Enclosing executive secrecy: arguments and practices in the German Bundestag

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Enclosing Executive Secrecy

Arguments and Practices in the German Bundestag

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List of Abbreviations

BRH	Bundesrechnungshof (Federal Court of Auditors)
CDU	Political party Christlich Demokratische Union Deutschlands (Christian Democratic Union of Germany)
CSU	Political party Christsoziale Union in Bayern (Christian Social Union in Bavaria)
Drs.	Bundestags-Drucksache (printed matter of parliament)
ExIA	Interviewee: Executive, intelligence agencies case
ExPPP	Interviewee: Executive, public-private partnership case
GRÜNE	Political party Bündnis90/ Die Grünen (Alliance 90/The Greens, or just Greens)
LINKE/ DIE LINKE	Political party The Left, formerly PDS (until 2007)
MP	Member of Parliament (Bundestag) – where used with a number, MP X refers to an interview by the author with an MP
PDS	Political party Partei des Demokratischen Sozialismus (Party of Democratic Socialism), later DIE LINKE (from 2007 on)

PlPr	Plenarprotokoll (plenary protocol of a session of the German Bundestag)
PPP	Public-Private Partnership
SPD	Political party Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)
StaffIA	Interviewee: Parliamentary staff, intelligence agencies case
StaffPPP	Interviewee: Parliamentary staff, public-private partnership case
VIFG	Verkehrsinfrastrukturfinanzierungsgesellschaft (Transport Infrastructure Financing Company)

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in the middle of my PhD studies, will, I hope, soon forget the word *Doktorarbeit,* as a three-year-old should. He is the uncontested champion of putting everything into perspective.

1 Introduction

Parliaments in democratic systems serve as the people's representatives, legislators and overseers of the executive. They have the power to define the framework in which the executive can act and must report about its action. For parliaments to fulfil their roles, though, they depend on access to information. Executive secrecy is an obvious impediment. How, then, do parliamentary actors try to reconcile secrecy and the normative demands of an open, democratic society? This study investigates their arguments, conflicts and patterns of agreement around this topic in the case of Germany.

The German Bundestag repeatedly raises questions of executive secrecy. One example is the controversial collaboration between German and American intelligence agencies revealed by Edward Snowden in 2013. The case triggered discussions about state secrecy covering illegitimate practices. The parliamentary and public investigation of these practices furthermore revealed disagreement about parliamentary access to classified information. Another example concerned the secrecy involved in introducing a new highway toll, to be organised as a public-private partnership (PPP). When the case was discussed in parliament, opposition actors feared that secret meetings and contracts with private companies cloaked the fact that the deals with the PPP partners were to the state's disadvantage and criticised the misleading of parliament by the minister of transportation.[1] Those are just two of many examples of public debates that pertain to the keeping of secrets by the government, illustrating the ubiquity of secrecy as a political issue. While certainly not all conflicts about executive secrecy reach this level of confrontation, both cases led parliament to set up investigative committees to scrutinize the executive's secret action.

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1 The German federal minister of transportation Andreas Scheuer (Christian Democrats) was criticised for secret contracts with a private company for levying the toll, a political project that was then scrapped by the European Court of Justice for violating the European treaties. Ultimately, the minister made the classified contracts accessible to parliamentarians in the *Geheimschutzstelle*, the Bundestag's secret reading room. However, criticism of his conduct persisted. Only months later, the minister had his public servants retrieve the documents from the Bundestag*'s Geheimschutzstelle* to have them re-classified at a higher level amid a scandal about costly and disadvantageous contracts for the state and secret meetings with the private companies (https://www.tagesschau.de/inland/scheuer-maut-113.html on the re-classification of documents and https://www.tagesschau.de/inland/pkwmaut-rechnungshof-101.html on the disadvantageous contracts, and https://www.tagesschau.de/inland/scheuer-pkw-maut-105.html on secret meetings with the private companies.

While secrecy is a heated topic of public debate, scholarly research on the topic lags behind (e.g. Sarcinelli 2009: 73,[2] Knobloch 2017: 205). The particular empirical patterns of secrecy's public legitimation are especially still rather unknown: 'Despite its obvious normative, theoretical, and practical importance, the trade-off between government secrecy and openness has received scant attention in the political science literature' (Shapiro/ Siegel 2010: 68). While one can see a recent surge in interest in the topic (see for example Voigt's 2017 edited volume or the West European Politics Special issue 'Secrecy in Europe' edited by Rittberger and Goetz 2018, Abazi 2019, Mokrosinska 2021, Knobloch 2019), there still is a desideratum for thorough analysis of the practice of legitimising secrecy in democratic states, and whether and how parliamentary actors in a democratic polity accept state secrecy.

Previous research has, for example, focused on over-classification (e.g. Kitrosser 2005, 2008, Friedrich 1973: 150). It demonstrated that over-classification is often driven by organisational (Pasquier/ Villeneuve 2007: 157, Fairbanks et al. 2007: 30) or individual self-interest and biases (e.g. MacCoun 2006, Stiglitz 2002: 34, Tefft 1979: 63). Complementary to this, there has been research on unauthorized disclosures of classified government information (e.g. Brevini et al. 2013, Roberts 2012, Bieber 2016, Möllers 2011, Kumar et al. 2015 on Wikileaks). The latter have been discussed as modes of governing (Pozen 2014: 562, Schoenfeld 2010: 23) or as scrutiny mechanisms (Sagar 2007, Boot 2017, Fenster 2017, Bail 2015, Pozen 2013, Gadinger/ Yildiz 2016), but also as triggers for further government secrecy (e.g. Voigt 2017: 7). Finally, secrecy is indirectly addressed in transparency research. The latter addresses secrecy when looking at transparency's limits and at executive circumvention strategies (e.g. Gersen/ O'Connell 2009, Hood 2007, Vaughan 1997/2009: 461, Roberts 2006b: 111 ff., Gingras 2012: 233).

While these lines of research address how secrecy and disclosure rules are dealt with and bypassed by different actors, empirical analyses systematically analysing the *actual* decision-making processes about executive secrecy, however, are largely lacking. Only a few works have done empirical research into rationales that underlie decisions in favour of secrecy. Such rare works include studies of US political practice (Aftergood 2009, Gibbs 1995/2009) or studies of practices of secrecy in the EU (Rosén 2018, Abazi 2019, Curtin 2018, Patz 2018).

This study strives to fill this gap. In particular, it illuminates how exactly parliaments use their power to discuss and decide on the need and limits of state secrecy,

[2] All translations of German language publications as well as of the German language empirical material are made by the author. For the sake of readability this is not indicated for every single quote.

thus providing its public legitimation. How do parliaments approach executive secrecy? Why do parliaments allow for executive secrecy and what limits do they set?

Parliaments are not unitary actors. Within parliament, there are different roles to fulfil, such as being in opposition or supporting one's government while simultaneously adhering to voters' interests (see for example Klüver/ Spoon 2014, Sagarzazu/ Klüver 2017, Hohendorf/ Saalfeld/ Sieberer 2020). When focusing on parliamentary decision-making with regard to executive secrecy, this dissertation therefore disaggregates parliamentary processes. It traces the internal conflict lines about the legitimate scope of executive secrecy arising from the different roles of individuals or parties within parliament. Thus, it connects partisan and government studies, looking into both ideological differences and conflicting institutional roles. Such a detailed analysis, however, makes it necessary to focus on a small number of cases, here two.

Germany makes an interesting case for studying the debate on secrecy. The German parliament, the Bundestag[3], is a relatively strong one (e.g. Sebaldt 2009, Sieberer 2011) making it more likely that its assessment of the merits and demerits of executive secrecy is independent of government pressure. At the same time, as in any other parliamentary democracy, parliamentary majorities regularly support the government. Furthermore, Germany has been classified as a country with a 'secrecy culture'.[4] Secrecy has long been the default option for administrative action (*Amtsgeheimnis*, see Müller 2004: 19). In recent decades, observers have acknowledged the beginning of a paradigm shift expressed in the introduction of freedom of information laws, first in the federal states (Redelfs/ Leif 2004) and later at the federal level with the so-called *Informationsfreiheitsgesetz* (German Freedom of Information Law) in 2005 (Wegener 2006: 27).

An analysis of the negotiation of secrecy rules in Germany is still missing. Legal studies have covered their legal qualities and their location and integration into the legal system, not their genesis. Political science analyses tend to focus on other issues,

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3 While there is a second legislative body, the Bundesrat, the latter is not a parliament (Amm 2020: 405; von Beyme 2017: 380). It is constituted of delegates of the *Länder* executives.

4 Sweden and the UK are often mentioned as the polar cases (Düwel 1965: 113f., see also Rösch 1999: 129, Grønbech-Jensen 1998: 185) concerning secrecy and transparency. Sweden with its early adoption of its press freedom law in 1766 (e.g. Swanström 2004) is mentioned as exemplary for the idea of publicity by default (Wegener 2006: 299). Great Britain, on the other hand, has long been seen as 'a country notorious for official secrecy' (Roberts 2006a: 65) with its Official Secrets Acts and Defence Advisory Notices (DA Notices, see Banisar/ Fanucci 2013). With the rise of transparency laws even British secrecy practices have been moderated to some extent (Wegener 2006: 407).

such as the practices of violations of secrecy, namely over-classification by governments and unauthorised disclosures by whistle-blowers, or transparency. Thus, the present study is not only an investigation of an understudied topic, it also provides new empirical evidence in the case of Germany.

The analysis of parliamentary decision-making regarding executive secrecy in the German Bundestag conducted in this dissertation focuses on two German policy fields chosen for in-depth comparative analysis. The first policy field under investigation is intelligence agencies. Intelligence work is a classic example of executive secrecy, and one that comes to mind quickly when political secrecy is mentioned. Intelligence agencies are the realm of classic statehood. The second policy field investigated here is Public-Private Partnerships (PPP). As a relatively recent instrument of public procurement in Germany, PPPs are an example of a new type of 'dissolving' statehood. The formerly clear-cut boundaries of the state – intelligence agencies being a prime example – become blurred by various types of cooperation and commissioning between the state and private companies. Here, too, questions of secrecy arise.

The study of these two very different cases will enable the carving out of the common characteristics justifying executive secrecy: is there a generalizable logic of why actors consider secrecy legitimate and what limits they set? Or is secrecy rather something that is discussed policy field by policy field, following different logics? The analysis and comparison of the two cases promises to identify general features of justifications of executive secrecy offered in parliamentary debates on the one hand, and case-specific ones on the other. Empirically, the study is based on the complementary analysis of parliamentary documents (such as legislative drafts and plenary protocols) and of expert interviews with MPs, staffers and executive actors as MPs' discursive counterparts. Parliamentary documents allow the tracing of decision-making processes as well as the justifications for secrecy that actors address to the broader public – and to each other – while anonymised expert interviews provide background information and context. The combination of the two sets of empirical material also eases the often-lamented access problems that secrecy as a topic for research quite obviously implies.

The main empirical findings of this study are, first, that most actors agree on general principles that justify executive secrecy. However, they disagree on how these considerations should be spelled out in practice. Defining the concrete scope of legitimate secrecy and balancing secrecy's aims with other goals are highly contested. Second, the study shows how embedding substantive legitimation in a system of legislation and parliamentary scrutiny can lay the ground for settling disputes and providing procedural legitimacy. Actors are to some extent ready to accept decisions

on secrecy if they are taken according to democratic rules. Third, the observed mechanism for getting secrecy accepted is not without limits. Secrecy can never be legitimised once and for all, but requires continuous updating and re-assessment. And the legitimising strength of legislation and scrutiny depend on the quality of the procedures, e.g. allowing opposition actors to present their alternative views.

To develop this argument both theoretically and empirically, the dissertation proceeds as follows. Chapter 2 lays out the conceptual framework of the analysis. First, it introduces secrecy as a political concept. Starting with a short history of political thought on secrecy, the chapter then presents two existing concepts of legitimising secrecy: substantive legitimation that focuses on secrecy's value for achieving a goal, and procedural legitimation that follows the idea that secrecy can be authorized if decided upon democratically. In a second step, the chapter discusses the methodological decisions taken to tackle the research question. It addresses why regulation of intelligence agencies and Public-Private Partnerships were chosen as case studies for the German case. Furthermore, it discusses the choice of empirical material and the method of analysis.

Chapters 3 and 4 focus on how secrecy is debated in parliamentary practice. For intelligence agencies and Public-Private Partnerships respectively, both chapters first discuss the substantive rationales for secrecy. As the empirical material reveals, substantive legitimation is contested and therefore, alone, this is insufficient to legitimize secrecy. The study demonstrates that contestation is influenced by the institutional roles and ideological positions MPs occupy. Each chapter then focuses on two domains of procedural legitimation, that is, legislation and parliamentary scrutiny. It explains to what extent procedural legitimation supplements the substantive rationales for executive secrecy.

Chapter 5 compares the two cases to identify the general logic of argument, conflict and agreement as well as the peculiarities of each subject of regulation. While in both cases procedural legitimation is invoked to supplement substantive legitimation, the main difference between the cases lies in how procedural mechanisms of legitimising secrecy are institutionalized. The chapter also discusses the inherent limits of procedural legitimation.

The concluding chapter makes two points. First, it discusses the implications of the empirical findings for the political practice of parliamentary decision-making with regard to executive secrecy. Second, it maps out a research agenda for deepening our understanding of secrecy and distils suggestions for political practice from the empirical findings, based on actors' perceptions of executive secrecy's place in a democratic setting.

2 State of Research and Conceptual Framework

This chapter defines secrecy as a social and political phenomenon and provides a brief historical overview of the role the concept has played in political practice since early modernity. It subsequently focuses on the role of secrecy in contemporary democratic states emphasising the tension between secrecy and the democratic commitment to transparency in governance. The chapter reviews the existing literature and introduces the two approaches to justifying secrecy in a democracy that will organize the discussion that follows.

2.1 Theorizing Secrecy

Secrecy can be regarded as a 'structuring principle of the societal world' (Assmann/Assmann 1997: 9), or as 'one of the greatest accomplishments of humanity' as a mechanism of creating and maintaining interpersonal relations (Simmel 1906: 462). Sociological theory shows that any regulation of political secrecy has to take into account that secrecy (as well as the possibility of disclosure) has effects on social relations and hierarchies and therefore is a power issue, too. In sociological theory, secrecy is, first of all, 'non-information' (Sievers 1974: 18). It is, furthermore, intentional (Bok 1989: 5); simple omission, forgetting or not being able to communicate do not qualify as secrecy (Costas/ Grey 2014: 1426). This intention of keeping a secret *from* somebody includes the idea that the other party *could* be interested in the secret, which is why it is hidden from her in the first place. Any claim for secrecy thus corresponds to a claim for disclosure (Simmel 1923: 272, Sievers 1974: 18, Stok 1929: 4, Düwel 1965: 111) – at least potentially. Secrecy in this sense is 'non-information *against expectation*' (Westerbarkey 1991: 23, emphasis added).[5] This does not require an express claim for disclosure in practice. It means that secrecy structurally assumes the possibility of this expectation, which is the reason for keeping the secret. Therefore, secrecy constitutes (at least) two types of involved parties: the secret-keepers and those who are excluded from it but (might) have an interest in knowing it. Rösch furthermore distinguishes between types of secret-keepers: on the one hand, there is the secret's master ('Geheimnisherr'), who is qualified to decide whether to disclose a secret. On the other hand, there is the simple secret-keeper ('Geheimnisträger') who

[5] It is not important for the status of a secret whether the interest in secrecy is legitimate (Düwel 1965: 31). This diverges from the (legalistic) perspective that a secret is characterized by a *justified* interest (Wolff 2010: 175) in not disclosing it.

does not have this authority, though s/he could in fact disclose the secret (Rösch 1999: 31). Of course, the number of those in- and excluded can vary as secrets are not defined by *how many* are excluded, but by the fact that *somebody* is (Westerbarkey 1991: 23).[6]

Secrecy therefore defines in- and outsiders (Bok 1989: 6) and produces difference (Hahn 1997: 27, Assmann/ Assmann 1997: 7) as well as hierarchy (Costas/ Grey 2016: 66, Roberts 2006a: 49). The secret-keeper gains a feeling of exceptionality (Simmel 1923: 274), strengthened by the curiosity of those who are excluded. In this sense, secrecy also entails and reinforces power relations (Horn 2006: 39). 'Control over secrecy and openness gives power: it influences what others know, and thus what they choose to do. Power, in turn, often helps increase such control' (Bok 1989: 282, see also Costas/ Grey 2016: 21, Sarcinelli 2009: 81, Schirrmeister 2004: 49).[7] The value of secrecy, though, is based not so much in the information itself but rather in the process of keeping it, as Georg Simmel (1906) argued. According to him, it is a 'logically fallacious, but typical, error, that everything secret is something essential and significant' (Simmel 1906: 465). This notion has been adopted, amongst others, by Westerbarkey who claims that a secret's content is 'random or even dispensable as long as the impression can be sustained that something valuable is hidden' (Westerbarkey 1991: 172). Information thus might only obtain value by virtue of being a secret (Curtin 2011: 6, Costas/ Grey 2016: 33) because the expectation is that secrets 'contain a truth that is "more real", "more true", or at least "more complete" than non-secret knowledge' (Costas/ Grey 2016: 87). One cannot verify the value of information one does not have, and the resulting demand for its disclosure increases a secret's value (Westerbarkey 1991: 172).

Not only keeping a secret but also disclosing it might provide secret keepers with power: 'If a secret is shared among a number of individuals any of the individuals can reap the scarcity rents for themselves by disclosing the information' (Stiglitz 2002: 33) Of course, secrecy can also be a burden on those keeping it, for example when obligated to secrecy by others against their own inclination to reveal the information (see Costas/ Grey 2016: 135) and since it implies some responsibility for the secret

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6 Secrecy furthermore has to be differentiated from lies, although many authors discuss them together (see for example Arendt 1967/2013: 8, Horn 2008: 114, Jay 2010: 134, Wise 1973). There is a difference in intent: lying aims at disinformation while secrecy simply means non-information (Martin 2009: 40 f.). Bok furthermore claims that, while lies are morally wrong, secrecy might not be (Bok 1989: XV). In a similar thrust, Simmel defines the lie as an 'aggressive technique of secrecy' (Westerbarkey 1991: 135).

7 This may not even require secrets to be kept very tightly. So-called 'public secrets' (Costas/ Grey 2016: 37 f.) or 'open secrets' which are in fact known broadly, but not confirmed by the secret-keeper (Schirrmeister 2004: 62), may equally have strong impacts on social relations.

(Bok 1989: 33). Therefore, every secret is to some extent precarious: its disclosure ever looms over it, it is endangered 'not only from outside, but also (and maybe in particular) from the inside' (Nedelmann 1995: 6). The secret-keepers' temptation of disclosure endangers every secret (Simmel 1906: 466) and once disclosed, a secret cannot be undisclosed. Luhmann and Fuchs stress this asymmetry of talking and remaining silent: 'He who is silent can still talk. Whoever, in contrast, has talked, can no longer be silent' (Luhmann/ Fuchs 1989/1992: 105). Secrecy therefore is time-sensitive, too. Information can lose its status as a secret over time if it is disclosed. Of course, not every disclosure means that secrecy disappears altogether: if only disclosed to some, information can still remain secret for others. It only loses depth, to put in in David Pozen's terms (Pozen 2010).

Secrecy is non-information, but it is in no way non-communication (Sievers 1974: 24). It can be understood as a form of communication with a 'negative sign' (Luhmann/ Fuchs 1989/1992: 104). Secrecy presupposes the potential of communication (Sievers 1974: 24) – and it certainly is communication for the insiders (Costas/ Grey 2016: 143). Sometimes, secrecy even enables communication. This is the case, for example, with religious confessions or the relation with a lawyer, where secrecy enables people to share information (Hahn 2002: 24) given the promise not to tell.

Furthermore, secrecy is not just an interpersonal phenomenon. It also plays a role for institutions and organisations. As Weber observed, bureaucracies rely on secrecy for maintaining hierarchies and internal structures and defending their organisational boundaries (Weber 1978, see also e.g. Sievers 1974). Often, secrecy is institutionalised, e.g. by formal sanctions to deter unwarranted disclosures (Shils 1956: 26, Nedelmann 1985: 41). Bureaucratic record-keeping, though, can also make secrets harder to keep effectively (Bok 1989: 108). Recorded secrets are detached from the secret-keeping person, can be multiplied and shared and require physical protection. Denying the existence of secrets is also harder if there are documents proving their existence. Therefore, bureaucracies also rely on informal mechanisms for ensuring institutional secrecy. 'Rewards and initiation procedures, loyalty oaths and censorship, threats and indoctrination may all be tools for collective secrecy,' as Bok points out (1989: 108), identifying both formal safeguards for secrecy as well as informal ones ingrained in institutional culture. Organisational secrecy culture differs from one institution to another (e.g. Costas/ Grey 2016: 110).

In addition to an interpersonal and an organisational dimension, secrecy also has a systemic aspect. For example, 'ignorance,' as Heinrich Popitz argues, has a 'preventive effect' in norms-based systems, allowing to keep up norms – and belief in them – despite their occasional violation (Popitz 1968). If every little transgression of

norms was known, he argues, the norms would collapse – but a certain level of ignorance allows to uphold the norms despite their violations. Not knowing every detail about political processes may support systemic trust rather than destroy it, to invoke a famous comparison of sausages and laws: they are better for not knowing how they are made.[8] Several scholars have pointed out this role of ignorance in systemic trust, arguing that too much transparency may lead to disappointment in the reality of democratic policy-making (e.g. Roberts 2006b: 119, Worthy/ Bourke 2011).[9] While these considerations do not focus on secrecy as an intentional process of non-disclosure as discussed above but more on non-transparency or not knowing, they nevertheless illustrate that secrecy, too, may have systemic effects.

2.2 From *Arcana Imperii* to Publicity

In political theory and policy analysis, secrecy was conceptualized as a state phenomenon. State secrecy entered Western political thinking with the medieval 'mysteries of the state' or *arcana imperii* (Kantorowicz 1955). Adapting religious motifs and applying them to politics,[10] *arcana imperii* 'transferred the aura of sacredness from the *arcana ecclesiae* of church, ritual, and religious officials to secular leaders' (Bok 1989: 172). Accordingly, just a chosen few were fit to govern, confirmed by their divine and superior knowledge. Through this secularization of the *arcana ecclesiae* the *arcana imperii*, the secrets of the state, emerged (Kantorowicz 1955: 66).

The rise of the idea of *arcana imperii* is often attributed to Niccolò Machiavelli and is closely linked to the concept of 'reason of state' (cf. Göke 2017: 34). *Arcana imperii* are founded on the notion that secrecy can be a necessary instrument to maintain a leader's dominion or to preserve the state itself. Machiavelli, however, was only one of several thinkers who laid the ground for secrecy's role in politics, he himself not even using the phrase *arcana imperii* or reason of state (Göke 2017: 34). The

8 This comparison is commonly attributed to Bismarck. However, it is disputed whether he even made this comparison originally drawn by poet John Godfrey Saxe; see https://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html (last accessed 01.02.2021).

9 There is also an opposing claim in the literature arguing in favour of a positive correlation between transparency and public trust. Nonetheless, proponents of this claim point out that there may be circumstances under which the effect is turned around (i.a. De Fine Licht/ Naurin 2015).

10 While the *arcanum* was already known in antiquity, it only became a central concept of political thought in the 16th century (Knobloch 2011: 21).

concept spread through the West at the beginning of the modern era: 'From Machiavelli and Guicciardini to Gracian and Richelieu, secrecy is a defining element in the politics of reasons of state, in the art of simulation and dissimulation' (Bodei 2011: 889). The secret was both an instrument and a symbol: an instrument of sovereignty and exclusive decision-making, and a symbol of the sovereign's superior knowledge (Wegener 2006: 39).

Institutionally, *arcana imperii* found their heyday in absolutism (Wegener 2006: 32) with secret councils, censorship, and secret jurisdiction (Wegener 2006: 40). Furthermore, state secrecy was complemented by a claim for transparency regarding the lives of subjects (Wagner 2015: 132). The rise of *arcana imperii* is closely linked to the emergence of the modern Western state (Wegener 2006: 39): Machiavelli's concern with identifying effective, even if not moral, governing practices (Machiavelli 1513), is an instance of the scientisation of thinking about politics (Stolleis 1980: 15) marking the passage to specifically modern thinking (Göke 2017). It is due to this secularization that secrecy came to be understood as debatable. This, in turn, paved the way for The Enlightenment's challenge of secrecy (cf. Luhmann/Fuchs 1989/1992: 119):

> The Enlightenment with Voltaire or Diderot undermines the legitimacy of the constituted political and religious powers; it subjects them in a Kantian way to the 'tribunal of reason', inviting everyone to think and decide for themselves. Public argument and the will to truth (the Greek parrhesia) take the place of secrecy, simulation and dissimulation (Bodei 2011: 894).

This questioning of traditional power relations thus also extends to secrecy. The use of political metaphors illustrates this change in secrecy's assessment well: negative connotations are invoked by referring to darkness and night when discussing secrecy while publicity is equalled with light (Wegener 2006: 122; Westerbarkey 1991: 21ff.). In other words, 'transparency is substituted for opacity, light for darkness' (Bodei 2011: 894). With this shift, consequently, publicity, not (god-like) opacity and mysteries, became a necessary condition for legitimacy (Wegener 2006: 142). Publicity served to provide the link between public opinion and the state and its policies (Habermas 1962/1990). Thus, the democratic idea of government by the people systematically depends on publicity as its cornerstone.

Secrecy and publicity were exchanged (Hoffmann 1981/2009: 122, see also Leutheusser-Schnarrenberger 2015: 24, Rossi 2015: 52). While the absolutist state had been marked by state secrecy in combination with the absence of privacy for its subjects, now it was turned the other way around. The individual henceforth had, in the eyes of many scholars of the Enlightenment, a right to secrecy in the form of individual privacy while the state was supposed to be public (Hahn 1997: 29):

> Individualistic or liberal democracy as it has developed in the West has combined privacy in the affairs which are the business of the individual or a corporate body, with publicity in the affairs of government, which are the business of the citizenry as a whole (Shils 1956: 22 f.).

Rights such as the privacy of correspondence, the right to refuse to give evidence, or the secrecy of the ballot were implemented in consequence (Wegener 2006: 193), even though step by step. To secure these rights, especially *vis-à-vis* the state, the state itself now had to be more transparent (Wegener 2006: 187). Privacy not only has a personal, individual significance, but also a political function in providing the basis for forming political opinions (Wegener 2006: 187), and is therefore inherently linked to democratic thinking.

Thus, with the disappearance of the quasi-religious legitimation that state secrecy enjoyed in absolutism, with the disappearance of its 'cosmological status' (Luhmann/ Fuchs 1989/1992: 118), the presumption in favour of publicity came to dominate political life and the secret becomes the exception.

Despite these developments, secrecy also plays an important role in modern democratic states.[11] For example, closed sessions have historically been proof of parliaments' sovereignty (Weiß 2011: 18 f.). And as Max Weber pointed out, growing bureaucracies introduced a new inclination towards secrecy.

> Th[e] superiority of the professional insider every bureaucracy seeks further to increase through the means of keeping secret its knowledge and intentions. Bureaucratic administration always tends to exclude the public, to hide its knowledge and action from criticism as well as it can (Weber 1978: 992).

In general, secrecy increased with the size of bureaucracies (Rourke 1957/2009: 407, Roberts 2006a). It was also formalized in classification systems and the 'institutionalization of intelligence agencies' (Birchall 2011: 13). This shows that despite the normative ambivalence of political secrecy it continues to exist.

This perpetuation of secrecy, though, went hand in hand with the introduction of freedom of information laws. The latter have their origins in the immense rise of the concept of transparency in opposition to secrecy.[12] Transparency became an important norm (again) in the 1970s (August 2018: 136), culminating in what some

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11 One example is the secrecy of the ballot. It is not just an individual privacy right, but also a principle of enabling democratic elections, by allowing citizens to take an independent and free election decision (e.g. Burke 1986: 180, Friedrich 1973: 152, Lever 2015). Hubertus Buchstein, though, demonstrated in the example of the United States that the introduction of the secret ballot was driven by actors who wanted to limit democratic inclusion by discouraging the illiterate sections of the electorate from taking part in elections (Buchstein 2000). This only ended with the advent of increased literacy.

12 Transparency research often finds that the high expectations for transparency do not hold empirically as there are limits to transparency (e.g. Birchall 2011: 64, Worthy

call a 'decade of openness' (Blanton 2002: 50) in the 1990ies. This new dominant norm was then implemented in Freedom of Information laws that spread over the world (Ackerman/ Sandoval-Ballesteros 2006: 85, Roberts 2006a: 107 ff.). For this most recent period, Hood ascribed to transparency a 'quasi-religious significance in debate over governance and institutional design' (Hood 2006: 3). This pursuit of transparency does not eradicate secrecy in politics. Instead, it further underlines the need for the justification of secrecy, and renders it suspicious per se (Rösch 1999: 51, Horn 2006: 39).

This discussion of the concept of political secrecy has focused on the changing normative evaluation of secrecy throughout history: secrecy in governance turned from default into an exception in need of justification. It was argued that despite these changes in the perception of secrecy, secrecy remains a persistent element in political life. As the following discussion will show, the idea that secrecy serves policy goals is still well entrenched in political practice.

2.3 Substantive Legitimation of Executive Secrecy

Medieval theories had no need to differentiate between executive and state secrecy: The ruler's secrets were the state's secrets. In modern democratic states, though, state power is distributed between various bodies. Consequently, so is secrecy. The interest of this study is in executive secrecy as a specific type of state secrecy.[13] Executives are the institutions most likely to dispose of a large number of secrets and, at the same time, their keeping of information from their citizens, or parliament as the citizens' representative, is in special need of justification.

2010). Sometimes this is explained as an imperfect transposition of the concept into concrete political frameworks. Yet, whether transparency is even achievable is contentious. Fenster points out the general implausibility of transparency (or secrecy, for that matter) as there can be no 'perfect information control' (Fenster 2014: 314) due to complexity: 'The state is too big, too remote, and too enclosed to be completely visible. The very nature of the state, in other words, creates the conditions of its obscurity. It can never be fully transparent, at least not in the sense that the term and its populist suspicions of the state require' (Fenster 2010: 623). The very idea of transparency, then, considering that there can be truth and visibility, is ideological (Cotterrell: 1999: 417) and an illusion (Marsh 2011: 533).

13 Legislative and judicative bodies also keep secrets: both parliaments and courts have a right to deliberative secrecy, for example parliament having closed sessions. Their secrets, however, are usually limited in time and only cover their decision-making process while the decisions themselves are regularly made public. Executive secrecy, in turn, may also cover government action.

Substantive legitimation of secrecy rests on the idea of secrecy as a means to achieve political ends.[14] Secrecy is legitimate if it is useful: it 'may make a contribution to the purposes as well as the survival of a constitutional society, for the defence of secrecy often rests exclusively on the grounds of political necessity' (Rourke 1957/2009: 417). Even authors who condemn secrecy as, for example, 'corrosive' of democracy often relativize their initial rejection of secrecy (Stiglitz 1999/2009: 697). Thompson describes this dilemma thus: 'democracy requires publicity, but some democratic policies require secrecy' (Thompson 1999: 182). These normative tensions are reflected in the depiction of secrecy as a 'necessary evil' (Kitrosser 2005: 3; Shils 1956: 25; Horn 2006: 39). Substantive justifications of secrecy therefore do not question democracy's dependence on publicity or transparency but admit limited needs for secrecy.

The argument that secrecy is necessary takes two forms. First, in the spirit of *raison d'état* politics, it presents secrecy as an extraordinary and exceptional means for achieving certain political goals. Second, its instrumental character can also be claimed as (an institutionalized) part of 'normal' politics within the constitutional framework. This necessity-based approach to secrecy is broadly recognized both in academic and public discourse, as Gowder observes. It is based on the assumption that where the benefits exceed the costs, secrecy is justified (Gowder 2006/ 2009: 674 f.). Max Weber, for example, argued that bureaucratic secrecy might be functional for organisations and for achieving their goals, for example in diplomacy or the military administration (Weber 1987: 992), although he also stressed the relevance of secrecy that is not justified by policy goals.[15] Relatively undisputed instances where secrecy is seen to be advantageous for democracy are the secret ballot (e.g. Burke 1986: 180), privacy (e.g. Raab 2012) or attorney-client confidentiality (e.g. Colby 1976/2009: 478). In each of these examples, secrecy is ascribed a protective role

[14] Some authors call this the functionality of secrecy (e.g. Friedrich 1973: 48). Labelling it functionality, though, often follows a limited understanding of functionality that excludes social functions as discussed above (see also Riese 2019).

