The Journal of Political Philosophy: Volume 15, Number 4, 2007, pp. 404–427

On Combating the Abuse of State Secrecy*

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THERE is a cartoon by Herbert Block, the legendary cartoonist of *The Washington Post*, which features two worried-looking officials seated at a desk. Holding up a file, one official says to the other: "Well, we certainly botched this job. What'll we stamp it—secret or top secret?"[1] If Block's cartoon summarizes the concern that state secrecy can be used to hide evidence of wrongdoing, past and present events remind us that state secrecy can also be used to justify the scope and substance of controversial policies.[2] As Daniel Ellsberg, the main protagonist in the *Pentagon Papers* episode, has recently reminded us, history shows that:

> Very smart men and women can adopt and pursue wrongful and crazy policies, and get those policies adopted and followed. And they can keep the basic illegitimacy and craziness obscured, at least, by secrecy and lies about its causes and prospects.[3]

This statement in particular and the aforementioned cartoon more generally provoke the follow question: how can democracies, having authorized the institution of state secrecy, combat its abuse by public officials? The theoretical

*Many thanks to Richard Tuck, Dennis Thompson, Nancy Rosenblum, Pratap Mehta, David Grewal, Daniela Cammack and Joe Perkins for invaluable advice and comments. The ideas in this paper benefited greatly from being presented at three venues at Harvard: the Edmond J. Safra Center for Ethics, the Project on Justice, Welfare and Economics, and the Political Theory Workshop. I am grateful for advice offered by the participants, especially Arthur Applbaum, Jane Mansbridge, Frank Michelman, Andrew Sabl, Michael Rosen and Michael Frazer. I am also grateful to the editors and anonymous referees for their detailed and constructive criticism.

[1]Herbert Block, "Well, we certainly botched this job. What'll we stamp it—'secret' or 'top secret'?" *The Washington Post*, March 13, 1957, in Herbert Block, *Herblock: A Cartoonist's Life* (New York: Macmillan, 1993), p. 165.

[2]The terms "secrecy" and "state secrecy" are used interchangeably throughout this article. Both refer to the form of secrecy oriented toward safeguarding intelligence. Excluded from consideration are other forms of secrecy such as those oriented toward the conduct of domestic policy, staff consultations and constitutional deliberation. These are analyzed in Amy Gutmann and Dennis F. Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996), ch. 3; Simone Chambers, "Behind closed doors: publicity, secrecy and the quality of deliberation," *Journal of Political Philosophy*, 12 (2004), 389–410; Jon Elster, "Deliberation and constitution making," *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1988), pp. 97–112; Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage Books, 1989).

[3]Daniel Ellsberg, "The Salon interview: Daniel Ellsberg," interviewed by Fred Branfman, *Salon*, November 19, 2002; available at http://dir.salon.com/story/news/feature/2002/11/19/ellsberg/index.html (accessed Dec. 11, 2006).

doi: 10.1111/j.1467-9760.2007.00283.x

problem here, as Dennis F. Thompson has put it, is not a conflict between state secrecy and democracy per se but rather a conflict that "arises within the idea of the democratic process itself."[4] The conflict is this: democratic accountability requires publicity, but democratic governments may legitimately claim the need for secrecy. Under these circumstances, how can citizens trust they will be able to detect and punish the abuse of state secrecy?

This is a question that democratic theorists ought to study with greater urgency than they have thus far. This silence likely owes to the assumption that democratic theory contains resources adequate to solving the problem that state secrecy creates. However, this assumption is arguably a mistaken one. To show why this is so, the article proceeds as follows. First, it briefly clarifies how state secrecy obstructs the standard mechanisms of oversight utilized by democracies – elections, public opinion and deliberation. Second, it explains why the alternative mechanisms of transparency, mediation and retrospection that democratic theory offers in response to this problem can prove problematic. Third, it identifies the mechanism that democracies evidently depend on to combat the abuse of state secrecy—a mechanism I term *circumvention* (commonly referred to as "leaking"). The article concludes that the reliance of democratic oversight on circumvention is problematic in a number of respects. In particular, it raises the prospect that the efficacy of democratic oversight in the case of state secrecy depends in a significant way on the role of private institutions and personal virtues. If correct, this assessment invites democratic theory to cultivate a relationship with theoretical approaches that can account for the importance of these institutions and virtues.

I. STANDARD MECHANISMS OF DEMOCRATIC OVERSIGHT

Under normal circumstances, democratic theory offers three mechanisms that citizens can utilize to oversee their governors: elections, public opinion and public deliberation. Elections are viewed as the principal mechanism of democratic control by theorists such as Joseph Schumpeter who argue that the competitive nature of the electoral arena provides the best available test of aptitude and skill.[5] This account is evidently premised on citizens having access to information—for how can we hope to secure the instrumental benefits of competitive elections if the electorate or the rivals of an incumbent are denied the information required to judge their performance? Therefore, if elections are to serve as an effective means of oversight, citizens must at least have a right to information—how and whether they use this right is a separate question.

[4]Dennis F. Thompson, "Democratic secrecy," *Political Science Quarterly*, 114 (1999), 181–93 at p. 182. Cf. Francis E. Rourke, *Secrecy and Publicity: Dilemmas of Democracy* (Baltimore, Md.: Johns Hopkins Press, 1961).

[5]Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Allen and Unwin, 1947), p. 289.

Public opinion provides a second mechanism of democratic oversight. If public opinion is to be a credible means of control, members of the public must be capable of forming opinions independent of government direction. It is not necessary that citizens actually form independent opinions—only that they are not prevented from forming independent opinions, so that, theoretically speaking, they may free themselves from being reliant on the very object of their attention. As Bernard Manin asserts, "in order that the governed may form their own opinions on political matters, it is necessary that they have access to political information, and this requires that governmental decisions are made public." But, he goes on to add, "if those in government make decisions in secret, the governed have only inadequate means of forming opinions on public matters."[6] Yet state secrecy evidently denies citizens such a right—and the consequences are apparent. For example, Benjamin Page and Robert Shapiro have concluded from their study of a half-century of American public opinion data that centralized control of information about foreign affairs has allowed successive administrations to "present a unified, carefully constructed picture of events to the public such that public opinion is led rather than followed by public officials."[7]

A third mechanism of democratic oversight is provided by the conduct of public deliberation.[8] In this case deliberators are expected to offer publicly accessible reasons in defense of particular policies. As Jürgen Habermas writes, what is democratic about deliberation is "the condition that all participate with equal opportunity in the legitimation process conducted through the medium of public discussion."[9] But if this equality of opportunity is to be meaningful then the preliminary materials of deliberation must themselves be publicly accessible. As John Rawls has put it, in aiming for public justification, "we appeal to ascertainable evidence and facts open to public view, in order to reach conclusions about what we think are the most reasonable policies."[10] Consider then this news report summarizing U.S. Attorney General Alberto Gonzales' argument on behalf of warrantless surveillance:

[6]Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), pp. 167–8. Also see Hannah F. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), p. 209.

[7]Benjamin I. Page and Robert Y. Shapiro, *The Rational Public: Fifty Years of Trends in Americans' Policy Preferences* (Chicago: University of Chicago Press, 1992), pp. 173, 205–6, 282–3, 376–7, 394–7. Also see Gabriel A. Almond, "Public opinion and national security," *Public Opinion Quarterly*, 20 (1956), 371–8 at p. 373; Robert Y. Shapiro and Lawrence R. Jacobs, "Who leads and who follows," *Decisionmaking in a Glass House*, ed. Brigitte L. Nacos, Robert Y. Shapiro and Pierangelo Isernia (New York: Rowman and Littlefield, 2000), pp. 223–46 at pp. 243–5; Ole R. Holsti, *Public Opinion and American Foreign Policy* (Ann Arbor: University of Michigan Press, 2004), pp. 298–300.

