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Deep Secrecy

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Stanford Law Review

DEEP SECRECY

David E. Pozen

ARTICLES

DEEP SECRECY

David E. Pozen*

This Article offers a new way of thinking and talking about government secrecy. In the vast literature on the topic, little attention has been paid to the structure of government secrets, as distinct from their substance or function. Yet these secrets differ systematically depending on how many people know of their existence, what sorts of people know, how much they know, and how soon they know. When a small group of similarly situated officials conceals from outsiders the fact that it is concealing something, the result is a deep secret. When members of the general public understand they are being denied particular items of information, the result is a shallow secret. Every act of state secrecy can be located on a continuum ranging between these two poles.

Attending to the depth of state secrets, the Article shows, can make a variety of conceptual and practical contributions to the debate on their usage. The deep/shallow distinction provides a vocabulary and an analytic framework with which to describe, assess, and compare secrets, without having to judge what they conceal. It sheds light on how secrecy is employed and experienced, which types are likely to do the most damage, and where to focus reform efforts. And it gives more rigorous content to criticisms of Bush administration practices. Elaborating these claims, the Article also mines new constitutional territory—providing an original account of the role of state secrecy generally, as well as deep secrecy specifically, in our constitutional order.

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INTRODUCTION

[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.

— Donald Rumsfeld¹

In October 2001, the Attorney General reversed the Justice Department's presumption in favor of disclosure for Freedom of Information Act (FOIA) record requests.² In March 2003, the President issued an executive order permitting the reclassification of previously declassified documents.³ In fiscal year 2008, executive branch agencies reported 23,421,098 combined classification activities, breaking a record set the previous year.⁴ Throughout the presidency of George W. Bush, his administration consistently withheld information from members of Congress and from investigative bodies,⁵ subjected FOIA users to long delays,⁶ and claimed the authority to refuse to comply with statutes and treaties in cryptic signing statements and in nonpublic opinions by the Office of Legal Counsel.⁷ Which, if any, of these acts of secrecy posed the greatest threat to democratic values and to good government? Which offended the Constitution? How would one even go about comparing and evaluating these secrets?

In this Article, I argue that Donald Rumsfeld's taxonomy holds an underappreciated answer to these questions. The statement quoted in the epigraph has already drawn a great deal of attention, but not for this reason. Almost from the moment of its utterance, commentators have ridiculed Rumsfeld for his kabbalistic logic and professorial cant.⁸ The British Plain English Campaign called it “the

1. Donald H. Rumsfeld, Sec'y of Def., Department of Defense News Briefing (Feb. 12, 2002), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636>.

2. Memorandum from John Ashcroft, Att'y Gen. of the United States, to the Heads of All Fed. Dep'ts and Agencies (Oct. 12, 2001), *available at* <http://www.usdoj.gov/archive/oip/011012.htm>.

3. Exec. Order No. 13,292, § 1.7(c), 3 C.F.R. 196, 200 (2004).

4. INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2008, at 7 (2009), *available at* <http://www.archives.gov/isoo/reports/2008-annual-report.pdf>.

5. *See* MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., SECRECY IN THE BUSH ADMINISTRATION 68-81 (2004) [hereinafter WAXMAN REPORT].

6. *See id.* at 26-28.

7. *See* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1562-63, 1591-99 (2007).

8. *See, e.g.*, HART SEELY, *The Unknown*, in *PIECES OF INTELLIGENCE: THE EXISTENTIAL POETRY OF DONALD H. RUMSFELD* 2 (2003) (setting Rumsfeld's remark to satirical verse); “*Foot in Mouth*” *Prize for Rumsfeld*, CNN.COM, Dec. 1, 2003, <http://www.cnn.com/2003/WORLD/europe/12/01/rumsfeld.english.reut/> (reporting Rumsfeld's receipt of an international booby prize for the “the most baffling comment by a public figure”).

most nonsensical remark made by a public figure” in memory.⁹ Yet while Rumsfeld’s statement was entirely, almost sublimely, unresponsive to the question he was asked—“is there any evidence to indicate that Iraq has attempted to or is willing to supply terrorists with weapons of mass destruction?”—it contained a valid insight.¹⁰ There *are* things we know we know, things we know we do not know, and things we do not know we do not know. And, in fact, the secrets in the latter category tend to be the most difficult ones for a free society. They are deep secrets.

Their obscurity in the literature is surprising. The proper scope of government secrecy is a classic question in legal and political theory. In recent years, the question has taken on special urgency. New technologies and new adversaries have increased the potential costs of disclosing government-controlled information,¹¹ at the same time as the rise of online media, changing social norms, and a worldwide “transparency lobby” have increased the demand for it.¹² The Bush administration aggressively challenged the gains of the open-government movement and linked these efforts to an extreme vision of executive power. The use of state secrets appears both more pervasive in practice and more discredited in the public mind than at any point in history. Across many parts of the globe, there has never been such popular and academic interest in separating out legitimate secrecy from illegitimate secrecy.

In the sprawling literature on this topic, a significant aspect has been understudied: what we might call the structure of government secrets, as distinct from their function, their subject matter, or the competing interests in disclosure versus nondisclosure. Sometimes, outside parties are aware that a secret exists even though they are ignorant of its content. They know that Agency X is withholding photographs of detainee abuse, though they do not know what exactly the photographs show.¹³ The photographs are a *shallow secret*. Other times, outside parties are unaware of a secret’s existence; they are in the dark about the fact that they are being kept in the dark. They have no clue that Agency X possesses detainee-related evidence of any kind. The photographs are a *deep secret*. There is

9. *Rum Remark Wins Rumsfeld an Award*, BBC NEWS, Dec. 2, 2003, <http://news.bbc.co.uk/2/hi/americas/3254852.stm>.

10. Rumsfeld, *supra* note 1. Rumsfeld’s remark is somewhat ambiguous as to its subject. Although the context suggests it was directed to the challenges of collecting intelligence, the reference to “free countries” suggests he may have been invoking the challenges of utilizing secrecy as well. Whatever his intent, my project here is not to vindicate Rumsfeld but to apply his taxonomy to state secrets.

11. See David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 650-52 (2005).

12. See ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 107-24 (2006) (describing the rise of the international right-to-know movement, facilitated by a “transparency lobby” that advocates and utilizes public disclosure laws); Thomas Blanton, *The World’s Right to Know*, FOREIGN POL’Y, July-Aug. 2002, at 50 (same).

13. This is the situation presented by the leading government secrecy controversy of the moment. See *infra* note 170 and accompanying text.

no bright line dividing deep from shallow secrets, but rather a continuum running from one extreme to the other. “Deep” and “shallow” are crude, but useful, signifiers for the positioning of a secret across multiple dimensions that together reflect the nature and degree of its concealment.

This Article aims to show that attending to the depth of state secrets can make a variety of conceptual and practical contributions to the debate on their usage. Sociologists and political scientists have distinguished between deep and shallow secrets for more than two decades now, and a number of legal scholars have applied these ideas to topics in private law.¹⁴ Yet, hardly anyone has considered the distinction in detail, and even fewer have applied it to secrets of state. When we move from the private to the public sphere, the categories of “deep” and “shallow” become more problematic, and many borderline cases arise. The notion of depth nonetheless enriches our ability to describe, assess, and compare state secrets, both in the abstract and, once specific secrets have emerged, on a case-by-case basis. It helps us to think and speak more clearly about things we do not know.

Part I reviews the literature on deep and shallow secrecy. The scholarship is provocative and insightful, but there is not much of it. Part II identifies problems with the existing understandings of these concepts, and develops a new, more rigorous definition for secrets that are kept in a government context.

Part III moves from the positive to the normative and considers a wide range of arguments for and against deep state secrecy. While many substantial arguments can be made in defense of governments’ keeping secrets, it turns out to be much harder to justify their use of deep secrets. Depth can be instrumentally valuable for the secret-keeper, but it is liable to generate perverse consequences, to exacerbate the costs of shallow secrecy, and to create a host of distinct harms. Rumsfeld was right: it is the unknown unknowns we have most reason to fear.

To reach this conclusion, Part III explores the role of state secrecy generally (as well as deep secrecy specifically) in utilitarian, liberal democratic, and constitutional theory. Some of this discussion synthesizes arguments many others have made; a good deal of it is new to the literature. My hope is that this Part can provide a useful framework for a debate that has often concentrated on discrete secrecy practices or discrete normative concerns to the exclusion of all others. The analysis of secrecy and the Constitution, in particular, marks an original contribution. Outside of a few areas—executive privilege, the First Amendment and the “right to know,” access to judicial and administrative proceedings—very little has been written about secrecy’s place in our constitutional order. The Article aims to spark conversation on this subject as well.

Part IV offers a series of practical solutions aimed at minimizing deep secrets in government while preserving adequate space for necessary shallow secrets. The Bush administration serves as a foil. One of the Article’s key lessons is that the space between full public disclosure and maximal opacity is much larger than is

14. See *infra* Part I.A.

commonly realized, and there are many ways to reduce the depth of state secrets without spilling their contents to the wider world. Even reforms that are purely internal to the executive branch can go a long way toward moderating depth, and thereby toward enhancing the deliberative quality and democratic legitimacy of our government's massive secrecy system.

I. WHAT IS DEEP SECRECY? PREVIOUS DEFINITIONS

The distinction between deep and shallow secrets has a distinguished but abbreviated pedigree in American legal theory. Beginning with Kim Lane Scheppele, scholars have applied the distinction in a variety of private law contexts, such as contracts and torts. Very rarely has anyone sought to refine Scheppele's framework—no one has challenged her original definitions—or to consider its relationship to public law. The concepts of deep and shallow secrecy are almost completely absent from the literature on government transparency.

Subpart A summarizes this line of scholarship. Although the phrase “deep secrecy” has several popular idiomatic meanings, as explained in Subpart B, it is the formal definition articulated by Scheppele that I will be considering and developing in this Article.

A. Academic Understandings

In a few pages from her 1988 book *Legal Secrets: Equality and Efficiency in the Common Law*, sociologist Kim Lane Scheppele introduced the concept of a deep secret.¹⁵ Secrets, according to Scheppele, are items of information that one party, the “secret-keeper,” intentionally conceals from another party, the “target.”¹⁶ Sometimes the target of a secret knows or suspects that information is being concealed from her, even though she does not know the content of the information. She has learned that last week her boss held a closed-door meeting to discuss her performance, but she has not learned what was said there. What transpired at the meeting is a shallow secret. Other times, the target of a secret is not aware, and has no reason to be aware, that something is being kept from her. She has no idea that any meeting was held last week. What transpired is a deep secret. Scheppele associates these terms with metaphors of light. Whereas the deep secret's target is “completely in the dark, never imagining that relevant information might be had,”¹⁷ the shallow secret's target “has at least some shadowy sense” that she is lacking relevant information.¹⁸

In the realm of interpersonal relations, the depth of a secret is not just a

15. KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 21-22, 75-79, 84-85 (1988).

16. *Id.* at 12-16.

17. *Id.* at 21.

18. *Id.* at 76.

practical or epistemological issue; it is also a moral issue. It changes, as well as reflects, the relative position of the keeper and the target and the duties they owe each other. Because the target of a deep secret has no idea she is being denied relevant information, her ignorance allows her “to make stronger justifications against the secret-keeper[]” and, if she has a plausible entitlement to the information, “a more forceful case that the secret amounts to fraud.”¹⁹ Deep secrets render their targets especially vulnerable by depriving them of information needed to make rational decisions. No amount of vigilance or cleverness would allow the target of a perfectly deep secret to defend herself against the keeper, prospectively, or to avenge herself, retrospectively. Shallow secrets, by contrast, have the important property that they may “be responsive to [the] effort [to learn their contents], in the sense that rational individuals can make decisions to search or not search for information.”²⁰ Scheppele concludes that deep secrets are presumptively unjust and that our laws should reflect this, forbidding them as a default rule and requiring their disclosure in the absence of compelling countervailing reasons.²¹

The depth of a secret may also be suggestive of the keeper’s intentions. Relative to shallow secret-keepers, deep secret-keepers will generally be more concerned to conceal from the target the fact that they wish to conceal something. The duplicity entailed by such double concealment may indicate a greater degree of embarrassment about the hidden information or a lower regard for the target’s interests. Deep secrets, Scheppele implies, will more often involve bad faith. Not always, however: consider a surprise birthday party that the host fears will be ruined if the honoree gets wind she is planning something.²² Scheppele’s distinction has a partial moral motivation. There is no accounting for the possibility of benevolent or paternalistic deep secrecy.

Although she touches at points on questions of “structurally unequal access to knowledge,”²³ Scheppele is mainly concerned with how secrets affect transactional relationships,²⁴ and the paradigm case for her contractarian theory of disclosure law is the contract itself. All of her examples of deep versus shallow secrecy involve disputes between private parties.²⁵ Following Scheppele, most scholars who have considered deep secrecy have done so in the context of contract law, commercial law, or insider trading.²⁶ Scheppele never considered whether and in

19. *Id.* at 21.

20. *Id.* at 76.

21. *Id.* at 84-85, 104. Scheppele does not elaborate how she would translate this principle into enforceable legal rules.

22. I thank Jim Wilson for suggesting this example.

23. *See, e.g.*, SCHEPPELE, *supra* note 15, at 120-21.

24. *See* Gary T. Marx, *The Law’s Secrets*, 88 MICH. L. REV. 1614, 1615 (1990) (book review) (“Scheppele restricts her attention to legal secrets involving contending parties whose cases come before a judge.”).

25. SCHEPPELE, *supra* note 15, at 21, 75-79, 84-85.

26. *See, e.g.*, THOMAS J. MICELI, *ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION* 100 (1997); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 109-11 (1993); Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in*

what ways the deep/shallow distinction might apply to secrets of state.

Three subsequent authors (two of them as coauthors) have made this move. In an influential book from 1996, political scientists Amy Gutmann and Dennis Thompson briefly explored the role of deep state secrets in democratic theory.²⁷ Gutmann and Thompson identify a secret as deep when its existence “is hidden from citizens,” and a secret as shallow “when citizens know that a piece of information is secret but do not know what the information is.”²⁸ Echoing Scheppele, they take as fundamental the feature of shallow secrets that “[c]itizens at least have the opportunity to challenge the keepers” and demand disclosure, whereas with deep secrets, citizens “are entirely at the mercy of the secret-keepers.”²⁹ Deep secrets present special obstacles to public scrutiny both of the underlying information and of related information that consequently will be less likely to emerge.³⁰ This constrains the possibilities for accountability, discourse, and political participation. Just as deep secrets present a contractarian problem for Scheppele because they impair the ability of the individual to exercise meaningful choice, undermining values such as fairness and autonomy, they present a democratic problem for Gutmann and Thompson because they impair the ability of the citizenry to exercise meaningful oversight, undermining values such as deliberation and consent.

Legal scholar Heidi Kitrosser likewise suggests in a recent article that deep secrecy raises special problems for the American polity, not only for democratic reasons but also for constitutional ones.³¹ Based on a variety of textual, historical, and structural arguments, Kitrosser concludes that the Constitution is best read to disfavor executive privilege claims asserted against Congress.³² She therefore believes such secrecy must be minimized, and this entails that “the apparatus for information control between the branches should be such as to funnel information, to the extent possible, into a state of minimal to very shallow secrecy and away from a state of minimal to very deep secrecy.”³³ Kitrosser never provides a theory of depth—she uses Scheppele’s terms only in passing, “as shorthand”³⁴—and her focus never strays far from the debate on executive privilege. But she makes an important contribution in linking the deep/shallow distinction to interbranch relations and to constitutional values. I shall build on both of these moves in Part III

Contract Law and Elsewhere, 92 VA. L. REV. 565, 571-72 (2006); Paula J. Dalley, *From Horse Trading to Insider Trading: The Historical Antecedents of the Insider Trading Debate*, 39 WM. & MARY L. REV. 1289, 1340-41 (1998).

27. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 121-23 (1996).

28. *Id.* at 121.

29. *Id.*

30. *Id.* at 123.

31. Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 514-15, 542-43 (2007).

32. *Id.* at 510-27.

33. *Id.* at 515.

34. *Id.* at 514.

of this Article.

B. Popular Understandings

Before proceeding to my own elaboration of deep secrecy, it is worth noting that most commentators who employ the term have something else in mind. Typically, the phrase is used to mean either an inordinate amount of secrecy or a secret that the keeper is particularly keen to conceal. Both of these meanings may correlate closely with the depth of a secret, as Scheppele uses the term, and also with each other. But they are distinct.

A secret may be shallow yet nevertheless reflect a very high degree of opacity, relative to popular interest or expectations. The *New York Times* recently argued that the practice of closing legislative conference committees to the public gives lobbyists too much influence, and that the majority's "credibility problem lies in the deep secrecy . . . that shroud[s] the conference committees."³⁵ That the *Times* could identify this problem in the first place shows the committees are not in fact shrouded in deep secrecy, in the Schepelian sense. The work of the committees must be a shallow secret, or else the *Times*'s editorial staff would not even think to complain about it.

Similarly, a secret may be guarded with special zeal or cherished in a special way by its keeper, yet nevertheless be shallow. The commonplace that someone's most intimate personal details constitute their deepest secrets³⁶ is inapposite in Schepelian terms. It is whether or not the target knows about the secret, not how much the keeper cares about it, that matters. There is no necessary relationship between the depth of a secret and the value the keeper attaches to it, the mechanisms she uses to conceal it, or the propriety and purpose of her actions.

II. WHAT IS DEEP STATE SECRECY?

The existing definitions of deep and shallow secrecy are unsatisfying in three main respects.

First, even though Scheppele and her followers imply a strict dichotomy between secrets that are deep and secrets that are shallow, no bright line separates these categories.³⁷ At one extreme, we can imagine a target who has no clue, and

35. Editorial, *Secrecy as a Spoil of Victory*, N.Y. TIMES, Jan. 25, 2006, at A20. For similar uses of "deep secrecy" to mean inordinate or extreme secrecy, in a generalized sense, see Jim Dwyer, *Out of Sight, Till Now, and Giving Away Billions*, N.Y. TIMES, Sept. 26, 2007, at B1; Nat Hentoff, *Fresh Start in '09? The Dark Bush Legacy on Secrecy*, WASH. TIMES, Feb. 25, 2008, at A19; Jonathan Schell, *American Tragedy*, NATION, Apr. 7, 2003, available at <http://www.thenation.com/doc/20030407/schell>.

36. See, e.g., Karl Fleming, *Twilight of a Tough Guy*, L.A. TIMES, June 26, 2006, at 11; Louise Kennedy, *Political Satire Waffles with Inconsistencies*, BOSTON GLOBE, Feb. 16, 2008, at 2C; Frank Warren, *Secret Thoughts of Travelers, Revealed*, N.Y. TIMES, Oct. 9, 2007, at C10.

37. One previous commentator has hinted at this point. While purporting to adopt

no possible means of learning, that an immense body of information is being withheld from her. At the other extreme, we can imagine a target who knows in detail all of the circumstances bearing on the withheld information and who can easily predict and confirm its contents. In between these two poles, how do we classify a secret as deep or shallow? What if the target acquires a vague sense of her own ignorance? A slightly more concrete sense? If the secret is deep at the outset, just how much information must be disclosed or made discoverable, and in what way, for the secret to become shallow?

To ask these questions is to see that the depth of a secret is not necessarily a binary feature; rather, depth is determined by a variety of interrelated factors, according to which any particular secret may be located on a continuum running from maximally opaque to maximally intelligible. Cutoffs may be made along the continuum, but criteria must be developed to do so—and even still, complications will inevitably arise in the application of general standards to a phenomenon as vast and heterogeneous as secrecy. “Deep” and “shallow” can serve profitably as proxies, or heuristics, for the rough location of a secret on the continuum. But it is a conceptual mistake to see them as wholly discontinuous categories.

This first concern applies to interpersonal secrecy and state secrecy alike. A second problem with Scheppele’s definition applies with special force to the latter: the “keeper”/“target” dyad breaks down when one moves from the private to the public sphere, for the government contains a multiplicity of actors, linked to each other through a multiplicity of channels, pursuing a multiplicity of ends, serving a multiplicity of masters. At the level of the state, many different internal groups may be aware of the same secret, many more outside groups may have reason to care about it, and each may have a distinctive relationship to the information. Scheppele’s assumption of unitary agents makes sense in certain private law settings, when there are two parties to a transaction and one is concealing something from the other. But it is much too simple, and potentially misleading, to speak of the keepers and targets of state secrets as monistic categories. These concepts, too, must be disaggregated.

The notion of a target is particularly problematic with state secrets because even if the underlying information directly concerns only a small number of individuals, *all* citizens of a democracy may claim a right to access the information, simply in virtue of being citizens—persons from whom the government derives its authority and to whom the government must be accountable. A policy focused on a single foreign leader will nevertheless implicate the American people in the sense that the policy is undertaken in their name and financed by their tax dollars. Regardless of whether the United States government is “targeting” Americans in any conventional sense of the term, it may have moral or legal duties that require

Scheppele’s distinction between deep and shallow secrets, Heidi Kitrosser adds that the two differ in “degree,” not kind, and that secrets may be not only deep or shallow but also “minimally” or “very” deep or shallow. Kitrosser, *supra* note 31, at 493-94, 514-15; *see also id.* at 515 (stating that these terms are necessarily beset by “imprecision”).

some amount of disclosure.³⁸

Finally, there is the problem of how to fix an appropriate level of generality for the analysis, which I will call the *problem of specification*. To determine the depth of any given secret, to measure its secretiveness against any set of external standards, one must first determine what constitutes the secret and the relevant informational background against which to understand it. At a high enough level of generality, hardly any secret is deep. If every employee knows her boss will at some point assess her performance, no employee can claim to be one-hundred percent surprised to learn that her boss held a closed-door meeting for this purpose. If everyone in the world knows the President is trying to defeat the terrorists, no one can claim to be one-hundred percent surprised to learn that he used any particular means toward this end. Yet plainly, we experience some secrets as more accessible or obscure, more predictable or shocking, shallower or deeper, than others. We constantly (if often passively) make judgments that certain social facts sufficiently cohere to comprise a unified thing, an item of information, even if information does not come packaged in stable units. And we constantly make judgments that certain items are more or less secretive than others, even if they are all embedded within larger webs of social facts that are familiar.

I cannot offer any categorical answer to the problem of specification, although Subpart C argues that the concepts of notice and social expectations can help us to draw relevant distinctions. We should always bear in mind that in evaluating any given secret, we are implicitly specifying a level of generality at which to conceptualize what the keepers have done, and that depth may depend on the level of generality that is chosen. It is particularly important to appreciate this problem in the context of state secrets, given that a vast matrix of public rules, norms, policies, and pronouncements overlays virtually every nonpublic act that officials take in their professional capacity.

To refine the distinction between deep and shallow secrecy and to apply it to the government context, it is necessary to develop a new definition: one that retains Scheppele's emphasis on the knowledge asymmetries between the parties and the ability of relevant outsiders to access the information, but that recasts the distinction in more quantitative than qualitative terms. It is necessary to ask not just whether a secret is deep or shallow in the Scheppelian sense to any particular individual or group, but also *how* deep or shallow it is to *society as a whole*.

The most productive way to conceptualize the depth of a state secret, I propose, is to evaluate it along four main indices, reflecting (1) how many people know of the secret, (2) what sorts of people know, (3) how much they know, and (4) when they know. To be "deep," a secret must have certain traits corresponding

38. In fact, the truly proximate targets of many state secrets—those individuals or groups against whom the state plans to take hostile action—will often have a weaker claim to the concealed information than the average citizen. Certainly as a matter of customary law and democratic theory, the government has a lesser duty to make information available to foreigners than to citizens, even if the foreigners may be more immediately and negatively affected by the content.

to each index. Let us examine them in turn.

A. *How Many People Know*

The first, and most straightforward, factor that determines a state secret's depth is the number of people who know that there is something they don't know. When fewer members of a community are aware of the existence of a secret, the secret is more opaque to the community at that moment in time and therefore intrinsically more secretive. It is deeper.

The secret is also more likely to stay opaque. There will be fewer opportunities for leaks, fewer opportunities for new parties to discern its contents through effort or accident, and fewer opportunities for dissensus regarding its disclosure and implementation. As the circle of people aware of a secret expands, it becomes more likely that the secret will be compromised both directly—because there are more parties who might purposefully or inadvertently illuminate the secret to others—and indirectly—because there will be more communications by and among insiders from which outsiders can glean information. Those in the circle who do not know the secret's full contents will be able to coordinate with a growing body of colleagues in evaluating the information they do have, allowing them to draw on more extensive expertise to identify new inferences and develop progressively richer estimates of the information they lack.³⁹

Consider a quintessential deep secret: a Central Intelligence Agency (CIA) plot to assassinate the prime minister of a foreign country ("Prime Minister X") that no one outside the agency and a few White House officials has any reason to suspect.⁴⁰ As more and more individuals are apprised of the CIA's plot, the

39. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007) (explaining how diversity of viewpoints facilitates problem-solving); JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS* (2004) (explaining why, under certain conditions, groups may be superior at aggregating and processing information than any single member would be on her own); *infra* notes 71-74 and accompanying text (discussing the "mosaic theory"). For the size of a group aware of a shallow secret to foster publicity, it is not necessary that the group as a whole be better than each of its individual members at discerning the secret's contents. In many cases, the mere fact that anyone in the group discerns the contents, or that the group average moves closer to a correct estimate thereof, will be enough to compromise the secret.