[15] Weber is often reduced to such a utilitarian understanding of secrecy (Blank 2009: 67). In fact, though, he points out that bureaucratic secrecy is also self-perpetuating: 'However, the pure power interests of bureaucracy exert their effects far beyond these areas of functionally motivated secrecy. The concept of the "office secret" is the specific invention of bureaucracy, and few things it defends so fanatically as this attitude which, outside of the specific areas mentioned, cannot be justified with purely functional arguments' (Weber 1978: 992). Thus, his account of secrecy on the one hand points out the functionality of secrecy, but also that it is expanded beyond its necessary (Westerbarkey 1991: 79 f.) and 'intrinsic functionality' (Costas/ Grey 2016: 21) or even turns into an 'obsession', as Rourke puts it (Rourke 1957/2009: 404).

(Knobloch 2017: 22). Classification systems that provide rules for bureaucratic secrecy also hinge on instrumentality: the necessity of secrecy stems from the information itself, from its assumed sensitivity.

In particular, in legal studies there are several typologies of rationales for secrecy. Jestaedt for example distinguishes 'instrumental' or 'modal' grounds (such as effective law enforcement or deliberation) and 'material' ones (other legally protected rights like privacy or state security) (Jestaedt 2001). Müller suggests a typology of secrecy on the basis of the secrets' intensity or whether they are original or derivative ones (Müller 1991: 56 ff.). Furthermore, he differentiates by secrecy's ends, including *streitbare Demokratie* (~'well-fortified democracy'), efficiency of state action, protection of basic rights and separation of powers. These sometimes rather complex typologies can be condensed to three main substantive rationales for executive secrecy:

1. Secrecy to ensure the quality of the decision-making process
2. Secrecy to ensure the quality of the policy outcome
3. Secrecy to protect third-party interests

The different types of secrecy found in the (jurisprudential) literature can be re-categorized according to these three types. While the first two focus on the state's intrinsic interests in secrecy, the third derives the need for secrecy from third parties' or private interests (especially citizens'). The secret then originates outside the state. The secret's necessity is not directly derived from concerns for the functioning of the political institutions, although there often is a link to state interests by rooting third-party rights in, for example, constitutional ideas. Below, the three substantial rationales for executive secrecy will be discussed in more detail.

Quality of the Decision-Making Process

The first type of justification for secrecy focuses on its use for ensuring the quality of political processes. This includes ideas about maintaining the separation of powers as well as references to the quality of deliberation that, according to this argument, depends on being shielded from outside interference.

A prominent manifestation of this type of substantive justification of secrecy is the notion of executive privilege. In Germany, there is the specific concept of a '*Kernbereich exekutiver Eigenverantwortung*' as coined by the German constitutional court.[16] It is derived from the separation of powers. For the executive and legislative

[16] The principle can be translated as follows: 'core area of executive responsibility", meaning an executive right to deliberative secrecy. In this, it is related to the English notion

powers to be effectively separated, government needs a protected sphere for discussing issues before taking a decision. Otherwise, the executive could not be held accountable for their actions by parliament (e.g. Trute 2014: 195). Parliament would already partake in the decision-making process and thus not be an independent overseer; therefore, the executive needs the possibility to make their decisions without outside interference and consequently has a right to secrecy (e.g. Müller 1991: 78 ff.).

While *Kernbereich* emphasises the dimension of accountability and separation of powers as a source of legitimate secrecy, other arguments present secrecy as a condition of the quality of the decision-making process, undisturbed deliberation, compromise (e.g. Depenheuer 2002: 25; Pannes 2015: 410), strategic action (Bieber 2014: 363) and as the prerequisite of a balancing of interests and problem-solving without loss of face for the parties involved (Sarcinelli 2011: 11). Dissenting opinions that could enrich the debate, Meade and Stasavage show in a US example, might only be voiced confidentially (Meade/ Stasavage 2006). Without deliberative secrecy, such important inputs would probably be lost. And several authors argue that decisions would be shifted to informal settings once committees were subjected to publicity (e.g. Friedrich 1973, Sarcinelli 2011: 11, Stiglitz 2002: 42), suggesting a 'functionality of informal governance' (Korte 2010: 218, see also Pannes 2015).

A recurring theme in this line of thought is the differentiation of a 'front stage' and a 'back stage' in politics (e.g. Depenheuer 2002: 17, Groddeck/ Wilz 2015: 8). The back stage is supposed to provide 'appropriate problem-solving' (Depenheuer 2002: 18) as a 'structurally necessary correlate of the comprehensive and permanent democratic postulate of publicity' (Depenheuer 2002: 25). The front stage, in turn, is merely ceremonial (Tacke 2015: 54). It provides legitimation (Pannes 2015: 197) for decisions that have been taken informally on the 'back stage' by validating them through the constitutionally competent institutions such as parliament. Confidentiality – its proponents prefer this term to secrecy – thus serves the public good in ensuring open-minded deliberation.[17]

However, these arguments are not unchallenged. Whether separation of powers truly requires executive secrecy is questioned. Wegener, for example, objects that disclosure of information does not constitute interference in executive decision-making power (Wegener 2006: 472). Moreover, too much executive secrecy, Sadofsky holds,

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of executive privilege (see Weaver/ Pallitto 2005/ 2009: 637 f.), although the two are not identical (see Riese 2021, Sagar 2012).

17 Here, there is a link to the second type of justification (quality of outcome), as there is a more or less explicit assumption that good deliberation will also produce good results. Still, secrecy only indirectly serves the outcome in enabling a good decision, while arguments about the quality of the outcome stress that a decision will only have the envisioned effect on condition of secrecy.

would be in 'sharp disharmony with the separation of powers and popular sovereignty.' (Sadofsky 1990: 89, see also Sagar 2012: 353): if parliament is supposed to check executive power, it needs information about government action. Consequently, secrecy can both strengthen or endanger the separation of powers. How much secrecy is warranted by executive privilege is uncertain (Sagar 2012: 351).

Similarly, claims about the positive effects of secrecy on the quality of deliberation and decisions are contested. Deliberation may not only profit from secrecy, but arguably also from disclosure: an open debate that allows everybody to bring up new arguments can assure that every viable option is discussed and that officials do not simply choose a policy based on partisan ideas or out of habit (e.g. Samuel 1972: 8, Tefft 1979). And deciding informally behind closed doors may blur responsibilities (Marschall 2004: 315) or result in 'new barriers designed to ensure that shared information is never disclosed to people or organizations outside the network' (Roberts 2006a: 21). Assuming that good decision-making can only occur under the veil of secrecy, Wegener argues, is also based in pre-democratic thinking and mistrust (Wegener 2006: 254). Whether deliberation always profits from secrecy is questionable.

Quality of Outcome: Effective and Efficient Decisions

A second line of argumentation focuses on secrecy's expected value for improving policy outcomes. Secrecy is considered to be a means for achieving efficiency or effectiveness (e.g. Müller 1991: 69 ff., see also Jestaedt's discussion of modal reasons for secrecy, Jestaedt 2001). The basic idea is that there may be policy decisions where a goal can only be achieved if kept secret. Law enforcement or a state's success in international negotiations are frequent examples (Thompson 1999: 182). Another classic example is financial market interventions (Riese 2015, Stiglitz 2002: 36) which would arguably lead to bank runs if disclosed. Thus, secrecy in this case is justified based on the expectation that a specific outcome can be achieved through it. Secrecy is thus legitimised by its ends.

National security secrecy is a specific manifestation of outcome-oriented secrecy. In legal scholars' typologies, it is often mentioned as an independent rationale for secrecy. Jestaedt (2001) and Müller (1991), for example, consider national security secrets as a separate type of secrecy rather than a sub-type of outcome-oriented justifications of secrecy. By contrast, I argue that national security is not an independent rationale for secrecy. Rather, it should be thought of as a sub-type of outcome-oriented justifications of secrecy given that the achievement of the policy goal (security) depends on secrecy. Of course, state security is arguably the most fundamental of the proposed outcome-oriented rationales. If a state's security or even existence is at

stake, the argument goes, secrecy is legitimate. National security secrets may for example include organisational information, information about vulnerabilities or possible targets for a state's enemies (Shapiro/ Siegel 2010: 71). Security has ever been a particularly strong argument in favour of secrecy: as Roberts explains, there was a 'presumed identity of security and secrecy' during the Cold War (Roberts 2006a: 42) and security an 'absolute trump over any demand for openness' (ibid.: 33). And Buzan et al. point out how referring to security remains a knockout argument by presenting something as an 'existential threat':

> The special nature of security threats justifies the use of extraordinary measures to handle them. [...] Traditionally, by saying 'security', a state representative declares an emergency condition, thus claiming a right to use whatever means are necessary to block a threatening development (Buzan et al. 1998: 21).

Buzan et al. describe this process of discussing issues *as security issues* with the term *securitization*. It describes a process of ascribing an issue special urgency through a reference to security.

Despite broad scholarly agreement that secrecy may serve security, there are objections, too. Shapiro and Siegel, for example, argue that more knowledge on the part of citizens or public authorities on different levels can help eliminate threats. They claim that there has been a one-sided concern with what enemies might do with information while the 'positive effects of information-sharing have been undervalued in policy making' (Shapiro/ Siegel 2010: 81, see also Blanton 2003/2009: 620). Disclosure can help discover dangers (Koch 2017: 127) or deal with them: the public is better off knowing about vulnerabilities to be able to act upon them, since possible attackers might know anyway (e.g. Gowder 2006/2009, Shapiro/ Siegel 2010: 74).

These arguments focus on how states deal with threats internally, minimising risks and preparing well for them. Furthermore, there is the assumption that disclosure may also deter enemies. Potential combatants may reconsider armed encounter if they are aware of each other's destructive potential, as Coser points out for international relations. He argues that secrecy produces more risks for military conflicts since it distorts knowledge about military capacities and, thus, the potential outcomes of conflict (Coser 1963/ 2009). Thus, opponents might risk open conflict in the uninformed hope of beneficial outcomes. Of course, this argument depends on the premise that there *is* a risk for opponents that could be disclosed. Deterrence arguably only works if there is a potential threat. Still, the diverging perspectives on secrecy's utility for security illustrate that references to national security may be contentious, and expectations about secrecy's effects upon it vary.

Thus, even the arguably strongest form of outcome-oriented justifications where secrecy is legitimised with its use for the preservation of the state and its security is

contested. Similar disagreement is conceivable for all kinds of outcome-oriented justifications of secrecy: whether secrecy actually serves a certain goal depends on the calculation of harms and benefits. Such calculations are inherently predictive since they state assumptions about the future effects of secrecy or disclosure. Therefore, whether these expectations are adequate can always be called into question.

Third-Party Interests

Third-party interests in confidentiality of information are a third type of secrecy justification. We deal with this kind of secrecy when, for example, the state has access to various types of confidential personal data that it must keep on behalf of its citizens (e.g. Rösch 1999: 74, Jerschke 1971: 135) – in this case, individual privacy turns into a rationale for state secrecy.[18] Third-party interests as justification for executive secrecy are also frequently mentioned when the state handles other countries' or private companies' secret information. Where there is cooperation and the state disposes of information that has its origin with third parties, secrecy may be mandated by those partners.

The legitimate scope of third-party interests in secrecy is contested in the literature on the subject (e.g. on privacy: Heald 2006: 64 f.). For example, there is debate about the kind of information that office-holders can keep private (Sadofsky 1990: 64) such as information regarding their interactions with lobbyists. The same goes for organisational secrets. Whether, for example, cooperation partners can define what the state has to keep secret is contested. This pertains to other states and businesses alike. To what extent their per se legitimate interests in keeping their secrets bind the state or whether such demands are negotiable is subject to debate.

These three types of rationale for secrecy serve to systematize arguments about necessary secrecy. Executive secrecy is then legitimized by its instrumental use for achieving certain policy goals or for the functioning or even survival of (democratic) institutions. Yet, as the discussion of substantive justifications for secrecy has shown, even the most urgent concepts such as state security do include significant leeway for diverging definitions and inferences. For example, there may be competing values such as transparent and open debate which need to be balanced with secrecy (see Ritzi 2017: 192, Rozell 2010: 3). Furthermore, scholars disagree which specific cases

[18] As privacy was linked to the rise of democracy and also has an instrumental role for democracy's functioning (e.g. the secret ballot, see Raab 2012), it is less disputed than the other rationales for secrecy. In this, it is often argued to be in the state's interest, even if it is not of state origin. Individual privacy is seen as a constitutive characteristic of liberal democracies.

in which security issues arise to justify the resort to secrecy (e.g. Rösch 1999: 131, Lerche 1981: 119, Bok 1989: 176). Even if there are approaches aimed at calculating harms and benefits (e.g. Epps 2008), those as well 'depend on the political beliefs of the adjudicators' (Sagar 2013: 100) since risks and benefits cannot ultimately be predetermined (e.g. Sagar 2013: 69). Trying to predict secrecy's effects is speculative (Pozen 2005: 666). In a nutshell, none of the three substantive rationales for secrecy is sufficiently self-explanatory as to provide clear, undisputable instructions on how much secrecy is necessary for achieving the respective goal. This gap may be filled by procedural legitimation.

2.4 Procedural Legitimation of Executive Secrecy

The central argument about procedural authorization is that secrets can be rendered legitimate if allowed for in a democratic (and public) process. This idea is closely associated with Niklas Luhmann's argument developed in his 1978 book 'Legitimation through Procedure'. A decision is not legitimised through its content, but by the way it is taken viz. according to (democratic) rules.19 Procedural legitimation allows to address the ambiguity of necessity by democratically deciding what end justifies secrecy as a means.

Procedural legitimation does not require disclosing the secret itself which might lose its value if revealed. Instead, procedural legitimation means discussing and authorizing secrecy in abstract terms, defining in what general circumstances secrecy is acceptable. The process lends legitimacy to secrecy:

> Secrecy is justifiable only if it is actually justified in a process that itself is not secret. First-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret) (Thompson 1999: 185).

Thompson assumes that there are different levels of thinking about secrecy: for a decision about secrecy to be taken in public, the fact of secrecy must be known even if its exact content remains concealed. Thompson refers to such secrets as 'shallow secrets' (Gutmann and Thompson 1996, 121). 'Deep secrets' are secrets whose very

19 For a further discussion of content-independent authorization of secrecy see Mokrosinska (2020b).

existence is hidden from the public. As such, they cannot be subject to public deliberation. Procedural legitimation, then, can apply only to shallow secrets.[20] Procedural legitimation of secrecy may still seem to rest on substantive considerations because discussions about secrecy may still focus on what goals require secrecy. However, these goals are merely a subject of the procedure, and not the inherent source of legitimacy. The focus lies in a different logic of legitimation, in secrecy deriving acceptance from being decided upon democratically.

Parliament is, ideally, the institution to debate and define realms of legitimate executive secrecy (Rösch 1999: 186, Rourke 1960: 690). The legislative process 'helps to ensure that meta-questions about secrecy and openness are aired in the sunlight, even if the resulting policies allow some secrecy.' (Kitrosser 2005: 3f.). Some authors do not simply consider decision-making about secrecy rules a parliament's right, but also its obligation. They criticise parliaments for not setting up sufficiently clear rules in political practice (e.g. Rösch 1999: 131, Rourke 1960: 690).

Parliaments can authorize executive secrecy, but the question remains how to ensure that the authorization of secrecy is not used in the self-interest of administrations or individuals (Sagar 2013). Executives, once authorized to keep secrets for a certain purpose, may be inclined to be more secretive than necessary to achieve a policy goal, as Weber had already pointed out (see Weber 1978). Deep secrecy, especially, where actors do not just keep the information, but also its existence secret, avoids detection (see for example 'hidden law', Roberts 2006a: 20). Consequently, 'deep' secrets, as argued by Thompson, cannot be legitimised procedurally. Furthermore, these concerns show that legislation is only one domain of the procedural legitimation of executive secrecy. The other domain is oversight. As one cannot know whether those empowered to keep secrets will comply with the rules (e.g. Robertson 1982: 181), procedural legitimation requires oversight. The existence of scrutiny mechanisms instils confidence that secrecy's use will be confined to what has been agreed upon. Correspondingly, how to ensure accountability of the executive vis-à-vis parliament and the broader public despite secrecy is a major concern in the literature (e.g. Rozell 2010, Sagar 2007, Epps 2008). Many authors have pointed out how secrecy can be used 'as a private political resource rather than as a program-oriented

[20] There are different expressions of this idea. Sievers for example distinguishes simple and reflexive secrets (Sievers 1974: 31), while Pozen differentiates between deep and shallow secrets (Pozen 2010). Pozen's concept of depth is understood as a continuum (Pozen 2010: 261) while Sievers' typification implies a dichotomy. Depth is defined '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' (Pozen 2010: 267).

social good' (e.g. Sadofsky 1990: 23). These concerns do not necessarily make procedural legitimation impossible,[21] but stress the importance of oversight mechanisms for legitimacy.

Several concepts for overseeing executive secrecy have been proposed. Proxy monitoring (e.g. Epps 2008: 1568) by courts, commissions[22] or ombudsmen has been suggested as a mechanism of scrutiny. By design, proxy monitoring enables scrutiny by a small body or individual official in order not to compromise secrecy. Such oversight mechanisms serve to build institutional trust in the democratic enclosure of secrecy: even if there are spheres of secrecy, they are not beyond democratic control. Therefore, oversight may serve to produce legitimacy for secrecy in embedding it in a democratic framework. Instead of focusing on an *ex ante* definition of when secrecy could be acceptable, it provides an *ex post* mechanism for evaluating whether its use actually was acceptable. While proxy monitoring institutions are systematic mechanisms for scrutiny, circumvention – meaning unauthorised disclosures such as leaks and whistleblowing – is mentioned as another possible way for controlling secrecy (Sagar 2011, 2013).

These different forms of oversight each have their limitations. Proxy monitoring only shifts the original agency problem between executives and parliaments to

21 There are those, though, who question more fundamentally whether secrecy can be democratically authorized. Deriving from Habermas's ideal of discourse, Paul Gowder for example questions whether secrecy can ever be justified: 'Secrecy creates a path-dependence which operates to prevent future participants from engaging in a future discourse' (Gowder 2006/2009: 684). Thus, in his view a true discourse on whether to allow for secrecy cannot exist. He still concedes that secrecy may be necessary in some cases, but stresses that it cannot be normatively justified and remains a 'moral transgression' (ibid: 685, see also Knobloch 2011: 27). While his objections stimulate a critical normative discussion of the idea of procedural legitimation, it is nevertheless a crucial concept for my empirical analysis. First of all, I argue that despite Gowder's and others' concerns, procedural legitimation is the legitimation mechanism that can address the gap left by instrumental legitimation approaches. Second, this study's approach is not normative, but empirical. It seeks to trace how actors discuss and justify secrecy. Thus, it is an open empirical question to what extent they relate to procedural legitimation and how they practise it. The empirical design may very well find that (some) actors share Gowder's concerns about the justifiability of secrecy in a democracy.

22 Parliaments have been shown to submit to classification and secret keeping in order to convince the executive to share information with them (Parry 1954: 768, Rosén 2011, Curtin 2011, Jahn/ Engels 1989: 622). 'Secrecy *from* parliament changes into secrecy *in* parliament' (Müller 1991: 168, emphasis in the original). In addition to closed sessions and their own classification rules, parliaments may also set up secret committees to deal with sensitive information such as, for example, financial markets interventions (Riese 2015) or intelligence agencies' oversight (e.g. the German Parlamentarisches Kontrollgremium, PKGr).

smaller bodies (Epps 2008: 1568, Sagar 2011: 209), raising the question of who controls the controllers. How can one be sure that the proxies – be they committees or ombudsmen – do their job properly? The same objections concern oversight by courts: several scholars have found (especially for the US) that courts regularly defer to the executive when dealing with conflicts about legitimate secrecy (e.g. Fenster 2006: 939, Fuchs 2006, Pozen 2005). Many approaches for oversight rely on delayed disclosure (Epps 2008: 1574). Executive secrets remain in the government's domain but are disclosed after a predefined period, hence becoming subject to public *ex post* control. However, delayed disclosure also has pitfalls. It cannot assure that the relevant documents are stored and intelligible *ex post* (Sagar 2007: 415). Also, the delay may make effective sanctions impossible. If those responsible for wrongful secret decisions are long out of office, they cannot adequately be held accountable for them. Unauthorized disclosures, too, have their limitations. For one, they are rather an ad hoc measure and do not work as a systematic check. They depend on individuals or groups who take the risk of disclosing wrongful secrets. Also, they may create problems of legitimacy. Circumvention empowers non-legitimized actors who may also have ulterior motives (Sagar 2011, 2013) and are not formally legitimized (Sagar 2007: 422, Boot 2017). Furthermore, there is the concern that unauthorized disclosures may even trigger executives to intensify their secrecy (Roberts 2012: 128, Bok 1989: 217).

In general, oversight often faces the 'problem of prerequisite knowledge' (Pozen 2010: 324): to conduct oversight, one needs initial information that indicates where to look and what to ask. As this discussion of scrutiny mechanisms shows, none is a single system of perfect secrecy oversight. Each of the different approaches have their own respective advantages and disadvantages. Like the decision as to where secrecy is considered justified, setting up a system of oversight is not the technocratic transposition of a best-practice solution.

Summing up, procedural legitimation of secrecy is another approach for legitimising secrecy that is not focused on substantive justification but on establishing the legislative framework for the handling of executing security and its scrutiny. Both mechanisms of procedural legitimation – legislation and parliamentary scrutiny – complement one another.

2.5 Disaggregating Parliamentary Conflict over Secrecy

Parliament is the logical focus of an analysis of procedural legitimation, as the legislative body in a parliamentary democracyis responsible for taking collectively binding decisions and providing a framework for public deliberation: the parliamentary decision-making processes concerning secrecy in different policy spheres and the arguments that are brought forward in favour of or against executive secrecy are therefore of central interest to the analysis. Why do parliamentary actors allow for executive secrecy and what limits do they set? To date, no empirical research has addressed the dynamics of German parliamentary decision-making in this area. This study makes a contribution to filling this gap in research via a detailed empirical study. In doing so, it applies central concepts of partisan theory and government studies that help to open the black box of parliament. These approaches help disaggregate and systematize various typical conflict lines and roles of and within parliament.

Role theory can help make sense of parallel and overlapping political conflicts about the legitimate scope of executive secrecy in parliament. Sociological role theory hypothesizes that individuals assume different, sometimes conflictual roles. Roles are characterized as institutionalized expectations concerning a certain position (see Dahrendorf 2006). Roles provide the link between institutions and concrete political actors 'by focusing on the subjective interpretation of the normative strategic constraints and opportunities' that institutional positions provide (Andeweg 2014). Actors may behave differently from case to case, adapting their actions to different role expectations. Role theory may help understand the various and sometimes conflicting logics of action of political actors (Boulanger 2013). Parliamentary roles have been the subject of political science analyses (see for example Müller/ Saalfeld 1997) as 'patterns of attitudes and/or behavior' (Blomgren/ Rozenberg 2012). In the parliamentary context, the crucial roles are a) the role of party politician, b) the role of opposition or governing majority, and c) the role of member of parliament or of the executive. Each entails certain expectations and images of how one usually behaves in each of these roles.

The ideological positions of parties may vary concerning the value ascribed to transparency on the one hand, and to the goals to be achieved through secrecy on the other hand. Where the balance should be struck between the two depends on general ideas about democracy's functioning. For example, if one stresses the output dimension of democratic legitimacy, one will be likely to accept more secrecy than someone who is more concerned about input legitimacy and public debate (see Scharpf 1999). If the role of party politician is the dominant frame of reference, then such ideologi-

cal conflicts will dominate the debate about secrecy (on partisan theory, see for example Cox/ McCubbins 2005, Hill/ Jones 2017, or Schmidt/ Ostheim 2007, Wenzelburger/ Zohlnhöfer 2020). There are many, mostly quantitative analyses measuring parties' policy positions within the ideological space (see the party manifesto project and the extensive body of literature based on the data[23] or the Chapel Hill Expert Survey, see Bakker et al. 2020[24]) and estimating their effects, for example on spending (e.g. Wenzelburger 2015, Savage 2019, McManus 2019) or policy-making in traditional policy fields (e.g. Heffington 2018 on foreign policy, Lutz 2019 on migration and integration policy or Schmitt/ Zohlnhöfer 2019 on economic policy). Still, we have less empirical data regarding topics such as secrecy. This study aims to fill this research gap.

In addition to party political ideology, disagreement about secrecy may be shaped by institutional roles: first of all, there is the conflict line between government and opposition. Often, this is the dominant conflict line in parliamentary democracies (e.g. Hix/ Noury 2016). In a parliamentary democracy such as Germany, conflict largely runs between government – supported by the government parliamentary party groups – and opposition (e.g. Steffani 1991: 19): empirical material demonstrates that opposition and government parties' activity in parliaments usually varies (e.g. Louwerse et al. 2017, Bräuninger/ Debus 2009, Hohendorf/ Saalfeld/ Sieberer 2020).

Furthermore, institutional role conflicts can run between parliament as such and the executive. It has long been known that this is not a dominant conflict line in modern parliamentary democracies, although there are instances of 'genuinely "legislative" style' or 'cross-party' mode (see King 1976, Russell/ Cowley 2018). Consequently, most literature investigates the above-mentioned conflict lines that are based on partisanship or the roles of the government majority and the opposition. Nevertheless, there is reason to assume that parliament will be likely to consider secrecy differently from the executive and will have an interest in gaining access to executive secrets (cf. Rosén 2011, Curtin 2013 for the EU parliament). Parliamentary functions such as scrutiny of, legislation concerning or communication with the executive each depend on parliament having access to information (Coghill et al 2012; Ismayr 2001: 302 f.). This indicates that access and usability of information is crucial for parliamentary performance. This could produce parliamentary perspectives on secrecy that diverge from those of the executive.

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23 An overview of all publications that use party manifesto data can be found on https://manifesto-project.wzb.eu/publications/all.

24 A special issue of *Electoral Studies* (26:1) discussed the strengths and weaknesses of different forms of gathering data on party positions (e.g. expert, manifesto, and survey data) (e.g. Benoit/ Laver 2007).

These two conflict lines relate to different models of the separation of powers. One sees the main conflict line between the opposition and the government majority, the other identifies the conflict between the executive and legislature as the key conflict. Both descriptions of the separation of powers and the resulting conflict lines come with expectations about how actors will behave in either role. Government scrutiny then is either an opposition task (because governing majority MPs are simply their government's supporters) or one that the whole of parliament has to fulfil, including governing majority MPs. With regard to secrecy, this means that we could expect criticism of executive secrecy from parliament as such or just from the opposition.

The role-based explanations for conflict about secrecy are not mutually exclusive, but can account for different aspects of contention. For example, Fenster shows for the US how the definitions of the legitimate scope of secrecy are on the one hand partisan but also vary with being either government or opposition (2017: 72 f.). This illustrates that it is important to conceptualize the different interests in secrecy or disclosure as being founded in different roles. MPs – and parties – are de facto confronted with different role expectations. Their positions, though, are not simple derivations from their roles. Actors may mobilize different roles and role expectations in concrete conflicts about secrecy. How they weigh these different roles (for example being a member of *parliament*, being a member of the *governing party* in parliament, or being a party politician) is shaped by their conceptions of what these roles mean.

Therefore, the study will disaggregate the positions that political actors in parliament take with regard to secrecy along the different roles they occupy, for example roles as party politicians, as government and opposition, or as parliamentarians and executive actors.

2.6 Research Question and Methodology

Executive secrecy can be found in all policy fields; indeed, it can be considered a fundamental characteristic of governance. Given the importance of information access, however, why do parliaments allow for executive secrecy and what limits do they set? To tackle this research question, the present study examines parliamentary debates on the role and justification of executive secrecy, legislation and oversight of secrecy with regard to two different subjects of legislation.

Comparative case studies are best suited to deepen our understanding of secrecy in this field and provide empirically grounded insights: on the one hand, case studies

allow for an in-depth analysis of the justifications of secrecy. Moreover, an explorative approach is best suited to adapt to the logics of the field and provide pointers for future research. On the other hand, comparing a small number of very different cases allows for systematically developing hypotheses explaining secrecy's legitimacy in democracy, while discussing concrete cases in great detail. In order to identify general features of the mechanisms of legitimation of secrecy, contrasting cases were chosen to identify commonalities despite the divergence of the cases themselves.

The two selected cases are intelligence agencies and private-public partnerships. Both policy fields are of special interest for an analysis of secrecy since they deal with basic interests of the state. Intelligence secrecy is often connected to nothing less than national security and the state's self-preservation. Also, agencies' competences regularly constitute infringements on individual rights (e.g. to privacy) and thus impact citizens' lives, at least potentially. Public-Private Partnerships are relevant as they are instruments for the provision of public goods (such as highways or, at the *Länder* and municipal level, schools), and therefore also have direct significance for citizens.

The two cases represent policy fields that differ along several criteria but are situated within a common institutional framework. While both, like most German policy fields, also have a subnational dimension (and the PPP case even a municipal one), the focus here is on the federal level where the conditions of the political system and general decision-making procedures can be kept constant for a systematic comparison. Table 1 systematises the central features and differences of the two cases.

Table 1: Case Selection: Intelligence Agencies and PPPs

	Intelligence Agencies	**Public-Private Partnerships**
Policy Area	Security policy	Provision of Services
Type of Statehood	Classic statehood	Hybrid or dissolving statehood
Origin of the Secret	State secrets	State and Private (Third Party) Secrets
Structure of the Policy Area	Permanent Institutions	Project-Based and Limited in Time

The most important distinguishing line is the **type of statehood** each of the two cases represents. Intelligence agencies are an instance of classic statehood as they represent hierarchical power exercised by state actors (cf. Risse/ Lehmkuhl 2006: 9). Often, they are assigned special competences that express this state power. Public-private partnerships, on the other hand, are examples of a dissolution of classic statehood. The privatisation of statehood and the resulting '*Zerfaserung*' (falling apart, losing its structure; Genschel/ Zangl 2007) finds an especially interesting case in public-private partnerships. PPPs are a cooperation between public and private partners who 'co-produce' public goods. They are an example of a 'hybridization of governance' (Schuppert 2008, see also Krumm/ Mause 2009: 106). The state then takes the role of a guarantor instead of a provider of services (see Ziekow 2011). And as the state diffuses its hierarchical forms (Fenster 2015: 157), 'traditional Weberian notions of bureaucratic control and accountability in the public sector' are eroded, 'obscuring who is accountable to whom for what' (Hood et al. 2006: 44). The different types of statehood are also reflected in the relative 'age' of the two policy fields: while public-private partnerships are a relatively new phenomenon, intelligence agencies have a much longer history (see for example Schmidt-Eenboom 2010).

The second difference between the case studies concerns the **origin of the secret**. The two cases differ concerning *whose* secret is kept and, arguably, on what grounds. On the one hand, there are the state's own secrets (intelligence agencies). On the other hand, there are not just state secrets, but also private actors' secrets (public-private partnerships) that are kept by the state. Whether this changes the perspectives on the legitimacy of secret-keeping by the executive is an important question, identifying whether the origin of a secret has an impact on how worthy of protection it is considered to be.

A third major difference consists in the **structure of the policy area**. While the area of intelligence agencies is characterized by permanent institutions – the intelligence agencies – the field of public-private partnerships is marked by projects that are inherently limited in time, although they usually cover long periods of several years or even decades.

These differences substantiate the interest in the two cases: they promise findings that – if corroborated in both of the policy fields – are perhaps more meaningful given their relevance in highly diverse contexts.

With regard to both case studies, several legislative processes and plenary debates over a long period of investigation (1998-2013) will be analysed. Limiting the examination to two cases allows an in-depth analysis of each single case. The long time period under review and the inclusion of several concrete processes nevertheless provide a sound basis for comparison. In addition to comparing the two policy fields, a

within-case comparison over time and between different debates is feasible. Nevertheless, the small number of cases limits their generalisability (see for example Lauth et al. 2015: 59, Jahn 2011: 48). This has to be borne in mind when interpreting the results. As an explorative empirical study aiming at opening up the field of secrecy negotiation, the focus lies on tracing the logics of political secrecy and checking their plausibility in a comparison of systematically differing policy fields.

