

A Reasonable Expectation of Privacy? Secrecy and National Security in a Democracy

Kathleen M. Hogan

University of Maryland University Campus, Largo, Maryland, USA
Kathleen.Hogan@faculty.umuc.edu

Abstract. Citizens do not routinely agree to sacrifice their privacy. When cases come to light that the government has been spying on its citizens, there is outrage. Still, citizens' fierce protection of personal privacy does not obviate their expectation of government to ensure national security. Public support for secret government operations is cyclical, self-interested, influenced by citizens' knowledge of political affairs, and related to the public's level of trust in its leaders and the perception of threats. Polls indicate that citizens are protective of their personal privacy but willing to give up a degree of control to trusted leaders.

Keywords: Secrecy; privacy, public opinion polls about national security, government, public preferences.

1 Introduction

When one works for the government, the phrase “no reasonable expectation of privacy” is part of every information systems security briefing and contract. This pertains to government employees at nearly all levels of seniority. In effect, employees affirm that they understand that every email, telephone conversation, or any other transaction is subject to monitoring and should not be considered private. Public awareness campaign placards tacked up in certain public areas within the company spaces state that “monitoring is for everyone’s good.” This understanding is considered part of the job.

Private citizens, however, do not routinely agree to sacrifice the privacy of their communications and activities. When cases come to light that the government has been spying on its citizens, people are outraged, watchdog groups spring into action and there is heavy media coverage. Still, citizens' fierce protection of their privacy does not change their expectation for the government to ensure national security by an architecture that is based on secrecy. Public support for secret government operations is cyclical, self-interested, and influenced by the public's level of trust in its leaders and their perception of external threats. Support for secret operations in the WWII years gave way to outrage in the mid-1970s when “allegations of abuse and improper activities” and “great public concern that the Congress take action to bring intelligence agencies under the constitutional framework” (US Congress Final Report of the Select Committee 1976, 94). The Church and Pike Committee reports, published in a multi-volume series, presented a litany of illegal actions taken by the CIA, the FBI,

and other government agencies and departments that included assassination of foreign leaders to spying on and plotting against American civil rights, and anti-war activists (US Congress Final Report of the Select Committee 1976, 101-755). Disclosure of intrusion into citizens' personal lives galvanizes public opinion and illuminates the degree of ambivalence toward secrecy that there is in our society: it is one thing to spy on "enemies" in the interest of national security; it is quite a different matter to spy on Americans!

Despite whistleblowers' accounts of government wrongdoing, public polls indicate that citizens continue to maintain trust in the government's role to safeguard national security despite some tradeoffs in transparency. That leaves one to explore the threshold at which secrecy in government is acceptable. Legal and constitutional institutions address secrecy, however, interpretation and implementation of these measures are dependent on the political environment, the administration's relationship to Congress, foreign policy issues and the tenor of public opinion. This paper discusses the paradox of secrecy in a democracy as a democratic government seeks to maintain national security for its citizens without overstepping the limits of personal privacy. It argues that citizens accept secrecy as a necessary means to protect national security and economic interests as long as personal privacy is sacrosanct, and that citizens maintain the right of oversight and consultation, even when those rights are limited, delegated to representatives, or perhaps not even practicable.

2 Review of the Literature

A survey of the literature about government secrecy and prevention of unlawful intrusion into the private sphere illustrates both the necessity and danger of the practice of secrecy within a democracy. While some quip that "intelligence is the second oldest profession", one could argue that secrecy represents the ubiquitous dilemma a democracy addresses. To ensure strategic advantage, governments protect information and hide vulnerabilities. This creates a Byzantine system of limited accessibility to information, which may be necessary to a nation's viability in a competitive world, but is nonetheless abhorrent to an open society. The next sections explore ideas relevant to various aspects of secrecy.

2.1 The Instrumental Role of Secrecy

Secrecy is part of human life. It allows persons to preserve personal thoughts, interests, and privacy. Our own understanding of why we wish to protect our own private elements makes us suspicious of others' motives. It is natural, then, that citizens expect these same motivations to carry over into public life, especially when there are competitive interests at stake. Secrets are a protective mechanism, imperative for self-preservation, and thereby legitimate as a means to preserve security.