40. Lest this example seem overly fanciful, see COMM'N ON PROTECTING AND REDUCING GOV'T SECRECY, REPORT, S. DOC. NO. 105-2, at 26 (1997) [hereinafter MOYNIHAN COMMISSION REPORT] (describing executive branch "unacknowledged special access," or "black," programs, the very existence and purpose of which are classified); SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465 (1975) [hereinafter CHURCH COMMITTEE ASSASSINATION REPORT] (detailing the CIA's lead role in several assassination plots). Shortly before this Article went to press, news reports revealed that in recent years the CIA developed but did not implement plans to assassinate al Qaeda leaders. See Mark Mazzetti & Scott Shane, *After 9/11, C.I.A. Had Plan to Kill Qaeda's Leaders*, N.Y. TIMES, July 14, 2009, at A1.

intelligence professionals serving Prime Minister X will have more and more chances to learn of it through espionage, leaks, and public sources. If the plans move from deeper to shallower secrecy such that a broader group of people becomes aware something is underfoot—say, through the President’s announcement that the United States will remove Prime Minister X “by any means necessary” unless he cedes power, or through a newspaper’s disclosure that the United States is considering an unspecified type of covert action against an unnamed foreign leader—the odds of publicity will increase further still. Thousands of engaged citizens can pool their collective knowledge to devise a list of likely methods and targets and thereby home in on the plot to assassinate Prime Minister X.

In Scheppelian terms, then, the greater the number of individuals within a community aware of an otherwise deep secret, the greater the likelihood that the secret will become shallow to the entire community; and the greater the number of individuals aware of a shallow secret, the greater the likelihood that the secret will cease to be a secret at all. On instrumental as well as intrinsic grounds, numerosity is linked to publicity.

B. *What Sorts of People Know*

It is not enough, however, to focus on the number of people who are aware of a secret; the composition of this group must also be taken into account. Within an entity such as the federal executive branch, there exists a tremendous diversity of actors. Dozens of departments, agencies, and commissions, each in turn composed of dozens of offices and directorates, pursue specific institutional roles. Bureaucratic, political, and ideological factions may develop within and across all of these units. Many executive agencies employ at the same time a professional class of civil servants, a temporary class of appointed officials, and a quasi-autonomous class of internal monitors such as inspectors general and professional responsibility officers.⁴¹ On multiple dimensions, the government is not a monolith. Even if we assume that no members of the general public are aware of a particular secret, it can matter critically which government officials, from which offices, are keeping it. (It also matters which private sector actors are aware, although with many secrets of state we might expect that there will be very few.)

To illustrate this point, let us return to the CIA assassination plot. If, outside of the White House, only the CIA’s leadership is aware of its existence, the secret will be protected not just by the small number of people who know but also by the *type* of people who know: intelligence officers who work for the same agency; who are likely to share similar backgrounds, objectives, and moral constraints; and who operate in an environment with strong norms of secrecy. By temperament, training,

41. See, e.g., U.S. Dep’t of Justice, Organization Chart, <http://www.usdoj.gov/dojorg.htm> (last visited July 14, 2008); U.S. Dep’t of Labor, Organizational Chart, <http://www.dol.gov/dol/aboutdol/orgchart.htm> (last visited July 14, 2008).

and design, CIA personnel are good at concealing things.

Now, let us assume that several lawyers from the Department of Justice (DOJ) are informed that some sort of assassination plot is in the works. These lawyers will bring a different perspective to the contemplated policy, both because of their distinctive skill-sets and socialization and because of their distinctive institutional responsibilities. The DOJ lawyers also have a duty to serve the President and to be mindful of national security, but their primary charge is to enforce the law. Assassinating foreign leaders is prohibited under domestic and international legal authorities (which is one reason the plot's secrecy is so deep).⁴² One might therefore predict that the DOJ lawyers will object to the plot and seek to have it called off. If the lawyers are unable to stop the plot on their own, they may take their arguments to other executive officials, further widening the circle of secret-keepers. Admitting a mere handful of DOJ lawyers into the deliberations may dramatically change the expected outcome of the concealed information.

As this example suggests, the type of officials who are aware of a secret is relevant not only to the odds that the information will be disseminated to the broader public but also, and more basically, for the process by which the information will be considered within government and for the manner and extent to which public interests will be represented in this process. Consistent with Scheppele's insight that the distinctive normative concern with deep secrets lies in the way their keepers unilaterally arrogate power, it should diminish depth when more different types of actors are in a position to demand a secret's disclosure and to challenge the policy decisions that may be derived from it. There may be no neat formula with which to differentiate relevant "types" or to quantify their status. But we can say generally that the depth of a secret decreases as the number of types of actors aware of its existence increases.

C. *How Much They Know*

Motivating Scheppele's definition of deep secrets is the fact that they will never prompt their target to search for the concealed information. The target lacks the capacity to make a reasoned decision whether to do so, because she does not know what she does not know.⁴³ Scaling this idea up to the level of state, Amy Gutmann and Dennis Thompson stipulate that if citizens know or suspect that a particular set of officials is considering a course of action, but do not know what the officials have decided, that course of action is a shallow secret. If no one knows or suspects as much, the course of action is a deep secret.⁴⁴

42. See Exec. Order No. 12,333, § 2.11, 3 C.F.R. 200, 213 (1982); Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 9 (2002). There are vigorous debates over what qualifies as assassination and whether assassination for reasons of self-defense is ever permissible under international law that need not concern us here.

43. SCHEPPELE, *supra* note 15, at 21, 75-76.

44. GUTMANN & THOMPSON, *supra* note 27, at 121-22.

Yet in this respect, too, a straightforward application of Scheppele's definition to state secrecy may obscure more than it illuminates, because in reality it will rarely be the case that the citizenry, as a whole, is either completely aware of or completely in the dark about a secret. Instead, the content of most state secrets will be known to a subset of officials, unknown but discoverable to another group of officials and possibly laypersons, and unknown and undiscoverable to a third group of officials and laypersons. In Scheppelian terms, state secrets will often be simultaneously deep and shallow across the population. It would not be very enlightening to say that a state secret is deep whenever some citizens lack the capacity to make an informed decision whether to seek out the hidden information, and shallow whenever some citizens have this capacity. Both may be the case. It is more helpful to say that the depth of a secret decreases to the extent that members of the community, including their representatives in government, understand that information is being concealed from them, the basic contours of that information, and how to go about discovering what it is.⁴⁵

The concept of notice is central to this understanding of depth. Citizens and their representatives can be completely ignorant of a particular secret's contents, yet aware of the process by which the secret has been created and protected. For instance, the rules for classifying and declassifying executive branch information are now set forth in a published executive order.⁴⁶ The rules are highly general and do not provide much insight into the substance of classified documents. But they make the act of classifying any particular document less obscure, because the process by which that act of secrecy occurs is itself a matter of record. "Second-order" publicity rules of this sort give citizens a platform for participating in the development of "first-order" secrets, which affords them a degree of comprehension and control.⁴⁷ Such rules can thereby decrease depth.

They do not do so in a constant way, however, because second-order publicity

45. On this dimension of depth as on the previous two, the secrets that score lowest will be those about which the entire community knows a tremendous amount but has no official confirmation: what might be termed open secrets. These are still secrets, in the thin sense that the government will not substantiate the information. But the public is in on the secret, and the government knows that the public knows. Open secrets are longstanding favorites of repressive regimes. Everyone in Stalin's Soviet Union was aware that certain acts could land him or her in a labor camp, even though the list of offenses was nowhere codified. See LESZEK KOLAKOWSKI, *MAIN CURRENTS OF MARXISM: THE FOUNDERS, THE GOLDEN AGE, THE BREAKDOWN* 864 (P.S. Falla trans., W.W. Norton & Co. 2005) (1978). It was important to the Communist Party that this awareness be fostered, so that the populace would be scared into compliance, but also that the list not be officially acknowledged and thereby exposed to public scrutiny or foreign criticism. *Id.* Requiring the Soviet people to deny known facts such as the role of labor camps allowed the Party to conscript them into a shared authorship over the falsehood and a shared complicity in the underlying policies. Open secrets may raise serious problems for a regime's legitimacy, but a different sort of problem from those raised by deep secrets. Open secrets can be seen as extremely shallow secrets.

46. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003).

47. See Dennis F. Thompson, *Democratic Secrecy*, 114 *POL. SCI. Q.* 181, 185-86, 192-93 (1999).

will not always give rise to the same degree of notice about first-order material. Regimes of second-order publicity permit certain types of information to be concealed pursuant to certain criteria. Some first-order secrets will fall in the heartland of what everyone assumed they were authorizing in setting up such a regime: Americans expect that the government uses undercover agents to spy on foreign terrorists and that documents identifying these agents will be classified. But other first-order secrets will not be so easily anticipatable. The American people might have no inkling that the government is doing certain things, might even believe that they had prohibited the government from doing those things, and the classification system can maintain this ignorance.

Consider Gutmann and Thompson's example of the United States government's radiation experiments on human subjects during World War II.⁴⁸ Congress had publicly declared war against Germany and Japan, and the President was visibly leading the war effort. Everyone was on notice that the President, as commander-in-chief, would be devising military tactics to prosecute the war and that the precise content of some tactics would be kept secret to prevent the enemy from gaining an advantage. So, contrary to Gutmann and Thompson's assertion, weren't the government's radiation experiments (inasmuch as they were conducted in the service of the war effort) quintessentially shallow secrets? Gutmann and Thompson do not explain why they believe the experiments were deep secrets, but it must be because the content of the experiments was so *unexpected*. The technology enabling the experiments was so new, and the decision to test it on human subjects so stunning, that the American people and their representatives did not have effective notice that such conduct might be occurring. Compared to the President's decision, say, to bomb certain German cities rather than certain other ones, the regime of second-order publicity governing military strategy did not likewise prepare the American people for the decision to conduct radiation experiments. Indeed, the American people might have felt differently about the decision to declare war if they had known such devastating weapons could be unleashed as a result of that decision.

This example shows how depth is determined not only by the formal processes that maintain a secret but also by the functional understandings that accompany those processes. The example also helps illuminate the problem of specification, by showing how depth can turn on how broadly or narrowly one defines the information that constitutes the secret.⁴⁹ Having declared war, the fact that the government was developing a more efficient means to wage war may have been entirely predictable. But the fact that it was developing any particular means may have been entirely unpredictable, at least to non-experts. Whether one considers the atomic bomb program to be deep or shallow will depend upon what one considers the relevant unit of analysis: the fact of a weapons development program (which everyone anticipated) or the fact of a weapons development program focused on

48. GUTMANN & THOMPSON, *supra* note 27, at 121-22.

49. See *supra* pp. 267-267 (setting out the problem of specification).

nuclear technology (which, we are assuming, hardly anyone could have anticipated).

Smaller first-order decisions taken by officials may be entirely opaque to regular citizens, even if they are embedded within larger first-order or second-order decisions that are themselves public or anticipatable. Like the atomic bomb program, those smaller decisions can still be deep secrets if the known information has not provided meaningful notice of their existence.

D. *When They Know*

The final factor that influences the depth of a secret is time. A secret may be extremely deep for an initial period, but then made progressively shallower in stages, as it is disclosed to more and more persons in more and more detail. How deep or shallow one considers the secret will therefore depend on the temporal frame one adopts. Time does not directly change depth as do the other factors; rather, time complicates the depth calculus because the other factors change with its passage.

If a fundamental concern with state secrecy is that the people may become disconnected from actions taken by their own government, it makes sense to focus on the window of time before a secret plan is put into effect. Disclosures that give relevant actors an opportunity to influence a secret's usage will decrease depth more than disclosures that occur after the policy formulation window has closed. Hence, in the case of the CIA plot to assassinate Prime Minister X, it would be reasonable to consider the plot a deep secret even if the general public learns about the plot immediately after the assassination has occurred.⁵⁰ The veil of secrecy will have been lifted too late.

In certain instances, it may be preferable for government officials to delay disclosure of their secrets, lest premature transparency undermine the policy the secret was meant to facilitate. Although delayed disclosure is in theory a second-best solution, because the secret-keepers will be deprived of input during the critical phases of policy development and execution, in practice it may be the best option. In assessing the depth of a secret, however, what matters is not whether the timing of disclosure was optimal, but whether the disclosure occurred within or beyond the policy formulation window and by how much.

E. *A New Definition*

Even if no bright line separates deep secrets from shallow ones, we can still coherently label a secret as "deep" or "shallow" if it lies sufficiently far to one side

50. Such post hoc disclosure is not inevitable. In the CIA's case, it would violate the doctrine of "plausible deniability," whereby covert operations are performed "in such a way that if discovered, the role of the United States could be plausibly denied." CHURCH COMMITTEE ASSASSINATION REPORT, *supra* note 40, at 3, 11-12.

of the depth continuum. Synthesizing the analysis above, we can say that a government secret is deep if a small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders' ignorance precludes them from learning about, checking, or influencing the keepers' use of the information. A state secret is shallow if ordinary citizens understand they are being denied relevant information and have some ability to estimate its content.

More concretely, we can say that depth is mitigated by the total number of people who know something is being concealed, the number of types of people who know, the amount they know, and the speed with which they know. If no one outside of a particular executive branch unit knows of a program the unit is running, the program is an extremely deep secret. If the general public knows all but a few details, the program is an extremely shallow secret. If the program is disclosed to the other branches of government, but not to the public, it lies somewhere in the middle of the depth continuum. Illegal programs will tend to be deeper secrets than legal ones, all else equal, given the assumption that laws are followed. Programs cloaked in cover and deception, whereby officials take active steps to mislead observers, will likewise tend to be deeper.

This definition builds on Scheppele's by refining her key insights and adapting them to an institutional context. It permits us to discriminate among state secrets on the basis of their overall accessibility, without passing judgment on their content. And it carries the important implication that some secrets may be known only to government actors and yet nevertheless be *less* deep than other secrets that are known to a different set of government actors. While one fairly bright line continues to separate deep from shallow state secrets—the public always is aware of the existence of the latter, ignorant of the former—the depth discrepancies between many secrets will be more quantitative than qualitative.

Just from this definition, we can see that deep secrecy in the United States government is much more likely to be an executive, rather than a congressional or judicial, phenomenon. Congress and the judiciary exercise their authority largely through public processes, by holding hearings and trials, confirming or rejecting appointments, issuing opinions, passing legislation. Secrecy does exist in both branches—indeed, I believe congressional secrecy is a seriously understudied subject—but the structures that channel and constrain legislative and judicial authority generally demand that it be shallow.⁵¹ Another overlooked factor

51. Cf. Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 920 n.41 (2006) (comparing executive and legislative secrecy). To be more precise, although deep secrecy may exist in the legislative and judicial branches with respect to deliberative machinations, it is highly unlikely to exist with respect to their final decisions. See *infra* note 66 and accompanying text (distinguishing consummated from deliberative deep secrets).

As Adam Samaha suggests, the intelligence budget is the obvious counterexample in Congress. Samaha, *supra*, at 920 n.41. Yet while the intelligence budget provides a dramatic example of congressional secrecy, it is not especially deep secrecy. Everyone knows of the

militates against deep congressional secrecy: the fact that Congress contains representatives from more than one political party. Each party has an incentive to expose controversial or inappropriate actions of the other, which creates an additional structural bar to unjustified concealment. The executive branch lacks this basic pro-openness feature.⁵²

We can also see that deep secrecy may be most likely to occur, and to raise the most vexing problems, in the area of national security. National security policies often have a true target in the colloquial sense of a party against whom the government is taking adverse action. Publicizing information about these policies therefore poses a special risk of vitiating the underlying objective. National security policies also involve matters of life and death, as well as some of the most morally and legally controversial activities taken by government, and therefore raise the stakes of secrecy generally. If a basic reason for keeping a secret deep is to deprive outside parties of the capacity to protest the hidden policy or to take responsive measures, national security policymaking is a natural field in which to expect officials to gravitate toward depth.

III. THE PROBLEMATICS OF DEEP SECRECY, OR WHY RUMSFELD WAS RIGHT

As the previous Part suggested, the depth of a secret will often have consequences for how the concealed information is (or is not) utilized by the state. Even within a single branch of government, alerting a larger number and wider range of actors, earlier in time, in greater detail, to the existence of a secret—and thereby decreasing its depth—can change the processes that apply to the information and the policies that emerge from it. Decreasing a secret's depth will not necessarily lead to better outcomes, but it will systematically lead to different outcomes: outcomes that are deemed acceptable from a greater variety of perspectives, that have been more thoroughly reasoned and refined through a dialogic vetting process, that are better documented, that take longer to be finalized, and that are more likely to be publicized. Does this tend to increase or decrease social welfare? To facilitate or frustrate democracy? Are there constitutional implications?

My thesis in this Part is that on utilitarian, democratic, and constitutional grounds, deep state secrecy ought to be seen as especially troubling. Good

budget's existence, many people know the rough contours of what it includes, and members of Congress and the executive can view the budget itself. *See generally* STEPHEN DAGGETT, CONG. RESEARCH SERV., THE U.S. INTELLIGENCE BUDGET: A BASIC OVERVIEW (2004). I am skeptical that any of the government texts that commentators describe as "secret laws" are very deep secrets. To have any effect on the lived world, these "laws" must be disclosed at least to those who would enforce them, which ensures some nontrivial degree of numerosity, if not also institutional diversity, in the types of actors who are aware of their content. More likely to be deep secrets are discrete government activities taken pursuant to or in contravention of public or quasi-public laws.

52. *But cf. infra* Part IV.C (explaining structural divisions within the executive branch).

arguments can be made under all three standards in defense of governments' keeping secrets. It turns out to be much harder to extend these arguments to deep secrets. To some extent, this conclusion simply follows from the fact that deep secrets are especially secretive. The normative concerns raised by state secrets, I will show, tend to increase in rough proportion to their obscurity. To some extent, however, this conclusion reflects features of deep secrets that are distinctive. When Donald Rumsfeld observed that the unknown unknowns "tend to be the difficult ones,"⁵³ he may have spoken truer than he knew.

Several caveats are in order. First, even though I explained above that the depth of a secret is best conceptualized along a continuum, I will be discussing deep and shallow secrets here largely in dichotomous terms. I do this because deep secrets are my specific evaluative subject, as well as for analytic clarity and for ease of exposition. Many of the arguments I make for and against deep secrets could be extended to deeper secrets. Second, I will be discussing these issues at a fairly high level of abstraction. Given my goal of theorizing deep state secrecy as a unified phenomenon, I need to paint with a broad brush. One claim I make is that it is valuable to home in on the deep/shallow distinction precisely because it allows us to move beyond case-by-case analysis to derive overarching, content-independent principles with which to assess secrecy practices.

Third, and relatedly, I will not be comparing secrets on the basis of their content or specifying a level of generality at which to evaluate them. It is impossible to address these issues satisfactorily in the abstract. State secrecy can take an infinite variety of forms, and one might weight the normative analyses quite differently if the secret at issue involves only extragovernmental actors (e.g., information the government has acquired about adversaries), or the personal lives of officials, or purely ministerial matters. Some shallow secrets may be highly problematic on account of their subject. Some deep secrets may be benign. Rather than try to limn every potentially relevant substantive distinction, I will restrict the analysis to secrets used in the formulation or administration of executive branch public policy, broadly defined. There are no universal answers or mechanical formulae when it comes to judging state secrets. Appreciating the deep/shallow distinction may help clarify the normative questions raised by any particular secret. It cannot in itself answer them.

A. *Utilitarian Theory*

1. *Secrecy and utilitarianism*

At least since Jeremy Bentham, the dominant cast of the literature on government secrecy has been utilitarian. Both its critics and defenders have tended to make arguments about consequences—to view transparency as an instrumental,

53. *Supra* note 1 and accompanying text.

rather than intrinsic, good and to evaluate openness policies on the basis of how they affect societal well-being.⁵⁴ In support of secrecy, four broad types of consequentialist arguments are made.

First, state secrecy may prevent bad actors from accessing information that could be used to harm national interests or to reduce the effectiveness of government policies. This is the quintessential justification for state secrecy: to preserve the state itself. Some amount of secrecy may be valuable for concealing plans and vulnerabilities from adversaries, acting quickly and decisively against threats, protecting sources and methods of intelligence gathering, and investigating and enforcing the law against violators. Some amount of secrecy may likewise be necessary for preserving the integrity of lotteries, elections, market interventions, and other government functions that rely on anonymity or timing.

Second, secrecy may enhance the quality of governmental deliberations and decision making. Secure in the knowledge that their comments will not be made public, policymakers may have more freedom to consider and debate different options, to take risks, to change their minds, to rely on experts, to conduct negotiations with outside parties, and to avoid “bad accountability” to narrow interest groups while preserving “good accountability” to the broader public.⁵⁵ Counterintuitively, secrecy can protect against the ossification of administrative practices and lead to more informed regulation.⁵⁶

Third, secrecy may protect privacy and associated values. The United States government controls an enormous wealth of information about individuals and organizations and even more information about its employees, the disclosure of which may cause psychic, reputational, and tangible harm to those concerned.

Finally, secrecy may be cheap. Compared to a transparency regime that requires case-by-case determinations of whether to publicize or protect items of information, a more categorical policy of opacity may be inexpensive to administer.

54. See Paul Gowder, *Secrecy as Mystification of Power: Meaning and Ethics in the Security State*, 2 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 2 (2006) (“The academic (particularly legal academic) and public discourse on government secrecy is overwhelmingly produced in the mode of utilitarian expediency.”); Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1557-58 & n.11 (2008) (adopting this view and providing citations to authors doing the same). Useful summaries of the costs and benefits of government secrecy include MOYNIHAN COMMISSION REPORT, *supra* note 40, at 6-9; SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 18-26, 102-15, 171-209 (Vintage Books 1989) (1983); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894-910 (2006); Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 894-98 (1986).

55. The concepts of “bad accountability” and “good accountability” are developed in Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 68, 83-87 (Elizabeth Garrett et al. eds., 2008).

56. See, e.g., William J. Stuntz, *Secret Service: Against Privacy and Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12 (arguing that too much transparency in government leads to a fixation on procedure rather than substance, a shuttling of decision making into informal back channels, and a privileging of the status quo). “Opacity,” Stuntz asserts, “is essential to a government that moves, acts, makes things happen.” *Id.* at 14.

Against these potential benefits, utilitarian critics of state secrecy raise powerful arguments. First, by inhibiting input, oversight, and criticism within and outside government, secrecy and compartmentalization will often lead to lower-quality policies. Even when the secret-keepers are perfectly virtuous, debate and dissent may be muted, important facts and insights may be overlooked, and preexisting biases may be amplified. Policymaking may suffer just as profoundly in a field such as national security, the *locus classicus* of clandestine affairs, as excessive secrecy can inhibit critical information sharing and increase vulnerability to internal leaks and to deception by sources.⁵⁷ In the absence of perfect virtue, secrecy creates greater opportunities for officials to pursue personal or partisan gain, to engage in logrolling or horse trading, and to commit legal and ethical abuses. An “instrument of conspiracy,”⁵⁸ secrecy exacerbates the principal-agent problem inherent in representative democracy and opens the door to tyranny. All of these criticisms inform the venerable strain of argument running through twentieth-century American political thought that “sunlight is . . . the best of disinfectants.”⁵⁹

Second, and relatedly, secrecy enables the secret-keepers to arrogate power to themselves. As Daniel Patrick Moynihan observed, secrecy is a form of regulation, used by insiders to magnify their status and influence relative to outsiders.⁶⁰ Partly for this reason, bureaucrats are inevitably attracted to secrecy; secrecy fosters interagency rivalries and harms interagency coordination; and secret programs tend to expand beyond their initial scope.

57. Notable arguments on how secrecy can harm national security include MOYNIHAN COMMISSION REPORT, *supra* note 40, at 8 (explaining that as the size of a secrecy system grows, the prospects for leaks grow in proportion); BOK, *supra* note 54, at 194-96 (discussing “self-defeating military secrecy”); DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 80 (1998) (concluding, from an extensive review of Cold War history, that “as the secrecy system took hold, it prevented American government from accurately assessing the enemy and then dealing rationally with them during this and other critical periods”); ROBERTS, *supra* note 12, at 42-48, 140-41 (explaining the widespread belief that excessive secrecy reduced our preparedness for the Pearl Harbor and 9/11 attacks); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 136-39 (2006) (providing numerous examples of how openness can promote security).

58. JEREMY BENTHAM, *Essay on Political Tactics*, in 2 THE WORKS OF JEREMY BENTHAM 301, 315 (John Bowring ed., Edinburgh, William Tait 1843) (1838).

59. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1913). Justice Brandeis’s aphorism has been enshrined in the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552(b) (2006)), the Sunshine in the Courtroom Act of 2009, S. 657, 111th Cong. (2009), the Sunshine in Litigation Act of 2009, S. 537, 111th Cong. (2009), and scores of other federal and state information-access laws that use the sunlight metaphor in their titles.

60. MOYNIHAN, *supra* note 57, at 59, 73; *accord* MOYNIHAN COMMISSION REPORT, *supra* note 40, at xxi. This argument is most associated with Max Weber and his writings on the efforts of bureaucracies to entrench their authority through the cultivation of privileged knowledge. *See, e.g.*, MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 233-34 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1970) (1946) (“The concept of the ‘official secret’ is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude . . .”).