[8]On this see Jon Elster, ed., *Deliberative Democracy* (New York: Cambridge University Press, 1998), p. 8; John Dryzek, *Deliberative Democracy and Beyond* (New York: Oxford University Press, 2000), p. v.

[9]Jürgen Habermas, *The New Conservatism*, trans. Shierry W. Nicholsen (Cambridge, Mass.: MIT Press, 1991), pp. 138–9.

[10]John Rawls, "The idea of public reason revisited," in Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), sec. 4.3, p. 155.

> Gonzales said the warrantless surveillance has "been extremely helpful in protecting America" from terrorist attacks. However, because the program is highly classified, he said he could not make public examples of how terrorist attacks were actually disrupted by the eavesdropping.[11]

This example reveals the obstacle that state secrecy places before the conduct of public deliberation, namely the possibility that officials will justify controversial decisions via reference to *suppressed evidence*, that is, by claiming to have secret information that validates their decision, but that cannot be shared with citizens. This form of argumentation can only be defeated by the presence of widespread skepticism about the government's use of suppressed evidence. However, as citizens cannot, by definition, have access to the content of the suppressed evidence, their skepticism must derive from some *other* grounds of suspicion, such as prior examples of bad faith. This, in some respects, is the strategy recommended by Rawls. He writes in *A Theory of Justice* of a "contingent pacifism," which is not a general pacifism but "a discriminating conscientious refusal to engage in war in certain circumstances."[12] He does not, however, address how citizens can ably exercise discrimination under conditions of state secrecy. Instead he asserts that "given the often predatory aims of state power and the tendency of men to defer to their government's decision to wage war, a general willingness to resist the state's claims is all the more necessary."[13] Be that as it may, this recommendation is theoretically inadequate because state secrecy is authorized in the first instance on the assumption that there *is* information that has to be kept secret. Ignoring the information *because* it is kept secret or suppressed is therefore contradictory. In other words, though widespread skepticism may episodically succeed in preventing the egregious use of suppressed evidence, it cannot be generalized as a theoretical response to the problem of secrecy without collapsing into anti-statism. Consequently, if we are to achieve the purpose of public deliberation, then we must provide citizens either with access to the suppressed evidence or the confidence that it has been withheld fairly.

II. ALTERNATIVE MECHANISM 1: TRANSPARENCY

We have seen thus far that the conduct of democratic oversight—via elections, public opinion and public deliberation—is implicitly premised on citizens having a right to information, and that this premise is challenged by the existence of state secrecy. So how do we respond to this conflict? One set of mechanisms that attempt to address this conflict are based on the norm of transparency, for

[11]"Gonzales defends NSA, rejects call for prosecutor," *CNN*, January 17, 2005; available at http://www.cnn.com/2006/POLITICS/01/17/gonzales.nsa/ (accessed Dec. 11, 2006).

[12]John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1999), II: 6.59, p. 335.

[13]*Ibid.*

example sunshine laws or freedom of information acts.[14] Transparency requires that governments limit the extent to which they withhold information from the public. This requirement does not imply that governments must be absolutely transparent in order to be deemed democratic. Since democracies actually *choose* to allow their governments to keep secrets in order to secure preservation, the institution of state secrecy is arguably compatible with—rather than opposed to—the ideal of democratic government. Nevertheless, one would be hard pressed to argue that withholding information that has no bearing on national security is a legitimate exercise of the power of state secrecy. Correspondingly, the purpose of seeking transparency in government is to ensure that withheld information is being kept secret only for legitimate national security reasons.[15]

However, proposals to increase transparency in government face a serious complication: how are members of the public to ascertain what degree of secrecy is requisite in any given instance? Since the calculation of harm caused by the disclosure of information cannot be undertaken in public without revealing the very information, democratic societies are forced to delegate this task to the executive. This arrangement implies that only the executive is authorized to judge the potential harm caused by disclosure. Then again, given that we wish to scrutinize the executive *because* we fear the abuse of state secrecy, asking officials to calculate the harm caused by disclosure is like asking the suspect to provide the evidence. In other words, the fundamental flaw in proposals to increase transparency is structural in nature because their success is destined to rely upon the faithfulness of officials, which is ironic since the point of the whole exercise is to prove rather than assume their good faith.

The resulting difficulties are not surprising. For example, in *A Preface to Democratic Theory*, Robert Dahl takes as one of the central assumptions of democracy that "all individuals possess identical information about the alternatives."[16] He admits that such equality is unlikely to be achieved in fact, noting that "in recent times the gap has been further widened in national governments by growing technical complexities and the rapid spread of secrecy regulations."[17] Nevertheless, as his emphasis is on measurement and prescription, Dahl concludes that "if one is dismayed by the utopian character of

[14]See, e.g., United States Commission on Protecting and Reducing Government Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy*, S. Rep 105–2, 103rd Congress, (Washington, D.C.: GPO, 1997); House Committee on Government Reform, *Emerging Threats: Overclassification and Pseudo-classification: Hearing before the Subcommittee on National Security, Emerging Threats and Internal Relations*, 109th Congress, 1st Session, March 2, 2005. More generally see Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006).

[15]This approach has its origin in Jeremy Bentham, *Political Tactics*, ed. Michael James, Cyprian Blamires and Catherine Pease-Watkin (New York: Oxford University Press, 1999), II: 4, 39; and Jeremy Bentham, *Constitutional Code: Vol. 1*, ed. F. Rosen and J.H. Burns (New York: Oxford University Press, 1983), VIII.11.A7–8.

[16]Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), p. 70.

[17]*Ibid*., p. 73.

[this requirement], it is worth recalling that we are looking for conditions that may be used as limits against which real world achievement can actually be measured."[18]

But how useful is this measure of "achievement"? Even if it is possible to measure how much state secrecy there is in any given context, this observation does not yield conclusions as to whether such secrecy can be reduced or not, much less whether it is desirable, since the degree of inequality may simply correspond to the extent of secrecy the executive calculates as necessary. Hence, even though advocates of transparency can, and frequently do, cite the millions of state secrets kept by the government, this citation is problematic since the number of secrets may not be a suitable proxy for evaluating the necessity that justifies their existence.

The aforementioned structural dilemma also seems to challenge the utility of pursuing the more limited form of transparency argued for by Amy Gutmann and Dennis Thompson. Recognizing that state secrecy may be necessary to fulfill certain democratic policies including the provision of security, they attempt to prevent its abuse by offering a criterion that outlines the conditions under which it is acceptable. The criterion specifies that:

> [i]t is the details of the policy, not the policy itself, that is [to be kept] secret. Equally important, is the fact that the details of the policy are secret is not itself a secret. Citizens have a chance to decide in advance whether the policy is justified and to review the details of the policy after it is implemented.[19]

The purpose of this criterion, according to Gutmann and Thompson, is to ensure that citizens know of secrets that are being kept because then they will have the "opportunity to challenge the keepers of secrets and ultimately to decide whether the secret should be kept."[20] Thus, for example, if an executive wished to establish secret prisons, their criterion would require it to obtain citizens' approval for the general policy of having secret prisons—even if it did not discuss the details of any prison in particular. Clearly, the potential for restricting the scope of state secrecy to only justifiable secrets rests entirely on the question of *who* is to determine what should be kept secret. By requiring the executive to offer justifications for keeping secrets, Gutmann and Thompson aim to vest this judgment in the outcome of public reasoning. However, the difficulty in pursuing this variant of transparency is that discussion on the reasons for creating a state secret can *itself* have potentially adverse consequences for the utility of state secrecy. This logic is exemplified by the concept of a black secret —that is, a secret whose existence can neither be confirmed nor denied because doing so could undermine the efficacy of the intelligence it shields. The possibility that offering reasons in defense of secrecy is not costless raises the

[18]*Ibid*., p. 70.
[19]Gutmann and Thompson, *Democracy and Disagreement*, p. 103.
[20]*Ibid*., p. 121.

issue of *who* is to compute the cost. Since the executive is responsible for determining the cost of disclosure, it is logical to presume that the executive will also be responsible for determining the cost of offering reasons in defense of secrecy. As is readily apparent though, this regulatory structure makes it possible for the executive to circumvent offering reasons in justification of its policies, thus making the proposed criterion ineffective in restricting the scope of executive discretion. Alternatively, to the extent that citizens demand reasons for secrecy from an executive unwilling to provide them, the criterion may only elicit reasons of a highly general nature.

