
Review

Secrets and leaks: The dilemma of state secrecy

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Princeton University Press, New Jersey, 2013, 304pp., ISBN: 978-0691149875

Contemporary Political Theory (2016) **15**, e38–e41. doi:10.1057/cpt.2015.31;
published online 10 November 2015

After Snowden and Manning, the CIA torture report and debates about the accountability of the intelligence services, *Secrets and Leaks* is a timely contribution. Yet, for Sagar, contemporary anxieties about the abuse of secrecy and leaking are nothing new. Rather, at least for US citizens, these problems are rooted in ‘silences’ left by the framers of the American constitution. The framers intended that the president should have the right to employ secrecy in the public interest, but they ‘did not fully explain how citizens and lawmakers could know whether the president is in fact exercising this power responsibly’ (p. 49). Sagar’s task is to fill this silence.

Sagar begins by asking whether better judicial or legislative oversight could be the answer. In the former, Sagar argues that the judiciary cannot and should not decide when executive secrecy should be broken. Courts may lack the insider knowledge to judge claims made by the executive about the likely harm from disclosure (p. 66). Furthermore, Sagar argues that judges should not be asked to decide on an essentially *political* question about how the community should weigh the costs and benefits of secrecy (p. 70). Instead, the judiciary’s role should be limited to making secrecy ‘shallow’, by ensuring that official justifications for secrecy are sufficiently reasonable and detailed to deter over-zealous concealment (p. 73). This dismissal of judicial oversight (which, comparatively, contrasts with measures found in the United Kingdom) is crucial to the remainder of Sagar’s argument. As for congressional oversight, Sagar is again sceptical. There are risks when the president alone weighs the costs and benefits of secrecy, but Sagar explains that placing the responsibility on a legislative body would reproduce these and other risks. Any congressional debate on individual secrets would have to take place *in camera*. In such circumstances, amidst partisan divides, opportunities for unauthorised leaks would be rife – a danger realised by leaks from the 9/11 committee in 2002 (p. 94). The only solution, Sagar claims, would be to limit this closed-door committee to a select few. Yet now this committee would be unable to convincingly explain its reasoning to the public, repeating the conditions of mistrust and secrecy that surround existing oversight practices.



No closer to filling the framers' silence, Sagar asks a different question: When, if ever, can whistle-blowing and leaking be a legitimate means of guarding against the possible harms of executive secrecy? Sagar begins by considering whether individual bureaucrats – such as Manning or Snowden – should be permitted *under law* to make unauthorised disclosures to the public, acting like an institutional 'fire alarm' (p. 103). Sagar recounts the usual claims that disclosures harm national security and undermine the frank and free exchanging of views upon which good governance depends. Sagar reinforces these views, claiming that the law should not condone unauthorised discourses because we cannot be confident that whistle-blowers possess the knowledge and legitimacy to decide which unauthorised disclosures are in the public interest. Moreover, this uncertainty means that any legal right to disclose would require arbitration by the courts, returning Sagar to his previous argument that the judiciary should not determine such political matters. Without such adjudication, there would be little means holding egregious disclosers to account, endangering national security and undermining democratic accountability.

Nonetheless Sagar believes that, on occasions, officials, reporters and publishers will and should 'put their necks on the line' by disobeying the law and disclosing classified information (p. 126). Sagar lists five conditions that must be met for such an act to be justifiable (pp. 127–134). First, the disclosure must reveal the violation of 'shared interests' insofar as the executive has exceeded lawful authority or established norms. Second, the evidence for wrong doing should be 'clear and convincing'. Third, the threat of this wrong doing must be 'specific and immanent'. Fourth, the official should use the 'least drastic means' of revelation by, in the first instance, whistle-blowing within the organisation. Finally, the whistle-blower must be willing to disclose her identity. This is essential to ensure that the whistle-blower is not 'the partisan or the zealot' acting to further sectional or personal interests (p. 136). These conditions raise questions: Are the lawful and normative bounds of executive authority always clear? Are there organisational cultures of prejudice or incompetence that cannot be demonstrated through one 'specific and immanent' disclosure but instead become clear through drip-by-drip revelations? Can someone know, before the act, whether whistle-blowing within an organisation will lead to support and consideration or cover-ups and retaliation? The problem of retaliation is significant. Aside from the more obvious accusations of partisanship or ideology, the treatment of Chelsea Manning shows how an informant's mental health and sexual orientation can become part of the public sphere's deliberations on the legitimacy of disclosures. Thus while Sagar would like us to depend on courageous *whistle-blowers* who are willing to subject themselves to scrutiny, he also considers the realistic likelihood of anonymous *leakers*.

