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Summit Report: Freedom of the Press in the Twenty-First Century – An Agenda for Thought and Action

Panel IV: The Future of the Press and Secrecy

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The idea that “knowledge is power” can be found in a biblical proverb and in a statement by the philosopher-scientist Francis Bacon in the late sixteenth century. By the time James Madison and Thomas Jefferson were making the same connection in matters of government, Americans were creating a representative democracy with popular sovereignty and guarantees for freedom of expression meant to protect participation in the processes of self-government.

Rudimentary conceptions of a right to know can be seen in the founding documents of the United States. The eighteenth-century Americans who revolted against abusive British rule listed grievances in the Declaration of Independence that included the difficulty of gaining access to depositories of “public Records.” The Constitution they wrote requires the president to give “Information of the State of the Union,” Congress to publish journals of its proceedings, and courts to allow criminal defendants a “public trial.”

Four days after the First Amendment was ratified, Madison published an essay in the *National Gazette* that stressed the importance of maintaining a free press and other ways of influencing decisions. “Public opinion sets bounds to every government,” he wrote, “and is the real sovereign in every free one.”¹ Discussing the need for education in 1822, Madison insisted that a self-governing people had to “arm themselves with the power which knowledge gives” or expect “a Farce or a Tragedy; or, perhaps both.”² Secrets, which were understood to be limited to highly sensitive matters of military or diplomatic necessity, were few in the early republic and leaks were not prosecuted.

American officials developed a culture of secrecy while fighting world wars, communism and terrorism. Atrocities, assassination plots, coups, incursions, black sites, detentions, “enhanced” interrogations, drone attacks, enormous surveillance operations, and even legal opinions have been covered up. People who exposed historical information or facts already known to enemies could lose their livelihoods and their freedom. Journalists could be harassed, spied on, and denied the knowledge needed to perform their constitutionally protected tasks. Since the attacks of September 11, 2001, as the *Washington Post* reported in its “Top Secret America” series in 2010, national security activities have become so massive and so much has been classified that no one really knows how many people are involved, how many programs exist, how much is being spent, and how much effort is wasted.³

Attempting to analyze immense amounts of information in time to be useful can be frustrating. Another exercise in futility is trying to contain information when more than 1.4 million Americans have top-secret clearance, cyber-warriors are constantly attacking, and legions of hacktivists are committed to confronting institutional power as a matter of civil disobedience. Courts have been reluctant to rule that leaked information is always protected by the First Amendment or that domestic surveillance operations have an unconstitutional chilling effect on expression.

Secrecy is a double-edged sword. Attempting to cut off access to facts that adversaries might want can slash the flow of information that is the lifeblood of democracy. Left without knowledge of what their servants in government are doing, citizens can become politically disengaged or groundlessly suspicious. Revelations about reprehensible actions performed in their name can foster resentment and cynicism. When not held in check by public opinion, the rule of law, or international norms, government authority loses its legitimacy. The concealed operations of a security-obsessed state inevitably include a variety of reckless and arrogant abuses of power that diminish moral stature and credibility. Democracy dies to the degree citizens cannot control or even understand the operations of their government.

Yet, few can seriously question the reality that some narrow exceptions to openness are necessary and legally acceptable at times. The most significant action most people ever take as citizens – voting – is conducted by secret ballot. Journalists themselves can expect confidentiality for their sources. But no amount of consensus about concealment should be regarded – or cynically misused – as a mandate for sweeping secrecy. Americans typically expect a transparent government that judiciously reserves its power to hide its activities for truly extraordinary situations. In the absence of express requirements for openness or external checks, excessive secrecy is inevitable. In the unusual instances in which government officials are challenged to justify a lack of disclosure, their tendency is to rely on categorical rationales such as national security, public safety, due process, or privacy. Such concepts have social resonance, but are not automatically sufficient to support acts of suppression.

Exceptions to the general expectation of openness are usually based on dire warnings that turn out to be uninformed, illogical or deliberately alarmist. The fears themselves, even when presented in good faith, are often illusory. Disclosure rarely has calamitous effects. Democracy requires a high degree of transparency that can involve some necessary risks or perhaps simply some ingenuity in avoiding harm.

Reconciling openness and secrecy is more complicated than merely fine-tuning doctrinal law; it is also a matter of significantly changing behavior. The most carefully worded law will accomplish little if those who implement it have been absorbed into a culture of secrecy. Officials who are supposed to serve the public have assumed broad powers to decide what citizens can know and even think. The federal government has a long history of resorting to repressive laws, loyalty oaths, access restrictions, censorship, propaganda, news management and secrecy.