As individuals, we know our own secrets and why we need to hide them. Yet we have a certain discomfort with secrets held by our government. Halperin and Hoffman write that from the beginning of the US' early democratic experience, the framers of

the Constitution devoted thought and debate to the issue of secrecy and how much was appropriate. For example, Article I, Section 5 requires that Congress publish journals of their proceedings “except such parts thereof as may in their judgment require secrecy”, yet the President was given no such allowance to conceal secrets from Congress (Halperin and Hoffman 1977, 87-91). Still, secrecy of the proceedings of the Convention itself was controversial. While secret meetings were more expedient, members were suspicious of conclusions without days of wrangling and discussion. Members of the Convention were sworn to secrecy and agreed that members would not divulge information from the session journals. (Bok 1984, 183) This duality of thought regarding the place of secrecy highlights the crux of the argument. Debate and open discussion endangers national security by revealing not only practices, intentions, and capabilities, but also our vulnerabilities. Debate can be a messy, time-consuming practice which could result in a loss of initiative and the element of surprise. Yet, our democratic process dictates that, however inefficient, citizens must retain the right to bring complaints, questions, and information to any forum at which government action is carried out on behalf of the people.

Secrecy safeguards economic advantage. This is evident in the modern industry of business intelligence, which uses practices similar to those used in national intelligence to gather information about competitors to gain advantage. Corporate “spying” can be traced back to our own years of “manifest destiny” when clever politicians and leaders used information gathered surreptitiously to political and economic advantage. O’Toole and Miller write that administrations dispatched Army officers to distant ends of the country to collect information about leaders, defense, and public sentiment. Members of Congress benefited from this knowledge to secure lucrative contracts for their constituencies and dividends for themselves (O’Toole 1991; Miller 1989). There is obvious advantage when nations and businesses can cloak their own intentions while ferreting out information about the competitor; in conditions where the competition is close, sensitive information provides an exponential advantage.

2.2 Ethics and Secrecy

Just as it would be capricious for a nation to plan a campaign without knowledge of the enemy’s capabilities, it would be negligent for leaders to engage in foreign policy without the best information about intentions, political maneuvering, and domestic conditions. The public depends on its leaders to safeguard security, and expects those in charge of their interests to use the tools at their disposal. That said, polls indicate that citizens are conflicted about what is necessary and what is unethical, especially when their security and economic interests are at stake (Best, Kruger, and Ladewig 2006).

It is useful to consider Bok’s “tests” as a baseline for the morality of secrecy. She writes that one should determine if there is an alternative action that achieves the same goals without lying or hiding the truth, then lay out the rationale for choosing secrecy. The final test would be to determine how a reasonable person might respond to the arguments. (Bok 1984, 113) She argues that secrecy goes against the democratic practices of deliberation, discourse, and consideration of other views. A leader who

might sometimes need “perfect secrecy and immediate dispatch” to keep sensitive operations intact, could result in a tendency to circumvent the practice of seeking consensus and public approval. (Bok 1984, 171; Gutmann and Thompson 1996)

It is important to note that there are different categories of secrets. For example, when secrecy is employed to safeguard critical national interests, it is defensible. However, if the very act of collecting those secrets violates law or would provoke a public outcry should the details come to light, the act becomes intuitively less defensible. Citizens regularly grapple with the dilemma of secrecy and make value tradeoffs for the advantages that secrecy yields. Citizens also are quick to differentiate that practices employed against potential enemies are thoroughly unacceptable when used at home. By accepting conditional dishonesty against those designated as our enemies, citizens become responsible for the outcomes. There are also nuances between what is acceptable against a commonly perceived enemy (a terrorist, cyber attacker, or an individual or nation who commits a significant economic fraud against the US), and more ambiguous cases. In these instances, citizens would be subject to the influence of the media, their own biases, and incomplete information.