Third, state secrecy may breed cynicism and suspicion, which in turn may weaken legal compliance, social trust, civic participation, and the capacity for collective action generally. Secrets distort our relationship to history and to each other. They impair a society's ability to understand the events of its own past and to derive lessons from mistakes that were made.

Finally, maintaining secrecy can be expensive. Although disclosure regimes impose administrative burdens, it may be more costly to run a system that classifies and protects huge amounts of information while simultaneously reassuring the populace that information is not being concealed improperly.⁶¹ Given that one disclosure by one individual can unravel an entire web of secrets, secrecy needs constant tending.

2. *Deep secrecy and utilitarianism*

The arguments just recited are familiar in the literature, if rarely assembled in one place. What is not familiar is that deep secrecy is liable to exacerbate all of the utilitarian costs of state secrecy, without offering a concomitant increase in benefits. While we may lack good methods to quantify or formalize this inquiry,⁶² we have good theoretical reasons to predict that relative to a baseline of shallow secrecy, deep secrecy will typically be a utilitarian loser.

On the cost side, deep secrecy raises special problems most basically because of the special way in which it handicaps those who are not privy to the secret. Deep state secrets leave all but a few individuals ignorant of their own ignorance. The threat to good policy is clear. When members of the public and their representatives are unaware that information is being concealed from them, their ability to provide input, oversight, and criticism relating to that information is not simply inhibited but nullified. Nothing but the secret-keepers' good faith connects them, as agents, to their citizen-principals or to other agents in government. Malefactors will find deep secrecy especially congenial, on account of the insulation from scrutiny it affords.

The ignorance goes in both directions. Not only will the wider world be completely in the dark about the plans and ideas of the secret-keepers; the secret-keepers will also be in the dark about plans and ideas of outsiders that might be relevant to their decision making, because the outsiders will not be prompted to

61. See MOYNIHAN COMMISSION REPORT, *supra* note 40, at 9-10 (discussing efforts to quantify the financial costs of United States government secrecy and noting various annual estimates in the billions).

62. It would be quite a challenge to test empirically the relationship between the depth of state secrets and the quality of policy outcomes. The researcher would have to devise not only quantitative measures of depth and quality but also a reliable way to monitor state secrets, to assess their impact, and to predict how outcomes would have differed had alternative types or amounts of secrecy been used. The study of particular deep secrets would perforce be conducted retrospectively, after the relevant information has emerged, and even then one could never be sure how those secrets compare to others that may remain entirely unknown.

come forward with their contributions. Shallow secrets at least permit outsiders to understand the contours of the policies the government is considering, to identify key players, and to participate to some extent in a debate over how the concealed information should be used. Deep secrets block out all sunlight from the decisional process beyond the small circle of secret-keepers. No public reasons need be given, no adversarial testing need occur. In addition to corruption and abuse, ideological amplification, bias, and groupthink will be more likely to flourish.⁶³

More speculatively, deep secrets may also exacerbate the social trust, perverse consequences, and budgetary arguments against government secrecy. They will not do direct damage to social trust so long as they remain deep, for by definition people will be unaware such secrets are being kept from them. But when these secrets eventually cease to be deep—whether from declassification, disclosure, or detection—they can arouse a greater sense of outrage and alienation. People are more likely to feel duped by revelations that were not preceded by advance warning. Deep secrets are the stuff of conspiracy theories. A government that uses them cannot help but engender skepticism.

Deep secrecy may also be more likely to breed leaks. Unauthorized leaks typically occur when a secret-keeper is unhappy with the activities of colleagues and cannot have her position vindicated internally. When a secret is shallow, disaffected keepers may be able to argue their position to a wide range of persons inside, and to some extent outside, government without compromising the secret. When a secret is deep, however, disaffected keepers will have fewer such channels for dissent and may have no recourse to deter the policy short of full publicity. Something like this appears to explain the case of Thomas Tamm, the conscientious Justice Department lawyer who exposed the Bush administration's remarkably deep Terrorist Surveillance Program by placing a phone call to the *New York Times*.⁶⁴

This possibility complicates the link between shallowness and publicity. As the previous Part explained, there are good reasons to assume that alerting a greater number of people, in greater detail, to the existence of a secret will increase the odds that the secret's contents will be compromised. But this causal relationship need not hold true in all cases, and toward the upper end of the depth spectrum it may reverse itself. Shallow secrets tend to unravel gradually, accretively, as outsiders piece together clues and pursue further disclosures. The keepers have

63. See IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (2d ed. 1982) (defining groupthink as “a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action”). Groupthink can lead to suboptimal decision making by “foster[ing] overoptimism, lack of vigilance, and sloganistic thinking about out-groups. At the same time, groupthink causes members to ignore negative information by viewing messengers of bad news as people who ‘don’t get it.’” Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1258 (2003).

64. Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40. I will return to the Terrorist Surveillance Program in Part IV. See *infra* notes 280, 289, 308, 310 and accompanying text.

some time to react. Those deep secrets that become public tend to do so in dramatic fashion.

Finally, the direct costs of maintaining deep secrecy should tend to exceed the costs of shallow secrecy. Because even partial disclosures can suffice to compromise a deep secret, its keepers may desire more elaborate and expensive protections.

Deep secrecy does not likewise enhance all of the beneficial consequences of state secrecy. Let us take first the candor-based justification for secrecy: that governmental deliberations can be chilled or distorted by the knowledge that outsiders may learn what has been said, and that this will lead to inferior decision making. However valid this is as a general justification for secrecy,⁶⁵ it is not an argument for deep secrecy. For government officials to reach collective decisions in a less inhibited manner, all that is necessary is that the content of their communications be concealed to some extent. Although disclosing the participation of specific officials in a specific meeting might spark interest in what those officials said, and may even generate counterproductive forms of media speculation and political pressure, the officials need not internalize the consequences of publicity so long as they can feel confident that their statements will be protected. Everyone understands that the United States Supreme Court Justices discuss cases in private conferences, making their content a shallow secret, yet the conferences certainly seem to sustain reasoned deliberation.

The distinctive contribution of deep secrecy to the decision making process is that it allows officials to shield not only the content of their communications but also the fact of their decision making, a type of freedom no utilitarian should embrace as a matter of course. There is no need to keep the public and the other branches of government completely in the dark about the existence of a decisional process for honesty, choice, courage, rationality, and other such values to be safeguarded within the process.

Although this Article has generally avoided categorizing secrets on the basis of their subject matter, it may be helpful to introduce an additional distinction here: between what might be termed *consummated* deep state secrets and *deliberative* deep state secrets. The former are deep secrets about actions taken by officials with tangible effects on the wider world: deals that were struck, money that was spent, troops that were deployed. The latter are deep secrets about the existence of predecisional government processes: meetings that were held, memos that were circulated, e-mails that were exchanged.⁶⁶ While consummated deep secrets are of

65. See Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197 (2008) (arguing that the strength of this justification varies depending on context and should not be given unqualified deference).

66. It is important not to conflate the concept of deliberative deep secrecy—secrecy about the existence of deliberations—with the more common (indeed, ubiquitous) phenomenon of secrecy about the content of deliberations. If members of the public know that a certain type of meeting was held by certain officials, but do not know what was said at the meeting, anything discussed therein should not qualify as a deep secret. The meeting is a classic shallow secret; the

more obvious concern to the utilitarian, the analysis here suggests that deliberative deep secrets are likely to generate related costs. Consummated deep secrets degrade the quality of external discourse and are more likely to reflect inferior decisions. Deliberative deep secrets degrade the quality of internal discourse and are more likely to produce inferior decisions.

Similarly, deep secrecy does not offer additional benefits for privacy, and instead threatens greater harm. Privacy advocates concerned about the government's collection of sensitive personal information often seek to enlist secrecy to limit the government's ability to disseminate that information. Yet while these advocates may want the government to be as secretive as possible with the information it has acquired, they should want it to be as open as possible about the rules that control its collection and dissemination activities. Shallow secrecy allows officials to maintain first-order secrets about members of the public—where they have lived, with whom they have associated, their social security numbers, and so forth—under the terms of a transparent second-order legal process. Deep secrecy, by contrast, allows officials to collect, use, and share information without ever acknowledging they have done so, through a process the public has never seen or approved. It vitiates people's control over the manner in and extent to which they are perceived by (government-employed) others. The explicit threat to privacy may not be apparent, but the functional threat is far greater. Indeed, it is hard to imagine a role for deep secrecy in a privacy regime other than to violate it.⁶⁷

Deep secrecy is not purely a destructive force, however. As Dennis Thompson has observed, "some policies and processes require obscurity" to be effective, because even generalized, "second-order publicity" about the policy or process "would destroy its first-order efficacy."⁶⁸ In some cases, that is, to make a secret shallower would risk defeating the objective that inspired the use of secrecy in the first place. What do these policies and processes look like?

Let us return first to the CIA assassination plot. To achieve the goal of

outsiders know in broad terms what they do not know. If outsiders could not anticipate the substance of particular topics of discussion, those topics will be deeper secrets than those that were more anticipatable, but still, the unknown content of a known proceeding is better classified as shallow.

Although we might assume a positive correlation between consummated and deliberative deep secrets, there is no necessary connection between the two. Decisions taken at an unknown meeting may lead only to public actions. Decisions taken at a widely known (but nonpublic) meeting may lead only to covert actions.

67. Deep secrecy might help officials shield potentially embarrassing details of their private lives from the media, which may be attractive to the utilitarian because it leads the press toward more productive areas of inquiry or because it makes qualified individuals more likely to pursue government service. On the other hand, these benefits may be counteracted by the costs of depriving the public of information that might bear on the keeper's fitness for office. These sorts of secrets, relating to the off-duty lives of government employees rather than the decisions taken by such employees in an official capacity, are not the focus of this analysis. Arguably, they are not even state secrets, just personal secrets.

68. Thompson, *supra* note 47, at 186. Thompson does not provide examples of policies that have this quality.

eliminating Prime Minister X, deep secrecy may well be useful. Alerting persons outside the CIA to the existence of a controversial covert action scheme, at whatever level of generality, will put them on notice and draw attention to the agency. Some outsiders may try to discover the plot; some may try to delay it; some may try to thwart it. Suspicious developments in foreign countries will be interpreted in new light. Keeping the plot a deep secret would deprive the CIA of feedback from the wider world, yet in the business of assassinating people, the CIA probably needs no such help. Shallowness would only get in the way.

Or, let us assume that the Centers for Disease Control and Prevention (CDC) learns of the outbreak of a never-before-seen virus in one portion of the country. CDC officials are still studying the reported cases and do not yet know the severity of the virus or the means by which it spreads. Alerting people to the virus, even in very general terms, might enable them to take useful precautions, but doing so would risk creating widespread panic and stigmatizing those who have contracted it. Let us further assume that the CDC employs a rigorous internal process, undisclosed to the outside world, for determining how to respond to such outbreaks. For some period of time, CDC officials may conclude it is better to say nothing, lest they create unwarranted fear and havoc. If it turns out that the virus poses no health threat to the broader population, this decision may appear to have been the correct one.

These examples show how deep secrecy can enhance social welfare by allowing secret-keepers greater freedom to develop and pursue policies without reaching premature conclusions or alerting those who would undermine the policies. The ignorance of others can have strategic value. Depth can increase efficiency, buy time, and maintain the element of surprise.

In pursuit of these benefits, deep secrecy centralizes responsibility over strategic planning and risk management. This approach to information control suffers from all of the flaws noted above, but its rationale is coherent. Secret-keepers will not always have a clear sense of how much shallower they can make a secret without precipitating full public disclosure. Nor will they always need additional input or oversight, and the political pressures that may ensue, to make the best decision. Outsiders who realize they are being denied information may make unreasonable or myopic demands on better-informed secret-keepers. Furthermore, once government information has been revealed to members of the public, it is extremely difficult to put it back in the box. Although First Amendment doctrine does not provide much protection for those who leak sensitive information, it provides significant protection for those who receive that information and then broadcast it.⁶⁹ The government has little authority to stop the press from publishing whatever it can find out.⁷⁰

69. See Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 691-92 (1984); Sunstein, *supra* note 54, at 898-901.

70. Since 1950, there has been a federal statute that criminalizes the publication of certain

From a starting point of deep secrecy, even minor disclosures can prove illuminating. As more and more items of information emerge about a secret plan or policy, outsiders will have more and more opportunities to draw inferences across the items and to relate them to other items of information they possess. Such analytic mosaic-making is a basic precept of intelligence gathering, used by our government to learn about our enemies and by our enemies to learn about us.⁷¹ When it works, “bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.”⁷² A strategy of deep secrecy, in which outsiders are not told even the rudimentary outlines of what the government is up to, deprives adversaries of material that might be used in a harmful mosaic. Apart from its susceptibility to abuse and its lack of a limiting principle,⁷³ a serious weakness of this strategy is that it likewise prevents citizens and allies from doing mosaic-making of their own, from assembling pieces of information in ways that can *improve* policy outcomes.⁷⁴ Sometimes this may seem insufficient compensation. Moving a secret from deeper to shallower can create greater risks as well as rewards.

However, if these examples show why deep secrecy might hold appeal as a model for information control, they also point to a fundamental difficulty with the utilitarian defense of the practice. It assumes not only that deep secrecy will facilitate superior outcomes, but also that deep secret-keepers are the appropriate body to decide what constitutes a superior outcome. Which is preferable: That the CIA faces more or less resistance regarding a plot to assassinate a foreign leader? That the CDC forestalls a potential panic or that members of the public are allowed to review some of the medical evidence and take whatever precautions they see fit? There is no obvious mechanism for evaluating these tradeoffs, because embedded within each are normative considerations of value and priority alongside technocratic considerations of instrumental rationality. Even if we could predict with confidence the effects of disclosure, it may not be easy to discern which outcome would conduce to greater social welfare (or happiness, or preference

classified information concerning United States intelligence activities, 18 U.S.C. § 798 (2006), but it has hardly ever been deployed by prosecutors. See Jack Goldsmith, *Secrecy and Safety*, NEW REPUBLIC, Aug. 13, 2008, at 31, 32-34 (discussing § 798 and the “government’s practical inability to enforce this law against the press”); see also MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 94 (2d ed., rev. 2002) (noting the “media’s natural bias in favor of complete openness”). Although the press will occasionally sit on sensitive information for weeks or months at the government’s request, the possibility of such journalistic self-restraint cannot give much comfort to the secret-keepers.

71. See Pozen, *supra* note 11, at 630-34, 664-66 (explaining the mosaic theory).

72. *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978).

73. Pozen, *supra* note 11, at 664-74.

74. See *id.* at 673-74, 677 (discussing the potential for “positive” mosaic-making); see also Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1060 n.188 (2008) (speculating that the Bush administration relied so heavily on the mosaic theory because it feared that concerned citizens—“mosaic artisans” in the person of investigative reporters rather than astute terrorists—would be the ones to piece together disclosures).

satisfaction, or whatever other utilitarian standard one might adopt).⁷⁵ Deep secret-keepers do not necessarily have any special expertise in this regard. On account of its resources and experience, the CDC may have a unique ability to identify the public-health costs and benefits of early versus delayed disclosure about viruses. It has no special expertise at weighing the costs and benefits alongside other relevant consequentialist considerations, on this or any issue. Yet, by declining to inform anyone from the White House, Congress, or the public about its plans, the CDC would effectively assume sole authority over this determination.

The utilitarian case for deep secrecy thus rests on two highly problematic assumptions. First, it assumes that given a specific goal, government secret-keepers will reliably use deep secrecy to make better decisions toward that end than they would have in the presence of greater input, participation, and oversight. This assumption is problematic because, as explained above,⁷⁶ we have numerous a priori reasons to expect that deep secret-keepers will not in fact make superior decisions and that, even relative to shallow secret-keepers, their insularity will instead lead to suboptimal and self-interested decision making.

Second, it assumes that secret-keepers will reliably use deep secrecy to pursue goals that are themselves the correct goals. This assumption is problematic because it assigns responsibility over these judgments to a small, and possibly arbitrary, group of officials, and because it assumes a stable metric of social welfare, which “neglects the contribution of publicity to the desirability of the policy,”⁷⁷ and to the determination of what would make for a desirable policy. Shallow secrets moderate these concerns through the notice they provide to outsiders. Deep secrets license their keepers to decide courses of action in the interests of people who have never, except in the most attenuated and formalistic sense, had any say in the matter.

Although it would be wrong to maintain that deep state secrecy categorically produces inferior outcomes, the rule-utilitarian case in its favor appears as precarious and narrow as the case against appears clear and robust. The broader lesson is that consequentialist justifications for any particular use of deep secrecy should be met with great skepticism.

B. *Liberal Democratic Theory*

1. *Secrecy and liberal democracy*

The other main strain of argument against state secrecy is non-consequentialist

75. Geoffrey Stone has argued that given the diversity and incommensurability of interests at stake in government secrecy policies, cost-benefit analysis is “so fraught with ambiguity” that it quickly becomes “unmanageable . . . in practice.” GEOFFREY R. STONE, *TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK* 2-3 (2007). Implicit in Stone’s argument on the limits of utilitarian analysis is the need to look to other, non-consequentialist values as well.

76. See *supra* notes 61-67 and accompanying text.

77. GUTMANN & THOMPSON, *supra* note 27, at 103.

in character. It emphasizes (in varying degrees) the democratic values of popular sovereignty and government accountability and the liberal values of choice and consent. These arguments have deep roots in Western political thought. Many of the modern era's most important political thinkers—from Locke, to Rousseau, to Kant, to the Founding Fathers—and virtually all of the normative schools of democratic theory—from contractarians, to deliberativists, to libertarians, to republicans—have viewed transparency as a critical component of popular legitimacy and moral government.⁷⁸

Seen in a different light, all of the main utilitarian arguments against state secrecy can be recast as liberal or democratic arguments. By concealing the activities of officials, secrecy reduces the ability of the people and their representatives to monitor those activities and to identify and debate relevant issues in an informed manner. By giving officials greater leeway to pursue unpopular and unethical policies, secrecy reduces the cost of adopting such policies, fosters elite rule, threatens the rule of law, and magnifies the power of government over the individual. By denying citizens the information they need to make rational and deliberate decisions about the institutions that govern them, secrecy undermines the basis for consent. Secrecy fosters ignorance and suspicion. “It is based on a mistrust between those governing and those governed; at the same time, it exacerbates that mistrust.”⁷⁹ Through numerous mutually reinforcing mechanisms, secrecy weakens the link between members of a polity and their leaders.

A government operating in secret is not only more likely to take immoral actions; its use of secrecy is itself a moral problem. State secrecy can deny citizens the ability to exercise their rights and liberties, to be free from the unjust and coercive exercise of power, and to understand the world around them. It threatens the project of collective self-determination. None other than Richard Nixon put this point well: “When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.”⁸⁰

78. See Mark A. Chinen, *Secrecy and Democratic Decisions*, 27 QUINNIPIAC L. REV. 1, 3-8 (2009) (summarizing canonical liberal democratic arguments on behalf of government transparency); Fenster, *supra* note 54, at 895-99 (same); Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1144-47 (2007) (same). Despite this rich vein of theorizing, Dennis Thompson has observed that contemporary scholars rarely address secrecy from a systemic perspective. “[M]ost of the literature on government secrecy,” Thompson wrote in 1999, “neglects the fundamental democratic values underlying the problem and focuses instead on the laws and policies that regulate secrecy, patterns of abuses by individual officials, or particular practices such as executive privilege and national security.” Thompson, *supra* note 47, at 181-82.

79. Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999, at 115, 116 (Matthew J. Gibney ed., 2003).

80. ROZELL, *supra* note 70, at 15 (quoting President Nixon). The hedge here lies in the phrase “which properly belongs to the public.” Under the expansive view of executive power that Nixon would later espouse, *see id.* at 54-71, much information was considered not to “belong” to

Far less has been written about the democratic case in favor of state secrecy.⁸¹ One can imagine arguments on democratic grounds for any number of specific types of secrets. For instance, many would agree that it is good for democracy to keep certain juvenile records under seal so that low-level offenders have a chance to enter adulthood without social taint, to withhold election results until after the polls have closed so that voting behavior is not skewed, or to take any number of measures to protect individual privacy. Arguments of this sort tend to be highly content dependent, however, and do not hold up across substantive categories. Can there be a systemic democratic justification for state secrecy?

It is easily overlooked, but there is at least one very basic justification, rooted in popular consent. If the public has voted to install any particular regime of secrecy, and thereby authorized certain officials to keep certain types of secrets in certain ways, those officials can be said to be carrying out their popular mandate when they do so. As the previous Subpart elaborated, state secrecy can contribute to a wide range of social goods—from deliberative candor, to strategic surprise, to administrative efficiency—and it is therefore rational for citizens to seek some measure of it in their governing structures. With secret activities, there can never be fully informed consent, because if the activities were publicly announced ahead of time, there would no longer be any secret to protect. This is what Dennis Thompson has dubbed the “Heisenberg uncertainty principle”:⁸² secret-keepers are precluded from garnering the direct assent of the public, because to do so would risk forfeiting the very advantage that the keepers think the public would want them to preserve.⁸² Secret-keepers can never be one-hundred percent sure that their decisions would survive the glare of publicity.

Nevertheless, if the public expressly grants someone the authority to keep certain secrets, and if the grantee faithfully applies that authority subject to post hoc review, it is fair to see this exchange as a victory for democracy, not simply as a concession to practical necessity. The most defensible cases are those that are least analogous to the Scheppelian adversarial paradigm, when the secret is of general character and the keepers sincerely and reasonably believe the public would want them to protect it.⁸³ Secret decisions may have inherent deliberative and

the public but rather to the President alone.

81. Rather than make an affirmative democratic case for state secrecy, commentators have more often rebutted democratic objections to the practice by asserting that the government “owns” the information it creates and controls, much like a private citizen might own information. *See id.* at 9 (noting the recurring use of this argument by American officials); Sunstein, *supra* note 54, at 916-18 (discussing and rejecting this view). The analogy to private ownership in this context strikes me as very unattractive. It reifies the government in regard to a legal concept (intellectual property) meant to respect personhood and to stimulate market competition and creative output, it disables criticism, and it profoundly offends principles of popular sovereignty when the concealed information concerns affairs of state.

82. Thompson, *supra* note 47, at 182.

83. Other cases more closely approximate the Scheppelian paradigm. For instance, the Constitution’s Due Process Clause has been interpreted to require that prosecutors reveal potentially exculpatory evidence to criminal defendants, even if the defendants have no way of

participatory deficits that preclude robust democratic legitimacy. But under the right conditions, even government activities hidden from the public can claim a respectable democratic pedigree and help effectuate the project of popular self-rule.

2. *Deep secrecy and liberal democracy*

As with utilitarianism, deep secrets exacerbate all of the standard liberal democratic criticisms of (shallow) state secrecy. They keep outsiders in a more profound state of ignorance, depriving the public of any means to learn about, check, or influence the underlying information and blunting its capacity to seek and comprehend related information. The secret-keeper has that much more room to pursue impermissible or inappropriate ends, through the use of impermissible or inappropriate means. Because the executive branch controls the greatest amount of sensitive information and has the greatest ability to operate in secret, deep secrecy allows it to magnify its power relative to the other branches, corroding checks and balances and obscuring internal policy debates. Congress and the judiciary may never learn of information needed to perform their respective functions; policies may persist despite widespread opposition in the legislature or a high likelihood that courts would hold them unlawful. Values such as impartiality, legality, and compassion may be trampled on with impunity.

That much is straightforward. By exaggerating the knowledge and power asymmetries between the secret-keepers and everyone else, depth can undermine accountability, deliberation, and consent and thus attenuate a secret's connection to standard sources of democratic legitimacy. Deep secrets carry forward the pre-modern legacy of *arcana imperii*, mysteries of state the sovereign could invoke to justify his absolute authority and "to secure domination over [an] immature people."⁸⁴ They may also threaten liberal democratic values in several additional, distinctive respects.

First, deep state secrets are more likely to offend the Kantian publicity principle and the liberal safeguards it incorporates. In a celebrated passage of *Eternal Peace*, Kant proposed as "the transcendental formula of public law: 'All actions which relate to the right of other men are contrary to right and law, the maxim of which does not permit publicity.'"⁸⁵ For Kant, disclosing a policy to

knowing the evidence exists. *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963). This disclosure requirement tracks Scheppele's contractarian arguments against deep secrecy in proceedings between two parties, only here one party is the state.

84. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 52 (Thomas Burger trans., MIT Press 1991) (1962); see also BOK, *supra* note 54, at 172-73 (tracing the ecclesiastic origins of the principle of *arcana imperii*, later appropriated by secular leaders to preserve an "aura of sacredness" and thereby to forestall democratic scrutiny and sentiment).

85. IMMANUEL KANT, *Eternal Peace*, reprinted in *THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS* 430, 470 (Carl J. Friedrich ed. & trans., 1949) (1795); see also GUTMANN & THOMPSON, *supra* note 27, at 97-105 (explaining Kant's publicity principle and defending it on moral and deliberative grounds); David Luban, *The Publicity Principle*, in

those affected guards against their instrumentalization and the violation of substantive principles of justice such as fairness and rationality; it is also a necessary condition, or test, of that policy's morality. A policy cannot be just if permitting publicity would defeat its purpose.