The volume of classified documents is exploding. A November 2012 report to President Obama from the Public Interest Declassification Board noted that federal agencies annually create petabytes of classified information, more than the amount of information that had been declassified in the previous seventeen years. At this rate, the report says, the backlog of records awaiting declassification will grow exponentially. (Two petabytes is the equivalent of the contents of all U.S. academic research libraries combined.)

Such numbers suggest that the only hope for meaningful change is stopping over-classification before it occurs. Doing so will require that openness be the norm. Some will fear blame for any adverse results, but dangers also exist when citizens cannot scrutinize what is being done with the authority they ultimately possess. The workings of excessive secrecy regimes can frustrate even the most basic information gathering and generate aggressive efforts to track down and severely punish laudable whistleblowers.

Officials at all levels of government need to be committed to the principles of transparency that undergird the entire democratic system. They cannot do their work properly if they do not understand that public knowledge is clearly part of our constitutional ethos and an essential precondition of self-governance. They should neither be placed in a position of having to violate a law to provide information citizens should have, nor be conditioned to believe that they must constantly make balancing decisions that favor suppression over disclosure.

Restrictions on information need to be minimal. Otherwise, the power of knowledge is being usurped. Neglecting the need for openness is not an option. If we seek to be a transparent society in addition to a free-speech society, we must begin to treat all acts of secrecy as illegitimate unless they are proven genuinely necessary and authorized expressly by the people's representatives in government.

All government records, meetings and actions ought to be routinely open to public inspection. Any exceptions ought to be clearly outlined by statute and judged by a standard akin to the one used by the Supreme Court to evaluate prior restraints. Specifically, any government system or act of secrecy ought to bear a *heavy presumption* against its validity. The burden must be firmly placed on the suppressors of information to justify their restrictions.

A first step for cultural change could be a legal change recommended by the Declassification Board report: provision of a stronger protection from punishment or retaliation for good-faith errors in classification that might lead to harm. Government employees must also be trained from the beginning about the value of transparency, not merely the importance of secrecy, and those at the top must model a commitment to openness. Change from the inside is essential at a time when the institutional press and its resources for fighting secrecy are shrinking.

Technology has brought a massive shift in the ways people can create and consume information. The practical obscurity of having difficulty in accessing information may be diminishing in some ways with the advent of electronic records, but hurdles remain when the custodians of government information refuse to comply with requests for materials that have not been disclosed.

Vast amounts of government information can be released or leaked with little editorial input. The ability of non-traditional media organizations to disseminate government secrets does not by itself mean that the public will

gain useful knowledge. Society still needs the institutional press to make sense of information. Professional skills of summary and analysis have critical significance in a nation that possesses so much global military and economic strength.

A commitment to freedom of the press in the future must include a commitment to the free exchange of information, even information that leaders would prefer be secret. The disclosures associated with the Pentagon Papers case, the Watergate scandal, the Iran-Contra affair, and post-9/11 secrecy are examples of how the dissemination of buried facts can prompt needed debate and keep those in authority accountable to public opinion. The three branches of government cannot always be relied upon to perform their checking functions in isolation.

The watchdog role of the press is severely limited when public servants are not allowed to divulge important information or journalists are not able to publish what they know without fear of prosecution. Therefore, the United States should provide better protection for whistleblowers who disclose classified information concerning fraud, waste, abuse, illegal activities or violations of basic human rights and international law. Reporters should have their work protected by a strong federal shield law.

Congress should amend any sections of the 1917 Espionage Act and other federal statutes that could be used to prosecute leakers or journalists who disclose secret information by adding *scienter* clauses that require evidence of both an intent and likelihood of harm to national security. While the Espionage Act was only used three times in its first ninety-two years of existence to prosecute officials for providing information to the press, the Obama administration has already used the law or the Intelligence Identities Protection Act of 1982 against at least eight government leakers and has not ruled out prosecuting journalists. The Espionage Act must be used only as intended—to prosecute true acts of espionage and attempts to “aid the enemy.”

Federal and state governments have enacted a matrix of laws and regulations designed to require substantial government disclosure. Those laws are of little use, however, without consistent and aggressive enforcement and a sufficient commitment of resources. The potency of open government laws is too unpredictable and too dependent on those in charge of their application. Government officials often go to great lengths to circumscribe the very tools used to hold them accountable.

Becoming a more transparent society requires a renewed commitment to the presumption of openness. Sufficient funds should be allocated for prompt compliance with requests for information. Appeals of any denials should be made swiftly by an independent body.

