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Secrecy, Transparency, and National Security

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SECRECY, TRANSPARENCY, AND NATIONAL SECURITY

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I. INTRODUCTION

More than a decade after September 11, 2001, the time has come to evaluate the various approaches the United States has employed in its fight against terrorism. Over the past decade, there have been dramatic successes and clear failures. Debate continues as to whether the successes have outweighed the failures, but what is beyond dispute is that the legal, political, and tactical landscapes have changed dramatically since September 11. For example, the United States now routinely uses unmanned drones to target and kill suspected terrorist leaders, even when they are United States citizens; this tactic was virtually unheard of a decade ago. At the same time, successive administrations have been dealing with the shifting legal and political considerations regarding the detention, treatment, and prosecution of suspected foreign terrorists; as of this writing, no clear resolution has emerged.

Understandably, discourse within the legal academia has focused on the legality of these and other policy approaches to the fight against terrorism. This focus is important for many reasons, not the least of which is the precedential weight that attaches to these efforts both inside and outside the courts. Still, we should not lose sight of the broader policy and political questions. The most fundamental of these questions concerns the ways in which the United States has approached the fight against terrorist forces:

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Are we as a nation more secure because of the programs and resources in which the government has invested to combat terrorism? Indeed, how can we assess the effectiveness of these initiatives?

The answers to these questions are beyond the scope of this essay—and perhaps our competence as professors of law. What we suggest here is that, in order to begin to answer these questions, we must have some sense of what it is the government is doing in our name. Among the many challenges in assessing the effectiveness of these initiatives is that the war on terror has brought to the business of policymaking in the United States a historically unparalleled concern for secrecy. Two recent books on transparency and secrecy address the tension between our competing needs for information and for secrecy. In the first, *Necessary Secrets: National Security, the Media, and the Rule of Law*,[1] Gabriel Schoenfeld argues for greater secrecy and urges the government to take steps to curtail leaks to the media; in the second, *Top Secret America: The Rise of the New American Security State*,[2] Dana Priest and William Arkin explore the expansion of the national security apparatus since September 11. The picture these writers give us is one of a nation in which the democratic means by which the institutions of government may be kept in check appear to be imperiled.

II. SECRETS, NECESSARY AND OTHERWISE

In *Necessary Secrets*, Gabriel Schoenfeld argues that secrecy in governmental affairs is "an essential prerequisite of self-governance."[3] "And," he continues, "when one turns to the most fundamental business of democratic governance, namely, self-preservation—carried out through conduct of foreign policy and the waging of war—the imperative of secrecy becomes critical, often a matter of survival."[4] Indeed, he maintains, "[e]ven in times of peace, the formulation of foreign and defense policies is necessarily conducted in secret."[5]

1. GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW (2010).

2. DANA PRIEST & WILLIAM M. ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE (2011).

3. SCHOENFELD, *supra* note 1, at 21. Schoenfeld is a Senior Fellow at the Hudson Institute in Washington, D.C. and a resident scholar at the Witherspoon Institute in Princeton, New Jersey.

4. *Id.*

5. *Id.*

Today, as Schoenfeld notes, we do not live in a time of peace; rather, we are engaged in a battle with the forces of terrorism, a battle in which he believes secrecy is "one of the most critical tools of national defense."[6] He accordingly condemns leaks to the press of information regarding aspects of our anti-terrorism strategies and tactics, and his bête noir is the 2005 revelation by the *New York Times* of the Bush administration's domestic electronic surveillance program.[7] He accepts the second Bush administration's claims about the damage caused by these revelations, asserting that these claims "seem plausible enough, and it is not difficult to imagine that a highly publicized report indicating that the NSA [National Security Agency] could readily tap into calls . . . might cause some [al Qaeda] communications to dry up."[8]

Schoenfeld sees as inconsequential the fact that Congress had not authorized the President's domestic electronic surveillance program. The regulatory framework that Congress created several decades ago to control surveillance of foreign agents, the Foreign Intelligence Surveillance Act (FISA),[9] requires a judicially issued warrant before certain communications involving agents of a foreign power can be intercepted. Schoenfeld argues that "[r]equiring a court order to intercept such communications was a preposterous barrier to U.S. intelligence gathering."[10] Moreover, he tacitly approves of the Bush administration's decision not to seek Congressional authorization for the domestic electronic surveillance program because informing members of Congress of the critical details of such a sensitive effort would have "virtually guaranteed leaks and dangerous publicity."[11] As for the President's authority to launch a surveillance program that potentially could involve eavesdropping on the communications of thousands of U.S. citizens, Schoenfeld relies upon the argument that the executive has "inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs."[12]

