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Who Holds the Balance? A Missing Detail in the Debate over Balancing Security and Liberty*

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The question of how best to balance the pursuit of security with the protection of civil liberties has been heavily debated in recent years. This paper challenges the conclusions reached in that debate. It argues that although theorists have identified important subsidiary causes of imbalance, they do not address the structural dilemma posed by state secrecy, which creates an information asymmetry that allows officials to manipulate safeguards meant to secure an appropriate balance. Since this asymmetry cannot be easily resolved, imbalance remains a perennial danger that often can be addressed only retrospectively. Unfortunately, retrospection too can be stymied by the executive's control over state secrets, and it can also be undermined by partisanship, even when the relevant information becomes available. With this in mind, the paper identifies mechanisms to limit the abuse of state secrecy and indicates institutional features that may temper the adverse effects of partisanship.
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Introduction

The security measures enacted in response to the events of 9/11 have ignited debate on how best to balance the pursuit of security with the protection of liberties, not least because there are many examples—past and present—of a failure to strike an appropriate balance. Often this debate has been characterized by the belief that the process of balancing tends to lead to the pursuit of security at an unduly or undesirably high cost in terms of liberties, an unsatisfactory outcome that requires remedy. By identifying a structural detail that has been overlooked by the literature on balancing security and liberty, I seek to contribute to the debate and to explain why Western democracies are perennially in danger of striking the wrong balance at the cost of traditional liberties.

To make this argument, I begin with contemporary explanations for why the process of balancing produces unsatisfactory outcomes from the perspective of liberty. Scholars and jurists have identified psychological, cultural, and institutional factors in modern Western societies, as well as more intrinsic flaws in the way liberal theory approaches the subject of civil liberties. I then argue that, while the process of balancing does seem to be flawed for the various reasons outlined by contemporary theorists, their analyses do not go far enough. In particular, they do not address the structural dilemma created by the institution of state secrecy, which creates an information asymmetry that allows state agents to override safeguards meant to secure an appropriate balance. I conclude on a pessimistic note by arguing that none of the available accounts offers a satisfactory response to the problem that state secrecy creates for balancing security and liberty. The appropriate balance between security and liberty, I maintain, may be discovered only retrospectively, once fuller information becomes publicly available. But accomplishing even this might be harder than it seems. Retrospection can be stymied by the executive's refusal to declassify relevant state secrets, and it can be undermined by partisanship even when the relevant information becomes available. With this in mind, I identify mechanisms that can limit the abuse of the power of declassification and indicate possible institutional reforms to temper the adverse effects of partisanship.

Imbalance: Contemporary Responses

Contemporary theorists address the problem of imbalance by seeking to identify why, or under what circumstances, the pursuit of security can lead to unwarranted intrusions upon liberty. One compelling explanation has been put forward by Cass R. Sunstein, who takes the view that "in the midst of external threats, public overreactions are predictable" due to two potential errors in the

way citizens respond to potential threats.[1] These errors owe to what Sunstein terms "the availability heuristic" and "probability neglect" in decision-making. In the former case, "citizens may think that a risk is far more serious than it actually is," because they can easily visualize or imagine potential harms; in the latter case, citizens tend to imagine a worst-case scenario without calculating the probability or likelihood of its occurrence.[2] When combined, these sources of error in decision-making create demand for laws that suppress liberty more than is in fact necessary. In response to these difficulties, Sunstein offers two proposals. One is to develop institutional safeguards that promote more calculated decision-making, primarily via the systematic use of cost–benefit analysis that takes into account the true salience and probability of threats. The other is to recommend that courts, instead of involving themselves in arbitrating between the concerns of security and liberty, should adopt institutional rules that would help contain the danger of "excessive fear." These rules include requiring the legislature to formally approve liberty-infringing measures, exercising skepticism with regard to restrictions imposed on specific groups, and utilizing a rule-utilitarian approach that affirms the intrinsic value of liberties as protection against an overbearing state.

Jeremy Waldron offers a second explanation for why we tend to witness an imbalance between security and liberty. Starting with the assumption that "much of the popular pressure for changes in liberties can be explained entirely at the level of symbolism," he emphasizes the desire of citizens to see something "striking and unusual" in response to a threat as the impetus for unwarranted restrictions on liberty.[3] As an antidote, Waldron proposes we modify how we think about the subject of balancing. The common "additive" approach, he argues, assumes that the concerns of security can be directly weighed against those of liberty, whereas the very purpose of rights is in fact to signal values or commitments that cannot be readily traded away. He recognizes, of course, that in appropriate circumstances liberties may still be justifiably curtailed for the sake of security, but emphasizes the need to utilize specific normative criteria about which kinds of restrictions are permissible under what circumstances.

By focusing on judicial failures to restrain violations of liberty, Justice William Brennan provides a third explanation for why security crises lead to imbalance. He argues that the evidence suggests that a "peacetime jurisprudence of civil liberties leaves the nation without a tradition of, or detailed theoretical basis for, sustaining civil liberties against particularized security concerns."[4] This is

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1. Cass R. Sunstein, "Fear and Liberty," *Social Research* 71 (Winter 2004): 1.
2. Sunstein, "Fear and Liberty," 1.
3. Jeremy Waldron, "Security and Liberty: The Image of Balance," *Journal of Political Philosophy* 11 (June 2003): 191–210.
4. William J. Brennan, "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises," address to the Law School of Hebrew University, Jerusalem, Israel, December 22, 1987, 1.

because, whenever a crisis does appear, judges tend to behave deferentially. They believe that the need for speedy decision-making, combined with their limited experience and expertise on matters of national security, makes it appropriate to defer to the executive branch's leadership. The resulting imbalances have not been corrected by the courts due to the "episodic" nature of security crises faced by the American republic, which prevents the emergence of judicial theory and practice capable of offering a measured response to crises. "Prolonged and sustained exposure to the asserted security claims," he argues, "may be the only way in which a country can gain both the discipline necessary to examine the asserted security risk critically and the expertise necessary to distinguish the bona fide from the bogus."[5] In particular, the "slow accumulation of precedents" combined with procedures that put such judicial expertise into action can provide a plausible mechanism to prevent jurisprudence from "perpetually" providing guidance in retrospect.[6]

