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Review, The New Era of Secret Law

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Review, The New Era of Secret Law

Abstract

In a recent Brennan Center report, *The New Era of Secret Law*, Elizabeth (Liza) Goitein articulates, examines, and evaluates the claims for and objections to secret law. Under this banner, the report includes any law that is withheld from the public, regardless of whether it may be shared among agencies or with certain members or committees of Congress.” Goitein’s underlying goal is to propose procedural and substantive reforms. *Secret Law* is a deeply-researched and highly valuable policy brief with an aim of making specific policy recommendations. And readable to boot.

Keywords

governmental accountability, secret law, secrecy, surveillance

DOCUMENTS

The New Era of Secret Law,

by Elizabeth (Liza) Goitein

Reviewed by Patrice McDermott

The new era of secret law, New York University School of Law, Brennan Center for Justice, 2016 / 106 pp. /

<https://www.brennancenter.org/publication/new-era-secret-law>

In a recent Brennan Center report, *The New Era of Secret Law*, Elizabeth (Liza) Goitein articulates, examines and evaluates both the claims for and objections to secret law. Under this banner, the report includes “any law that is withheld from the public, regardless of whether it may be shared among agencies or with certain members or committees of Congress.” Goitein’s underlying goal is to propose procedural and substantive reforms.

Goitein’s history is of central importance to the utility of this work. She co-directs the Brennan Center for Justice’s Liberty and National Security Program. Before coming to the Brennan Center, Ms. Goitein served as counsel to Senator Feingold, Chairman of the Constitution Subcommittee of the Senate Judiciary Committee, and as a trial attorney in the Federal Programs Branch of the Civil Division of the Department of Justice.¹ This

1 Ms. Goitein is co-author of the Brennan Center’s reports *Overseas Surveillance in an Interconnected World*, *What Went Wrong with the FISA Court*, and *Reducing Overclassification Through Accountability*, and author of the chapter “Overclassification:

background and the relationships she has developed with officials in the Intelligence Community inform not only this research, but also her advocacy on the issues addressed in it. This is not only a deeply-informed², and informative, work but it also reflects Goitein's principled advocacy stances.

The red cover indicates (according to the Center's stated color scheme) that it is a research reports offering in-depth empirical findings.³ These include interviews and discussions with Intelligence Community officials and also FOIA requests submitted by the Brennan Center that allowed Goitein (and her colleagues) to provide background and context.⁴

Goitein's report is intended to answer several critical questions that are related to a central question: Is Secret law Necessary? Toward answering this central inquiry, she asks: what do we mean when we refer to "secret

Its Causes and Consequences" in the book *An Enduring Tension: Balancing National Security and Our Access to Information*. Her writing also has been featured in major newspapers including *The New York Times*, *Washington Post*, *Wall Street Journal*, *USA Today*, and *LA Times*, and she is a frequent commentator on MSNBC and NPR. Ms. Goitein graduated from the Yale Law School and clerked for the Honorable Michael Daly Hawkins on the U.S. Court of Appeals for the Ninth Circuit.

- 2 Goitein's 469 endnotes cover 37-plus pages.
- 3 The Brennan Center attempted to discern the amount of secret law in certain categories; they relied on a "combination of public documents, interviews and other communications with government officials, and records obtained through FOIA. Discussing the "inherent limitations of this process and the wild card of "unknown unknowns,"" Goitein states that "there is no pretense that the resulting information presents a complete or precise picture." She further notes the obstacles to completeness: "Assembling comprehensive statistics regarding the number of published versus unpublished legal pronouncements in any given category would require government cooperation, if not participation. Nonetheless, even the partial information the Center was able to obtain suggests that secret law is more prevalent than many would imagine." See page 28.
- 4 See, for example, pages 5, 6, 28, 39, 41, 47, 49, 52, 59, 61.

law;” why secret law is of greater concern than other forms of government secrecy that we tolerate and even condone; and how common is *security-driven* secret law, and where else is it occurring? A central point is that the rise of the national security state which emerged after World War II and intensified after 9/11, has resulted for the first time in the systematic and deliberate concealment of law.

