

Introduction

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Who Watches the Watchers?

Does state secrecy threaten democracy? Although this question has been at the forefront of public debate for more than half a century now, the debate has become especially heated in recent years. The principal factor behind the heightened feelings has been the sense that state secrecy has made it especially difficult for citizens and lawmakers to oversee and bring the president to account for the vigorous exercise of executive power since 9/11. For instance, over the past decade, state secrecy has served to limit public debate on questions such as whether the United States ought to undertake preventive war and utilize practices like extraordinary rendition and targeted killing. It has also hindered members of Congress from knowing about, much less overseeing, the use of secret prisons, extralegal surveillance, and so-called enhanced interrogation techniques. And it has prevented the courts from proceeding with cases brought by citizens and foreigners who have been subjected to warrantless wiretaps, incarceration, and torture by the United States or its allies.

This is not, however, the only reason why state secrecy has been the subject of public debate. There has also been growing concern about violations of state secrecy in the form of unauthorized disclosures of classified information. Perhaps the best-known example is the publication on the WikiLeaks website of a quarter million American diplomatic cables. It has been argued, not unreasonably, that disclosures of this variety threaten the United States' diplomatic capabilities because, if repeated often enough, they will lessen the willingness of local sources to share sensitive information with American diplomats (and also make American diplomats reluctant to share with each other what they have learned through their carefully cultivated networks of informants). No less controversial have been the

disclosures that have appeared in leading newspapers such as the *New York Times* and the *Washington Post*, which have revealed details about various covert measures utilized in the so-called war on terror—for example, the surveillance of banking transactions and the monitoring of communications. These disclosures have been condemned on the grounds that they allow the United States' adversaries to understand, and thereby defeat, the sources and methods the U.S. government uses to obtain intelligence about their activities. Such disclosures, it has been argued, spring from a failure to recognize that state secrecy actually furthers the interests of citizens.

What are we to make of these contending claims? Does state secrecy threaten the interests of citizens or does it actually further them? Some might argue that there is no conflict here at all. They might claim that in modern democracies citizens choose representatives rather than policies, and that public sources of information are sufficient to judge policies and performance. But this argument fails to recognize that officials can use secrecy to conceal wrongdoing and to justify policies by claiming to have information that validates their decisions but which cannot be shared with citizens. Consider, for instance, Attorney General Alberto Gonzales's defense of the NSA's warrantless surveillance program:

Gonzales said the warrantless surveillance has "been extremely helpful in protecting America" from terrorist attacks. However, because the program is highly classified, he said he could not make public examples of how terrorist attacks were actually disrupted by the eavesdropping.¹

It might be proposed that claims of this kind should always be discounted. But given that there will inevitably be information whose disclosure would in fact harm national security, such skepticism has its limits. Consequently, if secrecy is not to undermine public deliberation and government accountability—practices that are central to most conceptions of democracy—then secrecy must be minimized or citizens must have some reason to believe that information will not be withheld in order to conceal wrongdoing or to manipulate public opinion. A few scholars emphasize the former requirement: democracy they insist requires publicity or transparency. John Dunn, for example, writes that "government seclusion is the most direct and also the deepest subversion of the democratic claim" because the "more governments control what their fellow citizens know the less they can claim the authority of those citizens for how they rule."² But claims of this kind have rightly been challenged. As Dennis Thompson has pointed out, democracy does not require "unconditional publicity," because citizens may themselves prefer secrecy when it leads to the execution of worthy policies that cannot otherwise be carried out.³

If it is widely accepted in theory and practice that secrecy is desirable so long as it is used to protect national security and not to conceal the abuse of power, then what explains the controversies cited earlier? These controversies might appear to be disagreements over whether secrecy is *really* necessary to protect national security in a given instance (for instance, whether the cables published by WikiLeaks really need to be kept secret in the interests of national security). But the fact that such controversies are so frequent and so heated indicates a deeper problem. Arguably, it speaks to a fundamental disagreement about *who* should ensure that secrecy is being used only for the purposes of furthering national security. That is, should we rely on self-discipline, legislative oversight, judicial arbitration, or media investigations to ensure that information is not being withheld for the wrong reasons? In other words, the question at the heart of the contemporary debate on state secrecy is not about whether or not there should be state secrecy; rather, it is about what sort of regulatory framework will ensure that state secrecy will be used to protect national security and not to conceal the abuse of power. This debate has arisen because many commentators believe that the existing regulatory framework is so deficient that it has allowed practice to diverge far and wide from the norm. Arthur Schlesinger has penned the most widely cited such condemnation. “No one questions the state’s right to keep certain things secret,” he writes, but the “real function of the secrecy system *in practice* is to protect the executive branch from accountability for its incompetence and its venality, its follies, errors and crimes.”⁴