Bruce Ackerman offers another important account of the cause for imbalance. As he understands it, challenges to national security are political challenges, which require a visible response intended not only to provide security but also to "reassure" citizens.[7] He expresses concern, however, that citizens' demand for reassurance provides political leaders with the opportunity to produce an ever-increasing number of repressive laws. The challenge, therefore, is to develop a doctrine that "allows short-term emergency measures but draws the line on permanent restrictions," such that violations of traditional liberties are allowed—but no longer than is absolutely necessary.[8] In order to secure such an outcome, Ackerman offers a new constitutional framework comprised of political, economic, and juridical checks on the deployment of a pre-specified emergency power:

Politically, the emergency constitution requires increasingly large majorities to continue the extraordinary regime over extended periods of time. Economically, it requires compensation for innocent people caught in the dragnet. Legally, it requires a rigorous respect for decency so long as the traditional protections of the criminal law have been suspended.[9] He expects this emergency constitution to perform more reliably than the existing "common law cycle" of crisis, violation, and repentance, because, unlike in the latter, violations of liberty are explicitly addressed within the legal system, which contains procedural safeguards to prevent the kind of excesses that might result when violations are committed and precedents are created on an *ad hoc* basis.

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5. Brennan, "Quest," 7.
6. Brennan, "Quest," 8.
7. Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113 (March 2004): 1029–92.
8. Ackerman, "Emergency Constitution," 1029.
9. Ackerman, "Emergency Constitution," 1076.

For Richard Tuck, imbalance is effectively an issue of political psychology: a rights-based approach to political life (such as the view that rights are "trumps") is predicated on providing the rights-bearer with "certainty" that he or she will always retain sovereignty over specific domains of decision-making.[10] However, this risk-averse psychology creates serious difficulty when the right to life or security comes into conflict with other rights. In this case, even though a civil code admits the nominal equality of a whole range of civil liberties, the state, when faced with a conflict between them, will prioritize the right to security, which is the primary motive for undertaking the social contract. As Tuck puts it, "It is hard to see how to avoid giving priority to some [rights] over others; and in particular, it is hard to see how to avoid giving priority over the ancient right to life. Once we accept a hierarchy, then the more fundamental will trump the less fundamental, and the subversion of civil liberties in the interests of natural rights will [be possible]."[11] Tuck's response to this conundrum is to provide civil liberties with a utilitarian (rather than a rights-based) foundation. Contrary to the "maximin" psychological stance that motivates the defense of rights, utilitarianism's focus on maximizing utility allows agents to "gamble," by which he means utilitarianism entitles agents to weigh the benefits of specific liberty-infringing policies against other vital interests such as maintaining liberty. A utilitarian approach, in other words, allows for security to be treated as only one among a number of fundamental interests. Consequently, it becomes conceivable that citizens can profess to value a certain way of life more highly than their own persons. It is for this reason, he argues, that "a theory of natural rights is more likely to lead to a weakening of the civil liberties embedded in the legal system of a society," whereas "utilitarian modes of thinking, surprisingly enough, can often strengthen them."[12]

The Missing Detail: State Secrecy

Having sampled explanations for the problem of imbalance, I next seek to challenge these explanations and offer a rival diagnosis. If persuasive, this diagnosis ought to trouble contemporary theorists, because the factor it identifies as causing an imbalance—the institution of state secrecy—is one that threatens the utility of the reforms they propose.

To understand the role that state secrecy can play in the process of balancing security and liberty, consider the following scenario. The government of Peacestan informs its citizens that it suspects that a neighboring state, Warstan,

10. Richard Tuck, "The Dangers of Natural Rights," *Harvard Journal of Law and Policy* 20 (Summer 1997): 683–94.

11. Tuck, "Dangers," 693.

12. Tuck, "Dangers," 684.

intends to invade Peacestan in the near future. The only way to combat this threat, the government asserts, is to use curfews. The citizens of Peacestan, who are often known to say that those who would sacrifice a little liberty for a little security deserve neither liberty nor security, are most unhappy at the imposition of this restriction on their freedom of movement, yet they recognize that the prospect of a defeat by Warstan does not bode well for their liberties. Public debate ensues. It is determined that in order to gauge accurately the necessity of acceding to their government's orders, citizens need to know (a) the actual likelihood or probability of attack and damage; and (b) the necessity of curtailing freedom of movement as a means to deter such an attack. The government, however, responds that publicly disclosing information on either (a) or (b) would compromise intelligence sources and security plans and allow the government of Warstan to devise undetectable plans the next time around. Under the circumstances, the officials assert, citizens are best advised to defer to the government's judgment. Meanwhile, news reports appear, citing intelligence reports that the Warstan military has been placing orders on the international market for industrial strength chemicals and gas masks. A general panic slowly starts to set in, and voices calling for preventive security measures become increasingly louder. In the face of such a severe threat, the citizens of Peacestan begin to silence their doubts. Better safe than sorry becomes the new national motto . . . .

The purpose of outlining this hypothetical scenario is to direct attention to the manner in which information can allow officials in the executive branch to manipulate or influence the willingness of citizens and their representatives to accede to intrusive state action.[13] Of course, the hypothetical scenario is simply that—a construct of the imagination. To convince readers that state secrecy and the secret intelligence it protects are as vital as the hypothetical claims, two arguments are required. It needs to be shown that intelligence or secret information is important to decision-making, and that this intelligence cannot be easily accessed because of intrinsic features of the institution of state secrecy. The former of these concerns does not require extensive comment, because there already is broad consensus on the notion that strategic information plays a pivotal role in national security decision-making.[14] It is the latter concern that deserves attention. For even when authors acknowledge the importance of secret intelligence to informed decision-making, they tend to assume that transparency can be readily obtained. However, if the arguments below are persuasive, the executive branch's control over state intelligence is not so easily countered by the

13. Also see Gabriel A. Almond, "Public Opinion and National Security," *Public Opinion Quarterly* 20 (Summer 1956): 371–78.

14. Ackerman, "Emergency Constitution," 1050–53.

pursuit of transparency—and this difficulty may well explain why we repeatedly find an imbalance in the trade-off between security and liberty.

