THE MANY FACES OF SECRECY

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ABSTRACT

Political secrecy in the United States has never been more studied – and less understood – than it is today. This irony is due in large part to the slippery nature of the phenomenon: Secrecy presents in different guises depending on the area of governmental activity under consideration. In the classified world of the U.S. national security state, secrecy results from affirmative governmental acts designed to enforce a sharp distinction between official and public knowledge. In the outsourced and technocratic worlds of governmental contracting and economic management, secrecy results from quiet acts of exemption of whole areas of decision-making from the normal processes of public scrutiny. Scholars have underestimated the magnitude of the political secrecy that besets American society, and misconceived prescriptions meant to manage it, because they have failed to recognize that they are dealing with the same challenge in different form across multiple disciplines.

This Article attempts to effect, for the very first time, the kind of comparing-of-notes that is needed for a proper assessment of the scope of political secrecy. It introduces a simple yet indispensable typology – direct versus indirect secrecy – that enables us to recognize the many different faces of secrecy. Once we do so we are in a position to realize that we are confronting a systemic secrecy crisis. For various reasons and under cover of conflicting rationales, large swaths of policy-making have been placed beyond the review-and-reaction authority of the American people, to the detriment of even the most humble conceptions of transparency and democracy.

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INTRODUCTION

Recently – having been tasked by my Dean to teach a course in Legal Philosophy after a long hiatus from the subject – I had occasion to revisit the debate between H.L.A. Hart and Lon Fuller on the topic of the connection between law and morality.[1] That debate is timeless in many ways. Yet what struck me when I re-read it was the one way in which it quite clearly does *not* resonate today and, indeed, seems hopelessly outdated: namely, in Fuller's quaint suggestion that governmental secrecy is best viewed as a "grim necessity" justified only in extreme circumstances. Wrote Fuller:

> [I]f we call by the name of law any official act of a legislative body, then there may be circumstances under which the full details of a law must be kept secret. Such a case might arise where a legislative appropriation was made to finance research into some new military weapon. It is always unfortunate when any act of government must be concealed from the public and thus shielded from public criticism. But there are times when we must bow to grim necessity. . . . All of this has very little relevance, however, to the laws that are the subject under discussion. I can conceive, for example, of no emergency that would justify withholding from the public knowledge of a law creating a new crime or changing the requirements for making a valid will.[2]

Fuller's language is carefully crafted to suggest that legitimate governmental secrecy is both temporally limited and exceptional in rationale. In saying that "there are times" when secrecy will be necessary, he implies that there will be times when it will not be so. In saying that he can conceive of "no emergency" that would justify the secrecy of laws regulating the

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1. The debate began in the form of dueling journal articles in the 1958 volume of the Harvard Law Review (see H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958); Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71 (1958)), and continued thereafter as extended treatments in book form (see H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961); Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964)).

2. Fuller, supra note 1, at 91-92 (footnote omitted).

behavior of citizens, he implies that *only* situations amounting to emergencies might justify the secrecy of legislative enactments that do not purport to regulate such behavior.[3] In choosing as his example of legitimate secrecy the potential need to keep secret research into a new military weapon, Fuller calls to mind – and may well have had in mind – the Manhattan Project, which was precisely the kind of temporally-delimited, response-to-extreme-emergency that appeared to most reasonable minds to warrant violation of the publicity principle.

I do not think it an exaggeration to say that if Fuller were able to return to us for a brief visit, he would not recognize his former society. For secrecy, properly understood, is everywhere today. It is the mind-numbing norm rather than the emergency exception, and it has seeped into many key aspects of our political, economic and legal decision-making structures. Indeed, Fuller might well find that secrecy has advanced to the point where it now threatens the basic integrity of our constitutional arrangements. Over the course of the last thirty years, the federal government has placed an increasing number of large "Do Not Enter" and "No Trespass" signs across our political landscape, signs directed at citizens and designed to keep both them and their most directly-accountable political representatives from venturing into certain (now cordoned off) areas of decision-making. Consider that in just the past few years we have been warned of the following:

- A phenomenon of secret law-making by Congress that is far more extensive than commonly known and that exists to fund and manage a gargantuan world of secret fact created by the Executive Branch;[4]

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3. Interestingly, the phenomenon we might call today "a permanent state of emergency" does not seem to have occurred to Fuller – and this despite the fact that he was writing at the height of the Cold War, when extreme geopolitical tensions with the then-Soviet Union were constant and seemed unlikely to abate.

4. See Dakota S. Rudesill, "Coming to Terms with Secret Law*," Harvard National Security Journal* 7 (2015): 249-50. Writes Rudesill:

> This inquiry includes the legal literature's first in-depth study of Congress's governance of the national security apparatus via classified addenda accompanying Public Laws and their reports….The incidence of provisions in Public Law that reasonably might be read to give classified report addenda legal force in part or in full have spiked in recent years.

- A new "authoritarian legality" that not only tolerates ex parte criminal judicial proceedings and secret evidence but actually embraces them as the new normal;[5]
- A vast, opaque world of outsourced governmental power that cloaks its political unaccountability in the mantel of (claimed) private-sector efficiency, flexibility, and creativity;[6]
- A central bank that plans increasingly substantial areas of our economic activity in hushed (read: secretive) corridors of power, and that cloaks its political unaccountability in the mantel of technocracy;[7]

> . . . I conclude that the Secret Law Thesis is sufficiently compelling that we need to confront secret law directly as a general phenomenon.

5. See Robert Diab, *The Harbinger Theory: How the Post-9/11 Emergency Became Permanent and the Case For Reform* (Oxford: Oxford University Press, 2015), 1, 32. Writes Diab:

> Since the terrorist attacks on the United States in September 2001, North American law has been transformed in ways previously unimaginable. Measures that had once seemed extraordinary or even unthinkable in sophisticated Western democracies have now become permanently ensconced in our legal systems. Laws now authorize, and courts have affirmed the constitutionality of, indefinite detention without charge on secret evidence, mass secret surveillance, and a vastly expanded scope for the assertion of the state secrets privilege. . . .
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> [T]he concept of authoritarian legality posited here will seek to highlight how many of the measures entrenched in law in response to the perceived crisis are not understood as temporary. Nor have the measures been entrenched with the primary goal of effecting a quick restoration of a prior status quo. Instead, the thrust of the measures to be canvassed below is to address a new status quo, with powers meant to persist indefinitely as part of a new normal.

6. See John J. Dilulio, Jr., *Bring Back the Bureaucrats: Why More Federal Workers Will Lead to Better (and Smaller!) Government* (West Conshohocken: Templeton Press, 2014); Janine R. Wedel, "Federalist No. 70: Where Does the Public Service Begin and End?" *Public Administration Review* 71 (2011): 118. Writes Wedel:

> Without revolution, public debate, or even much public awareness, a giant workforce has invaded Washington, D.C. – one that can undermine the public and national interest from the inside. This workforce consists of government contractors, specifically those who perform 'inherently governmental' functions that the government deems so integral to its work that only federal employees should carry them out (OMB 2003). Today, many federal government functions are conducted, and many public priorities and decisions are driven, by private companies and players instead of government agencies and officials who are duty bound to answer to citizens and sworn to uphold the national interest.

See also Janine R. Wedel, *Shadow Elite: How the World's New Power Brokers Undermine Democracy, Government, and the Free Market* (New York: Basic Books, 2009) (demonstrating how the outsourcing of government functions has led to a fusion of state and private power that guts political accountability, frustrates white-collar criminal-law enforcement, and enables widespread financial corruption). Dilulio's and Wedel's works are the latest and arguably most alarmist in a voluminous body of academic literature that has called attention to the transparency-deficit involved in governmental outsourcing. For a small sampling of this literature, see Jody Freeman and Martha Minow, eds., *Government By Contract: Outsourcing and American Democracy* (Cambridge: Harvard University Press, 2009); Paul R. Verkuil, *Outsourcing Sovereignty: Why Privitization of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge: Cambridge University Press, 2007); and Daniel Guttman and Barry Willner, *The Shadow Government: The Government's Multi-Billion-Dollar Giveaway of Its Decision-Making Powers to Private Management Consultants, "Experts," and Think Tanks* (New York: Pantheon Books 1976).

7. See Lawrence R. Jacobs and Desmond S. King, *Fed Power* (Oxford: Oxford University Press, 2016), 90. Write the authors:

- A subtle yet persistent project to diffuse authority away from national institutions to inter-, supra-, and/or transnational institutions that are marred by transparency and democracy deficits.[8]

Based on the foregoing, Fuller could well conclude that macro-secrecy as structural reality is the system we now have, however much "macro-transparency as structural directive" was the system we inherited[9] and was supposed to have been the system we bequeathed.

That we are confronting a systemic crisis of secrecy becomes clear once we realize that secrecy can present in two very different forms. The far better-known and appreciated form is what we might call "direct secrecy." Secrecy qualifies as direct in three distinct ways. First, it arises by way of an affirmative act of the government in withholding from the public information about its activities. Classifying government documents as "secret" and holding closed-door Congressional briefings on matters of national security are paradigmatic examples of direct secrecy. Second, direct secrecy is closely associated with, and closely implements, the goal that is publicly touted to the citizenry. If the goal is the denial of sensitive information to third-party malfeasors (*e.g.* terrorists), the means is the obvious and explicit one of taking the measures

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> The Fed now enjoys extraordinary capacity to manipulate economic activity through its control over interest rates and the money supply. Although lawmakers retain the authority to reorganize the Fed (which it [sic] does on occasion), no government agency of comparable power is as free of public accountability. The Fed's routine policy decisions are, in practice, shielded from the scrutiny of Congress, presidents, and Treasury secretaries, and yet the central bank dictates monetary policy and is the dominant force in steering the economy….

See also Robert D. Auerbach, *Deception and Abuse at the Fed* (Austin: University of Texas Press, 2008).

8. This "Diffusion Project," as I shall call it, has had two distinct iterations. The first has spanned the period from roughly 1990 to the present day and – in the name of fighting ostensibly intractable transnational problems such as climate change, international terrorism and economic instability – aims to displace democratic national sovereignty in favor of IGOs, NGOs, international business organizations, and trans-governmental networks. The second iteration has spanned the period from roughly 2006 to the present day and, in the name of fostering "free trade," aims to remove important areas of domestic legislation and regulation into the realm of multilateral treaty regimes (*e.g.* the Trans-Pacific Partnership). Due to space constraints I shall discuss herein the first iteration only. See infra Part III.C

9. See Heidi Kitrosser, "'Macro-Transparency' as Structural Directive: A Look at the NSA Surveillance Controversy," *Minnesota Law Review* 91 (2007).

necessary to restrict access to that information to a limited, trusted few.[10] Third, direct secrecy grows in direct proportion to the number of affirmative governmental acts creating secret information. Example: The more government documents that are classified as secret, the more the total amount of governmental secrecy grows. It is also worth noting that direct secrecy usually rests on the claim that the government is not only a competent force in general but that it is peculiarly capable of striking the right balance between the demands of public security (on the one hand) and the demands of public knowledge (on the other). In essence, the claim is that, in matters of national security and defense, the government knows what it's doing.[11]

In addition to direct secrecy, we have a second type of governmental secrecy that is far less acknowledged, if it is acknowledged at all. This type of secrecy tends to be the subject of study, not of secrecy scholars, but of public policy and administrative law scholars, and it tends to be referred to, not as secrecy per se, but as "lack of transparency," "opacity," and/or "lack of accountability." This less-acknowledged form of governmental secrecy is what I shall call "indirect secrecy." Secrecy qualifies as indirect in three distinct ways. First, it is the product of intentional government *inaction*, not *action,* in that it arises by way of a refusal or failure of government to extend otherwise applicable transparency and accountability mechanisms to its activities. Outsourcing core government functions to private corporations without then

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10. See Andrea Prat, "The Wrong Kind of Transparency," *American Economic Review* 95 (2005): 863 ("In the political arena, voters may choose to forego information pertaining to national security to prevent hostile countries from learning [it] as well."); Dan M. Kahan, "The Logic of Reciprocity: Trust, Collective Action, and Law," *Michigan Law Review* 102 (2003): 82-83; see also Note, "Mechanisms of Secrecy," *Harvard Law Review* 121 (2008): 1560.

11. This claim is frequently made to – and deferentially accepted by – the courts. See, e.g., Diab, supra note 5, at 50 ("Traditionally, courts have been deferential to the executive in matters of national security and foreign policy. In an authoritarian legal framework, courts show an even greater deference through a willingness to suspend various core liberal legal principles on the explicit or implied basis that current threats make this necessary."); Mark Fenster, "The Opacity of Transparency," *Iowa Law Review* 91 (2006): 945 ("Federal open government laws rely on the judiciary to resolve challenges to agency determinations about the applicability of disclosure requirements and exemptions. This has not worked well, not least because the judiciary has proven exceptionally deferential to executive efforts to resist disclosure [on national security and/or law enforcement grounds].")

subjecting them to the requirements of open government laws is a paradigmatic example of indirect secrecy.[12] Second, indirect secrecy is one step removed from the goal that is publicly touted to the citizenry, and it is rarely made explicit. If, for example, the goal is the more efficient or expert delivery of governmental services, the primary means identified is not secrecy but rather the outsourcing of government functions via contract to (allegedly) more efficient and expert private-sector agents. The decision to exempt the activities of such agents from open government laws – the decision, in other words, to create secrecy – is a secondary one made quietly rather than expressly, and it is usually not even admitted to by the government unless the public becomes concerned and demands some sort of an accounting. Third, indirect secrecy tends to grow quietly under the radar screen in direct proportion – not to the number of affirmative governmental acts of information-withholding (for there are few to none of these) – but to the growth in power and influence of the institutions to which it attaches.[13] Finally, it is worth noting that indirect secrecy usually rests on the claim that government is an incompetent actor and that it is peculiarly *incapable* of serving the public interest in the ways that certain laws of public welfare purportedly demand. The claim is that – in a variety of contexts requiring efficiency, creativity, flexibility, long-range vision and/or expertise – the government is the problem rather than the solution.[14] Needless to say – and as was actually the case during

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12. By "governmental outsourcing" I mean a situation in which the government claims responsibility for a particular area or field but delegates via contract the execution of that responsibility to a non-governmental actor, typically either a for-profit corporation or an NGO. I am not presently concerned with the outsourcing of federal-governmental functions to state- and local-governmental proxies. Nor am I concerned with the phenomenon that often goes by the label of "privatization," meaning the government's complete withdrawal from a given field via the sale of state assets to private parties and/or deregulation.

13. Examples: (1) The more private institutions carry out core governmental functions, the more the total amount of political secrecy grows; (2) The greater the role the (traditionally non-transparent) Federal Reserve System plays in managing the economy, the more the total amount of political secrecy grows; (3) The greater the amount of domestic law shaped by electorally unaccountable and opaque supra-national institutions, the more the total amount of political secrecy grows. Each of these examples will be discussed in turn in this Article.

14. In the governmental-outsourcing context, claims of governmental incompetency are usually presented in tandem with encomia to private-sector virtues. Compare, e.g., Matthew Diller, "Form and Substance in the Privatization of Poverty Programs," *UCLA Law Review* 49 (2002): 1744 ("In arguing for markets and against government provision of goods and services, free market advocates argue that government .. . is inefficient,

the George W. Bush Administration – this has the effect of placing national-security secrecy hawks who promote governmental outsourcing in a rather unstable intellectual position.[15]

Indirect secrecy differs from direct secrecy in its rationale, means of origination, manner of growth, and underlying assumptions about governmental competency. But in its deleterious effect on our political system it appears to be largely commensurate with direct secrecy. At the end of the day, both phenomena operate to deny information to the public and, in so doing, disable the public from reviewing and reacting to government activity. Both phenomena result in a lack of transparency that prevents political accountability. Both phenomena, in short, cause the

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inattentive to public wants, and slow to reform and innovate.") with Alfred C. Aman, Jr., "Globalization, Democracy, and the Need for a New Administrative Law," *Indiana Journal of Global Legal Studies* 10 (2003): 133 ("Over and above economies of scale, private actors and market approaches can introduce new management techniques more easily, perhaps fire workers more readily, and make some of the tough resource allocation decision that public officials might just as well avoid.")

In contrast, in the financial-policy context, emphasis tends to be placed almost exclusively on governmental incompetency. Thus, Ben Bernanke:

> Effective Congressional oversight of the Fed is essential, of course, but it involves some complex tradeoffs. On the one hand, Congress has the ultimate responsibility of assuring itself and the public that monetary policy is being conducted reasonably and in the national interest. On the other hand, institutionally, Congress is not well-suited to make monetary policy decisions itself, because of the technical and time-sensitive nature of those decisions. Moreover, both historical experience and formal studies . . . have shown that monetary policy achieves better results when central bankers are allowed to focus on the longer-term interests of the economy, free of short-term political considerations.

Ben S. Bernanke, "'Audit the Fed' Is Not About Auditing the Fed," *Brookings,* January 11, 2016, accessed March 10, 2016, https://www.brookings.edu/blog/ben-bernanke/2016/01/11/audit-the-fed-is-not-about-auditing-the-fed. Financial journalists tend to be even more openly dismissive of elected officials. Thus, the National Review:

> The idea of having Congress take a stronger position on monetary policy might be appealing to conservatives who trust Paul Ryan or Ron Paul more than they trust Ben Bernanke, but there are no permanent congressional majorities. It is not difficult to imagine the mess they would make should the Barney Franks, Chris Dodds, and Maxine Waterses of the world be given a whip hand over monetary policy. Short-term, election-driven political considerations have a pronounced tendency to distort economic policy.

Noah Glyn, "Beware 'Audit the Fed,'" *National Review*, July 31, 2012, accessed April 16, 2016, http://www.nationalreview.com/article/312592/beware-audit-fed-noah-glyn.

15. Accord Verkuil, supra note 6, at 170 ("The market state points in the direction of private solutions; the threat of terrorism reconnects to the public sector. One implies governance, the other government.")

gravamen of the harm posed by political secrecy to a democracy, to wit, they place the government beyond the judgment of, and ultimate control by, the people.

If we think of secrecy in terms of its fundamental effect rather than its form, it becomes clear that scholars across a variety of disparate subject areas have been talking and warning about political secrecy for some time now. But subject-matter (and consequent linguistic) specialization has prevented scholars from appreciating the extent to which they are talking about the same phenomenon in different guises. Scholars who call attention to the opaque nature of decision-making in the Federal Reserve System, for example, are in fact zeroing in on the same fundamental problem, from a political theory and public policy perspective, as scholars who decry classified FISA Court opinions or Presidential Policy Directives; yet because "top secret" stamps are not used in both contexts these scholars do not tend to compare notes or tailor their policy recommendations to each others' findings. As one might expect and as we shall see, this failure to compare notes can lead to distorted policy prescriptions, as scholars make recommendations regarding the acceptable levels of secrecy in one area without considering the extant levels of secrecy in other areas. It is indeed ironic that the very compartmentalization of function and expertise that makes direct secrecy possible (the "need to know" basis) works to handicap the effective academic study of secrecy by preventing recognition of the fact that we are now confronting a systemic crisis of secrecy, with all the implications that crisis has for our system of government and way of life.