It is important to recognize and acknowledge the motives for keeping secrets because, ultimately, those motives will influence how secrets are used. Warren writes of the connection to trust. One has less “need to know” if parties share interests. A citizen cannot know the facts of every issue so he must place his trust in leaders in whom he has faith to carry out actions on his behalf (Warren 1996, 57). Defensible secrets require that those with authority observe constitutional and legislative guidance, remain responsive to the public trust, and make daily judgments about the importance and utility of secrecy. Being above any possible gain from illegitimate acts is critical, and problematic.

2.3 The Unintentional Consequences of Secrecy

There is no shortage of comprehensive accounts of the history of secrecy, the dangers, and unintended consequences resulting from secrecy and this paper will recap the salient points. First, policies to create and maintain a culture of secrecy within government agencies have been fairly consistent since World War II. Kate Doyle provides a historical summary of events and executive policies from the start of the Cold War through the Clinton administration and makes a clear argument that policymakers have historically used “national security” as an excuse to evade questions and a public justification of their actions. (Doyle 1999, 34) She shares Steven Aftergood’s view that the public regularly abrogated right to disclosure because it chose not to question in prevailing security considerations (Aftergood 2009; Aftergood 2010.)

During the Cold War decades, there was considerable public fear of a nuclear attack by the Soviet Union, but even after the fall of the Soviet Union, there were always new events on the horizons to keep the public fearful, and conditioned to trust leaders to act appropriately to maintain national security. The attack on the USS Cole by suicide bombers in a Yemeni port brought a new set of fears to the public. The catastrophic attacks of 9/11 actualized to many people the greatest fears of the Cold

War – that an enemy would attack the US on its own soil. Following these attacks, the public expected results from their leaders and cost was no object.

Second, the proliferation of secrecy by over- or misclassification of information denigrates the ability of government to be transparent and responsive to its citizens, and creates opportunities and plausible deniability for government entities to illegally collect information on US citizen. Advocates for a more open society argue that this “culture of secrecy” must be rehabilitated, and disclosure policies systematically reviewed at every level of government because without greater disclosure of information, citizens are “deprived of a meaningful role in the political process” and the exercise of authority remains “insulated from public oversight” (Aftergood 2011, 399).

Third, secrecy carries its own burdens. By the very nature of hiding information and actions, secrecy requires exclusion and collusion: exclusion to limit the number of people who have access to the information, and collusion to reinforce the pact of secrecy within the membership of the group. The danger of exclusion is that people or agencies that may need to have the information may be prevented from access to it. Many events in our political and military history demonstrate that key members were unable to get critical information and important operations failed as a result. The latest and most glaring instance of the results of exclusion and over classification is documented in the 9/11 Report, which describes the dysfunctional relationship between agencies and their ability to share information (9/11 Report 2006). Collusion also pressures indoctrinated members to conform to the rules of the group or risk expulsion, or worse. Alexander George, the seminal author of the concept on the psychology of group dynamics, explains how members of a group feel compelled to adhere to group objectives. The element of secrecy produces its own momentum for consensus, which is dangerous because there is little room for dialogue in this environment (George 1980)

Last, the proliferation of classified documents devalues the information and creates risks of unintended errors in the handling of the material. The Moynihan Commission concluded that excessive secrecy carries risks. To coin a phrase from the Ellsberg case, the report notes that when “everything is secret, nothing is secret”. The best way to “ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role.” (Secrecy: Report of the Commission on Protecting and Reducing Government Secrecy 1994, 794) Aftergood argues that the proliferation of classified material requires more handling, more attention to rules, and is more prone to error as a result. (Aftergood 2010, 846)

Yet, despite the immense power of the government to collect information and engage in surveillance against both U.S. citizens and foreigners, a degree of risk to personal privacy is still acceptable to many Americans. Best, Kruger, and Ladewig write that trends from polls conducted during the years of 1990 – 2005 indicate that while Americans affirm that privacy is a critical right, they are willing to “support expansion of government investigative powers to combat terrorism...and support specific surveillance measures introduced since 9/11” (Best et al 2006, 383).