This concern is supported by the evidence. For example, despite a constitutional requirement that government expenditures be publicly accounted for, repeated efforts over the past half century to obtain even the most general information about the budget of American intelligence agencies have been turned down on the basis of national security concerns about detailing "sources and methods."[21] Given such a degree of generality in the reasons for maintaining a state secret, it is unclear whether requiring justifications will yield information that the executive does not wish to share. Conversely, when the scope of state secrets cannot be narrowed much further than knowing that there is an intelligence budget of an unknown amount, it is not clear how much the conduct of public deliberation can restrain the abuse of state secrecy.[22]

III. ALTERNATIVE MECHANISM 2: MEDIATION

An alternative to the pursuit of transparency is provided by the mechanism of mediation. This mechanism resolves the conflict between democratic oversight and state secrecy by having citizens delegate the task of oversight to the judiciary and the legislature. Mediation therefore promises the benefits of oversight without the potentially adverse consequences of having such oversight conducted in public view. The fact that mediation relies on overseers who are themselves not exposed to public scrutiny is not especially problematic from the perspective of democratic theory. Since on at least some conceptions of democracy citizens need only will the creation of institutions—which then take on the personality of the

[21]As the former Director of Central Intelligence William E. Colby deposed before Congress: "I think it is inevitable if you disclose a single figure you will immediately get a debate as to what it includes, what it does not include, why did it go up, why did it go down, and you will very shortly get into a description of the details of our activities"; Barry M. Blechman and W. Philip Ellis, *The Politics of National Security: Congress and U.S. Defense Policy* (New York: Oxford University Press, 1990), p. 151.

[22]This particular example draws on a series of court decisions induced by efforts to compel disclosure of contemporary and historical intelligence budgets. The two most prominent cases are *Aftergood v. CIA*, Case No. 02-1146, (D.D.C. Feb 6, 2004) and *Aftergood v. CIA*, No. 01-2524, (D.D.C. Feb. 9, 2005). In the latter case, the judge directly addressed the crux of the matter, stating that, "the fact that the plaintiff subjectively believes that releasing the requested budget information would not compromise sources and methods of intelligence is of no moment. The [Director of Central Intelligence] is statutorily entrusted with making that decision, not the plaintiff. 50 U.S.C. §403-3(c)(7)."

sovereign—mediation can plausibly be viewed as compatible with democratic principles.

But how successful can mediation be in combating the abuse of state secrecy? To be sure, the involvement of a different branch of government in reviewing secret material begins to respond to the fear of abuse. Nevertheless, concerns persist. From a practical point of view, we have to confront the obstacle posed by the executive's day-to-day control over the national security apparatus, which can allow it to limit the information available to mediators.[23] Under these circumstances, we should not be surprised to find that the more an oversight committee is composed of potential critics rather than confederates, the less likely it is that it will be allowed to become aware of instances of abuse. A recent example of this tendency is provided by the fact that a majority of the members of the U.S. Senate Select Committee on Intelligence only became aware of the President's authorization of warrantless wiretapping after the news media revealed the operation. Understandably peeved, a member of the Committee, Senator Ron Wyden (D-Oregon), complained that a majority of the members on his Committee had been reduced to hiring a news clipping agency to bring reports of potential abuse to their notice. "My line," he is reported to have said, is "What do I know? I'm only on the Intelligence Committee."[24]

Another obstacle faced by mediators is that of competency. For example, despite the fact that the existing statutory framework for information disclosure in the United States, the 1974 Freedom of Information Act (FOIA), authorizes courts to conduct a *de novo* review of classified information to determine whether it should be exempt from disclosure, there is widespread evidence of judicial reticence in challenging the executive's determination of harm likely to be caused by disclosure. In a recent case for instance, the D.C. Circuit Court noted that "in the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."[25] The courts have ascribed this reticence to an explicit doctrine of deference, observing in a landmark case that:

[23]This institutional arrangement derives from the executive's control over the classification system. See, for example, Nathan Brooks, *The Protection of Classified Information: The Legal Framework* (Washington, DC: Congressional Research Service, 2004), p. 2, n. 6; David H. Morrissey, *Disclosure and Secrecy: Security Classification Executive Orders* (Columbia: AEJMC, 1997), pp. 35–7. Also see the discussion on the related but distinct topic of "executive privilege" in Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability* (Lawrence: University Press of Kansas, 2002).

[24]Sheryl Gay Stolberg, "Senators left out of loop make their pique known," *The New York Times*, May 19, 2006.

[25]*Center for National Security Studies v. United States Department of Justice*, 331 F.3d 918, 928 (D.C.Cir. 2003). Also see Robert P. Deyling, "Judicial deference and de novo review in litigation over national security information under the Freedom of Information Act," *Villanova Law Review*, 37 (1992), 67–112. Deyling writes that "since the enactment of the 1974 [FOIA] amendments, the courts have ruled on hundreds of cases involving classified information, affirming the government's decision to withhold the requested information in nearly every case." A summary of the exceptions is provided in "History of Exemption 1 Disclosure Orders," in United States Department of Justice, *FOIA*

> the decisions of the Director of the Central Intelligence, who must of course be familiar with "the whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.[26]

The judiciary's reluctance to contest the executive's assessment of the likely harm caused by disclosure means that it is typically limited to using procedural rather than substantive criteria to gauge the legitimacy of state secrets. In the event, judicial mediation places a low procedural hurdle rather than high substantive barrier before executive control over secret information, making it a potentially limited mechanism of information disclosure.

Concerns about access to information and the competency of overseers are not likely to deter the proponent of mediation. These defects, the proponent will argue, are practical problems that could be solved through institutional innovations such as the enforcement of information sharing requirements or the creation of special courts. Indeed, the proponent could point to institutional arrangements in countries like Germany, Norway and Canada, where the legislature and judiciary have greater access to secret intelligence.[27] So if we are to prove that mediation is an inadequate means of combating the abuse of state secrecy, we must do more. To be precise, we must show that making the legislature or the judiciary the final authority on questions of state secrecy is itself troubling.

I would argue that the use of mediators is troubling because this shifts rather than resolves the threat of abuse. To see why, note that proponents of mediation wish for a group rather than an individual to serve as the final authority on matters of state secrecy because this arrangement presumably allows for a fuller consideration of interests and reasons. But under what circumstances does group decision-making display such virtuousness? Arguably, it does so only when the partisan deliberations of a committee face the threat of exposure. This is a point that Alexander Hamilton takes for granted in *The Federalist No. 26* when he

Update XVI (Washington, DC: Department of Justice, 1995). Also see "Note: Keeping secrets: congress, the courts, and national security information," *Harvard Law Review*, 103 (1990), 906–925.