To conduct the investigation, two types of sources were included in the analysis: in a first step, legislation on the two cases was studied. Both plenary documents (drafts and protocols) as well as committee records (where accessible) were part of the data corpus. MPs' speeches in parliament can be understood as a strategic positioning that is addressed to the public. MPs and parties use those speeches to present their positions and, by focusing on specific issues, to indicate their importance to them. In order to have a broader body of empirical material and include different party-political constellations in parliament, four legislative periods were chosen for analysis (1998-2013) that represent a wide range of government coalitions and, conversely, opposition parties (see Table 2). Also, longitudinal data allow for tracing developments over time.

Table 2: Period Under Examination by Legislative Term

Legislative period	Time intervals	Government majority	Opposition parties
14	1998-2002	Social Democrats (SPD) Green Party (Bündnis 90/ Die Grünen)	Christian Democrats (CDU/CSU) Left Wing Party (PDS) Liberal Democrats (FDP)
15	2002-2005	Social Democrats (SPD) Green Party (Bündnis 90/ Die Grünen)	Christian Democrats (CDU/CSU) Liberal Democrats (FDP) *

16	2005-2009	Christian Democrats (CDU/CSU) Social Democrats (SPD)	Liberal Democrats (FDP) Left Wing Party (Die LINKE.PDS Green Party (Bündnis90/ Die Grünen)
17	2009-2013	Christian Democrats (CDU/CSU) Liberal Democrats (FDP)	Social Democrats (SPD) Left Wing Party (Die LINKE.PDS Green Party (Bündnis 90/ Die Grünen)

In the period under examination there was no 'real' change of government in the sense that all governing parties changed. This is very common in the German political system: of 18 transitions from one electoral term to the next only one election resulted in a full replacement of all government parties (1998).
*There were two PDS politicians with a direct mandate, but no PDS parliamentary party group.

Table 3 gives an overview of the legislative processes under review. In the intelligence agencies case, nine pieces of legislation were analysed, including the respective drafts, committee reports and plenary debates.[25] In the PPP case, one legislative process was relevant for the analysis.[26]

[25] For the purpose of this dissertation, the drafts' explanations and the plenary debates were most fruitful, as they provided the argumentations of the parties regarding issues, addressed to each other as well as the general public. Where accessible, committee minutes were also analysed. These minutes, though, seldom provided additional input: often, they were rather short, being just result protocols documenting the voting results.

[26] Other legislative processes in the period under consideration were left out of the final analysis as they bore no reference to secrecy. While they partly dealt with public-private partnerships, they primarily concerned procurement law (Drs. 16/10117) and investment law (Drs. 16/5576) and had no reference to secrecy and disclosure despite the aim to make procedures more transparent to investors and bidders, which is not the main interest here.

Table 3: Data Basis

Data Basis	**Intelligence Agencies**	**Public-Private Partnerships**
Legislative Processes	10**	1 (+ 9 motions)
Interviews (no. of interviewees)*	15 (16)	9 (11)

*Some interviews were conducted with two interviewees at the suggestion of the interviewed.
**One of these included an amendment to the *Grundgesetz* (Basic Law/ Constitution). This includes a higher threshold for successful decision-making: to amend the Basic Law, a two-thirds majority is necessary. An eleventh legislative process on visa information concerning the intelligence agencies' competences was left out as this was primarily a transposition of an EU council decision into German law, was little discussed in the Bundestag (there were just a few speeches recorded in the minutes but not orally presented in the Bundestag) and bore no reference to secrecy (VISZG, Drs. 16/11569).

As there was only one relevant legislative process in the PPP case, the analysis was supplemented by the study of motions. In Germany, motions (*Anträge*) are often used as a means to suggest the general direction government or legislation should take. While they are not comparable to the binding nature of legislation observed in the intelligence agencies case, motions nevertheless are informative about actors' positions on legitimate or illegitimate secrecy. Most motions are introduced by opposition parties (see as an example Annex 1), although at times governing majorities use motions to set the pegs for their government's policies,[27] too. Given that Public-Private Partnerships are a relatively new policy area, suggestions on how to develop them further were often introduced in the form of motions here. While for the PPP case, motions were analysed in-depth, (see chapter 4), in the intelligence agencies case, motions were used as supplementary information (see Annex 1).

In addition to plenary documents, a total of 24 expert interviews with 27 interviewees were conducted. A detailed description of how the interviews were prepared and conducted can be found in Annex 2. Two additional background interviews, one with a judge and one with a civil servant, provided a general understanding of secrecy in political practice. For the expert interviews, members of parliament (some-

[27] An analysis of motions by originator at the example of the 17th legislative period substantiates the claim of different use: the opposition parties (SPD, LINKE and Greens) introduced a total of 1,758 motions while the government or governing parties introduced 260 according to the Bundestag's parliamentary database.

times an MP's or a parliamentary party group's staff) and executive actors (from ministries as well as two former high-ranking agency staff) were recruited. The interviews were based on a semi-structured guideline (see Meuser/ Nagel 1991: 449). The actual course of the interviews diverged from the interview scenario to some extent since interviewees were encouraged to talk about what they considered most important. Every interview covered the following thematic blocks (for concrete questions within the blocks see the full guideline in Annex 2).

Interview guideline overview

- Open question inviting interviewee to share experiences with access to executive information and secrecy
- Part 1: Questions on the legislative process concerning executive secrecy
- Part 2: Questions about mechanisms of oversight of executive secrecy
- Part 3: Questions on when secrecy is considered necessary or legitimate
- Reflections about changes over time in the parliamentary debates about secrecy
- Opportunity to address any issue not explicitly asked for.

Interviews were conducted with all parliamentary party groups that were in the Bundestag in the legislative periods under investigation. When analysing the interview material, a selection bias must be taken into account because interview partners could more easily be acquired from the smaller parties, while bigger parties, especially the Christian Democrats (CDU), were more reluctant to participate in the research.[28] For this reason, party comparisons must primarily be based on the analysis of the plenary documents. After conducting the interviews, they were transcribed word-for-word.[29]

Both types of empirical data – parliamentary documents and expert interviews – each contribute an important facet to the analysis: the plenary documents provide for a reconstruction of decision-making processes about the two cases. They allow to reconstruct who initiated legislation and amendments, what changes were made in

[28] For the PPP case, no Christian Democrat interviewee could be acquired. As there are sufficient plenary speeches from their parliamentary party group and as interviews are not systematically evaluated based on party affiliation due to their anonymization, this is a pity but not critical for the significance of the analysis. Yet, the different response behaviour must be kept in mind as a potential bias when using the interview data.

[29] In a few cases, interviewees requested to read the transcript again with no option to make any changes to the finished transcript as this would constitute meddling with the data. If considered necessary they could indicate passages that they would not want quoted, even anonymously. Following the ethical standards of qualitative research, such data was only used as background information for the researcher.

the plenary process and who agreed to the final draft. Furthermore, coalitions and ideological differences can be identified. The latter are most explicit and tangible in parties' voting behaviour regarding parliamentary proposals. However, one has to be careful drawing conclusions about acceptance of secrecy from voting behaviour only: as legislative proposals cover a wide range of issues, not just secrecy or competences for secret action, votes in favour of a draft may not mean that MPs agreed to secrecy, but might also mean that they agreed to a proposal *despite* secrecy. Therefore, the analysis of actors' speeches as indications of their positions on concrete aspects of a proposal can put the pure figures of the votes into context. The expert interviews, on the other hand, provide background information on how actors perceive the decision-making process and the resulting practices. They deliver indications about actors' motives, understandings and strategies. Expert interviews provide interpretive knowledge (Bogner/ Littig/ Menz 2014: 75) that otherwise would not have been accessible (Meuser/ Nagel 1991: 443 ff.). The researcher then has to extrapolate latent and implicit aspects from the manifest level, the text (Bogner/ Littig/ Menz 2014). In addition to providing context information, the interviews also serve to address a potential bias inherent in the choice of legislation as a unit of investigation. By choosing legislative processes and the connected parliamentary debates as units of investigation, there may be a bias in favour of finding that legislation is an important source for legitimation. Expert interviews put those evaluations into context. Also, the focus on how actors perceive the legitimising function of legislation limits the potential distortion produced by the choice of plenary documents as empirical material.

Both plenary documents and interviews may be imperfect data sources. Plenary documents can show a distorted view as actors are not likely to admit to ulterior motives. The same applies to expert interviews to the extent that political actors can be expected to provide a favourable version of their motives and actions. Interviews furthermore depend on the memories of those interviewed and may also invite interviewees to present themselves in a specific way or to overemphasize their own importance. Therefore, data triangulation helps to overcome the imperfections of each. For example, the combination of plenary documents and interviews can help put actor's perspectives in context as well as provide background for representations in *plenum*. Plenary speeches are well-developed positions addressed to the public and other parties, while interviews allow for delving deeper into actors' considerations and actions, especially given the anonymity granted to the interviewees. Both types of sources thus contributed important facets to this dissertation. Quotations are used in the empirical chapters for illustrative purposes.

With regard to the method of analysis of the empirical material, the research design is explorative. Therefore, an open coding method was employed to map out rationales for executive secrecy and the underlying justifications (see Corbin/ Strauss 2008, Bogner/ Littig/ Menz 2014, Meuser/ Nagel 1991). This makes it possible to identify new and unexpected factors and aspects and can trace the argumentations and logics employed by actors in deciding and debating about secrecy. By nature, the expert interviews are more pre-structured. Any interview guideline is based on assumptions and expectations about what will be important. Despite some pre-structuring, though, the rather open design of the guideline (including, for example, an open question at the beginning as a stimulus) gives room for new findings and actors' narratives. A detailed discussion of the methodological approach adopted in this dissertation can be found in Annex 3.

2.7 What Do We (Not) Know About the Cases?

In the following, I will briefly introduce the two cases and sketch out how the present study contributes to advance the state of research in each of the two cases with regard to political secrecy.

2.7.1 Intelligence Agencies

When compared to other intelligence agencies (e.g. in the US), the German intelligence system has only rarely been the subject of analysis. There is research in history (e.g. Krieger 2007, Hechelhammer 2014) and jurisprudence (e.g. Gusy 2011), but only little empirical political science research. While secrecy as a special feature of intelligence agencies' work is mentioned regularly, there is no analysis of how parliamentary actors justify and enclose executive secrecy in political practice.

There is a striking number of practitioners' accounts in journals and edited volumes on the German intelligence agencies.[30] German political science, however, has

[30] Examples are the former BND heads Ernst Uhrlau (2009) or Hans-Georg Wieck (2007, 2008). Equally, Members of Parliament provide their views (e.g. Neumann 2007, Hirsch 2007). Edited volumes also often include a mixture of scholarly contributions and practitioners' perspectives (e.g. the edited volumes by Smidt et al. 2007 or by Morisse-Schilbach and Peine 2008). Such first-hand accounts are invaluable for understanding the agencies, especially given their 'difficult access' nature (Maravic 2012). Nonetheless, practitioners' accounts should be regarded as primary sources rather than secondary literature.

'almost completely ignored the topic' (Krieger 2007: 25).[31] While a few scholars have since contributed to overcoming this lack of research (e.g. Bossong 2018, Daun 2009, 2018, Lange/ Lanfer 2016, Waske 2009), there is still a desideratum for a systematic study of the intelligence agencies' secrecy.[32]

The existing academic literature on intelligence agencies in general has convincingly pointed out the tension between the secret work of intelligence agencies and the democratic principles of publicity and accountability (e.g. Morisse-Schilbach/ Peine 2008: 28 f., Ulbricht 2014). What is missing, though, is an empirical study of how (or whether) political actors perceive these tensions and how they address them. In particular, an analysis of the role of parliamentary decision-making on secrecy is lacking. By comparison, there is more research on parliamentary control as a second mechanism of procedural legitimation. Thus, practitioners' contributions by executive and parliamentary actors alike convincingly point out the practical problems of intelligence oversight (e.g. Wieck 2008: 46; Brandt-Elsweier 2008). Amongst others, they indicate that the German system of overseeing intelligence agencies not only depends on information by the executive to fulfil their functions (Daun 2009: 74) but also lacks sanctioning power (e.g. Weidemann 2014: 7, Wolff 2010: 177). Whereas all these findings have corroborated a normative tension between secrecy and democratic accountability, they do not address the political practice of dealing with this tension beyond cursory references to necessity and substantive justifications for intelligence secrecy. The latter are often taken at face value, or only addressed in such general terms that the disagreement about what that means in political practice does not become an issue. Pointing out that secrecy serves security (see Ritzi 2017: 184, Gibson 1987: 35) or the protection of 'sources and methods' (cf. Herman 1996: 90) sidesteps discussing what this means in practice. Unlike the practitioners' contributions, legal analyses of executive secrecy have acknowledged that necessity may not be as obvious as often assumed since competing legal assets need to be weighed (Wolff 2010: 180). However, they do not reconstruct how such an exercise in balancing considerations is done in political practice.[33] For the Anglo-American context, scholars have noted a deference to claims for secrecy and a reluctance to weigh

31 Krieger does not consider this just a gap in research, but also sees it as a lack of scrutiny, considering scientific scrutiny a part of general oversight (see Krieger 2007: 25).

32 Again, this lack may be due to access problems, as historian (and BND employee) Bodo Hechelhammer points out: researching intelligence agencies remains in tension with secrecy requirements (Hechelhammer 2014: 296). Since there is a more developed body of literature on, for example, US agencies (e.g. Halperin/ Hoffman 1977, Gibson 1987, Herman 1996), though, this may not be a sufficient explanation for the comparatively limited research on German agencies.

33 Legal scholars often aim to identify a formal hierarchy of norms for deciding whether secrecy is warranted (e.g. Bröhmer 2004: 374). Often, though, they also point out that

competing values or calculate costs (e.g. Schulhofe 2013, Herman 1996), but for Germany, such a discussion of political practices concerning the assessment of secrecy's necessity is still needed.

This shows that while secrecy and the tensions it creates are addressed in the literature on intelligence agencies, there is a void concerning political actors' solutions for the tensions at hand. How they weigh values or make a cost-benefit calculation remains largely unknown. This research desideratum is even more pressing concerning the German intelligence agencies, which have received less scholarly attention than other countries' agencies.

2.7.2 Public-Private Partnerships

Research on PPP secrecy is still in its infancy. With few exceptions where secrecy is discussed as an issue for parliamentary oversight (e.g. Krumm 2013, Siemiatycki 2007), secrecy is not a central concern of academic analyses of PPPs. Krumm argued in 2013 that the problem of secrecy (and private actors' ability to commit the state to secrecy) has been, so far, a 'blank spot' in PPP research (Krumm 2013: 394). Together with Mause, he suggests that the 'question of how PPP projects, which are mostly long-term in nature, can best be subjected to democratic scrutiny' is 'of central political science significance' (Krumm/ Mause 2009: 111). He also postulates a political need for the parliament to find adequate strategies and means for parliamentary scrutiny of PPPs (Krumm 2013: 405).

In contrast, there is research on transparency in PPPs, although the findings are inconclusive. While one side argues that there is too little transparency in practice (e.g. Gerstlberger/ Siegl 2011: 38, Hood et al. 2006), others hold that PPPs increase transparency – at least output-wise (Reynaers/ Grimmelikhuijsen 2015: 622). Thus, there is not just disagreement on the justification of PPP secrecy, but also on the initial premise whether secrecy is an issue or not. This substantiates an interest in parliamentary discussions of PPP secrecy: given these different evaluations, it is an open question how political actors perceive this and how they position themselves.

Rather than looking into PPP secrecy, much existing research on PPP so far has focused on the question of whether PPP projects are more efficient than traditional procurement.[34] Some of this literature still touches upon the topic of PPP secrecy.

these decisions finally have to be made case-by-case and cannot be solved in the abstract (e.g. Lerche 1981: 118, Schulhofe 2013).

[34] The findings are diverse: to actually compare classic and PPP procurement is difficult. Assessing the risks and costs in the future depends on how they are calculated (e.g. Grimsey/ Lewis 2002: 247, WB BMF 2016: 9). For example, several scholars point out that transaction costs, meaning the costs arising from having to negotiate and control

For example, the discussion of motivations for introducing PPPs shows several points of contact to secrecy. Here, secrecy is a problem because it can be employed for cloaking the ulterior motives of the parties involved. Such motives are, for example, suspected to be escaping new disclosure rules (e.g. Roberts 2006a, Birchall 2011: 15) or the so-called 'debt brake' that obliges the state not to incur new debts (e.g. WB BMF 2016: 28) while still realizing projects that promise electoral success (Mühlenkamp 2011: 69).

In addition to these questions of assessing PPPs' value, there are also explicit mentions of the problem of secrecy, especially private partners' trade and business secrets that are constitutionally protected.[35] For example, there are discussions within legal scholarship whether providing public services brings private companies under the scope of state transparency rules and thus justifies the disclosure of private partners' secrets (see for example legal scholars Masing 1998, Dörr 2015, Gusy 1998: 268). The Bundestag's own Research Services36 suggest that a company must expect to be subject to parliamentary scrutiny when it accepts state commissions (DBT 2013: 8). This is mainly a legal debate discussing the applicability of certain provisions of law to new forms of cooperation, though. Thus, it is not about how frameworks of secrecy are discussed and created, but rather considers their scope once they are set up. A political science analysis of the underlying debates as well as actors' justifications should complement this legal debate.

This review of existing research on PPP secrecy has shown that there is a need for systematic analysis of political actors' perspectives on and dealing with secrecy. While the literature does mention the problem of competing interests in secrecy (protecting trade and business secrets) and disclosure (for parliamentary scrutiny), it stops short of analysing how actors deal with these tensions.

complex contracts, have to be taken into account in addition to the direct procurement costs (e.g. Krumm/ Mause 2009: 119, Gerstlberger/ Siegl 2011: 38, Mühlenkamp 2011: 77). Capturing transaction costs, however, is difficult as they are not inherently suitable for quantification.

35 There is a separate debate about the question whether the concept of individual privacy can be transferred to companies: is the right to individual informational autonomy applicable to them? Many deny that idea (e.g. Sadofsky 1990: 118, Bok 1989: 141). Even if there is no right analogous to privacy, the right to trade and business secrets is nevertheless deduced from individual basic rights (Kloepfer 2011).

36 The Bundestag Research Services are part of the Bundestag administration and provide the Bundestag with scientific expertise in general.

3 Legitimising Intelligence Agency Secrecy

Intelligence agencies are a traditional bastion of executive power. Secrecy in the operation of intelligence agencies is connected to conceptions of classic statehood: national security and the state's integrity. Thus, it is a key case for tracing understandings of legitimate secrecy. Following the research question – under what circumstances is parliament, as the people's representation, ready to accept and legitimise executive secrecy – the chapter traces the conceptions of secrecy in the German Bundestag.

The German intelligence system– like many policy areas in Germany – is organised and regulated at both federal and states level. The states each have their own domestic intelligence agencies (*Verfassungsschutz*, literally the 'protection of the constitution' agencies), but there also exist federal organisations within *Bund* jurisdiction. Given this study's interest in the Bundestag as the Federal parliament, I focus on the three Federal agencies: The *Bundesnachrichtendienst (BND)* is tasked with gathering intelligence about external threats such as, i.a., international terrorism. The *Bundesamt für Verfassungsschutz (BfV)* is the federal domestic intelligence agency, responsible for monitoring threats created by internal enemies such as extremist groups and individuals who are suspected of posing a threat to the constitutional order.[37] The *Militärischer Abschirmdienst (MAD)* is in charge of the armed forces (*Bundeswehr*). It is often compared to a *Verfassungsschutz* for the German military. Given its limited jurisdiction and high levels of secrecy it is less in the public focus than the other two. The agencies are supposed to gather information in their respective fields of jurisdiction and have competences for doing so.

Intelligence gathering has been part of the Federal Republic's history from its beginning. The BND's predecessor (1946, named *Organisation Gehlen* after its founding director, a former *Wehrmacht* major general), for example, was founded years before the Federal Republic (1949) with American support (Daun 2011: 173). From the beginning, the organisation was considered crucial in securing the state against threats, especially in the context of the Cold War. However, it worked without a legislative basis for decades. Only in 1990, were the BND as well as the military intelligence agency (MAD) regulated by law. A Federal Constitutional Court ruling on individual data protection required a legal basis for the BND's work. Before that,

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[37] There have, for example, been many recent reports of right-wing extremist groups preparing for a coup (see for example https://blog.zeit.de/stoerungsmelder/2019/ 07/06/ gruppe-nordkreuz-rechtsextreme-stellten-todeslisten-auf_28672, last accessed 17.03.2020).

the legal grounds of those two services remained opaque compared to other state institutions. The domestic service (*Verfassungsschutz),* by contrast, was already set up by law in 1950, although it lacked any specific regulations beyond very basic provisions about its federal structure and the mandatory separation of police and intelligence agencies (*Trennungsgebot*).

The first, very informal system of parliamentary scrutiny was introduced in the form of a committee composed of the heads of the parliamentary party groups (1956). Its jurisdiction was enlarged over time. Only in 1978, did a law define parliamentary scrutiny of intelligence agencies (see Schmidt-Eenboom 2010).[38] The Bundestag established the current system of three standing oversight bodies in several steps. The *Parliamentarische Kontrollkomission* (Parliamentary Oversight Panel) is tasked with scrutinizing the Federal government in its Federal intelligence agencies oversight (PKGrG § 1). The G 10 Committee[39] oversees individual communications surveillance by the agencies. The so-called 'Confidentiality Committee' (*Vertrauensgremium*), a sub-committee of the Budget Committee, decides secretly about the Federal agencies' budgets (Daun 2009). The Parliament can also establish ad hoc committees of enquiry. This instrument is mainly applied by the opposition. While committees of enquiry can refer to all policy issues, no other subject has gained more attention by them than intelligence agencies (Schmidt-Eenboom 2010: 39).

This chapter covers legislative debates on the agencies, their competences for secret action as well as their scrutiny within the period 1998 to 2013. It traces how intelligence agency secrecy is justified and limited by parliamentary actors. First, the chapter demonstrates that actors are mainly guided by substantive motivations when they accept secrecy as necessary for providing security. However, this substantive justification is also highly contested. The patterns of conflict are analysed in terms of ideological differences between political parties and in terms of political actors' institutional roles. The second part of the chapter focuses on procedural legitimation. Procedural legitimation involves parliamentary decision-making on when and for what reasons executives may resort to secrecy. It is laid down in legislation on intelligence agencies' competences and scrutiny, and oversight mechanisms for ensuring compliance with these rules. Procedural legitimation, it is shown, can confer legitimacy upon the secret operations of intelligence agencies even when substantive legitimation is missing.

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38 The parliamentary scrutiny law was also the first legal text to define two of the three federal agencies (see BT Drs. 8/1140: 3) before they were regulated in greater detail in 1990, including for example a general description of their competences.

39 The G-10 committee is named after the article of the German constitution that defines the individual's right to communication privacy (Art. 10 *Grundgesetz*).

3.1 Substantive Legitimation: Controversies Concerning the Instrumental Benefit of Secrecy

Debates about secrecy in the intelligence agencies case are dominated by substantive justifications. Its supporters share the belief that secrecy is a necessary form of operation to ensure that intelligence agencies can perform their tasks. In this sense, 'the need for secrecy must be derived from functionality' (MP 6: 38). However, what exactly qualifies as necessary and functional secrecy is highly contested and, therefore, substantive legitimation is deficient. The disagreement corresponds to ideological differences between political actors and their different institutional roles (e.g. party politicians; members of executive and parliament, or of governing majority and opposition). They reflect the theoretical concerns about substantive legitimation raised in Chapter 2.

Table 4 gives an overview of the subject matters discussed. Parliamentary debates revolved around two general themes during the period under investigation: on the one hand, intelligence agencies' competences for secret action were redefined and, often, expanded. While not always addressed explicitly, secrecy was a crucial aspect of these debates: since intelligence agencies work in secret, the more competences are conferred on them, the broader the scope of secret action that is in need of legitimation. On the other hand, there were debates about amending scrutiny mechanisms. These two discussions are connected: if competences are expanded, the oversight competences of parliament or certain committees must be legally extended as well, as both opposition and governing party MPs argue (e.g. MP Uhl, CDU/CSU, 2009b; MP Stadler, FDP, 2009a). Accordingly, as the competences of the agencies were changed or increased, changes or an increase in oversight were considered, too, either in the same draft or in subsequent legislative proposals.

Table 4: Parliamentary Debates on Intelligence Agencies Under Review

Subject Matter	**Date of Introduction (of Final Plenary Debate)**	**Introduced by Gov/** *Opp*	**Voting Result**
Legislative Draft Drs. 14/539 Act amending regulations on parliamentary panels	16.03.1999 (25.03.1999)	SPD Grüne *CDU/CSU* *FDP*	Accepted (with *CDU/CSU & FDP*)
Legislative Draft Drs. 14/5655 Act revising restrictions on the secrecy of correspondence, post and telecommunications*	26.03.2001 (11.05.2001)	SPD Grüne	Accepted (with *CDU/CSU*)
Legislative Draft Drs. 14/7727 Act on Combating International Terrorism (Counter-Terrorism Act)	04.12.2001 (14.12.2001)	SPD Grüne	Accepted (with *CDU/CSU*)
Legislative Draft Drs. 16/509 First Act amending the Article 10 Act	02.02.2006 (27.03.2009)	CDU/CSU SPD	Accepted
Legislative Draft Drs. 16/2921 Counterterrorism Amendment Act	02.02.2006 (01.12.2006)	CDU/CSU SPD	Accepted
Legislative Draft Drs. 16/2950 Law on the establishment of joint databases of federal and state police authorities and intelligence agencies (Joint Files Act)	16.10.2006 (01.12.2006)	CDU/CSU SPD	Accepted

Legislative Draft Drs. 16/12411 Act on the Advancement of Parliamentary Scrutiny of the Federal Intelligence Services	24.03.2009 (29.05.2009)	CDU/CSU SPD *FDP*	Accepted (with *FDP*)
Legislative Draft Drs. 16/12412 Law amending the Basic Law (Article 45d)	24.03.2009 (29.05.2009)	CDU/CSU SPD *FDP*	Accepted (with *FDP*)
Legislative Draft Drs. 17/6925 Act amending the Federal Constitution Protection Act	06.09.2011 (27.10.2011)	CDU/CSU FDP	Accepted (with *SPD*)
Legislative Draft Drs. 17/8672 Act on Improving the Fight against Right-wing Extremism	13.02.2012 (28.06.2012)	CDU/CSU FDP	Accepted (with *SPD*)

Own illustration based on parliamentary database (http://dipbt.bundestag.de/dip21.web/). Government drafts without the participation of an opposition party were formally introduced by the Federal Government. In order to have a clear overview of the partisan composition of the respective government coalition, the table indicates the government parties.
* This law became necessary because of a constitutional court ruling that declared the current legal status unconstitutional (BVerfGE 100, 313 ff.). The coalition seized the opportunity to make further amendments.

One goal of parliamentary control of the executive is to get 'government and parliament [to] act at eye level' (MP Oppermann, SPD, 2009b). Consequently, legislative amendments have not just changed agencies' competences, but also their parliamentary scrutiny. In particular, the regulations on the German Bundestag's oversight committees were amended. There were changes in the committee structure (merging two committees to centralize parliamentary scrutiny), new access to documents rights, the introduction of public statements (and, later, of dissenting opinions) and reforms to the resources of the committees. Often, such changes were induced by external events or scandals (MP 6: 18). Parliament then sought to improve the system of parliamentary oversight in order to more adequately fulfil its function, to get themselves to 'eye level' with the agencies (e.g. MP 5: 40).

Besides legislative debates, there were a number of motions, especially from opposition parties, which put secrecy on the plenary and public agenda, for example demanding disclosure of files or limits to competences for secret action by the agencies (see Annex 1). The analysis of these parliamentary documents is complemented by findings from the interviews. In the following, the empirical findings are presented along the three types of substantive justifications of secrecy. Furthermore, it is shown that each of them is contested and fails to provide broadly accepted justifications of executive secrecy.

3.1.1 Security

The predominant concern in the debates about intelligence agencies' secrecy is achieving security as a policy goal. Therefore, it can be categorized as an outcome-oriented justification of secrecy. The concern for security, as I will show, is particularly strong in the domain of counterterrorism.

Political actors argue that security provision is the intelligence agencies' main task. To fulfil that task, they depend on secrecy. Secrecy is thus considered to be an integral part of intelligence gathering, and, in turn, of ensuring security.[40] Specifically, actors' justifications often start from pointing out the uniqueness of intelligence agencies, arguing that intelligence agencies can do things that other state institutions cannot. More police or military presumably cannot provide the additional security that intelligence can (MP Uhl, CSU, 2009a). Intelligence agencies are seen as central to the state's protective role (MP 4: 3, MP Wiefelspütz, SPD, 2001a). As some MPs argue, the state has to 'produce' (MP Wiefelspütz, SPD, 2001b) or 'guarantee'security (MP Marschewski, CDU/CSU, 2001b). Others doubt whether it is possible to ensure or promise complete security (e.g. MP Beck, Grüne, 2001), but share the notion that it is the state's role to try.

In order to provide security, intelligence agencies are expected to work secretly. This is considered an essential element of their functioning (e.g. MP Uhl, CSU, 2009a): 'information about the work of security authorities and intelligence agencies must be secret, otherwise they would not be intelligence agencies anymore' (MP Bin-

[40] Roberts argued that there is a 'presumed identity of security and secrecy. The assumption that the defence of national security demands strict controls in the flow of information is deeply embedded in bureaucratic – and popular – culture' (2006: 42). Similarly, Bok points out the argumentative strength of security references: 'Terms such as "confidentiality" or "national security" or "the public's right to know" are used as code words to create a sense ofself-evident legitimacy' (Bok 1989: 115).

ninger, CDU/CSU, 2006). In this view, secrecy is inscribed in the agencies' institutional DNA. 'Their concrete measures and the concrete approach, as trivial as it may be when you see that, simply only work when the other side does not know' (ExIA 3: 77). This relates to concrete operations – those under surveillance must not know if meaningful intelligence is to be gathered. Furthermore, it also relates to a general idea of protecting the intelligence agencies' methods and operational practices. The latter should be unknown so potential targets cannot adapt and evade detection and surveillance. MPs worry that public knowledge about the operational procedures of intelligence agencies would compromise their work (MP 6: 38, see also MPs 4 and 5). Protecting methods and operational practices is a means for the agencies to fulfil their tasks. Thus, it is part of the general justification of secrecy for security purposes. However, what is covered by the reference to methods is contested (e.g. MP 11: 23). There is no agreement on how much of the inner workings of the agencies needs to be beyond public knowledge. The extent to which, for example, details about agencies' budgets would provide their targets with relevant information about their methods is disputed, as recurring conflicts about classified budget information show.[41]

Arguably one of the most important domains of intelligence agency action according to parliamentary debates is the field of (counter)terrorism. Here, security-related justifications of secrecy are debated. Terrorist threats put security under pressure, and that terroristic threats have to be addressed is a consensus. In the debates, the necessity to respond to terrorist threats functions as a legitimation for the existence of secret intelligence agencies. The agencies must be 'a step ahead' (Minister Friedrich, CDU/CSU, 2011; MP Benneter, SPD, 2006) of terrorists, or at least at 'eye level' (MP Mayer, CDU/CSU, 2009). (New) competences for secret action are suggested with reference to the realities of international terrorism (see draft counter-terrorism law, Drs. 14-7727). While 9/11 is seen as an extraordinary event requiring extraordinary measures (MP Beck, Green Party, 2001), terrorism remained an important frame for justifying an extension of competences for secret action also after the 9/11 attacks (e.g. draft on shared databases of police and intelligence agencies,

41 The debate about protecting the agencies' methods culminated in a heated public discussion in 2015 after the Attorney General (*Generalbundesanwalt*) had initiated criminal investigations against two online journalists of the website netzpolitik.org for treason and betrayal of state secrets after publishing the secret budget plans of the federal internal intelligence agency, the *Bundesverfassungsschutz*. In addition to a discussion about whether the investigations were an undue infringement of the freedom of the press, the debate revolved around the issue whether access to budget plans effectively provides the target of intelligence agencies with valuable information on the agencies' methods that would be to the states' detriment. This illustrates the problem of calculating potential harms (or benefits) of executive secrecy or its disclosure.

Drs. 16-2950). Actors continued to evaluate the threat posed by terrorism to be consistently high or to have increased (e.g. MP Binninger, CDU/CSU, 2006; MP Dressel, SPD, 2006).