Given that the contemporary debate on state secrecy is not about the legitimacy of state secrecy *per se*, but rather about ensuring that state secrecy is used only to further national security, it is tempting to conclude that whether state secrecy furthers or threatens our interests ultimately depends on whether we design the corresponding regulatory framework well. If we design the framework well, then there will be no reason to worry that state secrecy poses a threat to democracy, since it will then be used only to further national security. The current scholarship on state secrecy certainly encourages us to think this way. Few, if any, scholars argue that the regulatory framework required to prevent the misuse of state secrecy poses anything like a major normative challenge. I believe this picture is misleading. The error stems from a failure to fully comprehend how difficult it is to design an effective regulatory framework—one that could inspire confidence that state secrecy will not be used to systematically conceal the abuse of power. As I show below, the only credible regulatory mechanism that we have to monitor the use of state secrecy does *not* sit easily with our moral and political values, especially not with key democratic norms.

To see why this is the case, consider the challenge we face when we try to ensure that state secrecy is being used only to further national security. It is widely asserted that we can be confident that the president will not be able to misuse state secrecy only if he is not allowed to have the final say on whether a given piece of classified information should be made public or shared with the other branches of government. Otherwise, there would be little to prevent him from using state secrecy to conceal information that has the potential to embarrass his administration. But to whom, then, should we give the final say? There are powerful institutional reasons to doubt that this responsibility should be vested in the hands of the obvious candidates—namely, Congress or the courts. As far as Congress is concerned, its structure and composition, particularly the fact that it is made up of adversarial parties, make it prone to indisciplined disclosures of classified information, that is, to disclosures contrary to Congress's own rules and orders. The partisan character of congressional politics is the reason why many scholars recommend turning to the courts or to an independent tribunal, either of which, they argue, could supervise the use of state secrecy more impartially than could the president or Congress. But this advice glosses over the fact that judges are not trained, and courts are not equipped, to make politically charged decisions about what uses of state secrecy are appropriate. This is not some trumped-up charge of judicial incompetence; these are the institutional reasons that judges themselves have offered in defense of their long-standing record of deferring to the executive branch's estimation of the harm that might be caused by the disclosure of classified information.

Suppose we are not convinced by these institutional reasons. Perhaps we feel that Congress could overcome the problem of indiscipline, or that the courts or an independent tribunal could master the business of judging national security harm. Even so, there remains another reason to doubt whether vesting the final say in any of these bodies can make us any more confident that state secrecy will not be used to hide wrongdoing. The concern is this: since the decisions of a committee or a bench that supervises the use of state secrecy will not be any more amenable to external scrutiny than the president's decisions are, what is to prevent the members of this committee or bench from behaving in a decidedly narrow fashion—permitting the use of state secrecy to conceal the abuse of power by their copartisans?

One might argue that the decisions of an independent panel or tribunal are likely to be more disinterested than those of Congress. But if a panel or a tribunal were to be routinely involved in the regulation of state secrecy, then could the politicization of appointments be far behind, and with it the loss of the disinterestedness that makes this panel or tribunal

such an appealing venue? More to the point, is there such a thing as a nonpartisan view of whether, for example, the use of warrantless surveillance constitutes an abuse of executive power (and that therefore classified documents evidencing the use of such surveillance ought to be made public)? Remarkably, the liberal scholars who champion using the courts, or an “independent” tribunal, to rein in presidents do not seem to consider that the members of such a body could have more in common with Justice Antonin Scalia than with Justice William Brennan. This is not to say that the members of an independent panel or tribunal are bound to act in a narrowly partisan manner. They may very well act disinterestedly or objectively (as far as this is possible). But how are we to know if and when this is the case, that is, whether and when they have been able to resist being swayed by their political affiliations, when their deliberations must be *in camera* and *ex parte*? In short, the conceptual problem associated with transferring the final say on the employment of state secrecy from the president to a “secrecy regulator” is that it leaves us with no way of knowing whether this regulator’s behavior is any different from the president’s. It is therefore not clear why turning to Congress or the courts, or indeed to an “independent” tribunal, should inspire great confidence that state secrecy will not be misused.