[26]*CIA v. Sims*, 471 US 159, 179, 1985. A sampling of the substantial precedent on judicial deference is provided by United States Department of Justice, *Freedom of Information Act Guide 2004* (Washington, DC: Department of Justice, 2004). For example, see *Bowers v. United States Department of Justice*, 930 F.2d 350, 357 (4th Cir. 1991) ("What fact or bit of information may compromise national security is best left to the intelligence experts"); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) ("the assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts"); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("Judges lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case").

[27]European institutional arrangements are discussed in Interparliamentary European Security and Defence Assembly, *Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform*, Document A/1801, December 4, 2002; available at http://www.assembly-weu.org/en/documents/sessions_ordinaries/rpt/2002/1801.html (accessed Dec. 11, 2006). For a wider comparison see Hans Born, Loch K. Johnson and Ian Leigh, eds, *Who's Watching the Spies?: Establishing Intelligence Service Accountability* (Washington, D.C.: Potomac Books, 2005); Geneva Center for the Democratic Control of Armed Forces, *Parliamentary Oversight of Intelligence Services* (Geneva: DCAF, 2006).

argues that legislative debate over military appropriations provides citizens with a safeguard against the abuse of the "necessary and proper" clause. He asks:

> Can it be supposed that there would not be found [in the legislature] one man, discerning enough to detect a conspiracy, nor honest enough to apprise his constituents of the danger? If such presumptions can fairly be made, there ought at once to be an end of all delegated authority.[28]

Under conditions of state secrecy though, this rhetorical question may provoke precisely the concern it was intended to extinguish. Note that unlike a regular oversight committee whose individual members can "go public" with their concerns, the members of a secret oversight committee cannot be allowed to disclose information unilaterally as this would defeat the purpose of entrusting the decision to the group as a whole. How then will such a committee resolve differences amongst its members over what information should be kept secret? Presumably a rule—such as majority voting—must act as the basis for such group decisions. But this implies that in instances where a majority of overseers on a committee belong to the same party as the executive, we have reason to fear collusive behavior. Conversely, where mediators belong to a different party, there is the fear that they will abuse their oversight power for partisan purposes—whether by withholding information that casts them in a negative light or by revealing decisions made by the rival party that are morally or politically embarrassing but perhaps necessary for the sake of national security.[29]

The potential for such abuse clarifies that the utility of mediation is closely linked to the publicity of the oversight process. This is especially true, I would argue, in the context of secret intelligence whose political significance makes it difficult to envision a disinterested intermediary. Hence, under conditions of state secrecy, mediation arguably does not resolve the fear of abuse, but instead redirects it away from officials in the executive branch toward majorities in the legislature and judiciary. This conundrum might explain why despite more extensive institutional arrangements, oversight of state secrecy in European countries has still proven vulnerable to abuse. This is made clear, for example, by the recent report of the Committee on Legal Affairs and Human Rights of the Council of Europe on the complicity of most European legislatures in the practice of "extraordinary secret renditions" contrary to their public statements and legal obligations. The report observes that:

> Some Council of Europe member States have knowingly colluded with the United States to carry out these unlawful operations; some others have tolerated them or

[28]Alexander Hamilton, James Madison and John Jay, *The Federalist*, ed. Terence Ball (New York: Cambridge University Press, 2003).

[29]For a recent example see "About that Rebellion . . ." *The New York Times*, March 11, 2006. The historical experience is analyzed in Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community 1947–1994* (Knoxville: University of Tennessee Press, 1994); U.S. Senate Select Committee on Intelligence, *Legislative Oversight of Intelligence Activities: The U.S. Experience*, S. Rep 103–88, 103rd Congress, 2nd Session (Washington, D.C.: GPO, 1994).

> simply turned a blind eye. They have also gone to great lengths to ensure that such operations remain secret and protected from effective national or international scrutiny.[30]

What this example suggests is that dispute over the *form* of the final authority on questions of state secrecy can be quite beside the point. Regardless of whether the final authority is the executive or a committee in the legislature, officials can make decisions in secret that violate the law. The decisions made by this final authority will of course be legitimate in the minimal democratic sense of being indirectly authorized by the people (who have elected the officials and approved the constitutional offices they inhabit). But we are not concerned here with the legitimacy of secret decision-making in this narrow legal sense; rather we are concerned with the *use* to which this power is put. And on this point it seems fair to ask what reason citizens have to believe that this final authority (whatever its form) will not abuse their trust by, for example, hiding evidence of wrongdoing or by manipulating the populace into approving policies that they would not otherwise approve. This is not to suggest that the use of legislative and judicial mediation will always be flawed. There may well be instances where these mechanisms work successfully, though a significant part of the problem is that citizens will not know if and when this is the case. Therefore, the issue at stake is not one that can be resolved empirically as such. Rather, the theoretical point to note is that under conditions of state secrecy citizens will lack a good and sufficient reason to trust mediators since they will not have access to the information necessary for rational trust.[31]

IV. ALTERNATIVE MECHANISM 3: RETROSPECTION

A third mechanism to secure the conduct of democratic oversight under conditions of state secrecy is retrospection. The term refers to the retrospective enforcement of accountability or the *ex post* analysis of decision-making in order to detect wrongdoing. We owe this approach to Jeremy Bentham who argues that its advantage lies in addressing the concern we raised in our discussion on mediation.[32] Mediation, we argued, fails to eliminate the threat of abuse because its conduct is shrouded in secrecy. Retrospection, by contrast, eliminates the concern that overseers will abuse their power because it is meant to be conducted in public view. Retrospection can be conducted in public view because it is meant to take place once secrecy is no longer called for. As Bentham puts it, in each case of state secrecy:

[30]Committee on Legal Affairs and Human Rights of the Council of Europe, *Report on Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees involving Council of Europe Member States*, Document 10957, 12 June, 2006; available at http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf (accessed Dec. 11, 2006).

[31]I owe this formulation of the problem to Dennis Thompson.

[32]Bentham, *Constitutional Code*, VIII.11.A8. For a contemporary analysis see Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, Mass.: Harvard University Press, 1987), pp. 24–31.

> a point of time will be assignable, after which the evil first produced by publicity, will have ceased to be thus producible. But at no time can the good produced by publicity cease to exist or operate. For, at no time can the operation of the tutelary power of the Public Opinion Tribunal—that judicial power to which publicity furnishes its necessary evidence—cease to be needed.[33]

Despite its advantages, the conduct of retrospection faces significant obstacles, many of which are practical in nature. For instance, retrospection can be stymied by the possibility that officials will destroy incriminating documents (as they did during the Iran-Contra affair) or that they will write in code in order to prevent incrimination (as they did during the Clinton Administration).[34] The absence of an appropriate institutional venue also poses a challenge for the conduct of retrospection. The electoral system, for example, can end up forcing citizens to choose between expelling an incumbent and ensuring that their favored party remains in office.[35] Investigative committees can similarly encounter divided loyalties—their dedication to punishing abuses of power can be compromised by the fact that they also have to maintain an ongoing relationship with officials in the executive branch.

For now we can set aside the practical obstacles to retrospection since appropriate institutional innovations—such as data retention policies—are not hard to conceive of. What we ought to focus on is the theoretical obstacle facing retrospection. The difficulty here arises from the fact that we cannot predict the length of time after which the disclosure of classified information will prove harmless. Bentham himself admits as much, noting that there are two departments in particular, "Defensive Force" and "Foreign Relations," in which "the nature of the business seems scarcely to admit of any limitation to the time during which the good of the service may require the secrecy to be observed."[36] This fact suggests that declassification (and therefore retrospection) cannot proceed automatically. It requires the calculation of harm from disclosure—a responsibility entrusted to the executive branch. But this arrangement would mean that an abusive executive could thwart retrospection by asserting that the declassification of the relevant information will harm national security.