This is not a particularly strong argument. History shows that the President's commander-in-chief authority is properly confined

6. *Id.* at 22.
7. *See id.* at 30 (discussing the *New York Times* article which brought the National Security Agency's Terrorist Surveillance Program into public view).
8. *Id.* at 32.
9. 50 U.S.C. §§ 1801–1871 (2006).
10. SCHOENFELD, *supra* note 1, at 39.
11. *Id.* at 40.
12. *Id.* at 41.

to battlefield decision-making and tactics.[13] Were his power to be construed more broadly, to include the discretion to establish a comprehensive domestic surveillance program, what need would there be for the President ever to look to Congress for authorization for any initiative related to national security? In other words, the "inherent authority" argument proves too much if it is understood to create in the executive the discretion to enact domestic policies without explicit Congressional authorization.[14]

Schoenfeld maintains, moreover, that the *New York Times* had nothing to report in 2005 because our constitutional system was functioning as it should: "The judiciary and the executive branch were collaborating in the midst of a crisis to make a classified program succeed within the confines of the law."[15] This statement raises at least two questions. First, what crisis? Any emergency created by the September 11 attacks had long subsided by the end of 2005; terrorists remained at large in the world, to be sure, but there was no imminent threat—much less an existential threat—facing the nation. Second, what law? Congress, the political branch primarily responsible under our Constitution for domestic policy, did not expressly authorize the President's program and the Constitution provides no workaround when the executive and judiciary happen to believe a particular initiative is a good idea. Here, Schoenfeld argues that "the [*New York*] *Times* was poised to disclose a counterterrorism program no longer deeply controversial within the government; rather it was going to blow a program behind which, after fierce arguments, a consensus had been forged regarding both its legality and vital importance."[16] But such a consensus, even if it existed, does not make a constitutionally unauthorized program legal and valid—consensus

13. *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (tracing the constitutional history of the President's commander-in-chief power from 1789 to the second Bush administration).

14. Furthermore, the "sole organ" language refers to the President as a figurehead and leader of negotiations in foreign affairs—it does not refer to a grant of lawmaking authority about which the Constitution is entirely silent. *See* VICTOR M. HANSEN & LAWRENCE FRIEDMAN, THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR 26 (2009) (arguing that "sole organ," as derived in United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936), means that the President is the nation's agent in foreign affairs and does not mean the President has unlimited discretion in exigent circumstances).

15. SCHOENFELD, *supra* note 1, at 46.

16. *Id.* at 48.

among the branches is no substitute for the congressional approval contemplated by the framers.

But let's set aside arguments about the legality of the Bush administration's domestic electronic surveillance program and focus on the issues with which Schoenfeld is concerned: the need for secrecy and the extent to which the news media may undermine legitimate efforts to keep the nation secure. The problem here, as Schoenfeld sees it, is the First Amendment—at least the First Amendment that exists in the popular imagination. Following the revelation by the *Times* of the domestic electronic surveillance program, the newspaper defended its decision to publish with the argument that the framers of our Constitution intended an aggressive and independent free press to stand against the abuse of power in our democracy.[17]

At this point, Schoenfeld devotes considerable space to rebutting this notion of the framers' views on the role of the press, explaining that, even when there was disagreement among them, the framers still agreed "that national security was the single area where the new government needed the latitude to keep its operations hidden."[18] And *Necessary Secrets* continues with a historical tour of secrecy and national security policy: the World War I-era Espionage Act and the criminalization of leaks of sensitive information, as well as the prosecutions that followed;[19] press coverage of intelligence capabilities and facilities during

17. *See id.* at 53 (discussing the *Times*'s "solemn responsibilities under the First Amendment").

18. *Id.* at 63. What Schoenfeld fails to appreciate in making this argument is that, while the framers may have embraced the need to keep certain matters from the people in the name of national security, they did not endorse the President's ability to hide the basis for policymaking from the people's representatives in Congress. *See* DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 32 (1981). Schoenfeld makes no persuasive argument to the contrary, referring only vaguely to the President being granted "extensive powers." This proposition represents little more than wishful thinking: One does not have to endorse originalist interpretation of the Constitution to expect that such a far-reaching policy have some connection to the actual text of the Constitution. *See infra* notes 78–86 and accompanying text.