So is the goal of this book to argue that there is no way to part the veil of state secrecy, that we can never really know whether state secrecy is being used only to protect national security and not to conceal the abuse of power? To the contrary, the purpose of this book is to focus attention on a remarkable means by which citizens and lawmakers can be—and indeed are—alerted to wrongdoing. I refer here to unauthorized disclosures of classified information, which have become an increasingly common feature of our public life, having grown almost in lockstep with the dramatic transformation in the scope and scale of the president’s national security powers. The possibility of unauthorized disclosures provides the most effective and credible guarantee that those who have the formal authority over state secrecy cannot systematically use it to their own advantage. This practice effectively *dispersed* rather than *centralized* the power to disclose classified information. By doing so, it eliminates the problem of “regulatory capture” accompanying any scheme that entrusts the responsibility for supervising state secrecy to a single authority, such as a committee in Congress or a panel or tribunal.

What diminishes the appeal of unauthorized disclosures, though, is the fact that they are not always used to further the interests and values of citizens. At least since Daniel Ellsberg’s disclosure of the Pentagon Papers to the *New York Times* in 1971, there has been a sense that, if all else fails, citizens and lawmakers can rely on “insiders” to blow the whistle on

wrongdoing that has been shrouded in state secrecy. The reality, though, is that very few officials have an incentive to blow the whistle, because doing so exposes them to bruising professional and social sanctions from managers, supervisors, and colleagues, whose reputations and careers are threatened, directly or indirectly, by their disclosures. As we shall see, there is little that we can do to protect would-be whistleblowers from such sanctions. Though the law does try to prevent supervisors and managers from retaliating against whistleblowers, it cannot easily prevent them from withholding career-enhancing plum positions or choice assignments. Nor indeed can the law compel a whistleblower's colleagues to behave in anything more than a tolerable fashion. It cannot, for instance, prevent them from shunning the whistleblower in social settings.

It should come as no surprise, then, that officials usually make unauthorized disclosures by *leaking* classified information: that is, by divulging it anonymously. This is where the complications begin to arise. There is a tendency for scholars to view the practice of leaking as a form of civil disobedience, a morally justified act of resistance to the wrongful use of political power. But this claim is highly problematic. When an official discloses classified information anonymously, citizens and lawmakers have little ability to discern his motives, much less to punish a harmful or misguided disclosure. Of course it is possible for an anonymous disclosure to reveal such severe wrongdoing that the identity and motives of the discloser are rendered irrelevant. In practice, though, relatively few leaks reveal activities that are so wrongful as to invite widespread condemnation. Consequently, anonymity allows an official to disclose classified information and then leave the public to pick up the pieces in the event that his disclosure eventually proves to be unwarranted. Worse yet, anonymity allows officials to make unauthorized disclosures that are actually intended to further narrow or partisan interests. These practices are at odds with the theory of civil disobedience, not to mention the democratic norms of publicity and accountability.

The realization that the practice of leaking is itself prone to grave abuse puts us in a difficult position. If we prohibit the publication of leaks of classified information, we stand to lose the most effective and credible means by which we can be alerted to wrongdoing that occurs under cover of secrecy. But if we permit the publication of such leaks, then we risk contaminating our public life with conspiracy and covert warfare, as not only good men and women but also partisans and zealots take advantage of anonymity to disclose information that suits their narrow purposes. Remarkably, the advocates of the press generally fail to acknowledge the existence of this dilemma. On the contrary, they claim that the press can be trusted to act in the public interest, and that it should therefore be allowed to decide

what classified information ought to be made public. But this is a remarkable conceit. Why should we believe that the press will always act in the public interest, especially when its role as information broker is shrouded in secrecy, thus preventing the public from ascertaining the motives and the precise actions of reporters, editors, and publishers, not to mention their sources? It is not clear why champions of the First Amendment, who refuse to believe that the president or Congress ought to be trusted to use state secrecy in the public interest, are so willing to trust reporters, editors, and publishers to use anonymity in the public interest. This blind faith appears to be a legacy of the fierce political battles of the 1970s, a time when reporters and publishers determined, albeit not without some hesitation, that they best served their own interests by playing the watchdog role cast for them by the First Amendment.⁵ This experience seems to have left many scholars and commentators with a lasting impression of the press as a heroic institution, perennially on the hunt for the abuse of power, in the fashion of *All the President's Men*. Whatever the precise reason for this one-sided view of the press, it is increasingly undermined by the facts. In recent decades, it has become ever more apparent that not only insiders, but also reporters, editors, and publishers, have learned to exploit leaks of classified information to their own advantage, whether to pursue vendettas, manipulate public opinion, obtain prizes, or earn profits.