This structural dilemma does not condemn retrospection to failure. We can identify instances where public controversy has compelled the executive to cooperate with particular exercises of retrospection. In such cases, the use of

[33]Bentham, *Constitutional Code*, VIII.11.A8.

[34]For example, see Scott Armstrong, "The war over secrecy: democracy's most important low-intensity conflict," in *A Culture of Secrecy*, ed. Athan G. Theoharis (Lawrence: University Press of Kansas, 1998), pp. 140–86; Cecil V. Crabb and Pat M. Holt, *Invitation to Struggle: Congress, the President and Foreign Policy* (Washington, D.C.: Congressional Quarterly, 1989), p. 156.

[35]The problematic relationship between elections and retrospection is discussed in Manin, *Principles*, pp. 175–183; Josè M. Maravall, "Accountability and manipulation," *Democracy, Accountability and Representation*, ed. Adam Przeworski, Susan C. Stokes and Bernard Manin (New York: Cambridge University Press, 1999), pp. 154–98 at p. 159.

[36]Bentham, *Constitutional Code*, VIII.11.A15. This persistence of state secrecy distinguishes it from the other instrumental forms of policy secrecy, which are more amenable to retrospective public scrutiny.

retrospection has met with some success, for example in the Iran-Contra investigation in the U.S. and the Scott Inquiry in the U.K. Nevertheless, even in such cases, the conduct of retrospection encounters two criticisms. First, in instances where retrospection has been conducted on the basis of investigators enjoying privileged access to secret information, a difficulty parallel to that discussed under the heading of mediation arises—namely, what basis do citizens have to trust in the satisfactoriness of the investigation?[37] Second, and more importantly, in instances where investigations are sought to be conducted in fuller public view, there is evidence that the political pressure required to force the executive's compliance with investigators can be manipulated or simply wane over time,[38] or that incriminating sections of the investigative report can itself be classified. Under these circumstances, the conduct of retrospection will arguably have a firmer theoretical foundation if we can show how democracies can check the abuse of the power of declassification.

The most credible solution to this challenge would be to utilize term limits, which would prevent an office bearer from perpetually thwarting declassification. Bentham, for instance, concludes his discussion on state secrecy with a favorable observation on the benefit of rotating representatives, stating that "the greater the proportion of new members is in each successive legislature, the less the probability is, that concealment will be continued beyond the duration of the exigency."[39] Be that as it may, remember that if we wish to enforce accountability retrospectively then the use of term limits alone will not be enough. The conduct of retrospection will actually depend on the willingness of succeeding administrations to disclose the relevant evidence in full. But in that case, what is to prevent succeeding administrations from selectively withholding or disclosing information in a manner that furthers their own partisan agenda? In other words, while term limits may bring a halt to the abuses of state secrecy by one administration, this may only serve as a prelude to the abuse of state secrecy by the next administration.

An example of this possibility is provided by the debate surrounding Executive Order 13233 issued by President George W. Bush, which allows a sitting president to withhold the papers of past presidents. Though the order was justified on grounds of national security, archivists and historians have pointed out that the order was passed shortly before President Ronald Reagan's papers were due to be made publicly available. The papers are expected to contain information relating to the Iran-Contra affair and its protagonists, including former President George H. W. Bush as well as senior members of President George W. Bush's administration.[40]

[37]For example, see U.S. Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq*, S. Rep. 108–301, 108th Congress (Washington, DC: GPO, 2004), 449 (Additional views of Senator John D. Rockefeller IV).

[38]One such episode is analyzed in Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven: Yale University Press, 1990), ch. 1.

[39]Bentham, *Constitutional Code*, VIII.11.A18.

[40]Stanley I. Kutler, "Bush's secrecy fetish," *Chicago Tribune*, January 2, 2002.

The apparent inadequacy of term limits may not be enough to deter the proponent of retrospection. He could argue that citizens do not require the details of decision-making in order to conduct retrospection. All they require is *proximate knowledge* or the general understanding that bad decision-making has led to adverse consequences. To be sure, the idea that the people cannot be prevented from slowly but surely becoming aware of the abuse of power has a long history. Hobbes, for example, warns rulers that negligence invites the "natural punishment" of rebellion.[41] Similarly, Locke famously offers the image of a slave ship on the way to Algiers, whose occupants eventually come to recognize the true destination of the ship – and respond accordingly.[42]

My response to this line of argumentation is to paraphrase from Tocqueville's *Democracy in America*. Democracies learn from their mistakes, Tocqueville says, but often they learn too late.[43] In other words, instead of considering adequate the kind of retrospection that follows once a democracy realizes it has suffered great harm, we ought instead to strive to prevent such harm from occurring in the first place. In order to accomplish this, however, we need to examine how citizens can become aware of the abuse of state secrecy in a more *timely* fashion. How this can be done is a subject we will turn to shortly.

V. SOME OBJECTIONS ADDRESSED

Before proceeding to the final section of this article, it is useful to consider some potential objections to the foregoing arguments. One objection could be that the claim that state secrecy undermines the operation of elections, public opinion and public deliberation is overblown—it depends on a straw-man version of democracy with implausible information requirements, whereas citizens in fact require very limited information to exercise judgment on the acceptability of executive decisions. Note however that it is unhelpful to prejudge the degree of information required to adjudicate executive action because the appropriate degree of detail can only be determined by the particular case—there is no general rule to espouse here. But—and this is the key point—the existence of a regime of state secrecy means that the executive can lawfully deny citizens the information necessary to forming judgments on executive action. It is this ability of the executive to sever the information supply that is the source of concern from the perspective of restraining abuse.

[41]Thomas Hobbes, *Leviathan*, ed. Richard Tuck (New York: Cambridge University Press, 1996), pp. 253–4.

[42]John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1980), II.18.210.

[43]Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), Vol. I, Pt 2, ch. 5, p. 216. The original text reads: "Democracy can only obtain truth from experience, and many peoples cannot await the results of their errors without perishing."

A second objection could be that state secrecy is only one amongst a number of so-called "non-ideal" factors such as differences in wealth, race, gender and ability that prevent democracy from functioning as an effective restraint on abuse. In the face of such pervasive inequality, why should the unequal access to information caused by secrecy be viewed as a particular source of concern? There are two reasons. First, the political implications of secrecy are of a unique magnitude. The class of government decisions protected from scrutiny due to state secrecy is not an ordinary subset of the larger class of government activity that democracy attempts to bring under social control. Rather, state secrecy is exercised in relation to questions of war and peace, which lie at the very heart of the sovereignty. Of course, it may be argued that this class of decisions ought to be treated as "special" in view of the constraints of the real world and therefore excluded from consideration. However, this strategy of compartmentalization is short-sighted because, though the preference rankings of citizens may indicate a wide variety of goals that they would like to see accomplished under "normal" conditions, it is reasonable to expect that they will be willing to sacrifice these preferences in the event of necessity. We can term this logic the principle of the priority of self-preservation (or the priority principle). There are two important observations to make in regard to this principle.

First, the priority principle does not rule out the possibility that citizens may prefer to face a significant security threat than surrender their normal preferences. Courage may certainly demand that citizens resist quick trade-offs between security and normal preferences, but this counsel diminishes when the magnitude of the threat is sufficient to cause serious impairment to the existence and functioning of society.[44] Second, if the concerns of preservation are prioritized under conditions of necessity then the question of *who* is to determine necessity becomes fundamentally important to democratic theory. This is the point at which concerns about secrecy crystallize because under certain conditions the information protected by secrecy—that is, intelligence—is precisely what may be required to make informed judgments of necessity. In such cases secrecy has the potential to undermine democratic control over the activation of the priority principle. If this analysis is correct, it implies that the so-called special class of security matters cannot be compartmentalized and isolated from the purview of democratic theory.