19. *See* SCHOENFELD, *supra* note 1, at 86. The Espionage Act notably stands in contrast to Bush's secret domestic electronic surveillance program, for the Act was created by Congress—drafted, researched, debated, and subjected to the presentment procedures spelled out in the Constitution. The authority the Act gave the President to prosecute thus had a democratic pedigree that Bush's domestic electronic surveillance program lacked. Of course, the Act proved an unwieldy and constitutionally questionable means with which to punish the leakers and publishers of national security secrets.

World War II;[20] and the development of nuclear weapons, with President Franklin D. Roosevelt ordering the creation of the classification system pertaining to any "information 'relating to the national defense.'"[21] Schoenfeld notes that journalists were complicit in the government's effort to keep atomic secrets from our enemies and allies alike; the Comint Act of 1950, which criminalized the publication of secret information, likewise enjoyed widespread support.[22]

That support for secrecy began to wane in the 1960s. "From . . . an excess of deference in the Cold War," Schoenfeld notes, "the press has moved to an excess of defiance."[23] Vietnam, and United States policy in prosecuting the war there, led Daniel Ellsberg to leak to *The New York Times* the so-called "Pentagon Papers." President Richard Nixon sought an injunction against further publication of the papers, a dispute that was eventually resolved by the U.S. Supreme Court.[24] The Court ruled that no prior restraint could issue based upon conjecture by the government; rather, the consequences would have to be definite and near-calamitous to justify overriding the commands of the First Amendment.[25]

As Schoenfeld acknowledges, the Pentagon Papers revealed no operational secrets.[26] And the *Times* made efforts to ensure that "the revelations in the Pentagon Papers would not in themselves jeopardize national security in any immediate way and/or put American or South Vietnamese lives at risk."[27] But Schoenfeld is sympathetic to the view that the publication created lasting damage:

> However much one might or might not sympathize with Ellsberg's motives, and however one might appraise the harm their disclosure wrought on American foreign policy, the fact is that at root Ellsberg's leak was an assault not only on orderly government but—in a polity that has an elected president and elected representatives—an

20. SCHOENFELD, *supra* note 1, at 123.
21. *Id.* at 142 (quotation omitted).
22. *Id.* at 158–59.
23. *Id.* at 161–62.
24. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).
25. *See id.* at 730 (Stewart, J., concurring) (publication would not "surely result in direct, immediate, and irreparable damage to our Nation").
26. SCHOENFELD, *supra* note 1, at 183.
27. *Id.* at 184.

assault on democratic self-governance itself.[28]

Of course, as Schoenfeld remarks, "If our country has had an especially unhappy history wrestling with secrets [since the Pentagon Papers], Richard Nixon is the major reason why."[29] By the 1970s, there emerged "a new kind of journalism hell bent on demystifying, deconstructing, and, on more than a few occasions, denigrating the U.S. government, especially its conduct of intelligence and foreign affairs."[30] Reporting by Seymour Hersh, for example, led to revelations about the illegal activities of the Central Intelligence Agency (CIA), which resulted in congressional investigations that led to the CIA becoming a more transparent organization.[31]

Certain high-profile memoirs by former CIA operatives resulted in court battles about the extent to which the agency could demand a pre-publication right of review. The courts in *United States v. Marchetti*[32] and *Snepp v. United States*[33] held that secrecy and the integrity of the CIA's intelligence-gathering had a value that justified the government's efforts to stop these publication efforts; Schoenfeld maintains that, "[i]f Snepp was allowed to flout the secrecy provisions, other ex-agents were likely to follow his lead, and a flood of secrets would be unleashed."[34] He reads *Snepp* as holding not that the CIA had an interest in protecting secrets per se, but that the publication had compromised the CIA's ability to, in the Court's words, "guarantee the security of information that might compromise [foreign sources] and even endanger the personal safety of foreign agents."[35] Interests in protecting secrets and in guaranteeing the safety of foreign sources and agents are not necessarily the same thing; as Schoenfeld notes, neither *Marchetti* nor *Snepp* undermined the need for secrecy, but together they raised questions about why and what kind of secrecy is appropriate.