In general, security threats are presented as urgent, and countermeasures as inevitable. This is reflected in the language used by MPs to justify extending intelligence agencies' competences for secret action. One example is the recurring reference to doing all that is 'humanly possible' (das Menschenmögliche tun) to save lives (e.g. Interior Minister Schäuble, CDU/CSU, 2006; MP Wiefelspütz, SPD, 2006). This phrase implies that security is attributed such outstanding importance that it outweighs other values or interests such as the democratic commitment to openness. Another example is references to 'ordinary people' who would demand that every possible action be taken:

> This means that I must provide our security bodies with all disposable legal means, be it surveillance [*Generalverdacht*[42]] or the inclusion of the fingerprint in the passport. I cannot understand how some feel burdened by such trifles. You will not be able to explain to the the man in the street that this Republic is in danger, but that you must be careful with such instruments. The man in the street doesn't give a damn whether his passport, which already contains a photograph of him, also contains ten fingerprints (MP Zeitlmann, CDU/CSU, 2001).

The reference to the man in the street (*der kleine Mann auf der Straße* and *Otto Normalverbraucher* in the original German quote) conveys the idea that debates about balancing security measures with abstract ideas about freedom is a discussion that is detached from the concerns governing everyday life. Security is supposedly far more tangible for 'ordinary people' than freedom.

In spite of the consensus that secrecy can be a necessary measure of security, political actors disagree about two issues. First, there are diverging assessments of a security threat itself. Whether a threat (e.g. a terrorist one) is immediate and real – and therefore justifies secret action by the agencies – is controversial.[43] For example, secrecy is more broadly accepted the more specific the security threat is. If there is a

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42 *Generalverdacht* literally translates as 'general suspicion'. It means surveillance that is not focused on individuals for whom there is concrete suspicion, but rather that everyone can be the object of general surveillance measures.

43 One MP suggests in a plenary debate that 'public opinion is an important indicator for the actual threat. The fear of terrorism has strongly increased' (MP Dressel, SPD, 2006) – but data shows that fear of crime is *not* a predictor of actual crime – the fear of it may be increasing despite decreasing crime rates. Incidentally, this quote illustrates that the threat of terrorism can be evaluated differently (e.g. https://www.sueddeutsche.de/leben/aengste-der-deutschen-kriminalstatistik-und-sicherheitsgefuehl-passen-oft-nicht-zusammen-1.3251296, last accessed 22.11.2018). Thus, fear of crime explicitly is a bad indicator for actual crime.

concrete danger to 'life and limb' (Leib und Leben) of specific persons such as informants (e.g. ExIA 1: 8) or people employed in ongoing operations or cases of abductions of German citizens abroad (e.g. MP 6, MP 11, MP 13), there seems to be unanimity that secrecy may be called for (see MP 13: 30). Aside from such relatively undisputed assessments, many security threats are judged differently by different actors triggering disagreements about what, if any, countermeasures are needed. The more abstract the threat, the more controversial its remedies. After 9/11, a sense of urgency was shared across all parliamentary party groups. However, the idea that security provision necessitates increasing powers for secret intelligence agency action was not as unanimously accepted. The left-wing PDS (later: DIE LINKE), for example, agreed on the need to counter international terrorism, but strongly questioned the need for increasing the powers of the intelligence agencies upon which the Social-Democrat and Green coalition insisted (MP Pau, PDS, 2001), arguing that they were ineffective and constitutionally problematic.

This section has shown that while security is a strong outcome-oriented motive for supporting secrecy, political actors disagree both concerning the weight of various security threats and concerning the measures to be taken to address them. Thus, whether the quest for providing security actually justifies the use of secrecy is contested.

3.1.2 International Cooperation and Third-Party Interests

A second important rationale for executive secrecy is international cooperation: secrecy enables sharing of information with international partners. Acceptance of the principle of originator control – keeping partners' information secret upon their demand – is considered the basis for international cooperation (e.g. MP Oppermann, SPD, 2009a). MPs believe that international intelligence cooperation is indispensable, that agencies depend on cooperation to compensate for their own weaknesses in acquiring information (MP 4: 3) and that the transnational nature of many threats makes cooperation necessary (e.g. MP Piltz, FDP, 2006). From this perspective, the principle of originator control as a rationale for executive secrecy is connected to the outcome-oriented rationale for secrecy that is based on security concerns. Nonetheless, it can also be considered an independent rationale for executive secrecy. The secret's origin lies outside of the state, and the interest in keeping it is primarily a partner's interest. The state's interest in keeping these secrets is derivative of the partners' claims. Originator control-based secrecy outsources the decision whether a piece of

information is sensitive to international partners. Instead of applying one's own classification rules, the partners' claim on the sensitivity of information is taken at face value. Interviewees acknowledged that classification rules differ between countries. An executive interviewee, for example, explained that other countries often classify much higher than Germany, which means that information has to be kept 'top secret' which would not deserve this classification under German rules (ExIA 1: 8). That the same information may be classified differently illustrates that secrecy's necessity – and secrecy's adequate depth – does not directly result from the nature of a piece of information. Rather, it is a question of rules and assessment, and these may diverge.

Often, the principle of originator control is understood to be a central prerequisite for international cooperation: 'If we were to publicly report which agency shared which information with whom, then this flow of information would instantly be stopped – to the detriment of Germany, because Germany would become more insecure' (MP Uhl, CDU/CSU, 2009a). Not only the disclosure of partners' information to parliament or the public would constitute a violation of the principle, many actors fear. They voice the concern that intra-executive information-sharing – like entering of partners' information in shared databases that can be accessed by different authorities (e.g. police forces and intelligence agencies) – may also be considered a violation of originator control (see Drs. 16-3642: 22). Infringing upon originator control, they worry, would not lead to formal sanctions, but to practical exclusion from information sharing (ExIA 3_1: 66, MP 4: 17). Given that international partners may become reluctant to inform the German authorities if they cannot control what happens to such information, Germany would simply be cut off from important security-relevant information.

Originator control is an excellent case for understanding the relevance of actors' expectations about the harms and benefits of secrecy. The discussion of adverse effects of violating the originator control rule reveals that the feared effects (no longer being informed) are hard to measure. It is hard to evaluate whether one is told less, as is always the case with non-information: one does not know what or how much one does not know.

To what extent references to third-party rights justify executive secrecy is contested, though. While one side stressed that Germany and its agencies would not accept their partners unilaterally disclosing secrets, and must therefore respect other countries' secrets in return (ExIA 2: 10, see also MP 1: 31), the other side is more critical of this notion. They demand that democratic procedures, especially parlia-

mentary scrutiny, be respected. This means that parliament needs access to originator control-based secrets (e.g. MP 13). Otherwise, the executive could use the principle of originator control to deny parliamentary access to all kinds of information simply by cooperating with partners – or claiming to do so (MP Nešković, LINKE, 2009b; MP 11: 5; MP 12: 31). Those who are wary of accepting third party rights as undeniable justification of secrecy reject the claim that any disclosure would lead to being cut off from partners' intelligence information as being too crude. They point out that democratic partner states have similar demands for democratic and parliamentary scrutiny, and that their parliaments would also not accept being denied access through reference to third party rights (e.g. MP 12: 31). Thus, they call into question whether the claimed negative effects of a failure to comply with originator control-based demands for secrecy necessarily obtain. This does not mean that originator control of secrecy is per se regarded as illegitimate, but that MPs demand that parliamentary rights not be suspended with reference to other countries' interests. Thus, part of the contestation regarding originator control-based secrecy is about how to embed the principle in a democratic framework. This is a question of secrecy's depth: often, critics of the principle do not demand disclosure of all third-party secrets to the public, but rather that they are subject to parliamentary control.

In addition to concerns about international cooperation on an institutional level, third-party rights justifying secrecy also refer to individuals. This is the case when secrecy is required by way of protecting informants. Protecting their identities and guaranteeing their safety is both a condition of success of the work they perform (ExIA 3_1: 32, MP 11: 23, MP 6: 38) and a matter of their individual rights and freedoms: without protections, they would not just be lost as informants, but would also have to fear serious consequences for their lives and freedom. Thus, third-party interests also come into play in the form of individual rights. Differing from international cooperation, the protection of concrete informants is a particularly uncontested justification for secrecy, at least at the international level.[44]

[44] The situation is different for internal informants of the *Verfassungsschutz*. Secrecy surrounding so-called *V-Leute* is hotly debated due to several scandals where they either failed to prevent attacks and/or where there was discussion whether the financing of informants and their protection served right-wing extremism and saved perpetrators from criminal prosecution.

3.1.3 Securing Separation of Powers: the *Kernbereich* Argument

A third recurring argument for secrecy is that the government needs certain room to manoeuvre in order to take its political responsibility. This concept is called *Kernbereich exekutiver Eigenverantwortung*[45] and was introduced by the German Federal Constitutional Court (BVerfGE 67, 101) in 1984. From the principle of separation of powers, the Court deduced the idea that the government must be allowed to take decisions free from parliamentary interference. At the same time, government alone is accountable for its decisions. In this sense, *Kernbereich* secrecy is a general constitutional argument. It is not based on the material value of secret information, but on its institutional origin.

In the debates, the concept was referred to less often than national security or the principle of originator control. Many references to *Kernbereich* are made in discussions about parliamentary scrutiny (e.g. MP Oppermann, SPD, 2009a; MP Uhl, CDU/CSU, 2009a), and in this context it is considered a limit on parliament's access to information (e.g. MP Wiefelspütz, SPD, 1999a). In general, interviewees conceded that they need not know every petty detail about the government's internal negotiations and decision-making processes (e.g. MP 13: 30, MP 2: 11). Operative decisions are to be taken by the executive – and thus be their political responsibility – uninfluenced by parliament.

However, the *Kernbereich* argument is also controversial. While recognizing the very idea, parliamentary actors criticised the executive practice in applying the principle and repeatedly brought the issue before the constitutional court. For example, they questioned the government's refusal to answer parliamentary questions by citing *Kernbereich* (e.g. *Bundesverfassungsgericht* 2009b) or executive restrictions on officials' permission to testify before a committee of inquiry (*Bundesverfassungsgericht* 2009a). The Court's rulings recognize the principle but regularly demand that the executive case-specifically justifies its use of *Kernbereich.* These conflicts illustrate the problems of applying the general principle in political practice.

3.1.4 Patterns of Debating Secrecy

Above, I have identified three substantive rationales that in German parliamentary practice are used to justify executive secrecy: (1) secrecy as a condition for realising national security, (2) secrecy as a protection of third-party rights and (3) secrecy as a

[45] *Kernbereich* is a right to executive deliberative secrecy. For a discussion of *Kernbereich* and its English language equivalent viz. "Executive Privilege" see Riese 2021.

condition of the quality of executive decision-making processes. I have demonstrated, however, that despite regular calls for a broad consensus on secrecy (e.g. MP Marschewski, CDU/CSU, 2001b, MP Wiefelspütz, SPD, 2001a) there is disagreement about the scope and depth of secrecy the three secrecy rationales justify. How much can be kept secret, and from whom? Should parliament have access to secrets even if the broader public does not?

In the following, I systematize actors' disagreement along two dimensions: on the one hand, there are differences that are based in party ideology. On the other hand, there are conflicts that can be ascribed to different institutional roles deriving from conceptions of the separation of powers.

Ideological Conflict Lines

Ideological differences between political parties are an important explanatory factor for conflict about intelligence secrecy. Much disagreement about the adequate scope of secrecy is based on different ideas and programmatic positions, especially concerning the balance that parties strike between security and freedom. Most agree that the state has a task to guarantee security. However, there is no consensus about the means the state can legitimately endorse to pursue this goal. According to some, security has absolute priority, being a prerequisite of every other political purpose. Those endorsing this view argue for more executive secrecy. Others balance security with other values, such as privacy, which leads them to support less executive secrecy. Where parties stress privacy as a value, they mean privacy vis-à-vis the state. Support for privacy means less acceptance of secret surveillance of individuals, less secret intelligence powers.

The most fundamental difference arguably concerns the general question whether agencies working in secret are necessary at all. Most parties in principle give an affirmative answer to this question based on the usefulness of secrecy for attaining security.

> With the exception of the left and only a few Greens [...] nobody questions anymore nowadays that we depend on efficient, well-functioning agencies for guaranteeing national security through the police and defending external security through the armed forces of the Bundeswehr (MP Oppermann, SPD, 2009a).

The principled rejection of the need for the intelligence service initially adopted by the Greens has gradually been weakened over the years leading to the party accepting the agencies provided they are reformed and subjected to meticulous oversight. The exception is the left-wing DIE LINKE, which questions the possibility of reconciling secretly working intelligence agencies with democracy (e.g. MP Korte, LINKE,

2011). Because they assume that the secret work of the agencies cannot be democratically enclosed, the left-wing party seeks to abolish them instead of providing them with 'ever more competences' (MP Pau, LINKE, 2011). Thus, a general difference may be observed between DIE LINKE, who want to abolish secret intelligence agencies, and the other parties that do not (e.g. ExIA 3_2: 40), at least not as a stated party programme. This difference between the LINKE (and to some extent the Green party) and other parties may be traced back to a fundamentally different evaluation of whether secrecy can be reconciled with a democratic system.

The parties who in principle support the existence of intelligence agencies (or are at least not fundamentally opposed to them) disagree about the legitimate scope of their powers on several levels. An underlying ideological conflict concerns the balancing of security and freedom. On the one hand, there are those who consider security to be the basis of any freedom: 'Who plays off freedom against security will lose both' (MP Marschewski, CDU/CSU, 2001b). The argument is based on the idea that you cannot be free without security – and will be unfree if deprived of security (e.g. MP Benneter, SPD, 2006). This conception is challenged by those who argue that freedom may be damaged or limited by overblown security measures:

> You make the citizens believe that you are giving them something. In fact, however, you are depriving them of what you want to defend against terrorism. [...] Because the promised gain of security by the state is paid with a significant loss of security from the state – i.e. freedom (MP Pau, PDS, 2001).

This position questions the narrative that freedom (and democracy) presupposes expansive security measures. Security should not be considered an end in itself, and the rule of law should not be sacrificed for aspiring to an (unachievable) goal of absolute security (MP Wieland, Grüne, 2011). While not explicitly about secrecy, these different ideological positions nonetheless determine positions on intelligence secrecy. As intelligence agencies' security-related work usually is conducted in secret, including secret surveillance and information gathering about individuals, a stronger emphasis on freedom means freedom from secret intelligence gathering.

These perspectives are based in ideological differences between the political parties along a liberal-conservative continuum. The idea that security is worthless without freedom (left, greens[46]) and that citizens' rights are the basis of and limit to any effort to ensure security (MP Stadler, FDP, 2006) on the one hand, and the idea that

[46] While the positions taken by LINKE and Greens come close to each other, they do not fully overlap: a Green MP explicitly criticised a left-wing MP for employing an understanding of fundamental rights that is too abstract and thus eludes the need to balance security and freedom (MP Wieland, Grüne, 2006a).

there can be no freedom without security (Christian Democrats) on the other hand indicate two extremes of the ideological spectrum. The Social Democrats at first sight seem to take a middle position by showing an awareness of possible trade-offs, but then tend to dissolve them in favour of security: 'We, too, would like to construct security for our citizens around data protection and fundamental rights. However, that misses the point of reality' (MP Hofmann, SPD, 2006).

Nevertheless, there are several shared points of reference. All parties, for example, share a commitment to the German *Grundgesetz* (basic law, the German constitution). Still, there are ideological differences. They disagree on what constitutional principles mean for concrete security policies, and, in consequence, for intelligence secrecy. Thus, despite a seeming consensus there are diverging interpretations of such fundamental principles when it comes to applying them to concrete policy decisions. Such divergencies are typically fought out when it comes to changing the agencies' competences for clandestine activities. Two examples serve to illustrate this: fundamental rights, and the so-called separation rule (*Trennungsgebot*) which demands the police forces and intelligence agencies to be separate. In both cases, parties support more or less secrecy based on their ideological interpretation of the shared principles.

Individual fundamental rights (*Grundrechte*) are the first example for both agreement on general principles and disagreement on their application in concrete cases. There is consensual support for fundamental rights across party lines. Yet, when discussing concrete policies, fractures become visible. They consist in diverging interpretations of what is in line with fundamental rights, especially privacy rights, and what is not. For example, to what extent should intelligence agencies be allowed to infringe upon privacy to perform their tasks? What type of personal information can be gathered and who should be allowed to access it? How targeted must such measures be? All these questions centrally relate to secrecy, because the answers to them define the scope of secret intelligence gathering.[47] Again, there is a consensus that restrictions of fundamental rights can be justified only in exceptional circumstances (MP Mayer, CDU/CSU, 2009). What qualifies as 'exceptional circumstances', though, is contested along party lines. The more parties stress privacy as a core principle, the less intelligence secrecy they accept.

[47] In 2001, for example, the government at the time (Social Democrats and Green party) argued in a draft for new legislation on telecommunications intelligence gathering that the probability that an individual would be affected was statistically very low (BT Drs. 14-5655). Their justification was situated on an aggregate level. The PDS, on the other hand, argued on an individual level. Any infringement of privacy rights is a problem (MP Jelpke, PDS, 2001a) regardless of its statistical likelihood.

A second example of ideational disagreement despite an abstractly shared reference point is the so-called German *Trennungsgebot.* The principle, which literally translates as 'separation rule', requires police forces and intelligence agencies to be distinct. As one interviewee pointedly defined it, the principle means intelligence agencies on the one hand may know everything and do nothing, while police forces on the other hand may do a lot, but not know everything (MP 1: 14). The separation rule was introduced as a lesson from the historical experience of the National Socialist *Gestapo* (*Geheime Staatspolizei).* The latter, as an all-powerful institution, had both intelligence gathering and policing competences. While the principle is broadly supported across the party spectrum, there were still debates concerning whether new competences were in line with the principle. For example, joint competence centres and databases were suggested to cope with the notorious (but somewhat intentional) communication problems between security authorities.[48] While the Greens and LINKE (e.g. MP Pau, LINKE, 2006; MP Wieland, Grüne, 2006a) argued that shared databases would violate the separation rule, the governing Christian and Social Democrats stressed that information exchange does not involve operational powers[49] (e.g. MP Bosbach, CDU/CSU, 2006; MP Benneter, SPD, 2006). And the liberal FDP argued that it depended on the specific design of the database (MP Stadler, FDP, 2006).[50] Like references to fundamental rights, the discussion about the separation rule may bear on parties' perspectives on secrecy. Depending on how they understand the rule, they strive to limit or allow for agency competences for secret action to a varying extent.

48 There remains the possibility that this is not an ideological conflict but one between governing majority and opposition. My interpretation of the specific case is that there is an overlap of ideological and role-based conflict lines. This is substantiated by the fact that the SPD also supported a similar database during one legislative period later when they were no longer in government (see debate about a right-wing extremism database, PlPr 17-187: 22403). Despite some concerns voiced in plenum about the adherence to the separation rule (MP Lühmann, SPD, 2012) they agreed to the draft.

49 The practice of the rule, as one interviewee points out, is again a different story: s/he tells how street-level cooperation transcends the separation, police-officers and agency employees exchanging information over a cup of coffee (MP 3: 39).

50 A significant part of the debate about the joint database concerned the planned free text field. The free text field would allow for notes whose content is not pre-defined. The fear was that oversight would be difficult because users of the database could include information that is, for example, not yet verified. It would open the door for unsubstantiated denunciations with real-world consequences for the persons concerned (MP Korte, LINKE, 2006).

These two examples – fundamental rights and the separation rule – have shown that actors may disagree on concrete policies despite general support for fundamental principles. And not least because they have very different conceptions of how such fundamental principles (should) translate into political practice.

Conflict Lines along Institutional Roles

In addition to these ideological conflicts, there are others that are based in institutional roles. The most important one runs between government majority and opposition, but not all conflicts are exclusively structured by this conflict line. In some instances, there is a self-understanding of parliament as opposed to the executive. Furthermore, not just parliament as such, but also individual committees occasionally develop an 'esprit de corps' in defending their institutional interests. All these conflicts are based on the assumption of roles as opposition (or government), as parliament (or executive) or as members of a certain committee with its own functional logic.

The most common conflict is the one between governing majority and opposition parties. Several interviewees explicitly contend that the perspectives naturally differ based on whether one is a member of the opposition or government party in parliament (e.g. MP 12: 23, Staff 1: 12, MP 4: 13). 'Of course, there are different roles that you have to fulfil. And it makes a difference whether you in a way share governing power in a coalition or whether you are in opposition' (MP 6: 10). Governing majority MPs might accept more executive secrecy than opposition MPs do, because it is 'their' government. They have easier access to government information, but at the same time, are more vulnerable to executive pressure: as a governing majority MP said, 'it might be easier to get access to information now and then, but then it is harder politically to deal with it, in my opinion [...] In opposition, some things are easier, because you can just rock the boat' (MP 1: 16). As a government majority MP, one may be under pressure to support executive secrecy, at least in public, because the government's stability depends upon being backed by its parliamentary majority. Opposition parties, on the other hand, are systematically warier of executive secrecy. These different perspectives in opposition or government also overlay ideological differences between parties: the same individuals may take different positions on executive secrecy as a governing majority or opposition MP (MA2: 15, MP 13: 14). Their sceptical stance evaporates once their party is in government, as interviewees argue self-critically, acknowledging that they did not behave any differently (MP 13: 18, MP 1: 16).

Two examples illustrate this general observation of government and opposition roles significantly influencing a party's perspective on executive secrecy.[51] A first example is the introduction of counterterrorism laws in the 14th legislative period after 9/11. Together with their Social Democrat coalition partner, the Greens enacted counterterrorism laws that included extended competences for the intelligence agencies, in contrast to their previous demands. Their manifesto for the 1998 election had still demanded the step-by-step abolition of intelligence agencies (Bündnis 90/ Die Grünen 1998). The coalition agreement with the Social Democrats, though, only envisioned strengthening parliamentary scrutiny of the agencies (SPD und Bündnis 90/ Die Grünen 1998). And the Green manifesto for the 2002 elections – devised from the position of a government party – still demanded a limitation of competences, but lacked a clear statement in favour of abolishing the agencies (Bündnis 90/ Die Grünen 2002). This programmatic change is likely to be an effect of having government responsibility, an effect that moderates ideological positions. Being in government led to more acceptance of intelligence agencies working secretly.

Another example of how membership in a government coalition overlays one's ideological commitments is the liberal FDP. As an opposition party, they had criticised the plan to include a free text field in the antiterrorism database law in the 16th legislative period, fearing arbitrary and unlawful use of the field (see footnote 50, page 52). However, the government draft for a right-wing extremism database in the 17th legislative period, when they were in government, included such a free text field (even though they stressed that they still considered this problematic and had in the parliamentary discussion added a provision that information put in this field needed to be based on facts (see MP Piltz, FDP, 2012)).

While these conflicts between governing majority and opposition are typical of a parliamentary democracy, there are additional layers of conflict that follow a different, but nevertheless role-specific logic. Most importantly, there are conflicts between parliament as a whole and the executive. They derive from a classic conception

[51] Of course, only parties that have changed their status as governing majority or opposition party during the period under review qualify for tracing the shifting perspectives on secrecy depending on opposition or government roles. The left-wing DIE LINKE (earlier: PDS) therefore falls outside the realm of such analyses as it has never been in Federal government so far. When discussing their particularly strong demands (such as the abolition of intelligence agencies) that stand out from the other parties in the Bundestag, this has to be taken into account. So far, the positions derived from their party programme and from their institutional role as opposition align – in both roles their claim is for less government secrecy and stronger parliamentary scrutiny. Therefore, they have not yet had to negotiate the specific role conflict of being in government on the one hand and pursuing party ideology on the other.

of the separation of powers where parliament scrutinizes the government – and its secrecy. It is based on a shared parliamentary concern about the executive's actions. The executive then is ascribed a distinct interest in secrecy that differs from parliamentary perspectives on the matter (MP 2: 35). The agencies were convinced, another MP argues, that 'what they do was in principle secret' (MP 3: 7), thus pointing out a specific executive logic, a logic that is mistrusted by parliament. For example, MPs fear that the executive sometimes uses the reference to security strategically to provide their claims for secrecy with legitimacy, referring to 'noble considerations'such as the interests of the state (MP 2: 15).[52] Such appeals by the executive are often seen with suspicion (MP 11: 5, see also MP 2: 15). A similar doubt met the executive's argument with regard to protecting the agencies' methods (e.g. MP 11: 23).53 It is in cases of such suspicions raised about executive secrecy that the MPs from both government and opposition parties stress their institutional identity as parliament, across the government-opposition divide. This is especially the case when they feel that the executive has kept secrets from them, even if they are part of the governing majority in parliament:

> We sometimes feel downright humiliated by what we read in the newspapers and by the fact that we have not been told many things. That is something a Parliament cannot accept. It must defend itself against this across party lines. We are trying to defend ourselves here (MP Uhl, CDU/CSU, 2009a).

Conflicts between the executive and parliament led to noteworthy instances of cooperation both across party lines and across the opposition-governing majority divide. These examples will be discussed in more depth in chapter 3.2.1.

Conflicts about secrecy and disclosure do not only run between parliament and the executive but also between parliamentary committees. An example is a larger amendment introduced by all parties but the left-wing PDS on the parliamentary oversight committees (Drs. 14-539) from the 14th legislative period. The amendment was supposed to address problems arising from the different jurisdictions of different parliamentary committees and from lack of communication between them (MP 11: 17; Staff 2: 19, see also ExIA 1: 46). In trying to strengthen parliamentary scrutiny,

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52 This approach of framing issues in terms of an existential threat was described as 'securitization" by Buzan et al.: 'It is when an issue is presented as posing an existential threat to a designated referent object (traditionally, but not necessarily, the state, incorporating government, territory, and society). The special nature of security threats justifies the use of extraordinary measures to handle them. [...] "Security" is the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics.' (1998: 21 ff.)

53 A public interest argument in favour of secrecy may also be turned around. Methods may as well be of public interest (StaffIA 2: 35) if they are illegitimate or illegal.

the draft concentrated formerly dispersed scrutiny powers in one committee, the Parliamentary Oversight Panel. Inter alia, the Parliamentary Oversight Panel should then also partake in the discussion of the budget plans of the agencies, together with the budget sub-committee for the agencies' budgets. Up until then, the secret agency budgets had been the domain of a specialist budget sub-committee. The suggestion sparked conflict between the committees. While the drafts' initiators from both government and opposition parties claimed that their suggestion was about cooperation, networking and enhancing oversight (MP Wiefelspütz, SPD, 1999b), the budget committee feared that the Oversight Panel would lack the necessary competences and overview for discussing budget issues (Drs. 14-653). The budget committee members were – across party lines – ready to defend the budget committee's prerogative of debating budget plans within their respective parliamentary party group (see *Haushaltsausschuss* protocol 14-14) against this presumption (MP Koppelin, FDP, 1999). Instead of following party lines, they took a position based on their committee's interests. This is an interesting case of committee identity where conflicts cut across other conflict lines such as party or government-opposition differences, showing a different type of institutional interest.

Summing up, there are different layers of institutional role-based conflicts. MPs' and parties' positions are not just shaped by programmatic ideas, but also by their institutional roles.

3.1.5 Conclusion: Insufficient Agreement on Substantive Legitimation

As the empirical material demonstrated, the question under what circumstances secrecy is considered legitimate is highly contentious. While Members of Parliament agree that some secrecy may be necessary, especially to guarantee security, but also for separation of powers and the protection of third-party interests, there is no consensus as to what follows from these rationales and how much secrecy they warrant. Parliamentary actors disagree on different levels: on the one hand, the weighing of different values (e.g. security vs. freedom) is disputed. On the other hand, whether concrete competences of the agencies for secret action effectively serve the provision of security is contentious, too. Such evaluations depend on assumptions about secrecy's effects that are hypothetical in nature – they are hard to predict or measure – and therefore inherently contested.

How the political actors place their arguments is influenced by ideological differences based on parties' programmes and by their institutional roles in the political system. While controversy between government and opposition is to be expected,

the observation of a shared identity in certain committees or even the whole parliament across government and opposition roles adds to existing knowledge about parliamentary logics.

3.2 Legislative Enclosure and Proxy Monitoring as Sources of Procedural Legitimation

While actors did fundamentally disagree on the substantive legitimation of intelligence secrecy, they considered the democratic authorization of executive secrecy crucial. In the following, practices of procedural legitimation are empirically analysed. One is legislating on intelligence agencies, thus shaping how secrecy is executed in day-to-day politics. The second is providing parliamentary scrutiny of executive practice. It will be shown how both domains, legislation and parliamentary scrutiny, are central for legitimising intelligence agency secrecy in practice.

3.2.1 Legislation

Political theorists have been arguing that secrecy may be democratically authorized by procedure, by deciding on secrecy according to democratic rules. Deliberation about secrecy thus assumedly legitimises secrecy (see chapter 2). By virtue of being decided upon in parliament, then, secrecy receives formal, institutional legitimacy. Parliamentary deliberation provides a mechanism of addressing the above-discussed disagreement about substantive rationales for executive secrecy, and democratic decision-making procedures allow for a binding resolution of such conflicts in the form of legislation. In the following, I demonstrate that political actors actually think about the legitimation of executive secrecy in terms of procedural authorization. Thus, the concept is not just a theoretical, but also a politically relevant one.

In the period under review, ten legislation processes (see 3.1) were identified in the field of intelligence agencies. In the following, I trace the importance of legislative authorization. Its legitimising force, though, depends on the *quality* of decision-making. MPs' acceptance of a decision *itself,* in other words, depends on *how* it was taken. Second, I show that there are instances of cooperation between government majority and opposition parties, who explicitly point out that broad agreement strengthens legitimacy. This, too, illustrates actors' acknowledgement of procedural legitimation through legislation.

Secrecy Legislation as a Source of Legitimacy and its Conditions

MPs, first and foremost, point out the crucial role of a public debate for legitimising intelligence agencies and their secret work, both in parliament and the broader public: 'one should not talk coyly about intelligence services, but they belong, as far as possible, in the public spotlight' (e.g. MP Wiefelspütz, 2001a, see also ExIA 3_2: 76). That does not mean that parliamentarians who stress the importance of public debate necessarily demand the disclosure of agency secrets. Rather, they demand to debate the general framework and the agencies' purposes in public, and define them in parliament. Parliamentary actors appreciate that they can set a framework for secrecy (e.g. MP 9: 7). The Bundestag, being a particularly strong parliament by international comparison, has the powers to do so (MP 6: 10). MPs' awareness of their legitimising function is perfectly illustrated by a plenary speech in which one MP explicitly refers to Niklas Luhmann's idea of legitimation through procedure:

> I remind you of the opus magnum of the legal philosopher Niklas Luhmann. It is called 'legitimation through procedure'. Niklas Luhmann's thesis can be described as follows: not only the content of a decision is relevant for its acceptance, [...] but it also depends on how the decision was taken (MP Stadler, FDP, 2001).

In the perception of the MPs, then, the powers of the intelligence agencies are legitimate not only because of the purposes they serve but also because of the democratic process through which they have been determined.

The legitimating force of democratic decision-making depends on a number of factors. MPs have certain expectations about the quality of the decision-making process. Such deliberative ideals can primarily be identified *ex negativo* from procedural criticism. Actors address conditions of a legitimate process mainly when they consider it imperfect in practice. Of course, there are also some instances of positive references, but most discussions of the criteria of good procedures nevertheless occur when actors think that those criteria have not been met.

The main condition that the legislative process must satisfy in order to confer legitimacy on executive secrecy is that it gives parliament, and especially the opposition, sufficient time and opportunity for discussing the relevant legislative proposals. When in opposition, parties often criticise the decision-making process as 'unparliamentary and undemocratic' (MP Ströbele, Grüne, 2009b), for example when there is too little time for debate and too much haste (e.g. MP Marschewski, CDU/CSU, 2001b), no or only limited expert hearings (MP Zeitlmann, CDU/CSU, 2001), or amendments introduced with short notice (MP Stadler, FDP, 2001; MP Piltz, FDP, 2006) that make it difficult for the opposition to familiarise themselves with the changes and be able to react to them. Such shortcomings make the actual parliamen-

tary deliberation fall short of the deliberative ideal, which requires sufficient information. Not being able to access related classified information is called out as a serious impediment (MP Jelpke, PDS, 2001b). Opposition parties are vocal in criticising such procedural shortcomings. For example, in the discussions of the counterterrorism act, the opposition parties did not take part in the vote on amendments in the Committee on Home Affairs (*Innenausschuss)* as a protest against the governments' hasty and exclusive legislative process (*Innenausschuss* Protocol 14-79).[54] This shows that the bar for legislation to confer legitimacy on secrecy is high, and many actual decision-making processes fall short of this in (opposition) MPs' view.