The Gatekeeper Problem

It is a truism that a political community cannot fulfill its ends if it does not protect itself from serious external harm. However, the pursuit of preservation may impose demands that undermine the pursuit of ultimate ends. This is typically the setting in which the pursuit of liberty and security come into conflict (as seen in the case of Peacestan, for example). In such a setting, a democratic political community in particular will be forced to make a trade-off between pursuing security and its ultimate ends, such as the protection of civil liberties. To be sovereign or self-governing then—in a deep sense—implies being able to make this trade-off autonomously or independently. To the extent that we trade off liberties for security, the making of trade-offs will depend upon a *first-order* judgment of necessity, that is, an assessment of the threat posed to preservation by the state of the world. Thus, for example, in deciding whether to impose a curfew or not, the government of Peacestan makes a first-order judgment of necessity as to the threat from Warstan and the most appropriate means to counter it. Since the pursuit of liberty depends upon the preservation of society, the pursuit of preservation will supersede that of liberty in proportion to judgment of necessity. In other words, the more serious the perceived threat from Warstan, the more likely that Peacestan will be willing to impinge on the liberties of its citizens if required. This dynamic reveals that first-order judgments of necessity have the ability to influence or even determine the making of trade-offs. Peacestan's response, for example, would be very different if it knew that Warstan were collecting party masks rather than gas masks.

Now, where preservation requires secrecy, the factual basis of such a first-order judgment will need to be kept secret. However, the pursuit of secrecy can *itself* conflict with the pursuit of ultimate ends, which, in the case of a democratic political community, would be the fundamental norm of publicity, hence necessitating the making of a second round of trade-offs. This second round of trade-offs will depend upon a *second-order* judgment of necessity, that is, an assessment of the threat to preservation caused by the disclosure of the factual basis of a first-order judgment of necessity. To continue with the earlier example, it is only when faced with the normative requirement to reveal the factual basis of its first-order judgment of necessity about Warstan's intentions that the government of Peacestan has to make a second-order judgment of necessity as to the harm likely to be caused by revealing how it came to know what it knows about Warstan's actions (i.e. the large-scale purchase of gas masks).

It is clearly self-defeating to make such second-order judgments in a manner that allows unintended disclosure of secret intelligence and information about sources and methods of intelligence gathering. Some persons or institutions must therefore play the role of gatekeeper in order to determine what can and cannot be made public. Modern democracies have traditionally delegated the business of making second-order judgments of necessity to the executive. Note here that the executive does *not* have a monopoly on making first-order judgments of necessity; it only has a monopoly over the making of second-order judgments. In other words, the executive does not have a monopoly over deciding how much liberty ought to be sacrificed for how much security; it only has a monopoly over determining whether potentially significant information required to make a first-order judgment will be made available to the public and its representatives. Any citizen of Peacestan can offer an opinion on Warstan's intentions and the required sacrifices. However, such opinions may or may not be well informed. Whether it will be well informed or not depends on whether the government of Peacestan utilizes its second-order judgment of necessity to make the relevant intelligence publicly available. Where it does not, the executive branch of the government of Peacestan would have *privileged* access to the intelligence protected by state secrecy. To the extent that the intelligence kept secret is required to make a first-order judgment, the executive's privileged access gives it a monopoly over the formation of *informed* first-order judgments. This is the setting in which the danger of manipulation arises—when, for example, the citizens of Peacestan do not know if, when, or how Warstan is planning an attack as their own government claims it is.[15]

Not surprisingly, this is the point at which the literature on balancing emphasizes the importance of openness and accountability. Let us follow this claim through to its logical conclusion. Assume that we want the executive to share secret information—either with citizens or at least with their representatives—so that it can be ascertained whether the first- and/or second-order judgments supplied by the executive were self-interested (in the sense of intentionally stirring public fear for partisan reasons). In order to ascertain culpability, citizens or representatives will require access to the secret information underlying the first-order judgment of necessity supplied by the executive. Yet, access to this secret information depends upon the original second-order judgment being rescinded, that is, declassification. In the event, declassification may only proceed if the executive branch judges that the cost of public disclosure is less than the benefit obtained by allowing wider public scrutiny. But if public scrutiny is pursued precisely because the executive's judgments are suspected of

15. For an intelligent analysis of this risk, see Note, "Keeping Secrets: Congress, the Courts, and National Security Information," *Harvard Law Review* 103 (February 1990): 906–25.

being self-interested, then it is paradoxical to trust it to make the above trade-off disinterestedly. It will decide what information to share based not on the likely harm to national security, but on the likely harm to its public standing and electoral prospects. In short, what appears to be lacking in the standard analysis of the causes for imbalance is an appreciation of the conundrum produced by the structure of the institution of state secrecy. The structural position of the executive makes it pivotal not only to the formation and distribution of informed first-order judgments by virtue of its monopoly over second-order judgments, but the same monopoly also allows it to preempt public scrutiny of the decision-making process. Thus the monopoly exercised by the executive creates an environment in which it can selectively publicize bits of information in order to generate public support in favor of policies it prefers.

Reconsidering the Contemporary Responses to Imbalance

In light of the above analysis, let us now return to the contemporary accounts of the causes of imbalance. Sunstein's account, we have seen, focuses on the role of psychological dynamics and creates institutional safeguards to prevent excessive fear. However, if the argument presented above is credible, state secrecy not only makes it possible for officials to produce fear but also to undermine these institutional safeguards. For example, the use of cost–benefit analysis, Sunstein's favored device to prevent excessive fear, depends significantly on the purity of the assumptions and probabilities fed into the mechanism. This purity is typically guaranteed by the public announcement of the assumptions and probabilities, which ensures that their foundation, estimation, or calculation is open to verification, review, and accountability. Consider, however, recent efforts to evaluate whether the former Iraqi dictator, Saddam Hussein, was stockpiling nuclear weapons. In this instance, the use of cost–benefit analysis would have produced vastly dissimilar outcomes depending on the quality of the intelligence inputs as to the probability of dual-use materials actually being procured, the likelihood of their procurement being intended for weapons-manufacturing purposes, the probability of weapons being successfully engineered, the likely efficacy of the command and control system, Saddam Hussein's willingness to use the weapons, and so on. However, when these intelligence inputs are closely guarded secrets, what reason do we have to believe the cost–benefit analysis cannot be manipulated to produce decisions favorable to the political elites in control of the information? "Sensible regulators manage fear through education and information," Sunstein writes.[16] This is

16. Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (New York: Cambridge University Press, 2005), 225.

correct, but it assumes, rather than proves, that the regulators, that is, officials in the executive branch, have the motive and inclination to use this power in a non-partisan fashion.