Using as its tool the simple but indispensable typology of direct and indirect secrecy introduced above, this Article takes a broad view of our sign-littered terrain of secrecy, a view that heretofore has been missing from the literature. It aims to provide a snapshot – no doubt a blurry one but with hope also serviceable – of the rather acute situation we find ourselves in, and to offer policy prescriptions with which to begin to extricate ourselves. In Part I, I shall spell out

certain definitions and assumptions that inform my analysis of our systemic secrecy crisis. In Part II, I shall canvass the known bounds of direct secrecy and explain why certain recent proposals for controlling direct secrecy are unrealistic and counter-productive. In Part III, I shall show how secrecy arises indirectly in a variety of important and disturbing ways.

I

DEFINITIONS AND ASSUMPTIONS

The analysis of secrecy contained in Parts II and III of this Article rest on certain definitions and assumptions regarding the nature of democracy, the requirements of transparency, and the hazards of secrecy. It is best to unpack these at the outset.

A. Definitions: 'Democracy,' 'Transparency'

One need not idealize the concept of democracy, nor insist upon its most aspirational participatory/deliberative versions, in order to see the dangers posed by political secrecy. Indeed, I would suggest that even the thinnest form of democracy identified by our political theorists fails to work in an environment of extreme secrecy.

Consider, for example, the instrumental conception of democracy offered years ago by Edward Rubin in his provocative essay *Getting Past Democracy*, according to which modern Western governmental systems represent, not self-government, but at best merely responsive government.[16] On this view, "We the People" do not rule. Instead, we are ruled by a thin layer of elected officials who loosely oversee an army of administrators who (in turn) make the decisions necessary to secure for us the public goods we insist upon (*i.e.* security, liberty, and prosperity). However unsatisfying this adminocracy (or *Minimal Democracy*, as I shall call it)

16. See Edward L. Rubin, "Getting Past Democracy," *University of Pennsylvania Law Review* 149 (2001).

may be to devotees of high levels of civic participation, there can be no denying that it is reasonably demanding in terms of the transparency it requires in order to function effectively on its own terms. For *Minimal Democracy's* one indispensable element is the signaling mechanism that enables the People to react to the quality of the work of their rulers. Without such a mechanism – the foremost type being regularly-held elections – the rulers have no reliable way of knowing whether their policies are meeting the People's needs.[17] Political secrecy quite obviously throws a monkey wrench into this mechanism: The People cannot meaningfully react to their rulers' policies if they do not know what those policies are. As Rubin observed:

> Elections have always been regarded as a necessary condition for democracy; they sustain the claim of self-government and provide the primary medium for citizen participation. . . . . The votes of the citizens must be uncoerced, and the citizens must have access to sufficient information so that they understand the basic implications of their votes. . . . If voters are uninformed, then they are not really making a choice but are being used as a randomizing mechanism, like the last digit of the pari-mutual handle. . . .[18]

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17. In the wake of the Brexit vote in the United Kingdom in June 2016, some scholars who opposed the Leave campaign expressed doubt as to whether the people even know what their needs are. See, e.g., James Traub, "It's Time For the Elites to Rise Up Against the Ignorant Masses," *Foreign Policy*, June 28, 2016, accessed July 12, 2016, http://foreignpolicy.com/2016/06/28/its-time-for-the-elites-to-rise-up-against-ignorant-masses-trump-2016-brexit; Jason Brennan, "Brexit, Democracy, and Epistocracy"*, Princeton University Press Blog*, June 24, 2016, accessed July 12, 2016, http://blog.press.princeton.edu/2016/06/24/ethicist-jason-brennan-brexit-democracy-and-epistocracy. Suffice it to say that while this doubt may have been held by arch-Federalist framers such as Alexander Hamilton (see, e.g., *The Federalist Papers*, ed. Ian Shapiro (New Haven: Yale University Press, 2009), 362 (No. 71)), it has not been seriously entertained since before the Ages of Jefferson and Jackson, and it is not entertained here.

18. Rubin, supra note 16, at 756-57. See also ibid., at 767 ("For voters, elections also possess a variety of meanings. Perhaps the most important include the government's duty to serve the public's needs and the voters' ability to evaluate and criticize the government's performance of that function.")

As Rubin was at pains to stress, citizens are also able to react to government policy at the administrative level by availing themselves of the opportunity to submit written comments to an agency regarding a proposed rule before the rule goes into effect. See Administrative Procedure Act, 5 U.S.C. § 553. While undoubtedly useful, this form of "reaction," being ex ante in nature, can ensure responsive government only if administrative agencies are required to adopt and implement the majority (or plurality) message conveyed to them by such comments. This has never been the case. See Rubin, supra note 16, at 776 ("In the case of rulemaking, [judicial] supervision is somewhat less stringent, and certainly more mercurial. There is no clear idea about the way the agency is expected to respond to submitted comments-the statute provides no guidelines and the whole mechanism is only fifty years old . . .") Unless and until it becomes the case, reaction-qua-ex-ante-input essentially amounts to a mandated listening exercise that

So far so good. But how much do the People need to know about their rulers' work in order to meaningfully review and react to it? Echoing my position on democracy, I suggest that we need not idealize the concept of transparency in order to see our way clear on this question. One can agree with transparency realists such as Mark Fenster that transparency has only instrumental value and that it will not "magically lead to [an] informed, deliberative, and/or participatory public . . ."[19] One can also sympathize to some degree with Fenster's insistence – rooted in insights drawn from literary criticism scholarship, semiotics and ethnography – that standard transparency theory rests on a simplistic model of linear communication that overestimates the ability and willingness of the government to communicate, and of the citizenry to comprehend and rationally respond to, informational messages that are themselves lacking in stable and coherent meaning. Yet we should not make too much of these concessions and sympathies or give up on transparency – for two reasons.

First, we cannot afford to do so. If transparency is a fiction then surely it is an indispensable one – much like the myth of "equally-matched litigants" that underpins our adversarial system of justice – such that to give up on it is very much to give up on the project of responsive government.[20] While the maw of literary criticism and cultural studies undoubtedly has its uses, we do well to shackle it when dealing with matters that are far more serious than the deconstruction of Jane Austin's oeuvre.

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at most can supplement, but not legitimately replace, electoral reaction. See discussion infra notes 224-228 and accompanying text.

19. See Fenster, supra note 11, at 893.

20. To his credit, Fenster – having created a straw man of perfect transparency that is easily demolished – disclaims a desire to abandon transparency and offers surprisingly modest reforms to set it on a more rational footing.

Second, contra its critics I do not believe that transparency even comes close to being a fiction. True, many citizens will not understand, or even be interested in understanding, the information about its activities that the government seeks to share. But many will. And is not the better view that of Fuller[21] (and of Bentham before him[22]), to the effect that publication of information is necessary as long as some part of the citizenry, perhaps even only a minor part, is willing and able to assess the publicized information in a competent and responsible manner? Further, while the meaning of some disclosed information may be ambiguous, the meaning of a good deal of important information will be crystal clear. Demanding a coherent answer to questions like "What did the President know and when did he know it?" will never be an exercise in futility.[23]

The concerned and capable part of the citizenry need know only a few key pieces of information about their government's work in order to responsibly assess it (for the purpose of later reacting to it). They need to know: (1) the content of decisions made by the government (decisional outputs); (2) the reasons for the decisions made (decisional inputs);[24] and (3) the source of decisional inputs.[25] Thus, if we wish to review the government's decision to go to war, we need to know (1) the fact of the war (*i.e.* the war cannot be waged secretly); (2) the reasons for commencing the war (*e.g.* to deny a dictator weapons of mass destruction versus a desire for

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21. See Fuller, *Morality of Law,* supra note 1, at 50-51.

22. See Jeremy Bentham, "Essay on Political Tactics,", in *The Works of Jeremy Bentham* 2, ed. John Bowring (Edinburgh: William Tait, 1838-43), 312.

23. For a more contemporary example of information-disclosure containing a coherent and self-evident message, see the Defense Intelligence Agency report discussed infra note 54.

24. Government would perhaps function more efficiently and innovatively if state actors were relieved of accountability for policy inputs and permitted to focus solely on policy outcomes. Some approaches to transparency – dubbed "bottom line" approaches – reflect a desire to capture these benefits. See Note, supra note 10, at 1570-71 (discussing scholarship that advocates bottom-line approaches). However, such approaches have yet to demonstrate, either as a descriptive or normative matter, that political ends justify the means as readily as financial ends do, or that citizens feel as little interested in how their government goes about securing peace and prosperity as they do in how the CEOs of the companies in their stock portfolio go about realizing profit.

25. Knowing (3) is crucial to judging the integrity of (2).

oil and empire); and (3) the source of those reasons (If the source is a CIA private-sector contractor with ties to U.S. Government defense contractors, the reasons may well be problematic.[26]) Disclosure of these three basic items of information (what I shall call *Minimal Transparency*) is arguably all that transparency requires, and so long as such disclosure routinely occurs, the sanctity of the "decisional space" so vaunted and defended in some quarters[27] can be respected. On the other hand, if such basic information is not disclosed, or if the public doubts the reliability of the disclosure, a level of distrust may arise that leads to pressure to invade the decisional space.[28]

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26. This apparently is not a far-fetched scenario. See R.J. Hillhouse, "Outsourcing Intelligence: How Bush Gets His National Intelligence from Private Companies," *Nation,* July 30, 2007, accessed March 10, 2016, https://www.thenation.com/article/outsourcing-intelligence ("Corporations are heavily involved in creating the analytical products that underlie the nation's most important and most sensitive national security document, the President's Daily Brief (PDB) . . . . Concerned members of the intelligence community have told me that if a corporation wanted to insert items favorable to itself or its clients into the PDB to influence the US national security agenda, at this time it would be virtually undetectable."); R. J. Hillhouse, "Who Runs the CIA? Outsiders for Hire," *Washington Post*, July 8, 2007, accessed March 10, 2016, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070601993.html.

27. See, e.g., William J. Stuntz, "Against Privacy and Tranparency," *New Republic,* April 17, 2006, accessed February 2, 2016, https://newrepublic.com/article/65393/against-privacy-and-transparency (transparency discourages the production of good ideas); Fenster, supra note 11, at 908 (remarking on the need for decisional space for executive branch officials); Adrian Vermeule, "The Constitutional Law of Congressional Procedure," *University of Chicago Law Review* 71 (2004): 412 (remarking on same for Congressional representatives).

28. This explains why, for example, the decisional space of U.S. Supreme Court Justices (centered on their biweekly Justices' Conferences) is routinely respected, while the decisional space of the Federal Reserve (centered on its Federal Open Market Committee ("FOMC") meetings) has recently been challenged. In the Court's case, the public knows the content of the decisions made (published written opinions), all decisional inputs (the parties' written submissions and oral argument); and the source of those inputs (the identities of the parties). In the Fed's case (as will be detailed infra Part III.B), there is concern that the public is not permitted to know about key decisions taken or the content and source of decisional inputs. Some commentators have been slow to grasp this difference and to recognize that not all decisional spaces are worthy of the same level of respect. Thus, Former Treasury Secretary Larry Summers:

> [Senator Bernie] Sanders proposes to make the Fed more transparent and accountable by releasing not just minutes but transcripts six months after [FOMC] meetings rather than the current five years. I am not sure I understand the logic here . . . . The Supreme Court justices meet alone, without clerks or stenographers, because the best decisions tend to come when policymakers can deliberate privately before reaching conclusions. This encourages out of the box thinking and forceful dissent while minimizing grandstanding. Why should monetary policy be different?

Lawrence H. Summers, "Here's What Bernie Sanders Gets Wrong – and Right – About the Fed," *Washington Post*, December 29, 2015, accessed February 22, 2016,

As we shall see below, it is a measure of the secret times we live in that *Minimal Transparency* – essential to *Minimal Democracy* – is now deemed by many to be excessive. In areas of direct secrecy, a seductive yet dangerous idea of "shallow secrecy" has emerged that would take the right to know away from the People and vest it exclusively in their political representatives and appointed government officials.[29] In areas of indirect secrecy, the People's right to know is said to imperil the achievement of other goals that the People are admonished to value more highly, such as the efficient and innovative delivery of governmental goods and services, the expert management of economic policy, and the ever-vague and self-justificatory "globalization."[30] Some have even gone so far as to render popular review unnecessary by positing a conception of democracy that dispenses with the need for popular reaction.[31] Needless to say, when the bare minimum becomes the too-expensive-to-afford maximum, and when the tool ceases to be necessary because the end has been abandoned, we know that we have entered new territory.

B. Working Assumptions

Throughout this Essay I assume that this new territory lies far afield from our traditional constitutional domain and, further, that it is an inhospitable landscape in which to find ourselves. Let me explain.

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https://www.washingtonpost.com/news/wonk/wp/2015/12/29/larry-summers-heres-what-bernie-sanders-gets-wrong-and-right-about-the-fed/?utm_term=.476cb263a6eb.

29. Proponents of shallow secrecy argue that the public has a right to know of the existence of secret governmental information but not its actual content. Knowledge of content is reserved for security-clearance-holding government officials who allegedly have the public's best interests at heart. See Rudesill, supra note 4, at 251 ("[A]ll secret law should be a shallow secret to the public: where the public does not know the content of a secret law it should at least know it is there, so the public can ask public officials to investigate."). Shallow secrecy is to be contrasted with "deep secrecy," a situation in which Congress and/or the public does not even know that a secret exists. See ibid., at 250 n.24. For reasons presented infra Part II.B, I argue that proponents of shallow secrecy strike the balance between openness and secrecy in a way that is fatal to *Minimal Democracy*.

30. See infra Part III.A-C.

31. See infra Part III.C.

Transparency of governmental policy and activity is immanent in our constitutional design. It is a first principle – perhaps *the* first principle – of what scholars have called the "structural Constitution,"[32] and for very good reason: A system that expressly mandates opportunities for popular reaction makes little sense unless it also mandates opportunities for popular review. It is true, of course, that within the four corners of the Constitution one looks in vain for an express individual right of access to governmental information and finds only a slim and somewhat vague requirement of information-disclosure.[33] But it would be a mistake to conclude from this (as some have done) that transparency's constitutional status is therefore "vague."[34] The better view – Fuller's again – is that some values are so obvious and important that they require no specification, transparency being one of them:

> One of the most obvious things about a law is that there ought to be some way for the citizen to find out what it says, yet the Constitution of the United States contains no provision requiring the publication of laws. The explanation for this kind of omission is suggested in the following passage from the philosopher Wittgenstein:
>
> > Someone says to me: 'Shew the children a game.' I teach them gaming with dice, and the other says, 'I didn't mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order? …..
>
> The writing of constitutions becomes impossible unless the draftsman can assume that the legislator shares with him some implicit notions of the limits of legal decency and sanity. If the draftsman were to attempt to forestall in advance every conceivable aberration of the legislative

32. See, e.g., Kimberly N. Brown, "Outsourcing, Data Insourcing, and the Irrelevant Constitution," *Georgia Law Review* 49 (2015): 665 [hereinafter "Brown 2015"] (noting that the Supreme Court has relied on the Constitution's structure, "as distinct from its enumerated government functions and provisions enshrining individual rights," to decide a host of important constitutional cases); Kimberly N. Brown, "'We The People,' Constitutional Accountability, and Outsourcing Government," *Indiana Law Journal* 88(2013): 1381 [hereinafter "Brown 2013"] ("Constitution's structure gives rise to essential principles that, though not express in its text, can do real doctrinal work in evaluating reallocations of power."); J. Harvie Wilkinson III, "Our Structural Constitution," *Columbia Law Review* 104 (2004).

33. See U.S. CONST. art. I, § 5, cl. 3 (the Journal Clause).

34. Fenster, supra note 11, at 889.

> power, his constitution would resemble a museum of freaks and monsters.[35]

On this view, what is remarkable about the Constitution is not its failure to mandate transparency, but its inclusion of any instruction regarding it at all.

Moreover, the fact that some of our arch-Federalist Framers, in the heat of the Republic's earliest and most vitriolic political battles, may have disavowed the idea of the public's right to know[36] hardly means that the constitutional structure they designed did not fully depend upon and presuppose that right. To regret the choice of foundation for the house one has just built does not mean the house can remain standing without that foundation. In this regard Fuller's contemporary, political scientist Wolfgang Krause, chose apt phrasing when he observed:

> Constitutional-democratic doctrine requires that policy be based upon the rational consent of the community. Since rational decisions cannot be arrived at without an adequate understanding of all pertinent facts and considerations, any substantial withholding of information (much of which must come from government under present conditions) *conflicts with the basic assumptions of the system itself.* [37]

Just so. And we can take it still further. For if the first basic assumption of our system is that transparency is the implicit sine qua non of responsive government, then the second basic assumption is that transparency requires vertical publication to the People themselves and not merely horizontal publication across the different segments of officialdom (as determined by branch- and/or party-affiliation). The current vogue in "shallow secrecy" aside, trust in government officials has never been deemed an adequate substitute for information-disclosure directly to the public. This is undoubtedly due to the deep Lockean distrust of the state that

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35. See Lon L. Fuller, "The Implicit Laws of Lawmaking," in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Oxford: Hart Publishing, 2001 [1981]), 177-78 (footnote omitted).

36. See Martin E. Halstuk, "Policy of Secrecy-Pattern of Deception: What Federalist leaders Thought About a Public Right to Know, 1794-98," *Communication Law and Policy* 7 (2002)

37. Wolfgang H. Kraus, "Democratic Community and Publicity," in *Nomos: Community*, ed. Carl J. Friedrich (New York: Liberal Arts Press, 1959), 255 (emphasis added).

informs our constitutional arrangements. While a full-blown history lesson is hardly needed here, it is worth recalling that the writings of both the Framers and the anti-Federalists were littered with endorsements of what we might call the *Distrust Principle* – the expectation that government officials would routinely, if perhaps not invariably, betray the interests of the governed. Executive officials were expected to commit "high crimes and misdemeanors;" thus the need for the impeachment mechanism.[38] Legislators were expected to "substitute their *will* to that of their constituents" and to exceed "the limits assigned to their authority;"[39] thus the need for both judicial review[40] and regular elections.[41] Both sets of officials were expected to try to usurp powers that did not belong to them; thus the need for "checks and balances."[42] The Founding generation's intuitions regarding elite misbehavior were far more raw, uncompromising, and frankly predictive than the tamer sociological analyses of the twentieth century that purported to confirm them.[43] From an historical standpoint, any system of transparency that hinges on trust is at odds with the macro-skepticism of officialdom that animates our basic constitutional design.[44]

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38. See U.S. CONST., art. II, § 4.

39. *The Federalist Papers*, supra note 17, at 394 (No. 78, Alexander Hamilton) (emphasis in original).

