronicles begin to smack of the unruly behavior of boys on the playground, but the consequences are serious. The intemperate charges ruin lives, cut short political careers and lifespans, and make reasonable debate and policy making almost impossible. The same name-calling and wild exaggeration are with us today, causing even more paralysis in our national public life. President Obama might be grimly gratified at Goodall's reminder that Franklin Roosevelt was also vilified as a socialist, fascist, and tyrant. (Which is not to say that both presidents were/are innocent of repression and power plays; on that, see James Pfiffner's *Power Play* and its updates.)¹¹

Linking the political repertoires of antiradicalism to a variety of ethnic, class, and political interests, Goodall creates a detailed social and cultural history of antiradicalism. Capitalist Henry Ford pursues anticommunism, laced with anti-Semitism, to monitor and defeat labor organization efforts and nest his industrial methods in a traditional and presumably Christian philosophy.¹² Al Smith had been a hero of labor who resisted the persecution of immigrants accused of disloyalty, but in the mid-1930s he joined the right-wing Liberty League that used donations from the Du Pont family and other wealthy donors to fight the Roosevelt administration.¹³ Smith's remarkable shift was apparently rooted in disappointed political ambition and a fierce hatred of Franklin Roosevelt.¹⁴

The Catholic Church both embraced the anticommunist crusade and disciplined its own members when they took their antiradical frenzy too far.¹⁵ The ultimately-punished malefactors included Father Charles Coughlin, the radio priest who first lauded FDR and claimed credit for his election, then turned viciously against the president. Coughlin himself forsook his righteous condemnation of the form of capitalism practiced by Henry Ford, and ended up as Ford's last defender. Protestant clerics could be militant anticommunists allied with capitalists in calling for the restriction of immigration that might bring in dangerous and immoral radicals; or they might adhere to a social gospel that took opposite stands.¹⁶ Some leading theologians (like Reinhold Niebuhr) swung from one pole to the other, and even fundamentalist Protestants were unpredictable. Some men of the cloth, and some leading New Dealers, visited the Soviet Union or Mussolini's Italy and pronounced them far more advanced in economics and social organization than the United States. Others were guided not only by hatred of atheism or secular modernism, but fear of statism as it took shape in the 1930s in the U.S and Europe.¹⁷ The same political party could contain both tendencies. Southerners who had been the most loyal New Dealers came to see an

11. See generally JAMES P. PFIFFNER, *POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION* (2009) (discussing various ways in which former United States presidents—although principally former-President George W. Bush—have attempted (and in some cases succeeded) to expand the scope of constitutionally-granted presidential powers).

12. GOODALL, *supra* note 1, at 192-93.

13. *Id.* at 215-17.

14. *Id.* at 215.

15. *Id.* at 164, 247-48.

16. *Id.* at 153.

17. GOODALL, *supra* note 1, at 161-64, 188-89.

active federal government as a threat to white supremacy and southern industrialization. Texas Democratic congressman Martin Dies, increasingly worried about wage and hour laws, CIO militancy, and racial integration, made an odd alliance with New York antifascist congressman Samuel Dickstein to create the investigating committee that became the House Un-American Activities Committee (HUAC).¹⁸ (Dickstein, who had fought socialism on the Lower East Side of Manhattan, ended his career denouncing HUAC. He was later discovered to be on the payroll of the Soviet government.) Roosevelt himself used the tropes of antiradicalism to condemn those who opposed intervention in World War II.

The most consistent practitioners of antiradicalism were capitalist elites. Attacked by New Dealers as disloyal and “un-American,” forced to accept new trade union and minimum wage laws, drastic new antimonopoly policies, and higher income taxes, wealthy conservatives first worked in the Liberty League, but after the late 1930s forged a potent and lasting alliance with southern politicians and Republicans.¹⁹

By the end of Goodall’s saga of the inconstant, but seemingly inevitable political currency of antiradicalism/antisubversion campaigns, one searches for some central generalization to characterize this American infatuation. The present reviewer, a political scientist, would suggest what seems obvious from World War I forward: it is war, and the usefulness of war to presidential power, that drives antisubversion, from the White House down to the opportunistic adopters who see political advantage in pursuing it. Without the manipulated fear campaigns of presidents, to which capitalists (for different reasons) subscribe, antiradical movements would have a hard time getting off the ground. Democrats like Woodrow Wilson, Franklin Roosevelt, Harry Truman, Lyndon Johnson, and John Kennedy pioneered Red Scares and Antifascist loyalty campaigns to mobilize foreign policy support, delegitimize political opponents, and win close elections.