The perverse feature of deep secrets from a Kantian perspective is that they may be valuable to officials precisely because publicity would defeat their purpose, whether noble or base, as to disclose even generalized facts about the policy would compromise it. This is at once the fundamental consequentialist rationale for deep secrets and, for Kantians, their fundamental defect. Because no one outside of a small, cohesive circle is aware of their existence, deep secrets relieve their keepers of the burden of reason giving. There can be no public defense of deep secrets, no case made to the parties who may be affected, because if any such case could be made, then the secret should not be deep in the first place. Paradoxically, the best justification for keeping deep secrets is that they cannot be justified to others.

Second, and relatedly, policies shrouded in deep secrecy (i.e., consummated deep secrets)⁸⁶ are more likely to offend the value of autonomy. When one's government adopts a policy that could not have been anticipated, one is conscripted into unwitting support for the policy as a citizen, taxpayer, and observer; as time goes by, official silence shades into outright manipulation and misrepresentation. Deep secrets can transform the lived world in important yet obscure ways. If the CIA were to conduct its assassination plot in deep secrecy, members of the general public, Congress, and other executive branch agencies would have no idea the plot had ever been contemplated. One day, Prime Minister X is alive, the next day dead, and no one outside of the CIA would understand why. Where in reality there is logic and motive, people will see only chance and circumstance. People will experience the world as arbitrary, or will assign mistaken reasons to the events they perceive, when in fact there is a hidden order. Such profound misunderstandings may compound over time.

Shallow secrets at least put members of the public on notice of the gaps that exist in their knowledge. They can learn the general contours of the material that is being withheld and can frame the decision problems that face them. The world is not entirely knowable but it is not entirely mysterious either.

Finally, deep secrets raise special democratic concerns in their deficits of representation. Representation is always imperfect in a political system. Given the heterogeneity of the electorate, the slack in selection and accountability mechanisms, and the unpredictability of human events, no one subset of government officials can ever claim to represent "the people" unproblematically. Rather, in Bruce Ackerman's figuration, every set of officials "re-presents" the people in a different, incomplete way.⁸⁷ When the policymaking process is more

THE THEORY OF INSTITUTIONAL DESIGN 154 (Robert E. Goodin ed., 1996) (providing a detailed historical and critical exegesis of the publicity principle).

86. See *supra* note 66 and accompanying text.

87. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 179-86 (1991).

multivocal, when more different types of the people's agents have a seat at the table, that process might therefore be considered more democratic—a richer simulacrum of the town-hall meeting that is practically infeasible as a means of reaching decisions in a modern polity.

This is true even within a single branch of government. If the CIA keeps Justice Department lawyers apprised of an assassination plot, it connects the plot to a review mechanism that has itself been established by elected officials in a public process. The assassination plot remains opaque to the citizenry in a direct sense—they still know and suspect nothing—but it is less obscure in an indirect sense, in that a different subset of government actors can apply the laws and values of the polity to the information. The connection between the secret and the people becomes a little more robust, the exercise of authority a little less arbitrary and contingent. The representation-reinforcing potential of shallowness is even greater across the branches. Bringing members of Congress or the judiciary into a secret not only introduces new forms of oversight and accountability; it also subjects the secret to new and qualitatively different forms of representation. In multiple respects, then, widening and diversifying the circle of keepers can enhance a secret's democratic credentials, even if the secret itself is never revealed to the demos.

Deep state secrets, by contrast, lack the *intra-keeper pluralism* that can help foster reasoned, public-spirited decision making and offset any external democratic deficits. Even among the subset of secrets about which the public knows nothing, the comparative insularity of the deeper ones, the smallness and cohesiveness of the group that keeps them, can pose a distinct threat to democratic values.

Can there be a liberal democratic justification for deep secrecy? It is hard to see how. I suggested above that a general defense of state secrecy may resort to hypothetical or constructive consent.⁸⁸ Even if members of the public have not actually blessed the contents of a particular secret (as they never have), officials may have positive legal authority to take the covert measure and persuasive reasons to think that people would have blessed it, had they been able to do so. It would take a severe proceduralist account of democracy to condemn the official who acts in good faith on this assumption rather than pass up a course of action that likely would have commanded widespread support.

88. See *supra* pp. 287-288. A few authors have also explored ways in which secrecy may be democracy-enhancing within government. For example, Amy Gutmann and Dennis Thompson describe a category of secrets, which they call "secrecy in the service of deliberation," that permit officials to engage in more extensive deliberation than would be possible with greater transparency. GUTMANN & THOMPSON, *supra* note 27, at 114-17. The obvious justification for these secrets is not democratic but utilitarian—that they will facilitate superior policy outcomes—but Gutmann and Thompson plausibly suggest that augmenting the quality of bureaucratic discourse can serve democratic values even when it comes at the expense of popular discourse. Whether one evaluates the quality of intragovernmental deliberation from a utilitarian or democratic perspective, deep secrecy should appear similarly unattractive. As explained *supra* Part III.A.2, shallow secrecy can suffice to provide many of the deliberative benefits that a clandestine decision making process might afford, without all of the drawbacks.

This logic breaks down with deep secrets. First, deep secret-keepers have a weaker epistemic basis for gauging public sentiment. A government official who believes the public would have consented to a deep secret cannot have any robust basis for so believing. If she had revealed enough information or widened the circle of keepers enough to test that assumption, she would have made the secret significantly shallower.

Second, and more critically, the obscurity of deep secrets calls into question the possibility of any meaningful form of consent or precommitment. By installing a regime of second-order publicity, a people can decide democratically at Time One how much and what kinds of transparency to sacrifice at Time Two, even if that loss of transparency means the public will not necessarily know at Time Two if it approves or disapproves of the specific actions the government is taking, and may have to wait until Time Three to evaluate them. There is a tension here, but it can be seen as just one facet of the general paradox of legal constraints in a regime committed to popular sovereignty.

But can a people decide democratically to sacrifice so much transparency that government activities will be not only unknown but also unknowable? To allow a small, homogeneous group of officials to pursue policies that others will have no ability to learn about, check, or influence? Given the virtual impenetrability of deep secrets, the impossibility of subjecting them to external constraints, a decision to authorize their keeping involves not so much a delegation of administrative discretion as an abdication of collective agency—an abandonment of self-rule on the matters at stake.⁸⁹ Arguably, there is no rational way to consent to future actions about which one will not have the faintest understanding.

None of this is to suggest that government policies must always be visible or subject to immediate popular control. These are impossible standards for modern democratic decision making. The problem with deep state secrets is that they do not satisfy more basic procedural and substantive criteria for democratic legitimacy. Deep secrets entail serious deficits in *ex ante* authorization by citizens and their elected representatives; partly as a result, they also entail serious deficits in *ex post* accountability. There can be no reliable expectation that they will foster equal treatment or even rationality. They facilitate an excessive concentration of power, which can constitute domination and which upsets the balance of mixed authority that gives the government a claim to being politically egalitarian.

From this perspective, a popular decision authorizing the President to keep deep secrets would not suffice to legitimate the practice, as it would license him to violate norms that are themselves constitutive of democratic rule. It would be like a vote to give up the right to vote, or to protest, or to demand fair and reasonable treatment from government. Like an attempt to contract away an inalienable right. It is not even clear that a statute purporting to authorize deep secrecy could have

89. *Cf.* JEREMY WALDRON, *LAW AND DISAGREEMENT* 265-66 (1999) (arguing that precommitment justifications cease to be useful in democratic theory “[o]nce it becomes unclear or controversial what the people have committed themselves to”).

sufficiently meaningful or intelligible limiting principles to warrant the label “law.”

The best liberal democratic argument for deep secrecy, if one can call it that, must therefore resort to bootstrapping. Sometimes, perhaps, government officials will have to violate fundamental norms of transparency in pursuit of the collective safety and well-being, so that democracy can flourish within the space that remains. They will have to impoverish the public sphere to preserve the public square. This argument from necessity accepts deep secrets as inherently evil, yet sometimes the lesser evil. We are back to consequentialism, or at least to a state of exception. As a matter of ideal theory, there is no democratic justification for deep secrets.

C. *Constitutional Theory*

1. *Secrecy and the Constitution*

If you asked most American legal scholars about secrecy’s role in the Constitution, they would probably say that it has none. The text mentions “secrecy” only once, in an obscure clause,⁹⁰ the Framers had relatively little to say on the subject, and throughout the vast part of our history “few have seen constitutional issues in governmental concealment.”⁹¹ It was not until the 1970s, in the wake of the Watergate scandal and the Vietnam War, that any significant number of lawyers began to ask whether state secrecy (and its opposite, transparency) might be a value of constitutional dimension. Those who have done so have focused on two questions: the President’s authority to withhold information requested by prosecutors or by Congress, and the existence and extent of judicially enforceable rights, anchored in the First Amendment, to access government institutions such as prisons and criminal trials. The courts have held that the President is entitled to withhold certain types of information and that the public is entitled to observe certain official proceedings, but the boundaries of these rights are highly unsettled.⁹² In the law reviews as in the court reporters, critical thinking is in a nascent stage. Although a great deal has been written about executive privilege, First Amendment access claims, and specific historical controversies, hardly anything has been written about secrecy’s broader place in our constitutional order.⁹³

90. U.S. CONST. art. I, § 5, cl. 3 (Journal Clause).

91. Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 276 (1971).

92. See, e.g., *Rubin v. United States*, 525 U.S. 990, 994 (1998) (Breyer, J., dissenting from denial of certiorari) (stating that “the bounds of [executive privilege] are unclear”); Fenster, *supra* note 54, at 889 (“[T]ransparency’s status as a legal obligation for government entities in the United States and as an individual right for American citizens is remarkably vague.”); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1051 (2008) (noting “widespread uncertainty as to whether Congress constitutionally may force the President to disclose information”).

93. I am aware of only one work, by Adam Samaha, that has considered secrecy’s

In this Subpart, I will try to nudge the ball forward by arguing that under each of the standard methods of constitutional interpretation—text, history, structure, prudence, and doctrine⁹⁴—the Constitution does speak to the issue of state secrecy, and that under each there is a colorable case to be made both for and against a constitutional norm of government openness. Along the way, I will try to synthesize the disparate strands of existing scholarship and suggest a variety of new interpretive moves that might be made.

a. *Text*

Start with the text. There are three main textualist routes to the conclusion that the Constitution guarantees some kind of access right to government information: extrapolating a broader principle from the scattered references to secrecy and publicity, evaluating Congress's enumerated powers in relation to those of the executive, and deriving from the First Amendment a right to receive as well as to express ideas. (Already, the discerning reader may glimpse that while these are textual arguments, in that they are rooted to specific language in the Constitution, the motivating insights might be better classed as structural.)⁹⁵

The document's only explicit reference to secrecy appears in Article I, Section 5's Journal Clause, which provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ." ⁹⁶ The Journal Clause contemplates legislative secrecy, but only as a deviation from a norm of publicity; the Constitution's sole grant of a secrecy power is coupled to an anterior duty of disclosure. As a baseline, the clause instantiates the view expressed by James Wilson at the Constitutional Convention that "[t]he people have a right to know what their Agents are doing or have done, and it should not be in the option of the

constitutional status from a systemic perspective, looking to the document as a whole and not just to a particular textual provision, doctrinal line, or category of information-access dispute. *See generally* Samaha, *supra* note 51. Mark Rozell and Heidi Kitrosser have taken similarly broad views in their insightful studies of executive privilege. *See generally* ROZELL, *supra* note 70; Kitrosser, *supra* note 31.

94. *See* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-92 (1982) (identifying these as the five standard modalities of constitutional argument). While Bobbitt's taxonomy can of course be disputed, it is comprehensive and "widely accepted," Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 *NOTRE DAME L. REV.* 1303, 1312 (2008), and so provides an attractive if artificial tool for organizing this overview. Bobbitt himself introduced a sixth modality, ethical argument, BOBBITT, *supra*, at 93-119, which has not gained widespread acceptance but which I will touch on briefly in conjunction with the historical and prudential analyses below.

95. *Cf.* BOBBITT, *supra* note 94, at 7 (noting that the various types of constitutional argument "are really archetypes, since many arguments take on aspects of more than one type").

96. U.S. CONST. art. I, § 5, cl. 3. The Constitution contains no reference to "executive privilege," the "state secrets privilege," or any other terms we now associate with government secrecy.

Legislature to conceal their proceedings.”⁹⁷ Additional guarantees of publicity appear in Article I, Section 9, which provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time”;⁹⁸ in Article II, Section 3, which provides that the President “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient”;⁹⁹ and in the Sixth Amendment’s right to a “public trial” in criminal proceedings.¹⁰⁰ Pursuant to these provisions, each branch of government is assigned a duty of publicity that relates to a core institutional responsibility—collecting and spending public funds (Congress), providing lawmakers with relevant information and guidance (the executive), and conducting criminal trials (the judiciary). These parallel obligations, together with the Constitution’s relative silence on secrecy, might suggest a broader norm of open government.

With respect to the President’s authority to keep secrets, a textualist might find it especially significant that, in contrast to Article I, Article II contains no reference to “secrecy.” The Framers evidently knew how to provide for secrecy when they wanted; perhaps this discrepancy suggests that the executive branch possesses no corresponding power to use it. With respect to the President’s authority to withhold information from Congress, a textualist might also note the many ways in which the former appears subordinate to the latter in the provision of means for carrying out its responsibilities.¹⁰¹ Congress is given the power of the purse,¹⁰² the power to create or abolish executive offices and departments,¹⁰³ the impeachment power,¹⁰⁴ and the necessary-and-proper power to make all laws for “carrying into Execution” its enumerated powers as well as “all other Powers vested by [the] Constitution in the Government of the United States.”¹⁰⁵ In light of all these

97. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 260 (Max Farrand ed., 1911) [hereinafter FARRAND].

98. U.S. CONST. art. I, § 9, cl. 7.

99. *Id.* art. II, § 3.

100. *Id.* amend. VI.

101. See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1153-69 (1999) (providing numerous textual arguments why “the President does not possess the constitutional authority to command the means of ensuring the complete utilization of [his own constitutional powers]”).

102. U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”); see also *id.* art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

103. There is no specific textual basis for this power. Conventional wisdom derives it from a combination of the Necessary and Proper Clause, *id.* art. I, § 8, cl. 18, and the reference to the President’s authority to appoint officers “established by Law” in Article II, Section 2, *id.* art. II, § 2, cl. 2, which carries the negative implication that the offices themselves must first be created by legislation. Whether and to what extent Congress may create executive agencies independent of the President is more hotly contested.

104. *Id.* art. I, § 2, cl. 5; art. I, § 3, cl. 6.

105. *Id.* art. I, § 8, cl. 18.

enumerated powers prodding Congress to oversee and respond to the actions of the executive, one might think it odd that the President would nonetheless have the right to deny a legislative request for information.

Suggestive as they may be, the foregoing arguments rely on interpretive inferences many would be unwilling to make. The Journal Clause appears to grant legislators unreviewable discretion to conceal proceedings (“as may in their Judgment require”),¹⁰⁶ the Constitution does not define the “Information of the State of the Union” that the President must share with Congress,¹⁰⁷ and each of its textual guarantees of publicity is limited in scope (to legislative proceedings, appropriations, presidential-congressional intercourse, or criminal trials). For the vast majority of open-government proponents, it has therefore fallen to the First Amendment—and its guarantees of free speech, a free press, and the freedom to petition—to provide a textual hook for a generalized, context-independent right to know what the government is up to. This argument has gained traction in recent years. Drawing on an influential 1976 piece by Thomas Emerson,¹⁰⁸ a number of scholars have argued that as a corollary to the negative rights it establishes, allowing Americans to be free from certain forms of government intervention, the First Amendment also establishes a “right of the public to obtain information from the government.”¹⁰⁹ This right could be operationalized any number of ways. A weaker form, institutionally, would require a presumption of access to those proceedings (such as trials) and institutions (such as prisons) that involve the exercise of the state’s coercive authority. A stronger form would require the government to publicize information it creates and controls even when no relevant formal process has been visibly initiated.

Like virtually everyone who has made the argument, Emerson did not see the “right to know” as an absolute, and he allowed that it could be overcome for reasons of national security or privacy.¹¹⁰ But he did see the right to know as an all-encompassing right, in that it would extend to all members of the public and, “as a starting point, to all information in the possession of the government.”¹¹¹ To bolster this reading of the First Amendment, one might look also to the Guarantee Clause¹¹² and to the Constitution’s provision for the election of Senators, Representatives, and the President.¹¹³ For federal elections to be meaningful, and

106. *Id.* art. I, § 5, cl. 3.

107. *Id.* art. II, § 3.

108. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1.

109. *Id.* at 14; see also Fuchs, *supra* note 57, at 140 & n.40 (citing numerous works “argu[ing] in favor of a [First-Amendment-based] right to know information about the government”). Emerson himself drew heavily on Alexander Meiklejohn in developing this argument, though he parted company with Meiklejohn in important respects. See, e.g., Emerson, *supra* note 108, at 4-5, 14.

110. Emerson, *supra* note 108, at 16-17.

111. *Id.* at 16. This is so because “[i]t is hard to conceive of any government information that would not be relevant to the concerns of the citizen and taxpayer.” *Id.*

112. U.S. CONST. art. IV, § 4.

113. *Id.* art. I, § 3, cl. 2 (Senators); art. I, § 2, cl. 1 (Representatives); art. II, § 1, cls. 2-3 (the

for states to have republican government in any realistic sense, the people must be aware of what their officeholders have been doing. Otherwise, they will have no sound basis on which to cast their votes.

Against these arguments for a constitutional right to government information, there are impressive textualist rejoinders to suggest that such a right, if it exists, may be substantially limited. The most basic rejoinder is that the document simply does not include the magic words: apart from the Journal Clause, it never once obliges any government entity to let the people know what it has been up to. Other constitutions state a publicity principle.¹¹⁴ The constitution of the Czech Republic, for instance, provides that “[o]rgans of the State and of local self-government shall provide in an appropriate manner information on their activity.”¹¹⁵ Albania’s constitution states baldly that “[t]he right to information is guaranteed.”¹¹⁶

Not only do our Constitution’s discrete references to publicity fail to ensure any generalized right to know; an intratextualist¹¹⁷ might well conclude that they point against such a conclusion. First, the interpretive canon of *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of the other) might suggest that where publicity is not so invoked, the omission should be seen as significant. For example, the right of criminal defendants to a public trial might be taken to imply a lack of such a right in non-criminal cases.

Second, with the exception of the Sixth Amendment’s public trial requirement, each of the Constitution’s textual guarantees of publicity—in the Journal Clause,¹¹⁸ the Statement and Account Clause,¹¹⁹ and the State of the Union Clause¹²⁰—is modified by “from time to time.” In those few places where the document demands publicity, it uses an identical formula to authorize temporal gaps in the exercise of that duty. If Congress need only publish a journal of its proceedings and a statement of its accounts from time to time, and if the President need only give Congress information on the state of the union from time to time, then it would seem to follow that, for some amount of time, they need do no such

President). In those settings in which information access bears on the ability of an individual or group to exercise its substantive rights, one might look also to the Due Process, Equal Protection, or Privileges and Immunities Clauses.

114. My understanding of comparative constitutional law on secrecy, and the examples I cite, derive almost entirely from Adam Samaha’s valuable discussion of the subject. Samaha, *supra* note 51, at 923-32.

115. *Id.* at 924.

116. *Id.* at 924 n.60 (alteration in original). According to Samaha, “at least two-dozen foreign constitutions now explicitly command some degree of public access to government-held information or records,” though these commands are often tempered by explicit access restrictions. *Id.* at 923.

117. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (elucidating the intratextualist interpretive methodology, which emphasizes recurring words and phrases as privileged sources of meaning).

118. U.S. CONST. art. I, § 5, cl. 3.

119. *Id.* art. I, § 9, cl. 7.

120. *Id.* art. II, § 3.

thing.¹²¹ Nor can the First Amendment necessarily pick up the slack. In the context of a document that calls for representative democracy, rather than direct democracy, and an Amendment that traditionally has been read to protect only negative liberties, rather than positive liberties, it does not necessarily follow from the guarantee of free speech and a free press that the government must proactively make information available to facilitate public discourse. The words of the First Amendment can bear this understanding, but they cannot in themselves compel it.¹²²

A further textualist rejoinder centers on Article II. Notwithstanding Congress's many powers relating to national security and foreign affairs,¹²³ the President alone is designated the Commander in Chief,¹²⁴ and it is natural to believe that incident to this authority he must be able to conceal some military information. Perhaps, too, the power to negotiate treaties and appoint ambassadors¹²⁵ implies an ancillary right to keep secrets. Finally, Article II's Vesting Clause¹²⁶—which, unlike its Article I counterpart,¹²⁷ does not limit itself to powers “herein” enumerated—might imply a residuum of executive powers beyond those listed in the spare confines of the text. If the President can exercise certain powers not delineated in any particular clause, perhaps he can use this unnamed authority to do things that will not be named.

b. *History*

The insights we can glean in this area from any form of originalist analysis are limited, because the Constitution's Framers and ratifiers did not say all that much

121. This point was not lost on the Framers. *See* Halperin v. CIA, 629 F.2d 144, 155-56 (D.C. Cir. 1980) (concluding that the debates surrounding the “from time to time” provision in the Statement and Account Clause “convey a very strong impression that the Framers . . . intended it to allow discretion to Congress and the President to preserve secrecy for expenditures related to military operations and foreign negotiations” (citation omitted)); JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 52-53 (2007) (summarizing Elbridge Gerry's, Patrick Henry's, and George Mason's criticisms of the “from time to time” provision in the Journal Clause). The Journal Clause in the Articles of Confederation contained a similarly worded secrecy exception but required monthly publication. ARTICLES OF CONFEDERATION art. IX, cl. 7; CHAFETZ, *supra*, at 52.

122. For an oft-quoted statement of this traditional view, see Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 636 (1975) (“The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”).

123. *See* Letter from David J. Barron, Professor, Harvard Law Sch., et al., to Harry Reid, Majority Leader, U.S. Senate, et al. 2 (Jan. 17, 2007) [hereinafter Scholars' War Powers Letter], available at http://www.law.duke.edu/features/pdf/congress_power_letter.pdf (cataloguing the “extensive powers relating to war” expressly granted by the Constitution to Congress).

124. U.S. CONST. art. II, § 2, cl. 1.

125. *Id.* art. II, § 2, cl. 2.

126. *Id.* art. II, § 1, cl. 1.

127. *Id.* art. I, § 1.

about government secrecy, and what they did say was rarely tied to a specific constitutional provision. Originalist analysis must therefore be conducted at a level of generality that some scholars would discount or reject. Even if our predecessors had spoken more clearly, the amount of information created and controlled by modern government is so many orders of magnitude beyond what eighteenth-century Americans had experienced that we might hesitate before relying on their views on the subject. Those caveats to the side, there are two basic historical arguments against government secrecy, and several in its favor.

First, we have specific remarks by Founding Fathers inveighing against the practice. Hardly a law review article on state secrecy goes by without mentioning the most provocative of the bunch, James Madison's aphorism that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."¹²⁸ Counterpoised against these remarks, however, are equally pointed statements in defense of government secrecy, particularly executive branch secrecy, proffered by equally esteemed Framers. Hardly a law review article on the unitary executive theory goes by without referencing Alexander Hamilton's or John Jay's tributes to the "secrecy and despatch" that only the executive branch can provide.¹²⁹ We have no explicit evidence from the drafting or ratifying conventions to suggest that executive privilege was a commonly recognized attribute of the "executive power" at the time of the Founding.¹³⁰ But neither do we have explicit evidence to suggest that the Framers and ratifiers understood the Constitution to create an enforceable "right to know."¹³¹

Second, we have a general historical understanding that the Framers were strongly motivated by a desire to avert government tyranny and by a concomitant desire to achieve popular sovereignty.¹³² Inasmuch as official secrecy seems

128. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON, 1819-1836, at 103, 103 (Gaillard Hunt ed., 1910); *see also supra* note 97 and accompanying text (quoting James Wilson's argument against congressional secrecy).

129. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (highlighting the President's superior ability to provide "[d]ecision, activity, secrecy, and despatch" in general); THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961) (highlighting the President's superior ability to provide "secrecy and despatch" in the negotiation of treaties).

130. Prakash, *supra* note 101, at 1173-85.

131. Jeffery A. Smith, Recognition of a Right to Know in Eighteenth-Century America 4 (Aug. 16, 2007) (unpublished manuscript, on file with author) ("[L]aw journal articles, textbooks, and other writings have concluded that the concept of a right to know was scarcely recognized, if at all, in the founding era." (internal citations omitted)).

132. *See, e.g.*, THE FEDERALIST NO. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . ."). *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5-53 (2005) (identifying popular sovereignty as the animating value of the original Constitution, as reflected in the Preamble's invocation of "We the People"); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 28-33, 86-90 (2008) (identifying popular sovereignty as one of the "bedrock"

anathema to these ideals, we might draw on the revolutionary spirit and etiology of our Constitution to deny its legitimacy. If the original Constitution failed to recognize or achieve these ideals, the subsequent addition of the First Amendment might also suggest a pro-openness trajectory, inflecting the preceding text and history with a deeper commitment to the values associated with free speech.¹³³

Counterpoised against these historical arguments, however, is the equally basic proposition that in drafting the Constitution, the Framers aimed to fix the central defect of the Articles of Confederation: the central government they created was too weak.¹³⁴ Secrecy used in the service of preserving the union, or more generally in the service of advancing the common interests of “We the People,” seems facially consistent with this foundational goal. Furthermore, it is an awkward historical reality for open-government advocates that the Constitution itself was drafted in strict secrecy.¹³⁵ Most scholars agree that the inaccessibility of the Philadelphia debates tends to negate whatever interpretive weight we might otherwise have assigned to their contents. Wholly apart from their substance, however, the conduct of the debates can serve as evidence that the Founding Fathers appreciated the benefits of secrecy in the predecisional stages of policymaking.