A key, although certainly not sole,⁵ focus of Goitein’s report is national security law. She asks, in confronting the various claims for the need for secrecy in this area: Are there cases in which disclosure of rules or legal interpretations, even with sensitive facts redacted, could harm national security? How great is that risk, and how does it compare with the harms of secret law? What procedural and substantive reforms could help ensure that the public’s interests in both the transparency of laws and the security of the nation are best served?

It is worth spending a few paragraphs looking at her Section C - *What’s Wrong with Secret Law?* as many of the arguments that Goitein puts forward throughout her examination of the *why nots* for secret law are central to her analyses and to the reforms she proposes. The problems with secret law are broken down into philosophical objections, constitutional concerns, and practical harms. Under the first category, she cites

5 Goitein’s Table of Contents serves as a useful and detailed outline of the scope and breadth of her discussions and arguments in the report. It can be viewed at https://www.brennancenter.org/sites/default/files/publications/The_New_Era_of_Secret_Law.pdf

philosophers who have variously argued that publicity or public promulgation is what gives law its moral legitimacy and authority. She quotes legal theorist Lon Fuller in points that re-appear throughout the report:

The laws should . . . be given adequate publication so that they may be subject to public criticism, including the criticism that they are the kind of laws that ought not to be enacted unless their content can be effectively conveyed to those subject to them. It is also plain that if the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.¹

As Goitein notes, a non-public regulation is an autocratic whim and the concept of a non-public regulation has particular force in democracies, where the legitimacy of the law stems from the open democratic process that generates it. Moreover, the secrecy of a law undermines not only the law's legitimacy, but also that of the lawmaker. She quotes the words of one scholar: "[S]ecret law deprives the governor of his legitimacy, undermining his right to rule."²

In regard to *constitutional concerns*, she notes that the U.S. Constitution includes surprisingly few express references — only two — to openness or secrecy. Both references pertain to Congress. In essence, the Constitution states that the proceedings of Congress *generally* must be public, and its appropriations *always* must be public. Beyond this, the Constitution contains no express commands to divulge — or powers to conceal. As Goitein notes, however, many of our most cherished rights, and

some of the government's most important authorities, are not explicit in the Constitution's text. Courts, rather, have inferred them from ambiguous language or derived them from the structure or purpose of various provisions.^{3, 4}The result to date, she notes, is that the constitutional right of access to government information is a narrow one that applies almost exclusively to court proceedings. Although there are Court indictments of "secret law," Goitein notes⁵ that they have been in the context of FOIA cases, not constitutional challenges. Goitein nevertheless, identifies strong arguments for why secret law violates the Constitution.

In *Richmond Newspapers, Inc. v. Virginia*,⁶ Chief Justice Warren Burger opined that "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." In his concurrence, Justice William Brennan, Jr. expounded on this idea, observing that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." For this reason, it "entails solicitude not only for communication itself; but also for the indispensable conditions of meaningful communication," including access to government information.

In his opinion, Justice Brennan articulated a two-part test, later adopted⁷ by the Supreme Court majority, for determining when the First

Amendment supplies a right of access: courts should inquire whether there is “an enduring and vital tradition of public entrée to particular proceedings or information;” courts should ask “whether access to a particular government process is important in terms of that very process.”⁸ Together, these are known as the “experience and logic” test.

Goitein notes, though, that courts have struggled to determine whether — or how — the two-part test applies outside the courtroom. As the administrative state⁹ is a somewhat recent (historically speaking) development, the “experience” prong becomes problematic in the context of agency adjudications.¹⁰ Lower courts are split over whether the right of access extends beyond the courts,¹¹ and the Supreme Court has offered no guidance or clarification. Many courts and scholars have taken the Court’s long silence as suggesting that the right of access to judicial proceedings is the exception, and that “[d]isclosure of government information generally is left to the political forces that govern a democratic republic.”¹²

In this discussion, Goitein expounds an argument that is central to her view of secret law in a democracy:

The rationale underlying the First Amendment right of access to judicial proceedings — i.e., that access helps “ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”¹³ ... would clearly support a First Amendment right of access to government pronouncements having the force of law.