Republican Richard Nixon practiced the war on anticommunist subversion with panache, but lost to a more articulate practitioner in 1960.²⁰ Ronald Reagan perfected the art, but in the saga’s most dramatic conversion (which Beth Fischer calls “The Reagan Reversal”),²¹ he dropped his anti-communist trope in negotiations that brought the Cold War and the Soviet Union to an end. George W. Bush revived the antisubversive currency as an endless War on Terror. When, if ever, will the game end? When presidents decide to forego opportunistic wars and find more balanced and productive ways to govern, and their political opponents find more reasonable and substantive ways to criticize their policies than accusing them of treachery and cowardice?

One comes away from Sagar’s *Secrets and Leaks* with little optimism about the exercise of presidential power over countersubversion. Sagar is confident that counterintelligence is necessary and well-grounded in law. But he acknowledges the dangers to individual freedom and good public policy when the enormous intelligence powers of the American national government are exercised in secrecy and with ever-expanding technological capability. His central question is the obvious one: if we grant the president and his intelligence bureaucracy the right to conduct massive surveillance both at home and

18. *Id.* at 222-23.

19. *Id.* at 203, 215.

20. *Id.* at 254.

21. BETH FISCHER, *THE REAGAN REVERSAL: FOREIGN POLICY AND THE END OF THE COLD WAR* (2000).

abroad, how can we assure that power is not misused to the detriment of democracy and individual freedom? But a secondary question, of almost equal concern for Sagar, is how we discipline those who reveal national government secrets. The leakers may be getting information from unsavory sources, he warns, and may have personal axes to grind, and the practice of leaking is “prone to grave abuse.”²²

Critics would not be so fast as Sagar to grant the necessity of the massive surveillance system mounted after 9/11, the operational legitimacy of the CIA (whose actions and budget are secret), or the pressing need to constrain investigative reporting that reveals facts the government wants to keep secret. Why are the First Amendment freedoms of press, speech, assembly, and petition not legitimate constraints on executive branch secrecy? Because the presidentially-appointed and nationalistic Supreme Court has declared that free speech does not *really* permit a former CIA operative or NSA employee to reveal unsavory practices of the agency, and the president has an executive privilege not enunciated in Article II that allows him to withhold information from Congress? The Court has given itself the last word in constitutional conflicts, but it is not infallible.²³

Sagar covers most major Court decisions on questions of executive branch secrecy in national security cases, and he proceeds clearly and analytically through a set of arguments about how state secrecy can be prudently regulated. Or, one might paraphrase, how the operation of government intelligence agencies can be made safe for democracy (my words, not his).

The book’s chapters explore whether we can rely on Congress, the courts, whistleblowers, or leakers to prudently and effectively monitor the executive branch. Sagar finds all four to be flawed regulators of executive branch secrecy, and each to present distinct additional problems that emerge from their efforts. The courts are too deferential to presidential authority; Congress cannot receive secret information without a significant risk of leaks and (like the courts) it presumably does not have the expertise or contextual information to assess the need for, or risks associated with, what the government is doing in secret; and the press may get its information from unreliable sources and refuse to identify them so that they can be scrutinized, inviting disgruntled or scheming officials to leak classified information.²⁴ If law demanded they identify their sources, leaking and press coverage of the executive branch would decline precipitously.

Thus, Sagar is not at all optimistic about the ability of other institutions or individuals to provide prudent and effective controls without damage to the legitimate functions of

22. SAGAR, *supra* note 9, at 7.

23. Though many critics of executive secrecy and surveillance criticize the courts for unjustifiable deference to the president, for Sagar, the danger of reliance on the federal courts to oversee and constrain administrative abuses of secrecy is mainly that “judges. . . are not qualified to challenge the executive’s claims about the harm likely to be caused by the disclosure of secret information,” or “to make what are effectively subjective judgments about the costs and benefits of disclosure.” Sagar cites, with apparent sympathy, John Yoo’s concern that the Supreme Court has a difficult task in “hold[ing] lower courts accountable for mistaken interferences with regard to foreign and national security policies set by the political branches.” Accordingly, given that the Court typically hears fewer than one hundred cases per year, Sagar argues that “it is reasonable to conclude that [in Yoo’s words] ‘judicial involvement in foreign and national security policy will create disharmony where uniformity is crucial.’” *Id.* at 72-73, 218, nn.82-83.