40. See ibid.

41. See *The Complete Anti-Federalist* 2, ed. Herbert J. Storing (Chicago: University of Chicago Press, 1981), 442 (No. XV, Brutus) ("A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice"); see also *The Federalist Papers*, supra note 17, at 270 (No. 52, Madison) (frequent elections are the "only policy" capable of binding federal representatives to the will of the People).

42. *The Federalist Papers*, supra note 17, at 264 (No. 51, Madison).

43. See, e.g., C. Wright Mills, *The Power Elite* (Oxford: Oxford University Press, 1956); Robert Michels, *Political Parties*, trans. Eden Paul and Cedar Paul (New York: Hearst's International Library Company, 1915) (identifying an "iron law of oligarchy," according to which organizational elites tend to prioritize the maintenance of their powers and privileges over the cause of advancing the core principles of the organizations they lead).

44. Accord Lance deHaven-Smith, *Conspiracy Theory in America* (Austin: University of Texas Press, 2013), 7 ("The Founders considered political power a corrupting influence that makes political conspiracies against the people's interests and liberties almost inevitable. They repeatedly and explicitly called for popular vigilance against anti-democratic schemes in high office.")

Writing in opposition to the national-security-inspired Alien and Sedition Acts of 1798, Thomas Jefferson expressed disdain for the idea that trust (or "confidence," as he called it) was an acceptable operational principle in a republic:

And while this does not mean that the People must always regard their political agents with distrust, or that distrust levels need be maintained at some specific absolute level in order for the political system to work, it does mean that the People can always revert to an attitude of distrust in the knowledge that such is consistent with the basic political calculus underpinning their institutions.

A third assumption follows on from this and I shall introduce it by way of a question. Even if we insist on "looking for ourselves" because we do not trust our leaders to look for us, does it necessarily follow that upon looking we shall find something untoward? Must we assume, in other words, that secrecy hides wrongdoing and is the shelter of the scoundrel? Or is it not instead possible, perhaps even likely, that secrecy serves as the shelter of the loyal public servant simply trying to do the most ethical and effective job she can for the American people?

This is an interesting question and one that Fuller and Hart unfortunately did not debate. They locked horns on precisely the opposite question: Will men tend to do evil in the light of day? Fuller thought they would not;[45] Hart disagreed and thought Fuller naive.[46] One can only

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> [I]t would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights; that confidence is every where the parent of despotism; free government is founded in jealousy, and not in confidence; it is jealousy, and not confidence, which prescribes limited constitutions to bind down those whom we are obliged to trust with power . . . . In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

Thomas Jefferson, "Kentucky Resolutions of 1798," in *Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 4, ed. Jonathan Elliot (Philadelphia: J.B. Lippincott and Company, 1891 [1836]), 543. For his part, Bentham enthusiastically embraced the idea – hurled as an accusation by his Burkean opponents – that systems of representative government are founded on distrust. "This is true," he wrote. "[A]nd every good political institution is founded upon this base. Whom ought we to distrust if not those to whom is committed great authority, with great temptations to abuse it?" See Krause, supra note 37, at 250 (quoting Bentham).

45. See Fuller, "Positivism and Fidelity," supra note 1, at 636 ("[W]hen men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness . . . .")

46. See Hart, "Positivism and the Separation," supra note 1, at 624 ("[A] legal system that satisfied these minimal requirements [of procedural regularity and coherence] might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive . . . .")

hazard a guess as to whether these two philosophers believed that men tend toward evil when operating in the dark shadows. Fuller may well have thought that they do.[47] Bentham, for his part, left no doubt as to where he stood. For him, public servants were akin to the prisoners in his Panopticon, kept from evil only by the incessantly watchful eye of the inspector.[48] Take away the inspector, and the functionary's moral restraint evaporates.

Abstract models drawn from economics scholarship – most notably agency cost theory, which posits that unmonitored agents will serve their principals' interests only incompletely – provide theoretical grounds for thinking Bentham right.[49] And secrecy scholars routinely acknowledge – if sometimes only in a pro forma, box-ticking sort of way – that secrecy generally entails an increased likelihood of official misconduct.[50] But if we wish for more trenchant confirmation of Bentham we need only look at the concrete and specific empirical evidence offered up by our own history. It was, after all, a thick cloak of secrecy that enabled the U.S. intelligence community to commit egregious political and civil rights abuses during the Cold War, as documented by Congress in the late 1970s.[51] More recently, direct secrecy has masked

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47. I base this remark on the following passage:

> During the Nazi Regime there were repeated rumors of 'secret laws.' In the article criticized by Professor Hart, Radbruch mentions a report that the wholesale killings in concentration camps were made 'lawful' by secret enactment. Now surely there can be no greater legal monstrosity than a secret statute. Would anyone seriously recommend that following the war the German courts should have searched for unpublished laws among the files left by Hitler's government so that citizens' rights could be determined by a reference to these laws?

Fuller, "Positivism and Fidelity," supra note 1, at 651.

48. See Krause, supra note 37, at 251.

49. See, e.g., Sidney A. Shapiro and Rena I. Steinzor, "The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism," *Law and Contemporary Problems* 69 (2006) (endorsing the use of agency cost theory in analyses of executive branch misconduct).

50. See, e.g., Rudesill, supra note 4, at 312; David E. Pozen, "Deep Secrets", *Stanford Law Review* 62 (2010): 278.

51. See Rudesill, supra note 4, at 260 n.58 (detailing key findings of the mid-1970s Congressional investigations headed by Senator Frank Church and Representative Otis Pike).

gross betrayals of the public trust that include unsanctioned torture programs,[52] indiscriminate mass surveillance,[53] and (arguably) an illegal and dishonest foreign policy.[54] Deep secrecy has also created a caste system based on access to secret information, wherein the security clearance has emerged as the ticket to power and economic advancement for those lucky or connected enough to acquire it.[55] For its part, indirect secrecy has enabled widespread financial corruption and self-dealing, and in the process abetted the growth of economic inequality to unprecedented levels.[56]

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52. See ibid., at 293-94 (recounting the deeply secret legal memos of the Bush II-era Office of Legal Counsel, which "gave legal blessing for the most controversial elements of the Bush Administration's 'war on terror,' concerning interrogation of detainees, detention of U.S. citizens in military custody as enemy combatants without charge or access to the courts, NSA collection of electronic communications of U.S. persons, and potential use of military force within the United States.")

53. See ibid.

54. Example: In 2015, a formerly classified Defense Intelligence Agency report was released pursuant to a FOIA request that not only anticipated the rise of Islamic State (IS) "but seem[ed] to suggest it would be a desirable development from the point of view of the international 'coalition' seeking regime change in Damascus. . . . American intelligence saw IS coming and was not only relaxed about the prospect but, it appears, positively interested in it." Hugh Roberts, "The Hijackers," *London Review of Books* 37, July 16, 2015, accessed March 10, 2016. The DIA report can be viewed at: https://www.judicialwatch.org/wp-content/uploads/2015/05/Pg.-291-Pgs.-287-293-JW-v-DOD-and-State-14-812-DOD-Release-2015-04-10-final-version11.pdf

55. See Dana Priest and William M. Arkin, "Top Secret America: The Secrets Next Door," Washington Post, July 21, 2010, accessed April 22, 2016, http://projects.washingtonpost.com/top-secret-america/articles/secrets-next-door. Priest and Arkin describe the phenomenon of national-security "clusters" – geographical concentrations of top-secret government organizations and corporate contractors which dot the United States and are "the nerve centers of Top Secret America and its 854,000 workers." National security workers employed in these clusters "submit to strict, intrusive rules."

> If they drink too much, borrow too much money or socialize with citizens from certain countries, they can lose their security clearances, and a clearance is the passport to a job for life at the NSA and its sister intelligence organizations. . . . The schools [their children attend] . . . are among the best, and some are adopting a curriculum this fall that will teach students as young as 10 what kind of lifestyle it takes to get a security clearance and what kind of behavior would disqualify them. . . . The [school] buses deliver children to neighborhoods that are among the wealthiest in the country; affluence is another attribute of Top Secret America. Six of the 10 richest counties in the United States, according to Census Bureau data, are in these clusters.

56. See Jacobs and King, supra note 7, passim (detailing how the Fed's operational secrecy has consistently abetted favoritism toward Wall Street financial institutions); Eric Lipton and Brooke Williams, "How Think Tanks Amplify Corporate America's Influence," *New York Times*, August 7, 2016, accessed May 25, 2016, https://www.nytimes.com/2016/08/08/us/politics/think-tanks-research-and-corporate-lobbying.html?_r=0 (finding that non-profit governmental grantees that are involved in policy-making clandestinely serve corporate interests); Wedel, *Shadow Elite*, supra note 6, passim.

Whether secrecy has *deliberately* been put in place in order to abet criminality and wrongdoing is a separate question I shall not now consider. Like Sheldon Wolin, who in his last major publication charted the devolution of the U.S. political system into what he claimed was a form of inverted totalitarianism,[57] I am happy to remain agnostic on the question of intent. But it seems reasonably clear that secrecy, once in place and for whatever reason put in place, is used to perpetrate serious wrongdoing, and that we should therefore be quite concerned about the systemic extent of the secrecy described in the pages to follow.

II

DIRECT SECRECY

A. *The State of Play*

The story of direct governmental secrecy, with its pedantic overtones and predictable finish, has all the rhyme and rhythm of a dull morality tale. The government, we are told, maintains an off-limits, classified world of fact – comprising secret policies, programs, plans, activities, communications and capabilities – in order to protect us from enemies who might otherwise use the secret information to do us harm. We are further told that this secret world of fact represents an acceptable "national security exception to the general [constitutional] norm against secret activities."[58] But as with any King James version of a narrative, this one suffers from oversimplification and distortion, the greatest perhaps being the use of the word "exception" to describe a phenomenon that appears to be well on its way to becoming the rule.

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57. See Sheldon S. Weldon, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism* (Princeton: Princeton University Press, 2008).

58. Rudesill, supra note 4, at 322.

It should by now be no secret that the world of secret fact has grown into a behemoth that is beyond any effective institutional cognizance or control. A 2010 investigation by *The Washington Post*, confirming the trend toward excessive Executive secrecy documented by the Senate in 1997,[59] began with the following arresting set of statements:

> The top-secret world the government created in response to the terrorist attacks of Sept. 11, 2001, has become so large, so unwieldy and so secretive that no one knows how much money it costs, how many people it employs, how many programs exist within it or exactly how many agencies do the same work. These are some of the findings of a two-year investigation by The Washington Post that discovered what amounts to an alternative geography of the United States, a Top Secret America hidden from public view and lacking in thorough oversight. After nine years of unprecedented growth, the result is that the system put in place to keep the United States safe is so massive that its effectiveness is impossible to determine.[60]

To remark (as the *Post* reporters did) that this Top Secret world lacked "thorough" oversight was a significant understatement: Their own findings revealed that hundreds, perhaps even thousands, of programs run by the defense and intelligence agencies are known to only a small handful of individuals.[61] Recent disclosures by former high-ranking CIA officer Kevin Shipp

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59. See *Report of the Commission on Protecting and Reducing Government Secrecy*, S. Doc. No. 105-2 (1997) [hereinafter "*Moynihan Report*"].

60. Dana Priest and William M. Arkin, "Top Secret America: A Hidden World, Growing Beyond Control," *Washington Post*, July 19, 2010, accessed March 15, 2016, http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control.

61. See ibid. See also *Moynihan Report*, supra note 59, at 26:

> Publicly acknowledged [special access] programs are considered distinct from unacknowledged programs, with the latter colloquially referred to as 'black' programs because their very existence and purpose are classified. Among black programs, further distinction is made for 'waived' programs, considered to be so sensitive that they are exempt from standard reporting requirements to the Congress.

One question that arises concerning these deeply secret programs is how they manage to be funded if Congress is unaware of them. The trillions of dollars that go missing from time to time from the U.S. defense budget may afford a clue to this mystery. See, e.g., Scot J. Paltrow, "U.S. Army Fudged Its Accounts By Trillions of Dollars, Auditor Finds," *Reuters*, August 19, 2016, accessed November 22, 2016, http://www.reuters.com/article/us-usa-audit-army-idUSKCN10U1IG (U.S. Army cannot account for $6.5 trillion for fiscal year 2015); Aleen Sirgany, "The War on Waste," *CBS News,*, January 29, 2002, accessed March 22, 2017, http://www.cbsnews.com/news/the-war-on-waste/ (reporting that the Pentagon's auditors "admit the military cannot account for 25 percent of what it spends").

would appear to confirm that many of the policy choices made by the publicly visible U. S. Government are controlled and even dictated by forces that remain stubbornly hidden.[62] As hard as one might try, it is virtually impossible to square this massive world of secret fact and authority with *Minimum Democracy* and *Minimum Transparency*. Public knowledge of decisional outputs (in the form of Executive decisions to undertake certain actions and activities), decisional inputs and input sources is utterly frustrated by such broad and intense levels of secrecy. One can of course agree with a point made by secrecy apologists, to the effect that the Framers "gave the President the ability to command armed forces to protect the nation in an international security context they understood to be Hobbesian and characterized by espionage and secret diplomacy."[63] Yet such a banal fact hardly constitutes a thick and hearty enough plank of constitutional history to support the weight of the vast secrecy infrastructure uncovered by *The Post's* investigation. I would also suggest that the fact that Congress and the Supreme Court have acquiesced in the building of this infrastructure since World War II[64] represents less an effective blessing of it than a call to re-examine the line separating institutional practice that evolves the Constitution from institutional practice that destroys it.

That being said, if the story of direct secrecy ended with this single scary chapter I would be inclined to hold my tongue on the grounds that to object at this late date would be churlish. (The image of Xerxes whipping the waters of the Hellespont comes uncomfortably to mind and counsels silence.) But the regrettable fact of the matter is that the world of secret Executive fact has not agreed to stay nicely contained. Instead, as recent developments and scholarship

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62. See Aaron Kesel, "High Ranking CIA Official Blows Whistle on the Deep State and Shadow Government," *Zerohedge*, Sept. 16, 2017, accessed September 18, 2017, http://www.zerohedge.com/news/2017-09-15/high-ranking-cia-agent-blows-whistle-deep-state-and-shadow-government.

63. Rudesill, supra note 4, at 322.

64. See ibid., at 322 & n.300.

confirm, that world has bled into and infected the other two branches of government – Congress and the judiciary – causing each to go dark in key respects. A bit of histrionics would therefore seem to be in order.

Let us first consider Congress. A recent and important empirical study of Congress's legislative practices reveals that for the past thirty-six years, unbeknownst to the public and underappreciated by the cognoscenti, Congress has been writing secret law. It has been doing so in the form of classified addenda to committee reports on public bills, and for the purpose of managing the funding, staffing, and programmatic direction of the world of secret fact.[65] The author of this study, Professor Rudesill, tries to make the best of her findings by insisting that it is better to have the People's representatives secretively involved in the management of Executive secrecy than to have them excluded and sitting on the sidelines. "If their elected Members of Congress cannot do classified legislative work," she insists, "the people will become less self-governing regarding classified activities. In turn, the legitimacy of classified activities will suffer."[66] Yet surely it is a bizarre twist of logic that would spin the fact of a legislature's going dark as a democratic victory for the People. The question practically asks itself: How can the People become more self-governing by virtue of a legislative practice from which they are totally excluded and about which they know nothing? If we adopt Rudesill's own definition of political self-government as "law/policy choice (law/policy improvement through selection and modification of alternatives),"[67] then certainly self-government would seem defeated by a practice that keeps the choosers from knowing what the choices are.

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65. See ibid., at 253-82.

66. Ibid., at 265.

67. Ibid., at 323.

Rudesill is right to focus attention on the key compromise Congress struck with the Executive in the late 1970s, when it learned the full (and depraved) extent of the latter's secret world. According to that compromise, Congress would for the most part permit the Executive to keep its secret world as long as Congress could effectively oversee it (in secret).[68] Yet surely the only democratically legitimate option open to Congress at that crucial juncture was to demand the slow and partial dismantlement of that secret world, not to become (as it apparently did) a co-conspirator in its out-of-control aggrandizement. Rudesill does not begin to explore this road-not-taken from the Church-Pike era. While she expresses discomfort at the vast world of secret fact that now begs for legislative regulation,[69] she makes no real effort to challenge its necessity.[70] Her deference to the national security state on this point is all the more curious given that, as she herself recognizes, much of the expansion of secret fact since 9/11 has aimed at solving a problem – insufficient information-collection capacity – that by all accounts was *not* a contributing factor to the 9/11 tragedy.[71]

Apart from its glaring democratic deficit, Congress's secret law-making suffers from two other problems – one of constitutional dimension, the other of what I might call constitutional concern. The first is its failure to satisfy the requirement that a bill must be passed by both Houses of Congress before being presented to the President for signature.[72] An ordinary bill (as

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68. See ibid., at 261.

69. See ibid., at 319 ("[B]ecause of popular sovereignty, [an Executive] policy publically made and ratified by the public through elections carries greater legitimacy than one that is secret.")

70. See ibid., at 325 (describing as "reasonable" the argument that secret Executive activities "are inevitable and vitally important to the nation's security"). Rudesill finds comfort in the fact that "[i]t is common for legislative ratification of secret activities to be inferred from public votes by Members of Congress to approve legislation with secret addenda," ibid., at 319, but she then undercuts this very rationale by confirming that most members of Congress, including members of relevant oversight committees, do not read classified addenda, see discussion infra notes 71-75 and accompanying text.

71. See Rudesill, supra note 4, at 311 & n.241 (citing Congressional investigations in acknowledging that the failure to prevent 9/11 was due not to a lack of information per se but to a lack of sharing of information already possessed within the intelligence community).

72. See U.S. Const. art. I, § 7, cl. 2.

opposed to a treaty) passes if it garners the votes of a majority of a House's members. However, most members of Congress apparently do not read the classified report addenda written by the six standing Congressional committees charged with defense and intelligence matters. They fail to read them not because they are lazy or indifferent (although in reality they may be each of these things), but because they have limited logistical access to the addenda and cannot discuss them with (or have their attention drawn to them by) an equally unaware public.[73] In *American Civil Liberties Union v. Clapper*,[74] this combination of factors was deemed sufficient to defeat the argument that Congress had indirectly ratified a classified judicial interpretation of one of its statutes (Section 215 of the USA PATRIOT Act[75]). It is not difficult to see how *Clapper's* logic might be extended to defeat the argument that members of Congress knowingly vote in favor of classified extra-statutory material made available in a "secure room" they are unlikely ever to visit.[76]

The second additional problem with Congress's secret law-making arises from the fact that regular Article III courts "are unlikely ever to see a case involving a classified legislative addendum due to the state secrets doctrine and other barriers to adjudication of classified matters."[77] This means, quite simply, that the more legislative work Congress does in the classified space, the more it insulates its work from judicial challenge – a moral hazard if ever there was one. While one does not want to make too much of this (many potential challenges to Congress's secret legislation would fail for lack of standing after all), there can be no denying

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73. Rudesill, supra note 4, at 262 & n.66, 264, 351.

74. 785 F.3d 787, 819-21 (2d Cir. 2015).