So did their successors. Although each branch of government has tended to become more open over time, the United States has a long and pervasive history of executive branch secrecy in matters relating to internal deliberations and military strategy.¹³⁶ Every President has kept such secrets. Congress and the courts have largely acquiesced. Notwithstanding the recent achievements of the open-government movement, the executive branch has emphatically not worked itself pure of this habit. For those who would derive meaning from nonjudicial precedents, from the Constitution outside of the four corners of the text and outside of the courts, this is strong evidence that some significant amount of executive branch secrecy is at least tolerable. Even if one believes that our poststratification traditions of secrecy are not constitutionally self-legitimizing, or that they provide no epistemic insight into the meaning of the Constitution, they might at least suggest that it is not incompatible with our national ethos for the government to conceal many things.

constitutional principles recognized “by nearly everyone as binding elements of our nation’s supreme law”).

133. Cf. *N.Y. Times Co. v. United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring) (asserting that, in cases of conflict with the “general powers” granted to the government in the body of the Constitution, the relatively “specific and emphatic guarantees” added by the First Amendment should prevail per standard inferences of construction).

134. AMAR, *supra* note 132, at 28-53, 132, 301; MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 2-12 (1913).

135. Max Farrand, *Introduction* to 1 FARRAND, *supra* note 97, at xi-xxv.

136. See *Halperin v. CIA*, 629 F.2d 144, 156-62 (D.C. Cir. 1980); MOYNIHAN COMMISSION REPORT, *supra* note 40, at app. A; ROZELL, *supra* note 70, at 28-43, 54-155; Henkin, *supra* note 91, at 273-76.

c. *Structure*

I noted above that the strongest textual arguments for a right to know might be better classified as structural arguments.¹³⁷ As a corollary of the right of Congress to exercise its legislative powers and the right of “We the People” to speak, publish, and petition freely, to choose leaders by elections, and to live under a republican form of government, it is plausible that officials must disclose information about their activities. If officials do not do so, they risk subverting the Constitution’s unifying aim to create a government of laws that would also be controlled by and responsive to the people. These are structural arguments, as well as textual arguments, in that they look not only to specific clauses in the Constitution but also to the relationships it establishes between the branches of government and between government and the people.¹³⁸ In many ways, they echo the liberal democratic arguments for transparency explored in the previous Subpart—which is unsurprising given that the Constitution was designed, in part, to safeguard basic liberal democratic guarantees.

We can take these structural insights further. The quintessential structural feature of the Constitution, the distribution of powers across the coordinate branches, serves as an information-forcing device. To fulfill its responsibilities, each branch is required both to give and receive information from the others. Congress must publish laws if it wants the other branches to understand and enforce them, and, like the executive, it must submit documents and arguments to the courts if it wants to participate in judicial proceedings. Congress, in turn, must learn from the executive and the judiciary how its laws are being applied, and how the other branches are functioning generally, if it wants to legislate intelligently. Judges must look to the other branches for positive sources of law, and must issue public decisions if they want their interpretations to guide their “political” colleagues. The President must persuade Congress if he wants to change statutes, receive funding, or reorganize his offices. And, of course, Congress and the President are required to collaborate to enact legislation, ratify treaties, and confirm nominations. The “public and dialogic nature” of these foundational government processes, Heidi Kitrosser has argued, provides significant evidence for a constitutional norm of publicity and visibility.¹³⁹

It may be of special significance to the structuralist that Congress—the branch

137. See *supra* note 95 and accompanying text.

138. The classic statement of the structural method of constitutional interpretation is CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). In its attention to the overarching themes, aspirations, and design of our constitutional order, structuralism could be seen as a kind of high purposivism or “macroscopic prudentialism.” BOBBITT, *supra* note 94, at 74. For a provocative new critique of structural analyses that fail to ground their claims in specific constitutional text, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009). I take it that Manning would reject some of the interpretive moves made in this Part for operating at too high a level of generality.

139. Kitrosser, *supra* note 31, at 518-20.

of government least equipped to keep secrets on account of its numerosity, multi-partisanship, and the nature of its authority—is the only branch given an express grant to do so.¹⁴⁰ Meanwhile, the branch that generates and controls the most sensitive information, the executive, is entirely dependent on Congress for the funds to do much of anything with that information. In all of these ways, the multilayered interdependence that characterizes the branches' relations appears to contemplate a regular flow of information so that each can try to influence, and modulate its activities in light of, what the others are doing.

Yet, if certain structural features of the Constitution suggest an expectation of government openness, other features appear to anticipate the use of secrecy. First, the information-forcing potential of the separation of powers does not necessarily yield any broader publicity principle. To the contrary, the creation of such a self-regulating system might carry a negative implication against deriving “rights to know” beyond what the ebb and flow of the political process will provide of its own momentum. Second, there is the special role of the executive branch. The paradigmatic areas in which secrecy can have strategic value are in the conduct of international negotiations and of military affairs. Primary authority in both fields is given to the branch that has a unitary administrator, representing all of the people, and that has the greatest procedural freedom. (Secondary authority in treaty-making, moreover, is given to the less numerous chamber of Congress, the Senate.)¹⁴¹ The branch that is best equipped institutionally to keep secrets is thus assigned the government functions that tend to require secrecy most. This hardly looks like coincidence. The design of the Constitution points to the executive branch as a privileged domain of clandestine action.

Whereas the structural arguments in favor of government transparency focus on the checks and balances that bind the branches to each other and to the people, this argument focuses on “the supremacy of each branch within its own assigned area of constitutional duties.”¹⁴² As Akhil Amar has observed, a dose of practical wisdom lies at the “nub” of this insight:

The Presidency is the only branch structured to be permanently in session, 24 hours a day, 7 days a week, 365 days a year. Also, it is the only branch whose power resides in a single, unitary figure. The evident constitutional design here is thus to enable one part of the government to act quickly and decisively, with unity, energy, vigor, dispatch, and, if need be, secrecy. When an insurrection breaks out or an invasion occurs or a foreign policy crisis erupts, Congress may not even be in session, and unless the President acts unilaterally

140. Aziz Huq, *Hold on There, Mr. President: It's Time to Put a Limit on Executive Privilege*, CHI. SUN-TIMES, July 29, 2007, at B2; see also *supra* notes 51-52 and accompanying text (discussing structural constraints on congressional secrecy).

141. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321 (1936) (quoting George Washington for the insight that excluding the House helps preserve secrecy in treaty-making); cf. *supra* Part II.A (explaining connections between numerosity and publicity).

142. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

to preserve the status quo ante, Congress may never again be able to act.¹⁴³

In this argument, as in so many compelling constitutional arguments, text meets history meets structure. Textual clues such as the discrepancy in the Article I and II vesting clauses, historical clues such as the Framers' concern to strengthen the central government and to enable unilateral action in times of emergency, and structural clues such as the allocation of treaty- and war-making powers to the body in government best able to keep secrets, converge to suggest a constitutional principle authorizing occasional executive branch secrecy. The scope and contours of that power are hazy, to be sure, and the mechanisms of judicial review and congressional oversight provide critical checks. But the principle can be glimpsed.

d. *Prudence*

The prudential arguments for and against government secrecy should be easier to grasp at this point, because they echo the consequentialist arguments elaborated above in Subpart A.¹⁴⁴ Against secrecy, we have the standard menu of claims about how it may lead to abuse, corruption, and inferior decision making. In favor of secrecy, we have the standard claims about its strategic and efficiency value.¹⁴⁵ Are these *constitutional* considerations? At least in a few circumstances, many would answer this question in the affirmative. When Justice Jackson famously quipped that the Constitution is not a "suicide pact,"¹⁴⁶ he was making not so much a descriptive or historical claim as a prudential argument about the meaning of the document: that no matter where the other interpretive modalities might lead, the Constitution need not tolerate legal outcomes that threaten the very existence of the nation; that constitutional rights "should not be interpreted to be self-defeating."¹⁴⁷ An argument that state secrecy is vital to national security is, by this reckoning, an argument that the Constitution does not forbid such secrecy, and may

143. Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 *YALE L.J.* 997, 2005 (2006).

144. Philip Bobbitt describes prudentialism as "constitutional argument which is actuated by the political and economic circumstances surrounding the decision." BOBBITT, *supra* note 94, at 61. This approach has clear affinities with, and in some formulations may be identical to, what others would term pragmatism.

145. There are also the standard arguments about institutional competence and the role of the courts that might lead a judge to decline to resolve a particular information-access dispute. These arguments are prudential too, but they do not provide any substantive basis for evaluating the constitutionality of the underlying secrecy.

146. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 17 (1991) (observing that prudential arguments are "likeliest to be decisive" in emergency situations). The other touchstone here is Abraham Lincoln's "all the laws, but one" line. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421, 430 (Roy P. Basler ed., 1953) ("[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?").

147. JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 247 (2001).

even require it. An argument that secrecy impairs national security carries the opposite implication.

Other formulations of prudentialism sweep broader. Justice Breyer likes to say that the Framers intended the Constitution to be a “workable” document, creating a government that would serve the nation well throughout the centuries to come.¹⁴⁸ This suggests that practices may be constitutionally unsound not only if they threaten the very existence of the country but also if they threaten more mundane administrative values, such as efficiency and reliability, or if they threaten values such as personal liberty that are especially important in the American cultural ethos (here, prudential analysis may verge into ethical or moral analysis). If secrecy truly is indispensable to the quality of deliberative processes or the effectiveness of government, then perhaps federal officials can claim a constitutional right to use it.¹⁴⁹ If, to the contrary, secrecy is more likely to undermine these values, its prudential basis falls away.

e. *Doctrine*

Lastly, let us consider what the federal courts have said about secrecy as a doctrinal matter. For many years, they did not say much—an indication of the low constitutional salience of the issue. It was not until the 1970s that open-government advocates began to make a concerted push for judicial recognition of public access claims, and it was not until the 1980s that they achieved some limited success. Two lines of doctrine are key.

First, in a series of cases involving challenges to closed judicial proceedings, the Supreme Court has established some basic access rights, rooted in the First Amendment, and laid a platform for possible further moves. After speaking dismissively of the idea of a constitutional right to know in cases such as *Pell v. Procunier*¹⁵⁰ and *Houchins v. KQED, Inc.*,¹⁵¹ the Court made what appeared to be a decisive shift in the opposite direction in the *Richmond Newspapers* case, holding that the public and the press have a presumptive right under the First Amendment to attend criminal trials.¹⁵² Applying Justice Brennan’s hybrid historical/pragmatic

148. See, e.g., *Medellin v. Texas*, 128 S. Ct. 1346, 1392 (2008) (Breyer, J., dissenting) (invoking “the workable Constitution that the Founders envisaged”); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 34 (2005) (“In sum, our constitutional history has been a quest for workable government, workable democratic government, workable democratic government protective of individual personal liberty.”). Other Justices have similarly invoked workability as a constitutional norm. See, e.g., *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

149. Cf. *United States v. Nixon*, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”).

150. 417 U.S. 817, 834 n.9 (1974).

151. 438 U.S. 1, 14 (1978) (plurality opinion).

152. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion).

test,¹⁵³ the Court progressively extended that right in several subsequent decisions.¹⁵⁴ But the case law has dried up. The Court has not issued a significant information-access decision in over two decades now, and lower courts have gone different ways.¹⁵⁵ The legacy of *Richmond Newspapers* remains up for grabs.

Second, in a longer line of cases, dating back to the 1800s, the Supreme Court has affirmed the power of Congress to investigate the executive branch. The Court has established some modest limits on this oversight power: namely, that it must have a legitimate legislative purpose, it must abide by constitutional restraints on government action, and it must not trespass “into matters which are within the exclusive province of one of the other branches of the Government.”¹⁵⁶ Yet, against whatever separation-of-powers problems such interbranch oversight might risk, the Court has repeatedly made clear that Congress’s power of inquiry is “as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”¹⁵⁷

In a variety of contexts, however, the Supreme Court has also made clear that government secrecy, particularly executive branch secrecy in the service of national defense, will be tolerated to a significant degree. *United States v. Nixon* recognized a constitutionally based presidential privilege, grounded in the separation of powers and the prudential need for candor, to withhold information from judicial process.¹⁵⁸ *United States v. Reynolds* recognized a common-law state secrets privilege to prevent materials from being disclosed in civil litigation.¹⁵⁹ Cases such as *Department of the Navy v. Egan*,¹⁶⁰ *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*,¹⁶¹ and *United States v. Curtiss-Wright Export Corp.*¹⁶² contain strong language on the President’s preeminence in international affairs and his authority, grounded in the Commander-in-Chief Clause, to classify and control

153. *Id.* at 589 (Brennan, J., concurring) (urging courts to ask whether the government process in question has “a tradition of accessibility” and whether public access “is important in terms of that very process”); see also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-13 (1986) (conducting this two-part inquiry); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982) (same); Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 108-25 (2004) (explaining that courts have generally taken Justice Brennan’s test to be the controlling standard for resolving access claims).

154. See Kitrosser, *supra* note 153, at 97-99, 103-12, 116-25.

155. Lower courts have split, for example, on whether and to what extent to recognize public access rights in administrative proceedings. See *id.* at 118-25.

156. *Barenblatt v. United States*, 360 U.S. 109, 112 (1959); accord *McGrain v. Daugherty*, 273 U.S. 135, 170-75 (1927). See generally William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 788-803 (summarizing the doctrine).

157. *Barenblatt*, 360 U.S. at 111.

158. 418 U.S. 683, 705-13 (1974).

159. 345 U.S. 1, 7-12 (1953).

160. 484 U.S. 518, 527-30 (1988).

161. 333 U.S. 103, 111 (1948).

162. 299 U.S. 304, 315-29 (1936).

information bearing on national security. And, of course, the Court has declined many invitations to expand the holdings of *Richmond Newspapers* and its progeny into a broader principle of public access to government information.

Outside of the constitutional context, courts have also been extremely deferential in their review of Freedom of Information Act record denials, virtually rubber-stamping them when the government invokes the Act's national security exemption.¹⁶³ Courts routinely emphasize their limited institutional competence and the potential costs of mandating disclosure in the face of executive branch claims that doing so would cause public harm.

This cursory sketch is enough to show that if our case law reflects cautious support for a publicly held right to know what the government is up to, and more robust support for a congressional and judicial right to see relevant documents the executive branch has produced, it also reflects a deep skepticism of judicial intervention in this area. Courts have never passed judgment on most pieces of our immense government secrecy system.

2. *Deep secrecy and the Constitution*

To sum up the analysis above: state secrecy's role in the Constitution is ambiguous. If there is a generalized "right to know," it cannot be a right for everyone to know everything at all times, and it may be trumped by other rights or responsibilities vested in a particular branch of government. Courts and commentators have taken an ad hoc approach to discerning when information-access rights should prevail; little attention has been paid to the character of the secrecy at issue, as opposed to its (putative) content or the character of the competing interests in disclosure versus nondisclosure. Does the Constitution suggest *any* overarching principles, *any* overarching themes, about which forms of secrecy may or may not be used?

I will argue in this Subpart that one such principle, perhaps the only such principle, is a strong presumption that deep secrecy is illegitimate. If the document and the doctrine yield only tentative answers when it comes to government openness generally, they permit a powerful argument against deep secrecy specifically.

It may be helpful to take stock of the universe of factual situations we are dealing with. In many information-access disputes, the government has restricted public access to something: a trial, a hearing, a prison, a foreign visa. These are important domains of secrecy, but they are not likely to involve very deep secrecy. If members of the public are able to identify the government privilege or proceeding to which they seek access, they have already crossed over the basic threshold of depth. They know something about what they do not know; their curiosity has been piqued; that is why they seek greater access. Deep secrecy might

163. See Fuchs, *supra* note 57, at 163-67; Samaha, *supra* note 51, at 939-40; Pozen, *supra* note 11, at 637-38.

still be lurking, as information might emerge from the courtroom deposition, the administrative hearing, the prison interview, or the foreign country that was not anticipated. But deep secrecy is generally more likely to occur in backrooms and back channels, in government discussions and decisions that take place outside of any formal, regularized, quasi-public structure. Compared to generic assertions of a “right to know,” the claim that deep secrecy offends the Constitution is therefore more modest in scope (in that deep secrets constitute an extreme subset of all state secrets), yet perhaps more ambitious to operationalize (in that access to these secrets cannot typically be granted simply by opening up a preexisting process).

a. *Text*

A textual analysis of deep secrecy can add a few wrinkles to the textual analysis of secrecy generally. Let us return to the Constitution’s only reference to “secrecy,” in the Journal Clause.¹⁶⁴ While the clause leaves great flexibility to the houses of Congress “in respect to the particular mode in which, or with what fullness, shall be kept the [i]r proceedings,”¹⁶⁵ the secrecy it authorizes is limited in several important ways. First, the clause places the obligation to keep a journal onto “[e]ach House.” As with the affirmative powers granted to “each House” in Article I, Section 5,¹⁶⁶ this phrasing suggests that the obligation is a collective one, shared by all members of the chamber and not just, say, the leadership of the majority party. Second, although the clause does not specify what counts as “proceedings,” it speaks in categorical terms about the duty to keep a journal that records them. It is only at the publication stage when secrecy and stalling may enter. Finally, the clause’s roll call provision (“the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal”) sets an exceptionally low threshold for requiring the journal to reflect the precise content of congressional votes, which “empower[s] minorities to force public accountability and transparency on the majority.”¹⁶⁷ Nowhere else in the Constitution do we find a precise submajority voting rule of any kind.¹⁶⁸

164. U.S. CONST. art. I, § 5, cl. 3; *see supra* notes 96-97 and accompanying text (discussing the Journal Clause).

165. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 671 (1892).

166. U.S. CONST. art. I, § 5, cl. 1 (power to judge qualifications of members and to do business); *id.* art. I, § 5, cl. 2 (power to determine rules and to punish members).

167. Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 79 (2005) (emphasis omitted). Adrian Vermeule provides incisive analyses of the Journal Clause in *id.* at 84-86, and Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 410-22 (2004).

168. I say precise because “a smaller Number [than a majority of Members] may adjourn from day to day, and may be authorized to compel the Attendance of absent Members.” U.S. CONST. art. I, § 5, cl. 1. Of course, every supermajority voting rule could be reconceptualized as a submajority voting rule, and vice versa, if one simply inverts the object of the vote. (If it takes “two thirds of the Senators present” to ratify a treaty, *id.* art. II, § 2, cl. 2, then it takes one-third to defeat a treaty.) But it is still notable that the Constitution expressly sets a submajority threshold only once, in the Journal Clause.

These three features of the Journal Clause—that a journal must be kept, that it may be excised only pursuant to a collective process, and that it must record individual members' votes if one-fifth of those present so desire—serve as a structural safeguard against depth. They make it much more difficult for congressional leaders to pursue a course of action that is not meant to be found out. Even if there is a time lag before the journal is published, and even if some portions will never be published, the journal's content will, at a minimum, be accessible to a large number of representatives from divergent backgrounds, constituencies, and political parties. To the extent that the Journal Clause yields any broader insight into the forms of government secrecy that are constitutionally permissible, it could be taken to suggest that secrets will be less offensive when the decision to conceal them is made pursuant to a clear and demanding procedure that incorporates robust political checks.

A stronger textual (and structural) argument against deep secrecy can be gleaned from the First Amendment. Proponents of a constitutional "right to know," such as Thomas Emerson, have sought to derive from the First Amendment an all-encompassing right to learn what the government is up to.¹⁶⁹ One difficulty with this thesis lies in its indiscriminating notion of what the First Amendment's guarantees require to be meaningful. In theory and reality, speech is not degraded equally by all forms of state concealment. A more modest version of Emerson's thesis would focus on deep secrecy specifically. Whatever other access rights it provides, we might say, the First Amendment at least secures a right to learn the *basic contours* of what the government is up to.

So long as the press is aware that officials are keeping certain types of secrets, public discourse can still flourish. One subject people can debate is whether the secrecy system is a good system, or whether more openness ought to be provided. Journalists can try to ferret out embarrassing or disturbing facts. Politicians can be rewarded or punished for their positions on these matters; citizens can check their guardians on the very issue of their commitment to being checked.¹⁷⁰ None of this is possible to any comparable degree with deep secrets. Deep secrets deprive information-outsiders of even the crudest means of comprehension and so frustrate public discourse at a more fundamental level.

The philosophical lesson here is that, while the rights to speak freely, to petition the government, and to choose leaders through popular elections are always impaired by state secrecy, these processes only become a "farce"¹⁷¹ in the face of consummated deep secrecy.¹⁷² Advocates of a right to know might do well

169. See *supra* notes 108-111 and accompanying text.

170. As I write these lines, all of these things appear to be happening in response to President Obama's decision to withhold certain photographs of United States military personnel abusing detainees. See Jeff Zeleny & Thom Shanker, *Obama Reversal on Abuse Photos*, N.Y. TIMES, May 14, 2009, at A1.

171. *Supra* text accompanying note 128 (quoting James Madison).

172. See *supra* note 66 and accompanying text (distinguishing consummated from deliberative deep state secrets).

to acknowledge that official acts of concealment do not threaten First Amendment values in a uniform way—that even when we do not know the contents of withheld information, we can still take a measure of comfort, and dollop out a measure of criticism, if the secret is shallow. There is a practical lesson here, too, as judges may find it easier to cabin and enforce an otherwise limitless right to know if they reason from this principle.¹⁷³ To agree on these points, we need not agree whether the central purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,”¹⁷⁴ “to protect the free discussion of governmental affairs,”¹⁷⁵ “to foreclose public authority from assuming a guardianship of the public mind,”¹⁷⁶ to “foster[] individual self-expression,”¹⁷⁷ or any other plausible alternative. Deep secrecy poses a unique threat to all of these.

With consummated deep secrets, another piece of the Bill of Rights becomes potentially relevant: the Fourth Amendment.¹⁷⁸ The Fourth Amendment’s prohibition on “unreasonable searches and seizures” clearly does not prohibit all search- and seizure-related secrecy. Government officials can obtain a warrant without first informing the target, or do preparatory investigative work to see if an arrest is needed, and no one would think this unreasonable. But the Amendment’s warrant requirement subjects that secrecy to certain constraints. The authorities who desire a warrant must go to a different set of authorities, describe with some particularity what they are looking for and why, and receive prior approval for their actions.

Within the government, then, the warrant requirement ensures that investigative secrecy will be moved from deeper to shallower before the moment when the search or seizure actually takes place. The many judicially recognized exceptions to this rule—exigent circumstances, search incident to a lawful arrest, plain view, hot pursuit, border searches, vehicle searches, special needs searches, and so on¹⁷⁹—do not necessarily undermine this safeguard. None of these exceptions allows the authorities to bypass the warrant requirement in a situation that is likely to have been preceded by deep investigative secrecy in the form of sustained government snooping or surveillance on an unwitting target.

The point can be generalized if we understand the “right of the people to be

173. Cf. Cheh, *supra* note 69, at 723 (asserting that the most “substantial claim raised against the right of access formulation is that courts lack a principled way to apply or confine it”).

174. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

175. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

176. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

177. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

178. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

179. See generally *Warrantless Searches and Seizures*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 39 (2008).

secure in their persons, houses, papers, and effects” to embody more than just a right to privacy or physical liberty. Jed Rubenfeld has recently argued in these pages that the Fourth Amendment’s central purpose is to guarantee a right to security, understood as the right to enjoy a personal life free from unjustified government violation, free from “a pervasive, cringing fear of the state.”¹⁸⁰ On this view, the Fourth Amendment serves the structural function of ensuring that a constitutional system founded on popular sovereignty and individual liberty does not degenerate into totalitarianism.

Consummated deep secrets offend this understanding of the Fourth Amendment. No matter what the laws might provide or the authorities might promise, there is no way for the individual to feel confident about his or her relation to the state if small cadres of officials may consistently manipulate the lived environment without any external checks. Deep secrecy threatens not only the rule of law but also the sense of personal security that comes with living in a society governed by the rule of law.

Against these arguments, it is much harder to identify a contrary principle anywhere in the text of the Constitution. The fact that the Constitution’s guarantees of congressional and executive publicity are all moderated temporally does not provide it.¹⁸¹ The “from time to time” modifier acts as a pragmatic brake on potentially unwieldy duties of transparency; the secrecy it validates is interstitial, bounded. The best textual candidates for a deep secrecy power, rather, are Article II’s Commander-in-Chief Clause and its comparatively open-ended Vesting Clause. Only in these provisions can a government actor claim an express basis for using secrecy that does not come with a built-in limiting principle.