The primary problem of leaking is that it is difficult for the official to know *ex ante* whether the executive action that she has discovered actually constitutes a violation of shared interests. In response Sagar suggests that the press – as the publisher – could take responsibility to filter out those leaks that violate the public interest



(p. 170). There are risks to such a solution: Journalists and editors have their own commercial and personal interests to publish disclosures that will not necessarily cohere with the public interest. Perhaps then, Sagar muses, a law could be enacted that places responsibility for rash or malicious disclosures on those journalists and publishers. Problems abound: Such a law would surely infringe upon the First Amendment and could lead to the demise of the American media establishment as an apparently independent fourth estate. Moreover, enforcing such a law would require *in camera* hearings that would foster greater public suspicion. Indeed, having the judiciary decide whether the law has been broken would return us to Sagar's objection to the judicial regulation of a political problem.

In the end, Sagar concludes that we must learn to live with the constant battle between executive secrecy and unauthorised leaks. Such leaks are the principle means of revealing concealed wrongdoing, but unauthorised disclosures are also, and often, undertaken for the wrong reasons. Our best hope, Sagar suggests, lies in creating normative expectations about the 'proper' practice of secrecy and leaking. On the one hand, the president must establish greater credibility by persuading officials and publics alike that the executive use of secrecy is 'well-founded and disinterested' (p. 185). One suggestion is for the president to appoint to government office, and thus share secrets with, those who do not share the president's political interests. On the other hand, Sagar argues that the press must be encouraged to behave responsibly through practices of self-criticism or self-censorship – perhaps through voluntary adherence to something akin to the British D-Notice system (p. 191).

Sagar's arguments may seem a little conservative, recognising the *status quo* as the best that can be hoped for. This is at least in part because of the author's unflinching willingness to critique his own arguments. Yet it is also because Sagar recognises how a contemporary anxiety about secrecy and leaking is actually a continuation of the well-worn dynamic of liberal democratic governance. Indeed, Sagar's problem exists precisely because of the phenomenon whereby factual information about the state is not kept unknown but is *secreted*. The root of the word 'secret' is *secretum*, that which is separated. This separation is between those-who-know and those-who-do-not-know but *suspect* something (Horn, 2011). The dawn of liberal governance brought with it a public awareness of concealed information held by the state. It is the fear brought by the awareness of not knowing, rather than the content of the secret itself, which matters. *Secrets and Leaks* is a meticulous explanation of how any attempt to relocate the oversight of secrecy and disclosure – in the courts, congress or the media – ultimately reproduces this separation. But the book also recognises how the battle over this separation is essential to the security of western liberal democracies, maintaining two co-constitutive practices of security: Keeping secrets to protect the community from threats and uncovering secrets to guard against the misuse of power.

Some critical avenues remain unexplored. By placing faith in the contest between the executive and the media, Sagar does not consider the problematic political imperatives that may arise when elite executive and press interests cohere (Herman



and Chomsky, 1988). We might also ask what function the promise of revelation performs in stitching together an otherwise fractured political community under those few who promise to uncover secrets (Dean, 2002). These criticisms are, however, at the limits of Sagar's puzzle. Thanks to the author's rigorous argumentation and empirical depth, *Secrets and Leaks* will be of interest to a wide audience concerned with the theoretical dilemma of openness and secrecy, as well as those concerned with the specific nature of the problem in the United States. This is an authoritative and welcome addition to a disparate literature on the topic.

References

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