The fact that leaks of classified information can be used both for good (to sound the alarm) and for ill (to pursue a narrow or partisan agenda) has a serious implication for democracy. It implies that our collective fate depends in no small measure on the outcome of battles fought out of public sight: it is the contest of morals and interests under the cloak of anonymity that determines whether state secrecy is used to protect or to manipulate the public. If so, the existence of state secrecy poses a great quandary for the American people, and indeed for all peoples that wish to live according to the norms of democracy. The quandary is this: we cannot do without state secrecy, as it is essential for national security, but so long as there is state secrecy, our ability to guard against its misuse depends not so much on the checks and balances established by the Constitution as on the virtues and vices of those men and women who secretly take the law into their own hands in order to either open our eyes or close our minds.

Clarifications

Before I outline the forthcoming chapters, a few clarifications are in order. The first concerns the scope of the study. Its focus is state secrecy: secrecy motivated by a concern for national security. It will not address civil forms

of secrecy. This latter form of secrecy, which is utilized by a range of public and private institutions including Congress, the Supreme Court, and the Federal Reserve, involves concealing deliberations or decisions in order to promote objectives such as fairness, candor, and efficiency.⁶ This form of secrecy raises fascinating moral and political questions of its own, but I will not be examining it here.⁷

Let me also preempt concerns about the scope of the conclusions drawn here. The evidence cited in this book is drawn almost entirely from the United States. I have focused on the United States because its extensive military and diplomatic commitments sharply elevate the demand for state secrecy—and hence the challenge of regulation. This focus might lead to the charge that the prognosis offered here is not generalizable, because it is based on an extreme case. In other words, it might be argued that state secrecy is an American problem rather than a problem in political theory more generally. I reject this charge. Although citizens and lawmakers in other democracies, especially in Europe, may be relatively less troubled by state secrecy, this difference should not be attributed to cultural or institutional variation but to the relatively modest role these countries currently play in world affairs. I have no doubt that if and when these democracies find themselves in a context that stimulates the vigorous use of executive power, they will be forced to confront the very same questions we shall be examining, namely, how best to regulate state secrecy.

The validity of the conclusions drawn here might also be challenged on the grounds that the remarkable growth in state secrecy since 9/11, and the press's role in monitoring it, are mere aberrations. These developments, it may be argued, are the product of the personalities and circumstances that have dominated American politics over the past decade, specifically President George W. Bush and his colleagues Vice President Richard Cheney and Defense Secretary Donald Rumsfeld, who, it is alleged, had a unique proclivity for secrecy.⁸ But this claim is not borne out by the evidence. If President Bush and his colleagues were indeed unique in this respect, then public anxiety about state secrecy ought to have died down following their departure. But that is not what happened. Though candidate Barack Obama roundly criticized the "excessive" secrecy of the Bush administration, the Obama administration has itself been strongly condemned for its use of the "state secrets privilege," for expanding the use of covert drone strikes, and for clamping down harder than ever before on the unauthorized disclosure of classified information.⁹ This record suggests that public anxiety about state secrecy cannot be attributed solely (or even substantially) to the proclivities of a particular administration.

It is also tempting to take the view that the weakening of Al-Qaeda and the United States' impending withdrawal from Iraq and Afghanistan will lessen the need for secretive executive action, and thereby ease the burden of regulating state secrecy. But this view seems shortsighted. Arguably, the need for boldness and discretion is linked to the United States' involvement in world affairs. So long as the United States continues to play a leading role in the international system, it will undoubtedly continue to encounter the sorts of tensions and crises that will compel or allow presidents to act energetically under cover of secrecy. Indeed, even before the ink has dried on the order to wind down in Iraq and Afghanistan, the Obama administration has announced that it will refocus the military on the Asia-Pacific region, a move that portends prolonged tensions with China.¹⁰ Meanwhile, there are, at the time of writing, news reports about the possibility of preemptive strikes on Iran, based on secret intelligence about its nuclear weapons program.¹¹ Other developments along the same lines, including continuing instability in the Middle East, suggest that the need for state secrecy and corresponding concerns about the abuse of this power are not likely to die down anytime soon.