There follows an extended discussion of the *United States v. Progressive, Inc.*,[36] in which *The Progressive* magazine sought to

28. *Id.* at 187.
29. *Id.* at 192.
30. *Id.* at 194–95.
31. *Id.* at 195–96.
32. 466 F.2d 1309 (4th Cir. 1972).
33. 444 U.S. 507 (1980).
34. SCHOENFELD, *supra* note 1, at 204.
35. *See Snepp*, 444 U.S. at 512.
36. 467 F. Supp. 990 (W.D. Wis. 1979).

publish the recipe for a nuclear weapon. The article revealed no secrets as such; the information in the article was culled from that available in the public domain. What Schoenfeld seems to be criticizing here, then, is the inability of the press (well, at least one left-leaning publication) to censor itself; Schoenfeld (quoting James Schlesinger) observes that "the controversy provoked by the magazine raised the 'central issues for a free society: the balance between freedom and order and, at core, whether or not a free society can protect itself.'"[37]

For Schoenfeld, this balance remains "an urgent question today."[38] Quoting U.S. Court of Appeals Judge Harvie Wilkinson, he sees the tension as "between the flow of 'the information needed for a democracy to function, and . . . leaks that imperil the environment of physical security which a functioning democracy requires.'"[39] He continues: "The question is 'how a responsible balance may be achieved' between these antagonistic forces. The answer supplied by Wilkinson is that where the protection of national security secrets is concerned, the courts must be deferential to the executive."[40]

In the end, Schoenfeld suggests a case can be made that, in publishing a story about the existence of the Bush administration's domestic electronic surveillance program, *The New York Times* violated the Espionage Act.[41] For instance, he notes that, in respect to the revelation of the program, "there can be little argument over whether the *Times* knew what it was receiving and disclosing. The paper's own reporting was unambiguous; the December 16 article explicitly refers to the 'classified nature' of the material, as well as the *Times*'s own hesitations, for precisely that reason, in publishing it."[42] Indeed, James Risen, one of the *Times* reporters who broke the story, acknowledged that "he was not only witnessing a crime but taking part in it."[43]

The *Times* and its reporters, Schoenfeld speculates, no doubt believed they were serving the public good by "calling attention to

37. SCHOENFELD, *supra* note 1, at 220.

38. *Id.*

39. *Id.* at 230 (quoting United States v. Morison, 844 F.2d 1057, 1082 (4th Cir. 1988) (Wilkinson, J., concurring)).

40. *Id.* (quoting *Morison*, 844 F.2d at 1082 (Wilkinson, J., concurring)).

41. *See id.* at 249 (discussing how the *Times* possibly violated the Espionage Act).

42. *Id.* at 249–50.

43. *Id.* at 250.

malfeasance in government, bringing into public view the Bush administration's illegal breach of FISA."[44] But he contends that in the American system of justice, it is not for the *Times* to determine what is legal and illegal, and mere allegations of illegal conduct "do not provide a basis for committing a crime of one's own."[45] Further, the *Times* arguably violated the Comint Act, which prohibits the disclosure of classified information.[46] This is a strict liability statute; violation occurs merely by knowingly engaging in the proscribed conduct. In any event, the Bush administration did not seek to prosecute the *Times*, owing, Schoenfeld reckons, to the political challenges the administration faced at the time.

The *Times* later revealed the existence of a government program aimed at tracing the flow of financing for terrorist activities through a large-scale review of global banking records. With respect to this, and the story about the domestic electronic surveillance program, Schoenfeld argues that the public has a right not to know; indeed, he contends that we *choose* to keep ourselves uninformed because "[w]hat [we] know about such matters our adversaries will know as well. If we lay our secrets bare and fight the war on terrorism without the tools of intelligence, we will succumb to another attack."[47] Thus, Schoenfeld sees the *Times* and like-minded news organizations as engaged in an assault on democracy, aided by "the so-called whistle-blowers, who operate in tandem with journalists and are hailed by them as 'heroes.'"[48] As he puts it, "when journalists reveal secrets necessary to secure the American people from external enemies . . . . [they] are not surrogates for the public but usurpers of the public's powers and rights."[49]

For Schoenfeld, the way out of the bind created by the dual needs of secrecy and transparency lies in enforcement of the laws criminalizing the disclosure of state secrets through prosecutorial discretion to charge only those individuals who disclose "secrets that truly endanger national security."[50] And the press, he urges, should exercise similar restraint before revealing information

44. *Id.* at 250–51.
45. *Id.* at 251.
46. *See id.* at 251–52 (explaining that, in addition to the Espionage Act, the *Times* could have also violated the Comint Act).
47. *Id.* at 259.
48. *Id.* at 261.
49. *Id.* at 263.
50. *Id.* at 270.

