

ON THE NATIONAL SECURITY LEAKS DILEMMA

ROGER PILON*

At the outset of this debate I need to make it clear, for reasons that will be apparent shortly, that I'm speaking here for myself, not for the Cato Institute, so those of you expecting a full-throated libertarian critique of government secrecy will be disappointed. In my defense I'd pose to you no less a libertarian than Senator Rand Paul, who wrote in the *Wall Street Journal* in January that too many people on both sides of the national security leaks issue are "trying to make a very gray subject black and white."¹

And I would add on that point that in our preliminary discussions in the run-up to this evening's debate, my good friend Nadine Strossen expressed a "strong preference" for a *discussion* rather than a debate about our subject. I agree, because our subject is, as Senator Paul said, "very gray."²

Still, I'm going first in this "discussion" because, on balance, I'm basically on the affirmative side of the question before us: "Should we better protect government secrets and punish leaks more severely?" Actually, those are two questions, covering a very large set of issues that neither Nadine nor I will be able to more than touch upon. But let me start with the first question, whether we should better protect government secrets. To answer that, one could do worse than start with First Principles.

The Declaration of Independence tells us that we leave the state of nature and create government to better protect our rights. We do that, at least on the domestic side, by authorizing public institutions to better define our rights and better secure

* Vice President for Legal Affairs and B. Kenneth Simon Chair in Constitutional Studies, Cato Institute; founder and director of the Cato Institute's Center for Constitutional Studies; publisher of the *Cato Supreme Court Review*. These remarks were delivered as part of a debate on the question, "Should We Better Protect Government Secrets and Punish Leaks More Severely?" This debate was held at the University of Florida as part of the Federalist Society's 2014 Annual Student Symposium.

1. Rand Paul, *I Never Said Snowden Is a Hero; He Should Be Tried*, WALL ST. J., <http://online.wsj.com/news/articles/SB10001424052702304347904579310463077857076> [<http://perma.cc/N24J-WXGL>].

2. *Id.*

them through either regulatory risk reduction or ex post adjudication and prosecution.³

But while that resulted—eventually, in the American experience—in “a more perfect union” and a sense of nationhood, on the foreign side of things, regarding *other* nations, we’re still in a state of nature, as John Locke noted. That means, on that side, that the public institutions we create must protect our rights, their main function, through rather different means—not mainly through ex post adjudication and prosecution, but preemptively through diplomacy, treaties, and, if necessary, force, up to and including war,⁴ all of which requires intelligence and secrecy.

But that secrecy troubles many small-d democrats, concerned as they often are about government transparency and individual privacy. So we come to our first dilemma: If government is going to protect our rights, it has to have the means to do so. But at the same time, those means themselves have to respect our rights, at least as far as possible—and there’s the problem, the twofold problem.

First, although secrecy is essential if government is to protect us from foreign threats, secrecy also frustrates the transparency that is necessary for citizens to exercise their democratic rights of self-government.⁵ And second, the gathering of intelligence may compromise our right to be left alone by our own government.⁶ Benjamin Franklin may have said, “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”⁷ But when it came

3. See Roger Pilon, *The Constitutional Protection of Property Rights: America and Europe*, CATO INSTITUTE, <http://object.cato.org/sites/cato.org/files/articles/constitutional-protection-of-property-rights-america-and-europe-2007-edit.pdf> at 4–6 [http://perma.cc/9R4L-2MWT] (last visited Oct. 27, 2014).

4. See *id.* at 5–6, 17, 20.

5. See Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 812–13, 816–17 (2007).

6. See *Olmstead v. United States*, 277 U.S. 438, 478–80 (1928) (Brandeis, J., dissenting).

7. Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, 11 November 1755, in 6 THE PAPERS OF BENJAMIN FRANKLIN 238–43 (Leonard W. Labaree, ed., 1963), <http://founders.archives.gov/documents/Franklin/01-06-02-0107#BNFN-01-06-02-0107-fn-0005> [http://perma.cc/Y6F-X729] (writing to the Governor of Pennsylvania on behalf of the Pennsylvania Assembly on November 11, 1755); BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF PENNSYLVANIA 289 (1812) (first printed in London, England, in 1759 by R. Griffiths, the book contains Franklin’s famous quote; although the book’s authorship is traditionally attributed to Benjamin Franklin, some attribute authorship to Richard Jackson; neverthe-

to *practice*, an older and wiser Franklin, heading up the Committee of Secret Correspondence at the nation's birth, kept the committee's actions secret even from the Continental Congress, for fear of leaks.⁸ In the real world, in short, trade-offs are inescapable.⁹ Our history shows that has ever been so.