Finally, it may be objected that the conclusions reached here are unimportant because the underlying arguments are applicable only in rare cases. For example, the claim that judges ought not to conduct penetrating review of state secrecy owing to their limited expertise in the field of national security is likeliest to hold true when courts are asked to make complex prudential judgments—for instance, whether disclosing an outdated nuclear blueprint will help a foreign country build a more refined nuclear weapon. This claim is less likely to hold true when an inventor seeks the court's help to obtain access to blueprints of a military weapon that he himself has designed. In the latter case, one might think, it would be entirely fitting for a judge to seriously question whether secrecy is warranted.

No doubt the conclusion reached here—that it is very difficult to design a regulatory scheme that is effective, credible, and legitimate—holds truer in cases of the former variety. As we shall see in chapters 4–6, there can be little objection to judges (or lawmakers and editors) countermanding patently abusive or foolish classification orders. But it is far from clear that most controversies concerning the exercise of state secrecy are of this kind. Certainly, the leading controversies—such as Iran-Contra or the Iraq War—have not been open-and-shut cases. Besides, given how high the stakes have been in these cases, improving our understanding of the pitfalls associated with regulating state secrecy seems important even if complex cases turn out to be rarer than we realize.

The Plan

Having outlined the broad argument, and preempted some common objections, I want to sketch out the contributions of the individual chapters. Our point of departure in chapter 1 is the observation that many commentators believe that state secrecy is commonly abused in contemporary America. This observation raises the question of how the Constitution, otherwise revered for establishing checks and balances, could have allowed the president a free hand when it comes to state secrecy. As we shall see, a number of scholars argue that the Framers never intended this outcome. The president, they claim, has come to exercise state secrecy as he alone sees fit, because war and conflict have prompted deference from lawmakers and judges and unquestioning loyalty from citizens. The real and apparent abuses of state secrecy are due, they argue, not to flaws in the Constitution but rather to a lack of courage and wisdom on the part of representatives and citizens.

Chapter 1 challenges this explanation. It argues that the Framers viewed state secrecy as an essential element of statecraft, and that they vested the authority to keep secrets in the executive because they saw it as best suited to exercise this power. Of course the Framers were not oblivious to the possibility that this authority could be abused. They identified three means of countering its abuse: elections, the separation of powers, and unauthorized disclosures. The problem, however, is that the Framers did not elaborate how these checks and balances can operate when the president has the right to keep secrets (and the ability to enforce this right). This silence, as we shall see, means that the Framers bequeathed future generations three puzzles: First, how can citizens hold the president accountable for the use of secrecy, since the president gets to decide when, if ever, to disclose secret information to the public? Second, how can lawmakers oversee the use of state secrecy, since the executive gets to decide when, if ever, to disclose secret information to Congress? Third, under what circumstances, if any, are subordinate officials entitled to disclose secret information that reveals wrongdoing?

The Framers' silence, as we will see, did not produce lasting crises of confidence in the nineteenth century because the dearth of foreign entanglements afforded presidents little reason or opportunity to employ state secrecy extensively. However, once the United States immersed itself in international politics after the turn of the twentieth century, the concomitant increase in the scope and scale of state secrecy made the Framers' silence impossible to ignore. Following real and perceived abuses of state secrecy, concerted efforts were made to counter the president's stranglehold over the flow of secret information. But these efforts, we will see, have now arrived at an impasse. The regulatory mechanisms that have been

championed in recent decades—the judicial enforcement of the Freedom of Information Act and the establishment of congressional oversight committees in particular—have proven ineffective at exposing wrongdoing. Meanwhile, the regulatory mechanisms that have proven effective at exposing wrongdoing—the practices of whistleblowing and leaking—are condemned as unlawful or undemocratic and therefore illegitimate. In sum, the regulatory mechanisms that are being used to counter the president's stranglehold over secret information are widely seen as either ineffectual or undesirable.