related to national security.[51] "In fact," Schoenfeld concludes, "the conduct of the press today raises the question posed by James Schlesinger of whether the free society built by the Founders can defend itself, and not only from external dangers but also from those who would subvert democracy by placing themselves above the law."[52]

III. TRANSPARENCY AND SECURITY

In *Necessary Secrets,* Schoenfeld elides discussion about the scope of our modern national security state and the extent to which information about policymaking and programs is shielded from view by either the citizenry or its representatives in Congress. Into this gap step *Washington Post* reporters Dana Priest and William Arkin, who have set out in *Top Secret America: The Rise of the New American Security State* to examine these issues. The authors question the necessity and efficacy of a national security apparatus that has been vastly expanded since September 11, 2001. From the outset, they make their position quite clear—they believe that the government has "still not engaged the American people in an honest conversation about terrorism and the appropriate U.S. response to it."[53]

The authors explore this point by examining three broad themes. First, they argue that the intense secrecy and lack of meaningful oversight of the government's antiterrorism programs since September 11 have led to duplication, inefficiency, and waste. Second, they suggest that much of the secret government apparatus created after September 11 has not been used to combat terrorism, but for more ordinary law enforcement, which has resulted in a loss of civil liberties without the benefit of making us safer from terrorist threats. Finally, they argue that government officials are making decisions based upon fear, rather than engaging in reasoned and rational policymaking. These themes tie into the authors' contention that there has not been an honest conversation

51. *Id.* at 271.

52. *Id.* at 275.

53. PRIEST & ARKIN, *supra* note 2, at xix. The authors bring a wealth of experience in the national security arena to their work. Dana Priest has been an investigative reporter for the *Washington Post* for more than two decades and has reported on national security and military issues throughout her tenure. William Arkin has been a columnist for the *Post* since 1998 and he has extensive experience as an intelligence analyst.

in this country about the best ways to respond to the terrorist threat.

An important contribution of this book is the detail the authors provide about the shadow government that emerged after September 11. Priest and Arkin did not have any special access to the secret government agencies and programs they investigated. To overcome this lack of access, they developed a way to pierce the veil of secrecy with publicly available information. They collected and cataloged troves of documents: budgets, contracts, military directives, program descriptions, hearing transcripts, job listings, phone directories, and other sources.[54] They then studied these documents as a whole, looking for phrases, code names, budget line items, and job listings. Patterns emerged that allowed the authors to get a picture of just how large the government's secret national security apparatus grew after September 11. For example, the authors determined that between 2006 and 2010, there were 182,000 job listings by various government agencies for people with top-secret security clearances and very specific skill sets.[55]

In addition to the information developed from this mosaic, the authors also looked at the money the government has allocated to the "Global War on Terror" (GWOT). For instance, in just the weeks following September 11, Congress approved $80 billion to wage this war.[56] This allocation was followed by numerous supplemental spending bills to fund the wars in Afghanistan and Iraq, and to fund the antiterrorism efforts of several largely secret government organizations and programs. The result of this hyperspending was an explosion of government programs and agencies with overlapping responsibilities, confused lines of authority, and multiple layers. James Clapper, who at the time he was interviewed was charged with overseeing the Pentagon's intelligence program, stated: "There's only one entity in the entire universe that has visibility on all [Special Access Programs (SAPs)]—that's God."[57]

Top Secret America recounts seemingly countless vignettes detailing examples of duplication of government effort, waste, and inefficiency. Consider that, by 2009, there were 1,074 federal government organizations and nearly 2,000 private companies

54. *Id.* at xxiii–xxiv.
55. *Id.* at 9.
56. *See id.* at 4.
57. *Id.* at 27. At this writing, Clapper is the Director of National Intelligence.

working on programs related to counterterrorism, homeland security, and intelligence—and all at the top-secret level.[58] These government entities and private companies were working from more than 17,000 locations across the United States.[59] According to the authors, since September 11, government agencies have published 50,000 separate serialized intelligence reports every year.[60] According to the Pentagon official the authors interviewed, these reports are so burdensome that senior officials ignore them altogether, relying instead upon personal briefings.[61] The authors use the term "terrorism-industrial complex" to describe the massive expansion of government facilities to house government agencies and contractors; the head of the U.S. Army's intelligence school describes this massive build-up as being "on the order of the pyramids."[62]