By and large, by constitutional design and by experience, it has fallen mainly to the executive branch to conduct our foreign affairs, to gather the intelligence necessary to that end, and to protect that intelligence.¹⁰ Yet administrations have failed in all three of those duties, including the last. To take the two most recent examples, it's appalling that such low-level personnel as Bradley Manning and Edward Snowden were not better vetted before they were given access to classified information—and that they were able to gain access to so *much* information.¹¹ Clearly, the systems in place to guard against such things failed and failed badly. So the answer to our first question is obvious: Yes, we should better protect government secrets.

less, Franklin's use of the quote within his letter to the Governor of Pennsylvania predates the printing of the book by several years); Jared Sparks, *Introduction to Benjamin Franklin, An Historical Review of the Constitution and Government of Pennsylvania*, in 3 THE WORKS OF BENJAMIN FRANKLIN 107–09 (Jared Sparks ed., 1882) (documenting several reasons in support of Franklin's authorship of "An Historical Review of Pennsylvania"); CARL VAN DOREN, *LETTERS AND PAPERS OF BENJAMIN FRANKLIN AND RICHARD JACKSON, 1753–1785* (1947) (compiling letters between Franklin and Jackson, some of which may support the theory of Jackson's authorship).

8. *Report of Thomas Story to the Committee of Secret Correspondence and the Committee's Memorandum upon It (1 October 1776)*, in 22 THE PAPERS OF BENJAMIN FRANKLIN 636–38 (William B. Wilcox, ed., 1982); Ray S. Cline, *Intelligence Oversight, National Security, and Democracy: Covert Action as Presidential Prerogative*, 12 HARV. J.L. & PUB. POL'Y 357, 357 (1989).

9. See Roger Pilon & Richard A. Epstein, *NSA surveillance in perspective*, CHI. TRIB., June 12, 2013, http://articles.chicagotribune.com/2013-06-12/opinion/ct-perspec-0612-nsa-20130612_1_nsa-national-security-agency-privacy [<http://perma.cc/XLR9-X2B2>].

10. See H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529, 540–41, 575–76 (1999).

11. See Greg Miller, *Edward Snowden, Bradley Manning and the risk of the low-level, tech-savvy leaker*, WASH. POST, June 11, 2013, http://www.washingtonpost.com/world/national-security/edward-snowden-bradley-manning-and-the-risk-of-the-low-level-tech-savvy-leaker/2013/06/11/f5e3ad72-d2c7-11e2-a73e-826d299ff459_story.html [<http://perma.cc/6DYG-BAPZ>]; Loren Thompson, *Cyberwars: Will the Pentagon's Plan For Defeating Insider Attacks Work?*, FORBES (Mar. 31, 2014, 12:12 PM), <http://www.forbes.com/sites/lorenthompson/2014/03/31/cyberwars-will-the-pentagons-plan-for-defeating-insider-attacks-work/> [<http://perma.cc/NL4N-P74H>].

The second question is harder, because even if we did punish leaks more severely, that would not go to the heart of the problem. In his recent book, *Secrets and Leaks*, Professor Rahul Sagar discusses in great detail the dilemma that secrecy poses.¹² On one hand, secrecy is essential for the conduct of foreign affairs. But on the other hand, secrecy is a shield behind which much abuse and lawlessness can occur, as history amply demonstrates. To guard against that, leaks are sometimes our only protection.¹³

Sagar argues that the Framers thought the separation of powers would address the problem, but they left unaddressed the means by which that principle would be given effect in the context of state secrets.¹⁴ He notes that the issue was less pressing in the nineteenth century because we were less involved in foreign affairs. In the twentieth century, however, that changed, even though American intelligence operations were still quite limited as late as the onset of the Second World War.¹⁵

With that war, followed by the Cold War, full-blown intelligence operations became essential—and the potential for abuse grew.¹⁶ From the U-2 incident to the Vietnam War, the Eisenhower, Kennedy, Johnson, and Nixon administrations were each caught deceiving the American public.¹⁷ That led in the 1970s to greater congressional involvement in foreign affairs—the War Powers Resolution of 1973, the Freedom of Information Act amendments of 1974, the Foreign Intelligence Surveillance Act of 1978, and more.¹⁸ And with Congress more in-

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

13. *Id.* at 49, 181–82.

14. See *id.* at 9–11, 24–29.

15. See *id.* at 30, 34, 36–40.

16. *Id.* at 42–44.

17. See *id.* at 44–46; Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 183, 227–29, 235–37 (1992); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 868–69 (2007).