This impasse, I conclude in chapter 1, suggests that the president's continuing monopoly of state secrecy cannot be attributed to the docility of lawmakers and judges, and the gullibility of citizens. It should be attributed instead to the intractability of the puzzles we have inherited from the Framers: the difficulty of constructing a regulatory authority to oversee state secrecy that is at once effective, credible, and legitimate. If we wish to subject the exercise of state secrecy to checks and balances, then we must examine whether it is possible to bolster the effectiveness of judicial review and legislative oversight, and to defend the legitimacy of whistleblowing and leaking.

Chapter 2 takes up the first part of the challenge laid down in chapter 1. It examines whether the judicial review of state secrecy has in fact been deferential, and, if so, whether such deference can be justified. After surveying the evidence, I conclude that the courts have indeed adopted a deferential posture toward the executive's claims about the harm likely to be caused by the disclosure of classified information, even in instances where the classified information appears innocuous. The question then becomes whether the judiciary ought to shed this posture. As we shall see, some scholars argue that judicial review of classification decisions ought to be expanded so that citizens can be confident that information is not being wrongly concealed from them. I challenge this view on two grounds. First, I make the case that judges are not qualified to challenge the executive's claims about the harm likely to be caused by the disclosure of secret information. Second, I contend that requiring judges to make what are effectively subjective judgments about the costs and benefits of disclosure will merely encourage the politicization of the relevant benches and thereby defeat the whole purpose of turning to the courts, which is to have an impartial regulator.

Given these objections, I devote the latter part of chapter 2 to evaluating whether judges can instead make state secrecy less opaque by requiring executive officers to justify why the information in their possession cannot be made public. I argue that while this strategy appears to ease the epistemic burden placed on judges, it is conceivable that offering reasons

as to why a secret ought to remain a secret can itself harm national security. It is not surprising, then, that judges prefer to treat secrecy claims as justified so long as they satisfy narrow procedural guidelines.

In spite of rejecting the idea that we can—or should—expect judges to take the lead in overseeing state secrecy, I conclude chapter 2 on a somewhat positive note. I note that judicial deference can be—and often is—set aside once unauthorized disclosures of classified information give judges reason to challenge executive branch claims about the harm likely to be caused by disclosure. The question that remains to be resolved, though, is whether we ought to condone such disclosures, seeing as the law vests control over classified information in the hands of the president.

In chapter 3 I examine why Congress typically struggles to stay abreast of the president's covert actions and policies. The principal challenge that Congress faces in its endeavor to oversee the exercise of state secrecy, I note, is that the executive does not believe that it is obliged to comply with Congress's requests for information. A number of scholars have argued that such invocations of an "executive privilege" to withhold information do not pose a serious obstacle to oversight because Congress can use its wide-ranging constitutional powers to compel the president to part with the information needed to perform oversight. But this claim, I argue, is problematic because absent some initial hint of wrongdoing, Congress will be hard-pressed to know whether and when it ought to enter into combat with the president. Hence, if we wish to bolster the effectiveness of oversight, we must strip the president of his privilege to withhold information so that Congress can have independent and timely access to classified information. But such a drastic move, I contend, is unwise for two reasons. First, it is sensible to vest control over national security information in the hands of the president because Congress's structure and composition mean that its members are more prone to making indisCIPLINED disclosures. Second, transferring the final say over the disclosure of classified information to a special committee in Congress or to an independent panel ultimately provides little comfort, because citizens have no way of ascertaining whether the members of this bench or panel have been "captured" by vested or partisan interests, since their decisions to withhold or to selectively reveal information will not be open to external review.

In spite of rejecting the idea that we can—or should—expect lawmakers to take the lead in overseeing state secrecy, chapter 3 concludes in a hopeful vein. I note that while executive privilege would appear to make it difficult for Congress to oversee the president, Congress is actually able to obtain crucial hints of wrongdoing quite easily, owing to unauthorized disclosures from the executive branch. What remains to be seen, though,

is whether Congress's dependence on such disclosures is acceptable, since these disclosures violate criminal and civil laws enacted by Congress itself.