The authors conclude that today we effectively have two distinct governments: the one with which citizens are familiar, which operates more or less openly; the other a parallel top-secret government whose parts have expanded so as to become a separate universe all its own.[63] What is the motivation behind this phenomenon? The cynical explanation is that the "terrorism-industrial complex" is fueled by government contractors who stand to make enormous profits. *Top Secret America* refers to several examples of the chummy relationship between government agencies and private contractors. The book tells the all too familiar tale of the revolving door that allows former government officials to make extraordinary salaries once they leave government service and begin working for these contractors or advising them and lobbying for their interests.[64]

Priest and Arkin also suggest the national security apparatus grew as a result of the determination that the United States should attack terrorism by undoing one terrorist at a time.[65] Going after one terrorist at a time and having the capacity to respond to every

58. *See id.* at 86.
59. *See id.*
60. *See id.* at 80.
61. *See id.* at 81 (discussing the overload of intelligence information and the lukewarm response by government staff).
62. *Id.* at 71.
63. *See id.* at 52.
64. *See id.* at 191–94 (recounting Michael Chertoff's path once he left the Department of Homeland Security).
65. *See id.* at 242.

potential threat requires enormous resources—and even with those resources it may be impossible. The authors contend that this focus distracts policymakers from the big picture: They maintain that the government has become less able to recognize broader trends and is unable to defend against an always shifting and dynamic threat.[66] For example, despite this vast security apparatus, the government was unable to detect the attempted bombing of an airliner flying to Detroit, Michigan, on Christmas Day in 2009, and the government was caught entirely off guard by the popular anti-government uprisings in several Arab countries in the spring of 2011.[67] In addition, the authors suggest that fear and panic are powerful motivating factors. Fear and an obsession with secrecy have prevented the nation's leaders from engaging in an honest discourse with the American people about the need to develop a rational and effective counter-terrorism policy. What they are suggesting, of course, is that democratic values have fallen by the wayside as the terrorism-industrial complex has continued to thrive.

IV. STRIKING THE BALANCE

The checks and balances created by a government of divided powers and responsibilities serve to prevent overreaching by any one branch or institutional actor. Reduced to its essence, our Constitution assigns to Congress the task of lawmaking and to the President the task of enforcing the laws; where national security is concerned the branches share both power and responsibility, but it remains that the President has no army to lead if Congress does not authorize the means by which to supply him with soldiers. Of course, the decision to provide the President with soldiers reflects a judgment by our representatives that such a move is in the nation's best interest. And those representatives are answerable to the electorate, which stands as the final safeguard in our constitutional system; in this way we hold our representatives in Congress and the Oval Office accountable for their actions.

The vitality of this ultimate check depends upon the availability of information. The public needs to know about governmental actions and policies in order to exercise its checking

66. *See id.* at 268–70 (tracing intelligence failures by the U.S. government in its focus on individual terrorists and concluding that the government lost track of the big picture).

67. *See id.* at 269 (highlighting the intelligence failure of 2011).

power at the polls. As U.S. Supreme Court Justice Potter Stewart put it in the Pentagon Papers case, "the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry."[68]

Based upon their reporting, Priest and Arkin have demonstrated that the American people likely do not have sufficient information at hand to evaluate, much less influence, the nation's anti-terrorism policies. But where Priest and Arkin find far too little transparency, Schoenfeld finds not enough secrecy. And he is not alone in this view; Alan Dershowitz, for example, has suggested that there are measurable costs associated with the revelation of national security information.[69]

To be sure, these costs are not difficult to imagine. The disclosure of operational information about a surveillance target, for instance, could be used by our enemies to a deadly advantage. Thus the real question, as Schoenfeld recognizes, is where the discretion to balance the costs and benefits of transparency should lie. He would defer to the government's estimations of the costs of disclosure—specifically, the determinations made within the executive branch about the proper approach to combatting terrorist forces and defending the citizenry from harm. But, even assuming executive policymakers had the competence and could be trusted to always make optimally beneficial decisions, Schoenfeld's position cannot be squared with the structure of our constitutional order. The Constitution simply does not contemplate unilateral executive action absent some kind of exigency.[70] This theory of Presidential authority is, as Daniel Hoffman has observed, "ultimately sustained not by respectable constitutional logic and historical research, but by the felt imperatives of patriotism, party unity, and personal ambition."[71]

Moreover, to embrace Schoenfeld's position is to share in his belief that we, as a people, somehow choose not to know about

68. N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring); *see also* Anthony Lewis, *The Press and the "War on Terror": A Failure of Courage?*, FLOERSHEIMER CENTER FOR CONSTITUTIONAL DEMOCRACY, OCCASIONAL PAPER NO. 1, at 5 (2004) (arguing that an informed citizenry depends upon a free press).