These demands about procedural quality are an inherent opposition theme: there are instances from different legislative periods where the respective opposition parties from the whole party spectrum criticised procedure (e.g. MP Stadler, FDP, 2001; MP Marschewski, CDU/CSU, 2001b; MP Ströbele, Bü90/Grüne, 2009). They demanded sufficient opportunity to present their alternative perspectives on legislative proposals touching upon executive secrecy.[55] Governing parties in parliament, on the other hand, usually discard such procedural criticism. Their MPs argue that the criticised procedure was in no way inadequate (e.g. MP Benneter, SPD, 2009), or that it may have been inadequate, but the issues at hand had been important enough to condone shortcomings in the decision-making process. One example of such argued urgency was the debate on the counterterrorism legislation after 9/11. Here, the governing majority, among others, referred to external threats that required quick action. Having to 'read and work a little quicker than we usually do as parliamentarians' was negligible compared to the security issues at stake (MP Beck, Grüne, 2001). In this case, the green MP even voiced sympathy for those unhappy with the procedure: 'this gives us no pleasure as parliamentarians. We all want to debate properly. I understand everyone who grumbles a bit. In opposition, we would have done the same' (ibid). However, the substantive arguments in their view outweighed procedural ones: the end justifies the means, or at least the procedural imperfections were

54 Still, the Christian Democrats supported the draft in the final vote. This shows that their non-participation was targeted at the procedural dimension of the legislative proposal, not its content.

55 Criticism of procedural inadequacies opens up a second level of debate about a proposal in addition to the substantive discussion about it. While opposition parties usually (unless there is a qualified majority requirement that the government alone cannot meet) have no possibility to push through their policy proposals, they nevertheless can question the legitimacy of the process leading to the majorities' policies. Thus, criticising the procedural shortcomings of decision-making processes can also be used strategically where there is no possibility of altering the substantive decision.

the lesser evil compared to the dangers of international terrorism that the law has to meet.

Based on the empirical material, it has been shown that actors connect legitimation of secrecy not just to it being decided upon in parliament at all, but also to the legislative process meeting certain requirements. Mainly, these are about inclusivity of the process, and in particular about having enough time and fora (e.g. expert hearings) to discuss the drafts. In this sense, political actors have a conception of procedural legitimation as discussed in the theoretical literature: secrecy may be legitimate if it is decided upon in an open and democratic process that allows for deliberation on why and to what extent to allow for secrecy (see for example Thompson 1999). If those conditions are not met, parliamentary actors may not be ready to accept the decisions taken. Procedural legitimation is a key reference point and a desideratum for political actors, but in political practice, not all actual decision-making processes meet this demand.

Opposition Support for Legislation as a Source of Procedural Legitimation

In addition to fair and inclusive procedures that allow opposition parties to state their perspectives and potential alternatives, the debates reveal that opposition support for a proposal is perceived as a particular source of legitimacy. Although the debates about intelligence secrecy were in general characterised by conflict between government majority and opposition in parliament, there were some cases of both active and passive opposition support for legislative proposals.

Active support is the strongest opposition support observed in the analysis. Three out of the ten legislative drafts[56] under review were introduced not only by the government, but by the governmental parliamentary party groups and at least one opposition party.[57] Therefore, these drafts should not be seen as government bills, but as proposals that are actively shared by the parliamentary opposition. This type

[56] Two of the three, though, were part of the same overall proposal. A constitutional amendment was one draft, the new formulation of the law on the Parliamentary Oversight Panel was another. Therefore, the two drafts may have been part of the same overall proposal (by the same parties), but formally distinct. Therefore, the two drafts were subject to different formal voting quorums.

[57] The vast majority of legislative proposals in Germany is introduced by the government, not the governmental parliamentary party groups. Furthermore, just between 2.2 and 2.7 per cent of all legislation during a legislative period was drafted by a coalition of government together with an opposition party – an obvious contrast to the three out of ten in the area of intelligence agencies 1998-2013 (my own calculations based on https://www.bundestag.de/parlamentsdokumentation)

of support was observed in cases where legislation concerned parliamentary oversight. Actors stressed that scrutiny was so important for the legitimacy of secret intelligence action that they considered broad cooperation in the legislative process crucial.[58] While the perspectives on how much secrecy is necessary vary, parties agree that there must be strong parliamentary scrutiny in the light of existing secrecy. 'In particular, the area of intelligence agencies and of their oversight is much too sensitive for party-political quarrelling' (MP Schmidt-Jortzig, FDP, 1999). One governing party MP applauds legislative cooperation on competences for parliamentary scrutiny:

> It is my parliamentary party group's position that this [legislation, D.R.] should not be done by the current majorities in parliament. This is about basic institutional, parliamentary questions, which should be decided upon between governing majority and opposition across the respective existing divides (MP Röttgen, CDU/CSU, 2009a).

Some see cooperation as an indication that a law is especially balanced and sufficiently considers the opposition's rights because they otherwise would not support a government draft.[59] They stressed that their cooperation across government-opposition lines was an expression of their self-awareness *as a parliament* (MP Marschewski, CDU/CSU, 1999a).

In addition to this active cooperation, there are instances of passive cooperation. Another four of the ten laws were passively supported by an opposition party. Passive support means that an opposition party endorses a government draft by voting in favour of it, but without being included in the drafting of the proposed piece of legislation.[60] In two cases, it was the conservative CDU/CSU opposition who supported red-green government proposals (14th legislative period), and in another two cases the social democrats were in opposition and supported proposals by the con-

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58 Constitutional politics is another domain of this rare form of cooperation where parliamentary initiatives are supported by government and opposition parties (Lorenz 2007).

59 The participation of a 'proven opponent of intelligence agencies' in the negotiation of the draft seemed to lend the latter special legitimacy. MP Wiefelspütz (1999a) refers to MP Ströbele here, an MP from the Green party which was the junior coalition partner. The Greens were in general more wary of the intelligence agencies – their manifesto still demanded their abolition – and Ströbele was considered to be a particular opponent of the intelligence agencies who as a directly elected MP enjoyed a certain jester's licence despite his governing majority role.

60 There may have been informal consultations with the supporting parties. Different from the cases described as 'active cooperation', though, the consenting opposition parties in these passive cases did not officially endorse the drafts as their own.

servative-liberal government coalition of CDU/CSU and FDP (17th legislative period). These four laws that gained passive support mainly focussed on agencies' competences. Here, support may be traced back to an understanding that the issues at hand are questions of necessity: what needs to be done then is not a question of partisanship (see 3.1.1). Like active support, the parties lending this type of passive support presented it as a source of particular legitimacy: the bigger the majority in favour of a draft, the more substantial its supposed legitimising effect.

Taking such as stance of doing what is necessary is enabled by overlapping policy preferences. Only when parties' policy preferences are not too far apart is it likely that an opposition party will accept a notion that a government's proposal is necessary. In all four instances of passive opposition support it was either the SPD or the CDU/CSU, the two big so-called peoples' parties, who backed a government draft despite their opposition role. Their positions on security matters may differ less than compared with other parties in the Bundestag.[61] For example, a Social Democrat stated in the debate about the extension of the counterterrorism laws in the 17th legislative period, that the government's draft in question was an inherently red-green project and, thus, could be assented to by the oppositional SPD (MP Wiefelspütz, SPD, 2011). This illustrates that they supported the drafts because they endorsed their substance and regarded it as their obligation as a responsible 'people's party' to do so. Still, their support is noteworthy, as legislation usually does not depend on their votes: the government could easily push laws through on their own. Yet the fact that opposition parties explicitly supported drafts signalled their importance and added to their procedural legitimation.

These instances of cooperation between government and opposition parliamentary party groups indicated above should not be taken to mean that actors cease to disagree on the necessity of secrecy. Rather, these should be regarded as exceptions from regular partisan or government-opposition conflicts. Even in the two legislative processes that were drafted from within parliament, the strong proclaimed institutional identity (e.g. MP Marschewski, CDU/CSU, 1999b, MP Wiefelspütz, SPD,

61 The two big peoples' parties may, in addition to being politically close on security issues, also employ a self-understanding as state actors (*staatstragend* in German debate), being potential future governing parties even while being in opposition. In the 17th legislative period, the extension of the counterterrorism laws was supported by the then oppositional Social Democrats, which MP Binninger (CDU/CSU) commended as commitment to their responsibility (PlPr 17-136: 16261). This may produce a different self-understanding, but also include an awareness that they may become the government that has to implement a law and is restrained by a law's limitations on secrecy or competences of the agencies. This hypothesis would require more research as it cannot be verified based on the present material.

1999b) was selective. The left-wing party (and in the second case in the 16th legislative period the Green Party, too) was excluded from this seeming consensus and criticised the misrepresentation as a consensual parliamentary initiative (MP Claus, PDS, 1999a). Nevertheless, these examples of both active and passive support stress actors' perception that broad majorities provide special legitimation for the sensitive policy field of intelligence agencies, and, especially, their oversight. Thus, these are as much instances of substantive agreement on the necessity of secrecy as they are examples of the perceived need of procedural legitimation.

3.2.2 Parliamentary Scrutiny

Parliamentary oversight is a second mechanism of procedural legitimation. Not least since legislation cannot or does not effectively define all the boundaries of executive secrecy *ex ante*, scrutiny as an *ex post* mechanism may ensure that secrecy is employed in the intended ways.

The German system of integrating intelligence agencies into a democratic framework relies largely on oversight mechanisms and parliamentary scrutiny. As indicated before, many accept that intelligence agencies depend on secrecy for their work (e.g. MP Röttgen, CDU/CSU, 2009b). [62] This nevertheless does not mean that intelligence agencies need be beyond scrutiny; it only implies that parliamentary scrutiny must be organised in a way to keep these secrets (e.g. MP Uhl, CDU/CSU, 2009a):

> From this specificity of parliamentary scrutiny which cannot take place as usual scrutiny which aims for publicity, we do not deduce that there can be no scrutiny by parliament. Instead, there is a special committee, which exercises scrutiny rights representatively – not of a minority, but of the whole parliament (MP Röttgen, CDU/CSU, 2009b).

The introduction of special committees follows the idea that the Bundestag as a whole, given its size, could not effectively keep secrets and thus cannot in its entirety conduct parliamentary scrutiny. Therefore, several committees were set up that are tasked with supervising executive secrecy. It is assumed that such committees have to work *in camera*, since information needed for oversight can only be shared by the executive if it is kept secret. But this in-camera oversight, the draft on the 'further development of parliamentary control of the Federal intelligence agencies' details, is

[62] This premise is to some extent also shared by the agencies' sharpest critics, who want to abolish them exactly for the reason of not being controllable or integrable into democracy given their secret work. They share the assumption of secrecy as a necessary feature of intelligence agencies, but draw the conclusion that democratic enclosure is impossible.

crucial for creating legitimacy for intelligence work, especially because their work can be in tension with basic rights:

> In the case of the intelligence agencies, whose work may heavily encroach on fundamental rights of the persons concerned because of the clandestine collection of information and the use of intelligence methods, this form of scrutiny assumes an especially important and trust-producing role. Trust in the fairness and legality of the services' mostly clandestine activities can only be established and consolidated if the scrutiny instruments provided for are effective and the scrutiny body has sufficient powers (Drs. 16-12411: 7).

If trust in the agencies, hence their legitimacy, depends on the conviction that what they do in secret will be effectively overseen, then proxy monitoring conducted by specialist, secret committees, assumes a crucial role for the legitimacy of the agencies' secret work. For this reason, the members of the Parliamentary Oversight Panel are seen as the 'legitimising link between the people and the intelligence agencies' (MP Uhl, CDU/CSU, 2009b).

> Parliament as the people's trustee is the legitimising nexus between sovereign and executive. In the special case of intelligence agencies, which naturally depend on secrecy, this is primarily the task of the Parliamentary Oversight Panel (PKGr), whose sessions are secret. This concept has in principle proven itself (BT Drs. 16/12411: 1).

The different oversight committees each have their own jurisdiction: the *Parlamentarische Kontrollgremium* (Parliamentary Oversight Panel), for example, is in charge of scrutinizing the actions of the three federal German intelligence agencies,[63] the *G-10-Kommission* (named after article 10, German basic law, on communications freedom) oversees individual surveillance measures and the *Vertrauensgremium* (a secret subcommittee of the budget committee) monitors the agencies' budgets. In addition, a Bundestag minority of a fourth of its members can demand to set up special committees of inquiry (*Untersuchungsausschuss*) if it wants to shed light on scandals and special events.[64]

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63 The three federal level agencies are the foreign intelligence service *Bundesnachrichtendienst*, the domestic intelligence agency *Bundesverfassungsschutz* and the military intelligence agency *Militärischer Abschirmdienst* (MAD), which is comparable to the *Bundesverfassungsschutz* but with special jurisdiction for the armed forces (*Bundeswehr)*. The federal states also have their own domestic agencies, although those are not relevant here since they are based on state legislation and overseen at state level.

64 Committees of inquiry are not permanent but instated during a legislative period with a limited and specific mandate. And their introduction can be enforced by a qualified minority, namely one fourth of the Bundestag*'s* members. Different from the other, permanent committees, committees of inquiry usually work publicly and only exceptionally in secret: if they want to hold secret sessions, they have to decide so and justify

Formally, it is important to note, the committees do not oversee the agencies directly. Rather, their scrutiny pertains to the government's oversight of the agencies. MPs in principle are aware of this. They recognize that it obviously cannot be the Oversight Panel's task to directly oversee agencies with thousands of employees (see MP 4: 3). In practice, this differentiation is blurred to some extent. For example, high ranking employees of the agencies report to the oversight committee (see MP 6: 24), and not just government clerks:

> Legally, we oversee the actions of the federal government and not those of the intelligence agencies directly. This impression [that they were directly overseeing the agencies, D.R.] is created by the agencies' heads appearing here and reporting about things of their own choosing (StaffIA 2: 5).

When MPs talk about the oversight committees, they often refer to overseeing the intelligence agencies.[65] Their self-perception – despite awareness of the legal framework – focuses on agency oversight rather than government oversight. This corresponds with the public perception of the committee. The formal setup (government control) and the political function (agency control) of the committees therefore are not entirely congruent. The intended outcome, though, is the same: meticulous oversight of the agencies, be it directly or through the government. That parliament ensures that the agencies are scrutinized constitutes the basis for its legitimising function.

When reflecting on the role of oversight of intelligence agencies for the legitimacy of their clandestine activities, MPs often refer to the notion of trust or acceptance. The agencies' scrutiny then is considered as a source of trust and thus a foundation for their work (e.g. MP Röttgen, CDU/CSU, 2009a; MP Stadler, FDP, 2009b). 'Only effectively scrutinized and thus legitimised agencies are good intelligence agencies in a democratic constitutional state since they enjoy the necessary trust' (MP Oppermann, SPD, 2009a). Often, the parliamentary committees and their members are therefore not conceptualised as the agencies' adversaries but as a basis for their support by providing them with legitimacy and acceptance[66] (MP Röttgen,

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their decision in a public session (§ 14 PUAG) – in line with the procedural legitimation requirement of taking the decision *about* secrecy in public.

65 MP Oppermann, for example, states that parliamentary scrutiny bodies need to be at 'eye level' with the executive, which they are factually not 'when nine MPs, who cannot make use of external help, are supposed to oversee three agencies with nearly 10,000 employees' (MP Oppermann, SPD, 2009a).

66 Trust is specifically linked to secrecy. We need trust where we know some, but not all, as Simmel points out: 'The possession of full knowledge does away with the need of trusting, while complete absence of knowledge makes trust evidently impossible' (Simmel 1906: 450). This shows that trust can be thought of as a counterpart to secrecy.

CDU/CSU, 2009b). This perspective is shared widely by MPs and executive actors alike (e.g. MP 12: 37, ExIA 3_2: 31).

In sum, MPs explicitly consider parliamentary scrutiny a central mechanism for legitimising intelligence agency secrecy. Parliamentary scrutiny in their view serves to ensure that secrets – and what they conceal – are legitimate. There are several factors that can strengthen parliamentary scrutiny's legitimising effect: information access, (human) resources (e.g. time, staff, expertise), sanctioning power of the overseers, and opposition rights.

Access to Information

Access to information is central for parliamentary committees to perform their task. In the period under review, legislation addressed this issue. For example, the amendment of scrutiny rules in the 14th legislative period included new provisions on access to agencies' files as well as the possibility for hearings of employees and inspections of the agencies (Drs. 14-539), which were again broadened with the law in the 16th legislative period (Drs. 16-12411). Information gaps are considered a central problem for oversight: 'Today the state of intelligence scrutiny is such: what we know is a drop, what we do not know is an ocean.'(MP Nešković, LINKE, 2009a).[67] The main, systematic problem underlying the debates about information access is the question of how to organize access in a way that effectively provides overseers with the information they need, given that the executive may not be inclined to share information about its failures or misconduct. Sometimes, MPs compare this to a suspect providing evidence (e.g. MP Nešković, LINKE, 2009b), a metaphor also used in the academic literature (e.g. Curtin 2011: 20, Sagar 2007: 408).

The principle of originator control that protects international partners' secrets is a further challenge for getting access. Since partners retain the power to determine what information can be shared with whom (see discussion above), originator con-

[67] The evaluations of the changes over time differ massively: while some hold that there is less secrecy nowadays, others claim that the government becomes ever more secretive. This finding that is at first sight inconsistent and paradoxical may be explained by different foci of their assessments: those who argue that there is less secrecy take examples such as increased media attention to the sessions of the Parliamentary Oversight Panel (e.g. MP 3: 7, ExIA 2: 14, MP 1: 41). And those who hold that there is more secrecy mainly refer to the information relationship between parliament and government and not – at least not primarily – the public (e.g. MP 12: 11-13, Staff 2: 7). Both assessments therefore are not mutually exclusive. It is very possible that there is increased public relations activity (understood as intentional communication) while parliamentary access to secret information is limited.

trol is an inherent limit on parliamentary scrutiny. Sharing those secrets with parliamentary oversight committees depends on partners' assent. International cooperation therefore is perceived as a threat to access.

Connected to the debates about access is the question of how access to information should be arranged: should the executive proactively provide information or should MPs ask for and get the information they want or need? Whose obligation is this? To a large extent, the debates focus on effectively committing the executive to provide all necessary information, for example by obligating it, on pain of sanctions, to provide information (MP 12: 27). This proposal, however, does not prevent the executive from deciding what information the controllers get to scrutinize (see for example MP 9: 5). And whether they would fulfil this obligation adequately, especially in cases where there is high interest in the information, is questioned: 'the willingness of the security agencies to tell you voluntarily about things that are problematic or conflictual and not public yet tends towards zero' (MP 5: 40). In addition, even the provision of information, as one executive interviewee explains, may obscure what is relevant: by overloading overseers in committees with so many files that they cannot possibly handle the amount of data (ExIA 1: 28). Thus, relevant information may be hidden without being explicitly secret.

Additionally, for parliament, there often is no way to check the soundness of information (Staff 2: 13). Also, they cannot check the validity of a claim for secrecy: MPs complain time and again that the executive does not take the trouble to substantiate classifications or redacted passages specifically, but that they just add the same standard justification over and over again (MP 13: 32). Whether their refusal to give access is legitimate, then, is hard to trace. Furthermore, there is a tension between comprehensive and comprehensible information:[68] information access per se does not necessarily help. The executive can, thus, conceal information even without formally classifying it. One example is agency budgets. Some expenses are entered in other department's budgets, so not all the expenses of the intelligence agencies are visible at once.[69] While the information is there, it is difficult for MPs to oversee.

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[68] This illustrates the problems of defining transparency as opposed to secrecy: there are different perspectives on whether transparency is direct access to data (which provides, the argument goes, the most undistorted, unfiltered view) (e.g. Finel/ Lord 1999: 317; De Fine Licht/ Naurin 2015), or rather processed, understandable information (which makes information usable, but of course bears the risk of a specific presentation of information) (e.g. Fung 2013).

[69] Curiously, when asked about this practice, one parliamentarian answered that I should not have been able to find this out. Actually, it is not secret information. Not only is there international precedent (e.g. Wise/ Ross 1964: 3), but there are also public texts referring to this practice. For example, the former president of the foreign intelligence

One example of the problems of information access is the much-quoted instance of 'events of special significance' (*Vorgänge von besonderer Bedeutung*). Legally, these have to be reported to the oversight panel by the executive.[70] What actually is an 'event of special significance' is a matter of interpretation and disagreement between the committee and government. As an interviewee stresses, what an acting official does not consider significant may be evaluated differently by an MP or gain relevance over time (MP 4: 5).[71] Thus, different perspectives of what the oversight bodies need to get access to need not be based in malicious intent, but can simply result from different practice: 'professionally, they [the intelligence agencies, D.R.] see as routine what the public or an MP deems explosive, and therefore perhaps do not always come up with the idea that it is so explosive that it has to be reported' (MP 3: 9). Given that defining events as 'events of special significance' is largely up to the executive, it is difficult to make regulations that are sufficiently specific and, on the other hand, open enough to also include new issues that have not been anticipated (MP 11: 5).

The issue of getting access to the information needed for scrutinizing the executive can be further illustrated by the example of a common and recurring theme in plenary debates: 'learning things from the newspaper'. With this phrase, MPs complain that they are not informed properly by the executive and first learn about problems and scandals from the newspaper (e.g. MP 11: 5, MP 9: 9, StaffIA 2: 11, MP 3:

agency *Bundesnachrichtendienst*, Hans-Georg Wieck, wrote in a chapter for a political science book on external policy in 2007 (266): 'For fundamental reasons, the budget funds cannot always be secured through the budget of the Federal Chancellery, but must be anchored and accounted for in other ministries.' This may, like those cases where former public servants (e.g. Wise 1973: 143) disclose official secrets in their memoirs, indicate the blurred boundary between individual memory and public records.

70 In the period under investigation, the law on the Oversight Panel did not specify what constitutes an event of special significance. An addendum to the Panel's rules of procedure defined the term (see MP 11). A 2016 amendment of the law added the following definition of three types of special events: '1. significant changes of the external and internal security situation, 2. internal processes with significant effects on the fulfilment of tasks, 3. individual incidents that are the subject of political debate or public reporting' (PKGrG § 4). The 2018 Addendum to the PKGr Rules of Procedure further spells out what these three types of special events are. It mentions, for example, the emergence of new terrorist networks (type 1), changes in agency structure or criminal offences by/against intelligence officers (type 2) or unauthorized and damaging disclosures (type 3) (PKGr 2018).

71 This is in line with Shapiro and Siegel's findings that officials have widely varying practices and general proclivities towards either secrecy, disclosure or a case-by-case decision (2010).

9). One interviewee estimated that they were informed about seventy to eighty percent of 'failures, scandals and malpractices' not within the competent committee, but from the media (MP 11: 5). In the field of terrorism, another claims, 'the most important source of information was *Der Spiegel*'[72] (MP 5: 38). Complaints about 'learning from the newspaper' are based on the criticism that the executive only tells committee members what they already know from the media. The executive was only giving them information that was already in the open anyway. The figure also conveys a sense of disregard for the committees, that MPs are told nothing in committees but then read about big scandals in the press.

> What has been articulated here by Mr Nešković, Mr Ströbele, Mr Oppermann, Mr Röttgen and Mr Stadler across party lines shows that none of us feels comfortable in the current situation. We sometimes feel downright humiliated by what we read in the newspapers and by the fact that many things have been kept from us (MP Uhl, CDU/CSU, 2009a).

As a side remark, note that MP Uhl refers to other speakers from all parliamentary factions to stress that this is a problem for MPs as such, not just for the opposition. This, again, is a motivation for the cross-party and cross-role cooperation within parliament observed in the discussion of legislation.

MPs often develop their own techniques to deal with these imperfections of information provision in political practice. For example, to escape the problem that one needs prior knowledge in order to ask meaningful questions, they may decide to 'shoot into the dark and wait and see if somebody is hit' (MP 9: 5), asking questions without tangible cause. Or they use media reports as point of departure for their questions (e.g. MP 3: 9). However, these are primarily individual coping strategies, not institutional answers to the problems. And (formal) access to a document might even prove disadvantageous: if MPs access information formally in the Bundestag reading room set up for classified files, they cannot, for example, make notes that they can then take away with them (MP 11), thus, even if they get access to files, limiting what they can make of them (MP 13: 10). And more importantly, after accessing the reading room, they are bound by secrecy, even if the information they access is already in the public domain. Therefore, some MPs waive their formal access rights in order to still be able to address topics in public (see for example MP 9: 9) based on what they know from other sources. Thus, their reliance on informal information access is deepened. Formal access paradoxically may have the effect of restraining information use.

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72 *Der Spiegel* is a national news magazine that has a history of investigative reporting.

Human Resources

A second type of resource relevant for parliamentary scrutiny of secrecy and the agencies is human resources. This includes MPs themselves and their assistants and covers both person-hours to be spent as well as expertise. MPs themselves are constrained by their limited time: given multiple committee memberships and other obligations, MPs do parliamentary scrutiny as one of many jobs, which is a more pronounced problem the smaller the parliamentary party group – and thus particularly affects (smaller) opposition parties. Several interviewees point out that, in order to do it properly, parliamentary scrutiny of the agencies should be done as a full-time job (e.g. MP 11: 27, MP 6: 12).[73] Of course, this problem may be solved by internal decisions of the parliamentary party groups: it is not a formal requirement that MPs have to be on other committees. Thus, it is a question of prioritization as to where to direct a parliamentary party group's limited human resources. Constraints also arise from the organisation of committee sessions: the sessions' agenda is never worked through, only a few issues are discussed, and the rest is 'pushed forward like a bow wave, worked on the next time. One never gets done with the agenda' (MP 4: 21). This is also based on the fact that MPs have diverse tasks and meetings to take part in, and session time is therefore limited.

Personal expertise also may vary. New members on the committees are not provided with an extensive introduction to relevant classified material. Unavailable documentation, for example the absence of protocols, is a problem for continuity in parliamentary scrutiny (MP Ströbele, Grüne, 2009a). In effect, it becomes harder to hold the executive accountable for what they have said or done in earlier committee sessions. This problem is further exacerbated when new committee members replace former ones. Valuable knowledge may vanish with personal change as may personal skill, contacts and networks, and experience (e.g. MP 1, MP 6: 4, MP 5: 46). Formal oversight rights thus depend for their effect on what parliamentarians (can) make of them.[74]

Since MPs' time is limited, they depend heavily on their staff. During session weeks, there is seldom time for them to work on classified files in person, and when

[73] It may well be that this is not specific to MPs on the oversight committees, but a structural issue of parliamentary work, as parliament is always confronted with an executive advantage concerning personnel and expertise. Thus, it would be important to compare these claims to the perceptions of MPs on other parliamentary committees.

[74] This may be interpreted as an instance of overstating their own importance. Since there are also several mentions of other prominent MPs as especially effective overseers, even from parties other than the respective interviewees' parties (e.g. MP 3: 41), there is reason to take the statement about the importance of personal ability serious to some extent.

there are no sessions, they often spend time in their constituencies. Thus, it is their staffers who read files for them (StaffIA 1: 20) and do their groundwork (MP 6: 12). As MPs admit: 'We all know: many MPs would in many situations on committees only be half as useful without their knowledgeable staffers, if at all' (MP Ströbele, 2009a). Other than MPs who are 'born secret-keepers' (MP 6: 4), however, staffers need security clearances to access classified data. To receive higher clearance, they have to give access to very personal data, which they sometimes feel is an intrusion and worry what might be done with the data (e.g. StaffIA 2: 17), which can sometimes complicate finding staff for those tasks that require security clearance. In addition, staff are liable to prosecution for infringements of secrecy rules – for MPs the hurdles for prosecution are much higher due to their immunity. Of course, staffers also gain importance as they provide information that the MPs cannot easily check themselves. Since they cannot take copies or notes, though, the information flow between MPs and their staff nevertheless is limited. And staff members may not only be regarded as assistance, but also as a threat:

> To avert dangers from the Federal Republic of Germany, we may not disclose anything from this committee. This is truly important. That's why it is probably wrong to also give the staffers, who we rightly can consult now, the right to attend the committee sessions. No, this would be a step to far (MP Uhl, CDU/CSU, 2009a).

Thus, the MP implicitly considers the staffers' attendance a risk for secret-keeping in the committee. This shows a tension between effective oversight and effective secret-keeping in the committee. Still, there is broad agreement on the necessity of supporting staff for MPs to fulfil their oversight tasks.

Sanctioning Power

The third type of resources that is central to effective oversight is sanctioning power. Interviewees point out that there are no explicit sanctions for abuse of executive secrecy (e.g. MP 12: 27). Sanctioning power is considered a crucial and indispensable aspect of scrutiny: 'oversight without the possibility of sanctions actually isn't oversight. And sanctions are only possible if one can pass on what you found out and what violates the rules to other instances that can draw respective consequences' (MP 3: 29). In-camera settings of oversight, thus, are the main impediment to exercise sanctioning power: even if wrongdoing is uncovered in committees, 'the fingers are tied' (StaffIA 1: 28). Thus, it is only logical that the agencies would not change their practices, if the worst that can happen is being reprimanded in a closed committee

(ibid: 8). On the other hand, just the possibility of detection and having to appear in front of a committee may have a positive effect on behaviour:

> Nevertheless, it is probably better that in a democratically constituted system there is such scrutiny at all, because this of course means that there is always at least a risk of detection for those acting in such secretly operating bodies. And perhaps this potential option, that this could come out, already leads to not doing many things that would otherwise be done on this side. That could perhaps, so to speak, be the most intensive effect that these instruments have at all (MP 9: 5, see also MP 1: 14).

Scrutiny, however selective,[75] may thus have a behavioural effect. One interviewee ascribes to committee work an 'educative function' vis-à-vis the agencies: if there is the potential that they will have to justify their actions later, agencies and their employees may more readily inform the committee from the start (MP 13: 28).

The most-cited sanctioning power is publicity. In the 14th legislative period (1992-2002), a large majority (all parties in the Bundestag except the left-wing LINKE) introduced the possibility for the Parliamentary Oversight Panel to issue public statements for commenting on recent issues. However, to make such a statement, a two-thirds majority had to agree, meaning that no statement could be made against the will of the governing majority. Therefore, public statements represented the governing majority's perspective on an issue. The possibility of making public statements by qualified majority was later complemented with new minority – and thus effectively opposition – rights in the 16th legislative period (2005-2009). Then, the governing Grand Coalition (Social and Christian Democrats) together with the oppositional liberal democrats added new provisions on dissenting opinions (Drs. 16-12411). Now, if the Panel majority decides to make a public statement, the minority has the opportunity to state their own evaluation of an event or an issue. Both amendments were part of the drafts that were introduced by cross-bench majorities including at least one opposition party. This shows that the issue of enabling a public debate is a crucial aspect for parliamentary scrutiny and thus, for secrecy's legitimacy.

Besides legally enforced disclosure of classified information in the possession of the executive, unauthorised disclosures could be seen as a sanctioning mechanism open to the overseers. Unauthorised disclosures, however, come at a personal risk of prosecution (StaffIA 2: 7), especially for staff not protected by legislative immunity. Also, as in the fable of the boy who cried wolf, one's credibility can be at stake if

[75] Parliamentary oversight may not actually review everything. Instead, it may be conducted randomly or suspicion-related, as the debate about oversight as police patrol vs. fire alarm indicates (McCubbins/ Schwartz 1984).

unauthorized disclosures are employed too often. And credibility is crucial for publicity to function as a sanctioning mechanism in those cases where it is really needed (StaffIA 2: 33). Furthermore, disregarding secrecy rules could result in being cut off from classified information (MP 1: 41, ExIA 2: 26, MP 2: 15).[76] Thus, parliamentarians may have to choose between being informed, but not being able to use information, or publicizing matters and loosing access in the future.

In the light of the disadvantages related to unauthorised disclosures as a sanctioning mechanism, a *threat* of unauthorised disclosure could actually be more effective. Threatening to make a public scandal in the media can be a way to enforce that one gets truthful information (MP 5: 38). This pre-effect (see Siefken 2018 on scrutiny instruments' *Vorwirkung*) therefore has to be taken into consideration as a sanctioning mechanism, too. Alternatively, limited publicity may be possible if the debate is conducted at a general level, which one interviewee described as their 'dilution strategy'. This means that information is shared within the party hierarchy, but generalised or 'diluted' with every step of dissemination, so finally the parliamentary party group leader can publicly speak about an issue (MP 3: 29) in general terms. Furthermore, time limits after which secrets have to be disclosed automatically (MP 12: 29) are suggested – publicity would therefore be possible with a time lag. Alternatively, redacting the sensitive parts of classified documents can pave the way for disclosing them (StaffIA 1: 8), thus paradoxically producing publicity through secrecy.