Yet it would stretch this text quite far if the President were to claim the power not only to withhold the content of specific information in his control but also to deprive the other branches of the means to learn about, influence, or check that content. The obvious rebuttal is that Congress and the courts need to know what the executive branch is doing in order to fulfill their prescribed functions and to police constitutional violations. The more basic objection is that there is nothing about commander-in-chief or executive authority that implies such a prerogative, that the power to use deep secrecy may not “flow from the nature of [the President’s] enumerated powers.”¹⁸² In order to lead a military, administer a bureaucracy, and enforce the laws, it may well be necessary for the President to conceal information from some outside parties for some amount of time. It is much harder to see why he would need to keep deep secrets to discharge his formal duties, or why the capacity to do so inheres in a nonmonarchical office. To the contrary, the power to conceal the fact of one’s concealment might appear to conflict with the vision of the presidency intimated by the many constitutional provisions permitting Congress to control the means by which the President carries out his constitutional

180. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 127 (2008).

181. See *supra* note 121 and accompanying text.

182. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

responsibilities.¹⁸³

I will return soon to the limits on deep secrecy suggested by the separation of powers. Here, I am suggesting that while it is reasonable to think that, as a logical or functional incident of his enumerated powers, the President may keep many secrets, it does not likewise follow that he has the authority to keep them deep.

b. *History*

Americans of the Founding era did not, of course, explicitly attend to the deep/shallow distinction. The entire concept of depth would have been less salient in an age when the executive branch was so much smaller and more unitary, information technology so much more primitive, and the mass media so much more remote. Nevertheless, if we take the arguments voiced by the opponents of state secrecy—James Wilson’s assertion that “[t]he people have a right to know what their Agents are doing or have done,”¹⁸⁴ Patrick Henry’s assertion that the “liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them,”¹⁸⁵ and so forth—it does not take much imagination to see how deep secrecy might be of special concern. I argued in the previous Subpart that deep secrets pose a distinct threat to liberal democratic values such as popular sovereignty and freedom from tyranny. These arguments may take on constitutional significance in light of the Framers’ professed goal to realize those values in the Constitution they were creating.

We know that the Framers were also seeking a more powerful and efficacious central government, and that certain Framers emphasized the utility of secrecy toward this end. It is less clear whether this principle speaks to the deep/shallow distinction. Historians have observed that while we have strong statements from leading Framers on the need for occasional executive-branch secrecy, we have no statements suggesting this secrecy would or could be “absolute.”¹⁸⁶ Furthermore, recent scholarship casts significant doubt on the notion that the Founding generation viewed the Constitution as vesting the President with any preclusive powers relating to warmaking, even in decisions on tactical details.¹⁸⁷ And though

183. See *supra* notes 101-105 and accompanying text.

184. See *supra* note 97 and accompanying text.

185. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 170 (Jonathan Elliot ed., 2d ed. 1891) (1836).

186. DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 34 (1981).

187. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 772-803 (2008); see also LOUIS FISHER, CONGRESSIONAL ACCESS TO NATIONAL SECURITY INFORMATION: PRECEDENTS FROM THE WASHINGTON ADMINISTRATION (2009), <http://www.loc.gov/law/help/usconlaw/pdf/GW.2009.pdf> (arguing that, contrary to recent executive branch claims, Washington-era precedents do not support the view the President was ever thought to have plenary and exclusive authority over national security information).

there may be times when deep secrecy is instrumentally valuable for officials, a central government can administer a bureaucracy, superintend the states, and defend against enemies without resorting to it in any systematic fashion.

At a very crude level, then, an asymmetry exists between the central originalist arguments for and against deep secrecy. While the basic normative principles articulated by the Framers can be invoked with comparable force for and against state secrecy, they offer stronger support to the opponent of deep state secrecy.

The secret drafting history of the Constitution cannot rebalance the scales. The content of the deliberations in Philadelphia may have been closely guarded, but it was well-known at the time that the Convention itself was occurring.¹⁸⁸ Once the drafting process was concluded, the document's contents were made public, its authors were identified, and its political fate was subjected to a ratification process unparalleled for the time in its levels of inclusiveness and democratic participation.¹⁸⁹ All of which is to say that the secrecy used in creating the Constitution was shallow indeed.

Looking to postratification history, the case for deep secrecy also suffers. While it is abundantly clear that the United States has a long and consistent tradition of executive branch secrecy, it is less clear that this tradition extends to deep secrecy. For one thing, it is uncertain, as an empirical matter, how often a small group of executive branch officials has intentionally and successfully concealed relevant information from the public and from the other branches, such that the outsiders' ignorance precluded them from learning about, checking, or influencing the keepers' use of the information. That is the nature of deep secrecy. We all know the President classifies thousands of documents. We have no clue how often he does things about which we have no clue.

However much Presidents have in fact utilized deep secrets, the decisive constitutional point is this: we do not have any significant *public* tradition of their usage, or of congressional, judicial, and popular acceptance thereof.¹⁹⁰ The interpretive force of a nonjudicial precedent depends in part on there having been meaningful contemporaneous consent to the practice, which generates pragmatic, epistemic, and democratic reasons to give the precedent weight. At the least, the

188. See generally FARRAND, *supra* note 134, at 9-41 (discussing public acts and debates leading to the Convention).

189. AMAR, *supra* note 132, at 7, 17-18.

190. We do have a recent tradition of explicit congressional acquiescence in certain national-security-related secrets, such as "waived" programs and covert actions, that the President discloses only to a very select group from Congress, such as the "Gang of Eight." See *infra* Part IV.B. Exactly how to characterize the depth of these secrets is a debatable question, and the answer may vary from case to case. When the vast majority of Congress (along with the general public) is clueless about a secret and the Gang of Eight lacks a meaningful ability to challenge it, the secret is best understood as deep. When many members of Congress understand the gist of a secret and the Gang of Eight can effectively represent their interests, the secret becomes significantly shallower. Both types of secrets raise constitutional concerns to the extent that the full legislative body is deprived pertinent information, but in the former case the concerns are much more acute.

precedent must be easily discoverable to ensure against self-interested or bizarre interpretations.¹⁹¹ But meaningful consent never exists with deep secrets. On account of their insularity, deep secrets never achieve robust support, even within government. And any discoverability that arises will be idiosyncratic and belated. It would be perverse to maintain that, in virtue of doing things that no one else knows about, the executive branch has established a precedential basis for the constitutionality of doing things that no one else knows about.

I suspect, moreover, that certain types of deep state secrets—those that never emerge or that emerge only many years later—will conflict with our constitutional ethos, with our sense of “who we are as a people.”¹⁹² Americans are unaccustomed to thinking of the United States as a country in which the government can operate beyond all public comprehension. Irrespective of their content, long-standing deep secrets may subvert our ethical commitment to understanding and learning from, rather than burying, our collective history.

If America’s postratification history cannot be invoked to legitimate a constitutional norm of deep secrecy, can it be invoked for the contrary purpose? My tentative answer is yes. I have already alluded to the dramatic shift in cultural sentiment toward state secrecy that occurred in the 1970s. In that decade, Congress passed two framework laws on government openness, the 1974 Freedom of Information Act (FOIA) amendments¹⁹³ and the Foreign Intelligence Surveillance Act (FISA),¹⁹⁴ as well as the Presidential Records Act¹⁹⁵ and the Federal Advisory Committee Act.¹⁹⁶ For those who subscribe to any form of living constitutionalism, this shift alone might caution against reading too much into experiences of secrecy that came before, as the constitutional understandings reflected in those precedents may have lost their foundation of popular support.

Yet the open-government movement, and the legislation it produced, has not targeted all forms of secrecy equally. FISA and FOIA both contemplate significant concealment. Pursuant to FISA, the executive may still conduct covert foreign intelligence surveillance. Pursuant to FOIA, the executive may still decline to turn over whole categories of records. What especially offends these laws is not government secrecy, nor even massive government secrecy; it is deep secrecy. In the case of FISA, this is true because the statute requires intelligence officials to

191. See Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 718-35 (2008); Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1067-68 (2008).

192. Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209, 220 n.53 (2006) (invoking Bobbitt’s ethical argument).

193. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (2006)).

194. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1862 (2006)).

195. Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201-2207 (2006)).

196. Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. App. 2 §§ 1-16 (2006)).

receive a warrant from a special Article III court before commencing surveillance on United States persons.¹⁹⁷ The central feature of FISA, and its central advance over prior practice, is that it subjects the executive's secret plans to ex ante approval by a separate and nonaligned group of officials—the classic means of moderating depth within government while preserving the advantages of opacity beyond. FISA represents a decisive repudiation of the deep-secret surveillance practices of earlier administrations.

The case of FOIA is a little more complex. FOIA appears on paper to be a remarkably, even radically, potent tool for transparency. It allows virtually anyone to request any government record, for any reason, in any accessible format, with the burden on the agency to justify withholdings.¹⁹⁸ It requires documents to be furnished at no charge or reduced charge whenever “in the public interest.”¹⁹⁹ Many have complained that, as it has been applied by agencies and courts, the statute's exemptions have sometimes seemed to overwhelm its access guarantees.²⁰⁰ Deep secrecy poses a more fundamental problem: for a FOIA request to generate responsive documents, the requester must have enough a priori information to be able to describe what it is she is seeking.²⁰¹ If the government keeps people ignorant of their own ignorance on certain matters, no one will be able to frame requests concerning those matters. The public will lack the necessary “prerequisite knowledge.”²⁰²

Deep secrecy does not formally threaten FOIA as it does FISA. An administration could keep the public in total darkness about many things but nevertheless comply with the Act. Deep secrecy functionally and purposively threatens FOIA. It defeats the Act's guarantees even before the point when an agency claims a nondisclosure exemption, which provides public notice that something is being concealed and, more important, exposes the underlying records to potential judicial scrutiny. An administration that favored deep secrets yet punctiliously complied with record requests would not be honoring the spirit of the Act and its “general philosophy of full agency disclosure.”²⁰³

197. 50 U.S.C. § 1802(b) (2006).

198. 5 U.S.C. § 552(a)(3)(A) (2006) (requiring agencies to make non-exempt records “promptly available to any person” upon appropriate request); *id.* § 552(a)(3)(B) (requiring agencies to make records available in “any form or format requested” that is “readily reproducible”); *id.* § 552(a)(4)(B) (authorizing de novo review of complaints in federal court, with “the burden . . . on the agency to sustain its action”).

199. *Id.* § 552(a)(4)(A)(iii).

200. *See, e.g.*, Fuchs, *supra* note 57, at 163-67; Samaha, *supra* note 51, at 937-41, 971-74.

201. 5 U.S.C. § 552(a)(3)(A) (2006) (requiring that requesters “reasonably describe[]” the records they seek). For a FOIA request to succeed, the agency must also comply in good faith and not, for example, destroy documents.

202. Kreimer, *supra* note 74, at 1025-32 (observing that FOIA record requests demand precise framing and “prerequisite knowledge” to yield useful results).

203. S. REP. NO. 89-813, at 3 (1965). Courts have incorporated a space for deep secrecy within the FOIA process by allowing agencies to submit “*Glomar*” responses, which “neither confirm nor deny the existence of the requested records.” *Phillipi v. CIA*, 546 F.2d 1009, 1013

FISA and FOIA are not regular statutes. They were developed in response to dramatic government abuses. They grew out of widespread social movements. They took years to craft. They were passed with overwhelming support. Their enactment entrenched a dramatic normative shift in Americans' expectations of government. Their proponents made their case in explicit constitutional terms; so did their opponents. FISA and FOIA are the closest thing we have to a constitutional amendment on state secrecy.²⁰⁴ As mere pieces of legislation, they

(D.C. Cir. 1976). *Glomar* responses may be necessary in some extreme cases. They threaten to undermine the text and purpose of the Act when a court relies solely on the agency's representations and does not determine for itself whether the underlying documents are properly classified or whether any portion can be reasonably segregated and disclosed. It is not so much the public ignorance that *Glomar* responses maintain as the judicial abdication they invite that is inconsistent with FOIA. Even an uncritical acceptance of a *Glomar* response, however, provides *some* notice to the public and to Congress that an issue may warrant further investigation—setting the stage for the secret to become shallower over time.

204. On the history and significance of FOIA, see, for example, *National Archives & Records Administration v. Favish*, 541 U.S. 157, 172 (2004) (stating that FOIA facilitates “a structural necessity in a real democracy”); *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 16 (2001) (“In FOIA, after all, a new conception of Government conduct was enacted into law, ‘a general philosophy of full agency disclosure.’” (quoting *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989))); *Ray v. Turner*, 587 F.2d 1187, 1190-95 (D.C. Cir. 1978) (explaining the origins and effects of FOIA’s foundational 1974 amendments); ROBERTS, *supra* note 12, at 14-17 (discussing FOIA’s global influence); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002) (noting that all fifty states now have open-records statutes, most of them modeled on the federal FOIA). On FISA, see for example, 154 CONG. REC. S15734-37 (daily ed. Dec. 17, 2007) (statement of Sen. Kennedy) [hereinafter Kennedy FISA Speech] (extolling the history of FISA and asserting that “[i]n our ‘information age,’ . . . FISA provides Americans a fundamental bulwark against Government tyranny and abuse”); William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1216-33 (2007) (tracing the origins of FISA); Rubinfeld, *supra* note 180, at 157-60 (defending FISA’s critical role in safeguarding Fourth Amendment values).

William Eskridge and John Ferejohn have popularized the term “super-statute” to describe a law or series of laws that:

- (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.

William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001). This is not the place to develop the argument, but FOIA and (more debatably) FISA could easily be said to meet these conditions. Passed in its modern form after the Watergate scandal and the Vietnam War, FOIA introduced a norm of open access to government documents that has commanded deep public loyalty, taken on a quasi-constitutional valence, and spawned a vast network of imitator laws at all levels of United States government and in democracies around the world. FOIA is such a good example of a super-statute that it is surprising no one has assigned it the label yet.

FISA has not influenced public culture to the same extent—which is to be expected given that, unlike with FOIA, members of the public have no direct role to play in the statute’s operation. But at least until the George W. Bush administration, every President, Congress, and court had accepted FISA, *see* Rubinfeld, *supra* note 180, at 159, and the statute is widely seen as having established norms of privacy, legality, and interbranch cooperation that transcend its specific context. The belief that FISA represents something greater than a typical law helps explain why the Bush administration’s noncompliance

have no place among the orthodox materials of constitutional interpretation. But the idea that they might nonetheless reflect or consolidate a constitutional norm has become increasingly familiar.²⁰⁵ Originalism is largely silent on the deep/shallow distinction. Our constitutional practices, as embodied in our framework open-government statutes, have moved markedly away from deep secrecy.

c. *Structure*

The deep/shallow distinction may be relevant to the structuralist on several levels. The basic arguments should by now be apparent, and I will not belabor them. First, above and beyond the language of any particular clause, deep secrecy can impair foundational values the Constitution was designed to protect at a systemic level. The previous Subpart explained that, as compared to shallow secrets, deep secrets pose a qualitatively greater threat to a cluster of liberal democratic values—personal liberty, accountable government, rule of law—both by exacerbating the standard problems of state secrecy and by introducing new threats to autonomy, legality, and representation.²⁰⁶ Inasmuch as deep secrecy poses a special threat to these values, and inasmuch as these values are integral to the meaningful realization of republican self-government, its usage poses a threat to the structure of our constitutional system.

Second, and more concretely, deep secrecy threatens the relationships among the coordinate branches. If the executive branch conceals the existence of a program it is running, Congress will have no ability to fulfill its legislative, oversight, or appropriations duties related to the program. Judges will not be able to adjudicate cases or controversies that might have arisen. All of the democratic and legal checks built into our branch structure, it turns out, depend on each branch being aware of what the others are doing. Deep secrecy threatens this sufficiency condition by allowing executive aggrandizement to occur not just unchecked but unnoticed.

To put the point a little more colorfully, we might say that there is a principle to be derived from the Constitution that forbids the existence of “black holes” in government: activities taken by one branch that the others have no means of

provoked such intense public anguish. *See, e.g.*, Kennedy FISA Speech, *supra*; Bob Herbert, *Who Will Stand Up for the Constitution?*, N.Y. TIMES, Jan. 19, 2006, at A23.

205. *See, e.g.*, Eskridge & Ferejohn, *supra* note 204, at 1275 (asserting that “[t]here is, and long has been, an intermediate category [between ordinary and higher law] of *fundamental* or *quasi-constitutional* law” and that “super-statutes” have served this function since the twentieth century); *see also* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 31-35 (2004) (similar for “foundational statutes”); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 *passim* (2007) (similar for “landmark statutes”); Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 481-92 (1976) (similar for “framework legislation”).

206. *See supra* Part III.B.2.

learning about.²⁰⁷ If there is an inherent constitutional problem with, say, the CIA running a program or a court issuing a judgment about which outsiders suspect nothing, I believe it is a structural one. No one can observe or oppose these deep secret-keepers. Their acts reflect a more extreme form of unilateralism than the belief that a certain branch has exclusive power to act in an area; they reflect the belief that this branch also need not tell anyone it has gone ahead and done so. The substantive prerogatives of the other branches may lie within the event horizon of such black holes.²⁰⁸ An executive power to run a program in deep secrecy, for example, could eventually swallow Congress's power to fund or defund executive operations as it sees fit.

Shallow secrets may function as singular points of privilege that preserve the separation of powers. Deep secrets can open up black holes into which the powers of a coordinate branch and the rule of law disappear. There is no specific textual hook on which to hang this claim, but the structural harm caused by black holes can be inferred from basic principles of accountability, diffused authority, and checks and balances that underlie our tripartite system.

In this vein, we might note that the most clearly preclusive powers assigned by the Constitution to the President are powers that may not be realized in secret. The enumerated presidential powers typically recognized as preclusive, in the sense that no other branch can claim any overlapping or checking authority, are the pardon power and the nominations and treaty-making powers in advance of Senate ratification.²⁰⁹ (The power to provide for the national defense, including the power to classify and control information, is emphatically not preclusive in this sense, as Congress controls numerous aspects of warmaking as well as appropriations and legislation generally.)²¹⁰ At any given time, the President may be hatching secret plans regarding pardons, nominations, or treaties, and he has no express

207. This is a somewhat different sort of black hole from the one explored by Adrian Vermeule in his recent article on Carl Schmitt. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009). Vermeule argues that United States administrative law is Schmittian, in the sense that it contemplates emergency situations in which the executive will be able to operate free from effective legal constraint. The suggestion here is that even in these situations the Constitution imposes a minimal (and not necessarily *ex ante*) duty of interbranch publicity, that it proscribes *informational* black holes. Whether that duty can be enforced by Congress or the judiciary is a separate question.

208. I thank Eric Citron for the event horizon metaphor.

209. See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 113-14 (1996). Neal Devins adds to the list “matters of current military significance.” *Id.* at 114. For reasons explained below, see *infra* notes 210, 231-247 and accompanying text, I believe this is generally incorrect. One might also add the President's Opinions Clause power to require that principal officers of executive departments deliver opinions relating to the duties of their offices. U.S. CONST. art. II, § 2, cl. 1. This power does not inherently generate publicity as do the powers mentioned in the main text, but it is also less significant consequentially. It is purely administrative—the power to force internal discussion of an idea, not to move an idea toward consummation.

210. See *supra* note 123 and accompanying text; MOYNIHAN COMMISSION REPORT, *supra* note 40, at 15; Barron & Lederman, *supra* note 187, at 729-50.

constitutional duty to tell anyone a word about them. But the President also has no ability to *effectuate* these plans except through highly visible processes, the latter two requiring Senate approval. Where the Constitution most clearly grants to one individual powers that no one else can claim, they are powers that generate disclosure as a necessary incident of their realization. The potential for deliberative deep secrecy is checked by the impossibility of consummated deep secrecy; preclusivity is checked by publicity.

The best constitutional argument in favor of executive branch secrecy, that the structure (and text and history) of the Constitution marks the executive as the privileged domain of clandestine action, does not fully counteract these insights. The key structural point is that the nation sometimes will need one branch “to act quickly and decisively, with unity, energy, vigor, dispatch, and, if need be, secrecy,”²¹¹ and the executive is clearly designed to be that branch. Depth may be useful for such decisive action. If keeping a deep secret might reasonably be expected to save the nation, then the President may be able to claim a constitutional license—and a duty—to do so. This is the immovable, paternalistic core of the case for presidential deep secrecy.

But notice how dangerous this argument is. It assumes that deep secrecy will in fact lead to better outcomes. It allows the President to determine in what circumstances it will be appropriate to use a tool that aggrandizes his own power. It undermines one of the core normative premises of the unitary executive theory, which is that assigning exclusive authority to a single administrator clarifies the nature of that authority and so permits greater popular accountability. And it cuts out the other branches. These criticisms cannot establish that the President must abstain from effecting policies no one outside the executive branch knows about. They suggest, however, that he was not meant to do so except perhaps *in extremis*, in the conduct of emergency governance, and never for any extended amount of time.

d. *Prudence*

More so than the other interpretive modalities, the prudential evaluation of secrecy’s role in the Constitution has an unavoidable empirical foundation. If someone argues, in the manner of Justice Jackson, that the Constitution is not a suicide pact,²¹² and that consequently the CIA should be allowed to conduct covert operations without informing Congress beforehand, she is making an argument not only about constitutional meaning but also about facts on the ground. She is assuming that a rule permitting undisclosed covert operations will serve the value of national security better than a contrary rule. If in fact these CIA operations tend to undermine security rather than enhance it, then not only would it be wrong, on prudential grounds, to claim a constitutional mandate on behalf of the practice; it

211. Amar, *supra* note 143, at 2005.

212. See *supra* note 146 and accompanying text.

would be more plausible to claim that the practice is counter-constitutional because it offends one of the core consequentialist values the document was intended to protect. And as we have already seen, the utility of deep state secrecy as a method of governance is highly dubious.²¹³

Another way to think about prudence and the constitutionality of state secrecy is to ask whether the political structures established by the Constitution are sufficient to ensure adequate transparency in government. Distinguished commentators including Justice Scalia, Neal Devins, and Mark Rozell have argued that the answer is yes, and that this helps explain why the President should not be compelled by statute or by court order to turn over documents he has determined to withhold.²¹⁴ We need not worry that this will lead to suboptimal disclosure, they argue, because Congress has a plethora of tools at its disposal with which to threaten or punish a recalcitrant executive: for instance, the power to withhold funds or to stall nominations. In today's media environment, some have suggested that the greater risk is overdisclosure, as even valid claims of presidential privilege can carry serious political costs.²¹⁵

On this view, the most desirable approach to secrecy, at least as a default rule, is to “[d]o [n]othing,”²¹⁶ to have faith in the political system and to abandon the quest for any substantive constitutional principle to guide disclosure determinations. A cynic might reply that this claim is contradicted by history—think, for example, of the disturbing revelations made by the Church Committee²¹⁷—or by basic political science—think, for example, of periods of unified government in which the branches share the same political incentives, periods of divided government in which one branch has the political power to bully the other branch into submission, or periods of unreasonably stubborn administrations. Once again, we are back to empirics. At the bottom of Scalia's, Devins's, and Rozell's arguments is a claim that judicially enforced access rights will only make things worse. Whether this is correct cannot be proven.

When it comes to deep secrecy, however, the Scalia-Devins-Rozell line of argument misses the mark. Scholars have tended to conflate the question of how much information the President has a duty to disclose with the question of how much information Congress or the judiciary may force him to disclose. Yet the two questions are not coterminous, not only because the President has an independent responsibility to comply with the Constitution,²¹⁸ but also because some amount of

213. See *supra* Part III.A.2.

214. ROZELL, *supra* note 70, at 156-69; Devins, *supra* note 209, at 126-37; Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.-Apr. 1982, at 14, 19.

215. See, e.g., Webster v. Doe, 486 U.S. 592, 621 (1988) (Scalia, J., dissenting) (noting “the political damage” that assertions of executive privilege “often entail[.]”); Marshall, *supra* note 156, at 811 (“[B]ecause of the media, the purported trump card in the President’s hand, the claim of executive privilege, is actually a joker.”).

216. Devins, *supra* note 209, at 109.

217. See *infra* note 317 and accompanying text.

218. See, e.g., U.S. CONST. art. II, § 1, cl. 8 (Oath Clause).

publicity is a necessary precondition for information-access disputes to arise in the first place. This precondition cannot be taken for granted. Even if one believes that the political give-and-take inherent in our tripartite system ensures the President will not go too far in withholding information the people and their representatives wish to see, it does not follow that he will be sufficiently forthcoming with information about which the outside world is unaware. To the contrary, the political cost of asserting executive privilege gives Presidents a strong incentive to use deep secrecy any time they make a controversial move. Congress and the public will always be the “losers” of access disputes that never materialize; the President will always be the judge of his own case.

The notion that it is desirable, consequentially, for Presidents to feel they have no constitutional obligation to comply with certain types of document requests is plausible, if unfalsifiable. The notion that it is desirable for Presidents to feel they have no obligation to disclose the basic contours of what they have done—no obligation to permit even the possibility of document requests—is much more radical. It would take a remarkable (indeed, a blind) faith in the relative virtues of the executive branch to defend the latter claim.

e. *Doctrine*

We come at last to the doctrine. My claim here is that, while strongly affirming the constitutionality of government secrecy in numerous contexts, the Supreme Court has made several interpretive moves that could be used to draw a line at deep secrecy. I cannot pretend that the deep/shallow distinction holds great explanatory power for a doctrine that never once acknowledges it. But I believe it can help illuminate some of the holdings’ underlying logic.

