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Gabriel Schoenfeld. *Necessary Secrets: National Security, the Media, and the Rule of Law.* New York: W. W. Norton & Co., 2010. 309 pp. $27.95 (cloth), ISBN 978-0-393-07648-6.

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Necessary Secrets: National Security, the Media, and the Rule of Law

In this absorbing study of the tension between freedom and security in a democratic society, Gabriel Schoenfeld takes up the charge he first made in 2006 after the *New York Times* published details about secret Bush administration counterterrorism surveillance programs. Schoenfeld suggested in an essay for *Commentary* that the paper should be prosecuted under the 1950 Comint Act, which, among other things, bans the publication of classified material about the country's communications intelligence activities.[1]

Necessary Secrets is an outgrowth of that controversial essay, with Schoenfeld expanding his argument to consider the broader implications in the conflict between security and transparency. The result is an intriguing book that he says he wrote to satisfy his curiosity about "the legal regime that permitted, or appeared to permit, this kind of tell-all-and-damn-the-consequences journalism" (p. 12). As the title suggests, Schoenfeld believes that secrecy is sometimes necessary for security even in the most open society in history. He argues that leaks and the journalists who publish them essentially subvert the democratic rule of law: "Along with the public's 'right to know,' constantly invoked by the press, there is also something rarely spoken about let alone defended: namely the public's right *not* to know" (p. 258). Schoenfeld, a scholar at the Hudson Institute, accuses the modern media establishment of acting too frequently without regard for the security of the nation and its citizens. Despite its sometimes harsh tone, however, this book offers a generally measured and insightful analysis of what the author allows is "an unresolved and perhaps irresolvable conundrum of government by popular consent" (p. 18).

The book's fourteen chapters open with a thorough recounting of the series of *New York Times* articles that prompted it, starting from the controversial December 2005 story that revealed a warrantless wiretapping program by the National Security Agency. Schoenfeld views the leak and resulting story as posing a clear danger to the safety of the nation, and it is here that his work takes on its most polemical edge. He attacks the adversarial mantle assumed by modern journalists and accuses the press of positioning itself as "*the* sovereign power, above the three branches, and free to violate their democratically enacted laws in pursuit of its mission" (p. 53). That mission, in *Times* editor Bill Keller's words, is to be "an unfettered provider of information to the American people."

Schoenfeld knocks down Keller's unconditional view of the press's role in two chapters devoted to the founders' sometimes maddeningly conflicted notions of secrecy and freedom of the press. While giving due consideration to the strain of republican thought that played an influential part in the founders' conceptions of transparency in government, he also correctly points out that "at no time in either the revolutionary or federal period was it in theory or practice an absolute" (p. 57). Indeed, secrecy was part of the Constitutional Convention, and the constitution itself made provision for secrecy of legislative proceedings when deemed necessary by the judgment of the members. Further, many of the founders clearly did not see First Amendment protections extending to speech that could bring harm to the government or the nation. Schoenfeld notes the fact that laws against seditious libel were kept on the books for decades after the ratification of the Constitution as evidence that "the

framers were hardly the apostles of libertarianism that they are today made out to be by Bill Keller and many others" (p. 68). Schoenfeld uses such contradictions among the founding generation to effectively puncture absolutist notions of the First Amendment. More challenging for his argument is that although the founders were apparently comfortable with some level of secrecy, this was more so in words than in deeds. "Prosecutions for publications of leaks, as best as I can ascertain, do not appear in the historical record," he candidly acknowledges. "Then as now, there was perhaps recognition that a cure would be worse than the disease" (p. 81).

Yet Schoenfeld suggests things might have been different had the leaks of old been as damaging as he contends more recent leaks have been in the age of world wars and weapons of mass destruction. He devotes the middle chapters of his book to exploring threats to the nation's security ranging from the Black Tom Island munitions sabotage in 1916 to Pearl Harbor to the Cold War. These are some of his strongest chapters, especially considering that many today either won't remember or have never heard of some of these episodes, such as the Black Chamber leak in which former intelligence official Herbert Yardley laid out intimate details of the American code-breaking program in a 1931 book. Schoenfeld contends that the leak energized Japanese militarism and spurred Tokyo to upgrade its code security, possibly ensuring a true surprise attack at Pearl Harbor a decade later. Yardley, for his part, was never prosecuted and is buried at Arlington National Cemetery.

His outrage about the current state of the press plays against the backdrop of the "patriotic press" of the World War II era–the press agreed to voluntary censorship codes, and the former Associated Press editor who devised and enforced the codes was even given a special award by the Pulitzer Prize board. This deferential stance assumed by the national press extended to the Cold War years, when many news organizations and individual journalists quietly cooperated with the CIA and the American Society of Newspaper Editors endorsed the Comint Act to punish disclosures of classified material about communications intelligence. This was the "heyday of American secrecy," and Schoenfeld argues that it was by and large justified. Moreover, he asserts that Congress worked to establish only a limited regime of secrecy, narrowly targeting the information to be protected and refusing to enact more restrictive measures such as banning publication of any classified material.