A third objection to my argument could be that while I have correctly taken publicity to be a prerequisite for the proper functioning of democratic oversight, I have incorrectly assumed that publicity must amount to *actually* sharing information with the populace. This objection can take two forms. First, one could argue that the executive can invoke democratic oversight by comparing its policy against a standard that citizens could reasonably be expected to approve

[44]Compare with Jeremy Waldron, "Security and liberty: the image of balance," *Journal of Political Philosophy*, 11 (2003), 191–210 at p. 194.

if they were in fact allowed access to the relevant information. The policy could then presumably be thought to have been hypothetically legitimated, and this would be just as capable of preventing misrule as the actual publication of the policy. Indeed, we could even imagine devising a lie-detector test to double-check on the executive's belief that the policy in question would in fact pass an actual publicity test.[45] If the executive were to pass such a test we would at the very least know that any subsequent discovery of harm could be attributed to an "honest" error of judgment rather than a more purposeful one.

However, the problem with this arrangement, as Thompson has pointed out, is that the first premises of the relevant actors "are usually too contestable to be resolved through assumptions about human nature, shared beliefs and interests under hypothetical conditions."[46] In practice this means that an executive may simply not know what might be a reasonable standard to compare their own policy against. One likely outcome of this arrangement will be that an official, utterly convinced of the rightness or appropriateness of their decisions, will almost always consider their policy to meet the standard in question. This is the reason why, as David Luban argues, "the best way to make sure that officials formulate policies that could withstand publicity is by increasing the likelihood that policies will withstand publicity."[47]

The objection that the publicity required to allow democracy to combat abuse need not involve the actual publication of information can take a second form. This objection draws on the concept of generalization — the idea that "if a particular decision cannot be disclosed in advance, the general type of decision can be discussed publicly, its justifiability in various hypothetical circumstances considered, and guidelines for making it in those circumstances formulated."[48] Nonetheless, as Thompson has noted, the use of generalized policy as a means of restraining the executive faces serious limitations owing to the difficulty of determining in any objective fashion whether a specific case falls under the purview of a general restriction or approval. More importantly, the priority principle, as encapsulated by the phrase "necessity knows no law," specifies the disutility of placing broad restrictions on the use of executive power since any restriction may be dismissible under the pressure of necessity. Of course, the fundamental question is whether necessity provides a sufficient warrant to ignore an existing policy. In determining this, as Thompson points out, there can be "no substitute for the consideration of particulars."[49] But the problem in this case is that the executive's monopoly over secret intelligence provides it with a significant, and even overwhelming, advantage in determining whether the

[45]I owe this idea to a discussion with Frances Kamm.
[46]Thompson, *Political Ethics*, pp. 23–4.
[47]David Luban, "Publicity principle," *The Theory of Institutional Design*, ed. Robert E. Goodin (New York: Cambridge University Press, 1996), pp. 154–198 at p. 157.
[48]Thompson, *Political Ethics*, p. 26.
[49]*Ibid*., p. 29.

circumstances are ripe for such a dismissal of "normal" restraints. In the event, a generalized policy does not appear to provide any distinct advantage over the status quo.

This is also the reason why institutional contortions to produce an impartial or independent regulator of state secrecy—distinct from both executive and legislature—are problematic.[50] Any such regulator will have to make difficult decisions as to whether state secrecy has been utilized in a reasonable manner—a question that can prove intensely political since the applicability of general rules can depend on an interpretation of circumstances. In the event, the use of a regulator is question-begging since whoever makes the final decision—the executive or the regulator—can be seen as imposing a potentially self-interested view in secret. In other words, it is unclear that disinterestedness in national security decision-making can be obtained by creating an independent regulator to apply general law. This approach seems more appropriate in the domestic context where the availability of information allows the disinterestedness of the regulator to be critically evaluated rather than assumed.

A fourth objection to the foregoing arguments could be offered by participatory democrats who take the view that it is possible for citizens to formulate normative positions in policy debates despite the presence of secrecy. For example, in an important work on the democratic management of national security, Bruce Russett acknowledges that the institution of state secrecy can be used to insulate the partisan choices of elected officials. "Secrecy limits democracy both by restricting the material available to inform choices of policy, and by restricting the ability of the populace to inform itself on how well its policy preferences have been met," he writes.[51] Despite the pervasiveness of state secrecy in matters of national security, Russett still assumes that citizens can adopt informed positions on matters of policy. As he writes in a separate passage:

> the person in the street can rarely be depended upon to make a complex and reliable judgment about the merits of a particular weapons system. But information levels are quite adequate to set basic and stable principles to guide public policy. These principles are heavily concerned with normative judgments as well as with empirical facts, and they are not trivial.[52]

To see why this claim is problematic, consider in the first place the fact that short of occupying an absolute normative position such as non-violence, the formulation of a normative position requires information detailing the relevant tradeoffs. For example, imagine that a citizen has to formulate a policy on the

[50]On this see Laurence Lustgarten and Ian Leigh, *In From the Cold: National Security and Parliamentary Democracy* (New York: Oxford University Press, 1994), ch. 16, esp. pp. 458–66. More generally see Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (Oslo: Parliament of Norway, 2005).

[51]Bruce M. Russett, *Controlling the Sword: The Democratic Governance of National Security* (Cambridge: Harvard University Press, 1990), p. 148.

[52]*Ibid.*, p. 157.

justified use of military force in the event of a trade dispute. This citizen understands that the natural resource in question can either be obtained through negotiation or force. Let us presume that when this citizen constructs an index of preferred outcomes she displays willingness to trade off a smaller quantity of the resource in return for a peaceful resolution of the dispute. However, if little or none of the resource can be obtained through negotiations, she may be willing to authorize the use of force as a last resort. Given the shape of this index, it is arguably the case that the degree of force she is willing to consent to will vitally depend on her judgment of necessity.

However, we have already examined at least two reasons why we should be skeptical of the ability of citizens to articulate independent judgments of necessity. In the first instance, to the extent that the assertion of citizen competency is an *empirical* claim, the evidence is quite grim, as the aforementioned public opinion study by Page and Shapiro suggests. This empirical claim could be contested by some contemporary democrats who point to the distinctive historical character of post-industrial Western democracies. They could argue that the "information revolution" of the late twentieth century has reduced the epistemic gap between citizens and the executive, and thus made it possible for citizens to offer informed critiques of government policy.[53] However, even supposing this claim were true, the existence of state secrets implies that the executive may justify its actions by reference to suppressed evidence, which we cannot ask citizens to ignore. Except in cases where such suppressed evidence is treated with extreme skepticism—in which case the point of having a government is itself in question—the evidence must trump the independent judgment of citizens.

VI. CIRCUMVENTION: AN ANSWER HIDDEN IN PLAIN SIGHT

We have now completed two parts of our argument. The first part outlined the problem, which is that the conduct of democratic oversight is implicitly premised on a right to information—a premise challenged by the existence of state secrecy. I have argued that in order to solve this problem, democracies must provide citizens either with access to withheld information or the confidence that it has been withheld for legitimate purposes. In the second part of this paper, we examined the three most prominent solutions that democratic theory has offered to this problem—transparency, mediation and retrospection. I have argued that each of these mechanisms of information revelation renews rather than resolves the threat of abuse. This common outcome owes to a structural dilemma created by state secrecy. That is, once citizens accept the need to keep secrets, discretion

[53]For example, see Michael Clough, "Grass-roots policy-making: say good-bye to the 'wise men'," *Foreign Affairs*, 73 (1994), 2–7; Jessica T. Mathews, "Power shift," *Foreign Affairs*, 76 (1997), 50–54.

requires that they appoint an agency to determine what information must be kept secret. Subsequently, citizens will lack a reason to trust that this agency will not abuse its discretionary power.