In a free and self-governing society, access to information must be the default. The information in the hands of officials belongs to the people who elect them and give them responsibilities. The people do not abdicate their governing authority. They retain their basic right of access to information.

Transparency is not the solution to every problem and may not always be required, but citizens must reverse the trend of government knowing more and more about the people and the people knowing less and less about the government. Officials who are subject to the check of public opinion are less likely to violate the standards they are expected to uphold.

Access to documents and decision-making processes is a prerequisite of a democratic society. A heavy presumption against government secrecy preserves the power of knowledge that the people must have.

Panel Discussion Excerpts

Smith: Are there reasons for transparency that we don't know about or haven't thought about? It seems like there's been a lot of discussion about the topic for hundreds of years. Is there anything new under the sun?

Drechsel: What would be a list of the positive functions that transparency serves?

Smith: The public needs to have checks on power.

Drechsel: One of the first things that comes to my mind is also fairness. If you have access to documents that government keeps, you have a way of determining whether or not you're being treated fairly. Are my property taxes being assessed fairly compared to my neighbor's?

Smith: I guess that would fall under the category of checking value. You're pointing out, I think, an important reason for why we would have the checking going on, because we do want government to act in a fair way.

Silver: Just to play devil's advocate for a second, I think one of the arguments that people make in the readings that we had was that that is all fine and well in theory but it doesn't actually work. Sort of criticism of the marketplace of ideas that the marketplace doesn't work. I think one of the arguments is WikiLeaks has not made the average person any more politically active than they were. So, do we want to make the argument against that and say yes it actually has? Or do we want to say even if it hasn't, it at least gives the people the opportunity to and so that's why it's a good idea unto itself regardless of what the actual outcome is.

Hopkins: And we need to recognize that there are disadvantages to transparency particularly in local government. Birchall points out that transparency can encourage self-censorship.

Ugland: Well, you can say the same thing about WikiLeaks, for example. Derigan is pointing out the idea that this torrential downloading of information doesn't necessarily lead to a more enlightened public, that the good of transparency is not self-executing, that somebody has to put it in context, somebody has to do something with it for it to be meaningful. But more to the point, it can have the opposite effect of what was intended in the sense that government then becomes less candid, more inward-looking, more closed off. They might then double down on their efforts to prosecute leakers, to plug the holes. And so it's not just that our conception of the good of transparency is sometimes inflated. Sometimes it's completely the opposite of what we intend.

Silver: And sort of along those lines is executive privilege, the idea that the president's advisors will be more candid with him if they know that information is confidential.

Smith: Candor is one of the rationales, of course, for operating behind closed doors, but you have to wonder where is the responsibility to the public?

Ugland: I think one argument you can make is that government is just an extension of us, and to the extent that the government takes actions that we disagree with or certainly that we find to be illegal, immoral, ill-advised, if we're not aware of these things then we're made to be kind of unwitting and unwilling accomplices to the evil or ill-advised acts that are committed. Transparency is a way of enabling us to define for ourselves and to the rest of the world who we are.

Smith: In theory better decisions are made with transparency and more discussion. Are we getting into a marketplace of ideas concept there?

Silver: I think you want to talk about "better" because Fenster talks about this. It slows things down and it makes things difficult but that's the prerequisite of democracy.

Drechsel: I would use the word legitimacy, that it lends a sense, an aura of legitimacy to a decision. You may or may not agree with the decision, but it's tougher to question its legitimacy when you've been able to watch, hear, read progress.

Drechsel: Without being explicit about it, we have been hinting of a couple of underlying things. One is that you can't talk about a right to know without talking about people's obligations as citizens, because a right to know in

and of itself is meaningless if people don't fulfill their roles of citizens in a representative democracy. And related to that is the whole question of what do we mean by representation in the first place? Maybe I'm not so bothered by drone strikes, let's say, if I voted for President Obama on grounds that, well, as a general matter I think he shares my values, and with confidence that he shares my values, then I trust him to do the right thing; as opposed to what I think somebody who represents me ought to be doing is to be constantly monitoring me and all of the other constituents to see what it is – regardless of what that representative thinks is the right thing to do – what is it that you want me to do? And that makes things messier, too, you know. In the former you might not care so much whether you get that memo. You might disagree after the fact with the implications of what's happened, in which case then next time you vote for somebody else. But you might care a lot more if you're expecting your representative to try to get a sense of what it is that most constituents want?

Smith: One of our purposes is to talk about what might be worth doing. Are there solutions for improving citizen awareness or getting people to be more concerned about their obligations as citizens?