Next, consider the impact of state secrecy on Brennan's proposals. He argues that "a jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact."[17] Historical example, as Brennan admits, shows that the courts have tended to lack such intimate familiarity, as evidenced best by the deferential attitudes expressed in *Korematsu v. United States* (1944).[18] But if, structurally speaking, the executive branch continues to be in control of the state secrecy system, how can courts ever be expected to develop the appropriate competence? Consider, for instance, the fact that, despite having been authorized to conduct *de novo* reviews of classification decisions, the courts in the United States have consistently adopted a deferential attitude on executive assessment of the harm caused by disclosure, "affirming the government's decision to withhold the requested information in nearly every case."[19] The courts themselves have defended this deferential attitude by pointing to the limits of their competence, observing for example in *Bowers v. United States Department of Justice* (1991) that ascertaining "what fact or bit of information may compromise national security is best left to the intelligence experts."[20] Moreover, even if the courts wade into examining secret materials *in camera* and *ex parte* (as they must in order to preserve state secrecy), it is worth asking what remains of the adversarial system of justice, the protections it is meant to offer defendants, and the legitimacy it confers on the enforcement of justice.

There is no better example of this difficulty than the widely reported shortcomings of the so-called FISA court. The court, named after the Federal Intelligence Surveillance Act (1978) that established it, is responsible solely for overseeing domestic surveillance operations. Yet, until recently, the court has apparently denied only one of the more than 10,000 applications it has received since its creation.[21] One could respond to this unappealing empirical record by arguing that it points to the need for further institutional reform—for example, by disallowing the Chief Justice to single-handedly choose members of the FISA

17. Brennan, "Quest," 8.

18. Eric A. Posner and Adrian Vermeule, "Emergencies and Democratic Failure," *Virginia Law Review* 92 (October 2006): 1091–146.

19. 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 (January 1992): 67.

20. *Bowers v. United States Department of Justice*, 930 F.2d 350, 357 (4th Cir. 1991). For other examples, see United States Department of Justice, *Freedom of Information Act Guide 2004* (Washington, DC: Department of Justice, 2004).

21. "A Green Light to Spy," *The New York Times*, November 19, 2002.

court, which in Chief Justice Rehnquist's tenure led to all but one of the court's members being those nominated to the bench by President Ronald Reagan.[22] But efforts to dampen the adverse effects of partisanship cannot detract from the structural oddity of having a court operate in secret with only one side granted access to the relevant information. It is true that this setting provides an opportunity to identify false positives, as proponents of judicial oversight have asserted. However, it also implies that the courts may concur with incorrect assessments, without public knowledge of the same. What is especially dangerous about this regulatory setting then, as Richard Posner has argued in the separate but related context of having special oversight courts issue "torture warrants," is that the defendant is assumed to have received "due process" and is therefore rightfully being deprived of his liberty.[23]

Of the contemporary accounts considered in the first section, Ackerman's is the only one that pays serious attention to the challenge posed by state secrecy. Asserting that "the legislature cannot act effectively if it is at the mercy of the Executive for information," Ackerman argues that "members of opposition political parties should be guaranteed a majority of seats on oversight committees" in the legislature and that "the emergency constitution should require the Executive to provide the committees with complete and immediate access to all documents."[24] This "puts the government on notice that it cannot keep secrets from key members of the opposition and serves . . . as an important check on the abuse of power."[25] The intention is to design "a permeable sieve, not an ironclad wall of secrecy."[26] This is a creative proposal, and Ackerman deserves credit for addressing the problem of information control in the first place.

Unfortunately, it is not clear that the solution he provides is a plausible one. At least three objections could be raised against it. First, it simply assumes that committee members will have the expertise and political capital available to enter into bruising contests over intelligence matters with the executive during times of crisis. The empirical evidence, though, shows that deference to the executive branch increases rather than reduces during times of crisis.[27] But, even if oversight committees are stocked with experienced and unflappable opposition members, the bare fact of executive branch control over the security services raises the question of what incentive officials have to divulge the appropriate information. These officials are certainly reliant on the support of the oversight

22. "Justice in the Shadows," *The New York Times*, September 12, 2002.

23. Richard A. Posner, *Catastrophe: Risk and Response* (New York: Oxford University Press, 2004), 239–41.

24. Ackerman, "Emergency Constitution," 1051.

25. Ackerman, "Emergency Constitution," 1052.

26. Ackerman, "Emergency Constitution," 1052.

27. For example, see Virginia A. Chanley, "Trust in Government in the Aftermath of 9/11: Determinants and Consequences," *Political Psychology* 23 (September 2002): 469–83.

committee's members, but why would they have any compulsions against misleading them in order to obtain that support, especially as the heads of the intelligence and security agencies will be appointed by, and likely owe loyalty to, the chief executive?[28] An obvious response to this threat would be to transform the structure of state secrecy by providing opposition parties with direct control over the heads of the security services. But then why has control over the national security apparatus traditionally been vested in the care of the executive branch? The answer, according to the *Federalist Papers*, which provides the original rationale behind existing arrangements, is that the "energetic" character of the executive branch makes it better suited to undertake such management.[29] If this assumption is correct, stripping the executive branch of its control over the national security apparatus presumptively undermines the ability of the government to provide the reassurance that Ackerman wants it to provide. Reassurance, as per his definition, requires visible and decisive action to demonstrate that any security breach is temporary and not likely to recur.[30] The supermajoritarian escalator, which kicks in "two or three months" after the emergency is declared, is expected to constrain the potential abuse of reassurance by requiring the approval of increasingly large proportions of the opposition. However, this proposed constitutional structure works on the assumption that the correct response to an emergency is an apparent, objective, and non-political course of action, upon which all major political parties can agree. Given what we know about basic unresolved differences in opinion on a variety of moral and political topics, though, this may well prove to be a chimera. One of the following outcomes is more likely: either members of the opposition will defer to the executive (which undermines the emergency constitution's intention to combat the abuse of state secrecy) or they will engage in partisan bickering (which undermines the emergency constitution's intention to allow for decisive action). In the event, the reassuring decisiveness for which Ackerman calls may in fact require that the executive *purposely* deny sensitive information to opposition parties that have a different idea of how to resolve the crisis. But then the difficulty remains that such purposeful use of secrecy may be used to serve partisan ends beyond the scope of the crisis.