If these arguments are correct, the implication is that the mechanisms forwarded by democratic theory may not provide adequate oversight. In the event, the danger arises that democracies will be left to enforce accountability retrospectively once the adverse consequences of decision-making have reached such a point as to render state secrecy an ineffective shield against scrutiny. But this claim may leave the reader unconvinced. He or she will recall, no doubt, recent Congressional hearings and public debate over the conduct of warrantless surveillance, the practice of secret rendition and appropriate interrogation methods in Guantanamo Bay. Surely these examples reveal the vitality of democratic oversight and thereby vindicate democratic theory—don't they?

I argue otherwise. As it turns out, none of these examples owe their existence to the use of transparency, mediation or retrospection. Rather the relevant information in each case was revealed on the front pages of newspapers such as *The Washington Post* or *The New York Times*. So what does this largely unnoticed fact tell us? It tells us that we need to evaluate the theoretical status of a hidden mechanism that allows democracies to become aware of the abuse of state secrecy in a *timely* fashion. I call this mechanism circumvention.[54] Circumvention is the mechanism that the news media use to discover evidence of wrongdoing. The term owes to the fact that the news media literally circumvent the executive's authority by relying on "leaks" from within the executive branch. Since circumvention does not rely on the good faith of the executive, it evades the structural dilemma that confounds transparency, mediation and retrospection. Therefore, from a theoretical perspective at least, circumvention is more likely to allow for the disclosure of incriminating information.

Nevertheless, this mechanism's brazenness also proves to be its greatest drawback. The difficulties begin once we acknowledge that democratic societies cannot condone the use of circumvention because this would, in effect, undermine the structure of government. In modern government, the executive branch is given command over the national security apparatus. This arrangement vests final judgment on matters of state secrecy with the head of the executive branch. Consequently, to attempt to legalize circumvention is to legalize insubordination within the executive branch.

If democratic societies cannot condone the use of circumvention, then an abusive executive will have the right to sanction any private party that attempts to circumvent its monopoly over state secrets. Consequently, we face a very real

[54]Recent examples of this practice include James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (New York: Free Press, 2006); Seymour M. Hersh, *Chain of Command: The Road From 9/11 to Abu Ghraib* (New York: Harper Collins, 2004); James Bamford, *A Pretext for War: 9/11, Iraq, and the Abuse of America's Intelligence Agencies* (New York: Doubleday, 2004).

concern as to the sustainability of this mechanism.[55] For reasons of brevity, I will not discuss here the practical devices that reporters can utilize to dampen the efficacy of the executive's threats—it suffices to say that the illegality of circumvention places a premium on the enterprising use of anonymous sources.

In addition to our practical concern for the sustainability of circumvention, we also need to evaluate whether it is prudent to rely on this mechanism. The use of anonymous sources by news reporters means that their assertions cannot be verified by members of the general public who lack access to the same sources. Consequently, any reliance on the use of circumvention raises a basic question of prudence—namely, if the process of circumvention is itself shrouded in secrecy then why should we trust circumventors any more than we trust public officials? As such, it would seem that the use of circumvention reiterates rather than eliminates our fear of abuse. For, if we depend on private individuals to oversee public officials, then logically we must now fear being misled by private individuals rather than public officials.[56]

Whether the cure we have discovered is worse than the disease must remain an open question. This is because our acceptance or rejection of circumvention will ultimately depend on an empirical assessment as to whether its benefit outweighs the cost. Circumvention would be beneficial when its use increases the probability of information revelation above what we can otherwise expect—without disproportionately increasing the probability of abuse. Such an outcome is not inconceivable if we are able to foster the kind of competitive media environment that would maximize the disclosure of information about *both* public officials and private individuals.

An example of such an outcome is provided by the case of Judith Miller, *The New York Times* journalist whose anonymously sourced reports on Iraq's weapons program played a significant role in making the case for war. When no such weapons could be found, Miller's reporting became the object of public criticism—a development spurred in no small measure by the reporting of *other* journalists who focused on her questionable use of anonymous sources.[57] This is not to argue that members of the media will always try, much less succeed, in holding each other accountable. But the example does provide an indication that a suitably competitive and diverse media environment *may* yield that rarest of things—a guardian of the public interest that can also guard itself.

[55]For a recent survey see Jack Nelson, "U.S. government secrecy and the current crackdown on leaks," Working Paper #2003-1, Joan Shorenstein Center on the Press, Politics and Public Policy, Harvard University, 2002. For a view from the opposite side see James B. Bruce, "Laws and leaks of classified intelligence: the consequences of permissive neglect," *Studies in Intelligence*, 47 (2003), 39–49.

[56]See, for example, Lustgarten and Leigh, *In From the Cold*, ch. 10, esp. pp. 260–9, 285–7; Pat M. Holt, *Secret Intelligence and Public Policy: A Dilemma of Democracy* (Washington, D.C.: CQ Press, 1995), ch. 8, esp. pp. 178–83; Francis E. Rourke, "The United States," *Government Secrecy in Democracies*, ed. Itzhak Galnoor (New York: Harper and Row, 1977), pp. 122–3.

[57]An especially important analysis of this episode is provided by Michael Massing, "Now they tell us," *The New York Review of Books*, 51 (2004), 43–9.

We have thus far argued that the sustainability and prudence of circumvention are in question. Finally, let us turn to consider whether circumvention is consonant with democratic principles—in other words, is it a legitimate form of oversight? The fundamental characteristic of circumvention is that it overrides the judgments of the executive authority. This act is not inherently illegitimate. As we have previously argued, secret oversight by the legislature and judiciary can be viewed as compatible with democratic theory—and this oversight process can result in the overriding of the judgment of the executive branch. But the key point is that these institutions are public, not private, and ultimately draw their legitimacy from the explicit authorization of the sovereign people. By contrast, the fact that news reporters are unelected means that circumvention must always operate as a private discretionary power whose exercise depends on the judgment of leakers and reporters. This outcome is arguably contrary to the intention of democracy, which is to directly or indirectly legitimate governance by public officials—and not to entrust decision-making on matters of national security to the judgment of private individuals.

We could respond to the charge that circumvention is illegitimate in a number of ways. One option is to argue that the reporter's unequal access to state secrets is akin to the differential ability of citizens to substantiate their otherwise equal rights. However, this claim is fallacious. Reporters do not come into possession of classified information by exercising a right more diligently than other citizens. This would be true if reporters obtained classified information through painstaking research in the same way that stock market firms utilize publicly available data to make profits. But this is not the case here. Rather, reporters depend on leaks, which grant them exclusive access to information otherwise denied to citizens.

A second response to the charge of illegitimacy would be to argue that the public's apparent forbearance of circumvention should be viewed as a tacit endorsement of the mechanism.[58] The difficulty here is that in the absence of explicit authorization of the mechanism, its legitimacy is being assumed rather than proven. More importantly, we ought to ask why, if circumvention is believed to receive implicit public approval, this has not translated into formal authorization. Presumably this is because formal authorization cannot be given without creating the aforementioned conundrum: to attempt to incorporate circumvention in the constitution produces a contradiction in the structure of public authority, with one part of the government authorized to leak what the other part has been authorized to classify.