Most commentators take the courtroom-access cases to be the key judicial precedents on the constitutional right to know. For several reasons, however, these cases have only limited application to deep secrets. First, as explained above, although criminal trials, voir dire proceedings, and the like may constitute important domains of secrecy, they are unlikely to implicate much deep secrecy.²¹⁹ Second, even if the Court chose to ground its pro-access holdings in a “structural” theory of the First Amendment that cannot logically be limited to judicial proceedings (or to formal government proceedings, privileges, or institutions of any kind),²²⁰ no such doctrinal migration ever came to pass. The Court’s long silence on information-access rights, and its confinement of these rights to the context of judicial proceedings, caution against divining any broader lessons from the

219. *See supra* p. 305.

220. “Underlying the First Amendment right of access to criminal trials,” Justice Brennan declared in the most thoroughly reasoned majority opinion in this series, “is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs’” and thereby “to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

opinions.

Third, Justice Brennan's two-part test for evaluating access claims²²¹ does not handle deep secrecy well. The test's "experience" prong asks whether the practice in question has "a tradition of accessibility."²²² As explained above, deep secrets distort our ability to perceive historical patterns and, in virtue of their obscurity, would not merit precedential weight even if a consistent tradition could be perceived in hindsight.²²³ It cannot be a valid constitutional justification for a practice's being cloaked in deep secrecy that it has always been so cloaked. The test's "logic" prong asks whether public access is "important in terms of [the] process" in question.²²⁴ Public access is the only antidote to the shallow secrecy of a closed proceeding; it is not the only antidote to deep secrecy. To remedy the gratuitous or illegitimate use of deep secrets in a given process does not necessarily require opening up that process to the public or the press, just to additional government actors. Justice Brennan's test is not well engineered to identify partial solutions between total opacity and full public access, solutions that vindicate the public's practical and constitutional interests without actually permitting them an admission ticket.²²⁵ Yet this is the middle space in which the deep/shallow distinction may be most relevant.

No, the most suggestive line of doctrine is not the courtroom-access cases but rather the congressional-inquiry cases and separation-of-powers cases more generally, not the opinions that reason from the First Amendment but the ones that reason from constitutional structure. At least since the 1926 case of *McGrain v. Daugherty*,²²⁶ the Supreme Court has taken an extremely broad view of Congress's power to investigate the other branches, emphasizing that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function,"²²⁷ that Congress may use this power not only to generate legislation but also for an "informing function" and to expose malfeasance,²²⁸ and that "[t]o be a valid legislative inquiry there need be no predictable end result."²²⁹ The Court has established one limit on interbranch inquiry relevant for our purposes: a bar on investigating "matters which are within the exclusive

221. See *supra* note 153 and accompanying text (summarizing the test and noting its continued application).

222. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

223. See *supra* note 191 and accompanying text.

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

225. As Heidi Kitrosser persuasively points out, Justice Brennan's test also is not well engineered to vindicate the theory of the First Amendment that purportedly grounds it. Kitrosser, *supra* note 153, at 114.

226. 273 U.S. 135 (1927).

227. *Id.* at 174.

228. *Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957) (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (1885)).

229. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975).

province of one of the other branches of the Government.”²³⁰ If it is within the “exclusive province” of the executive branch to execute the laws, negotiate treaties, or command the military, this bar implies that Congress has no power to demand an accounting of the President’s activities in these spheres—and that the President may therefore keep the information a deep secret from legislators.

Yet in practice, as William Marshall has demonstrated, the “exclusive province” limitation has proven feeble to the point of irrelevance.²³¹ The Court has never once applied it against the executive branch, and to the contrary, the Court has repeatedly upheld congressional inquiries into executive activities—from “military action, [to] foreign policy, [to] bureaucratic administration, [to] prosecutorial judgment”²³²—that one might have thought good candidates. Marshall concludes that the limitation “may only stand for the proposition that the Congress, through its investigative powers, cannot interfere with or attempt to alter a judicial proceeding.”²³³ The logic of these holdings strongly undermines the notion of a presidential power to use deep secrecy (at least, deeper than the point of meaningful congressional awareness). If Congress has a constitutional right and “duty”²³⁴ to inquire into virtually every last thing the executive does, it cannot also be the case that the executive has a right to prevent Congress from learning where to look, thereby rendering its inquiries fruitless. Even if the President does not have a constitutional responsibility to facilitate Congress’s power of inquiry, presumably he has a responsibility not to subvert it.

In their constricted reading of the “exclusive province” limitation, the congressional-inquiry cases are consistent with the Court’s general posture of acknowledging the theoretical possibility of “conclusive and preclusive” presidential powers,²³⁵ while declining to recognize virtually any powers as actually meeting that standard.²³⁶ True, the Court has recognized the executive privilege, the state secrets privilege, and the President’s authority to classify and

230. *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959); *accord Kilbourn v. Thompson*, 103 U.S. 168, 192 (1880); *see also supra* note 156 and accompanying text (listing the other substantive constraints).

231. Marshall, *supra* note 156, at 800-03.

232. *Id.* at 802 (citations omitted).

233. *Id.* at 802-03.

234. *Tenney v. Brandhove*, 341 U.S. 367, 377 n.6 (1951) (“[I]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees” (quoting with approval WILSON, *supra* note 228, at 303)).

235. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

236. The most obvious counterexamples are the Court’s pardon power holdings. *See Schick v. Reed*, 419 U.S. 256, 266 (1974); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866); *see also Barron & Lederman, supra* note 187, at 728 & n.115 (discussing these cases and concluding that Congress likely retains some power to “affect the President’s pardoning practices,” as through “disclosure requirements and bribery restrictions [for] those who lobby the President for pardons”). As explained above, *see supra* notes 209-210 and accompanying text, the pardon power generates publicity as a necessary incident of its exercise, and therefore permits only shallow consummated secrecy.

control information bearing on national security or foreign affairs, and threatened to invalidate government actions that “unduly interfer[e] with the role”²³⁷ or “undermine the authority and independence”²³⁸ of a coordinate branch. But the Court has also made clear that executive privilege is not absolute,²³⁹ that courts must resolve claims of the state secrets privilege for themselves,²⁴⁰ that Congress has extensive powers relating to national security and foreign affairs,²⁴¹ that “a state of war is not a blank check for the President,”²⁴² and that, in wartime as in peacetime, the President’s power to pursue a course of action is diminished to the extent Congress regulates the action pursuant to its constitutional authorities.²⁴³ In these cases and many others, the Court has rejected a vision of the Constitution that “requires that the three branches of Government ‘operate with absolute independence.’”²⁴⁴ Especially following its functionalist turn in the late 1980s,²⁴⁵ the Court has instead tended to valorize the flexibility²⁴⁶ and “inevitable friction”²⁴⁷ that the separation of powers entails.

Each of the aforementioned Supreme Court holdings is also consistent with the Court’s position that “the federal judiciary is supreme in the exposition of the law

237. *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

238. *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

239. *United States v. Nixon*, 418 U.S. 683, 706-07 (1974).

240. *United States v. Reynolds*, 345 U.S. 1, 8 (1953) (“The court itself must determine whether the circumstances are appropriate for the claim of privilege . . .” (footnote omitted)). The *Reynolds* Court also observed cryptically that “broad” assertions of the privilege, whereby executive officials claim the “power to withhold any documents in their custody from judicial view if they deem it to be in the public interest,” have “constitutional overtones.” *Id.* at 6.

241. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting); *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967); *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964).

242. *Hamdi*, 542 U.S. at 536 (plurality opinion).

243. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring); Scholars’ War Powers Letter, *supra* note 123, at 2-5 (documenting the Court’s consistent stance that the President must comply with applicable statutory limits in wartime); *see also* FISHER, *supra* note 187, at 7 (asserting that none of the cases typically cited by the executive branch in secrecy disputes “supports the view that the President’s authority over national security information is in any sense plenary or exclusive”); Mark D. Rosen, *Revisiting Youngstown: Against the View That Jackson’s Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1706-07 (2007) (observing that the motivating assumption behind *Youngstown* categories two and three is a conflict-sorting principle of “categorical congressional supremacy”—the principle that “wherever congressional power overlaps with antecedent presidential powers, congressional action categorically trumps”—and that in national security policy as in virtually every other area, the Court has established a constitutional norm of “overlapping governmental authority” rather than strict departmentalism).

244. *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (quoting *Nixon*, 418 U.S. at 707).

245. Rosen, *supra* note 243, at 1735.

246. *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (characterizing the Court as having consistently adopted a “flexible understanding of separation of powers”).

247. *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)); *id.* at 629 (Douglas, J., concurring).

of the Constitution.”²⁴⁸ Like it or not, the Supreme Court’s assertion of judicial supremacy in constitutional interpretation similarly undermines the basis for a presidential deep secrecy power. For how can the Court faithfully and efficaciously resolve constitutional controversies if the executive branch takes actions so secret no one can challenge them? And how can the Court be sure that its interpretations are in fact functioning as the supreme law of the land if the executive may apply them (or decline to apply them) in unknown ways?

All of this is to say that, if a President were to assert the power to keep Congress or the judiciary in the dark about his activities, the doctrine provides ample precedents with which to rebut the assertion. Given the inherent feature of deep secrets that they disable outsiders’ checking abilities, the President would be on firm ground in claiming the right to use them only in the exercise of an uncheckable power or when the inability to do so would substantially undermine his constitutional role. Yet, the Court has never once recognized a presidential secrecy power, or a national-security- or foreign-affairs-related power more generally, as “conclusive and preclusive”²⁴⁹ in this sense. And while Congress has generally avoided pushing the boundaries of its authority to request sensitive information, the Court has never once invalidated any such effort as a functional impediment to the President’s role. Judged by these standards, it seems implausible to maintain that the President must have the power to keep deep secrets to be able to do his job, or to do it well.

This bird’s-eye view of a vast swath of cases is necessarily unsatisfying and neglects much nuance. But it allows us to see a basic commonality. The broad doctrinal themes I have touched on—the expansive and near-plenary power of congressional inquiry, interdependent rather than wholly independent branches, and judicial supremacy in constitutional interpretation—all provide conceptual and normative tools for rejecting any government actor’s claim to a deep secrecy power. The Supreme Court’s separation-of-powers case law has consistently intimated an attractive and coherent *anti-ignorance principle* of constitutional government. In a variety of interpretive modes and a variety of contexts, the Court has consistently cast doubt on the notion that one branch of government can take actions about which the others have no clue.

IV. PRACTICAL SOLUTIONS

If this Article has made a convincing case that deep state secrecy ought to be avoided whenever feasible, the question arises how we might achieve this aim. In this Part, I sketch possible responses in the United States context, and I compare them briefly to the practices of the George W. Bush administration. My list of solutions is by no means comprehensive. I seek only to outline in broad form the kinds of mechanisms that can be useful at moderating depth and improving

248. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

249. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

democratic decision making, without spilling sensitive content to the world at large.

The general strategy has a nested structure: when public disclosure and deliberation cannot be permitted in advance, interbranch disclosure and deliberation ought to take its place; when interbranch disclosure is not feasible, interagency deliberation ought to substitute; and when interagency disclosure is not feasible, more robust intra-agency deliberation should be pursued.²⁵⁰ By disaggregating the government, by seeing official secret-keepers as a plural “they” rather than a singular “it,” we open up the possibility of partial solutions that do not entail the public’s involvement. Although widening and diversifying the circle of secret-keepers may increase the risk of spilling secrets, this risk can be managed. (And this risk is not intrinsically undesirable. Some secrets conceal content that should be spilled to the public; some types of conduct should be deterred.) Institutional depth is remediable in a way that interpersonal depth is not.

A word, first, about reforms that are not likely to be useful toward this end. For all of its transformative potential to open up government and “pierce the veil of administrative secrecy,”²⁵¹ the Freedom of Information Act is not likely to pierce the veil of deep secrecy. FOIA requests, as explained above, must be precisely framed to generate responsive records.²⁵² No one will be able to meet this standard when they do not know what they do not know. The Bush administration debilitated FOIA in a variety of ways, including long delays in processing requests, aggressive use of exemptions, fee-waiver denials, and a reversal of the Clinton-era presumption in favor of disclosure,²⁵³ and many in the open-government movement are justly focused on rectifying these trends. But they must look elsewhere to rectify misuses of deep secrecy.

The point is larger than FOIA. All transparency mechanisms that are reactive in nature, that trigger disclosure only upon specific request by an information-outsider, face a problem of prerequisite knowledge. These mechanisms can help

250. What happens when the secret-keepers believe none of these options is feasible? And by what standard should feasibility be measured? A rigorous answer lies beyond this Article’s scope, but the analysis above suggests some rules of thumb: it will generally be less objectionable for an executive branch component to keep outsiders in the dark about the existence of a policy to the extent the secret-keepers have clear positive authority to act in the area, there is a crisis situation, the policy’s aims are narrow and uncontroversial, the potential costs of disclosure are severe, and the secret-keepers acknowledge what they have done as fully, broadly, and quickly as possible after the fact.

251. *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted). Seth Kreimer provides exceptionally rich celebrations of FOIA’s ability to facilitate and authenticate government disclosures in Kreimer, *supra* note 74, and Kreimer, *supra* note 78.

252. *See supra* notes 201-202 and accompanying text. While FOIA’s requirement that users “reasonably describe[]” the records they seek, 5 U.S.C. § 552(a)(3)(A) (2006), could be liberalized, the results would quickly overwhelm agencies and users alike. Some manner of framing requirement is a practical necessity in a requester-driven disclosure regime. To the extent we want to force agencies to reveal high-level policy decisions, as opposed to specific records reasonably described, public disclosure requirements are preferable to individualized FOIA requests.

253. *See WAXMAN REPORT*, *supra* note 5, at 2-31.

keep shallow secrets accessible and comprehensible. They are not well suited to making deep secrets any more checkable, and to the contrary may push officials toward depth precisely to evade their reach.

Along with FOIA and the classification system, the other main institutional target of open-government advocates has been the courts.²⁵⁴ A large body of commentary urges judges to push back against executive excesses and demand persuasive justifications from those who wish to claim a FOIA exemption, assert the state secrets or executive privilege, or otherwise deny disclosure. Yet even the most determined judge could not reliably push back against deep secrets.²⁵⁵ Apart from the traditional concerns about institutional competence and justiciability, the reason is that lawsuits, like FOIA requests, require sufficient prerequisite knowledge to be actionable. Courts, too, are reactive mechanisms.

Rigorous judicial review could make some important contributions, as forced disclosures may turn up unanticipated or partially anticipated information that leads to the unraveling of deeper secrets. For example, judges could restrict executive branch secrecy privileges as much as possible to specifically identified content. This would mean, among other things, that judges reject the Bush administration's goals of using executive privilege to avoid compliance with congressional subpoenas and of applying the state secrets privilege to entire categories of (alleged) government activity.²⁵⁶ It could help still more if judges devised means to evaluate systems of secrecy, above and beyond any particular item of information.²⁵⁷ For instance, they could give greater weight to secrecy justifications that have been subjected to greater amounts of interagency process, thereby tying deference to shallowness, and they could invalidate executive practices that are likely to lead to violations of the anti-ignorance principle.²⁵⁸ But judicial review is bound to be a limited tool for addressing secrets that lurk in the shadows and are perceived only hazily, if at all, by the parties who seek them. Depth must be minimized at an earlier stage in the policy process.

254. See Kreimer, *supra* note 78, at 1215-16 (cataloguing recent criticisms); see also Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399 (2009) (summarizing the literature on overclassification and recommending reforms).

255. *But see infra* notes 275-276 and accompanying text (discussing the possible use of specially-constituted courts, as in FISA).

256. The latter move is one of the key prescriptions of the leading judicial secrecy bill in Congress, the State Secrets Protection Act, S. 417, 111th Cong. (2009). See S. REP. NO. 110-442, at 11-12, 20-25 (2008) (explaining why the bill "forbids judges from dismissing cases at the pleadings stage on the basis of the privilege").

257. For interesting variations on this idea, see Cheh, *supra* note 69, at 730-34; Samaha, *supra* note 51, at 960-63.

258. See *supra* Part III.C.2.e (final paragraph) (explaining the anti-ignorance principle); see also *supra* Part III.C.2.c (arguing that the Constitution proscribes informational black holes).

A. *Second-Order Disclosure Requirements*

More promising than either FOIA or the courts, for the goal of minimizing deep secrecy, are simple disclosure requirements. We have many of these already.²⁵⁹ The President or a subordinate must provide annual reports to Congress on dozens upon dozens of matters, along with discrete reports any time he takes certain specific actions, such as providing arms to foreign governments²⁶⁰ or authorizing covert action.²⁶¹ The reports are typically unclassified, though they sometimes include a classified annex. These laws are classic tools for reducing depth, as they provide the public, as well as a differently situated group of officials in Congress, with regular, structured notice about what the executive has been doing. They are particularly useful at reducing depth when they require prior notification, rather than subsequent or annual notification, and when they specify in detail the disclosures they seek. Of course, an executive official might choose not to comply with any particular reporting requirement, and outsiders might never learn. But the existence of the requirement raises the costs of such secrecy—that official is now a lawbreaker—and it enhances the political standing of Congress, the courts, and the public to punish violations that are found out.

Separate from noncompliance, however, reporting requirements have inherent limitations that blunt their ability to expose government secrets. Most basically, it is impossible to specify in advance all of the information that may become relevant to voters and lawmakers. Human events are too fluid; Congress's predictive powers are too limited. If Congress makes its reporting requirements highly detailed or numerous, it risks creating excessive administrative costs not only for the executive but also for itself, owing to the need to process the data it receives. If Congress makes the requirements highly stringent or categorical, it risks undermining legitimate goals that secrecy is meant to serve. A legislature can only go so far in invigorating public disclosure laws without taking on the entire system of executive secrecy.

There are three basic strategies for dealing with these concerns that preserve ample space for shallow secrets but not for deep ones. The first is to raise the level of generality. To moderate depth without falling prey to the problem of prerequisite knowledge, demanding undue specificity, or forfeiting the advantages of secrecy, Congress can demand public disclosure of second-order policy choices made by the executive branch (the types of activities it has taken, for what reasons, pursuant to what processes and legal authorities), while forgoing disclosure of the first-order choices embedded within (the specific content of those activities). In Amy Gutmann and Dennis Thompson's terms, Congress can pass legislation that permits "particular secrets" about identifiable sources and targets and the like, while

259. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2341 (2006). According to Katyal, executive-congressional reporting requirements "have gone without much scholarly analysis." *Id.*

260. 22 U.S.C. § 2364(a)(3) (2006).

261. 50 U.S.C. § 413b(c)(1) (2006).

forbidding “general secrets” about higher-level plans and goals.²⁶² Second-order disclosure requirements can make the activities of government “translucent,”²⁶³ if not always transparent.

The second, and related, strategy is to bifurcate disclosure requirements so that members of Congress must be apprised of sensitive information that is denied to the public. Congress can stand in for the people when the potential costs of full disclosure seem too high. Third, reporting requirements can be aimed not just at discrete areas of policymaking but also at legal interpretation. Learning what the President believes he is permitted to do will often provide insight into what he is likely to do.

It turns out that a number of commentators have advocated new second-order disclosure requirements recently, although they have not identified them as such. Neal Katyal has proposed that the President be required to notify Congress any time he decides a particular treaty does not apply to a particular conflict.²⁶⁴ Heidi Kitrosser has proposed that the President be required to publish a notice in the *Federal Register* any time he modifies, revokes, suspends, or waives a published executive order.²⁶⁵ Dawn Johnsen and Trevor Morrison have proposed that the Attorney General be required to report to Congress any time he invokes the constitutional avoidance canon in interpreting a statute.²⁶⁶

All of these proposals use the first strategy, requiring executive officials to disclose the fact that they have taken a particular type of act without necessarily disclosing its content. Each could be augmented by a requirement that the content itself be made available to members of Congress. In this vein, Congress recently amended the Foreign Intelligence Surveillance Act to require the Attorney General to provide the House and Senate Intelligence and Judiciary committees a copy of

262. GUTMANN & THOMPSON, *supra* note 27, at 106-11; *see also supra* notes 46-47 and accompanying text (discussing the capacity of second-order publicity rules to reduce depth). While it may be quite difficult in some cases to draw a principled line between particular, first-order information and general, second-order information, any such effort would help reduce deep secrecy.

263. Samaha, *supra* note 51, at 923, 969.

264. Katyal, *supra* note 259, at 2341.

265. Letter from Heidi Kitrosser, Assoc. Professor, Univ. of Minn. Law Sch., to Edward M. Kennedy, Senator 3 (May 19, 2008), *available at* <http://feingold.senate.gov/ruleoflaw/testimony/kitrosser.pdf> (endorsing a proposal suggested by Senator Feingold’s written questions following Professor Kitrosser’s testimony before the Senate Committee on the Judiciary, Subcommittee on the Constitution).

266. Johnsen, *supra* note 7, at 1599-1600; Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1237-39 (2006). The Attorney General would have to identify the offending statute, but he would not have to identify specific policy decisions that may be implicated by his use of the avoidance canon. This proposal builds on an existing statute that requires the Attorney General to report to Congress whenever the Justice Department determines to refrain from enforcing a statute or complying with a judicial decision on the ground that the operative legal provision is unconstitutional. 28 U.S.C. § 530D (2006). Johnsen and Morrison do not address the possibility that the Attorney General would practice a kind of double avoidance, secretly invoking the avoidance canon in refusing to comply with the very law that requires him to report on his use of the canon.

any decision by a FISA court “that includes significant construction or interpretation of any provision of [the Act], and any pleadings, applications, or memoranda of law associated with such decision.”²⁶⁷ The public still has guaranteed access only to aggregate statistics on FISA’s usage,²⁶⁸ but four congressional committees will now have access to the substance of FISA jurisprudence.

More ambitiously (and more costly), executive departments could be compelled to follow Sweden’s model and keep a list of the actionable documents they generate in an official register.²⁶⁹ Less ambitiously, they could be compelled to keep a list of the *types* of documents or plans they generate. Specific items could still be withheld from specific requesters. But the register would guard against disappearing records, and it would provide enough information about enough items that outsiders would have a sense of what each department was up to. Even if access were limited to government officials, the creation of any such register could significantly reduce the depth of secret agency action.

The desire to invigorate our second-order disclosure laws comes in response to recent events. The Bush administration kept Congress and the American public in the dark about remarkably basic aspects of its “War on Terror.” Until the leaks started to appear, often several years after the fact, the administration refused to disclose its decision that the Geneva Conventions pose no obstacle to the CIA’s holding and interrogating unacknowledged “ghost detainees” in unacknowledged “black sites” across the globe,²⁷⁰ that the Convention Against Torture and the federal anti-torture statute do not restrain the President in wartime,²⁷¹ or that the President may use the National Security Agency to conduct electronic surveillance on Americans in contravention of FISA.²⁷² It refused to disclose plans to establish

267. FISA Amendments Act of 2008, Pub. L. No. 110-261, § 103(c)(1), 122 Stat. 2436, 2460 (codified at 50 U.S.C. § 1871(c)(1) (West 2009)).

268. 50 U.S.C. § 1807 (2006).

269. See ROBERTS, *supra* note 12, at 220 (explaining the Swedish model). Internal working drafts are exempted from the register.

270. The existence of the CIA black sites was first disclosed by the *Washington Post* in late 2005, perhaps four years after the sites had been established. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; see also JANE MAYER, *THE DARK SIDE* 148 (2008) (reporting that we still do not know any precise locations).

271. The infamous OLC “Torture Memo” that made these claims, Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>, was not leaked until the spring of 2004, nearly two years after its issuance. Morrison, *supra* note 266, at 1238.

272. The OLC analysis supporting this determination still has not been made public. In former OLC head Jack Goldsmith’s memorable telling, “[a]fter 9/11 [the Vice President and his Counsel] and other top officials in the administration dealt with FISA the way they dealt with other laws they didn’t like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.” JACK GOLDSMITH, *THE TERROR PRESIDENCY* 181 (2007); see also ERIC LICHTBLAU, *BUSH’S LAW* 155-58 (2008) (describing the administration’s “go-it-alone approach” in circumventing FISA).

new programs of detention, rendition, interrogation, and surveillance. These secrets involved not merely tactical decisions about particular targets or methods, but high-level legal and policy decisions about the nature of the “War on Terror.” Perhaps the closest the administration came to providing advance notice of these enormously controversial moves was Vice President Cheney’s cryptic statement shortly after the 9/11 attacks that, in fighting terrorism, the administration would “have to work sort of the dark side,” to “spend time in the shadows.”²⁷³

The legacy of the Bush administration provides powerful anecdotal evidence that new second-order disclosure rules may be needed to illuminate this netherworld. To combat deep secrecy, leaks are not an adequate or attractive substitute for prophylactic measures. Leaks have proven too unreliable, partial, and belated, and they are too destructive in their own right; they may also be criminal offenses. If second-order disclosure rules serve no other purpose, they can at least provide insight into how the President is interpreting and enforcing the Constitution and the laws Congress has passed.

B. *Congressional-Executive Consultation*

The obvious downsides of second-order disclosure requirements, from the vantage point of those on the receiving end, are that they may be too generalized to permit rigorous scrutiny, they almost always occur after the fact, and they are unidirectional, rather than dialogic, in nature. It may therefore be attractive to supplement them with consultation requirements, pursuant to which executive secret-keepers must actively explain and defend their plans to outsiders during the policy formulation window. Which outsiders?