In addition to authorized and unauthorized publicity, legal recourse is a third mechanism for sanctioning illegitimate secrecy. MPs or parliamentary party groups can appeal to the Federal Constitutional Court (*Bundesverfassungsgericht*) if they consider that their parliamentary information rights have been infringed. Whether this is an effective measure is highly controversial among MPs (MP 6: 12; MP 12: 15). Proceedings take a long time, and even if the ruling is in favour of the plaintiffs, they do not know whether the documents they have been denied are truly relevant, whether it was worth it (MP 11: 7). Given the duration of proceedings, 'the government can effectively say half-way through the legislative period: "We do whatever we like, there will not be a ruling anymore"' (MP 11: 13). Additionally, a court case can also be risky for opposition parties. Any lost case on the side of the opposition could be perceived in public as if the executive had won (StaffIA 2: 25, MP 12: 37). In effect, this means losing opposition leverage because it sets a precedent for later disputes about opposition access to executive secrets. As long as there has not been any

[76] Rosén (2011) and Curtin (2011) have described this for the European Parliament: in order to get access to classified information, the European parliament submitted to the Council's secrecy rules.

Court decision, the opposition can plausibly claim in public that they have a right to access.

Despite these constraints and uncertainties, once the court holds that the government has wrongfully kept information to themselves this is perceived publicly and puts pressure on a government to fulfil their duties (MP 13: 8). Even threatening to appeal to the constitutional court may already be enough to move a government to change those provisions that an opposition party would otherwise bring before the constitutional court (ExIA 2: 28). Thus, legal recourse can be considered a sanctioning mechanism, although not a perfect one.

Opposition Rights

Above, I have listed three factors that, according to political actors, increase oversight's legitimising effect: the overseers must have sufficient access to information; they must have sufficient resources in terms of manpower and time to process the information; and they must dispose of sufficient sanctioning power when they conclude that the executive abuses secrecy. Opposition rights (see also Scheppele 2006: 619) are a fourth and final factor that contribute to oversight's legitimising effect. They are important on two levels: committees' composition needs to be representative, members coming from all parliamentary party groups. Second, opposition rights are important when it comes to oversight bodies' competences: it makes a difference whether scrutiny rights in a committee are designed as rights of each individual member, or as rights of the committee. Both dimensions will be discussed in the following.

The first issue is the representative composition of oversight bodies. This can be illustrated with the example of a debate about committee size in the 14th legislative period. The left-wing PDS moved for an added provision that every parliamentary party group must be represented on the Panel. The other parties rejected this demand, arguing that the previous practice of having nine members for the Parliamentary Oversight Panel was sufficient for both oversight and the protection of sensitive information. Yet, with just nine members, the PDS would not have a seat on the Panel given parliamentary practices of proportional representation – their parliamentary party group was too small to win them a committee seat. The debate revolved around the question whether the legitimacy of the scrutiny mechanism is impeded if not all parliamentary party groups are represented on the committee. The major conflict ran between one opposition party that feared their strategic exclusion and the other parties who argued that the limitation of the committee size served

effective secret-keeping. The argument for the number nine was based on the necessary secrecy of the committee: 'I mean, a bigger circle – that is the main problem; this truly is our experience – would not guarantee the confidentiality of oversight anymore' (MP Marschewski, CDU/CSU, 1999a).[77] From the oppositional left-wing party's view (the PDS), this was only an ostensible argument to keep their parliamentary party group out for partisan reasons (MP Claus, PDS, 1999a). They allege that the other two opposition parties, the Christian and the Liberal Democrats, only got on board based on the promise to keep the left-wing PDS out (MP Claus, PDS, 1999b).[78] Even an MP of the current government majority declared his unease. He acknowledged that the debate about the size was fuelled by political interests in excluding one parliamentary party group and promised further discussions within the coalition. His stated goal was to find a compromise between the small size for effectively keeping secrets and the representative composition of the Panel (MP Ströbele, Grüne, 1999b). The debate about the size and composition, he argued, was not just a technical decision, but one that defines the legitimising force of the Panel:

> I believe that the effectiveness of the new body is important. It will also depend on whether all sides, all wings and all groups in this Parliament are involved in the current PKG, the Parliamentary OversightPanel. If that is not the case, then this commission also lacks legitimacy in a way (MP Ströbele, Grüne, 1999a).

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77 There is the calculation that there is a linear relation between successful secret-keeping and the number of people with access: 'The more people know about a classified piece of information or one in need of secrecy, the greater the danger that this piece of information does not stay where it is' (ExIA 3_1: 41). While this certainly cannot be denied, it nevertheless misses an important aspect: successful secret-keeping does not only rest on the number of those included, but also on the strength of norms binding them to keep these secrets, be they formal sanctions or secrecy cultures and social pressures (see for example Nedelmann 1985). Otherwise, it could not be explained how big bureaucracies are nevertheless successful in keeping secrets: given that there are about three million people in the US with security clearances for classified information (e.g. Curtin 2011: 20), one would expect more leaks if there was a linear relationship between unauthorized disclosures and the number of people with access to official secrets.

78 To some extent, this is acknowledged by the Christian Democrats who claimed that effective scrutiny depended on a 'trusting cooperation of politicians from all democratic parliamentary party groups' and stated that they did not expect this to be possible with the left-wing party (MP Marschewski, CDU/CSU, 1999a). He does not name the PDS, only the fact that they employed a former spy named 'Topas' (MP Marschewski, CDU/CSU, 1999a) as a parliamentary assistant. 'Topas' had given sensitive information from the NATO to the GDR and was sentenced to 12 years' imprisonment (http://archiv.rhein-zeitung.de/on/99/01/05/topnews/topas.html, last accessed 10.05.2020).

On this view, the legitimising force of *in camera* oversight depends on committees' inclusiveness.

The second dimension of opposition rights concerns the concrete setup of scrutiny rights. It is a crucial question in political practice whether concrete competences for exercising oversight (e.g. demanding or accessing files) are designed as individual committee members' rights or as committee rights. As individual (or party group) rights, scrutiny competences can be used by opposition parties within the committee. If they are rights that require a committee majority decision, though, they are effectively unusable for the opposition without the government majority's consent, because committees' seats are allocated proportionally to the size of Bundestag parliamentary party groups. The Parliamentary Oversight Panel's investigative rights are constructed as committee rights, not individual members' rights. A left-wing party MP holds: 'The design flaw is that there should be no strong minority rights in the new committee. This is bad in a parliamentary democracy, because it is not the entire parliament that oversees the government, but the opposition' (MP Nešković, Linke, 2009a). He considers oversight to be the opposition's constitutional duty. This is a distinct opposition position, as the rebuttal of a governing majority MP shows:

> We do not share your concept of democracy that since the majority was not prepared to scrutinize, scrutiny was a task for the minority in parliament. The majority, too, is part of parliament and is a monitoring body vis-à-vis the executive. Your understanding of democracy certainly does not correspond to our understanding of parliament (MP Röttgen, CDU/CSU, 2009b).

These examples are proof of different oversight conceptions: one concept assumes that oversight is a right (and duty) of parliament as such, and thus also extends to the governing parties. Demanding majority decisions for the exercise of scrutiny rights is not problematic for this conceptualisation of oversight. The other oversight concept assumes scrutiny to be an opposition task directed at majority-backed executive action. Then, minority or individual members' rights are crucial for oversight to work.

These different understandings of oversight can be illustrated by the introduction of public statements as an instrument of the Parliamentary Oversight Panel. When they were first introduced in the 14th legislative period, they were construed as a majority right, requiring a two-thirds majority in favour of releasing a statement. Thus, opposition MPs would not be able to make public statements unless the government majority agreed to do so. However, when the respective law was amended in the 16th legislative period, the possibility of dissenting opinions instead introduced the view that the opposition may have a legitimate, different evaluation of the issues discussed in the committee. Therefore, while a statement still can only be published by majority decision, the minority now can counter the majority perspective. This

development is an indication of the ongoing debate about oversight and separation of powers practice.

The contributing factors discussed so far are usually identified *ex negativo*, by actors referring to the problems of parliamentary oversight. Yet, the question remains whether these issues are simply imperfections of the current setup of parliamentary scrutiny or whether they are inherent limits fundamentally impeding oversight. In particular, MPs from the Green and the Left parties question whether secret intelligence agencies can be scrutinized effectively at all. The inherent information asymmetries combined with incentives to keep secrets for one's own gain especially substantiate these concerns. Oversight as a legitimation of executive secrecy is limited if the executive does not provide the information needed to perform this task. While the executive may have an interest in keeping incriminating information from the oversight committees, this produces problems for legitimation. Thus, a short-term interest in keeping information for self-serving reasons may result in long-term losses of legitimacy.

3.3 Summary

Intelligence agencies are a traditional bastion of executive power and executive secrecy. Therefore, they constitute an obvious and crucial case for studying the legitimation of secrecy. This chapter considered the legitimacy of executive secrecy from the perspectives of its substantive and procedural legitimation. The empirical analysis has highlighted the interdependencies of the two concepts: substantive legitimation, relying on narratives of necessity and inevitability, is contested. How much secrecy parliamentary actors consider to be necessary depends on expectations about harms and benefits – and these expectations differ. Also, what concrete policy goal justifies secrecy beyond very abstract acceptance of secrecy for the sake of security is controversial. Disagreements were shown to run along the different roles taken by political actors: there are partisan conflicts about the right balance of secrecy and disclosure, but there are also conflicts that are based in institutionally defined roles such as governing majority and opposition or parliament and the executive.

Given its broad contestation, substantive legitimation of executive secrecy is lacking. Since the necessity of secrecy is open to interpretation and decision, it cannot serve as an independent source of legitimation of secrecy. Procedural legitimation under certain circumstances closes this gap. If the necessity and scope of secrecy is

decided upon in an open and democratic process (e.g. through legislation), the democratic decision-making procedure lends legitimacy to the content of the decision. In addition, oversight as a second mechanism besides legislation serves to ensure that the secrets kept are justified. Both legislation as an *ex ante* mechanism of legitimation, and scrutiny as an *ex post* one, are interconnected. Legislation does not just define legitimate secrecy, but also designs a system of parliamentary oversight. And oversight, in turn, serves to ensure as much as possible that executives comply with the legal regulations governing the use of intelligence secrecy.

In practice, secrecy's legitimacy is fragile. There is much concern about the way secrets are kept and suspicion that they are not kept for the reasons considered legitimate or legislated upon. The analysis of both interviews and plenary debates has highlighted the fear that the executive could keep secrets for its own sake – a concern which indicates the fragility of secrecy legitimation. The inherent possibility of the executive to keep deep secrets or wrongfully justify their secrecy with references to the welfare of the state or necessity requires procedural legitimation to be ongoing. Instead of assuming that secrecy can be legitimised once and for all, its justification needs continuous debate and updating.

4 Legitimising Public-Private Partnerships Secrecy

Public-Private Partnerships (PPP) are a relatively recent phenomenon in German politics. The first PPP projects date to the 1990s (Krumm/ Mause 2009:107) with the number of projects steadily growing from the early 2000s.[79] The basic idea is that of cooperation of the state with private partners (companies or consortia) to provide services, for example, developing infrastructure (buildings, roads etc). While it is nothing new that the state commissions private companies, the core of the PPP model is the so-called life-cycle approach: not only are planning and construction itself included in the contract, but also, for example, financing and/or maintenance over a longer period of time, often decades (e.g. Krumm/ Mause 2009, Reynaers/ Grimmelikhuijsen 2015: 610). The integration of these different organisational steps is expected to provide gains in efficiency (e.g. Bundesministerium für Verkehr et al. 2009: 21).

There is no single form of PPPs in Germany. Instead, there is a wide range of models of cooperation. In practice, 75 per cent of projects in Germany are organized based on the so-called 'ownership' model where the state remains the owner of the objects (Partnerschaft Deutschland[80] 2018: 17). The remaining 25 per cent is spread over a wide range of models, including, for example, leasing models or the like where the private and public partners set up a new project corporation specifically for the PPP. Moreover, PPPs can be found in different areas, ranging from building and maintaining administrative buildings to projects in the health sector, leisure or security. While the majority of projects are located at *Bundesland* or municipal level (many of them being in the educational sector), Federal projects still account for a large share of the money spent. Until 2017, for example, there were 214 projects overall, only 29 of which showed Federal involvement (of which 24 were roads, mainly highways, see BT-Drs. 18/13093). Nevertheless, the Federal level accounts for almost half of the investment volume (Partnerschaft Deutschland 2018: 21).

With the emergence of PPPs, secrecy in governance has acquired a new dimension. As Thomas Krumm argues, the possibility of private partners to 'not only refuse disclosure themselves but also to oblige the public partner to keep secrets' is a

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79 A database commissioned by the Federal ministry of transportation provides an overview of the projects: https://www.ppp-projektdatenbank.de/fileadmin/user_upload/181231_OEPP-Projekte_mit_Vertragsabschluss__im_Hoch-_und_Strassenbau_Investitionsvolumen_getrennt.gif

80 'Partnerschaft Deutschland' is a private-law consulting firm founded by the Federal government, originally in the form of a stock corporation including private shareholders, but since 2016 in full public ownership.

challenge for parliamentary scrutiny. PPP secrecy has not received systematic analysis even though it may obstruct parliament's duty to oversee PPP projects (Krumm 2013: 394). This chapter fills this research gap by discussing the role of secrecy for this new type of statehood and by presenting empirical findings on the negotiation of secrecy rules in parliamentary practice.

In order to reconstruct the mechanisms of legitimation of secrecy in PPP cases, the chapter focuses, first, on the **substantive legitimation** of secrecy, identifying two distinct arguments: on the one hand, there are private partners' trade and business secrets that serve to protect their economic interests. Here, the origin of the secret (and the interest in secrecy) lies outside the state. On the other hand, there are concerns about the fiscal interests of the state as a rationale for keeping secrets. Both substantive secrecy rationales, then, focus on economic considerations, but they differ on *whose* interests are to be protected. The analysis traces both these substantive rationales throughout the debates and interviews. It reveals that they are contested and, therefore, fail to provide unquestioned justification for secrecy. In the second part, the chapter focuses on secrecy's **procedural legitimation** and asks to what degree this provides a mechanism for legitimising PPP secrecy where substantive references alone fail to do so.

Unlike in the intelligence agencies case, there was only one relevant legislation process in the PPP case which was supposed to lay the foundations for setting up PPP projects. Fittingly, it was, literally translated, called the 'PPP acceleration law' and was introduced by the governing coalition of Social Democrats and Greens at the time. In addition to this legislative process, motions were included in the analysis. The latter indicate what actors programmatically consider the adequate balance between necessary secrecy and disclosure. Table 5 gives an overview of the parliamentary processes under review.

Table 5: Parliamentary Debates on PPPs under Review

Subject Matter	**Date of Introduction** **(of Final Plenary Debate)**	**Introduced by Gov/** *Opp*	**Voting Result**
Motion Drs. 15/1400 Public-Private Partnerships	04.07.2003 (01.04.2004)	SPD GRÜNE	Accepted
Motion Drs. 15/2601 Privatisation and Public-Private Partnerships	03.03.2004 (30.06.2005)	*FDP*	Rejected
Motion Drs. 15/4391 Creating transparency regarding toll preparation processes - Publicising the report of the Federal Court of Auditors	30.11.2004 (no final debate)	*CDU/CSU*	-
Legislative draft Drs. 15/5668 Draft law to accelerate the implementation of Public-Private Partnerships and to improve the legal framework for Public-Private Partnerships	14.06.2005 (30.06.2005)	SPD GRÜNE	Accepted
Motion Drs. 15/5676 Growth strategy for Germany: Further developing and now implementing public-private partnership - optimising infrastructure, dissolving investment backlog	14.06.2005 (30.06.2005)	*CDU/CSU*	Rejected
Motion Drs. 16/12283 Creating fair conditions of competition for public-private partnerships	18.03.2009 (19.03.2009)	SPD CDU/CSU	Accepted
Motion Drs. 17/5258	23.03.2011	*GRÜNE*	Rejected

Transparency in Public-Private Partnerships in Transport	(25.04.2013)		
Motion Drs. 17/5776 Accelerating remunicipalisation - Stopping public-private partnerships	10.05.2011 (25.04.2013)	*LINKE*	Rejected
Motion Drs. 17/9726 For a new consensus on infrastructure: Differentiated assessment of public-private partnerships, further development with greater transparency and a stronger focus on economic efficiency	22.05.2012 (25.04.2013)	*SPD*	Rejected
Motion Drs. 17/12696 Public-Private Partnerships - Exploiting potentials properly, making them SME-friendly and increasing transparency	12.03.2013 (25.04.2013)	CDU/CSU FDP	Accepted

My own overview based on parliamentary database (http://dipbt.bundestag.de/dip21.web/). As there were no cases of cross-cutting cooperation (e.g. an opposition party supporting a government draft), the table simply indicates whether a proposal was accepted or not.

4.1 Economic Interests as Substantive Legitimation of PPP secrecy

Public-Private Partnerships produce specific instances of secrecy. Most PPP-related secrecy either concerns economic feasibility studies or contracts with private partners. For example, highway PPPs have been the recurring subject of critical discussions, especially given the secrecy of contracts.[81] Mostly, these discussions concern

[81] For example, a prestige PPP project, the highway A1 was discussed prominently. The consortium sued the government based on the secret contracts, see for example https://www.berliner-zeitung.de/wirtschaft-verantwortung/alexander-dobrindts-autobahn-desaster-so-kaempft-das-a1-konsortium-gegen-deutschland-li.26646 (last accessed 18.08.2020). The truck toll that will be discussed later in this chapter is another example of public attention to secret PPP contracts.

the question whether the contractual arrangements are detrimental for the public sector.

PPP projects pass through various stages. First, the state produces preliminary economic feasibility studies to calculate the costs and benefits of PPP procurement and compare whether PPP procurement is more efficient than classic procurement. If it is, bids are invited. Second, there is a final economic feasibility study that includes the winning bid of a company and compares it to classic procurement. Feasibility studies are usually kept secret to protect both the state's and private partners' financial interests. Third, the project is contractually fixed and implemented, usually over a longer period of time including both construction and operation. Contracts, too, are often kept secret, either completely or in part. And, finally, after the project is completed, what has been built usually comes into state ownership, and the project is, potentially, evaluated, for example by the court of auditors (*Bundesrechnungshof*[82]). Such reports may also be classified because of the sensitive data they include. Therefore, secrecy is an issue at all stages of PPP projects. The dominant justifying rationales for secrecy, however, usually change depending on what stage a project is at (Siemiaticky 2007). Each of these will be discussed in detail below.

Throughout the period under investigation, there has been a development of the debate about PPPs: at first, the debate focused to a large extent on the gains in efficiency expected by implementing public-private partnerships. Only the liberal FDP prominently thematized transparency from the beginning and demanded that PPPs should not circumvent established mechanisms of parliamentary scrutiny (FDP motion, Drs. 15-2601). Only later did transparency and secrecy with it become political issues: after the first PPP experiences, mainly with the botched introduction of a truck toll,[83] there were motions by all parties in the Bundestag, all of them in one way or another focusing on the issue of transparency and secrecy.

How is the secrecy of feasibility studies, contracts and evaluation reports justified in the PPP case? The empirical material allows for the identification of two main substantive justifications for secrecy: trade and business secrets and the fiscal interests

82 The German Court of Auditors (*Bundesrechnungshof*) is provided for in the German constitution (*Grundgesetz*) and is tasked with auditing the Federal Government's budgetary management for efficiency and regularity. It is an independent financial scrutiny body that reports among others to the Bundestag.

83 The truck toll was introduced as a PPP project, but was crisis-ridden. The introduction had to be postponed due to problems with getting the software to work. Afterwards, there was litigation between the government and the private consortium to establish whether the consortium was liable for the toll losses due to late introduction. Furthermore, the political debate dealt with the question whether the government had made mistakes in negotiating the contract, failing to establish sufficient liability. As the contract was secret as well as a court of auditors' report, this also sparked debate.

of the state. A third but less frequently discussed substantive justification relates to *Kernbereich*. However, before turning to these substantive justifications one by one, it is important to reconstruct actors' motivations for supporting PPPs, because they lay the foundation for their acceptance of secrecy. The discussion about PPPs as a new type of procurement and innovative form of cooperation between the state and private companies arose amidst concern for the state's capacity to fulfil its tasks. Efficiency was the overarching aim for introducing and promoting PPPs (e.g. MP Bürsch, SPD, 2005; MP Hajduk, Grüne, 2005). Secrecy, in turn, is considered legitimate where it serves this goal. The governing coalitions' motion preceding the introduction of the PPP acceleration law draft illustrates the underlying logic of promoting effectiveness:

> The financing needs of public budgets on the one hand, the high performance of the state and the considerable need for modern infrastructures on the other force us to rethink the traditional division of labour between the state and the private sector (Motion SPD/ Grüne, Drs. 15-1400: 1).

PPPs, it is claimed, allow for sharing entrepreneurial risks in a way that allocates risks to the partner most equipped to deal with them (SPD and Grüne motion, Drs. 15-1400). And it is seen as a possibility to include private partners (and their capital) in the provision of public goods:

> We intend to increasingly acquire private capital. For us, new, innovative, efficiency-enhancing and thus cost-saving procurement methods are necessary to finance and carry out the mandatory tasks of the state (MP Hinsken, CDU/CSU, 2011).

PPPs are believed not only to provide the state with new financial means, but also to have positive macroeconomic effects. By creating investment opportunities for domestic capital, the assumption is, it will be kept in the country (see StaffPPP 2: 47, ExPPP 1: 48) and can be channelled to the provision of public services and infrastructure (ExPPP 1: 48).

As already implicit in the quotes above, involving private partners in the provision of public services is framed as a necessity: 'ailing budgets' lead to less investments in infrastructure. Therefore, actors fear that the involvement of private partners may be the only option to still invest (MP Fuchs, CDU/CSU, 2003) and carry out state responsibilities. Budgetary constraints are a long-term concern, not a momentary crisis, as similar references two legislative periods later indicate: 'In the current budgetary situation, we cannot afford to maintain ideological reservations about PPPs' (MP Sendker, CDU/CSU, 2013). Taking partisan positions therefore is presented as a luxury that parties should forego in the light of tight budgets. While it is controversial whether PPPs can (and should) be an instrument to realize projects where they would otherwise be unaffordable, or whether they should just be implemented as an

alternative to classic procurement, there is still a strong cross-party expectation of more efficiency – at least there was initially. At the moment they were introduced, PPPs promised that public services would be provided faster, at lower cost and higher quality at the same time (Drs. 15-5668: 1).[84] These positive effects were expected to be comprehensive and to benefit, for example, the labour market and general economic development as well as all kinds of policy fields such as education, transportation or the environment (MP Krüger-Jacob, Grüne, 2005).

These observations concerning the expectations connected to the introduction of PPPs are important for an understanding of actors' positions on PPP secrecy. They defend PPP secrecy because they expect PPPs to be advantageous. Only in a second step, they discuss the two partners involved in public-private partnerships, namely the state and a private company or consortium, and their interests in secrecy.

> But transparency ends - this is a piece of truth - where the interests of those involved in the project worthy of protection and the economic interests of the state are concerned. In this respect, the successful PPP model must not be deprived of its advantages (MP Sendker, CDU/CSU, 2013).

This quote not only summarizes the two main rationales for secrecy – (a) private partners' interests and (b) state interests – but also suggest that PPPs' success depends precisely on its secrecy. Secrecy is a (necessary) means to generate maximum efficiency in PPPs. This shows that actors' acceptance of PPP secrecy is intricately linked to their views regarding PPPs as an economic instrument.

Trade and Business Secrets

The trade and business secrets of the private partner are the first of two main substantive justifications for PPP secrecy. They are usually articulated only at the later stages of the PPP process, once there are bids by private companies or project contracts. Trade and business secrets are usually defended, both in scholarship and political practice, in terms of fundamental rights such as freedom of occupation, the guarantee of ownership or the right to informational self-determination (Kloepfer 2011: 5, cf. Hoeren 2012, ExPPP 1_1: 22, StaffPPP 2: 12, BRH: 31). In practice, this is often taken to mean that private interests override the public interest in transparency because of their roots in fundamental rights (see StaffPPP 2: 38). As trade and

[84] The VIFG interviewee differs from these (earlier) arguments about PPPs' advantages and holds that there are mainly two gains: on the one hand, PPPs are realized faster than conventional projects (which has macroeconomic effects), and on the other hand the private partners dispose of management competences the public sector does not have, especially concerning the management of risks (VIFG: 23).

business secrets are central to a company's economic success, and thus to, for example, the basic right to freedom of occupation, they must not be disclosed by the state. The underlying argument is that the disclosure of such secrets may be a disadvantage for a private company in competing with other private companies (StaffPPP 2: 12) – working for or with the state thus should not negatively affect a company's competitive position. Thus, this is a classic example of a rationale for secrecy that is based on a concern for third-party interests as typified in Chapter 2 (see 2.3).

Fiscal Interests of the State

The fiscal interests of the state are the second substantive justification for executive secrecy. They come into play at the early stages of the PPP projects, concerning the preliminary and the final economic feasibility studies, but are less dominant in the political debates. This rationale is driven by the idea that information about the public sector's calculations and other companies' bids may harm the state's bargaining position. A motion by the governing majority (CDU/CSU and FDP) in the 17th legislative period in 2013 thus stated that confidentiality of bids was necessary 'to prevent bidder collusion, protect innovation and bring the award procedure to a successful conclusion with the most efficient outcome' (Drs. 17-12696: 5). If, for example, the preliminary economic feasibility studies were published, an interviewee from the VIFG[85] argues, companies would use that information to bid accordingly (VIFG: 10). The state's methods of calculating risks or tax returns might prove valuable for companies to adjust their offers (ibid: 25). Thus, the price for disclosure would be less efficient procurement and impaired competition (ExPPP 1: 26, BRH: 6). This justification of secrecy can be systematized as a concern for the quality of outcomes as discussed in 2.3.

Both interests in secrecy – trade and business secrets of the private partners, and the fiscal interests of the state – are rooted in different functional logics of the private and the state sector. Most actors acknowledge that these two interests may not align: 'The main policy challenge of PPPs is to combine the public sector's public interest orientation with the interest of private companies in maximising profits' (SPD motion, Drs. 17-9726: 6). Actors assume that the advantages of PPPs depend on creating a 'win-win-situation' for both partners (MP Schulz, Grüne, 2003). Private partners seek to secure their market position, while the state strives for making the most of public money. While those interests are clearly distinct, sometimes actors argue that

[85] The German *Verkehrsinfrastrukturfinanzierungsgesellschaft* (~ transport infrastructure financing company) was a fully state-owned company that was organised under private law as a limited liability company. In 2019 it was merged in the new Autobahn GmbH.

keeping private partners' secrets may also be in the state's (or government's) interest. Protecting private secrets is stressed as part of the liberal democratic setup, and thus in the state's interest.[86] In order to profit from PPPs, the state has to ensure private partners' gains as well. And the danger of being sued for damages is yet another incentive for the state to effectively keep private partners' secrets (StaffPPP 1: 13). While the origins of the secret may be outside the state's control, this illustrates that the state may nevertheless have an intrinsic interest in keeping those secrets.

Kernbereich Secrecy

In addition to these output- and third-party-oriented rationales of executive secrecy, there is a third justification for secrecy regarding the quality of the political process, namely the executive's *Kernbereich*. It is mentioned only rarely compared to the other two rationales, but interviewees pointed out the need for an executive deliberative sphere that is inscrutable to parliament. In the case of PPP projects, deliberative secrecy involved in *Kernbereich* refers to internal debates about procurement decisions. As argued above in the intelligence agencies case, *Kernbereich* differs from other substantive arguments in favour of secrecy since it is not about the content of withheld information – and its sensitivity – but about its institutional origin with the government, and the latter's right to take decisions independently from parliamentary interference in order to then be held accountable for them. *Kernbereich* secrecy is claimed for enabling internal deliberation and open decision-making processes within the executive (e.g. ExPPP 3: 13). Parliament may judge procurement decisions retrospectively, but not interfere in them (ExPPP 1: 41).

In the PPP case, a central question is how far executive responsibilities reach and what is covered by the *Kernbereich* principle. What constitutes a completed decision-making process as opposed to an ongoing one can be difficult to identify.[87] This was also raised by the Court of Auditors interviewee: the boundaries of what parts of procurement processes qualify as unfinished decision-making protected by *Kernbereich* are not clear, even if nobody would claim that a project was only finished after the whole project cycle of several decades (BRH: 14ff.). In day-to-day decision-making, though, there may well be disagreement on the scope of *Kernbereich.* All in all, though, *Kernbereich* is only a subordinate justification of secrecy in the PPP case, and is consequently debated less, and less controversially. Instead, the two rationales

[86] While the different interests are usually acknowledged, there also is a debate where PPPs' proponents argue that private companies were working in the public interest. 'They too belong to our society. These companies also work in the interest of the common good' (MP Tiefensee, SPD, 2011).

[87] This is a typical conflict about *Kernbereich* in other policy fields, too (see Riese 2015 on the implementation of the European Stability Mechanism in Germany).

that focus on the financial interests of the partners involved – private partners' trade and business secrets, and the state's fiscal interests – are more frequently invoked.

4.1.1 Conflicts over Substantive Rationales for PPP Secrecy

The early parliamentary debates about PPPs showed a rather cooperative atmosphere regarding the goal of creating favourable conditions for PPP projects. The main focus was to make public procurement more efficient by promoting PPPs and there was a general 'PPP euphoria' (e.g. ExPPP 1: 48, StaffPPP 1: 19).[88]

Debates about PPPs in the Bundestag became more polarized over time. Problematization of PPPs often prominently featured the problem of PPP secrecy and the lack of oversight. Table 6 illustrates the changing perspectives over time. While the Social Democrats and Green Party introduced the PPP acceleration law and consequently were in favour of PPPs as a new procurement instrument, they later took more critical positions, demanding more transparency and questioning whether the promised gains in efficiency were being delivered.

Table 6: Development of Party-Political Positions on PPP secrecy

	2005 (PPP acceleration act and FDP motion)	**2013 (motions on further development of PPPs)**
FDP	Transparency and parliamentary scrutiny	[coalition government] demands further development of PPPs, including better access for SMEs + transparency + better basis for economic feasibility studies
CDU/CSU	In favour of PPPs as a type of procurement Own motion on truck toll introduction demands disclosure	
SPD	[coalition government] create legal conditions that enable PPP as a type of procurement	Demands differentiated assessment and evaluation needed, improve transparency

[88] It must be noted, though, that at the time of the introduction of the PPP enhancement law in 2005, the left-wing PDS (later DIE LINKE) as an outspoken opponent of PPPs was not represented as a parliamentary group in the Bundestag, which may to some extent account for the less controversial debate.

GRÜNE		Demands legislation on transparency, broad publicity of projects
LINKE	[not in Bundestag as a parliamentary party group]	General rejection of PPPs (and their secrecy) in favour of re-municipalisation

Source: Legislative and motion drafts + plenary protocols. As the drafts normally cover a variety of demands addressed to the government, this table necessarily focuses on selected aspects and does not claim completeness.

Most conflict is sparked by the rationale for the private partner's secrecy and the underlying general ideas about the state's and the private sector's roles in society. This is also a question of 'ownership' of secrets. Whether trade secrets are secrets that concern the state or not is contested and has implications for the discussions about parliamentary oversight discussed in the second part of this chapter. The rationale of the fiscal interests of the state, by contrast, is less debated and referred to more by executive or majority actors. In the following, the different conflict lines underlying disagreement about the legitimate or necessary scope of PPP secrecy will be discussed and systematized. Again, there are ideological conflicts that derive from actors' roles as party politicians. Additionally, there are conflicts that are based on the institutional roles that political actors occupy.

Ideological Conflict Lines

The main ideological disagreement concerns the legitimacy of PPPs and starts with definitional disagreement as to whether PPPs are a type of privatisation. Furthermore, there is specific disagreement about the balancing of private partners' secrets and parliament's (and public's) interest in disclosure. The assessment of PPPs as privatisation and their approval is an important predictor of party positions on PPP secrecy. When parties support the use of PPPs as a procurement method, they tend to be more accepting of the secrecy that comes with it than parties that oppose PPPs as such.