75. See USA Patriot Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001).

76. Rudesill recognizes this issue but does not persuasively address it. See Rudesill, supra note 4, at 263-65, 273, 319.

77. Ibid., at 265.

that Congress has gone down a road that is full of temptation and one on which it is left largely to police itself.[78]

As for the judiciary, it too has been compromised by Executive secrecy. By now it is clear that an entire area of deeply important constitutional jurisprudence (the Fourth Amendment as it relates to government surveillance authority) has been delegated to a court (the Foreign Intelligence Surveillance Court (FISC)) that operates in secret in order to preserve the secrecy of its subject matter.[79] Recent legislative reforms intended to bring greater transparency to the FISC[80] are so modest in nature that they serve merely to highlight how entrenched this judicial secrecy has become: FISC proceedings are still closed to the public and ex parte in favor of the government,[81] and FISC decisions and opinions, no matter how extensive and far-reaching they increasingly appear to be, can still be withheld from the public at the Executive's discretion.[82] Moreover, as the battle over the meaning of Section 215 of the USA PATRIOT Act made clear, the FISC seems quite willing to interpret Congressional directives in linguistically improbable

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78. Accord ibid., at 341.

79. See Eric Lichtblau, "In Secret, Court Vastly Broadens Power of N.S.A," *New York Times*, July 6, 2013, accessed November 22, 2016, http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html (reporting that, in the judgment of anonymous officials familiar with its inner workings, the FISC "has quietly become almost a parallel Supreme Court, serving as the ultimate arbiter on surveillance issues and delivering opinions that will most likely shape intelligence practices for years to come").

80. See USA Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

81. Although the USA Freedom Act provides for the appointment of an amicus curiae to make arguments on behalf of privacy rights before the FISC, the FISC may decline such appointment upon a finding that it "is not appropriate." Ibid., § 401(i)(2)(A).

82. Although the USA Freedom Act mandates publication (in redacted or summary form if necessary) of all FISC opinions having "a significant construction or interpretation of any provision of law," ibid., § 402(a), the determination of the level of "significance" is entrusted to the unreviewable discretion of the Attorney General and the Director of National Intelligence. In these circumstances, it "is not too far-fetched to imagine that officials might creatively interpret 'significance' to avoid the disclosure requirement in cases they view as particularly sensitive." Elizabeth Goitein, "There's No Reason to Hide the Amount of Secret Law," *Just Security*, June 30, 2015, accessed March 10, 2016, https://www.justsecurity.org/24306/no-reason-hide-amount-secret-law. For their part, the unclassified opinion summaries may be so "cryptic" as to "not give the public much meaningful notice of the law." Rudesill, supra note 4, at 352.

and even tortured ways that redound to state power.[83] Whether this willingness stems from an awareness on the part of the FISC that its classified handiwork is likely to fly under the radar and go unnoticed by the vast majority of Congress is an interesting question – one which, if it ever were to be answered in the affirmative, would again raise the troubling issue of moral hazard, this time vis-à-vis members of the judiciary instead of Congress. At the very least we may be justified in saying that the FISC's demonstrated independence from the ordinary canons of statutory interpretation represents a case of a watchdog joining the ranks of the watched.[84]

Secrecy is also deforming the judiciary in the core realm of criminal and civil procedure. A recent comparative study of U.S. and Canadian counter-terrorism cases since 9/11 documents a number of instances of judicial sanction of indefinite detention without charge based on in camera, ex parte review of secret evidence.[85] In such cases the right to due process – skeletalized and subordinated to the need to protect confidential government "sources and methods" – no longer includes the right to confront witnesses, knowledge of the details of the basis of detention, or (consequently) the effective assistance of legal counsel. Secrecy is also used defensively: Tort actions filed in both North American countries that seek to hold officials accountable for involvement in torture, rendition (kidnapping), and other violations of core human rights have been barred in response to government assertion of the "state secrets privilege" – the claim that mounting an effective legal defense would impermissibly require the disclosure of classified material.[86] What is arguably most alarming about these types of judicial accommodation of Executive secret fact is the sea-change in attitude that has accompanied

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83. See Clapper, 785 F.3d at 819 (criticizing the FISC's "extraordinary departure from any accepted understanding" of the statutory text of section 215).

84. Congress established the FISC in 1978 for the purpose of overseeing, and if necessary restricting, Executive surveillance projects. Rudesill, supra note 4, at 301.

85. See Diab, supra note 5, at 42-56.

86. See ibid., at 89-91, 93-94.

them. Professor Diab has documented what amounts to a paradigm shift in favor of a new concept of "authoritarian legality:"

> By virtue of a common insistence on the part of government that various measures are legal, and a broad acceptance on the part of the public and the judiciary (with some qualifications), the measures can be understood collectively as marking a shift in the cultural currency of liberal legality to what can be called authoritarian legality – effecting a shift of a deeper, more pervasive character. This new concept of law can be understood in terms of its basic features, including a repudiation of absolute or 'non-derogable' human rights (against torture or indefinite detention without charge); the expansion of seemingly unfettered state secrecy and surveillance; broad judicial deference to executive discretion; and a reluctance to remedy serious rights violations or to be held accountable for them.[87]

That the deformed practices of the "new" due process are deemed a form of legality at all is testament to the stealthy manner in which our system of transparency appears to be degrading – in this as in other areas still to be discussed. In effect, the judiciary's acceptance of secrecy is abetted by an even more secret process of cognitive psychology: Indefinite detention based on secret evidence is becoming acceptable because it is skillfully presented as but a minority variant on an older form of liberal legal process that still controls the vast majority of prosecutions and civil adjudications. For a time the "exceptional and unthinkable" co-exists, uneasily, with the "usual and acceptable." Then, having secured its beachhead, it moves inland, eventually becoming the new occupying force – the new normal. In this manner, as Sheldon Wolin presciently warned us, a liberal democratic value system is slowly inverted:

> An inversion is present when a system, such as a democracy, produces a number of significant actions ordinarily associated with its antithesis: for example, when the elected chief executive may imprison an accused without due process and sanction the use of torture while instructing the nation about the sanctity of the rule of law. The new system, inverted totalitarianism, is one that professes to be the opposite of what, in fact, it is. It disclaims its real

87. Ibid., at 9.

> identity, trusting that its deviations will become normalized as 'change.' [88]

What Wolin perceived in dim outline in 2008, Diab seems to have fully mapped in 2015

B. Shallow Secrecy: A Cure That Is As Bad As the Disease

The proponents of the concept known as "shallow secrecy"[89] – Rudesill foremost among them – will no doubt bristle at the suggestion that their concept represents an authoritarian politics every bit as dangerous as the authoritarian legality documented by Diab. Yet I shall argue that this is precisely what it represents. The concept is intended to make us feel comfortable with several of the manifestations of direct secrecy described above. We are told that if we implement a second-order disclosure regime that reflects the principles of shallow secrecy, we shall not need to choose between democracy and security.[90] Instead, we shall be able to enjoy both constitutional values in "sustainable equilibrium,"[91] if not in exactly equal measure. The optimism here contrasts markedly with the subdued realism of an earlier era, epitomized perhaps best by the *Moynihan Report*, which viewed democracy and secrecy as being largely in zero-sum tension.[92] For the reasons set forth below, I must side with the Moynihan camp. I conclude that, far from succeeding in squaring the circle, shallow secrecy leads to the worst of all possible worlds: If it works as intended, *Minimal Democracy* is dead;

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88. Wolin, supra note 57, at 46.

89. See definition supra note 29.

90. See Rudesill, supra note 4, at 360.

91. Ibid.

92. *Moynihan Report*, supra note 59, at XXI-XXIX (recommending resolving the "long-standing tension between secrecy and openness" by scaling back secrecy through a legislatively-mandated declassification regime).

if it does not work as intended, *Minimal Democracy* has the potential to become so handicapped that it might as well be dead.

Shallow secrecy is a set of claims regarding events that should take place at both the user level (the citizenry) and the producer level (the government). At the user level the key concept is the idea of the "known unknown:" In matters requiring direct secrecy the People will be told that they are *not* being told something. That "something" might be the contents of a classified law, FISC decision, Executive legal authority,[93] or Executive plan/policy/activity. The People will be informed about the creation of each new secret via a "bell ringing" notification from the government that will disclose the secret's meta-data but not its content/substance/first-order information.[94] From what I can gather from the fairly thin commentary on this point, once the People receive the announcement of the birth of a new secret, they are expected to go into a veritable frenzy of democratic action. They are expected to (1) "ask their public officials to investigate, and hold those officials accountable knowing that those officials do know the content of the secrets;"[95] (2) "have an informed discussion about whether too many [legal authorities] are kept secret"[96] and "whether the secrecy system is a good system, or whether more openness ought to be provided;"[97] (3) "learn the general contours of the material that is

93. *E.g.* an Executive Order, a Presidential Policy Directive or an Office of Legal Counsel memorandum

94. In the case of secret legal authority, meta-data would typically include the date of the authority's creation, the identification of its agency-author and general subject matter, and its sunset or declassification date. See Rudesill, supra note 4, at 251. In the case of secret Executive fact, meta-data would typically include the general nature of the activity undertaken or planned for, as well as the activity's general rationale and legal basis. See Pozen, supra note 50, at 326-27.

95. Rudesill, supra note 4, at 344.

96. Goitein, supra note 82.

97. Pozen, supra note 50, at 307.

being withheld and . . . frame the decision problems that face them;" [98] and/or (4) "check their guardians on the very issue of their commitment to being checked."[99]

While the People busy themselves in these various meta-issue dialogues, a raft of new activity is expected to take place at the governmental level. This activity consists in the main of intra- and inter-branch disclosure exercises and observance of good-practice secrecy protocols. Its purpose is said to be the simple good-governance one of promoting sounder and wiser decision-making,[100] but of course it should prove equally effective at building out the government's capacity to do internally the review-and-reaction work formerly done by the People (from which they are now disabled due to the demands of secrecy). Proposals in this regard have come fast and furiously in recent years and include, *inter alia*, the suggestion that the FISC employ an interpretive Rule of Lenity in favor of privacy rights; [101] that executive branch officials adopt a "front page rule" requiring them to avoid secretive acts that might embarrass or discredit them if publicly revealed;[102] that Congress honor a "public law supremacy rule" requiring secret law to be narrower (or at least no broader) in scope than public law and always subordinate to it in case of conflict;[103] that more executive branch agencies institute the equivalent of the Foreign Service's "dissent channel," which allows foreign service officers to challenge departmental policy without fear of reprisal,[104] and that they experiment

98. Ibid., at 289.

99. Ibid., at 307.

100. See, e.g., ibid., at 338.

101. See Orin S. Kerr, "A Rule of Lenity for National Security Surveillance Law," *Virginia Law Review* 100 (2014).

102. See Marty Lederman, "The 'Front Page Rule,'" *Just Security*, December 30, 2013, accessed November 22, 2016, https://www.justsecurity.org/5184/front-page-rule.

103. See Rudesill, supra note 4, at 338-40.

104. See Neal Kumar Katyal, "The Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within," *Yale Law Journal* 115 (2006): 2328-29. Katyal also suggests allowing the minority party in Congress to appoint additional agency ombudsmen during periods of one-party government. Ibid., at 2347-48.

with the use of internal "red" or "B" teams to mimic the adversarial testing of policy that would otherwise occur through debate and engagement with the public;[105] that all secret law and legal interpretations created in the executive and judicial branches be made known to Congress;[106] and that (as a backstop for Congress) an elite, non-partisan cadre of lawyers, possessing "super user" clearance status, be tasked with overseeing the creation and sharing of secrets throughout the government.[107] It seems to be hoped that between the to-and-fro of all this intra-governmental discourse and disclosure (on the one hand), and the energy of the People in debating the level of the secrecy that surrounds them (on the other), the essence of democracy can be preserved whilst secrets remain kept.

That this hope is unrealistic and, indeed, dangerously naïve can best be shown micro-analytically by way of a few real-world examples. Consider first two recent instances in which government officials took their secrecy oaths seriously:

Example # 1: In April 2016, CBS reporter Steve Kroft interviewed former Congressman Porter Goss as part of an investigative report on the so-called "28 Pages" that had been redacted out of a 2002 Congressional report on 9/11. At the time of the interview the 28 Pages were still classified and Goss was legally barred from publicly disclosing their contents. His conversation with Kroft unfolded as follows:

Kroft: Is it safe to say it [the 28 Pages] has to do with the possible involvement of the Saudi Arabian Government in 9/11? That's the subject matter, isn't it?

Goss: Well, I'm not going to speculate on who and what is involved because it's still classified and I took an oath to maintain that classification.

Kroft: I know you can't talk about it, don't want to talk about the contents of it but do you believe the results would have been embarrassing to the Saudis?

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105. See Pozen, supra note 50, at 335.

106. See Rudesill, supra note 4, at 356-57.

107. See ibid., at 357-59.

Goss: I'm not going to comment on that; that would be speculation and I'm simply not going to comment on that. I don't think it's right. I'm not going to talk about what's in the 28 pages and that makes an assumption that it's about the Saudis and I'm not going to make that assumption.[108]

Example # 2: In 2013, after Edward Snowden leaked a classified FISC order authorizing bulk phone-data harvesting by the government, *New York Times* reporter Eric Lichtblau asked FISC judges to comment on the scope and volume of their decisions. They refused to do so. Lichtblau was left to remark to his readers that on prior occasions the judges had "bristled at criticism that they are a rubber stamp for the government, occasionally speaking out to say they apply rigor in their scrutiny of government requests."[109]

It is difficult to know precisely what the People are supposed to debate, discuss, frame, and/or demand investigation of when faced with this kind of (principled) official contumacy. Certainly the reporters themselves were stymied by the officials' refusals to reveal content; in each case the reporter was able to make progress on his story (and score headlines) only because other government officials were willing to break the law and leak the classified information he was seeking.[110] Provided one has a healthy sense of the absurd, it is not hard to imagine the kind of fatuous conversations citizens are likely to have when confronted with a

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108. CBS News, "60 Minutes Overtime: How To Report on a Top-Secret Document," June 19, 2016, accessed September 11, 2016, http://www.cbsnews.com/news/60-minutes-overtime-how-to-report-on-a-top-secret-document.

109. Lichtblau, supra note 79.

110. In Kroft's case, former Senator Bob Graham revealed that the 28 Pages outlined a network of Saudi charities, wealthy nationals, and government officials that supported the 9/11 hijackers while they were in the U.S. See CBS Evening News, "Senator Urges Obama to Declassify Part of 9/11 Report," April 9, 2016, accessed November 22, 2016, https://www.youtube.com/watch?v=TOu1eF_uQsE. Graham's disclosure was clearly substantive enough to be unlawful but constituted the kind of "official leak" for which senior officials are rarely held to account. See David E. Pozen, "The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosure of Information," *Harvard Law Review* 127 (2013). Lichtblau was able to learn information about the FISC's secret jurisprudence from national security officials who "discussed the court's rulings and the general trends they have established on the condition of anonymity because they are classified," Lichtblau, supra note 78., as well as from the whistle-blowing revelations of Edward Snowden.

united governmental front of secrecy.[111] In such situations, they will have little choice but to abandon the *Distrust Principle* and accept the protestations of good faith and sincere effort made by the likes of the FISC judges. Indeed, these two examples suggest that the sine qua non of shallow secrecy – provided it works as intended – is the very same trust-in-officialdom that Lockean democracy repudiates and Hobbesian democracy embraces. Ironically, not even deep secrecy – the realm of "unknown unknowns"[112] – promises to inflict as much systemic damage on a Lockean body politic as shallow secrecy does: Because the holders of deep secrets never approach the People regarding their secrets, they do not seek to condition them to accept severe deviations from their heritage.[113]

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111. **Citizen 1:** Do you think withholding the 28 Pages constitutes too much secrecy? There seems to be a lot that's kept secret from us these days . . . .

Citizen 2: I'm not sure. It depends on what's in those pages. Maybe the information is being withheld for our own good.

Citizen 1: Maybe, but it troubles me that Goss doesn't think he's accountable to us. He seems a bit arrogant. Maybe he's hiding from us something that we should know about. Don't you think we should ask our Congresswoman to investigate?

Citizen 2: Yes, let's do that. Sounds like a good way to frame our decision problem. Surely our rep will be able to get to the bottom of things.

Citizen 1: I hope so. But if she drags her feet then we can hold her accountable for her lack of commitment to being checked!

Postscript: The congresswoman accepts her constituents' invitation to investigate. When she returns to debrief them, she is not at liberty to reveal the details that can answer their initial questions, and so she says: "I cannot disclose what I have found but it is my firm belief that the 28 Pages should remain classified. National security requires it." Her constituents must then decide – on what basis I do not know – whether to believe her or not.

112. For the distinction between deep and shallow secrecy, see supra note 29.

113. A medical analogy illustrates the difference here. In terms of its effect on the body politic, we might conceive of deep secrecy as an unknown malignant tumor: Unless and until it is discovered, it does not prompt a conscious, negative reaction from its host (the patient). Shallow secrecy, on the other hand, is akin to a known tumor that is being treated: The mere fact of its being known will prompt steps (surgery, chemotherapy) that will affect the host. This does not mean, of course, that unknown tumors pose less of a threat than known tumors. In the end they may kill after all, and quite suddenly at that. The analogy does highlight, however, that the short- and medium-term effects of different types of tumors (and secrecies) can be quite different, and that it is fanciful to pretend that patients undergoing treatment (or shallow secrecy) are healthy or in the same condition they were in prior to the commencement of treatment.

As time passes and the "grim necessity" of Trust (*a.k.a.* authoritarian politics) takes hold in a land regulated by shallow secrecy, one can foresee the People getting used to the sound of all the bells going off in the distance to announce the birth of each new governmental secret. The ringing might become like so much muzak piped into and throughout the post-modern political theatre; after a while, it may become such a muted regularity that the People will cease to notice it.[114] They will come to terms with, and even begin to enjoy, a new sonic normal. And when they reach this point, they will no longer be able to recall the very different kind of noise they had once been told would be the accompaniment to their political lives: that of the strident, full-throated alarm sounded throughout the countryside by the conveyers of content-specific information regarding the rulers and their "pernicious project[s]."[115]

Of course, there is the possibility that this democracy-defeating scenario will not come to pass and that a secrecy-defeating scenario will ensue instead.[116] The government, after all, may not be able to muster a united front of secrecy, and certain officials, concerned to let the People know what is going on, may conspire to get the word out. Such was the case with the above two examples as they eventually played out. It was also the case with Senator Ron Wyden, who dramatically took to the Senate floor in 2011 to warn the American people that the NSA

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114. Rudesill herself anticipates just such a scenario when she writes:

> It is true that activists, reporters, and the public generally . . . would be interested in the secret laws they are now aware are being created, but to which they are being denied access. They may redouble efforts to surface them. On the other hand, in our accelerated information age culture, the novelty of the secret law bell being rung may wear off for the public . . . .

Rudesill, supra note 4, at 347.