Smith: The marketplace of ideas in a sense is involved in a lot of things we do every day. Jury trials are like a marketplace of ideas. Scientific method is basically a marketplace of ideas. So it's not really a strange notion. We have to accept the fact we're not always going to have perfect results but what else have we got?

Drechsel: And there are marketplaces of ideas and marketplaces of fact. That line has never been entirely clear to me. It's one thing to argue about who is right about a particular proposition but, you know, it's also important to have a marketplace where the raw material is available to formulate and justify whatever those ideas are.

Smith: These days we have interest groups and lobbyists, people whose job it is to argue things in public and especially in Congress. So they dig things up and they are doing the job journalists could do, in a sense, but they are not necessarily being objective about it.

Drechsel: But some of them don't have an agenda necessarily. So you know one of the most useful sources of, say, in Wisconsin campaign finance information is not the government accountability board that collects all this stuff in the first place but makes it incredibly complicated to access it, but rather, it's the Wisconsin Democracy Campaign, where they have taken it upon themselves to take all this data from the government accountability board and put into a form that's much more accessible and useful. I tend to think that when the best education occurs is when someone says I missed the boat here but these documents are available, this information is available, so next time the school board makes a bone-head decision, I know where I can go and I know where I can find information. It's not our job to force the horse to drink but it's the government's job to make water available, it's our job to encourage that this be available so that if I ever want to, I know I can find the information I need.

Silver: Isn't that what the court said in *Citizens United*? They said, yes, we know that decision might distort the marketplace but the solution to that is disclosure, is that we upheld the disclosure laws because transparency – and they use the word “disclosure” not transparency – but transparency can correct.

Drechsel: So is that sort of on our list of benefits of transparency? Because that's a good example: campaign finance disclosure. Maybe it's kind of a watch dog thing – but it's valuable, as the court said. It's valuable because then you can make a judgment as to how to assess the argument that's being made and the communication that's being funded.

Silver: Is that self-government?

Ugland: Self-government. I think being just being able to make informed decisions.

Smith: Is that realistic to expect that somebody is going to find out who is behind a campaign ad and then that's going to affect their opinion about the content of the message?

Silver: I actually had a really interesting guest speaker come to class who has been involved in Colorado politics all the time and he was incredibly critical of *Citizens United*. I had never seen it this way. He says *Citizens United* actually got it backwards. What they have should have done, instead of allowing all independent expenditures and banning contributions, it should have allowed all contributions and completely banned independent expenditures, and it should have disbanded PACs because the ability of a citizen to figure out who runs "Americas for the American Way" – because that's what all PACs are named. None of them are named "Big Oil PAC," they are named, "Americans for Energy Independence," – it's ridiculous but if you only allow people to contribute under their corporate name and those contributions had to go directly to the politician, then the politician couldn't say, "I don't like that ad and I don't even know who is running that ad so don't associate with that ad." They would have had to run the ads themselves. Then you would associate the message with them and you would know exactly the corporation that was giving money to that individual through a contribution. I thought that was a really novel way to look at them. I had never considered that way.

Smith: Can you really realistically ban groups from expressing something?

Hopkins: That's part of the messy part.

Ugland: We don't have time to sort through that one either. I forget who was raising the initial point about whether or not it's realistic to expect the public to find this information. It's kind of what you were getting at Derigan.

Silver: Provide the water.

Ugland: But maybe it's enough that it's there and they are assured by the fact that it is there and that somebody can access it, that the politicians themselves or those who govern us will be more circumspect knowing that it's out there, but then again, there's this sort of charge to the press and all of us to make people care.

Silver: That was my other question. Does that sort of get back to this bigger issue of the whole point of this summit? The role of the press in the future. A journalist's job is no longer to necessarily get the information because the information is super available. The journalist's job is to highlight what information is important. So in the age of WikiLeaks data dumps it becomes even more important for a journalist to say hold on, hold the phone. Yes, this is 10,000 pages of documents but here are the five that really matter. And I think Fenster even brings this up, he says the first data dumps of WikiLeaks were not successful. It took the press to mobilize the public's attention to focus on these issues. But again, we can't get the public to focus on these issues if the water is not even there.

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Notes

Quoted in James Madison, *Writings* 500 (Jack N. Rakove ed., 1999).

Quoted id. at 790.

The multi-part series by Dana Priest and William M. Arkin is available at <http://projects.washingtonpost.com/top-secret-america/>. The series was published July 19, 20, 21 and Dec. 20, 2010.