Whether PPPs constitute a type of privatisation is hotly debated in political practice. The political debate underlines the underlying ambivalence of PPPs. Economists and social scientists have tried to grasp the specific nature of PPPs as 'partial' (Gerstlberger, Siegl 2011: 11) or 'functional' privatisation (Krumm 2013: 397), considering them a 'hybrid' between classic procurement and privatisation (WBBMF

2016: 7). These definitional issues show that the classification of PPPs is not an easy task.

The conflict about whether PPPs constitute a form of privatisation or not has not yet been resolved in favour of one interpretation or the other (StaffPPP 2: 30). While one side argues that PPPs are privatisation (e.g. LINKE motion, Drs. 17-5776), others stress that despite restrictions imposed by long-term contracts, the infrastructure still remains in public hands (e.g. SPD motion, Drs. 17-9726: 4; MP Tiefensee, SPD, 2011). This view that PPPs are simply a form of contractual cooperation is also underlined by executive interviewees (VIFG: 14, see also ExPPP 1: 10) who argue that critics simply misunderstood the legal concept of privatisation (ExPPP 2: 14) and mistakenly applied it to PPPs.[89] For the parliamentarians, this is an important question. Privatisation withdraws projects from parliamentary scrutiny, and therefore is a basis for more secrecy.

The roots of these differences largely lie in the diverging ideologies of political parties concerning the respective role of the state and the private sector. The conflict is based on normative disagreement whether the state should be either lean or comprehensive. A comprehensive state is responsible for providing public services itself, while the conception of a lean state stresses that the state should leave as much to the market as possible, only stepping in where market-based provision of services does not work. Thus, depending on the normative model, a delegation of service-provision to private partners is problematic or desirable. For example, the economically liberal FDP's critical distance from PPPs stems from their preference for 'real privatisation' (FDP motion, Drs. 15-2601). They are concerned that small- and medium-sized enterprises (SMEs) would systematically be excluded from large-scale PPP projects, which would constitute a distortion of the market. The state in this view only has to fulfil the role of guarantor or fallback option in fields where private services are not (or cannot) be provided, and should not favour large companies over SMEs. The left-wing LINKE, at the other end of the ideological continuum, base their criticism on the idea that there needs to be a strong state that provides public services itself where service provision does not follow the capitalist logic of profit.[90] These

[89] Parties also show internal disagreement about PPPs and PPP secrecy. For example, the Social Democrats disagree internally on whether PPPs are a worthwhile instrument or not. The Greens, too, are not as united (e.g. StaffPPP 2: 18, StaffPPP 3_1: 15), at least not longitudinally. Additionally, there has been a general shift throughout the spectrum of political parties towards a more critical view of PPPs and a heightened demand for transparency as a limit to PPP secrecy.

[90] In addition to these general partisan differences, there is also disagreement within parties based on individual preferences and experiences. A party may programmatically support PPPs at the Federal level. Nonetheless, individual politicians of the same party

ideological positions on the desirability of PPPs motivate parties' stance on secrecy. Parties that are more supportive of PPPs also accept PPP secrecy. If actors, on the other hand, doubt that PPPs are an efficient and publicly desirable procurement method – like the LINKE or the Greens in opposition – then they are less ready to accept secrecy because they fear that secrecy will only disguise PPPs' disadvantages.

In addition to the general ideological disagreement on the desirability of PPPs as such, there is also ideological debate about the concrete rationales for PPP secrecy. The balancing, for example, of private trade and business secrets with transparency requirements follows a partisan divide. What trade and business secrets concretely mean for PPPs is debated. Some argue that private partners cannot claim the same protection of secrets if they deliberately and intentionally enter a contract with the state, because the nature of such projects is different from other economic activity.

> Furthermore, one can also argue, and argue very clearly, that if a private contractor gets involved with the state, then they know that this is a democratic state and democratic scrutiny belongs to the democratic state and nobody is forced to answer for the democratic state, that's why there's also another restriction on the trade secret (MP 8: 26).

The critics do not necessarily question the legitimacy of trade and business secrets as such. However, they argue that the specific framework of a PPP agreement is different from 'normal' private sector action, since partners enter into cooperation fully aware of transparency requirements. If public money is spent, then it must be subject to parliamentary scrutiny (e.g. Green party motion, Drs. 17-5258: 2) – and therefore disclosure, at least to parliament.[91] Actors are aware that they need to balance different, sometimes conflicting goals and values. They refer to a trade-off between transparency and efficiency which requires a weighing of both aspects.

> This is then a question of balancing, then perhaps the majority will say today, yes, we are prepared to pay this price because we want this information, perhaps in a few years one will come to the conclusion rather and say, no, it was perhaps not such a good idea after all. Then we better leave it at that (StaffPPP 1_T2: 3).

The quotation illustrates that the necessity of secrecy is not obvious, as there may also be competing goals (such as publicity) and it is a political choice which – transparency or efficiency – is valued higher.

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sometimes oppose PPPs if they have had bad experiences such expensive or unsatisfactory projects at the municipal level (StaffPPP 2: 18).

[91] By contrast, actors sometimes question whether PPPs are even especially secretive. For example, in a debate about a motion by the oppositional LINKE to prohibit PPPs, both government and other opposition parties agreed that PPPs brought more transparency by forcing the public sector to anticipate costs and risks over the life cycle of a project (e.g. MP Tiefensee, SPD, 2011; MP Toncar, FDP, 2011; MP Brandner, SPD, 2005). This does not preclude secrecy in other regards, though.

The perspectives on *how* transparency and secrecy should be weighted are different, corresponding to parties' views on the role of the state: while the CDU/CSU parliamentary party group, for example, argues that the interests of private partners worthy of protection constitute limits to disclosure, the more left-wing parties argue that the state's interests limit the legitimate scope of private partners' secrets – especially since they could anyway choose not to bid for state contracts.

In all these conflicts, actors dismiss each other's positions as ideological and unobjective. PPPs' critics accuse its proponents of being blind in their support of PPPs (e.g. LINKE motion Drs. 17-5667) while they, in turn, are criticised for being too state-centred and wary of private business (e.g. MP Toncar, FDP, 2011). One quote illustrates this widely shared idea that the only ones who were not biased were themselves:

> As a result, if you read the motion of the LINKE, you find that pure ideology is celebrated. It is said here that the state is always better than the private sector. - That is just as intelligent as the statement of the FDP: private before state. -The ideologues are sitting at the edges, and now it is up to us in the centre to explain that life is not quite as simple as some simple mover might imagine (MP Kahrs, SPD, 2011).

Summing up, there are strong ideological differences regarding PPP secrecy, despite the initial impression that during the first PPP debates all parliamentary party groups were more or less in favour of the new instrument. Disagreement first and foremost concerns the general evaluation of PPPs as desirable or not, including the contentious question whether they constitute privatisation or not. In these general debates, positions on secrecy are often derivative of more fundamental positions on the role of the state and private companies. If actors support PPPs in general, they tend to accept secrecy, too, although there is variance as to how much secrecy is necessary and whether or how to oversee it. If, on the other hand, a parliamentary party group rejects PPPs as a procurement method, then it also rejects secrecy. In addition to the general evaluation of PPPs, there is also specific disagreement on secrecy; private partners' trade and business secrets are especially disputed. While they are accepted as a constitutional principle, actors disagree whether a contractual cooperation with the state, which partners enter willingly, should not limit the reach of such secrets for the benefit of parliamentary scrutiny and democratic procedures.

Institutional Conflict Lines

In the PPP case, disagreement about secrecy rationales is mainly partisan. Role-specific differences are secondary in the overall justification of secrecy. Nevertheless, there are some differences between executive argumentations and parliamentary debates.

First of all, there is a distinct government perspective that focuses on the nature of the secrets at stake. Executive interviewees often assume that private partners' secrets are not government secrets to begin with. Since they were based on third-party rights, the government was merely protecting them (e.g. ExPPP 1: 8). On this understanding, the responsibility for those secrets is beyond the state's grasp.

In addition, executive actors stressed that PPPs may even be more transparent than classic procurement.[92] In their view, criticism of PPP secrecy was biased: public interest in secrecy concerning classic procurement was not as pronounced as it is for PPP secrecy (e.g. VIFG: 12, ExPPP 1: 10), although such classic projects are also executed by private companies (VIFG: 12).

> And that's why I often don't understand this argument about the term in politics, where it is said, 'Well, you keep something secret, something you should reveal', because it's no different than in other cases, where the public sector has something to do with the private sector. Except here, no questions are asked (ExPPP 1: 10).

In a way, this *tu quoque* type of argument is supposed to serve as a de-legitimation of criticism of PPP secrecy: if one does not care about (problematic?[93]) secrecy in other cases, then one should not oppose PPP secrecy either.

A second difference between executive actors and MPs with regard to PPP secrecy concerns the degree to which *Kernbereich* justifies PPP secrecy. They disagree about the scope of the independent decision-making power of the executive: 'The only question is: Where does the political decision end and where does the normal commercial, functional and technical handling begin?' (MP 7: 18) This is an important question that pervades the whole issue: to what extent are those issues technical and executive ones, and at what point do they become political ones? While executive interviewees stress the decision-making powers of the executive and point

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92 For example, there is now a follow-up cost analysis which was not done before (Min ÖPP 1: 10). The comparison of the two types of procurement, it is argued, forced political decision-makers to strategically assess not just the current costs, but also future operating costs (ibid: 12). And just the fact that files are now created, which later can be reviewed for example by the court of auditors, constitutes progress towards more transparency in this view (ibid).

93 'But nobody asks. And that always irritates us enormously here, because there are so many things where money is not actually spent justifiably, because you could make it more efficient, but nobody asks about it. And then there is no criticism from politics like one should expect. And it is irrational that there are actually areas of expenditure in the budget that are just as investive, but which are financed conventionally, which are not questioned at all' (Min ÖPP 1: 34). Whether this claim that nobody was interested in conventional procurement or was questioning procurement secrecy is true is a question on its own.

out the administrative and technical side of procurement (e.g. VIFG: 29), parliamentarians demand programmatic influence, albeit not detailed bureaucratic control (MP 7: 16). Not least because of the size of the projects and their binding effects for legislative periods to come, MPs argue that PPPs differ from classic executive procurement, especially if there are, for example, profit guarantees for the private partners: this may interfere with a future parliament's budget rights (FDP motion, Drs. 15-2601: 4).

Finally, executive actors and MPs emphasise different aspects of PPP secrecy. While the parliamentary debate primarily focuses on the legitimacy of third-party interests and private companies' trade and business secrets, executive actors additionally stress the concept of the fiscal interests of the state, an issue that is merely a side note in parliamentary debates. Executive actors contend that there can be disclosure to serve public interests and debate, but stress that this comes at the cost of less efficient outcomes (VIFG: 10, 12, 25[94]). This shows that occupying different institutional roles, unlike ideological positions, need not result in systematic disagreement on the justification of PPP secrecy but has an effect on *which* justifications actors debate at all. While executive actors often do not consider third-party secrecy to be executive secrecy (see above) because trade and business secrets are a constitutional requirement beyond their influence, the state's interest is their main concern.

Within parliament, there also are differences between opposition and government majority, especially when it comes to the reasons for advocating transparency. These debates about PPP transparency reflect actors' positions on secrecy as transparency's counterpart. The 2013 debate of the parties' motions on the further development of PPPs, each of which bore reference to the issue of secrecy and transparency in some way, is proof of that. The governing parties at the time (CDU/CSU and FDP) stressed transparency as a means to achieve public acceptance of PPP projects. Transparency would 'steal the critics' thunder' (MP Holmeier, CDU/CSU, 2012) or function as 'tailwind' for PPPs (MP Sendker, CDU/CS, 2012). The opposition parties, on the other hand, focus on better opportunities for scrutiny (Grüne motion Drs. 17-5258). Thus, the reasons for supporting transparency and limiting secrecy differ between government and opposition parties in parliament.

Summing up, while partisan disagreement in the PPP case was dominant, there are also disagreements that reflect institutional rather than partisan roles. Depending

[94] The interviewee later advocates a balance between transparency and secrecy, limiting the latter to where it is truly necessary. This indicates that there is no single 'correct' balance between the two that is in itself evident, but that it is a political decision which aspect is valued more highly.

on their institutional role as governing majority or opposition, actors focus on different aspects of PPP secrecy, and accept it to differing degrees.

4.1.2 Conclusion: Substantive Rationales are Contested

Secrecy in public-private partnerships is motivated by two main substantive rationales. On the one hand, private partners' trade and business secrets are considered worthy of protection. On the other hand, the state's fiscal interests in receiving the most efficient offers by private bidders is seen as requiring secrecy on the internal calculations of the public sector, its expectations and decision-making processes.

The justification of secrecy based on third party interests – private partners' interests – is contested, both abstractly and in concrete cases. Private partners' secrecy, while being derived from fundamental rights, is primarily questioned in the specific context of a PPP contract: while some argue that those secrets are precisely why this procurement method is more efficient than classic procurement, others hold that parliament (and the public) need access, and private partners should be aware of this requirement in advance and be compliant with it. In addition, there is fundamental disagreement on whether PPPs are a worthwhile instrument, and the necessity of secrecy is in consequence accepted or questioned. These conflict lines are mainly ideational and based in different partisan conceptions of the role of the state versus the private sector.

Fiscal interest-based secrecy is less thematized in general and therefore relatively uncontroversial among the MPs in the public debates. Protecting the state's fiscal interests is an uncontested goal amongst MPs. By contrast, parties focus on PPPs in terms of privatisation and private companies' roles which are the more politicizable and salient issues. Therefore, private partners' trade and business secrets feature more prominently in the debates than the fiscal interests of the state as a justification of secrecy.

4.2 Limited Procedural Legitimation of PPP Secrecy

The discussion of rationales for secrecy revealed disagreement about how much secrecy is necessary and legitimate in the context of PPPs. This section will focus on the procedural mechanisms of dealing with disagreement and of legitimising secrecy in practice. Disagreement about legitimate rationales for secrecy can, at least partly,

be resolved through legislation or parliamentary decision-making about them. Furthermore, concerns about the actual practices of secret-keeping, and the legitimacy of references to substantive rationales can be addressed by setting up mechanisms of (parliamentary) oversight. In the following, both will be discussed for the PPP case.

4.2.1 Legislation

Public-private partnerships have not been subject to extensive legislative regulation and the limited legislation that took place was not preoccupied with questions of secrecy and disclosure.[95] Consequently, unlike in the case of intelligence secrecy, legitimation of PPP secrecy has not proceeded through parliamentary decision-making or legislation. Yet, the empirical material shows that political actors see a demand for parliamentary decision-making as an instrument increasing the legitimacy of PPP secrecy.

In the debates about the legislative proposal under review (the so-called 'PPP acceleration act'), access to information was not a central issue. The draft focused primarily on creating favourable conditions for PPP projects. There is one indirect mention of trade and business secrets in a section about competitive dialogue, where it is noted that private bidders' information may not be disclosed against their will (Drs. 15-5668: 5). Furthermore, there is a very general call for transparency of costs and risks, choice of partners and concrete design of the project in the reasons of the draft (ibid: 10). Apart from these side notes, secrecy and disclosure have not been dominant topics during the legislative debates. The only parliamentary party group explicitly thematizing transparency and secrecy then was the liberal FDP. They demanded the introduction of adequate parliamentary scrutiny mechanisms that allow for an

[95] One legislative process in the 15th legislative period was part of the analysis, the other plenary discussions under review were based on motions. While motions are used to take parliamentary decisions on specific issues and the latter include positions or calls for government action or a legislative draft, they nevertheless are less concrete than legislative proposals which aim at collectively binding and enforceable rules. Furthermore, while governing majorities introduce motions to set their agenda, too, they are primarily an instrument used by opposition parties to state their policy positions and demands. The statistics for the 17th legislative period (2009-2013), for example, show that each of the three opposition parties introduced around 500 to 600 motions, while the governing parties introduced 166 and the government another 44 (plus a few intergroup initiatives). Opposition parliamentary party groups less frequently prepare legislative drafts given the large effort and personnel needed and because they are aware that their proposals will not be adopted given parliamentary logic. Instead, they usually introduce motions (MP 8: 14) to make their political alternatives public.

evaluation of PPPs' effects on public budgets (Drs. 15-2601: 1). They explicitly derived their concerns from the experiences with the introduction of the truck toll (ibid: 2). Furthermore, they suggested the legal determination of transparency requirements to counter corruption (ibid: 3). In the debate – their motion was discussed together with the government's legislative draft – though, these demands did not figure prominently. This may be due to the fact that at the time of the legislative debate, there was a perceived need to find new ways of providing public services in times of tight budgets, and euphoria concerning the expected gains as indicated above.

Only with more experience arising from concrete projects, did secrecy and transparency become a central issue in parliamentary debates about PPPs. Parliament's demand for procedural legitimation increased. Correspondingly, the debate in the 17th legislative period in 2013, eight years after the introduction of the PPP acceleration act in 2005, centred on the issue of information access (see Table 6[96]). Then, all parliamentary party groups in the German Bundestag introduced motions on the further development and use of PPPs as an instrument, all of which prominently featured the topic of transparency. This shows that parliament increasingly perceived secrecy to be an issue that parliament should address. The previous lack of procedural legitimation was the breeding ground for parliament to claim a re-assessment of PPPs.

While focusing on transparency, the debates also touched upon questions of necessary secrecy. For example, the governing party motion of Christian and Liberal Democrats demanded more transparency and a disclosure of contracts 'as far as it is justifiable'. They identified the limits to this justification to be '[p]rivate interests worthy of protection, such as company or business secrets, but also those of the Federal Government, such as fiscal interests in the efficient use of taxpayers' money' (CDU/CSU and FDP motion, Drs. 17-12696: 5). In their view, increasing transparency did not preclude the protection of legitimate secrets. Opposition parties were more critical, questioning whether references to trade and business secrets were candid. One motion discussed references to trade and business secrets as an impediment to parliamentary scrutiny, criticising the 'blanket rejection of requests for information based on such contracts with reference to confidentiality agreements and trade and business secrets' (Grüne motion, Drs. 17-5258: 2). Another considered secrecy of the contracts an instrument for securing private profits at the public's expense (LINKE motion, Drs. 17-5776: 4). From these criticisms, they derived the demand for more transparency. The debates show that transparency and secrecy were

96 All the motions had transparency in their titles except the LINKE motion, which demanded abolishing PPPs altogether in favour of re-municipalisation.

increasingly seen as an issue that parliament should take a position on and set the pegs for further government action.

As there was little Bundestag decision-making on PPP secrecy, the actual procedural legitimation of secrecy was consequently limited. The increasing parliamentary thematization, though, indicated a heightened demand for procedural legitimation by parliament. The legislative proposal in the 15th legislative period mentions only confidentiality of bids and a very general endorsement of transparency, but no specific rules. And two legislative periods later in the discussion of motions that meant to lay out further development, only the governing majority's motion that passed parliament included a reference to legitimate interests in secrecy: both private companies' trade and business secrets and the state's fiscal interests are mentioned. Thus, the Bundestag did not take many decisions that explicitly dealt with PPP secrecy and its limits. While there is an obvious development of the topic of information access from the early discussions in 2005 to the more recent debates in 2013, it remains at a rather general and non-binding level. Motions on secrecy and transparency and their respective debate in parliament may qualify as public deliberation of secrecy, but they fail to unfold the binding force of laws. Nonetheless, they are an indication of the parliamentary demand for procedural legitimation.

Despite this lack of legislative legitimation of PPP secrecy, the debates show that actors want parliamentary debate and decision-making. Actors postulate limited publicity that allows a general public debate but keeps confidential what is deserving of secrecy. MPs anchor their demand for publicity in parliamentary functions. 'Parliament's actual function is also to be able to address issues, to create a public sphere for issues. And, finally, Parliament should also decide on this' (StaffPPP 2: 6). The same holds when scrutiny is seen mainly as an opposition task. The function of pointing at mistakes made cannot be fulfilled if faced with secrecy (MP Friedrich, FDP, 2004).

In addition to debates about how to enclose secrecy in concrete cases, there was a debate about designing a legal framework for PPPs in general, especially for ensuring that PPPs are only implemented where they are in the state's interest (see MP Toncar, FDP, 2011). This concerns both the calculations made in preparing for PPP procurement (the economic feasibility studies) and the contracts negotiated with private partners – both of which underly secrecy requirements as discussed above. Secrecy is considered problematic where there is insufficient enclosure of how contracts and projects can be shaped. Thus, the legal enclosure of PPPs in general is connected to the legitimacy of secrecy. Secrecy may be allowed for, but that requires that other provisions set the pegs for PPP practice.

First of all, this concerns calculating the expected costs and benefits in order to decide in favour of PPP or classic procurement. This comparison of procurement methods must be done meticulously and 'on the basis of the naked numbers and the four basic arithmetic operations' (MP Bürsch, SPD, 2005). The question raised by some is whether such an informed – and obvious – decision about efficiency can be taken at all. For example, actors challenge whether public procurement and PPPs can be made comparable at all (MP Bonde, Grüne, 2009, MP 10, StaffPPP 3: 9). The outcome, it is pointed out, depends on how the comparison is done (e.g. VIFG: 17), for example whether or how hazards such as interest-change risks are calculated (VIFG: 23). Also, it is a question how to estimate the macroeconomic effects on growth, which is hard to do with a numerical comparison of costs: if, for example, a road was built years quicker than it would have been conventionally, then this will have effects on the economy, too, which are hard to measure (VIFG: 23). In turn, negative effects like a loss in employment in the public sector (MP 10_T2: 10) resulting from PPPs or losses in efficiency also need to be calculated.[97] These examples illustrate the challenge in making a sound comparison of procurement methods and show why MPs ascribe such relevance to the debate about the secrecy of economic feasibility studies: knowing or even influencing how all these calculations are made (and with what concrete outcomes) is considered central in evaluating PPP projects as such. Therefore, actors perceive a need for publicly debated rules about how these comparisons are made, even if the comparisons themselves in turn will not be public.

Second, the debates show a demand for regulation of contracts. Here, again, there is debate about what the contracts should include and how they can ensure that the state's interests are safeguarded in PPP projects. The risks for the state should be minimised. For example, this includes providing for later changes of projects (for example adding ventilation to a building so it complies with occupational safety) and contractually defining how additional costs such as increasing expenses for material and personnel are to be covered (StaffPPP 2: 32).[98] Also, actors demand that contracts are designed in ways that make sure the state only pays for what it gets.[99] There

97 An interviewee illustrated this with the example of road maintenance. If the lucrative parts of a road were run as a PPP and others were not, then a road maintenance depot would have to take care of road segments that are further away from each other, leading to long journeys (StaffPPP 3_T2: 86) that increase the costs of maintenance even for conventionally built streets.

98 And it is hard for the state to enforce their rights: the municipalities, especially, one staffer argues, often cannot afford a lengthy court process which leads them to usually conclude a settlement rather than pursuing a court decision (StaffPPP 3: 57).

99 One PPP model was particularly controversial for this reason: the construction of PPPs with a so-called 'forfeiting with waiver of objections' (*Forfaitierung mit Einredeverzicht*). In many political actors' view, this leads to the idea of risk-sharing *ad absurdum*

is a need to legislatively define the framework of what is possible and what is not, including the yardsticks to be applied for decisions on concrete projects as well as procedural requirements to ensure their application. This is especially true as the details of projects are often secret due to the rationales laid out above. Therefore, setting a framework for ensuring a specific quality of projects is considered to be relevant. Such content specifications in addition to rules about secrecy itself can increase the legitimacy of secrecy within PPPs: if problematic practices and models are precluded, it is easier to accept the secrecy of concrete PPP information.

Finally, the debates illustrate *how* legislative legitimation could work. Actors criticised the *status quo,* which allows to identify their ideas about how the process *should* be. In their view, the decision-making process must satisfy ideas of fair procedure, enabling a thorough discussion and giving the opposition the opportunity to present alternative views (e.g. StaffPPP 2: 6; Lippold, CDU/CSU, 2005a). If these conditions are not met, actors consider it a serious problem for legitimacy:

> What you do and how you do it, however, is not appropriate for parliamentary deliberation on laws, because you are pushing this forward at breakneck speed. In principle, the opposition is not involved, there is hardly any chance of getting involved, and you obviously have not even informed your coalition partner in such a way that they know how to vote in the committees (MP Friedrich, FDP, 2005).

Thus, as in the intelligence agencies case, actors refer to the idea that any legislative procedure should meet certain non-legal requirements of guaranteeing sufficient time for debate and enabling the opposition to take a position and comment on drafts. Meeting these procedural demands is seen as a condition for legislation to produce outcomes that are accepted as legitimate.

4.2.2 Parliamentary Scrutiny

Legislative legitimation of PPP secrecy, as demonstrated above, has been rather limited. While there is little legislative activity and almost none that explicitly concerns secrecy and disclosure, debates focus much more on how to oversee PPP projects as well as the problems arising from this task. In the following, it will be shown that

since it basically means that the state has to service bank credits irrespective of whether the agreed service is actually rendered (see StaffPPP 2: 34). The idea behind this is to ensure that the project may be implemented with low interest rates the state would have to pay, but what follows from this is that there is no risk transfer as suggested as a main advantage of PPPs. Thus, PPP contracts are not just imperfect by nature and given their complexity as discussed in the literature (e.g. WBBMF 2016: 16), but there may also be systematic bias concerning the allocation of risks in political practice.

there is a clear demand for scrutiny that arises from executive PPP secrecy in practice. Proxy monitoring again is the dominant approach for overseeing executive secrecy.

Parliament should be able to oversee what is done with public money. If taxpayers' money is used, then parliamentarians claim access to information about the projects (see MP 7: 20), even more so because PPPs bind public money for decades to come (ibid). This is the most basic argument for parliamentary access to contracts and economic feasibility studies. This does not necessarily mean the whole Bundestag. Instead, actors often suggest organizing parliamentary scrutiny as proxy monitoring: in order not to disclose secrets to the broader public and, especially, to competing companies and bidders, oversight should be proceeding *in camera* as well. This suggestion is based on the concern that giving access to the whole Bundestag may equal general disclosure (StaffPPP 1: 9). Debates concern both improving or strengthening existing oversight mechanisms such as the Federal Court of Auditors'[100] financial scrutiny as well as introducing new competences for parliamentary oversight.

Debates about the legitimacy of secrecy in concrete PPP cases illustrate the importance of oversight. Such debates are triggered in the context of disagreements about PPP secrecy that arise along the opposition-government divide. Opposition parties are doubtful about executive motivations for secrecy in concrete cases of PPPs, questioning whether arguments about the necessity of secrecy are genuine. Interviewees suggest a range of reasons why government might keep secrets in its own interest. Often, this is connected to the suspicion that PPPs are not as efficient as promised. Opposition actors fear that government may use secrecy to hide that fact. For example, they suspect that PPPs are a tool for circumventing the national debt brake that limits annual new indebtedness of the state. By stretching the costs over its life cycle a project may be realised even if it could not be done through conventional procurement given the debt brake (e.g. MP 8: 6). Thus, some see it as 'hidden borrowing' (Berlin Senator Wolf, LINKE, 2011; MP Groß, SPD, 2012) and compare PPPs to bank credit (StaffPPP 2: 24). PPPs are buying time and allowing for paying the costs by instalments (MP 7: 14, 22). As there is pressure to deliver infrastructure, governments may opt for 'hiding' the costs in ways compatible with the debt brake.[101] Another suspected source of inefficiency in PPPs is corruption, giving

100 The Federal Court of Auditors (*Bundesrechnungshof*) is an independent body that is provided for in the German constitution (*Grundgesetz*). Its members are granted judicial independence. It audits the Federal budget and advises parliament, government and the Federal Council (*Bundesrat*) (see BRHG § 1).

101 In principle, this is precluded, as a ministry interviewee points out: only if a project could also be financed conventionally, can it also be done as a PPP (Min ÖPP 1: 48), although political practice may diverge from these general rules (Min ÖPP 1: 41). The

lucrative long-term contracts to companies because of personal networks and relationships (as recounted by ExPPP 1: 48).[102] Alternatively, strong MPs may promote PPPs as constituency gifts (ExPPP 1: 36, MP 8: 12). These are fears found predominantly in opposition parties, who worry that decisions they cannot oversee are taken for self-serving reasons. They are the foundation of demands for meticulous parliamentary scrutiny. While actors may accept secrecy at an abstract level, they can still question whether its practice is justified and therefore demand oversight.

This can be illustrated with the example of the German truck toll. After the toll's problem-ridden introduction, there was strong criticism by the opposition parties at the time, the Christian Democrats (CDU/CSU) and the liberals (FDP). While both are generally responsive to claims for the protection of trade and business secrets, considering them an important right for economic activity, they questioned whether there actually were private secrets worthy of protection in the concrete case. Instead, they claimed that the government was using the reference to trade and business secrets to hide their own incompetence in negotiating contracts in the public interest:

> We also had to listen to what you said here on the basic toll agreement: the agreement contained sensitive company data that could not be published for reasons of tax secrecy. - It took half a year for us to receive the basic agreement. The only thing really worth protecting in the treaty was the Federal Government's terribly poor negotiation of the liability regulations (MP Friedrich, FDP, 2004).

This criticism concerned both the secret contract and a court of auditors' report that was classified as well. The Christian Democrat motion on the matter argued that if the government had nothing to hide, they should be interested in publishing the report on the toll (CDU/CSU motion, Drs. 15-4391: 1). If 'their conscience was clear', the government would disclose the report because 'only those who have dirty hands have something to hide' (MP Lippold, CDU/CSU, 2004). They argued it was government incompetence, not private interests that were kept secret (MP Austermann, CDU/CSU, 2004). The truck toll example therefore illustrates that a party may well

assumption that PPPs were precluded if not financeable conventionally somewhat clashes with the initial PPP debates in the 15th legislative period, where several actors pointed at the 'empty treasuries' as a reason for advocating PPPs, thus precisely suggesting that PPP projects should be done where they could not otherwise be realized (e.g. MP Hinsken, CDU/CSU, 2005; MP Krüger-Jacob, Grüne, 2005).

102 The VIFG interviewee argues about the example of the economic feasibility studies that such self-interested action would be precluded: as there are dozens of people (from the federal and states level as well as the VIFG) involved in preparing these studies, collecting data etc. S/he points out that there are also critics of PPPs there, which means that intentional twisting of the numbers would be exposed instantly (VIFG: 27). These safeguards inherent in the process, though, were not visible to the public, and thus the fears persist.

endorse PPP secrecy in theory and still question executive secrecy in political practice. Secrecy opens up room for concerns about self-interested action which is problematic for all sides concerned: opposition parties mistrust government decisions which they cannot retrace, and government cannot easily dispel these concerns without disclosing the very secret they want to keep. Oversight, the demand for which is raised in this context, is meant to resolve these problems.

Appeals to general claims about the functional necessity and instrumentality of PPP secrecy fail to legitimise it to the extent that such appeals are contested in concrete cases. It has been shown that PPP secrecy derives its legitimacy basically from its utility as an economic instrument, argumentations about PPPs then focusing primarily on the expected gains in efficiency. However, in order to verify the legitimacy of PPP secrecy in concrete cases, a mechanism is required that will ensure that projects are as useful as argued, and that secrecy is as justified as claimed. There has not always been broad and explicit debate about scrutiny mechanisms. Early on, only the liberal FDP suggested that there should be 'an independent supervisory body – for example of a parliamentary nature' that secretly reviews the costs and benefits of suggested contracts (FDP motion Drs. 15/2601: 3).[103] Only over time did more parties join in the discussions about transparency and parliamentary scrutiny, demanding procedural authorization of PPP secrecy.