115. *The Federalist Papers*, supra note 17, at 436 (No. 84, Hamilton) (expecting citizens living at or near the seat of the federal government to "sound the alarm" for citizens living farther afield and to "point out the actors in any pernicious project"). See also ibid., at 132 (No. 26, Hamilton) (state legislatures expected to guard against "encroachments" by the federal government ;"if anything improper appears, [they are] to sound the alarm to the people"), 232 (No. 44, Madison) (state legislatures expected to "sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives," should the federal government commit unconstitutional acts).

116. On either outcome, shallow secrecy fails on its own terms.

was up to some sort of illegal activity. "When the American people find out how their government has secretly interpreted the PATRIOT Act, they are going to be stunned and they are going to be angry," he gravely declared.[117] Two days later, walking the finest of lines, Wyden prefaced his warning with a repetition of his secrecy oath: "I can't say a word. It's all classified. But if the American people knew how the law was being interpreted, they would demand that people vote for change."[118] He persisted in this vein – speaking without speaking – for the next two years, up to and including the breaking of the Snowden revelations in 2013.[119]

Defenders of *Minimal Democracy* and *Minimal Transparency* have obvious reason to be grateful for the Ron Wydens of the world; efforts like his can ultimately be expected to result in secrecy-disclosure in important cases. Yet one can hardly be happy about the state of affairs his example represents. The process of disclosure-via-persistent-yet-cryptic-warning may not be as messy as the process of promulgation-via-security-breach (which Rudesill insists disserves us[120]), but it does represent a baleful weight thrown around the neck of *Minimal Democracy* nonetheless. Consider, to begin with, all the extra time and effort the People will need to expend decoding suggestive statements, reading mangled tea leaves and boxing at hypotheticals. Consider as well the psychic angst the People reasonably may feel at being warned of matters they cannot easily investigate. I do not think it a stretch to assume that these

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117. 157 Cong. Rec., S3,386 (daily ed. May 26, 2011) (Statement of Sen. Wyden).

118. David Sarasohn, "On Patriot Act, What We Don't Know Might Hurt," *Oregonian*, last modified May 31, 2011, http://www.oregonlive.com/news/oregonian/david_sarasohn/index.ssf/2011/05/on_patriot_act_what_we_dont_kn.html (quoting Wyden).

119. See Spencer Ackerman, "Senators: NSA Must Correct Inaccurate Claims Over Privacy Protections," *Guardian*, June 24, 2013, accessed November 31, 2016, https://www.theguardian.com/world/2013/jun/24/senators-nsa-letter-inaccurate-information-privacy ("[I]n a demonstration of the intense secrecy surrounding NSA surveillance even after Edward Snowden's revelations, the senators [Wyden and Mark Udall] claimed they could not publicly identify the allegedly misleading section or sections of [an NSA] factsheet without compromising classified information.")

120. See Rudesill, supra note 4, at 334.

burdens will be enough to dispirit and eventually de-politicize many average citizens (who, we are oft reminded, do not relish the task of staying abreast of public affairs and find that task challenging under even the best of conditions, when information about government outputs is readily available).[121] Putting such citizens through information-obstacle courses is a recipe for mass disquiet and, eventually, mass passivity. It is a project that has not been remotely normatively justified. Until it is so justified, the burden on *Minimal Democracy* that shallow secrecy is likely to impose whenever the secrecy dam cracks should go far toward disqualifying it as an operational concept.[122]

I cannot leave the topic of shallow secrecy without making a few observations about the intra-governmental reforms that tend to be put forward in conjunction with it. It goes without saying that those reforms are well-intentioned. If implemented, they should prove quite useful at curbing deep Executive secrecy – no small accomplishment. Yet in reading the works of the reformers it is hard not to come away with the impression that they seek to make of intra-governmental sharing and debate what the proponents of polyarchic pluralism have long sought to make of politically active organizations: not so much an aid to *Minimal Democracy* as a substitute for it. Much as pluralists contend that "all political interests in society, or perhaps the primary political interests of all members of society, are reflected in the organizations that vie

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121. See Fenster, supra note 11, at 928 ("Transparency theory presumes, in the first instance, the existence of an interested public that needs and wants to be fully informed. This presumption badly needs proof. A vast body of empirical studies demonstrates citizens' lack of political knowledge") (citing Peter Dennis Bathory and Wilson Carey McWilliams, "Political Theory and the People's Right to Know," in *Government Secrecy in Democracies*, ed. Itzhak Galnoor (New York: New York University Press, 1977), 3, 13-15 (questioning the existence of a public that wants to be, and is capable of being, informed)).

122. It could be argued that politically awake and energized citizens, together with their allies in the media, will be willing and able to run these obstacles courses, and that we should tailor our rules of disclosure to them. I propose a different rule of action, one that I shall phrase in the negative: We should not tailor our disclosure rules under the assumption, or with the expectation, that certain classes of citizens may be left behind. Put another way, in fashioning our disclosure rules we need to insist on as much transparency as our most capable citizens can use and our least capable citizens may need in order to stay profitably engaged in the political arena.

for political control,"[123] so too do shallow-secrecy reformers suggest that those interests can be reflected in and protected by proxies within the government – be they members of Congress, minority party-appointed ombudsmen, Executive "B" teams, or "super user" government lawyers. The reformers' clear infatuation with intra-governmental processes calls to mind the wonderful lines of Brecht's *Die Lösung* (*The Solution*),[124] and one is tempted to ask (in paraphrase of them) whether it would not be easier for the government simply to dissolve the People and carry on without them. A more serious response would remind the reformers that government – no matter how multi-branched, checked and balanced – is at best the People's agent, not their alter ego, and that this inherent limitation means that it can never virtually represent the People's voices nor implement comprehensive popular control over itself. Like it or not, democracy and transparency need to be more than internal government phenomena. They need to run externally to the People themselves.

Moreover, by undervaluing the need for popular oversight of government activity, the reformers are inevitably led to overstate the coherence of government as an institution separate and apart from society. A central (and unexamined) assumption of the reformers is that certain persons and groups *inside government* are making secrecy decisions which need to be monitored and possibly checked by other persons and groups *inside government*. This assumption is evident

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123. Rubin, supra note 16, at 742.

124. Bertolt Brecht, "Die Lösung," in *Bertolt Brecht: Poetry and Prose*, ed. Reinhold Grimm, trans. Derek Bowman (New York: Continuum, 2006), 118:

> After the uprising of the 17th June
> The Secretary of the Writers Union
> Had leaflets distributed in the Stalinallee
> Stating that the people
> Had forfeited the confidence of the government
> And could win it back only
> By redoubled efforts. Would it not be easier
> In that case for the government
> To dissolve the people
> And elect another?

(for example) in Rudesill's suggestion that Congress be the essential monitor of secret law created in the executive and judicial branches;[125] in Pozen's emphasis on the importance of thinking creatively about bureaucratic structures and design within the government,[126] and in Katyal's insistence on encouraging bureaucratic redundancies.[127]

But what if the structural reality of government is quite different from what these reformers posit? What if their conception of government is outdated and/or simplistic, and the reality is that government, far from being a coherent entity, is disaggregated and riddled with holes? As she does on other key points, Rudesill here senses a more problematic situation than she is prepared to deal with, acknowledging that Congress may amount to but a "shifting cast" of elected officials who are not worthy of the responsibility she would repose in them.[128] But what if this is merely the tip of the iceberg? What if we can say of our government something even more damning, something akin to what Gertrude Stein famously said of Oakland, California: "There is no there there"? What if, in short, a newly-minted cadre of legal super users, seeking to ferret out and monitor secrecy in the Executive, descend upon government office buildings only to be told that "the government" left a long time ago; that it is now to be found largely in private corporate office parks, academic labs, and non-profit think tanks; and that the doors of these places can remain barred to the cadre? The answer is obvious; the implications for the reformers' proposals would be serious.

To this and other issues of indirect secrecy I now turn.

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125. See Rudesill, supra note 4, at 356-57.

126. See Pozen, supra note 50, at 337:

127. See Katyal, supra note 104, at 2324-27.

128. Rudesill, supra note 4, at 359.

III

INDIRECT SECRECY

A. Outsourced Government: A Classified World in All But Name

When the Reagan Administration sought to secretly pursue an illegal foreign policy in the 1980s, it did not use conventional deep-secrecy tools such as Waived Special Access Programs[129] or CIA black sites.[130] Instead, in a move that Paul Verkuil stunningly describes as reflecting a true grasp of "what privatization of policy making was all about,"[131] the Administration turned to private parties to do its bidding. Funds denied by Congress in the so-called Iran-Contra Affair were obtained by the Administration from third countries and private citizens, and activities normally conducted by professional intelligence services accountable to Congress were delegated to ex-military officers such as Richard Secord and private businessmen such as Albert Hakim.[132] Similarly, when the Bush II Administration sought to evade Congressional restrictions on intelligence-gathering in the wake of 9/11, it struck informal "handshake" agreements with telecommunications executives granting the NSA warrantless access to international telephone calls and electronic communications involving U.S. persons.[133] These agreements, being off-the-record and in most cases strictly verbal, were

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129. See supra note 61.

130. See, e.g., Edmund Clark and Crofton Black, *Negative Publicity: Artefacts of Extraordinary Rendition* (New York: Magnum Foundation, 2016).

131. Verkuil, supra note 6, at 10.

132. See ibid., at 10-11.

133. See Jon D. Michaels, "All the President's Spies: Private-Public Intelligence In the War on Terror," *California Law Review* 96 (2008): 904-05, 910-11.

invisible to Congress and the courts and enabled the Administration to operate outside a framework of legality consisting of a structured subpoena process and inter-branch oversight.[134]

I mention these two cases because they are a useful segue to the topic of governmental outsourcing and how and why it represents a phenomenon nearly identical to direct secrecy in terms of its secrecy effect. In each of these two cases it was abundantly clear that the delegation of tasks to non-governmental actors abetted governmental secrecy. And it is tempting to assume that in each case, the secrecy problem was created – and could fully have been resolved – at the point at which the deep-secrecy effect was created (*i.e.* the point at which the private actors were quietly given their instructions in a back room, or over a martini lunch, leaving only a handful of Executive officials aware of the delegation). Put another way, it is tempting to assume that if an act of delegation is accomplished via a formal, public process (the most common being via the conclusion of a governmental contract), the secrecy problem melts away. But such an assumption would be wide off the mark. Delegation via contract *(i.e.* governmental outsourcing) does not cure the secrecy problem. Far from it. As I shall argue below, governmental outsourcing as currently practiced represents a deep secret to the People and a shallow secret to much of the elected and appointed government.

Let us first consider the People. It may be seem absurd to claim that they are unaware of the existence of a practice as widespread, regulated, and studied as outsourcing. Yet all indications are that the People are as little aware of outsourcing as they are of deeply-secret Executive policies, plans and rogue statutory interpretations. Some of the evidence on this point is of an anecdotal or circumstantial nature, but revealing nonetheless: Instance (for example) of politically well-versed individuals expressing shock at being told about the extent

134. See ibid.

of outsourcing,[135] and of political scandals erupting on the heels of public disclosure of governmental contractors performing highly sensitive government functions.[136] Other evidence reflects more abiding characteristics of the system and is therefore more substantial. We know, for example, that the government abets public ignorance of the fact of outsourcing by permitting governmental contractors to pass themselves off as governmental employees[137] and by exempting agencies' decisions to designate jobs and functions as "outsourceable" from both judicial and administrative challenge and the APA's notice-and-comment procedure.[138] There is also reason to believe that the government is manufacturing public ignorance intentionally: Scholars agree that one reason why the government outsources its functions is to mislead the

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135. Writes Wedel:

> I asked the well-known conservative thinker and publisher Alfred S. Regnery, who had just given a book talk on the importance of limiting the size of government, what he made of the fact that three-quarters of employees doing the work of the federal government are now contractors and that the federal budget for services increases by the day. He was taken aback. It was immediately apparent that the subject was not on his radar.

Wedel, *Shadow Elite*, supra note 6, at 77-78.

136. A political firestorm erupted in 2007 after journalist R.J. Hillhouse exposed the outsourcing of 50 percent of the National Clandestine Service – the heart, brains and soul of the CIA – to private firms such as Abraxas, Booz Allen Hamilton, Lockheed Martin and Raytheon. See sources cited supra note 26. See also R.J. Hillhouse, interview by Amy Goodman and Juan Gonzalez, *Democracy Now!*, July 26, 2007, accessed November 22, 2016, https://democracynow.org/2007/7/26/outsourcing_intelligence_author_r_j_hillhouse. A political firestorm also ensued when the public learned the extent to which the Bush II Administration used private security firms such as Blackwater for combat and combat-support missions in the Middle East. See Brown 2013, supra note 32, at 1353-56; Jeremy Scahill, "Blackwater's New Sugar Daddy: The Obama Administration," *Nation*, June 28, 2010, accessed June 17, 2016, https://www.thenation.com/article/blackwaters-new-sugar-daddy-obama-administration.

137. In a 2008 study of defense contractors, the Government Accountability Office found that (1) contractors did not always identify themselves as such in the documents they prepared or when dealing with the public; and (2) contractors were sometimes specified on contract documents as the government's point of contact – a role that enabled them to appear to be speaking for the government and to create the impression that they were government employees. See Wedel, "Federalist No. 70," supra note 6, at 122. In her study of Executive outsourcing, Brown highlights the fact that the public often does not know that they are dealing with contractors as opposed to government employees, and labels this a lack of "identity transparency" that offends the structural Constitution. See Brown 2013, supra note 32, at 1380-81, 1397-1401.

138. See Brown 2013, supra note 32, at 1363-64; Aman, supra note 14, at 141 n.66; Alfred C. Aman, Jr., "Privatization and Democracy: Resources in Administrative Law," in *Government by Contract*, supra note 6, at 261, 283-84; Verkuil, supra note 6, at 127-29.

public as to the true size of government,[139] and this "ruse" (Wedel's term[140]) would have little chance of success if the People realized that governmental employment was not being shrunk but instead simply moved to buildings with private entrances.

Then there is the shallower aspect of outsourcing's secretive nature. Just as in the direct-secrecy context knowledge of a classified document's existence need not entail knowledge of its contents, so too in this indirect-secrecy context knowledge of a contract's existence will likely not entail knowledge of the contractor's activities. Put another way: Even if the People were fully aware that a significant portion of their federal government is in private hands, they would have little way of learning anything of importance about how these private actors are governing. Several factors are responsible for this. First, the People have been disabled from getting information on their own initiative due to the fact that the sunshine laws they would normally rely on to pry open the government do not readily apply to the activities of governmental contractors.[141] Second, the People cannot rely on governmental officials to watch

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139. See Dilulio, supra note 6, at 35 ("For decades now, the incumbent-dominated Congress has cloaked big government in two main ways: debt financing and proxy administration. . . . [I]t has used proxy administration to spare the public from reckoning with the federal government's ever-increasing size and scope; otherwise, citizens would come face-to-face with big government in the form of ever-bigger federal bureaucracies."); Wedel, *Shadow Elite,* supra note 6, at 30-31 ("Largely out of sight except to Washington-area dwellers, contractors and the companies they work for do not appear in government phone books. . . . Most important, they are not counted as government employees, and so the fiction of limited government can be upheld, while the reality is that of an expanding sprawl of entities that are the government in practice.") (footnote omitted); Paul C. Light, "Outsourcing and the True Size of Government," *Public Contract Law Journal*. 33 (2004): 316 ("Outsourcing is even worse when it's used to hide the jobs. Politicians are loathe to tell the American public the truth about what it takes to manage a government mission as large as ours is. They would much rather offload the jobs in contracts and grants . . . .")

140. Wedel, *Shadow Elite*, supra note 6, at 78.

141. See Nina A. Mendelson, "Six Simple Steps to Increase Contractor Accountability," in *Government by Contract*, supra note 6, at 241, 249-50 & n.51 (inapplicability of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000)); Craig D. Feiser, "Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Federal Law," *Federal Communications Law Journal* 52 (1999) (same); Shapiro and Steinzor, supra note 49, at 119-21 (inapplicability of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II §§ 1-16 (2006)).

In the interest of accuracy, I should say that the FOIA is not so much inapplicable to private contractors as haplessly circumvented by them. Contractors know that as long as agency officials sign off on their work product and they are careful not to send agencies certain documents, they can avoid the reach of the FOIA definitions of "agency" and "agency record." See Feiser, supra. This may explain, among other things, the disquieting amount

the contractors for them because the government has outsourced so much, so fast that it lacks the personnel needed to meaningfully supervise the contractors.[142] If this seems an echo of the fact that most members of Congress do not know the contents of their own classified legislation, it is because the element of official ignorance – of official shallow secrecy, as it were – is essentially the same. Third and finally (and as if to add insult to injury), state-action doctrine as currently formulated – formalistic, restrictive – often prevents the People from holding contractors to account when their activities result in malfeasance of constitutional dimension.[143]

Combined, these factors ensure that outsourced government is largely dark government. Breaking it down into transparency-theory terms, we can say that the outsourcing of Executive functions principally impedes knowledge of decisional outputs: The People know little about how the Executive fights wars, secures air travel, identifies and treats toxic waste sites, and administers the welfare state when it accomplishes these tasks through private firms.[144] The outsourcing of legislative and rule-making functions principally impedes knowledge of the content and sources of decisional inputs: The People have a difficult time uncovering hidden agendas, skewed empirical evidence, and bogus rationales when Congress and administrative agencies outsource research and development projects and the drafting of laws, regulations,

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of agency rubberstamping of contractor work that is documented in the literature. See Wedel, "Federalist No. 70," supra note 6, at 122; Wedel, *The Shadow* Elite, supra note 6, at 82-89; Verkuil, supra note 6, at 42-46.

142. Many scholars have called attention to the astonishing lack of official oversight. See, e.g., Dilulio, supra note 6, at 54; Wedel, "Federalist No. 70," supra note 6, at 121-22; Verkuil, supra note 6, at 6.; cf. Steven J. Kelman, "Achieving Contracting Goals and Recognizing Public Law Concerns," in *Government by Contract*, supra note 6, at 153, 171-77.

143. See Brown 2015, supra note 32, at 651-56; Gillian E. Metzger, "Private Delegations, Due Process, and the Duty to Supervise," in *Government by Contract*, supra note 6, at 295.