24. *Id.* at 157-64, 178.

the executive branch and to the national interest that the executive branch presumably represents to a greater extent than its competitor institutions. Nevertheless, he acknowledges that a government official may be justified in disclosing unauthorized information *if* three rigorous conditions are met: “the disclosure must (a) concern an abuse of public authority; (b) be based on clear and convincing evidence; and (c) not pose a disproportionate threat to public safety.”²⁵ The third condition requires that the unauthorized disclosure “should not impose an undue or disproportionate burden on national security.”²⁶

Sagar’s strong concerns about the unreliability and illegitimacy of reports from investigative journalists who get information from leakers or whistleblowers are puzzling to this reviewer. The most prominent examples of unreliable press reports purveying false information from disreputable sources with axes to grind would seem to be incidences like Judith Miller’s articles on Iraq’s presumed nuclear and chemical weapons programs in the *New York Times*.²⁷ But these are better examples of the extreme deference given the executive branch by the media when other high officials are silent.²⁸ The support (or lack of scrutiny) given to presidential claims by even the most prominent national media organizations is a pathology, to be sure, but not a pathology of leakers revealing state secrets.

This reviewer would argue that the results of broad executive branch secrecy and manipulated “intelligence,” as illustrated in the reasons given by officials for the disastrous decision to go to war in Iraq in 2003, have been far more damaging to this nation (and others) than leaks by critics of secret executive branch policies. Why is the press release of information about illegal executive branch conduct—which after all can be contested by the president and other actors—threatening to the national interest if the information was leaked to a reporter from a source with an ax to grind? It is unfortunate that we do not often scrutinize the motives of presidents or their advisors who lead us into disastrous wars. Sagar’s focus on *The New York Times*’s presumed motives for publishing revelations by James Risen and Eric Lichtblau about illegal NSA spying seems misplaced, compared to the illegality of the massive surveillance program itself.²⁹ Is it also not profoundly ironic and regrettable that the only CIA agent to be jailed in connection with the agency’s illegal torture policies was the person (John Kiriakou) who leaked their existence?

In sum, Sagar’s book is an essential read for those concerned with the problems of executive branch secrecy, but it should not be the last. It was written before the Snowden leaks were revealed, although those leaks would seem to pass Sagar’s three-fold test for the legitimacy of leaks. They revealed a serious abuse of public authority in the unauthorized data sweeps by the NSA, as well as conscious and repetitive lying about the existence of the massive surveillance program by public officials; the evidence was “clear and convincing;” and despite being called a traitor by many public officials, it seems unlikely that

25. *Id.* at 132.

26. *Id.* at 131.

27. SAGAR, *supra* note 9, at 7, at 199-200.

28. See generally W. Lance Bennett, *Toward a Theory of Press-State Relations in the United States*, 40 J. COMM. 103 (1990) (hypothesizing that “news is ‘indexed’ implicitly to the range and dynamics of governmental debate,” and in absence of serious debate within the national government, the media will generally follow the line given out by the president).

29. SAGAR, *supra* note 9, at 196-97.

Snowden's leaks seriously threatened national security. The bulk collection of Americans' phone records by the NSA was held to be illegal in a New York federal appeals court in May of 2015,³⁰ and the following month Congress addressed the issue by passing a new law (the USA Freedom Act) to end mass data collection after a six-month transition period.

The nation must still come to terms with the questions of: (1) whether Edward Snowden is a traitor who can never come home from exile without risking a long prison term for revealing the extent of NSA spying on American communications, and (2) whether Bradley Manning deserved to be sentenced to thirty-five years in prison, often in solitary confinement, for leaks that revealed government lies about actions in Afghanistan and Iraq, beginning with the killing by an Apache helicopter of Iraqi civilians and journalists that the government insisted were terrorists. As the *Washington Post* commented on the sentencing of Manning, "[t]he long prison term is likely to hearten national security officials who have been rattled by the subsequent leaks from former National Security Agency contractor Edward Snowden."³¹ Indeed.

30. Charlie Savage & Jonathan Weisman, *N.S.A. Collection of Bulk Call Data Is Ruled Illegal*, N.Y. TIMES, May 7, 2015.

31. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST, Aug. 21, 2013, https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-to-day/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html.