Other polls also demonstrate that the public does not believe the government is the biggest culprit when it comes to infringement of personal privacy. Rather, they believe that banks and credit card companies, and entities not associated with the U.S. government at all, but other countries’ governments are the entities that create

suspicion. A recent poll taken by McAfee in partnership with the National Cyber Security Alliance (NCSA) reveals a “substantial disconnect between their respective online security perceptions and their actual practices while on the Internet” (*NewsWire Story* “Kickoff of National Cyber Security Month” 2012, accessed October 1, 2012). Reportedly, 90 percent of the citizens surveyed believed that “Americans do not feel completely safe online and believe a safe and secure internet is crucial to U.S. economic security.” Respondents replied that “a safe and secure Internet is crucial to our nation's economic security”, it was vital to American jobs, and they were worried that their personal economic data had been breached (*NewsWire Story* 2012, accessed October 1, 2012).

Given Americans’ degree of alarm about cyber security, there is surprisingly little mention of citizens’ concern that the government is intruding into their private cyber lives. This leads to a preliminary conclusion that citizens are less concerned about government practices in its efforts to maintain national security. This perception may be attributable to ongoing fears of terrorism and national security, fears that are not lessened in a citizenry that is technologically more sophisticated but yet exposed to breaking news from around the world that contributes to a perception that the world is unstable, unsafe, and threatening to American security. Taken at face value, this seemed a counterintuitive stance, though perhaps it is in line with how people adopt positions and beliefs. The next section explores the basis of public adoption of beliefs and relates the concepts to polls.

3 Zaller’s Concept of Reception and Acceptance of Messages

The process by which citizens arrive at their preferences is admittedly mysterious. Therefore, this paper uses John Zaller’s explanation of how people come to their beliefs, which in turn shapes the way they vote, who they support, and what they will accept when they have faith in their leadership. Simply, the average citizens, even those who are well-informed and follows political issues cannot own every issue. Therefore, citizens rely on trust and other heuristics to arrive at their opinions about secrecy, national security, and citizens’ right to privacy, especially since the event of 9/11 (Zaller 1992). Media and political leaders also shape public perceptions of national security and the degree of transparency in government. First, citizens vary in their attention to politics so have varying exposure to political information and media coverage of political events. Second, people react to information based on their own knowledge of political events. Third, citizens do not carry around fixed notions about every issue that a poll might ask, so their answers are often “top of the head” and perhaps based on their most recent information or attitudes. Finally, citizens formulate their answers to questions from information most readily available to them. (Zaller 1992, 1)

The two most important elements to political preferences are political knowledge and political attitudes. Incoming and available information shapes preferences. In the simplest case, individuals receive information and accept or reject it. However, there are often two-sided information flows in which the dominant message is pushing opinion in one direction as the less intense countervailing message counteracts the

effect of the dominant message, especially when discourse is divided along partisan lines. The choice the individual makes is based on the strength of his feelings for the messages, based on the source, degree of interest in the issue, and the most salient beliefs the individuals hold at that particular time. The next section applies these concepts to polls about individuals' belief about secrecy as part of national security and personal privacy.

3.1 The Best, Krueger, and Ladewig Poll

These researchers sought to determine public attitudes about the degree of acceptance of forms of surveillance, the types of abuses that could occur, and under what circumstances individuals believe that collective interests matter more than individual ones (Best et al 2006, 375). This study presented data from a fifteen year period of time from 1990 – 2005 from a variety of opinion polls to capture developments that shifted public attitudes: the emergence of the internet; the war on terrorism; and, the development (and use) of a wide array of surveillance technology (Best et al 2006, 375). The conclusions indicate that citizens believed that privacy was an important right, but they also understood that the government had to institute measures to guard against attacks. The trend toward a more skeptical view indicates reception of a countervailing message and less support for government invasion of privacy.