Finally, consider Tuck's critique of the role played by the conservative psychology that underpins rights theory. Contrary to Tuck's position, one could

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28. For an overview of the difficulties that can arise, see Barry M. Blechman and W. Philip Ellis, *The Politics of National Security: Congress and U.S. Defense Policy* (New York: Oxford University Press, 1990): 151; Loch K. Johnson, *Secret Agencies: U.S. Intelligence in a Hostile World* (New Haven: Yale University Press, 1996): 136.

29. Publius, *Federalist No. 64*, 314 and Publius, *Federalist No. 70*, 342 in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Terence Ball (New York: Cambridge University Press, 2003).

30. Ackerman, "Emergency Constitution," 1037.

argue that it is not clear that a utilitarian approach would be any more capable of defending civil liberties than a rights-based approach under conditions of state secrecy. A utilitarian's calculations would have to rely on the information provided by executive branch officials, who would be in a position to manipulate the outcome (since a utility function suggests there would always exist a point at which the individual's perception of the cost of disobeying official advice would be higher than the benefits of acting upon his other preferences). For example, imagine that officials inform citizens that the temperature outside their homes is one hundred and twenty degrees Fahrenheit and that they are putting their lives at risk by venturing outdoors. Under these conditions, we can imagine that at least some risk-loving utilitarians would still be willing to venture outdoors in order to satiate preferences for a right to free movement. But what would happen if officials were to inform citizens that the outside temperate is two hundred and fifty degrees Fahrenheit and that the cost of venturing outdoors would be near certain death? Now, unless the utilitarians in question are absolutists who would always prefer exercising their liberties even at the cost of extinguishing their lives, we can see that the executive's control over information would allow it to strongly influence decisions over whether to venture outdoors. This dynamic suggests that it may be unfair to view the psychology underpinning rights theory as conservative. Rights confer autonomy on subjects who are then capable, within certain bounds, of exercising those rights in a number of risky ways and of autonomously prioritizing rights when they come into conflict. Euthanasia, abortion, cigarette smoking, and hazardous sports activities highlight instances where individuals make trade-offs autonomously, using estimates of probabilities drawn from publicly available information. By contrast, the reason why neither a utilitarian nor a rights-based approach is able to produce reliably balanced outcomes in the security–liberty context is because, in both cases, citizens are forced to rely on officials for an estimation of the probabilities—information that citizens cannot obtain or verify independently and that determines their willingness to act in particular ways, including approving of liberty-infringing legislation.

Some Objections Addressed

I want to consider next potential objections to my thesis that the pivotal role of state secrecy creates a political environment that can produce an incorrect balance between providing security and protecting civil liberties. One important objection could be that the problem that state secrecy creates for the proposed balancing mechanisms could be minimized if attention were directed toward reforming the institution of state secrecy to reduce opportunities for manipulation.

My response to this objection proceeds on two fronts. In the first instance, the limited scope of this paper should be noted. I attempt to bring to the attention of theorists the impact that the institution of state secrecy, as currently configured, has on efforts to improve the balance being struck between security and liberty. The question of how the institution of state secrecy can be prevented from becoming a tool for manipulation is a logically derivative, but separate, question. The limited claim being offered here is that continuing executive branch control over the institution of state secrecy leaves the proposed balancing mechanisms vulnerable to manipulation by public officials acting on partisan motives.

Having narrowed the scope of the claims being made here, it is nevertheless possible to offer some preliminary remarks as to why the institutional reform of state secrecy may not eliminate the threat of manipulation and/or abuse.[31] The difficulty with this approach, which recommends the creation of oversight committees or independent regulators, is that it replicates rather than eliminates the fear of abuse. To see why, note that, as discussed previously, the nature of state secrecy makes it necessary for some institution to play the role of gatekeeper, which raises the obvious question of how such a gatekeeper can be trusted when it alone determines what information will be shared with citizens and auditors. This outcome does not owe to a failure of theoretical imagination or a lack of skill in designing new institutions. Rather, the basic structural dilemma highlighted here can never be overcome, because the nature of state secrecy requires the presence of a gatekeeper to separate or sort that which can be made public from that which cannot. Once this is understood, it will be readily comprehended that we can never know whether the gatekeeper is performing appropriately: our ability to audit it relies by definition on its cooperation, which in turn makes for a highly unsatisfactory regulatory setting. Consequently, the threat of manipulation and abuse always remains a possibility in the context of balancing security and liberty. This explains, for instance, why deliberate institutional reform by European states has still proven unable to prevent recent abuses of state secrecy, despite careful attention being paid to the development of appropriate checks and balances.[32] In other words, the limited theoretical claim being made here is that, since we cannot eliminate the discretionary element associated with the control of state secrecy, we cannot eliminate the fear of abuse or manipulation, even when the final authority on questions of state secrecy is a committee in the legislature.

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31. This section draws on Rahul Sagar, "On Combating the Abuse of State Secrecy," *Journal of Political Philosophy* 15 (December 2007): 404–27.

32. 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, June 12, 2006. Also see Kim Lane Scheppele, "We Are All Post-9/11 Now," *Fordham Law Review* 75 (November 2006): 622–23.

This is *not* to argue that we ought to be indifferent to the institutional context in which state secrecy operates; *nor* is it to deny that some institutional settings might minimize the abuse of state secrecy more than others. Therefore, a comparative empirical analysis of the costs and benefits associated with differing oversight and regulatory mechanisms could still prove helpful. For instance, there may be reason to believe that an independent and competitive media environment provides one of the most important defenses against the abuse of state secrecy.[33] Note however that neither this, nor any other institutional setting, can eliminate the gatekeeping function. *Somebody*—if not an official in the executive branch, then an editor or reporter or legislator—gets to decide what is made public and what is kept secret. The irrepressibility of this discretionary power implies that episodes of imbalance could always arise, which in turn invites us to direct attention toward the development of mechanisms and institutions that promote the retrospective enforcement of accountability in such instances.