As an answer to these difficulties, we might require that circumventors bring wrongdoing only to the attention of representatives or overseers (rather than the public at large by leaking to reporters). However, this requirement returns us to the dilemma associated with mediation—namely, what reason can citizens have

[58]I am grateful to Frank Michelman and Jane Mansbridge for a helpful discussion on this topic.

to believe that secret overseers will perform their duties faithfully? As evidence, consider, for instance, this exchange recorded in the report of the U.S. Senate Select Committee on Intelligence on the potential misuse of secret intelligence in the case of the Iraq War. The Committee asked Mr. Richard Kerr, a former member of the intelligence community, whether intelligence analysts felt they had faced political pressure to skew secret intelligence:

> *Mr. Kerr:* There's always people who are going to feel pressured in these situations and feel they were pushed upon.
> *Committee Interviewer:* That's what we've heard. We can't find any of them, though.
> *Mr. Kerr:* Maybe they are wiser than to come talk to you.[59]

A third response to the charge of illegitimacy could be to defend circumvention as an instance of moral action akin to civil disobedience. This approach would escape the conundrum discussed above—which arises when we attempt to determine the acceptability of circumvention at the level of constitutional principles—by allowing us to adopt a more supple account of legitimacy. Nonetheless, the cases appear dissimilar for at least two reasons. In the first place, the penalty for law-breaking in the context of civil disobedience is borne by the agent himself. However, by violating the directives of public officials authorized to manage national security, the circumventor puts the security of other citizens at risk. In doing so, the circumventor assumes a political authority he is not entitled to. Furthermore, civil disobedience is an act of law-breaking whose public nature allows for the study of motives and context. The secretive nature of circumvention, by contrast, undermines moral evaluation of the act and therefore challenges the ability of citizens to legitimize it retrospectively.

We could respond to these shortcomings by requiring individuals with access to evidence of abuse to act publicly—that is, as whistle-blowers rather than circumventors. This requirement solves the problem of legitimacy, but only at some substantial cost (or risk) to the concerned individual. Note that we cannot offer whistle-blowers in the national security context guaranteed legal protection without producing a contradiction in the constitution, because to do so would in effect simultaneously entrust the executive management with the authority to withhold information, and also entrust individual employees with the moral authority to release information at their own discretion. We therefore may have little choice but to fall back on the idea of evaluating instances of whistle-blowing on a case-by-case basis. However, this approach undermines the search for general normative standards and places a significant burden on judicial discretion. Moreover, while it is certainly possible that criminal prosecutions may fail if a judge or jury ascertains that extenuating circumstances permitted whistle-blowing in the public interest, these protections do not reach alternative means of retribution including

[59] *Prewar Intelligence Assessments on Iraq*, 484–485 (Additional views of Senator Dianne Feinstein).

administrative or social sanctions.[60] This means in all but the most fortunate of circumstances, we can expect whistle-blowing to be undertaken at some—likely significant—personal cost. We should therefore not be surprised if, knowing the paucity of the rewards, officials tend to prefer the anonymity offered by the press to the specter of punishment promised by a visible breach of regulations.[61] Hence, to solve the problem of legitimacy by requiring circumventors to act like whistle-blowers is to have democratic oversight rely on the private virtues—prudence and integrity in particular—of the individual actor.

VII. CONCLUSION: THE WAY AHEAD

This article began by raising the question of how democracies can combat the abuse of state secrecy by public officials. As we have seen, the three answers offered by democratic theory—transparency, mediation and retrospection—encounter significant difficulties. What democracies evidently rely on is a mechanism that is, so to speak, hidden in plain sight. This is the mechanism of circumvention, which is able to reveal incriminating information because it bypasses the executive's monopoly over state secrets. Nonetheless, to have the conduct of democratic oversight rely on the use of circumvention is problematic for at least three reasons.

The first challenge is that of sustainability since circumvention is vulnerable to legal sanction. Circumvention ensures its survival by "going underground"—that is, by utilizing anonymous sources. However, the use of anonymous sources creates another challenge—namely, what guarantee is there that circumventors will not abuse their privileged position? We responded to this concern by arguing that a regulatory framework that maximizes the disclosure of information about both public officials and circumventors themselves *may* minimize the fear of abuse.

However, even if we are able to find the use of circumvention sustainable and prudent, there is one issue we have not been able to resolve—that of legitimacy. The difficulty here is that the unelected nature of circumventors makes circumvention illegitimate. At the same time, we cannot legitimize circumvention since this would produce a contradiction in the structure of public authority with

[60]On this see Bok, *Secrets*, ch. 14; James C. Thomson, Jr, "Resigning from government and going public: the costs and benefits of speaking up and the unwritten vow of silence," *Secrecy and Foreign Policy*, ed. Thomas M. Franck and Edward Weisband (New York: Oxford University Press, 1974), pp. 385–398; Lustgarten and Leigh, *In From the Cold*, pp. 239–40; *Overclassification and Pseudo-classification*, (statement of Sibel Edmonds); Thomas Newcomb, "In from the cold: the Intelligence Community Whistleblower Protection Act," *Administrative Law Review*, 53 (2001), 1235–68; Janine M. Brookner, *Piercing the Veil of Secrecy: Litigation Against U.S. Intelligence* (Durham: Carolina Academic Press, 2003), pp. 48–51; Note, "The military and state secrets privilege: protection for the national security or immunity for the executive?," *Yale Law Journal*, 91 (1982), 570–589. I am grateful to Richard Tuck for an illuminating discussion on this topic.

[61]For a recent example, see David Johnston and Scott Shane, "C.I.A. dismisses a senior officer over data leaks," *The New York Times*, April 22, 2006.

one part of the government authorized to leak what the other part has been authorized to classify. Therefore, even if circumvention could be proven sustainable and prudent, it must always remain a private check on the abuse of public power. In other words, to have democratic oversight depend on circumvention is to place it at the discretion of private individuals. This, it seems, is the price democracies currently pay to combat the abuse of state secrecy by public officials.

What this means for democratic theory is the following. If we value democratic legitimacy then we must develop more credible institutions of public oversight that can eliminate the reliance of democracies on circumvention. Alternately, if we are unable or unwilling to develop credible institutions of public oversight, then we must utilize political concepts and norms appropriate to a world where the abuse of public power is checked by private means. This latter pursuit would be founded on the idea that the inability of democracy to combat the abuse of state secrecy in a legitimate manner makes it necessary for democracies to take recourse to private institutions and private virtues. We have examined one of these private institutions here—the fourth estate. But there are others that also need to be accounted for, including think-tanks, universities and organizations in civil society.[62] Furthermore, as the efficacy of these private institutions ultimately depends on their access to state secrets, we must also account for the pivotal role played by the private virtue of individuals and factions within the state apparatus whose prudence or integrity leads them to either abstain from the abuse of state secrecy or to engage in circumvention (or even whistle-blowing) when they witness it.[63]

Note however that these private institutions and personal virtues cannot be said to derive from democratic theory—their foundation rests in the broader field of political theory, especially republican theory. This is *not* to argue that democratic theory is irrelevant in combating the abuse of state secrecy. The private institutions and virtues cited above would not always be efficacious if we lacked the legitimate venues and mechanisms that democratic theory provides for the exercise of accountability. Rather, the point is best put this way: democratic mechanisms are necessary but not sufficient to combat the abuse of state secrecy because their efficacy depends on access to secret information. The sufficient condition is provided by incorporating the role of private institutions and personal virtues, which provide democratic mechanisms and institutions with access to the relevant information. If this assessment is correct, it provides an incentive to bring democratic and republican theory closer together and to understand how they might better complement each other in our efforts to combat the abuse of state secrecy.

[62]Nancy L. Rosenblum, "Constitutional reason of state: the fear factor," in Austin Sarat, ed. *Dissent in Dangerous Times* (Ann Arbor: University of Michigan Press, 2004), pp. 146–75 at pp. 162–3.

[63]For example, see Daniel Ellsberg, "The next war," *Harper's Magazine*, October 19, 2006.