144. Jon Michaels argues that the source of abuse and fraud in this context may just as well be a faithless Executive as a faithless contractor. See Jon D. Michaels, "Privatizations Pretensions," University of Chicago Law Review 77 (2010).

guidelines and procedures.[145] The darkness wrought by this compromised transparency is arguably every bit as thick as the darkness of the classified world. This is not commonly recognized due to the fact that the modality of secrecy is so different across the two contexts. In the classified world we see an affirmative imposition of state secrecy – through the use of classification schemes, closed-door briefings, and the like – that enforces a sharp demarcation between state and citizenry, whereas in the outsourced world we see a quiet limitation of sunshine laws and political oversight that relaxes this demarcation and allows for a blurring of the line between state and citizenry. But contrasting modalities aside, I do not think it can be denied that the secrecy effect in each context is substantially similar. Indeed, the ease with which I have been able to use the "deep/shallow" typological language to assess secrecy in the outsourcing context tells us that something very common undergirds both phenomena.[146]

And what of the scope of the secrecy, as opposed to its qualitative nature? Is that, too, similar across both worlds? Unfortunately it is. Like direct secrecy, outsourcing has refused to

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145. Congress's self-exemption from the FOIA allows it to indulge in a fairly carefree reliance on private legislative proxies:

> The policy think tanks have provided a vast reserve army of partisan policy experts, reams of tendentious studies, and mountains of prefabricated legislative ideas for members of Congress who are too busy raising money to think about governing. . . . Since 2011, the House of Representatives under the influence of the Tea Party has reduced the number of committee staff members by almost 20 percent; at the same time, press office personnel within those same House committees has grown by about 15 percent. Why bother to have legislative experts on staff when bills can be written by lobbyists, or the Heritage Foundation, or the American Legislative Exchange Council, the legislative drafting arm of corporate America?

Mike Lofgren, *The Deep State: The Fall of the Constitution and the Rise of the Shadow Government* (New York: Penguin, 2016), 55, 67. That said, administrative agencies do not appear to be all that far behind. See, e.g., Kelman, supra note 141, at 177 ("As early as 1989, it was uncovered during Senate hearings that EPA contractors were drafting budget documents, overseeing field investigators, drafting responses to public comments during the rulemaking process and writing regulation preambles, and organizing and conducting public hearings.") (footnote omitted).

146. Of all the public policy scholars to study outsourcing, Verkuil arguably comes closest to sensing the similarity, with statements such as: "Accountability for acts of government is difficult when duties are delegated to private hands and secrecy covers the tracks," and "The desire for secrecy may be one of the motivations for executive delegations of significant authority to private contractors, at least for some presidents." Verkuil, supra note 6, at 13, 105.

stay nicely contained. Over the last forty years it has increased exponentially and bled into every governmental institution save the Article III courts.[147] By this point it may not be much of an exaggeration to say that the formal, public federal government is no more solid or substantial than the propped-up building façades on the set of a Hollywood western: The real drinking, horse-trading, and fighting are being done elsewhere.

The implications of this are at once obvious and profound. First and foremost, because the classified and outsourced worlds comprise a sizeable portion of governmental activity – perhaps even a major portion, though I shall leave it to the political scientists to attempt a numerical estimate – when you put their opaqueness side by side and add them up, *Minimal Transparency* and *Minimal Democracy* begin to look crippled on a massive and systemic scale. Second, the outsourcing of much of the national security state to private parties[148] calls into question the policy prescriptions of secrecy scholars who would contain secrecy by reducing its deep aspects. As noted above, those prescriptions rest on the assumption that the world of secret fact resides within governmental enclaves and can be ferreted out from them. But in a world where "[p]rivate industry performs government intelligence functions on an eye-popping

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147. Wedel captures the trend lines nicely when she writes:

> The 1976 *The Shadow Government*, published five years before Reagan took office, details the vast off-the-books government workforce already entrenched. Since then, the shadow government has done nothing but grow. Its ranks include all manner of consultants, companies, and NGOs, not to mention entire bastions of outsourcing – neighborhoods whose high-rises house an army of contractors and 'Beltway Bandits.'

Wedel, *The Shadow Elite,* supra note 6, at 30. Jody Freeman, writing almost a decade before Wedel, noted much the same development. See Jody Freeman, "The Private Role in Public Governance," *New York University Law Review* 75 (2000): 574-92 (analyzing "the reality of the extensive private role in every dimension of administration and regulation"). For some of the latest facts and figures on the now-gargantuan extent of outsourcing, see Dilulio, supra note 6, at 17-19, 21-22, and Brown 2015, supra note 32, at 617-20.

148. See, e.g., Dana Priest and William M. Arkin, "Top Secret America: National Security, Inc." *Washington Post*, July 20, 2010, accessed November 22, 2016, http://projects.washingtonpost.com/top-secret-america/articles/national-security-inc.

scale,"[149] where, at one point, "the Department of Homeland Security had more private contract employees (about 200,000) than federal employees (about 180,000),"[150] and where [c]ontract employees make up an estimated one-quarter of the country's core intelligence workforce," [151] this plainly is not the case. All the inter-branch dialogue and oversight in the world will not result in intra-governmental transparency if the Executive agencies responsible for national security and law-enforcement are not privy to much of what is going on.

Some may not find these conclusions all that troubling, and they have their reasons. The main argument of defenders of the status quo is that compromised transparency is an acceptable price to pay for enhanced national security and the economic gains that come with increased reliance on the efficiencies and innovativeness of the private sector.[152] But increasingly we have cause to wonder whether these quid pro quos are being portrayed correctly; the benefits flowing from political secrecy may by now be so questionable and contingent as to permit us to move arguments celebrating them out of the category of "fact" and into the category of "wishful thinking/article of faith." It is helpful and telling to recall, for example, that at the conclusion of its two-year investigation into the classified world *The Washington Post* reported that the effectiveness of Top Secret America was "impossible to determine." To that effect it cited one high-level official (retired Army Lt. General John R. Vines) as doubting whether the explosion in the classified world since 9/11 had made the

149. Brown 2015, supra note 32, at 618.

150. Dilulio, supra note 6, at 21.

151. Wedel, "Federalist No. 70," supra note 6, at 121.

152. See, e.g., Rudesill, supra note 4, at 325 ("Classic futility, jeopardy, and perversity arguments can be deployed against greater publication of secret legal authorities and other transparency changes.") (footnote omitted); Fenster, supra note 11, at 919 ("[E]fforts to extend the burdens of public law procedural and disclosure requirements to private entities inevitably reduce the economic and administrative advantages that originally led government agencies to privatize or contract out previously public services") (footnote omitted).

United States any safer at all.[153] This was a damning admission. In that part of its investigation devoted to private defense and intelligence contractors, *The Post* called attention to the highly lucrative nature of governmental contracting and, in so doing, found itself debunking the notion that outsourcing saves the government money. "Hiring contractors was supposed to save the government money. But that has not turned out to be the case."[154] Around the time of publication of this latter finding scholars began dishing up cogent analyses that served to explain it. Rubin approached outsourcing from a microeconomic/microanalytic perspective, Wedel from a sociological one, and both arrived at more or less the same conclusion: In many instances, outsourcing not only fails to deliver economic gains; it saddles society with economic losses courtesy of the predictable inefficiencies that result from distorted markets (Rubin) and crony capitalism (Wedel).[155] Most recently, Diulio and Verkuil have teamed up to warn the public that "[t]here is no evidence that outsourcing federal administrative work saves money."[156]

These are still in many ways treacherous intellectual waters, and my purpose here is not so much to wade into them by quarrelling with the ostensible benefits of secrecy as to expose secrecy's true and under-appreciated hold on our society. That said, reminding ourselves that

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153. Priest and Arkin, supra note 148 ("'I'm not aware of any agency with the authority, responsibility or a process in place to coordinate all these interagency and commercial activities,' [Vines] said in an interview. 'The complexity of this system defies description.' The result, he added, is that it's impossible to tell whether the country is safer because of all this spending and all these activities.")

154. Ibid. According to one of Priest and Arkin's sources (former senior CIA official Mark M. Lowenthal), "the idea that the government would save money on a contract workforce 'is a false economy.'" Ibid. (quoting Lowenthal).

155. See Edward Rubin, review of *Government By Contract*, supra note 6, *Harvard Law Review* 123 (2010): 915-25; Wedel, *The Shadow Elite*, supra note 6, at 92-99. But see Michaels, supra note 144, at 726-27 n.30 (discussing scholarship touting outsourcing's economic benefits).

156. John J. Dilulio, Jr. and Paul R. Verkuil, "Want a Leaner Federal Government? Hire More Federal Workers," *Washington Post*, April 21, 2016, accessed November 22, 2016, https://www.washingtonpost.com/opinions/want-a-leaner-federal-government-hire-more-federal-workers/2016/04/21/a11cf98c-fd8b-11e5-886f-a037dba38301_story.html?utm_term=.95494e462941.

secrecy's benefits are far from proven can help us see how threatening – because arguably gratuitous – our systemic secrecy is. Such a realization should in turn lead to a redoubling of efforts on the part of statesmen, scholars and judges to roll secrecy back – especially in the outsourcing context, where at most only money, not life, is at stake. In this connection there are heartening signs that the Supreme Court is beginning to perceive a meaningful distinction between legislative delegation to administrative agencies and legislative delegation to private parties, and that it may be prepared to re-tool and deploy a long-idled delegation doctrine against the latter.[157] Were it to do so perhaps it would also be willing to entertain constitutional challenges to the outsourcing of Executive functions based on either constitutional-accountability or Article II-textual arguments.[158] For its part, Congress might at long last bestir itself to either mandate the insourcing of the many "inherently governmental functions" that have been outsourced or extend the most important open government laws (APA, FOIA, FACA) unequivocally to the actions and activities of contractors. The bottom line is that, whatever shape it takes, reform would seem to be the only rational response to the juxtaposition of secrecies laid out above.

B. The Federal Reserve: Secretive In Nature, Secretive in Practice, and in Command of the World's Leading Economy

Since its inception in 1913, the Federal Reserve System (the "Fed") has grown from a relatively small cog in the machinery of the federal government – "tethered to regional banks, subservient to the US Treasury, and operated for decades with relatively limited powers" [159] –

157. See Brown 2015, supra note 32, at 675-82; Lisa Schultz Bressman, "Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State," *Yale Law Journal* 109 (2000).

158. For constitutional-accountability arguments, see, e.g., Brown 2013, *supra* note 32. For Article II-based textual arguments, see, e.g., Paul R. Verkuil, "Outsourcing and the Duty to Govern," in *Government by Contract*, supra note 6, at 310.

159. Jacobs and King, supra note 7, at 48.

into an economic "'titan' that acts as 'the primary economic policymaker in the United States, and therefore the world.'" [160] Indeed, from fairly humble beginnings the Fed has evolved not merely into a fourth branch of government but arguably into the preeminent branch, its power and influence rivaled only by the national security state itself.[161] In true indirect-secrecy fashion, to the extent the Fed is a dark institution its dramatic aggrandizement over the years will have entailed a significant growth in political secrecy. The question, then, is of some moment: How secret is the Fed? While opinions on this point differ,[162] the side that would indict the Fed on secrecy charges has much the better case.

We can begin, improbably enough, with the Fed's essential institutional nature. The Fed does its best to suggest to the public that it is a governmental entity attending to the People's business through the formulation and implementation of the nation's monetary policy (as delegated to it by Congress).[163] But this suggestion is misleading. While the seven members of the Fed's Washington-based Board of Governors ("BOG") are indeed appointed by

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160. Ibid. at 134 (quoting Nicholas Lemann, "The Hand on the Lever: How Janet Yellen Is Redefining the Federal Reserve," *New Yorker*, July 21, 2014, accessed November 3, 2016, http://www.newyorker.com/magazine/2014/07/21/the-hand-on-the-lever.

161. See Jacobs and King, supra note 7, at 29; Tom Mullen, "The Federal Reserve Runs the Economy, Not Congress or the President," *Huffington Post*, last modified May 19, 2015, accessed March 10, 2016, http://www.huffingtonpost.com/tom-mullen/the-federal-reserve-runs-_b_6898658.html; Zachary Karabell, "In Bernanke We Trust?" *Time*, April 28, 2011, accessed March 10, 2016, http://business.time.com/2011/04/28/behind-bernankes-press-conference-the-fed-is-the-fourth-estate.

162. Compare, e.g., Marc Labonte, "Federal Reserve: Oversight and Disclosure Issues," *Congressional Research Service*, May 24, 2016, accessed November 31, 2016, https://fas.org/sgp/crs/misc/R42079.pdf, at 8-9 (remarking that "[t]he Fed has publicly disclosed extensive information on its operations on a voluntary basis" and citing two studies that found the Fed to rank as one of the more transparent central banks in the world.) with Alex Newman, "Senate Blocks 'Audit the Fed,' Preserving Central Bank Secrecy," *New American*, January 13, 2016, accessed March 10, 2016, http://www.thenewamerican.com/economy/economics/item/22318-senate-blocks-audit-the-fed-preserving-central-bank-secrecy (detailing Senator Rand Paul's insistent allegations of Fed secrecy).

163. See Board of Governors of the Federal Reserve System, "The Federal Reserve System: Purposes and Functions," *The Federal Reserve,* 10th ed. 2016 [hereinafter "Purposes and Functions"], accessed March 10, 2016, https://www.federalreserve.gov/pf/pdf/pf_1.pdf, at 1 ("The Federal Reserve System is the central bank of the United States. It performs five general functions to promote the effective operation of the U.S. economy and, more generally, the public interest.")

the President with the advice and consent of the Senate,[164] the twelve regional Federal Reserve Banks ("FRBs") that comprise the bulk of the Federal Reserve System are private corporations owned and controlled by the commercial member banks located in their respective districts.[165] The private power of the district FRBs reaches back to and partially controls Washington itself: Five of the twelve members of the Fed's premier monetary policy-making body – the Washington-based Federal Open Market Committee ("FOMC") – are drawn from the ranks of FRB presidents, who, being private citizens rather than public servants, owe their loyalties to the FRBs' commercial-bank shareholders instead of to the People.[166]

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164. See 12 U.S.C. § 241 (1982).

165. See Andrew Levin, "Reforming the Federal Reserve to Ensure Accountability, Transparency, and Good Governance," April 8, 2016, accessed July 2, 2016, *https://populardemocracy.org/sites/default/files/Federal%20Reserve%20Reform%20Proposal%2008apr2016.pdf* ("Under current law, commercial banks are the legal owners of the twelve regional Federal Reserve Banks, and they control two-thirds of the seats on the boards of directors of each regional Fed."); Note, "The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens," *Virginia Law Review* 75 (1989): 112-14 & n.9. The FRBs have long argued that they are exempt from both the FOIA and the Federal Tort Claims Act, 28 U.S.C. §1346(b), on the grounds that they are private corporations, not federal agencies. See, e.g., Bloomberg L.P. v. Board of Governors of the Federal Reserve System, 649, F. Supp.2d 262 (S.D.N.Y. 2009) (FOIA exempt), aff'd, 601 F.3d 143 (2d Cir. 2010); Lewis v. U.S., 680 F.2d 1239 (9th Cir. 1982) (FTCA exempt).

166. See Howard J. Krent, "Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government," *Northwestern University Law Review* 85 (1990): 84-85 & n.66; Note, supra note 164, at 117-18. The Fed concedes that "parts of the Federal Reserve System share some characteristics with private-sector entities" but insists nevertheless that "the Federal Reserve was established to serve the public interest." Purposes and Functions, supra note 162, at 2. This, of course, is sophistical; that an entity was created for a certain purpose does not mean ipso facto that it fulfills that purpose. The Fed does not identify any institutional controls that are in place to ensure that the Fed's private owners and their hand-picked FRB directors put the public's interests ahead of their own. Commentators have rightly been skeptical. See, e.g., Levin, supra note 164 ("The board of directors of each regional Fed bank selects its president, who sits on the Fed committee [the FOMC] that sets America's monetary policy. Those appointments currently happen in secrecy [sic] with no public involvement or accountability; the presidents of all twelve regional Fed banks were reappointed recently in *pro forma* fashion."); Krent, supra, at 85 ("[T]he private individuals on the FOMC are not immediately accountable to any public official for their exercise of statutory authority. They owe loyalty instead to the private Federal Reserve Banks.") (footnote omitted).

Beginning in 2010, courtesy of the Dodd-Frank reforms, bank-representative directors on the FRB boards no longer have a formal vote in the selection of FRB presidents. This change, however, has not prevented member banks from ensuring that bank presidents are, in effect, "their men." See Summers, supra note 28 (calling "indefensible" the fact that the public-interest members of FRB boards, who do have a formal vote in the selection of FRB presidents, have in the past been bankers); Bernie Sanders, "To Rein in Wall Street, Fix the Fed," *New York Times*, December 23, 2015, accessed March 10, 2016, https://www.nytimes.com/2015/12/23/opinion/bernie-sanders-to-rein-in-wall-street-fix-the-fed.html?_r=0 (complaining that in 2016, "four of the 12 presidents at the regional Federal Reserve Banks will be former executives from one firm: Goldman Sachs").

This governance structure has been called "normatively offensive,"[167] and secrecy scholars will easily appreciate why. Permitting private citizens to sit on the FOMC and structuring the FRBs as non-FOIAable private corporations look and feel like unconstitutional delegations of legislative and regulatory authority to private actors, with all the frustration of transparency that governmental outsourcing typically entails.[168] They also represent exceedingly unwise delegations, as regulated entities (commercial banks) are granted not only the practical opportunity to capture their regulators but also the legal right to constitute them.[169] There is, further, a deeper level of secrecy that stems from the public's general ignorance of the private nature of these delegations. When in 2016 Dartmouth economist and former senior Fed-advisor Andrew Levin came forward to declare that "a lot of people would be stunned to know" the extent to which the Fed is privately owned,[170] he was inadvertently echoing both Senator Wyden's 2011 warning about deeply-secret NSA surveillance practices and the deeply-secret aspect of governmental outsourcing identified by Wedel and Brown.[171] As with these other types of deep secrecy, public ignorance in the Fed context appears to be deliberately

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167. Jacobs and King, supra note 7, at 183.

168. Regarding the FOMC specifically, see Note, supra note 164, at 152-53 ("The organization of the FOMC presents troubling problems. It delegates power to individuals who may be motivated by private interest and who are unaccountable either to Congress or to the public for their actions. . . . [It] blurs the line between what is public and what is private, and that line is important to ensure that those who use public power to affect the public interest have a breadth of purpose that should be essential to government.")

169. Accord Jacobs and King, supra note 7, at 66 ("Writing private business into the governing of the money supply and the operation of banks is akin to assigning foxes to guard the chicken coop."); Michael S. Derby, "Former Fed Staffer, Activists Detail Plan to Overhaul Central Bank," *Wall Street Journal*., last modified August 22, 2016, accessed December 2, 2016, https://www.wsj.com/articles/former-fed-staffer-activists-detail-plan-to-overhaul-central-bank-1471882559 ("None of [the FRB] directors should be from the financial sector, which will eliminate the inherent conflict of interest created by a member of a regulated financial institution in turn overseeing the operations of their own regulator."); Summers, supra note 28 ("[I]t is hard to imagine an appropriate governance activity for business figures with respect to the Federal Reserve System. Nor is it clear why banks should in any sense be 'shareholders' in the Federal Reserve System.")

170. Michael S. Derby, "Former Fed Adviser, Activists Lay Out a Plan for Change at the Fed," *Wall Street Journal*, April 11, 2016, accessed November 1, 2016, https://www.wsj.com/articles/former-fed-adviser-activists-lay-out-a-plan-for-change-at-the-fed-1460400788.