A second objection to the argument outlined here could draw on the idea that the legitimacy of state secrecy comes into question when one misconstrues security as nothing more than freedom from external threat. In fact, the objective of security should incorporate the desire to continue pursuing the ultimate ends espoused by the constitutional order, which may warrant challenging the prioritization of responding to external threats. While this reminder to balance security against other ends is unobjectionable, it accomplishes little in this instance because it evades the underlying conundrum: how are we to know in a given context what the appropriate balance between the pursuit of security and defense of democratic norms ought to be? By redefining the term security to include the protection of democratic norms, we could attempt to implicitly incorporate a balance between security and liberty. But this redefinition does not eliminate the possibility that, in the event of external threats, citizens or their representatives may still have to consider responses that conflict with broader democratic norms. This is especially likely in the face of the most serious external threats to security, because the existence of the state is a prerequisite to the pursuit of democratic norms. In the event, it appears that the people's representatives are faced with contradictory obligations since either course of action—upholding democratic norms while allowing the external threat to persist or responding to the threat at some cost to democratic norms—arguably undermines the revised conception of security. The way out of this contradiction is to recognize that reconceptualizing terminology cannot evade the fact that the pursuit of security and the defense of democratic norms may come into conflict,

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33. Sagar, "On Combating the Abuse of State Secrecy," 421–26; more generally see Pat M. Holt, *Secret Intelligence and Public Policy: A Dilemma of Democracy* (Washington, DC: CQ Press, 1995), chapter 8.

thereby necessitating the need to strike a balance. If this is correct, we must give due attention to the cause of imbalance in this context.

A third objection to my claim about the difficulty state secrecy poses for balancing could be that it approaches the problem in the wrong way. It is a mistake to focus on institutional factors when the fundamental problem is normative. The real difficulty, in other words, is not information asymmetries, but cultivating in citizens a mindset that militates against "trading away" liberties. This strong civil libertarian position has many virtues, but as Waldron has pointed out, no rights theory treats rights as absolute in this regard, thereby making it necessary to consider the cause of imbalance.[34] We may want to define the conditions for balancing very strictly, but a failure to study the institutional and theoretical context in which balancing occurs potentially leaves liberties worse off, as and when the manipulation of information allows those conditions to be deemed met. The question of where to draw the line on balancing is a separate one that is not considered here. I restrict myself to pointing out that, as long as we recognize the need for balancing, solutions to prevent imbalance need to account for the challenge created by state secrecy.

What is most unsatisfactory is that the thrust of theorizing on the subject of balance has focused on establishing the normative guidelines to the exclusion of a consideration of the institutional preconditions for the enforcement of those guidelines. A typical example here is Michael Ignatieff's study of the challenges associated with balancing security and liberty. He accepts on the one hand that political leaders must be willing to dissemble and use secrecy in extraordinary times, while on the other he asserts that ethically challenging decisions ought to be justified publicly.[35] He resolves the apparent discrepancy by subsequently arguing that "if executives must withhold information from a legislature in public, they can be obliged to disclose it in private session or at a later date."[36] But of course Ignatieff's criterion is of questionable utility if only the executive knows what information has been kept secret and is also solely responsible for determining what to share, and when and with whom.

A fourth objection to the account offered here is that the ability of executive branch officials to manipulate public opinion depends critically on the level of trust in the government.[37] Where trust is low, the estimation of probabilities offered by officials will be greeted skeptically and may have little impact. Therefore, given the challenge posed by state secrecy, a suitable response to the

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34. Waldron, "Security and Liberty," 198.

35. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004), 15, 19.

36. Ignatieff, *Lesser Evil*, 21.

37. Darren W. Davis and Brian D. Silver, "Civil Liberties Versus Security: Public Opinion in the Context of the Terrorist Attacks on America," *American Journal of Political Science* 48 (January 2004): 28–46.

problem of imbalance might be to cultivate distrust in the actions and pronouncements of officials. The difficulty with this recommendation, however, is that while distrust of the government can be useful and important, the stability of the political order requires that this distrust be based on reasonable grounds. In particular, as state secrecy is authorized on the assumption that there is information that ought to be kept secret, distrusting the executive's first order judgment of necessity because the supporting information has been kept secret is contradictory, since an essential part of the government's function is to determine what information can be made publicly available. So a now familiar conundrum appears: if distrust is not to descend into anti-statism, it must be based on evidence; however, the required evidence is precisely the kind of information officials are most likely to improperly classify as secret. In response to this conundrum, one could argue that, since the probabilities of catastrophic events can perhaps never be well estimated, we ought to treat all probability estimations offered by the government and based on undisclosed secret intelligence with a general sense of skepticism. Such skepticism may be useful in particular situations where, for example, prior examples of bad faith give pause. However, if generalized, this norm poses the danger of asking us to "fly blind," that is, to ignore even poorly evidenced estimations offered by officials while lacking credible ones of our own.

A fifth objection to my thesis could be that it mischaracterizes the problem of imbalance. The actual kind of imbalance, critics might contend, is the tendency of contemporary democracies to guard civil liberties overzealously, frequently at the cost of national security.[38] This is an empirical dispute that cannot be resolved here, and its resolution is in any case complicated by the fact that the covert nature of national security operations makes it difficult to account for instances where an excessive concern for civil liberties caused disproportionate harm to national security. However, even if it turns out that state secrecy in fact contributes to an imbalance that actually harms national security, this conclusion would not detract from the argument presented here, namely, that the institution of state secrecy allows officials in the executive branch the opportunity to unfairly obtain public support for policies that may have an unduly adverse impact on civil liberties.

Retrospection: The Consolation of History

The theorists discussed in this paper intend to prevent unwarranted infringements on liberty in times of crisis. For the reasons I have outlined, the measures they have proposed are vulnerable to manipulation. This suggests we

38. Posner and Vermeule, "Emergencies and Democratic Failure," 1111–14.

will likely continue to encounter the "common law cycle" of crisis, imbalance, and repentance.[39] This conclusion will be embraced by scholars who take the view that clarity about the appropriate balance between security and liberty is usually reached only retrospectively, because information constraints, inadvertent biases, and cognitive failures mean that often *no one* may know, *ex ante*, what the best trade-off between security and liberty is, or because officials usually respond to majoritarian pressure.[40] However, as I explain here, the problem is that, under conditions of state secrecy, even the operation of the "common law cycle" cannot be taken for granted: the presence of state secrecy can scuttle efforts at discovering precisely when it was the case that no one genuinely knew, *ex ante*, that violations of civil liberties were uncalled for.