The late 1960s and 1970s, for Schoenfeld, were a turning point when the patriotic press gave way to a newly adversarial journalistic culture. The Pentagon Papers case helped break down any consensus about the idea of justifiable secrecy, and since then leaking and the publication of leaked materials has expanded dramatically. (Schoenfeld makes much of the fact that the Pentagon Papers case was not exactly a slam-dunk victory for the press because it kept the door open to post-publication prosecution, but that will not be a revelation to most media scholars.)

Even after the terrorist attacks of September 11, 2001, Schoenfeld says, leaking has accelerated to the point where it is unreasonable to claim that "the press is impeded by law enforcement in any appreciable way from doing its job" of informing the public (p. 233). He disputes any contention that enforcement of secrecy is excessively burdensome, noting the Bush administration's decision not to prosecute the *New York Times* in the case that prompted the book. Further, he says, there have been only three successful prosecutions of leaks in American history, though they have all come in the last thirty years.

After all this, a reader would expect a harsh indictment of the press in the concluding chapter, and for the first half, that is indeed what Schoenfeld offers. Quoting a comment by the *Times*'s Dean Baquet that it is journalists' job to cover government no matter the cost, he calls the concept of a free press that should cover government no matter the cost a false and self-serving myth. Rather, he argues that leaks and the journalists who publish them are usurping the democratic rule of law under which information has been duly classified by elected officials or their appointees to protect the public. But, true to his word at the outset that he didn't intend this book as a prosecutor's brief, Schoenfeld puts forth his closing arguments in a markedly more moderate tone. The costs of stronger action against the press, he allows, would be profound: "We face the ineradicable potential for misuse of secrecy to obscure incompetence and to promote illicit ends. Closed doors are incubators for corruption and can enable units of government, as in Watergate and the Iran-Contra affair, to depart from the confines of law" (p. 268).

Schoenfeld shows flashes of similar evenhandedness at several points in the book, acknowledging, for instance, the bureaucratic tendency to view transparency "as a distracting impediment to deliberation and policy making" (p. 24).

So what does Schoenfeld wish to happen? He does not advocate prosecuting the press every time it pub-

lishes classified material, a solution he says would be absurd. Rather, in a somehow unsatisfying conclusion, he calls essentially for goodwill and discretion on both sides–editors must act responsibly with national security in mind and prosecutors must enforce the law only to send a message in the most egregious cases, "while giving a pass to all lesser infringements" (p. 270). That is a mild prescription for such a passionately argued case, and it may stem from Schoenfeld's overestimation of the villainy of the media and underestimation of how far secrecy has taken hold in bureaucratic culture. Regarding the press, his depiction is something of a straw man; you'd be hard-pressed to find a journalist who believes there is never a legitimate need for secrecy. It's when you get to specifics that the disagreement arises. Although he is probably correct that we live in the most open society in history, it is also true that the tendency toward secrecy is accelerating, with the Obama administration classifying documents and prosecuting leakers at unprecedented rates. And it is also the case that the USA Patriot Act has dramatically expanded the reach of domestic surveillance, eliminating checks and balances that were part of the reform of intelligence abuses uncovered in the 1970s. Schoenfeld does not seem to contemplate that the "patriotic press" he so reveres might have unwittingly encouraged those abuses in the first place. What might have been the outcome had there been a more vigorous and skeptical national press during that "heyday of American secrecy"?

Schoenfeld's jaundiced view of the modern press may be to blame for his peculiar characterization of *Branzburg v. Hayes* as a case of journalists "claiming, on First Amendment grounds, to be exempt from the requirements to observe the criminal law" (p. 227). In fact, there was no such broad claim in *Branzburg*; rather, the journalists simply claimed a First Amendment privilege protecting them from being forced to reveal their sources in court testimony. In an even more curious passage, Schoenfeld argues that the NSA wiretapping program disclosed by the *Times* wasn't necessarily illegal, but could be justified even if it were: "[T]here were ample precedents for a president to bend or break the law when facing a supreme national emergency like the one the United States was facing after 9/11" (p. 40). This is an astonishing assertion to make in a book in which the central argument consists of criticizing the media for subverting the rule of law.

Despite these flaws, Schoenfeld ultimately provides a fascinating and well-written account of the culture of leaking and the perhaps intransigent tension between the need for both occasional secrecy and far-reaching transparency in democratic society. The book is suitable for a general audience but will naturally be of great interest to students and scholars of journalism and legal history as well as policy studies.

Note

[1]. Gabriel Schoenfeld, "Has the 'New York Times' Violated the Espionage Act? " *Commentary*, March 2006, `http://www.commentarymagazine.com/article/has-the-''new-york-times''-violated-the-espionage-act/` (accessed October 13, 2011).

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