69. Alan M. Dershowitz, *Who Needs to Know?*, N.Y. TIMES BOOK REV., May 28, 2010, http://www.nytimes.com/2010/05/30/books/review/Dershowitz-t.html.

70. *See* HANSEN & FRIEDMAN, *supra* note 14, at 24–27.

71. DANIEL N. HOFFMAN, OUR ELUSIVE CONSTITUTION: SILENCES, PARADOXES, PRIORITIES 127 (1997).

governmental actions and policies related to national security. Yet, as Priest and Arkin point out, the matter was never put to a vote; no national referendum was held in which a majority of Americans declared that they preferred not to know what the government does to promote national security. And it is far from clear that a collective willingness to defer to the judgment of the President and his advisors out of fear about the possibility of terrorist attack should in any event serve to tacitly abrogate the accountability scheme created by the Constitution's separation of powers.

Of course, what drives Schoenfeld to distraction is the fact that, despite a governmental predisposition toward secrecy, information about national security policy nonetheless comes to light, thanks to government employees who leak such information and the efforts of journalists like Priest and Arkin. Either way, news outlets must decide what to do with this information when they get it. And so the question at this point becomes: Can we trust the press corps to make responsible decisions in this area—to recognize instances in which the revelation of national security information may enhance the capabilities of our enemies?

On the one hand is the time-honored argument that the press may serve as a bulwark against governmental policies and rules that may work to undermine individual rights and of which Americans may be unaware. Thus, the press has a duty, in Anthony Lewis's view, "to report with courage what underlies government decisions to send Americans off to die of foreign shot and shell," as well as "government actions menacing the constitutional protections that have kept us free."[72] Echoing Justice Stewart, Lewis notes that, when the matter at hand involves national security, "the usual legislative and judicial checks and balances on executive power scarcely operate,"[73] making it even more important that journalists act courageously.

On the other hand, there is the reality of the news business. Setting aside the romantic view of the press as the last guardian of democracy,[74] the problem with investing news outlets with the discretion whether to disclose national security information is not,

72. Lewis, *supra* note 68, at 8.

73. *Id.* at 5.

74. *See* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 1 (1991) (describing the "central image" of the press as an institution without which "the public cannot receive all the information it needs—about government actions or public issues—to exercise its sovereign powers").

as Schoenfeld suggests, that they view themselves as being "above the law."[75] Rather, the problem is that the press is not a branch of government. We can hold news outlets accountable for their actions only through the give and take of the marketplace, which is not a means as precisely calibrated as a political election to keep those with discretion accountable.

Moreover, when it comes to national security matters, the market may not be the best way to ensure that the information news outlets report about governmental policies is both relevant to democratic decision-making and unlikely to cause harm. Because news outlets operate in a competitive media environment, publishers and producers may experience some compulsion to make decisions about disclosing information that are unwise and, perhaps, dangerous. Schoenfeld notes, for example, that one of the reasons the *Times* elected to publish its story about Bush's domestic electronic surveillance program when it did was because James Risen, one of its reporters, intended to reveal the story in a forthcoming book.[76] Currently, there is no evidence that revelation of the domestic electronic surveillance program created any immediate danger. Nonetheless, as Dershowitz has observed, "No reasonable person can dispute the reality that there are 'necessary secrets,' like the names of spies, the movement of troops, the contents of codes and ciphers, the location of satellites and the nature of secret weapons."[77]

Perhaps, apart from relying upon government officials to do the right thing or the press to tell us when they do not, there is another way to ensure that the national security apparatus does not operate unchecked. We suggest that the first branch of government may be in the best position to police national security policymaking. After all, most individuals would not be able to absorb and act on much of the information that Priest and Arkin discuss in their book. But Congress has the capacity to do this. Our representatives can keep an eye on what the President is doing; they can act as our agents, with access to information and

75. SCHOENFELD, *supra* note 1, at 275.

76. *See id.* at 47–48 (elucidating about James Risen's threat to publish National Security Administration surveillance techniques in his new book if the *Times* did not print his story); *see also* JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 39–60 (2006) (explaining the numerous manners in which the National Security Administration adopted a technologically driven surveillance program).