To summarize, there were five primary conclusions. First, privacy is an important right in the abstract and even after 9/11 this opinion did not change markedly. (Best et al 2006, 377). Second, although few people actually reported government invasion of privacy, concern had grown in recent years. The public reported greater worry over intrusion over the internet, although these worries were not solely targeted against government surveillance but more against fraud by private citizens and corporations (Best et al 2006, 377-8). Third, the public is willing to expand government surveillance capabilities to combat terrorism, but that willingness steadily declined since 9/11 and did not support carte blanche "all means available" even to combat terrorism (Best et al 2006, 379). Fourth, the majority of Americans supported specific surveillance measures introduced since 9/11 but the support for these measures has since steadily declined, especially support for wiretapping (Best et al 2006, 380). Finally, while few people report being victimized by new government powers, many worried that the government would overstep its bounds, especially since the passage of the Patriot Act (Best et al 2006, 381).

3.2 Response to the NSA Spying Case

The breaking of a series of articles in the *New York Times* that "President Bush had authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for terrorist activity without the court-approved warrants that are required for domestic spying" caused a furor in public outrage (*New York Times* "Bush Lets US Spy" December 16, 2005.) It also touched off a skirmish between entities that argued that the first poll issued by the *Washington Post* which indicated support for the President's actions was skewed by the way the questions

were worded. *USAToday*/Gallup and *Newsweek* followed with their own polls which produced results indicating that Americans felt much more negatively about NSA’s domestic surveillance program. This indicates that the mood for counter terrorism action remained strong as long as personal privacy (phone conversations, for example) was not monitored. Another key point to make is that respondents with the strongest preferences were in the age group 30-45 and Republican, indicating support for the administration and a level of knowledge and maturity greater than younger and older respondents.

3.3 The Latest Polls on General Satisfaction with the Government

Recent polls indicate that Americans’ fear of terrorism is at its lowest point since 2001 and the public is most satisfied with the nation’s military strength and preparedness and the nation’s security from terrorism and least satisfied with the state of the economy. Fig 1 shows the poll on Americans’ fear of terrorism and indicates stable satisfaction rates since 2002.

	Very satisfied	Somewhat satisfied	Somewhat dissatisfied	Very dissatisfied	No opinion
	%	%	%	%	%
2013 Jan 7-10	22	45	16	13	4
2012 Jan 5-8	23	49	14	10	5
2008 Jan 4-6	14	44	20	17	4
2007 Jan 15-18	13	40	26	18	3
2006 Jan 9-12	16	42	23	16	3
2005 Jan 3-5	14	44	22	17	3
2004 Jan 12-15	19	51	16	13	1
2003 Jan 13-16	11	43	26	17	3
2002 Jan 7-9	10	41	27	20	2

GALLUP

Fig. 1. Gallup Poll Results indicating Americans’ satisfaction with the nation’s security from terrorism (Source: Gallup Poll Jan 10, 2013. Accessed from <http://www.gallup.com/poll/160154/Americans-security-from-terrorism.aspx>)

Finally, a Gallup poll in early February 2013 asked about American’s particular concerns. The “big five” were as follows:

- The economy
- Jobs and unemployment
- Problems with the way government works
- The federal budget deficit
- Healthcare

The big differences, according to Gallup's Frank Newport, is that terrorism, education, and Medicare were not mentioned very much in the poll. He writes that these are important matters but they were not "top of the mind" issues, or seen as particular problems for this poll (Newport "Polling Matters" Feb 20, 2013). This behavior supports Zaller's claim that preferences are based on immediate considerations and the issues that are most prevalent at the time of the question. A respondent might have listed the government's work on counter terrorism as important, but the subject just did not measure as a problem.

4 The Way Forward: The Role of Secrecy in the Government

The thesis of this paper has been that, contrary to a view that average citizens are alarmed about the potential for the government to illegally monitor its citizens, the public generally believes that national security "trumps" personal privacy concerns as long as the breaches are not egregious, public, or signals a movement toward a police state or habitual offenses. As part of the government kit, secrecy has a legitimate role in a democracy as an integral element of national security. By electing officials to act on their wishes to protect collective interests – both security and privacy – citizens are delegating authority to their elected leaders. The nature of secrecy complicates this relationship because citizens do not have access to classified information so must take on faith the need for secrets and faith that their leaders will accomplish their will as effectively in secret as they can in open debate.