The idea of using Congress to serve this function—to mediate the tension between the need for occasional executive branch secrecy, on the one hand, and the democratic and deliberative deficits this secrecy entails, on the other—connects with several major themes of this Article. The deep/shallow distinction has helped us to see that for our transparency structures to be working well, we do not always need the circle of secret-keepers to be large. We need it to be diverse. A secret Y may be unknown to millions of citizens, yet well-known to a wide range of government actors who have been charged by the people with evaluating it on their behalf. Compared to secret X that is unknown to all but a small cabal of like-minded officials, secret Y may be less objectionable from the standpoint of law, policy, morality, and democratic theory, irrespective of either secret’s content.

Congress is the natural choice to provide the intra-keeper pluralism needed to

273. Interview by Tim Russert with Richard Cheney, *Meet the Press* (NBC television broadcast Sept. 16, 2001), *quoted in* MAYER, *supra* note 270, at 9-10. These lines had a double meaning. The counterterrorism effort, they insinuated, would be not only observationally dark but morally dark, not only opaque but unpleasant. A (vice-)head of state faced with an elemental threat to his country, Cheney was expressing the atavistic desire to operate without scrutiny or constraint. His imagery foreshadowed an intent to maintain through deep secrecy a dimension in which the normal rules do not apply.

move a secret from X to Y.²⁷⁴ Members of Congress have a direct democratic connection to the people they serve, a compelling constitutional and practical claim to information that may be relevant to their legislative duties, and the institutional resources to evaluate and critique sensitive plans. All of this is in contrast to Article III judges, who are not even allowed to render advisory opinions. The example of FISA shows that some valuable forms of judicial-executive “consultation” can be engineered to ensure the legality of secret executive programs.²⁷⁵ But the FISA model, in which special courts review surveillance plans prior to implementation, could not be extended to many other substantive areas or to strictly policymaking questions without radical reform of our constitutional system.²⁷⁶ Members of Congress, more so than judges, are ideally positioned to serve as the people’s proxy in vetting and checking otherwise deep presidential secrets.

To some extent, they already do so. The President routinely consults with congressional leaders on his own initiative, and members of Congress routinely demand consultation in the form of oversight hearings, investigations, and information requests. No doubt some secrets are disclosed in these interactions. A few statutes go further and specify discrete modes of consultation on confidential matters, such as the requirement that the President notify the “Gang of Eight” (the leaders of the House and Senate and their intelligence committees) “as soon as possible” when he makes a finding in support of covert action and “determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States.”²⁷⁷ But there are clearly gaps in this structure, and much congressional-executive consultation occurs only episodically, or occurs only after the executive’s secret plans have solidified or been realized.

The George W. Bush presidency revealed how often, and how easily, the vast majority of Congress may be cut out in the area of national security. The

274. The other natural choice is different departments within the executive branch. As the following Subpart explains, I believe that internal checks on deep secrecy are both independently attractive and practically essential, given that executive secret-keepers will not always have the time, will, or authority to run their plans by Congress. But it is important to bear in mind that internal consultation mechanisms will never be able to provide the degree of democratic or constitutional legitimacy provided by congressional (and judicial) mechanisms.

275. See *supra* note 197 and accompanying text (discussing FISA’s utility in reducing the depth of surveillance-related secrets).

276. The historical unwillingness of the FISA court to say no to the executive might suggest additional limits on the efficacy of any nonpublic judicial check. Many commentators have called the Foreign Intelligence Surveillance Court a “rubber stamp” for approving nearly one-hundred percent of the surveillance orders submitted by the executive branch. See, e.g., Note, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 HARV. L. REV. 2200, 2206 (2008). These criticisms have some bite, but they overlook the extent to which the FISA court requires executive officials to modify orders before it will approve them, as well as the extent to which the mere existence of FISA court review forces intelligence agencies to internalize relevant laws, to focus resources on high-priority targets, to justify their practices, and to collaborate with the Justice Department. Sky-high approval rates do not necessarily imply a toothless or captured review mechanism.

277. 50 U.S.C. § 413b(c)(1), (2) (2006).

administration never told most members of Congress about the evidentiary holes in the claim that Saddam Hussein's regime possessed weapons of mass destruction.²⁷⁸ It never told most members about its plans to use interrogation methods widely seen as torture.²⁷⁹ It never told most members about its plans to launch the Terrorist Surveillance Program.²⁸⁰ It never alerted Congress to its most controversial Office of Legal Counsel (OLC) opinions.²⁸¹ When the administration did provide congressional briefings on highly sensitive subjects, it frequently sought to limit them to the Gang of Eight and to prohibit the Gang from sharing what it learned with cleared staff or with other members.²⁸² These briefings may have helped create a historical record of the administration's conduct, but at the time they led to little pushback, exposure, or statutory revision.

Even after sympathetic leadership from the same political party took control of Congress, Bush officials continued to resist interbranch consultation on matters relating to counterterrorism. Perhaps they believed that, relative to executive personnel, members of Congress "leak[] like a sieve"²⁸³—that when the circle of secret-keepers is widened to include authorities from another branch, the odds of public disclosure increase not linearly but geometrically. This theory is not implausible, yet to my knowledge no one inside or outside the administration ever marshaled any evidence, even anecdotal evidence, to justify it.

Are there ways to invigorate Congress's consultative role on matters unknown to the public, and thereby to reduce their depth, without enfeebling the presidency or publicizing sensitive content? Consultative requirements are significantly more intrusive than disclosure requirements, and Congress must therefore be cautious in establishing them. But modest improvements are possible.

A wealth of suggestions has already been offered by Harold Koh. Koh has proposed identifying a core group of members "with whom the President and his staff could regularly meet and consult on national security matters,"²⁸⁴ creating a

278. See MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 110TH CONG., REINING IN THE IMPERIAL PRESIDENCY 233, 253-63 (2009) [hereinafter CONYERS REPORT].

279. See *id.* at 123-37 (characterizing the "battle" between Congress and the President over interrogation techniques as beginning with the leak of the Torture Memo in June of 2004).

280. *Id.* at 146-55.

281. See Johnsen, *supra* note 7, at 1596 (observing that the Bush OLC "released shockingly few of its legal opinions" in any form).

282. See CONYERS REPORT, *supra* note 278, at 297-98 (describing efforts of the Bush administration to use Gang-of-Eight briefings beyond the limits imposed by 50 U.S.C. § 413b(c)(2)).

283. Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 885 (2007).

284. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1327 (1988) [hereinafter Koh, *Iran-Contra*]; see also HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 164 (1990) [hereinafter KOH, NATIONAL SECURITY] (recommending legislative reforms to strengthen congressional consultation on covert action specifically). These regular meetings would allow for significantly more collaboration, earlier in the policymaking process, than the irregular Gang-of-Eight briefings that are currently used.

Comptroller-General-like entity “to monitor the output of the Executive’s national security apparatus,”²⁸⁵ and increasing congressional access to classified and unclassified national security information, including the direct submission of particularly controversial legal analyses to the intelligence committees.²⁸⁶ Koh’s proposals hold appeal because they build on existing oversight mechanisms and are unlikely to entail “unacceptable sacrifices in flexibility, [shallow] secrecy, or dispatch.”²⁸⁷ Special advisory commissions, currently in vogue on account of the 9/11 Commission’s perceived success, would be slower, costlier, more constrained by their institutional form, and may raise their own legitimacy problems.²⁸⁸ Mechanisms such as special commissions and inspectors general can be good for investigating previously deep executive secrets that have since become shallow; they cannot flexibly and effectively check the executive branch during the policy formulation window.

The Bush era undermined confidence in the ability of the Gang of Eight to stand in for the full Congress. Gang-of-Eight notification laws are meant to temper the depth of the administration’s most sensitive plans with institutional and political diversity. Yet as the process is currently structured, the Gang has little capacity to constrain executive secret-keepers, or even to engage them in meaningful discussion.²⁸⁹ The Gang’s insularity also breeds a risk that members will become overly acculturated to their “insider” status. Strengthening the Gang of Eight could be accomplished by allowing cleared congressional staffers to participate in briefings (the simplest and most important reform, in my view), expanding or rotating the Gang’s membership, requiring executive officials to hold repeat meetings with additional Senators and Representatives upon request, or liberalizing the information-sharing rules between Gang members and their congressional colleagues. Both branches must ensure that the Gang of Eight does not come to supplant the intelligence committees and the relevant standing committees, and both houses of Congress must ensure that the intelligence committees do not hoard information.

Reforms such as these suggest ways to balance the benefits of secret executive action with the costs of limiting the circle of secret-keepers. These reforms may also have a multiplier effect for reducing deep secrecy. The mere existence of such

285. Koh, *Iran-Contra*, *supra* note 284, at 1327.

286. KOH, NATIONAL SECURITY, *supra* note 284, at 163-64; Koh, *Iran-Contra*, *supra* note 284, at 1328-29.

287. Koh, *Iran-Contra*, *supra* note 284, at 1327. More controversially, Congress could experiment with enhancing protections for whistleblowers who bring their concerns directly to a member, rather than to the press.

288. For a stimulating discussion of advisory commissions’ promise and pitfalls, see Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239 (2008).

289. See Kitrosser, *supra* note 92, at 1071 (noting common complaints that “the Gang of Eight as a group lacks the power to take recourse in response to what they’ve been told” and “that the group’s small size, combined with the absence of staffers in most briefings, makes meaningful deliberation and even adequate grasp of the issues unlikely”).

regularized structures, through which high-level executive actors must disclose their thinking to high-level congressional actors, can forge bonds of trust and collegiality that breed additional disclosures over time. Forcing the secret-keepers to confront their congressional counterparts would raise the social and psychological costs, as well as the legal ones, of withholding pertinent information.

C. Internal Checks and Balances

We do not need to leave the executive branch to reduce the depth of its secrets. One of this Article's descriptive goals has been to show how two different state secrets, both known only to executive actors, can vary significantly across numerous dimensions of depth. By increasing and diversifying the pool of officials who are aware of a secret, we can capture some of the benefits of publicity without incurring all of the costs. Yet, while a tremendous amount of attention has been paid to the potential for Congress, the courts, and the press to check presidential secrecy, very little has been paid to internal mechanisms that can check secret-keepers from within.²⁹⁰

Neal Katyal recently moved to plug this hole in a much-discussed symposium piece on the "internal separation of powers."²⁹¹ Against those who would exalt executive energy and dispatch above all else, Katyal celebrates the internal friction, competition, and moderation that bureaucracy can provide. Intra-executive checking, Katyal argues, is needed now more than ever to compensate for "the demise of the congressional checking function."²⁹² His is a project in the "second-best."²⁹³ Katyal's focus is not secrecy specifically, much less deep secrecy. But his aims are compatible with those of the deep secrecy critic, for executive decisions taken in deep secrecy can be seen as an extreme manifestation of the unchecked, unilateral "adventurism" that Katyal so deplors.²⁹⁴

Among the many reforms Katyal suggests are: "bolster[ing] existing bureaucratic redundancy with legislation setting out inter-agency consultation requirements";²⁹⁵ allowing the minority party in Congress to appoint additional agency ombudsmen during periods of one-party government;²⁹⁶ enhancing the

290. Cf. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1388 (2008) (noting the "comparative dearth of scholarship analyzing the internal allocation of authority within branches, particularly the executive branch," as compared to scholarship analyzing the allocation of authority across branches (citation omitted)).

291. Katyal, *supra* note 259.

292. *Id.* at 2320-21. The demise of the congressional checking function, in Katyal's telling, is attributable to the massive growth of the federal bureaucracy, judicial abandonment of the nondelegation doctrine and the legislative veto, and aggressive presidential use of statutory interpretation, the veto power, and the party system. *Id.*

293. *Id.* at 2316, 2322, 2344.

294. *Id.* at 2318.

295. *Id.* at 2327.

296. *Id.* at 2347-48; see also Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 24 (2008) (proposing that Congress "create a cadre of informational

pay, status, and employment protections of civil servants so they are not marginalized by political appointees;²⁹⁷ and replicating across government the Foreign Service's "Dissent Channel," which allows foreign service officers to challenge department policy without fear of reprisal.²⁹⁸ Each of these reforms has the potential to reduce deep secrecy by empowering additional types of authorities to review any given plan or process. Katyal acknowledges the loss in efficiency the reforms would entail. But this worry is overrated, he says, because better policies will result. "[E]fficiency is not the equivalent of wisdom."²⁹⁹

In the most substantial criticism levied against Katyal to date, Eric Posner and Adrian Vermeule point out that Katyal never actually explains why his "second-best" solutions are, in fact, second-best to the traditional separation of powers, or why his solutions are desirable at all.³⁰⁰ I do not think this criticism is entirely fair. Katyal's prescriptions are clearly, if subtextually, grounded in the commonsense belief that increasing the volume and diversity of deliberation will increase the quality of decision making.³⁰¹

But here is a (somewhat) more rigorous answer: internal friction, competition, and overlap will tend to decrease the depth of executive branch secrecy. This Article has shown that on utilitarian, liberal democratic, and constitutional grounds, that is generally a good thing. Even when a secret must remain an unknown unknown to the world at large, internal checking measures can serve a

ombudsmen within the executive branch—with the highest security clearances—whose job is to ensure that the government deploys information collection techniques legally and nonarbitrarily").

297. Katyal, *supra* note 259, at 2330-35. Seth Kreimer similarly stresses the importance of the career bureaucracy for resisting secret abuses in Kreimer, *supra* note 74, at 1018-19; Kreimer, *supra* note 78, at 1143, 1217.

298. Katyal, *supra* note 259, at 2328-29.

299. *Id.* at 2345. There is nothing necessarily radical about using internal checking mechanisms in this way. The federal executive branch already has many "plural" characteristics, as reflected in the prevalence of independent agencies, entrenched bureaucrats, and interdepartmental jurisdictional redundancy. Many states have significantly more "fractured and dispersed" executives. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1896 (2001). Most state attorneys general, for example, do not serve at the will of the governor. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006).

300. Posner & Vermeule, *supra* note 283, at 897-98.

301. *See, e.g.*, Katyal, *supra* note 259, at 2317 ("When the State and Defense Departments have to convince each other of why their view is right, . . . better decision making results."). Posner and Vermeule also contend that Katyal's proposals are "self-defeating," in that a power-maximizing President would never "adopt or enforce the internal separation of powers to check himself," and a feckless Congress would never force him to. Posner & Vermeule, *supra* note 283, at 898. By "self-defeating," Posner and Vermeule apparently mean "unrealistic." Yet Posner and Vermeule do not explain why it is unrealistic to believe that Presidents would comply with internal checks for strategic or legal reasons, or to believe that the media and civil service could push Congress to patrol violations. More important, they fail to grapple with the fact that many of Katyal's proposals would not actually check the President himself, but would instead check certain of his subordinates so that no one faction can entirely control the flow of information he receives. *That* kind of checking might be attractive even to an ill-motivated executive.

whistleblowing function (rooting out unlawful or nefarious conduct), a deliberative function (improving the quality of decision making), and a representational function (enhancing the democratic credibility of the policies chosen). Indeed, the analysis above suggests that some threshold amount of internal checking may be desirable entirely independent of the balance of power across the branches. Congress will never be able to constrain many facets of secret presidential decision making, nor should we necessarily want it to. On consequentialist grounds, at least, a combination of intrabranch openness and post hoc disclosure will sometimes be the optimal solution when content is extremely sensitive.

Other reforms could complement Katyal's. Harold Koh has made a number of suggestions to facilitate interagency review of proposed covert actions and to increase civilian and law enforcement representation on the National Security Council.³⁰² A group of nineteen former OLC officials has argued that the Office should always consult with other Justice Department components when time permits, and should likewise seek to be consulted by White House lawyers.³⁰³ Intelligence agencies have experimented with the use of internal "red teams" or "B Teams," composed solely of agency staff, to challenge prevailing interpretations and to mimic the adversarial testing that outside debate would have provided.³⁰⁴ The President could revise the executive order on national security information to encourage multiple signoffs for classifications or to expedite the declassification schedule for documents that have not been reviewed by multiple agencies. Even such simple gestures as reconfiguring the physical architecture of government, so that decisionmakers from different agencies work in closer proximity to one another, can invigorate the internal separation of powers without compromising external secrecy.

In thinking about prescriptions such as these, the Bush administration's handling of the "War on Terror" can serve once again as an instructive foil. In a subversive twist on traditional interagency consultation, a self-appointed, five-member "War Council" became the President's key advisory body on many matters.³⁰⁵ The CIA outmaneuvered the Federal Bureau of Investigation and the Department of Defense to take on greatly expanded powers relating to interrogation, detention, and rendition.³⁰⁶ The Vice President and his deputy controlled significant national security policy areas on their own, hoarded

302. KOH, NATIONAL SECURITY, *supra* note 284, at 162-66.

303. WALTER E. DELLINGER ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL 5 (2004), available at http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf.

304. See MOYNIHAN, *supra* note 57, at xvi (describing "B Teams"); ROBERTS, *supra* note 12, at 46 (describing "red teams").

305. See GOLDSMITH, *supra* note 272, at 22-23; MAYER, *supra* note 270, at 66-68, 80-83, 121. On one notable occasion, the Secretary of State and the National Security Advisor learned of the War Council's decision to try terrorism suspects in military commissions after the fact, from a news report. MAYER, *supra* note 270, at 82.

306. This is one of the major themes of MAYER, *supra* note 270.

information, and steamrolled opponents.³⁰⁷ Major OLC opinions were produced not only without interagency consultation but also without intra-agency consultation; even the Attorney General was cut out.³⁰⁸

The Guantanamo prison camp is often taken as the paradigm case of the administration's zeal for secrecy, of its desire to wall off whole spheres of government activity, and whole living human beings, from outside scrutiny. But Guantanamo's use as a detention center was widely debated within the administration and was disclosed to the public in short order. It is the CIA's global network of "black site" prisons that is the better symbol of the administration's zeal for deep secrecy.³⁰⁹ In perhaps the most striking example of depth being preferred to shallower norms, the Justice Department refused to provide the National Security Agency (NSA) with any legal justification for the Terrorist Surveillance Program—despite the fact that the famously tight-lipped NSA was running the program.³¹⁰ The Bush administration provides a textbook study in how the urge to stifle dissent can push officials toward deeper and deeper secrecy, and consequently toward outcomes many would find radical, immoral, or unwise.

D. Bureaucratic Culture

There was significant internal dissent within the Bush administration, we now know. The dissenters just had no power; they were bullied into submission or exiled. Potential critics were weeded out ahead of time through a selection process that placed the highest premium on loyalty. The zeal for secrecy within the administration both reflected and reinforced the concentration of power among a small group of ideologically-aligned officials. The policymaking process was consistently rigged to block informational pathways that could have subjected deep secrets to additional forms of scrutiny and revision.

A final lesson of the Bush years, then, is that beyond any of the discrete procedural and institutional reforms that might be tried, there is, in the end, no

307. On the role of Vice President Cheney, see generally BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY (2008). On the outsized role of his counsel David Addington, see GOLDSMITH, *supra* note 272, at 76-90, 124-29, 169-71, 181-82; MAYER, *supra* note 270, at 48-71, 300-04, 322-23.

308. See, e.g., GOLDSMITH, *supra* note 272, at 24 (describing OLC lawyer John Yoo's practice of bypassing the Attorney General); Johnsen, *supra* note 7, at 1600 (noting that OLC appears not to have consulted with the Justice Department's Criminal Division before issuing the Torture Memo); see also OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF. ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 10, 30 (2009), available at <http://judiciary.house.gov/hearings/pdf/IGTSPReport090710.pdf> (explaining that Yoo was the only OLC official "read into" the President's domestic surveillance program for nearly two years and reporting the DOJ Inspector General's conclusion that "it was extraordinary and inappropriate that a single DOJ attorney . . . was relied upon to conduct the initial legal assessment of the [program]").

309. See *supra* note 270 and accompanying text.

310. See GOLDSMITH, *supra* note 272, at 181-82; LICHTBLAU, *supra* note 272, at 138; MAYER, *supra* note 270, at 68-70.

escaping the influence of bureaucratic culture. To minimize deep executive secrecy, formal mechanisms can only do so much. Congress and the judiciary can only do so much. If the keepers are determined to keep their secrets deep, no matter the cost, there is not much the outsider can do.³¹¹

Consequently, it is vital that the government works to foster a culture that repudiates, rather than celebrates, deep secrecy. There is no obvious way to do this. Some of the formal prescriptions offered above might help: if interbranch consultation and interagency coordination become normalized as methods of reviewing secret plans, unilateral acts of secrecy may come to seem more provocative and suspicious.

Probably more important, department heads must set an appropriate tone. In this spirit, nineteen former OLC officials (some of them now back in charge of the Office) recently issued a list of best practices to guide future administrations.³¹² The guidelines emphasize the importance of adhering to norms of publicity and legality and of respecting the views of the coordinate branches. The guidelines also advise OLC attorneys to devote special scrutiny to decisions that are unlikely to face judicial review,³¹³ a strategy that matches internal scrupulousness to external depth. More generally, department heads can follow the advice of the 9/11 Commission and encourage their employees to abandon the Cold War intelligence officer's cherished principle of "need to know" in favor of a culture of "need to share."³¹⁴

Institutional design can also help, in several senses. Placing different types of officials in closer physical proximity lowers the cost of their interacting and can foster more diverse and dynamic deliberation, earlier in the policymaking process. Empowering civil service employees in secret decision making can counteract the likelihood of political appointees' stronger affinity for clandestine adventurism, on the one hand, and for covering up mistakes, on the other. And broader use of mechanisms such as the "Dissent Channel"³¹⁵ can help elevate the perception of internal dissent to a kind of civic contribution, rather than a deviant practice. This inversion might ironically be good for the maintenance of secrecy, as well as for the quality of governance, because disaffected employees who lack a Dissent Channel may find it more tempting to take their grievances to the outside world.³¹⁶

311. Something like this might be the meaning of Adam Samaha's curious statement that "[t]here is one proper purpose for which informal channels of disclosure are uniquely suited: combating deep secrecy." Samaha, *supra* note 51, at 948. Or perhaps Samaha just means that there is nothing like an old-fashioned leak for exploding a deep secret. As the previous Subparts reflect, I do not agree with the implication that formal channels are unsuitable or unhelpful for combating deep secrecy.

312. DELLINGER ET AL., *supra* note 303.

313. *Id.* at 2.

314. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 417 (2004) (recommending that intelligence agencies promote "a 'need-to-share' culture of integration").

315. See *supra* note 298 and accompanying text.

316. Cf. *supra* note 64 and accompanying text (positing links between the depth of state

Internal whistleblowing can partially substitute for external whistleblowing.

A bureaucratic culture that looks down upon deep secrets need not be a culture that looks down upon shallow ones. To the contrary, an institution that draws this distinction can breed greater respect for shallow secrets both within and beyond its walls.

CONCLUSION

In a powerful passage from its report on Cold-War-era intelligence agency abuses, the Church Committee asked:

What can properly be concealed from the scrutiny of the American people, from various segments of the executive branch or from a duly constituted oversight body of their elected representatives? Assassination plots? The overthrow of an elected democratic government? Drug testing on unwitting American citizens? Obtaining millions of private cables? Massive domestic spying by the CIA and the military? The illegal opening of mail? Attempts by an agency of the government to blackmail a civil rights leader? These have occurred and each has been withheld from scrutiny by the public and the Congress by the label "secret intelligence."³¹⁷

In this passage, the report calls into question not only the integrity of the "secret intelligence" label, but also the ability of any one group of officials to make appropriate decisions for the entire society. The value choices reflected in these unknown government activities, the Committee suggests, were profoundly wrong choices, and if the circle of information-insiders had been a little wider, they might never have been taken. The depth of these secret policies allowed them to persist—and to undermine our laws and our well-being—even though Congress, the courts, the American people, and other segments of the executive branch would not have approved them.

We are back where we began. In the wake of the George W. Bush administration, the United States finds itself wrestling once again with the need to check executive excess and adventurism, on the one hand, and the need to preserve executive energy and dispatch in a dangerous world, on the other. This tension will never be resolved fully, but the analysis here suggests one way to close the gap. Even among the subset of government secrets about which the public knows nothing, it has shown, the comparative insularity of the deeper secrets can pose a special threat to good governance, to liberal democratic values, even to the Constitution. We cannot and should not seek to prevent the executive branch from keeping secrets. We can and should seek to have them kept as shallow as possible.

* * *

State secrecy is such a vast and heterogeneous—and secretive—phenomenon

secrets and the likelihood of leaks).

317. 1 SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 94-755, at 12 (1976).

that it is difficult even to talk about it systematically. This Article has advanced a means of doing so. Whether or not any of the Article's normative arguments or policy prescriptions have been convincing, I hope I have convinced the reader that it pays to attend to depth: that state secrets differ along a variety of stable dimensions; that we can draw meaningful distinctions among them without judging their content; and that there is a vast space between total public disclosure and maximal internal stealth, between sunlight and darkness.

The understanding of depth developed here does not provide a substantive theory of state secrets. It provides a tool for theorizing them, a consilient framework for describing and assessing the infinite different things that governments do without the public's full knowledge. Secrecy is a topic that by its nature tends to confound measurement and criticism. It need not confound them quite so much.