77. Dershowitz, *supra* note 69.

the ability to keep the President in check by appropriately challenging his policymaking choices.

The text of the Constitution supports the notion that the framers imagined Congress would play this role. First, there is the requirement that the President keep Congress informed about matters within his purview, which would include details about national security issues like intelligence-gathering and threat assessments. That requirement, contained in Article II, Section 3, provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ."[78] As Daniel Hoffman has remarked, this is "an explicit statement of the [P]resident's right and duty to keep Congress informed."[79] And, as Professor Raoul Berger has argued, the text contains no limitation on the President's "duty to supply information" to Congress.[80]

Second, the Constitution gives Congress the authority to keep secret its internal proceedings and debates—in other words, to keep close that information which in the national interest should remain secret.[81] The existence of this provision suggests the framers were aware that, to govern effectively and responsibly, Congress might have to conduct proceedings and debates away from the public eye. And, it supports the contention that the framers contemplated that the members of Congress—the most accountable actors in the federal system, given the relative size of their constituencies—would serve as our agents in respect to executive policymaking, fully possessed of the authority to review and evaluate the President's actions.

Of course, debates about constitutional authority aside, the real objection to disclosing national security information to all of Congress for its review is the danger of leaks—perhaps a legitimate fear in a legislative body of more than 500 individuals and their staffs. Thus, modern practice has been for the President to advise a select number of Congressional leaders about national security policy and developments, the so-called "Gang of Eight."[82] Yet the

78. U.S. CONST. art. II, § 3.

79. HOFFMAN, *supra* note 18, at 31.

80. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 37 (1974).

81. *See* U.S. CONST. art. I, § 5, cl. 3 (noting that Congress need not publish parts of proceedings "as may in their Judgment require Secrecy").

82. *See* 50 U.S.C. § 413b(c)(2) (2006) (enumerating members of the "Gang of Eight").

"Gang of Eight" has no legislative power and is generally sworn to secrecy. They accordingly are not in a position to exercise measurable oversight authority over the President.

It is not clear, though, that the size of Congress should be an impediment to its being briefed by the President and his deputies about the nature of national security programs and policies and taking appropriate action either to authorize those actions which are beyond the President's constitutional discretion or to act to curtail a President's excesses. Both houses of Congress have utilized the power under Article I, Section 5, to meet in secret session, often about national security concerns. As a historical matter, the Senate has met in secret around fifty-six times since 1929,[83] while the House of Representatives has met in secret four times since 1830.[84] Members of Congress and their staffs are sworn to secrecy about these sessions, violations of which may be punished under each chamber's rules.[85]

Congress has utilized its supervisory power to great effect. For example, there is the World War II precedent of the Truman Committee, created by Congress to investigate the nation's defense program and headed by then-Senator Harry S. Truman. Over the course of several years, the committee held numerous public hearings, conducted investigations into defense spending programs, and visited military bases and factories.[86] The committee became a powerful watchdog against fraud, waste, and abuse and was credited with saving the government billions of dollars, eliminating wasteful programs, and saving American lives.[87] This demonstrates that even in a time of anxiety about national security, Congress may act to ensure that executive decision-making is truly in the public's interest.

Obviously, political considerations may prevent Congress from optimally performing a checking function. All we are suggesting here is that Congress has the authority to police the President's policymaking; the Constitution does not leave the President to his own unfettered discretion. The only remaining question is, as always, whether Congress will find the political will to make use of

83. *See* BETSY PALMER, CONG. RESEARCH SERV., SECRET SESSIONS OF THE HOUSE AND SENATE: AUTHORITY, CONFIDENTIALITY, AND FREQUENCY 3 (2011), *available at* http://www.fas.org/sgp/crs/secrecy/R42106.pdf.

84. *Id.*

85. *Id.* at 2.

86. *See* DAVID MCCULLOUGH, TRUMAN 261–69 (1992).

87. *Id.* at 288.

its authority.

V. CONCLUSION

American constitutional democracy depends upon an informed electorate. But the federal government has emphasized secrecy over transparency since September 11, and we should not put all our hope in the press to keep us up-to-date about the President's many and varied national security actions. Congress can and should act in our stead; indeed, the health of our democracy may depend upon its willingness to play its constitutionally designed role to ensure that the policies and programs we pursue in the interest of national security are truly relevant and effective in keeping us safe.