171. See supra note 137.

manufactured. In public hearings and the press, Fed officials routinely emphasize the FRBs' local nature (as opposed to their private one) and seek to contrast that local nature favorably with the BOG's allegedly context-impoverished existence at the national level.[172] In doing this they both garner the good will that stems from association with decentralized power and deflect attention away from the FRBs' private character.[173] As a tactical matter one can hardly quarrel with their strategy: Portraying FRBs as beacons of liberty and localism makes for infinitely better press than their portrayal as dens of private greed.[174]

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172. Examples: (1) Esther George, head of the Kansas City FRB, recently testified before Congress that the Fed's structure reflected "the public's distrust of concentrated power and greater confidence in decentralized institutions." Esther George, testimony before the House Financial Services Committee, September 7, 2016, accessed December 7, 2016, https://www.youtube.com/watch?v=efZY-5pBltg, at 32:30-.40; (2) Former BOG member Frederic S. Mishkin has defended the FRB presidents' participation on the FOMC on the grounds that:

> [T]he prestige of the bank presidents enables them and their banks to collect information from businesses in their districts, which helps the FOMC understand where the economy is heading. . . . [T]he participation of the Federal Reserve bank presidents in policy-making keeps the Fed from losing touch with the view and desires of the public throughout the country.

Frederic S. Mishkin, "Politicians Are Threatening the Fed's Independence," *Wall Street Journal*., September 29, 2011, last modified December 7, 2016, https://www.wsj.com/articles/SB10001424052970204831304576597200646525870; (3) Patrick Harker, a member of the board of directors of the Philadelphia FRB, has parried Levin's proposal that FRB directors cease to be drawn from the private-banking sector with the following thrust: "'[T]he banker from a small town in Pennsylvania provides incredibly important insight,' and [I] want[] people like that on [my] board." Derby, supra note 168 (quoting Harker).

173. Judges tend to uncritically accept the association of the FRBs with decentralized power. Judge Hellerstein, for example, could not invoke the national/local distinction enough in his opinion deciding Fox News' FOIA request of the BOG :

> Congress divided the powers of the Federal Reserve System between the Board, which is a federal agency, and the FRBs, which were established as regional banks. . . . The Federal Reserve is structured to empower local institutions to lend, while permitting federal oversight. . . . Congress established the Board and the regional FRBs as separate entities, reflecting the tension between a centralized federal bank and generally independent state and local banks. The Board establishes national policy, but that policy is implemented by each FRB, which maintains its own banking relationship with the member banks of its region.

Fox News Network, LLC v. Board of Governors of the Federal Reserve System, 639 F. Supp. 2d 384, 395 (S.D.N.Y. 2009), rev'd and remanded, 601 F.3d 158 (2d Cir. 2010).

174. Fed officials like to preempt accusations of greed by reminding the public that the FRBs, BOG and FOMC annually turn their profits over to the U.S. Treasury (net ample operating expenses). This point is true as far as it goes but in reality means quite little; the mammoth profit-taking within the Federal Reserve System occurs mostly at the level of the commercial member banks, not the Fed institutions themselves. See Jacobs and King, supra note 7, at 17-24; David Dayen, "This Is the Fed's Most Brazen and Least Known Handout to Private Banks,"

The public-private blur is not the only ambiguity that obscures a clear view of the Fed's essential nature. There is an equally important domestic-international blur. We can approach this issue by way of a question: Is the Fed principally a domestic institution devoted to the welfare of the People of the United States (with some minimal, necessary degree of involvement with foreign financial regulators and policy-makers for coordination purposes), or does it principally function as the U.S.-based branch of an international monetary authority that seeks to engineer economic outcomes not for any one nation-state but across a variety of them? Put another way: Does the Fed sit at the apex of a domestic-authority pyramid (as conventionally assumed) or at the mid-level of an international one? In his 1966 epic work *Tragedy and Hope*, Georgetown historian Carroll Quigley directed us toward an answer, revealing that since its founding in 1913 the Fed had been serving the interests, and executing the judgments and plans, of a supra-national group of financiers and central bankers who owned, controlled and regularly met at the Bank of International Settlements (BIS) in Basel, Switzerland.[175] A more recent (and empirically-minded) study gives grounds for believing that the Fed does owe some sort of fealty to the private financial interests behind the BIS that continues to this day.[176] This would explain (among other things) the persistent evidence of

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New Republic, March 10, 2014, accessed March 17, 2016, https://newrepublic.com/article/116913/federal-reserve-dividends-most-outrageous-handout-banks.

175. See Carroll Quigley, *Tragedy and Hope: A History of the World in Our Time* (New York: The MacMillan Company, 1966), 324-27. Wrote Quigley:

> In addition to these pragmatic goals, the powers of financial capitalism had another far-reaching aim, nothing less than to create a world system of financial control in private hands able to dominate the political system of each country and the economy of the world as a whole. This system was to be controlled in a feudalist fashion by the central banks of the world acting in concert, by secret agreements arrived at in frequent private meetings and conferences. The apex of the system was to be the Bank for International Settlements in Basle, Switzerland, a private bank owned and controlled by the world's central banks which were themselves private corporations.

176. Adam LeBor, *Tower of Basel: The Shadowy History of the Secret Bank That Runs the* World (New York: PublicAffairs, 2013).

foreign-based influence on the Fed that has been noted for years – with some perplexity – by Fed commentators. Examples: All Fed transactions "for or with a foreign central bank, government of a foreign country, or non-private international financing organization" are exempt from Congressional audit;[177] the Fed hires an eye-popping number of foreign nationals to serve in senior staff positions without going through normal channels of oversight and approval by the Office of Personnel Management;[178] the Fed has been known to confer upon itself, without consulting Congress, the authority to funnel hundreds of billions of U.S. Dollars to foreign central banks for use by foreign commercial banks and businesses;[179] and the Fed has permitted an untold number of foreign central bankers and "visiting scholars" to attend its internal meetings, at which they have gained access to highly-sensitive information regarding non-public interest-rate policy.[180] After decades of seeming indifference, Congress now appears to be growing alarmed at the Fed's international connections and commitments. Recently, Representative Patrick McHenry, Vice Chairman of the House Committee on Financial Services, demanded that the Fed stop "negotiating international regulatory standards for financial institutions among global bureaucrats in foreign lands without transparency,

177. Labonte, supra note 162, at 4.

178. Paul H. Kupiec, "Fed Oversight: Lack of Transparency and Accountability (Statement for the United States House of Representatives, Committee on Financial Services, Subcommittee on Oversight and Investigations)," July 14, 2015, accessed March 8, 2016, https://www.aei.org/wp-content/uploads/2015/07/KupiecTestimonyJuly14.pdf, at 15 ("Federal Reserve hiring practices also differ markedly from other government agencies in ways that I doubt the public (and perhaps even the Congress) is aware of. . . . In my opinion, the general public *would be shocked by* the number of noncitizens the Fed has hired for relatively senior staff positions . . . .") (emphasis added).

179. See Robert Auerbach, "Stop the Federal Reserve from Shredding Its Records," *Huffington Post*, last modified May 25, 2011, http://www.huffingtonpost.com/robert-auerbach/stop-the-federal-reserve_b_385328.html ("The FOMC controls the nation's money supply, targets short term interest rates and since 1962 took it upon themselves to bypass the Congressional appropriations process and loan money to foreign governments."); Ryan Grim, "Bernanke: 'I Don't Know' Which Foreign Banks Got Half Trillion U.S. Dollars," *Huffington Post,* last modified May 25, 2011, http://www.huffingtonpost.com/2009/07/24/bernanke-i-dont-know-whic_n_244302.html.

180. Auerbach, supra note 7, at 78-79.

accountability or the authority to do so." [181] McHenry singled out for criticism international banking venues such as the Basel Committee on Banking and Supervision as fora characterized by "secretive structures" and an "opaque decision-making process." [182]

Of course, no nation is an island in this era of international financial capitalism, and the Fed could easily argue that it cannot secure the U.S.'s economic health without also attending to the health of the larger world economy. But the fact that economic gains and losses across nation-states often do positively correlate and are far from zero-sum leaves unanswered crucial questions of distributive justice, to wit: By how much does the Fed adjust U.S. economic prospects in light of the needs of other nations, for what reason(s), and to what bottom-line effect(s)? Our recent domestic history underscores how much relative percentages matter. In the wake of the 2008-09 financial crisis, the Fed defended its generous rescue of Wall Street on the grounds that to have let it fail would have meant devastation on Main Street.[183] Perhaps so, but as Jacobs and King rightly observe, this argument could not begin to justify Fed policies that engineered vast improvements in Wall Street's position relative to only meager improvements in Main's.[184] This same point could be made about the economic performance of the U.S. relative to that of her sister nation-states, and it would interesting to know, at the very least, which role – Wall Street or Main – the U.S. may be playing vis-à-vis other states.[185]

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181. See Tyler Durden, "'This Is Unacceptable' – Congressman Slams Yellen For Prioritizing Foreign Banks Over 'America's Interests,'" *Zerohedge*, February 2, 2017, accessed March 10, 2017, http://www.zerohedge.com/news/2017-02-02/unacceptable-congressman-slams-yellen-prioritizing-foreign-banks-over-domestic-inter (reproducing and quoting from letter dated January 31, 2017 from Rep. Patrick T. McHenry to Chair Janet L. Yellen [hereinafter Letter]).

182. Ibid.

183. Jacobs and King, supra note 7, at 111.

184. Ibid., at 6-9, 11-13, 17-19, 51, 96-100.

185. Representative McHenry certainly conveys the impression that the United States is playing Main. See Letter, supra note 180 ("It is incumbent upon all regulators to support the U.S. economy, and scrutinize international agreements that are killing American jobs. Accordingly, the Federal Reserve must cease all attempts

The key point for our purposes is that, at the end of the day, we simply do not know what we are seeing when we look at the all-powerful Fed. Private power or public, home-grown or foreign-controlled? That I easily could have included analysis of the Fed in either the section on governmental outsourcing (Part III.A, supra) or the section on the diffusion of power away from the nation-state (Part III.C infra) shows just how deep the level of confusion regarding this entity is. In terms of transparency-theory, the confusion does much to gut transparency regarding decisional inputs and sources-of-inputs and makes people nervous enough about the Fed's legitimacy to want to invade its key decisional space by requiring the release of FOMC meeting transcripts to Congress and the public within a few months' time (as opposed to the current five-year lag).[186]

Incredibly, the Fed fuels still further distrust by adopting a range of strategies at the BOG/FOMC level that shield its decisional outputs and activities from public scrutiny. Examples here are plentiful and surprisingly unsavory. The Fed lied to Congress for seventeen years about the existence of FOMC transcripts[187] and to this day shreds unedited source FOMC transcripts and holds FOMC discussions "off the record" at its discretion.[188] It couches its policy decisions in highly technical language and processes that border on the esoteric and create "an almost impenetrable force field" designed to prevent public understanding (and thus criticism).[189] It enlists the resources of the very banks it regulates to lobby against

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to negotiate binding standards burdening American business until President Trump has had an opportunity to nominate and appoint officials that prioritize America's best interests**.")**

186. See Auerbach, supra note 7, at 182 (proposing expedited release of transcripts). As Jacobs and King observe, "The now incessant bubbling of discontent about the Fed originates, at its most basic level, in questions about its legitimacy – public power wielded, in part, by and for private interests." Jacobs and King, supra note 7, at 183.

187. See Auerbach, supra note 7, at 87-105.

188. See Auerbach, supra note 179.

189. Jacobs and King, supra note 7, at 100. See also ibid., at 33-34, 108, 129-30; AUERBACH, supra note 7, at 183, 193.

Congressional efforts to audit its monetary-policy decisions (which are currently exempt from GAO audit) and/or diminish its powers.[190] It withheld from Congress evidence of its ultra vires activities during the 2008-2009 crisis, thereby sabotaging more extensive attempts at banking reform than eventually ensued,[191] and it has recently flouted a Congressional subpoena issued to probe for evidence of financial criminality by its staff.[192] It engineers a deferential press by favoring with access those journalists who sing its praises[193] and blocking journalists who ask uncomfortable questions.[194] It mutes criticism from academic economists by co-opting them with offers of consultancy contracts, think-tank sinecures and conference invitations, and by ensuring that pro-Fed gatekeepers man the editorial boards of the premier journals.[195] Fed defenders can of course counter that the Fed's all-important decisions on interest rates are publicly announced and explained almost immediately; that its staff go before Congress on a regular basis to disclose all that (in their opinion) needs disclosing; and that the Fed's room to act unilaterally during emergencies via covert lending and buying programs has recently been

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190. Jacobs and King, supra note 7, at 154; Auerbach, supra note 7, at 156-60

191. Jacobs and King, supra note 7, at 35, 150, 154.

192. See Kupiec, supra note 178, at 4; Kate Davidson, "Rep. Hensarling to Yellen: Ignoring Subpoena Is 'Inexcusable,'" *Wall Street Journal*, July 15, 2015, accessed November 22, 2016, http://blogs.wsj.com/economics/2015/07/15/rep-hensarling-to-yellen-ignoring-subpoena-is-inexcusable. Because the Fed is entirely self-funding, it need not worry that Congressional ire over a rebuffed subpoena will lead to a reduction of its budget.

193. For an opinion critical of this favoritism, see David Stockman, "The Donald Nailed It: 'We Are In a Big Fat Ugly Bubble,'" *Contracorner*, Sept. 28, 2016, accessed October 29, 2016, http://davidstockmanscontracorner.com/the-donald-nailed-it-we-are-in-a-big-fat-ugly-bubble. For an opinion flattering of it, see Julia LaRoche, "Meet the Man Responsible for Today's Huge 230 Point Dow Surge," *Business Insider (AUS)*, June 7, 2012, accessed December 29, 2016, http://www.businessinsider.com.au/jon-hilsenrath-2012-6.

194. See Tyler Durden, "Fed Reporter Pedro Da Costa Is Leaving the Wall Street Journal After Asking Yellen 'Uncomfortable' Questions," *Zerohedge*, July 30, 2015, accessed December 9, 2016, http://www.zerohedge.com/news/2015-07-30/fed-reporter-pedro-da-costa-leaving-wall-street-journal-after-asking-yellen-uncomfor.

195. See Jacobs and King, supra note 7, at 45-46, 49-50 ; Ryan Grim, "Priceless: How the Federal Reserve Bought the Economics Profession," *Huffington Post*, last modified May 13, 2013, http://www.huffingtonpost.com/2009/09/07/priceless-how-the-federal_n_278805.html; Auerbach, supra note 7, at 141-43.

curtailed by Congress.[196] But all operational things considered, such instances of transparency are best viewed as but small atolls in a sea of deeply submerged activity and policy-making.[197]

As with governmental outsourcing, there are those who may not find these conclusions all that troubling, and they have their reasons. The main argument of defenders of the status quo is that compromised transparency is an acceptable price to pay for the technocratic expertise the Fed allegedly delivers in the area of economic management. According to this line of reasoning – irreverently dubbed the "Fed Catechism" by Jacobs and King[198] – central bankers are conscientious intellectuals who adjust the difficult-to-master levers of monetary policy for the public good.[199] Mandating greater transparency and accountability to Congress and the public would allow political considerations – invariably deemed tainted and short-sighted – to interfere with the otherwise smooth running of the bankers' technical project.[200] But again as with outsourcing, we have reason to question whether the quid pro quo portrayed here (transparency and political accountability traded for value-neutral expertise) is correctly presented. Recent studies have done much to debunk the Fed Catechism. Fed officials have

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196. See Jacobs and King, supra note 7, at 156-58; Labonte, supra note 161, at 5.

197. Accord Jacobs and King, supra note 7, at 32-36, 101.

198. Ibid., at 5.

199. The appeal to trust that underlies this claim is often made quite explicit. See, e.g., Bernanke, supra note 14 ("Monetary policy is complex and must be conducted under tremendous uncertainty about both the economic outlook and how the economy works. Nevertheless, I know from first-hand experience that the FOMC sets monetary policy with the best technical information available and without any consideration of politics or partisanship.")

200. See, e.g., Neil Irwin, "Nine Questions About the Federal Reserve You Were Too Embarrassed To Ask," *Washington Post*, September 18, 2013, accessed February 23, 2017, https://www.washingtonpost.com/news/wonk/wp/2013/09/18/9-questions-about-the-federal-reserve-you-were-too-embarrassed-to-ask/?utm_term=.0e169ae8c525 ("The reason for [the Fed's insulation from politics] is that the job the Fed to do is complex (do you really want to trust Congress to decide how to calculate capital levels for giant banks?) and benefits from being separate from politics."); Glyn, supra note 14; Mishkin, supra note 172 ("Politicians, God love 'em, necessarily focus on the short term. After all, they have to get re-elected. Monetary policy needs to focus on the longer-term health of the economy.") How the same group of politicians can be myopic and clumsy in the monetary-policy context yet trustworthy and wise in the national-security one is, to say the least, a mystery.

been unmasked as incompetent,[201] corrupt,[202] and self-serving,[203] their monetary wisdom shown to be more a function of their personal goals for subsequent employment on Wall Street than of any scientific judgment.[204] Even the most sacrosanct of their technocratic claims – that (ceteris paribus) central-bank freedom from the political process results in lower rates of inflation – no longer works the magic it once did.[205] "Monetary policy" has been unmasked as a series of deeply political and value-laden choices entailing significant and often malign distributional consequences.[206] Conversely, robust political oversight of central-bank policy-making has recently been rehabilitated via comparative analysis with foreign experience and shown to generate better outcomes than American-style central-bank independence.[207] Indeed, the authoritarian notion that lies at the heart of the Fed Catechism and does so much subliminal work for it – that the answer to "bad politics" is "no politics," not "better politics" – is coming to be regarded as increasingly suspect.

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201. See Jacobs and King, supra note 7, at 13-15, 22, 37-38, 97 ("Crediting the Fed with saving the country is, with only some exaggeration, akin to praising an arsonist who called the fire department."), 144-45.

202. See ibid. at 19-21, 145; Auerbach, supra note 7, passim (detailing a history of Fed officials trading on inside information via leaks and post-Fed employment opportunities).

203. See Jacobs and King, supra note 7, at 24 ("The Fed's most basic interest is to sustain its flow of resources to function and to reward the private banks in its system."), 180-81.

204. See Jose Fernandez-Albertos, "The Politics of Central Bank Independence," *Annual Review of Political Science* 18 (2015): 8.9. Writes Fernandez-Albertos:

> [R]esearch shows that one can go a long way in explaining central banks' policy choices by understanding their members' individual preferences. These individual preferences are in turn surprisingly consistent with models of career concerns, in which the existence of 'shadow principals' (agents outside the formal relationship between political authorities and legally independent central banks) exert influence on central bankers' actions because they have some control over their professional trajectories after leaving the central bank.

205. See Jacobs and King, supra note 7, at 15; Fernandez-Albertos, supra note 204, at 8.5; Auerbach, supra note 7, at 191-92.