Additionally, Goitein argues that, reading several provisions of the Constitution together — including the First Amendment, the enumeration of powers, the election provisions, and the Guarantee clause — one might posit a broad public right to information about all kinds of government activity, as secrecy “risk[s] subverting the Constitution’s unifying aim to create a government of laws that would also be controlled by and responsive to the people.”¹⁴

The “*harms*” concern is at the heart of Goitein’s project. She regularly returns to the practical ways in which secret law subverts the rule of law. On one front, when people are not aware of the rules their government must follow,

- They cannot hold the government accountable for violations of those rules or otherwise assert their own legal rights against the government¹⁵;
- Indeed, they cannot even protest the abrogation of their rights¹⁶;
- It allows the government to develop unfair laws or to apply them an unfair manner, safe in the knowledge that there will be no repercussions¹⁷;
- Government actors are, of course, aware of this *de facto* immunity.

Another harm resulting from secrecy is the creation and perpetuation of bad law:

- Secrecy inhibits the process by which law is made and refined — a process that begins with public participation. The legislative process

affords ample opportunity for stakeholders to express their views.

- Secrecy – and lack of public participation – inhibits the development of better-informed regulations. Congress passed the APA to require (at a minimum) public notice and comment. The purpose was not to pay deference to a theoretical public right. Rather, Congress believed that input from the public – including experts outside of government and people directly affected by the proposed measures – leads to better-informed lawmaking and, thus, better laws.¹⁸

From another perspective, when laws are made without public involvement – particularly when they are made by small groups of government officials acting in secret – the result can be the entrenchment of existing institutional norms, biases, and even mistakes.¹⁹

From my perspective, her analysis of the Bush-Cheney Administration's subversions and evasions of law in the area of foreign intelligence surveillance encapsulates the effects of secrecy and secret law on the ability of the public – and much of Congress – to hold government accountable. As Goitein makes clear, it was not only the Executive that escaped publicity and accountability, but also the courts and the oversight committees in Congress. The follow-on to the Snowden disclosures⁶ demonstrated vividly how far the U.S. government had gone down a path of deeply secret law the purpose of which was to circumvent statutory and constitutional limits on the surveillance of U.S. persons. This path is a clear example of Daniel P.

Moynihan's insights about a parallel regulatory regime:

6 I am using this terminology although it is important to note that Snowden himself did not make any disclosures; he made the information available to journalists who chose, with their editors, what to disclose.

...“overregulation” is a continuing theme in American public life, as in most modern administrative states. *Secrecy would be such an issue, save that secrecy is secret.* Make no mistake, however. It is a parallel regulatory regime with a far greater potential for damage if it malfunctions.²⁰

Goitein first discusses the Bush administration’s initiatives to develop legal interpretations on torture and warrantless surveillance programs in her discussion of the harms of secret law:

...the risk of developing ill-considered legal interpretations that reflect institutional bias or “groupthink” is greater when only a handful of executive officials are involved in formulating them. The opportunity to correct such mistakes disappears when the law itself is kept within this small group. Such close holds also prevent the other branches of government from exercising their constitutional function of providing checks and balances.⁷

Indeed, the administration came under criticism for relying on a small cadre of like-minded officials. Time after time, “[t]he policymaking process was...rigged to block informational pathways that could have subjected deep secrets to additional forms of scrutiny and revision.”²¹ In one famous example, cited by Jack Goldsmith (who led the Justice Department’s Office of Legal Counsel under President Bush), the Department of Justice refused to share its legal justification for the NSA’s warrantless surveillance programs with the NSA’s General Counsel.²²

While it is often argued that disclosures were made to congressional oversight committees, Goitein notes that these raise the question of how