Transparency within a democracy and the public availability of information about nearly every facet of government enables citizens to engage in government by the powers of opinion, oversight, and public action. Trust and integrity are enviable resources and democracy must rest on social capital, a shared belief in communities of citizens. Another safeguard within the US system of government is the system of checks and balances and Congressional oversight of the US intelligence community. The Constitution does not seek to infringe upon or grant exclusive powers regarding secrecy and national security; rather, the intent is to forge a cooperative relationship between the Executive branch and Congress. Presidents and their advisers recognize the wisdom of encouraging Congressional participation in matters of secrecy. While Congress might be considered "obstructionist" and "complicating", it provides the forum for debate as the elected representatives of the people. The prospect of justifying secret actions in Congress has a way of keeping imprudent ideas in check.

Americans situate their beliefs about the role of secrecy in national security versus the expectations of personal privacy. Citizens' participation is critical. Democratic authority is based on deliberation and citizens must exercise their right and duty to engage those in authority. Far from weakening national security, debate and judgment enables it. Discourse is a key element of oversight and safeguards privacy. Even if some citizens choose not to exercise their prerogative for discourse with authority, the prospect for interaction allows citizens to suspend judgment and build trust.

Citizens are charged by the Constitution to hold government responsible. Thus, effective and balanced policies require citizens to be knowledgeable, interested, and

involved in foreign affairs, ever questioning of actions carried on under the cloak of secrecy. When these responsibilities are borne by the people and government, there is the assurance of a reasonable expectation of privacy.

References

1. The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States. W.W. Norton & Company, Inc., New York (2004)
2. Steven, A.: Reducing Government Secrecy: Finding What Works. *Yale Law and Policy Review* 27(399), 399–416 (Fall 2009)
3. National Security Secrecy: How the Limits Change. *Social Research* 77(3), 839–852 (Fall 2010)
4. Americans' satisfaction with the nation's security from terrorism. Gallup Poll. (January 10, 2013), <http://www.gallup.com/poll/160154/Americans-security-from-terrorism.aspx> (accessed)
5. Best, S.J., Krueger, B.S., Ladewig, J.: Poll Trends: Privacy in the Information Age. *Public Opinion Quarterly* 70(3), 375–401 (Fall 2006)
6. Sissela, B.: *Secrets*. Vintage Books, New York (1984)
7. Gary, D.: Majority of Americans Do Not Feel Safe Online. 2012. McAfee Blog (2012), <http://blogs.mcafee.com/consumer/online-safety-survey2012> (accessed)
8. Kate, D.: U.S. National Security and the Imperative for Openness. *World Policy Journal* 70(2), 34–50 (Fall 1999)
9. Alexander, G.: *Presidential Decisionmaking in Foreign Policy: The Effective Use of Information and Advice*. Westview Press, Boulder (1980)
10. Morton, H., Hoffman, D.: *Top Secret: National Security and the Right to Know*. New Republic Books, Washington (1977)
11. James, R., Lichtblau, E.: Bush Lets U.S. Spy on Callers Without Courts. *New York Times* (December 16, 2005), <http://www.commondreams.org/headlines05/1216-01.htm> (accessed)
12. State of the Union and the People's Will Poll. Gallup Poll (February 12, 2013), <http://www.gallup.com/poll/160445/economy-dominant-obama-speech-americans-priorities.aspx> (accessed)
13. U.S. 1976 U.S. Congress, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Congress. Government Printing Office, Washington, DC (April 26, 1965)
14. *Secrecy: Report of the Commission on Protecting and Reducing Government Secrecy*. Government Printing Office, Washington, DC (1994)
15. Warren, M.E.: Deliberative Democracy and Authority. *American Political Science Review* 90(1), 46–60 (1996)
16. Zaller, J.R.: *The Nature and Origins of Mass Opinion*. Cambridge University Press, Cambridge (1992)