206. See Jacobs and King, supra note 7, at 32, 99-100; Fernandez-Albertos, supra note 204, at 8.9, 8.13-.16.

207. See Jacobs and King, supra note 7, at 11, 170-74, 180-81; Fernandez-Albertos, supra note 204, at 8.10.

Again, these are treacherous intellectual waters and I shall not attempt to calm them here. What I shall do is argue that the gains from secrecy in the context of economic management are not sufficiently established to deter us from reform, and that reform is all the more necessary given the high levels of secrecy wrought by direct secrecy and governmental outsourcing. There is no reason (for example) not to demand full clarification of the Fed's institutional nature in terms lawmakers and the public can understand so that they might alter the Fed's relationships with private commercial banking and international power structures if they so wish. There is also no reason not to demand the provision of full, unedited transcripts of FRB board and FOMC meetings to members of the relevant Congressional oversight committees and the White House as soon as these have been secretarially prepared. The one proposed reform we would do well *not* to embrace is that of de-politicizing fiscal policy in a bid to equalize its treatment with monetary policy,[208] as this would only further entrench an already secretive and undemocratic status quo. Consistency across the two areas is better achieved by bringing monetary policy back into the political fold where it once quite happily, if raucously, existed.[209]

C. The Nation-State Diffuses: Up, Up and Away

The third and final example of indirect secrecy I shall examine is that of the diffusion of political power away from the nation-state in favor of inter-, supra- and transnational entities (*a.k.a.* the Diffusion Project[210]). Of course, in and of itself diffusion is not problematic in the slightest; the case of American federalism shows that power that is shared downward from the national to the sub-national level (to states, cities and towns) is not only consistent with

208. See Jacobs and King, supra note 7, at 10; Fernandez-Albertos, supra note 203, at 8.16.

209. See Jacobs and King, supra note 7, at 56-60.

210. See supra note 8.

democratic principles but positively enhancing of them. But power that is shared upward from the national to the supra-national level is a different kettle of fish, for it is very likely to be dark: While not all nation-states have transparent and democratic political systems, it is equally true that no one has yet proposed an arrangement of political authority above the nation-state that vouchsafes *Minimal Transparency* and *Minimal Democracy*. National sovereignty seems to be a necessary condition for these crucial values, even if it obviously is not a sufficient one. Accordingly, we can expect to see a rise in political secrecy to the extent the Diffusion Project expands and succeeds.

The Diffusion Project has gone through two distinct iterations to date. The first began in the early 1990s, upon the ending of the Cold War and at precisely the same time as power began to hemorrhage massively out of national institutions in favor of private entities at the domestic level via governmental outsourcing.[211] In the international context power flowed upward from the nation-state to newly-invigorated IGOs, newly-nascent and -empowered NGOs, and punishingly-mobile international financial capital. The explanation for this diffusion rested on several claims: (1) The nation-state as a political unit was incapable of solving certain serious global problems that thrived in the transnational gaps; (2) the nation-state could no longer be trusted to provide its citizens with the "human security" they deserved; and (3) the anti-hierarchy, anti-monopoly effect of the Internet Revolution was enabling non-state actors (such as NGOs) to supply the problem-solving capacity the nation-state lacked and the human-rights-related monitoring it needed.[212] In her seminal 1997 article *Power Shift*, Jessica Matthews boldly proclaimed the diminished status of the nation-state:

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211. Several scholars have sensed the substantial philosophical affinity between the Diffusion Project and governmental outsourcing and have analyzed the two phenomena together. See, e.g., Wedel, *Shadow Elite*, supra note 6, passim; Fenster, supra note 11, at 915-19; Aman, supra note 14, at 131-38.

212. See, e.g., Jessica T. Matthews, "Power Shift," *Foreign Affairs* 76 (1997).

> The end of the Cold War has brought no mere adjustment among states but a novel redistribution of power among states, markets, and civil society. National governments are not simply losing autonomy in a globalizing economy. They are sharing powers - including political, social, and security roles at the core of sovereignty - with businesses, with international organizations, and with a multitude of citizens groups, known as nongovernmental organizations (NGOS). The steady concentration of power in the hands of states that began in 1648 with the Peace of Westphalia is over, at least for a while.[213]

There was, of course, just one problem, and to her credit Matthews did not shy away from acknowledging it: How to make the newly-emerging system of diffused public power transparent and democratic?[214] Matthews called for nothing less than the creation of "new institutions and political entities that match the transnational scope of today's challenges while meeting citizens' demands for accountable democratic governance."[215] In the ensuing several years, scholars rushed to pick up and run with the gauntlet she had thrown down.[216] Consensus quickly emerged that *Minimal Democracy* would not be possible,[217] and the race was on to find acceptable democracy "surrogates."[218] Some representative offerings: Jost Delbrück felt that a "partially democratized global order of peace and justice" could be achieved as long as international public authorities were transparent and rational in their decision-making.[219] True,

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213. Ibid., at 50 (footnote omitted).

214. See ibid., at 65 ("More international decision-making will also exacerbate the so-called democratic deficit, as decisions that elected representatives once made shift to unelected international bodies . . . .")

215. Ibid., at 66.

216. Matthews was by no means the first to throw down this gauntlet, see, e.g. Commission on Global Governance, *Our Global Neighborhood* (Oxford: Oxford University Press, 1995), 66, but unlike earlier attempts her throw-down succeeded in drawing immense attention.

217. See Jost Delbrück, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?" *Indiana Journal of Global Legal Studies* 10 (2003): 36-37 ("Universal suffrage is out of the question . . . . The upshot . . . is that there seems to be consensus that a direct transfer of the concept of legitimation by democracy to the international level is not feasible in the foreseeable future.")

218. Ibid., at 37, 40.

219. Ibid., at 43.

he admitted, such authorities could not be voted out of office by the people affected by their decisions, but they could be watched vigorously by global non-state actors (such as the media and NGOs) and thereby "forc[ed] . . . to react constructively to public critique."[220] Steve Charnovitz acknowledged that "[f]ree elections are essential to democracy" but then proposed a theory of international democracy that dispensed with them.[221] In his view, the key to democracy at the global level was ex-ante pluralistic input: Electorally unaccountable decision-makers could exercise power democratically provided they took into consideration the needs and opinions of the public as filtered and communicated by NGOs.[222] Anne-Marie Slaughter proposed a disaggregated view of the nation state that would permit the development of vertical networks linking IGOs with sympathetic islands of officials in its least politically-accountable branches (*i.e.* the national bureaucracies and judiciaries).[223]

To re-state these theories is in some measure to expose them; their flaws are hardly subtle. Delbrück, for example, neglected to specify the process(es) by which public international authorities could be "forc[ed] . . . to react" to public critique of their work – a glaring and crucial omission. His expectation that the world's peoples would be grateful for the authorities' "sound expertise"[224] was naïve at best; even in 2003 it was rather late in the day to be insisting on an objective science of politics. Charnovitz offered NGO participation at the Paris Peace Conference of 1919 (at which the Treaty of Versailles was negotiated) as the defining moment and template for international democracy.[225] Yet, incredibly, he showed no

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220. Ibid.

221. See Steve Charnovitz, "The Emergence of Democratic Participation in Global Governance (Paris, 1919)," *Indiana Journal of Global Legal Studies* 10 (2003): 46.

222. See ibid., at 56-60.

223. Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

224. Delbrück, supra note 217, at 43.

225. See Charnovitz, supra note 221, at 73-77.

appreciation of the fact that what lent the Treaty its democratic bona fides was not its drafters' willingness to listen to self-appointed stakeholders and supplicants in the halls of Versailles but its submission for approval via ratification proceedings to the political representatives of the electorates of its signatory states.[226] And while Slaughter was to be applauded for recognizing the problematic nature of theories of democratic legitimacy that ignored national political institutions, she was to be criticized for thinking she could extract an affirmation of democracy from a project devoted to breaking apart and looting those political infrastructures located most proximately to the world's citizenries. Not surprisingly, full and effective critiques of these theories and their variants eventually emerged to throw much-needed cold water on what had become a heady, not to mention very well-funded, intellectual enterprise.[227]

For my purposes, and because this Article concerns political secrecy rather than democracy per se, I should like to linger briefly on the claim – advanced by both Delbrück and Charnovitz, amongst others – that transparency and ex-ante openness can be severed from ex-post electoral accountability and then substituted for it as independent grounds of legitimacy of supra-national public authority. From a normative perspective this claim is surely unappetizing: Who amongst us would wish to live under a dictator even if she fully opened up her autocratic decision-making to the cameras and agreed to accept citizen petitions on matters

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226. Not only is pluralistic inputting insufficient to satisfy democratic concerns; it is also unnecessary: The U.S. Constitution has an impeccable democratic pedigree despite being negotiated behind closed doors at Philadelphia. The key to the Constitution's legitimacy is that its terms were extensively and very publicly debated prior to being put to up-or-down vote by the electorate of each state that would be bound by it. Moreover, despite the anonymity of authorship of the Federalist Papers, there seems to have been little doubt as to the identities (as a class) and motivations of the Constitution's drafters. Evident in the writings of the Anti-Federalists is a strong assumption that the Constitution had been drafted by the elite for the purpose of fashioning a government that would enslave the common people. Transparency of outputs, inputs, and sources-of-inputs were thus safely achieved.

227. The literature here is thick but I would recommend, as much for their restraint as for their devastating effect, Martin Shapiro's "Deliberative,' 'Independent' Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?" *Law and Contemporary Problems* 68 (2005) and Kenneth Anderson's "Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks," review of *A New World Order,* supra note 222, *Harvard Law Review* 118 (2005).

of concern to them prior to writing her laws and regulations? From a descriptive standpoint the claim falls apart: There is little evidence that electorally-unaccountable political institutions (as opposed to judicial ones) are capable of sustained transparency. Indeed, what evidence we have suggests – in line with Fuller's intuition regarding the modus operandi of evil intention[228] – that unaccountable political power shuns the light and bends toward darkness. The fundamental and abiding criticism of the European Union – the world's most advanced supra-national entity that is only minimally electorally sensitive[229] – is that most of its laws and regulations are made behind closed doors by a handful of officials with little-to-no public consultation or input.[230] *Why* such opaqueness occurs is open to the speculation of political scientists and psychologists.[231] *That* it occurs may well mean that public power exercised beyond the nation-state is unlikely ever to achieve genuine transparency. If this be the case,

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228. See supra note 45 and accompanying text.

229. Of the three EU institutions involved in law-making – the Council of the EU, the European Commission and the European Parliament – only the members of Parliament are elected by the citizens of EU-member states. All other officials are appointed. *See* EUROPA (official website of the EU), https://europa.eu/european-union/about-eu/institutions-bodies_en.

230. See, e.g., Carl Dolan, "Trilogues: What Goes On Behind Closed Doors?" *Euractiv*, September 16, 2015, accessed February 9, 2016, http://www.euractiv.com/section/eu-priorities-2020/opinion/trialogues-what-goes-on-behind-closed-doors; Benjamin Fox, "Secret EU Lawmaking: The Triumph of the Trilogues" *EUobserver*, April 4, 2014, accessed March 10, 2016, https://euobserver.com/investigations/123555; Daniel Guéguen, "Bad News for EU Decision-making: Comitology No Longer Exists," *Euractiv*, April 20, 2013, accessed March 10, 2016, http://www.euractiv.com/section/public-affairs/opinion/bad-news-for-eu-decision-making-comitology-no-longer-exists/; Honor Mahony, "Complex EU Lawmaking Dubbed 'Infernal, Undemocratic,'" *EUobserver*, March. 4, 2013, accessed March 10, 2016, https://euobserver.com/political/119181. This criticism appears to have motivated the recent decision of the British electorate to leave the EU. See, e.g., Telegraph Editorial Board, "Vote Leave to Benefit From a World of Opportunity," *Telegraph*, June 20, 2016, accessed November 22, 2016, http://www.telegraph.co.uk/opinion/2016/06/20/vote-leave-to-benefit-from-a-world-of-opportunity; Boris Johnson, "Please Vote Leave on Thursday, Because We'll Never Get This Chance Again," *Telegraph*, June 19, 2016, accessed November 22, 2016, http://www.telegraph.co.uk/news/2016/06/19/please-vote-leave-on-thursday-because-well-never-get-this-chance; Spectator Editorial Board, "Out – And Into The World: Why the Spectator Is For Leave", *Spectator*, June 18, 2016, accessed November 22, 2016, http://www.spectator.co.uk/2016/06/out-and-into-the-world-why-the-spectator-is-for-leave.

231. I suspect the reason has to do with the fact that, as a simple matter of human nature, transparency entails accountability: When people are allowed to see decision-making processes in action, they are apt to want to control them. If this is correct, international decision-makers will be able to preserve their unaccountable power in only one of two ways: (1) by avoiding genuine transparency (the EU's approach); or (2) by allowing the public to see but then convincing them that surrogate forms of control (e.g. Delbrück's policing by the media and NGOs) afford the desired degree of accountability.

then an original sin of sorts lies at the heart of the Diffusion Project, a sin that places it in a far bleaker column of the political-secrecy ledger than the two other cases of indirect secrecy (governmental outsourcing and the Fed) examined herein.[232]

To make matters worse, the Diffusion Project suffers from a deep-secrecy problem: Much of the world demos seem to know little about it. As in the case of outsourcing, the evidence of public unawareness is anecdotal and/or circumstantial, but telling nonetheless: Instances (for example) of senior officials of powerful countries professing ignorance of the extent of diffusion,[233] and of political firestorms erupting when the general public gets wind of it.[234] A number of subtle and interrelated practices are responsible for the public's unawareness. First, Diffusion Project proposals tend to be put forward and debated in academic and quasi-academic fora (*e.g.* think tanks) instead of national legislatures or other public bodies that are accessible to and regularly monitored by the public, and they tend to be adopted and implemented quietly via executive order instead of legislation.[235] Second, as evidenced by the torrent of criticism that rained down on the Trump Administration when it proposed to withdraw the United States from the Paris Climate Accords, Diffusion Project promoters use a bait-and-switch tactic whereby they sell international law as non-binding "soft law" for

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232. As previously noted, with the necessary reforms it may be possible to enlist private parties (including bankers) to perform governmental functions in a manner that serves the public interest.

233. Senior officials in former Prime Minister David Cameron's government were apparently shocked to learn the extent to which the British Government exists simply to do Brussels's bidding. See Spectator Editorial Board, supra note 226 (recounting experiences of Michael Gove and Steve Hilton).

234. Growing public awareness of supra-national influence over local land-use policy in connection with Agenda 21 has sparked a significant amount of outrage in the United States. See David Z. Morris, "Agenda 21: Global Conspiracy or Climate Savior?" *Fortune Magazine*, June 18, 2014, accessed December 7, 2016, http://fortune.com/2014/06/18/agenda-21; Alex Newman, "Sustainable Freedom: Surging Opposition to Agenda 21, 'Sustainable Development,'" *New American*, July 10, 2012, accessed November 22, 2016, http://www.thenewamerican.com/tech/environment/item/11999-sustainable-freedom-surging-opposition-to-agenda-21-%E2%80%9Csustainable-development%E2%80%9D.

235. Delbrück, supra note 217, at 36.

purposes of adoption/accession but as binding "hard law" for purposes of withdrawal.[236] This tactic results in the public being misled as to the true nature of the international legal regimes their political agents are signing them up to. Third, as Slaughter's vertical networks proliferate – one of the latest being a network that links an international consortium of cities seeking to combat violent extremism with a supra-national steering committee run by a privately-funded, London-based think tank[237] – the public's attention is focused on the networks' sub-national terminus points instead of their supra-national ones.[238] This tactic allows the Diffusion Project to be presented as an effort at power devolution (*e.g.* from national government to municipality) instead of power centralization (*e.g.* from national government to murky supra-national NGO dominated by corporate operatives).[239] Fourth and finally, supra-national legislative and regulatory work-product is often quietly passed off as national work-product. Remarked Delbrück, casually enough, in 2003: "[I]n many instances, domestic law that appears to be genuinely 'homemade' is actually nothing but a rubberstamped regulation worked out at the level of IGOs by teams of international and national administrators (civil service)."[240] Needless to say, the public cannot begin to demand access to "the level of IGOs" unless they know that

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236. See Rebecca Flood, "Jean Claude Juncker Warns Donald Trump It Will Take Years For U.S. To Leave Paris Agreement," *The Express*, June 1, 2017, accessed June 4, 2017, http://www.express.co.uk/news/world/811652/Jean-Claude-Juncker-Donald-Trump-Paris-agreement-climate-change-years-withdraw-USA; Ian Tuttle, "The Paris Agreement Is A Treaty. Treat It As Such," *National Review,* June 1, 2017, accessed June 5, 2017, http://www.nationalreview.com/article/448156/paris-agreement-treaty-requiring-two-thirds-senate-vote. For an astonishingly open acknowledgment of this tactic, coupled with a breathtaking indifference to its implications for democratic accountability, see Harold Hongju Koh, "Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking," *Yale L. J. F.* 126 (2017): 338.

237. See Strong Cities Network, http://strongcitiesnetwork.org, accessed January 25, 2017; Institute for Strategic Dialogue, http://www.strategicdialogue.org, accessed January 25, 2017.

238. See, e.g., John Fullerton, "City States Rising!" *Huffington Post,* January 2, 2017, accessed January 19, 2017, http://www.huffingtonpost.com/john-fullerton/city-states-rising_b_13932212.html.

239. The marketing legerdemain at work here echoes the savvy branding of the FRBs in the Fed context. See discussion supra notes 172-174 and accompanying text.

240. Delbrück, supra note 217, at 35.

IGOs are involved in constructing their world. Sadly, one suspects that this may well be the intention.

CONCLUSION

We tend to believe that our political system is transparent and our democracy accordingly secure. If this Article shows anything, it shows that this belief is unwarranted. By surveying the extent of direct and indirect secrecy across multiple areas of political activity, this Article makes clear that we are living in the midst of a systemic secrecy crisis. While it is certainly true that even the most transparent political system will have the odd nook-and-cranny filled with the small shards of secrecy that are inevitable in any human system, small shards are plainly not what we are dealing with here.

In order to respond effectively to this crisis, secrecy scholars and statesmen will need to adopt an inter-disciplinary approach and grapple with political secrecy across the board instead of locally within the comfortable confines of specific areas of expertise. When making recommendations to manage or ameliorate secrecy in one context, they should take into account the secrecy challenges present in other contexts. Doing otherwise is akin to medically treating one limb or organ of the body without regard to the condition of the patient as a whole.

Finally, I would suggest that, as a society, we be far more skeptical of the claim – so dominant these last thirty years – that removing power from traditional governmental structures will take us to a promised land of "No Politics" and/or "Peak Efficiency." We would do well to remember that very few actual human enterprises are apolitical or efficient in an economics-model sense. Indeed, as my analyses of both governmental outsourcing and the Fed indicate, the very concepts of apolitical expertise and market-driven rationality can be hijacked and used as cover for the financial self-interests of powerful private factions. I am confident that our

rampant political secrecy will begin to abate once we cease our demonization of "politics" and bring public power back within the four walls of national and local governmental institutions – formal spaces where that power can be monitored, with the utmost degree of well-intentioned distrust, by the people it is meant to serve.