7 See page 10.

effective *secret* legislative oversight can be. The calculus of congressional accountability (and that of individual members) changes when oversight happens behind closed doors. Goldsmith has noted that intelligence committees have little incentive to pick secret battles with the executive branch on national security issues: there are no political rewards to these fights — no victories to splash across constituent newsletters, no legislative favors to dole out to donors, but there are political risks: if a terrorist attack were to occur, any actions members had taken to limit the executive branch’s exercise of national security authorities surely would come to light.²³

To the question whether secret law is inevitable — particularly when legal opinions are (or are claimed to be) intermingled with legitimately secret operational details (“the entanglement of legal analysis with classified fact”), Goitein responds that after several FISA Court opinions were made public by Snowden and (in response) by the Director of National Intelligence, that court began writing at least some of its opinions with an eye toward public disclosure — a practice that will likely become standard now that the USA Freedom Act requires the release of a redacted or summarized version of all significant FISA Court opinions.

Goitein also addresses the claim that the efficacy of surveillance programs depends on concealing, not just the identities of particular targets,

but the programs' very existence.⁸ This was the claim behind the secrecy of President Bush's warrantless wiretapping program. When the general framework of this program was made public through leaks, however, Goitein notes that the executive branch did not abandon it on the ground that its efficacy had been compromised. Instead, the administration pushed to have the program continued under public laws. Congress obliged, codifying the program in Section 702 of FISA, and executive officials continue to tout its effectiveness.²⁴ Similarly, the bulk collection of Americans' phone records, which was kept secret allegedly to preserve its utility, was replaced with a narrower program designed to accomplish the same end. As she points out, the rules for the new program are contained in public law, yet their publicity did not affect the administration's assessment that the program would provide the intelligence establishment with the tools it needs.²⁵

Due to the constraints of length, I am regretfully relegating Goitein's reform recommendations to a footnote.⁹ This is not to imply they do not

8 See page 25.

9 The report recommends six reforms that could rein in secret law across all three branches: 1) Decisions to withhold legal rules and authoritative legal interpretations from the public should be made by an inter-agency body of senior officials; 2) The standard for keeping law secret should be more stringent than the current standard for classifying information. Legal rules and authoritative legal interpretations should be withheld *only* if it is highly likely that their disclosure would result, either directly or indirectly, in loss of life, serious bodily harm, or significant economic or property damage; 3) Certain categories of law should never be secret. The disclosure of pure legal analysis, containing no sensitive facts, cannot harm national security. Legal interpretations that purport to exempt the executive branch from compliance with statutes or that stretch statutory terms beyond their ordinary meanings also should not be secret; 4) When the executive branch issues secret law, it should immediately share the law with the other branches and with independent oversight bodies; 5) Indefinite secret law is constitutionally

merit attention and discussion; they are, after all, the policy arguments to which her report builds. I hope, though, that - with limited space - the review above of a small portion of the assessments and analyses on which she builds her case will entice the reader to turn to Goitein's admirable report (and to turn students and colleagues to it). It is, in essence, a deeply-researched and highly valuable policy brief with an aim of making specific policy recommendations. And readable to boot.

intolerable. There should be a four-year time limit on the secrecy of legal rules and authoritative legal interpretations. Renewals should require the unanimous approval of the inter-agency body charged with making secrecy determinations. Two renewals should be permitted, creating an effective 12-year ceiling on the secrecy of laws; 6) Americans should know how much secret law exists and the general areas where it is being applied. Each government body producing secret law should be required to make public an index that lists all of the secret rules and interpretations by date, general subject matter, and any other information that can be made available.

1 Lon L. Fuller, *The morality of law* (New Haven: Yale University Press, 1969), 59.

2 Christopher Kutz, "Secret law and the value of publicity," 22 *Ratio Juris* 197, 211 (2009) at 212.

3 Adam M. Samaha, "Government secrets, constitutional law, and platforms for judicial intervention," 53 *UCLA L. Rev.* 909, 916 (2006).