Retrospection is the *ex post* analysis of decision-making in order to detect wrongdoing. The definition of "wrongdoing" here depends on the conception of justice being enforced. Under what circumstances a lie or an act of negligence should count as a violation of political justice, and whether the corresponding penalty ought to be a fine of *X* amount or a prison sentence of *Y* duration, is not considered here.[41] Rather, assuming questions of desert will be addressed by a theory of justice, I limit myself to studying the theoretical obstacles to the conduct of retrospection—irrespective of the particular conception of political justice being enforced.

A fundamental theoretical challenge before the pursuit of retrospection concerns access to information. Retrospection requires information in order to ascertain culpability, because determining whether a choice is prudent or not requires knowledge of the circumstances in which the choice was made. In instances where the relevant information is classified, which will presumably be the norm in the national security context, declassification is necessary. However, as declassification cannot proceed without an examination of the potential harm caused by publication, an abusive executive can utilize its position as gatekeeper to thwart the declassification of potentially incriminating information. There may of course be instances where declassification is genuinely harmful, but the (now familiar) conundrum is that ordinary citizens will be hard pressed to distinguish between genuine and spurious claims of harm from declassification.

This conundrum does not condemn retrospection to failure. It does, however, imply that we cannot ensure systematic public retrospection. If pursued,

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39. Ackerman, "Emergency Constitution," 1042; Posner and Vermeule, "Emergencies and Democratic Failure," 1137; Posner, *Catastrophe*, 239–41; Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?" *Yale Law Journal* 112 (February 2003): 1011–34.

40. For instance, see Richard A. Posner, "Security Versus Civil Liberties," *Atlantic Monthly* (December 2001).

41. For instance, see Ackerman, "Emergency Constitution," 1062–66.

systematic retrospection must occur *within* the confines of the state, at least until the executive deems the publication of evidence and conclusions non-harmful. Democratic theorists usually welcome such internal oversight, since the division of powers and responsibilities is thought to provide auditors with sufficient incentive to undertake an adversarial or impartial inspection. However, the presence of state secrecy challenges this assumption. A committee that exercises oversight in secret will typically resolve differences and act collectively through voting. Consequently, when a majority of the members belong to the same party as the executive, there is reason to fear collusive behavior. Conversely, when the majority belongs to a rival party, there is reason to fear that they will victimize officials for decisions that are morally or politically embarrassing but necessary for the sake of national security. This predicament reveals that the utility of adversarial oversight is limited in the absence of publicity: we can only know if overseers are behaving in an appropriate manner if we can witness their actions.[42]

A parallel difficulty arises if we attempt to utilize an independent regulator distinct from both executive and legislative branches.[43] Such a regulator will have to decide whether imbalances are "reasonable"—a question that can prove intensely political since the applicability of norms will depend on an interpretation of circumstances. Consequently, the use of a regulator is question begging, since whoever makes the final decision on wrongdoing can be seen as imposing a potentially self-interested view in secret. The use of an independent regulator seems more appropriate where the availability of information allows the disinterestedness of the regulator *itself* to be critically evaluated rather than simply assumed.

Neither of the above discussions implies that internal systematic retrospection is unimportant. Indeed, it may serve its purposes admirably. The true difficulty is that under conditions of state secrecy citizens will not know if and when this is true, since they will not be privy to the process. One could address this difficulty by requiring that the deliberations and decisions of the auditors be themselves open to investigation and sanction in subsequent time periods. But this solution suffers from an inherent constraint: while it provides aggrieved parties with an additional source of retrospective compensation, it cannot ensure that the partisanship of particular auditors will be detected prior to the original act of retrospection.

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42. 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 Cong. (Washington, DC: GPO, 2004).

43. Laurence Lustgarten and Ian Leigh, *In From the Cold: National Security and Parliamentary Democracy* (New York: Oxford University Press, 1994), 458–66.

Fortunately, retrospection may not always have to be conducted in secret. Two mechanisms can aid the revelation of incriminating information despite the executive's best efforts to withhold it. The first is the use of term limits. A change of personnel may help uncover past abuses of state secrecy, but there is no guarantee that succeeding administrations will be willing to disclose the relevant information. They could choose to selectively withhold or disclose information in an effort to further their own partisan agenda. There may also be a strong incentive to "let sleeping dogs lie" in order to protect the credibility of state institutions or even to avoid establishing a precedent of declassifying controversial material so as to forestall becoming the victim of such a policy upon demitting office.

Whistleblowing by officials within the executive branch serves as another mechanism of information revelation.[44] The great advantage of this mechanism is that it allows for timely retrospection; its great disadvantage is that it is an unlawful act. We cannot legalize whistleblowing in the national security domain as this undermines the executive's role as gatekeeper.[45] Hence, an abusive executive will always have the power to punish whistleblowers. Whistleblowers can evade this problem by leaking information anonymously. But this practice raises questions of prudence and legitimacy: the former because officials may leak information selectively, in order to unfairly bolster support for their views; the latter because democracies intend to entrust decision-making on vital matters, including national security, to individuals willing to defend their decisions in public. Hence, the only way whistleblowing can be made compatible with democracy is for the whistleblowers to act in public view so that their actions can be pardoned and legitimated retrospectively. Nonetheless, the potential hazards associated with such conscientious disobedience, including the likelihood of suffering political retribution even if pardoned by a court of law, explain why leaking tends to be the preferred mode of conduct in the national security context.[46] This means that the retrospection may often prove scarcer or riskier than would ordinarily be the case: the former when it would depend on the willingness of whistleblowers to act virtuously and publicly, the latter when it would depend on the unlawful and potentially illegitimate acts of leakers.

Thus far this section has examined how the executive's power over declassification can be used to prevent retrospection, and the mechanisms by

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44. Cass R. Sunstein, "Government Control of Information," *California Law Review* 74 (May 1986): 898–904; Sagar, "On Combating the Abuse of State Secrecy," 421–26.

45. For a contemporary example, see Thomas Newcomb, "In From the Cold: The Intelligence Community Whistleblower Protection Act," *Administrative Law Review* 53 (September 2001): 1242–45.

46. Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage Books, 1989), 210–30.

which the abuse of this power may be limited. Unfortunately, ensuring access to information does not promise that retrospection will proceed smoothly. Conflicting perceptions, which can be witnessed in the widespread political and moral disagreements that surround us, introduce an element of contestation. There are a number of opportunities for perceptions to clash. For instance, except in the most egregious cases, it may prove difficult to identify objective criteria for retrospectively judging particular decisions. As imbalances tend to be provoked by extraordinary circumstances, the applicability of any general norms in use will have to be ascertained on a case-by-case basis. Furthermore, discerning whether the office bearer intended to deviate from normative guidelines can invite disagreement. In the domain of national security, where interactions tend to be strategic, it is highly likely that the web of causation spun out by various actors will seriously complicate the attribution of responsibility. Similarly, given the sheer volume of information available to modern states, it is possible for decision-makers to be accused either of having neglected information that subsequently proves important or of selectively choosing pieces of information that exaggerate dangers that do not come to pass. In such cases, there is the danger that acts of retrospection will mischaracterize decisions as deliberate acts of omission or commission when they in fact reflect the use of bounded rationality under conditions of uncertainty.

When interpretive contests arise on the issues identified above, the most appropriate response would be to investigate cases individually in order to ascertain what, if any, perverse incentives decision-makers might have had to generate imbalances. The fairness of these retrospective exercises will rely heavily on the disinterestedness of the auditors. Indeed, the threat of victimization could make decision-makers in subsequent time periods risk-averse, thereby potentially creating new imbalances that endanger national security. In the case of judicial retrospection, the disinterestedness of judges, who would decide upon criminal and civil complaints, can be assumed. However, the pivotal importance of perception to the attribution of responsibility will inevitably draw political persuasion and legal judgments closer together. Remember, it is likely that the facts themselves will not be in dispute in such cases. Rather, questions will address whether imbalances were justified. For example, assuming that the use of torture has been established, judges will have to determine whether it is permitted. If they utilize only procedural criteria, such as whether the legal authorization exists or whether the procedures to make an exception were followed, they can be expected to limit their scrutiny only to those who chose to brazenly disregard the formalities. By contrast, if they utilize substantive standards of judgment, they will be compelled to invoke their own views as to whether the end to which executive power has been put is compatible with the intent and purpose of the law. This means that the political

views of any given bench (and of those that appoint them) could have a significant effect on the outcome.[47] For instance, judges who share the biases of the general population could prove slow to compensate harms that affect minorities, until the passage of time or subsequent events transform perceptions.

Retrospection can also be conducted in a more explicitly political or public setting. The outcome of such an exercise can range from tacit expressions of public disapproval to more explicit public expressions of regret. The advantage of this form of retrospection is that it can directly address the political and normative justifiability of past instances of imbalance without being constrained by existing laws and precedents. Its disadvantage, though, is that it is especially vulnerable to corporate and institutional failures. For instance, entrusting retrospection to elected representatives, who may well have an ongoing relationship with the executive, makes collusion or victimization likely, and also threatens to privilege the viewpoint of majorities to the detriment of minorities. Institutions in civil society are no less likely to display partisan allegiances. In the absence of a formal mechanism to adjudicate between the competing interpretations offered by rival non-governmental organizations, retrospection may end up producing either a draw or a victory for whichever side can bring greater financial and political resources to bear on the issue.

Finally, the people, despite their distance from past events, may also be unable to offer disinterested judgments. There is the danger that, where the adverse consequences of an imbalance affect only a minority, electoral politics oriented toward the concerns of the majority may ignore questions of harm and reparations. Moreover, in contemporary democracies, the will of the people is typically formed and expressed via elections. The appropriateness of elections as a means of retrospection, on the other hand, is questionable.[48] As elections are also a means of selection, the electorate may often be forced to choose between promises about the future and limiting itself to evaluating past actions. A desire to support other aspects of a decision-maker's program also makes elections blunt instruments that cannot be used to express a textured disapproval of an executive's previous decisions. Further, in an electoral setting, as José Maravall notes, the formation of the will of the people encounters the "noise" associated with a campaign setting where "incumbents will use strategies of concealment of political responsibility and will

47. See, for instance, Janine M. Brookner, *Piercing the Veil of Secrecy: Litigation Against U.S. Intelligence* (Durham, NC: Carolina Academic Press, 2003).

48. Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), 175–83.

mobilize 'partisan patriotism' and discipline to get protection under the party's mantle."[49]

One response to these constraints would be to accept the inevitability of partisanship and hope that the conflict allows citizens to access a variety of perspectives, which they would use to form their own opinions. The danger here is that citizens will either voluntarily or involuntarily access only a partial set of views or that they will fail to act as astute and impartial observers of past events and personalities.

An alternative would be to work toward developing an institution that separates the conduct of retrospection from the vagaries of interest-based politics. Two institutional features would arguably serve the cause of disinterested evaluation. First, an institution dedicated to political retrospection ought to utilize a method of selection that minimizes the probability of collusion or partisanship. For instance, members could be chosen randomly in a manner similar to the selection of jurors. No method of selection is without potential hazards of course: randomly selected auditors may have little willingness to act as such and will likely share the biases of the general population. In the event, it would be reasonable to limit the pool of potential jurors to a more qualified subset of the population. Second, the institution's mandate should be restricted to issuing statements of praise and blame; it should not have the power to sanction. It should not directly challenge political and legal decisions, but instead work to rouse the public's conscience. Attaching legal and material consequences to its judgments risks endangering its disinterestedness. The absence of power will arguably temper the appeal of partisanship, since members will know that their judgments will have lesser immediate impact on their factional interest.

Configured along these lines, an institution dedicated to political retrospection would be in a position to serve a distinct moral and political purpose: to offer solace to those adversely affected by imbalances created in the pursuit of national security and to spur repentance where possible. We ought to avoid the temptation to evaluate the utility of this institution on the latter count alone. While it ought to encourage repentance, we should not underestimate the importance of its role as a record of conscience. To offer victims merely the consolation of acknowledgment may seem a paltry response. However, given the unavailability of systematic retrospection as well as the contestable nature of contingent acts of retrospection, this seemingly meager compensation offers not only the chance to learn from past mistakes but also an admission of wrongdoing, which keeps open the possibility of more substantive compensation in the future.

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49. José M. Maravall, "Accountability and Manipulation," in *Democracy, Accountability and Representation*, ed. Adam Przeworski, Susan C. Stokes, and Bernard Manin (New York: Cambridge University Press, 1999), 159.