18. See Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552 (2012)), amended by Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974); War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–48 (2012)); Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. § 1801 *et seq.* (2012)); Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 5–6, 8, 25 (1981); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, AEI J. ON GOV'T & SOC'Y, 15–16 (1982); Sudha Setty, *The President's Ques-*

volved, the courts were brought in as well, adjudicating cases brought under those statutes.

Yet abuses and leaks persist. That will continue, and for good reason: There is no ultimate solution to the problem secrecy poses. Congressional oversight is sometimes useful. But as we've seen in recent years, oversight too often affords an opportunity for little more than after-the-fact political posturing. Then-speaker Nancy Pelosi, for example, supported enhanced interrogation until it became public.¹⁹ Senator Jay Rockefeller wrote a letter to Vice President Cheney protesting warrantless wiretapping, but he put it in his desk drawer until after the story broke years later.²⁰ And more recently, Representative Jim Sensenbrenner stated that he was appalled to learn about NSA surveillance practices, but he skipped the briefings he was offered on the program.²¹

While Congress has too often been asleep at the switch, the Supreme Court, for its part, has been asked to rule on matters about which it has little or no expertise, producing opinions that give unclear guidance to courts below that are then asked to wade into these matters.²²

The hard truth to bear, of course, especially for lawyers, is that in the end these foreign affairs issues are mostly political, not legal.²³ When Congress tries to regulate by statute what for most of our history the executive branch alone did, such as gather foreign intelligence, we find those 535 "generals" trying to make sense of it all—playing "catch-up" as the world moves

tion Time: Power, Information, and the Executive Credibility Gap, 17 CORNELL J.L. & PUB. POL'Y 247, 254–55 (2008).

19. See Karl Rove, *Congress and Waterboarding*, WALL ST. J., May 15, 2009, <http://online.wsj.com/news/articles/SB124226863721018193> [<http://perma.cc/5MDQ-MZQX>].

20. *Face the Nation* (CBS television broadcast Jan. 4, 2009) (Interview with Dick Cheney, Vice President of the United States), available at http://www.cbsnews.com/hdocs/pdf/FTN_010409.pdf [<http://perma.cc/C6G2-DDJH>].

21. Adam Serwer, *Patriot Act architect cries foul on NSA program, but skipped briefings*, MSNBC (Sept. 13, 2013, 8:47 AM) <http://www.msnbc.com/msnbc/patriot-act-architect-cries-foul-nsa-progr> [<http://perma.cc/MXR6-EAX5>].

22. See generally *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138 (2013); *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (cert. denied).

23. See Roger Pilon, *Constitutional Intelligence: Restoring Politics in the War on Terror*, 12 CHAP. L. REV. 655, 670 (2009).

from analog to digital and far beyond.²⁴ As Judge Laurence Silberman implied in his perceptive 2002 opinion for the FISA Appeals Court, far better it is to read the Constitution as having left that power as implicit in the “Executive Power” the Constitution vests in the president.²⁵

Indeed, it’s no accident that the Constitution treats domestic lawmaking in some detail, while its treatment of foreign affairs is sparse by comparison.²⁶ An energetic executive “is essential for the protection of the community against foreign attacks,” wrote Alexander Hamilton in Federalist 70, a unitary executive reflecting “[d]ecision, activity, secrecy, and dispatch.”²⁷ Those are not the characteristics of the slow legislative process, much less of the even slower judicial processes.

And so I conclude on the question of whether the Mannings and Snowdens of the world—useful as their leaks may, *or may not*, be—*should* be prosecuted. That too is a political question, but one with real world consequences going forward. Let me just say this: I was not unhappy to see that Rand Paul, however grudgingly, said that Snowden was no hero, and that he *should* be prosecuted,²⁸ proving that not every libertarian is disconnected from the real world.

24. See Michael Franc, *Fighting a War With 535 Generals*, HUMAN EVENTS (Mar. 23, 2007, 3:01 AM), <http://humanevents.com/2007/03/23/fighting-a-war-with-535-generals> [<http://perma.cc/Z5MA-N8LY>]; Adam Serwer, *Pols vote for national security laws they don’t understand. Here’s why*, MSNBC (Sept. 13, 2013), <http://www.msnbc.com/msnbc/pols-vote-national-security-laws-they-don> [<http://perma.cc/FGK3-YSH2>].

25. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

26. See Nancy E. Powell, *The Supreme Court As Interpreter of Executive Foreign Affairs Powers*, 3 CONN. J. INT’L L. 161, 164 (1987).

27. THE FEDERALIST NO. 70, at 421–23 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

28. Paul, *supra* note 1.