4 *United States v. Nixon*, 418 U.S. 683, 711 (1974). The Supreme Court... has recognized an "executive privilege" that shields communications between the president and close advisors, stating, "Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." Similarly, the Court has read Article II as according the president implied authority to control access to national security information in certain contexts. See *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

5 See *infra* Part II.B.2.

6 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980).

7 *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604-06 (1982).

8 *Richmond Newspapers, Inc.*, 448 U.S. at 589 (Brennan, J., concurring).

9 Goitein is referencing the proliferation of new agencies, issuing social and economic regulations and adjudicating the rights of private parties in the first part of the 20th century which resulted in a new kind of law. At first, there was no legal requirement for publication of agency regulations and decisions, and no system for registering or distributing them. [Harold C. Relyea, "The Federal Register: Origins, formulation, realization, heritage," 28 *Gov't Info. Q.* 295, 296-97 (2011)].

The public and even government officials were often in the dark as to the enactment and repeal of specific administrative laws [Erwin. N. Griswold, "Government in ignorance of the law — A plea for better publication of executive legislation," 48 *Harv. L. Rev.* 198, 204-05 (1934)]. The system was so confused that the government Lawmakers addressed these problems with a trio of laws, beginning in 1935 with the *Federal Register Act*, [*Federal Register Act of 1935*, Pub. L. No. 74-220, 49 Stat. 500 (1935) (current version at 44 U.S.C. § 1501-1511)] which requires all rules and regulations to be published in an official periodical known as the *Federal Register*. The other two laws were the Administrative Procedures Act and the Freedom of Information Act.

10 See Heidi Kitrosser, "Secrecy in the immigration courts and beyond: Considering the right to know in the administrative state," 39 *Harv. C.R.-C.L. L. Rev.* 95, 118 (2004) (discussing how courts have handled the "experience" prong in light of "the relative modernity of most administrative proceedings").

11 See *id.* at 118 & nn.130-34; see also Samaha, *supra*, at 944-45 & nn.163-64.

12 *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003); see also David E. Pozen, "Deep Secrecy," 62 *Stan. L. Rev.* 257, 339 (2010), at 319-20.

13 *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982).

14 Pozen, *supra* note xii, at 300.

15 Dakota Rudesill, "Coming to terms With secret law," 7 *Harv. Nat'l Sec. J.* 241 (2016), at 323-24.

16 Samaha, *supra* note iii, at 917-18.

17 See Claire Grant, "Secret Laws," 25 *Ratio Juris* 301, 314 (2012); Rudesill, *supra* note xv, at 317.

18 See *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985); Arthur Earl Bonfield, "Military and foreign affairs function rule-making under the APA," 71 *Mich. L. Rev.* 221, 222 (1972).

19 See Bonfield, *supra*, at 223; Rudesill, *supra* note xv, at 311.

20 In "Chairman's foreword" to the Commission on Protecting and Reducing Government Secrecy (1997) <https://fas.org/sgp/library/moynihan/foreword.html>. Thanks to Susan Maret, for highlighting this in her Introduction to *Government secrecy: Classic and contemporary readings*, Susan Maret and Jan Goldman, eds., Libraries Unlimited, Westport CT, 2004, xxiii.

21 Pozen, *supra* note xii, 339.

22 Jack Goldsmith, *The Terror presidency: Law and judgment inside the Bush Administration* (New York: W.W. Norton, 2007), 181-82.

23 Jack Goldsmith, *Power and constraint: The accountable presidency after 9/11* (New York: W.W. Norton, 2012), 91-92.

24 *Oversight and reauthorization of the FISA amendments act: The balance between national security, privacy, and civil liberties: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 4-9 (2016) (testimony of Hon. Matthew G. Olsen, President, IronNet Cybersecurity), <https://www.judiciary.senate.gov/imo/media/doc/05-10-16%20Olsen%20Testimony.pdf>

25 Office of Management and Budget, Executive Office of the President, *Statement of administration policy: HR 2048 — USA FREEDOM Act* (May 12, 2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr2048h_20150512.pdf