Having seen the complications that arise when we try to invigorate judicial review and legislative oversight, as well as the extent to which judges and lawmakers depend on unauthorized disclosures to alert them to potential wrongdoing, I then turn in chapter 4 to examine whether the law ought to condone unauthorized disclosures. I begin by clarifying what the law has to say about unauthorized disclosures of classified information. I show that, contrary to common belief, the law is not favorably disposed toward the most important link in the transmission chain, namely, the official responsible for making the unauthorized disclosure. Following this, I ask whether the law ought to be revised to take account of the fact that unauthorized disclosures can allow lawmakers and citizens to become aware of misconduct that would otherwise be shielded by state secrecy. I argue that, for two reasons, the law should *not* be revised: first, because neither officials nor the reporters, editors, and publishers who transmit their disclosures can reliably know the extent to which an unauthorized disclosure will harm national security; and second, because neither officials nor reporters, editors, and publishers can readily claim to be acting on behalf of citizens, since they are unelected and also cannot be easily held accountable for irresponsible disclosures. At the same time, however, I point out that even though the law is right to forbid unauthorized disclosures, this does not rule out the possibility that officials could be morally justified in disobeying the law in order to bring incriminating information to the attention of citizens and lawmakers.

Chapter 5 then considers the circumstances under which an official will be justified in violating laws that prohibit unauthorized disclosures. Here I argue that an official may "blow the whistle" if he encounters classified information that clearly reveals wrongdoing posing an immediate and serious threat to the public interest, and if he makes a good faith effort to minimize the harm that the publication of this information may cause national security. I also argue that the official must identify himself so that we can examine whether his view of what constitutes a wrongful exercise of executive power is a disinterested one. Unfortunately, the last requirement, as we shall see, gravely complicates matters. A would-be whistleblower has little incentive to disclose her identity, because doing so makes her vulnerable to retaliation from her managers and colleagues, who are likely to take a dim view of the negative publicity resulting from her disclosures. There is, I will argue, little we can do to ameliorate this situation, for even if we were to enact a law to shield whistleblowers from outright harassment, we will not be able to protect them against subtler

forms of administrative and social retaliation. Nor, I will argue, can we hope that officials will routinely blow the whistle in spite of the threat of retaliation, because the uncompromising attitude required to spur such defiant behavior is hard to instill, and can easily shade into an imprudent moral absolutism.

Having established that we cannot rely on the practice of whistleblowing to counter the misuse of state secrecy, I then turn to examine whether there is a more practical means by which officials could alert citizens and lawmakers to wrongdoing. Chapter 6 argues that the practice of leaking meets this requirement. In particular, I show that officials are able to disclose classified information anonymously, because they recognize that presidents are often hard-pressed to identify the responsible party. But I also draw attention to the fact that officials can—and do—make anonymous disclosures to advance narrow or partisan agendas by revealing classified information that casts their actions (or those of their adversaries) in a favorable (or unfavorable) light. In light of this danger, the latter half of chapter 6 considers whether we might be able to utilize reporters, editors, and publishers—who are the likeliest to know the identity, and thereby the motives, of their sources—to help us detect when anonymity is being used to advance narrow or partisan interests. I conclude that reporters, editors, and publishers cannot be relied upon to act as filters in the public interest, and that the means by which we can compel them to take up this responsibility are severely limited by a variety of constitutional and practical factors, including the First Amendment's constraints on press regulation, and our inability to regulate foreign media outlets.

The arguments outlined above lead to a bittersweet conclusion. Since officials can disclose classified information without being detected, and reporters, editors, and publishers can publicize such information without being regulated, there will inevitably be leaks of classified information. This outcome is to be welcomed, I argue, insofar as it means that it is very difficult for any president to use state secrecy to systematically conceal the abuse of power. However, this outcome is to be bemoaned insofar as unwarranted or malicious leaks of classified information undermine energetic leadership as well as public deliberation and democratic accountability. There is, in other words, no neat answer to the puzzles we have inherited from the Framers. It really is very difficult to construct a regulatory framework that is efficient, credible, and legitimate.

Given this less than ideal outcome, I devote the concluding chapter to outlining some of the means by which we might minimize the downsides of our dependence on unauthorized disclosures. The president, I note, can try to stem unauthorized disclosures by acting in ways that will encourage his subordinates to defer to his decisions about what to keep secret, and

media critics can try to foster responsible journalism by subjecting anonymously sourced reports to critical review. But these measures, I warn, can go only so far. The president will not always be able to take everyone along when morally or politically controversial decisions need to be made, and even the threat of public censure will not always deter officials, reporters, editors, and publishers from making selective disclosures in order to promote their own agendas. This in turn means that the “unruly contest” between the president and the press, which causes so much heartburn in our day, is here to stay. The wisest course, I conclude, is to reconcile ourselves to the attendant disadvantages, because there is, at present, no better way to regulate the exercise of state secrecy.