In political practice, it is often the Federal Court of Auditors (*Bundesrechnungshof)* and not parliament that assumes the role as scrutinizer of PPP secrecy. MPs acknowledge this role of the Federal Court of Auditors, considering its scrutiny of projects a middle ground between no parliamentary oversight at all and direct parliamentary access to secrets (StaffPPP 1: 5). The Court's role, then, is to alert parliament if it finds inconsistencies in its review (e.g. ExPPP 1: 41), thus giving an impetus to parliamentary discussion. While generally MPs acknowledge the role of the Court of Auditors, there are some who propose extending its competence to scrutinizing PPP projects. However, as the Court's constitutional task is overseeing the efficiency and regularity of the Federal budget and its management, it has no competence for discussing political questions such as the need for a certain project. Therefore, some

[103] The Christian Democrats as the other opposition party at the time also mentioned a need for oversight. Their view of the issue, though, was more concerned with ensuring PPP's efficiency, and less on parliamentary oversight as parliament's right. Consequently, they saw it as a government task, as the argumentative connection to the truck toll and the government's supposed failures there shows (e.g. MP Dobrindt, CDU/CSU, 2004). They stated a need for 'controlling' (MP Lippold, CDU/CSU, 2005b), which as an economic concept of steering and planning is different from parliamentary scrutiny.

argue that there needs to be parliamentary scrutiny, too. For example, another suggestion is to task a sub-committee of the budget committee with overseeing PPP secrets (ibid: 13) *in camera*. These suggestions show that political actors do not necessarily commit to one specific setup of oversight. They agree, though, that there should be at least *one* institution that gets access because PPPs involve large sums of taxpayers' money (MP 10_T2: 66). The references to different setups of proxy-monitoring indicate that actors consider it a useful mechanism to ensure secrecy while enabling parliamentary scrutiny.

As with legislation, the legitimising effect of parliamentary scrutiny depends on how it is designed in practice. Parliamentarians are ready to accept executive secrecy if it is subject to effective oversight. The latter is strengthened by four factors, as the analysis of plenary debates and interviews suggests: institutionalised scrutiny rights and competences, information access, processing capacities and effective sanctioning mechanisms.

First of all, in the light of a fragmented system of parliamentary scrutiny, actors see a need for further definition of scrutiny mechanisms. PPPs are a comparatively new type of procurement and provision of public services. Therefore, their oversight is less institutionalised and less centralized in specialist committees than observed in the intelligence agencies case. As discussed above, there is disagreement about the nature of issues concerning PPPs as political or technical ones. This also raises questions of responsibilities for oversight. Defining parliament's oversight tasks – and, thus, also its rights – may be considered one step in this direction. Second, it is a question of assigning these oversight responsibilities to concrete bodies. Given that PPPs fall under different committee jurisdiction, there is no single parliamentary committee exercising parliamentary scrutiny of all PPP projects. For example, transport PPPs (e.g. highways) on the one hand and construction PPPs (e.g. ministry buildings) on the other are dealt with by different committees. This results in fragmentation of the debates, as one interviewee points out (StaffPPP 1: 13). While one committee discusses some of the projects, another discusses others. The VIFG interviewee also addressed this issue and expressed the wish for a more structured debate. S/he pointed out that there need to be institutionalized responsibilities for committees that regularly discuss such projects (VIFG: 35) instead of putting PPPs on top of different committee's general responsibilities in their respective policy field. Therefore, the importance of assigning scrutiny competences is stressed.

Second, access to information is crucial. Several MPs pointed out that they, as the people's representatives, need access to information, even if (or especially if) the latter is not broadly accessible to the public. For secrets vis-à-vis the public to be legitimate, MPs want to be able to access and scrutinize these secrets. Their claim is

founded in a strong conception of parliament as the people's proxy. Thus, while there may be necessary secrets that have to be kept from the broader public, MPs as the public's representatives need and deserve access:

> So I have to trust the MP to do that and say, okay, if he goes to the secret reading room and does not write anything down, does not take any photos, does not make any copies, then he must also get the right report. Like this. And not half blacked out' (VIFG: 25).

In political practice, actors are often discontent with the limited information they get. For example, an interviewee pointed out that MPs may get more access if they request information as a private citizen based on the German freedom of information law (*Informationsfreiheitsgesetz, IFG*) than as a Member of Parliament – although partly blacked out (MP 8: 4). Another interviewee argued that some documents 'circulate freely' within ministries, but once they are handed over to parliament, they are classified. In their view, this means that the information is not inherently sensitive – otherwise it would be classified from the beginning – but that the executive wants to limit parliament's use of it (StaffPPP 1: 9). At least, the executive is more negligent of the need for secrecy when it comes to intra-ministerial practicality. These examples illustrate both parliamentary demand for sufficient information and the fear that the executive will try to keep as much to themselves as they can, not as much as they need. It stresses the importance of information access for the bodies scrutinizing PPP secrecy.

Third, there is a need for processing capacities. Access alone may not be enough if the resources for understanding and processing large amounts of complicated information are lacking. As one interviewee pointed out, there is a 'difference between data and information' (StaffPPP 1: 9): a large number of files may not help understand the issues at stake. Complexity is perceived as a second layer to penetrate once secrecy has been surmounted (StaffPPP 2: 36). Furthermore, complexity may be used as an instrument for effectively hiding information without resorting to formal classification. Tables being hard to understand or in formats not usable for data analysis and designed a little differently each time to disable comparison over time (StaffPPP 1) in practice conceal information without formal secrecy. Given the complexity of the issues at hand, processing capacities in the form of personnel and expertise are crucial. Expertise also includes knowing how to access information informally, through networks and investigative research, which depends heavily on MPs' skills (MP 8: 18). Also, expertise and networks are built up over time. The hurdles to understanding PPPs, one interviewee stresses, are high, and with changing membership in the German Bundestag, such expertise gets lost. New people then need time to become acquainted with the topic (StaffPPP 3: 85). Also, the debate about expertise and processing capacities underlines the first condition discussed here: the need for

institutionalisation of scrutiny. If oversight tasks are ascribed to certain committees, this allows MPs to develop expertise within these committees.

The fourth and final factor that is important for parliamentary scrutiny is the existence of effective sanctioning mechanisms. It is considered crucial in order to ensure that parliament has a lever to exact penalties if it finds that the executive has kept illegitimate secrets or kept secrets illegitimately. If parliamentary scrutiny is supposed to confer legitimacy on PPP secrecy, it is important that legal rules governing the use of PPP secrecy are coupled with mechanisms that sanction their violations. Only if one can trust that wrongdoing will not only be discovered but also punished can parliamentary scrutiny procedurally ensure legitimation. Political debates on sanctioning secret wrongdoing (and wrongful secrecy) suggest further mechanisms for parliament to hold the executive accountable that do not depend on publicity. For example, parliament can use its power of the purse for demanding information or as a sanctioning mechanism, refusing funds if they are discontent (see StaffPPP 1: 9, ExPPP 1: 17, 19, VIFG: 29). Examples from political practice illustrate that the budget committee takes decisions that regulate on a very low, but effective level (not through legislation) what kind of information they require from government, although such decisions are not systematically documented for later MPs to find and use (ibid: 5). For example, the committee has installed new reporting duties for government that are not legally defined. Nevertheless, such demands by the committee can become a 'real hurdle' for government (ibid: 7).[104] Another sanctioning mechanism suggested is the court of auditors' reports. As they provide an (*ex post*) evaluation, they may function as restraints for coming projects. However, that requires the executive to also accept the reports' findings, as one MP interviewee critically adds (MP 10_T2: 4).

Summing up, the debates show that parliamentarians see a need for parliamentary scrutiny of PPPs and PPP secrecy. In order to evaluate the legitimacy of a PPP project as being in the state's interest, secrecy, in the actors' view, especially needs to be monitored and enclosed. As with the secrecy of calculations in the decision-making process about secrecy, the secrecy of contracts with private partners, and the secrecy of evaluations impede public debate about a PPP's costs and benefits, and need to be complemented with scrutiny mechanisms. Proxy-monitoring, either by parliamentary committees such as the budget committee or a specialist sub-committee, or

[104] Even if such decisions have binding effects, they are often not formalized in the federal budget code, as the interviewee illustrates at the example of one earlier committee decision that has become institutionalised informally. As it is 'applied state practice", there is no need to formalise it in the Federal Budget Code (StaffPPP 1: 40).

by the court of auditors that reviews on behalf of parliament are discussed as solutions for this problem. Also, several factors render scrutiny effective, which in turn is a foundation for the acceptance of executive secrecy. These include resources such as institutional rights, information access and processing capacities, and, finally, sanctioning mechanisms for penalising wrongdoing.

4.3 Summary

This chapter has analysed the parliamentary debates about Public-Private Partnership secrecy in the German Bundestag. It discussed the two dimensions of legitimation of PPP secrecy: substantive and procedural legitimation. Based on the discussion of substantive justifications for secrecy and the identification of conflicts over their scope and binding force, the chapter demonstrated that substantive rationales do not suffice to effectively legitimise PPP secrecy. The second part of the chapter therefore discussed whether and how procedural mechanisms may fill this gap.

Substantive legitimation of secrecy rests on two main rationales that are grounded in the two partners' interests, as well as a third institutional rationale. First, there are private partners' trade and business secrets that are derived from fundamental rights and must be respected and guarded by the state. This is a classic justification that is based on third-party interests as typified in Chapter 2. Second, there are the state's fiscal interests that justify a call for secrecy: in order to keep private companies from taking advantage of the state, it needs to keep its internal calculations as well as companies' bids secret. Otherwise, private companies could adapt their calculations and bids to the state's detriment. This is an example of a justification for secrecy that is based on concern for the quality of a policy outcome. A third, institutional rationale for secrecy is the executive's deliberation, the *Kernbereich exekutiver Eigenverantwortung*. This is an example of a secrecy justification with regard to the quality of the political process. While the executive does refer to it for justifying secrets in political practice, *Kernbereich* is less important when parliament discusses general rules on how to deal with PPP secrecy.

Private partner secrecy has proven to be contentious. Public, or at least parliamentary interests in transparency and disclosure must take precedence over private secrets, one side argues. Since they enter PPP contracts voluntarily, private partners should be subordinated to the state's rules despite their right to trade and business secrets. The other side holds that the private partners' right to trade and business secrets is a fundamental right and also one of the reasons that this type of procurement

produces gains in efficiency. They caution against obliging private partners to disclose their secrets. The fiscal interest rationale is less thematized and debated.

Disagreement about PPP secrecy runs along two conflict lines: first, there are conflicts that are based on party ideology and, i.a., concern the question whether PPPs as such are desirable instruments of public procurement. Whether secrecy is legitimate or not then depends on whether PPPs are considered legitimate. Second, there are conflicts along a government-opposition divide, especially when it comes to the assessment of concrete PPP projects. Here, it is clearly visible that parties stress their role as governing majority or opposition. Even parties that endorse the secrecy rationales discussed above may question, when in opposition, whether such rationales are legitimately invoked when it comes to concrete PPP projects.

These conflicts have only partially been enclosed procedurally. Legislation on PPPs has been limited and does not include specific rules on secrecy and disclosure. Decisions about PPPs are mainly taken on a case-by-case basis. Parliamentary decision-making, some argue, could be a source of legitimation for projects, if parliament would set general rules for PPPs or be more included in the decision-making about PPP projects. So far, though, it has not been relevant for PPPs in practice. Therefore, parliamentary scrutiny is the main procedure legitimising PPP secrecy.

The empirical material collected in the context of PPPs shows a demand for more regulation and provisions on parliamentary scrutiny in the first place. Defining a framework, but also the respective responsibilities and competences of executive and parliament is a broadly shared desideratum. Additionally, the analysis highlighted that there are factors that may enhance the legitimising effect of procedures related to legislation and parliamentary oversight. One of these is inclusiveness, meaning a process that enables opposition parties to publicly state their alternative views and discuss the issues at hand publicly. For parliamentary scrutiny, several types of resources were identified as potentially improving factors, including access to and usability of information and sanctioning mechanisms.

5 Legitimising Executive Secrecy from a Comparative Perspective: Patterns and Limits

Why do parliaments agree to executive secrecy, given their dependence on access to information to fulfil their roles as legislators and scrutinizers of the government? This question was discussed for two distinct case studies: intelligence agencies and public-private partnerships. The two examples represent different manifestations of statehood: while intelligence agencies represent a traditional domain of a state's sovereignty, being in charge of ensuring the state's security, PPPs represent a new mode of governance where the state cooperates with private partners in providing public services such as infrastructure. Comparing these two very different cases laid the ground for identifying general patterns of reconciling secrecy with a democratic framework from the perspective of Members of Parliament. This chapter describes the common characteristics and peculiarities of legitimising secrecy in the two cases and discusses the limits of legitimate executive secrecy.

The cases share three common features: (1) the idea that some secrets may be necessary, (2) disagreement about the scope of the executive secrecy that is necessary and (3) the recognition that the democratic ideals of openness and public debate require parliamentary scrutiny of governmental secrecy and its legal definition. Additionally, MPs recognize inherent limits to the legitimation of secrecy. Thus, while striving to enclose secrecy democratically, actors were aware of the constraints of this endeavour.

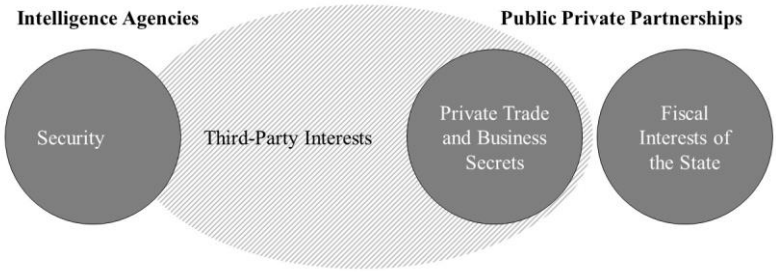
5.1 Comparing Substantive Legitimation of Executive Secrecy

Substantive rationales for executive secrecy rely on the idea that a certain piece of information deserves secrecy due to its sensitive content. Secrecy thus is seen as instrumental or necessary for achieving a certain goal. In the following, the respective dominant arguments identified in the plenary debates and interviews are compared and discussed for the two cases (5.1.1). Furthermore, it is shown that actors disagree on the substantive justifications for secrecy in both cases, and the sources of dissent are systematized (5.1.2).

5.1.1 General Patterns

The dominant substantive justification of secrecy in the intelligence agencies case was security. MPs accept secrecy when they believe that it is necessary to ensure security, both of the state and its citizens. The PPP case was characterized by two distinct substantive rationales. Members of Parliament wanted to protect private partners' trade and business secrets on the one hand, and the state's fiscal interests on the other hand. In this, the two different rationales are representative of the different structure of the PPP case: since there are two parties involved – the state and private business – there are also two interests in secrecy. Figure 1 gives an overview of both case-specific substantive rationales and commonalities.

Figure 1: Dominant Substantive Justifications for Secrecy



Private trade and business secrets are entirely third-party interests, but the security rationale is not exhausted in third-party interests. While there are some security-related secrets that are additionally justified with regard to third parties, others are not and remain in the state's own sphere.

Actors argue about executive secrecy in similar ways across the two policy areas. First of all, in both cases they often present secrecy as particularly urgent, as a course of action that leaves no room for disagreement. In the intelligence agencies, the problem at hand is terrorism and new threats to security, and in the PPP case actors state a crisis of the public sector, of public budgets and the state's capacities to provide public services. Framing the situation as one of crisis entails a special call for action (see also Riese 2021 on reason of state logics). Pointing to the necessity of secrecy is part of its justification: secrecy can only be legitimate if there is no alternative for achieving a goal. If there was a democratically more acceptable way of achieving it than resorting to secrecy, secrecy would be hard to justify.

Actors in both cases argue that secrecy serves the common good. In the intelligence agencies case, the common good is fleshed out in terms of the persistence of

the state and, to some extent, individual citizens' security. In the PPP case, the common good is addressed in terms of an expected increase in efficiency in the provision of public goods and as a solution to the problem of tight budgets.

In addition to these case-specific rationales, there is also one common substantive justification for secrecy that actors refer to in both cases: the protection of third-party interests (see Figure 1). In the intelligence agencies case, third-party interests come into play through the principle of originator control requiring countries to respect and keep each other's secrets. MPs and executive actors argue that cooperation is indispensable in the light of transnational terroristic threats, and therefore partners' intelligence secrets must be secured. They derive the need for secrecy from the main rationale of providing security. Nevertheless, third-party rights constitute a distinct argument. It is no longer about a need for secrecy inherent in the information itself, but about the acceptance of partners' classification – even if that may diverge from German rules. In the PPP case, too, most parties showed a concern for third party rights. Here, they take the form of private companies' interests in secrecy when entering a PPP contract. The sensitivity of information, not for the state, but for the private partner then is the justification of secrecy. It is not the state itself whose interests are protected by secrecy. Rooted in the constitutional rights of private partners, there is nevertheless an indirect connection with state interests as the protection of fundamental rights is a core element of the democratic setup. This shows that the dominant substantive rationales in the two cases are rooted in concerns for the quality of the outcome (security and fiscal interest) and concerns for third-party interests (originator control and private partners' trade and business secrets) (see chapter 2.2).

The third type of substantive rationales identified in both case studies was the concept of executive responsibility or the so-called *Kernbereich exekutiver Eigenverantwortung*. This focuses on the secrecy of the decision-making *process* rather than on withholding of the sensitive content of political decisions. It differs from the other substantive justifications of secrecy as it is not based on the idea that information is inherently sensitive, but on the concession that the government needs to be able to deliberate freely in order to then be held accountable for the ensuing decisions. The need for secrecy here is based on information's institutional origin. Therefore, it is an example of secrecy that is justified with regard to the quality of the political process, a process based on concepts of separation of powers. In both case-studies, actors only rarely referred to *Kernbereich* for justifying executive secrecy. When discussing the general frameworks of secrecy and disclosure, they rather focus on the quality of the outcome and concerns for third-party interests. The executive, by contrast, often invokes *Kernbereich* when they refuse to answer minor inquiries (*kleine Anfragen*) (e.g. MP 2: 9-11) or deny access to documents. These references

by government actors are regularly questioned by members of parliament. Therefore, conflicts about *Kernbereich* are more frequent in political practice than in debates about regulating secrecy.

Summing up, the purpose of secrecy as argued by the actors is not the same across the two cases. Nevertheless, the rationalisations of executive secrecy share a number of common features. First of all, secrecy is often presented as a necessary instrument to achieve certain political goals. Furthermore, in both cases we find an appeal to third-party interests, as well as a concern for the so-called executive's *Kernbereich* that is explicitly *not* concerned with the sensitivity of concrete information but with separation of powers.

5.1.2 Conflict Lines: Partisan and Institutional Roles

Even though political actors present secrecy as necessary, they strongly disagree on how much secrecy is necessary, and for what purpose. Moreover, even if they agree that certain policy goals such as security justify executive secrecy, they disagree about *how much* secrecy is necessary to achieve them. Conflict lines refer either to normative and programmatic differences between political parties or to actors' institutional roles as, for example, parliament, governing majority or opposition. These role conflicts represent divergent expectations about parties' and individual MPs' behaviour. Which role conflict is dominant in a debate differs case by case, and often, different, sometimes conflicting roles overlap and interact with each other.

Partisan Conflicts

The case studies reveal that parties' disagreement about the legitimate scope of executive secrecy reflects their diverging ideas about the state's role.[105] In the intelligence agencies case, the key issue are the agencies' competences for secret action: to what extent can they encroach on basic rights? In the PPP case, conflicts about secrecy often reflected general disagreement on the responsibility of the state in providing public services: to what extent can – and should – such tasks be transferred to private partners and how? Market- and state-oriented parties disagree about efficiency and quality of services provided in either fashion. Positions on secrecy then are derivative of the more fundamental positions on a PPP's value or demerit: if PPPs are considered a worthwhile economic instrument, the ensuing needs for secrecy are accepted.

[105] Variation does not just exist on the side of parliament. There are also differences between ministries, but also within ministries between generations and their respective socialisation (Min ÖPP 2: 11, see also Siefken's findings, 2018: 414).

If they are criticised as problematic, secrecy consequently is, too. This brings the instrumental quality of secrecy to the fore: actors consider it an instrument, not a goal in itself.

Positions on secrecy in the two cases are connected. Generally speaking, parties who argue in favour of a need for secrecy in one policy domain tend to do so in the other as well. Concerning intelligence secrecy, the LINKE, Grüne and FDP are rather criticial of executive secrecy. They insist on individual freedom rights as limiting the scope of competences for secret action of the intelligence agencies. SPD and CDU/CSU, on the other hand, focus more on the need for security justifying intelligence secrecy. The differences are rooted in disagreement about whether it is the state's dominant task to ensure individual freedom, or whether it is charged with providing security – and how the two relate to each other.

The PPP case shows a similar distribution of party-political positions on secrecy. Again, the Christian and Social Democrat Parties support executive secrecy when it serves to protect private partners' trade and business secrets and the expected efficiency gains. The position of the liberal FDP is ambiguous: on the one hand, given their economic liberalism, they stress the importance of private rights to trade and business secrets. At the same time, though, they have been the first to address the issue of parliamentary scrutiny of secrecy emphatically, even at times when the other parties focused euphorically on the expected gains for the state. The Green Party has become more critical of PPP secrecy despite their initial support for PPPs. And the left-wing LINKE with their general rejection of PPPs in favour of re-municipalisation consequently reject PPP secrecy as well. The conflict about PPP secrecy can be traced back to disagreement about the role of the state.

However, these party positions are far from fixed. Especially in the PPP case, party positions changed significantly over time (see Table 6, p. 88): awareness of the topic of secrecy was raised across the whole party spectrum, parties becoming more critical of PPPs (and the ensuing secrecy) over time. This was interpreted as policy-learning: as parties gained experience with the new procurement tool, they learned from problems arising in political practice and drew conclusions for their political demands and positions. In addition, as illustrated by the case of the FDP positions on PPP secrecy, there may be different aspects of secrecy that are assessed differently depending on the context. And some parties more than others, for example the SPD, internally disagree about the position they want to take on PPPs and PPP secrecy.

Nevertheless, comparing the positions on executive secrecy in the two cases shows that the parties under review are in general relatively consistent in demanding more or less executive secrecy. For example, the left-wing LINKE is very sceptical in both fields whether secrecy is compatible with democracy at all and are negative

about both intelligence agencies and public-private partnerships. The Christian Democrats, on the other side, in both cases stressed the instrumental value of secrecy for achieving policy outcomes that are in the common interest (security or efficient procurement). The other parties can be placed in between these two poles on an axis of more or less executive secrecy.

Positions on secrecy follow these lines: stressing individual liberties lays the ground for questioning state secrecy, while a more security-oriented position suggests that secrecy may be a necessary means for achieving security. Similarly, depending on whether political parties take a more economically liberal and free-market oriented approach or a more state-centred one, their evaluations of PPP secrecy differ: if parties are more state-centred, they are critical of private partners' inclusion in the provision of public services and thus dismissive of secrecy as well. And if they position themselves on the market side, they also stress private partners' rights to secrecy.[106]

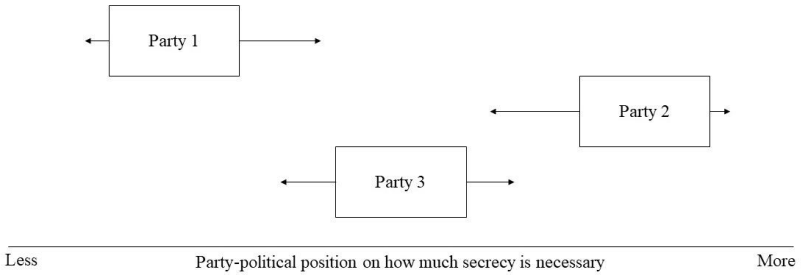
Institutional Roles

While parties' ideological differences can explain much of the contention about secrecy and its adequate scope, these conflicts are moderated by institutional roles. The same parties argue differently when belonging to the government majority or to the opposition. Regularly, it is opposition parties who voice concerns about secrecy, while governing parties defend secrecy as a necessary means for attaining certain goals. Opposition parties often demand strong opposition rights for accessing and overseeing executive secrecy and question whether secrecy truly is necessary. Interviewees stress that this was 'normal political play' (StaffIA 1: 12) and take the different roles of governing majorities and opposition to be in 'the nature of democracy' (MP 4: 13). To a large extent, it is accepted as a parliamentary reality. Still, some voice their concerns about this 'division of labour', arguing that the parliamentary majority's uncritical stance towards government is a problem (e.g. MP 12: 23). This conflict line between governing majority and opposition often does not directly concern rationales for secrecy. Instead, disagreement often arises concerning concrete executive practices of secret-keeping. Opposition parties doubt the legitimacy of executive claims for secrecy and their references to the agreed-upon rationales for secrecy.

106 The FDP's economic liberalism is also a source, as has been shown, of scepticism about PPPs. They fear that the size of many PPP projects can distort the market since small and medium-sized enterprises are unable to manage such big projects and are therefore excluded from bidding for them. Therefore, while the FDP clearly is economically liberal, stressing the importance of a free market, they also demand transparency, also for the sake of a fair market.

Which role in parliament a party assumes during a legislative period, being in government or opposition, influences their positions on secrecy. Parliamentary institutional roles shift parties' normative and programmatic positions, as Figure 2 illustrates. Being in opposition shifts a party's perspective on secrecy toward less executive secrecy, being in the governing majority tilts it toward more executive secrecy. This effect is presumably less pronounced if the party's programmatic position on secrecy is already in line with the role-specific perspective on secrecy: a party that defends secrecy to a larger extent will likely change its position more when in opposition than in government, and a party critical of secrecy might not change its position much when in opposition and more so when in government.

Figure 2: Roles Shift Programmatic Positions



Being in opposition shifts a party's perspective to the left of the graphic, being the governing majority tilts it to the right.

Being in government makes parties less vocal about secrecy than when they are in opposition. This is not surprising: first of all, governing majority MPs may have more informal access to secret information than opposition party MPs do (e.g. MP 13: 20, MP 6: 4, ExPPP 1: 19, ExPPP 3: 23). Thus, they perceive less need to access executive secrets. Also, the majority in parliament tends to support its executive, including their claims to secrecy. Therefore, they are more hesitant to criticise executive secrecy, let alone in public. While the government-opposition divide was important for legislation, too, it is particularly important where concrete demands for information access are negotiated in political practice.

While the main institutional conflict line runs between governing majority and opposition, there still are instances of a conflict between parliament and the executive as described by classic notions of the separation of powers. Especially in the in-

telligence agencies case there was cooperation between political parties within parliament and in explicit opposition to government when it came to institutionalising parliamentary scrutiny mechanisms. Political actors, though, were well aware that this type of cross-bench cooperation was unusual (e.g. MP Stadler, FDP, 2009b).[107] Most likely, this special cooperation can be explained by secrecy's saliency in the field of intelligence gathering: as agencies' competences often touch upon individual rights and freedoms, these are seen as exceptionally sensitive and in need of oversight. The perceived importance of enclosing intelligence secrecy therefore enables overcoming the classic opposition-majority divide.[108] This was also mentioned by interviewees when asked to compare the two cases: intelligence agency secrecy is seen as a much more pressing issue, also in the public perception. In the PPP case, by contrast, the complexity and technicality of the matters at hand made public interest and pressure more complicated, interviewees argued. Conflict about the legitimate scope of secrecy largely remains organised along partisan lines when it comes to defining general rules on PPPs and PPP secrecy without any significant inner-parliamentary cooperation.

These instances show that the parliamentary logic of government vs. opposition has not fully replaced the conflict line between parliament and government, although it is in many cases the dominant institutional conflict line. While most parliamentary decisions are taken by the government majority against the opposition parties, there remain issues that are perceived as inherently parliamentary ones. Here,

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107 Information access, though, seems to be a topic that more often evokes parliamentary cooperation: the so-called *Informationsfreiheitsgesetz*, the German federal freedom of information law, was introduced by a large parliamentary majority, too. The draft was not, as usual, prepared by the ministerial bureaucracy (see MP Philipp, CDU/CSU, 2004). One MP stated that this was in the nature of the issue at hand: ministries and agencies were the 'natural enemies' of transparency and thus opposed the draft (MP Stadler, FDP, 2005).

108 In addition to these formal institutional roles of government and opposition, there is a peculiarity of the Social Democrats' and Christian Democrats' opposition behaviour. In the intelligence agencies case, both big so-called 'people's parties' supported government drafts regarding the increase in the competences of intelligence agencies while being in opposition. This is representative of the two parties' explicit self-view as being responsible, state parties. They often argue that they were doing what is necessary or in the interest of the common good. In the PPP case, there was at least verbal support for changing the legal framework in favour of PPPs as a necessary complement of classic procurement in order to provide public services (although this did not manifest in votes in favour but just abstentions). Actors actively portray their government-supportive behaviour as statesmanlike and non-ideological in order to give particular emphasis to one's argument. Since opposition parties do not often support government proposals even if they are programmatically close to their own in order to distance themselves from the government majority, explicit opposition support as a form of 'state' behaviour remains noteworthy.

government and opposition roles in parliament can recede behind a shared interest in overseeing the executive.

5.1.3 Summary: Missing Agreement on Substantive Legitimation

As shown, focusing on secrecy's expediency for attaining a certain goal is insufficient for the effective legitimation of executive secrecy. While such substantive justifications are central in actors' accounts of secrecy, political actors disagree both to what extent secrecy actually is necessary for achieving a goal, and whether that goal is worth it.

Table 7: Substantive Legitimation Arguments Compared

	Intelligence Agencies	**Public-Private Partnerships**
Dominant Substantive Rationales	Security International Cooperation and Originator Control (Third Party Interests serving the provision of security)	Trade and Business Secrets (Third Party Interests) Fiscal Interests of the State
Conflict Lines	Partisan Opposition vs. Government Majority Parliament vs. Government	Partisan Opposition vs. Government Majority

Two main political conflicts about secrecy are summarized in Table 7. There are, on the one hand, party-programmatic differences and on the other hand, differences arising from institutional roles. Depending on these institutional roles, secrecy is considered urgently needed (government) or potentially problematic (opposition). Institutional roles therefore moderate parties' ideological positions, shifting them towards more or less secrecy.

5.2 A Matter of Democratic Practice – Procedural Legitimation of Executive Secrecy

Two forms of procedural legitimation were identified: legislation and parliamentary scrutiny. Legislation (and parliamentary decision-making in general) is a mechanism that produces a collectively binding decision, not because parliament knows better, but because it decides according to democratic procedure. While the literature (see chapter 2) has dominantly focused on the legitimation of secrecy through parliamentary deliberation and legislation as a source of democratically taking generalised decisions about the legitimate scope of secrecy, the empirical analysis has stressed that parliamentary scrutiny is an equally important mechanism of procedural legitimation for political actors. In a way, the two are sides of the same coin: legislation alone fails to legitimise secrecy lastingly if it is not complemented with a mechanism of ensuring that actors stick to the law. And parliamentary scrutiny depends on strong, legally defined oversight rights in the light of executive secrecy.

Nevertheless, the two can be considered distinct mechanisms of procedural legitimation as they focus on two different phases in political practice. Legislation and parliamentary decision-making define *ex ante* what can be secret, how it is to be overseen et cetera. Parliamentary scrutiny, on the other hand, works *ex post* and either checks whether the rules set by parliament are followed, or provides a mechanism for legitimation for those cases that have not been covered by legislation. In the following, the findings from both case studies will be discussed comparatively.

5.2.1 Legislation: Making Rules on Secrecy and Secret Action

The chance for parliamentary actors to address and regulate secrecy depends on how it is covered by legislation. If there is little or no legislation on secrecy, then there is little or no legitimation of secrecy through procedural norms.

In the intelligence agencies case, legislation included defining agencies' competences for secret action, as well as mechanisms of scrutiny. The PPP case was very different from this: the only relevant legislative process in the period under investigation did not cover secrecy beyond some quick references to a need for transparency and the protection of trade and business secrets as well as the state's fiscal interests. Questions of transparency and secrecy prominently featured only in later plenary debates. The debates were based on parties' motions that suggested cornerstones for future dealings with PPP projects, but no legislation. At first sight, it may seem that the constitutional justification of trade and business secrets was providing PPP secrecy with an alternative source of legitimacy. By being derived from fundamental

rights in the *Grundgesetz*, it could be argued that they enjoy legitimacy without legislation and parliamentary debate, simply based on their constitutional nature. However, the debates have shown that this does not preclude political disagreement over how much of PPP contracts can be kept secret with reference to trade and business secrets.

The different level of legislative activity and legislative legitimation can be explained by two factors. A first factor is the general level of institutionalisation. Intelligence agencies' regulation and legal definition of oversight mechanisms have evolved over decades. Starting with no parliamentary scrutiny at all through informal forms of scrutiny (informing, for example, parliamentary party group leaders), it took decades until scrutiny rights were formally institutionalized through legislation. And still, there is continuing debate about the imperfections of intelligence legislation as well as about improving it. By comparison, PPPs are a more recent phenomenon that only gained momentum in the 2000s. A second factor lies in the structure of the two policy areas. While intelligence agencies are formal and permanent organisations, PPPs are project-based and limited in time. Given the case-specific setup of PPPs, actors argue it simply may not be possible to set rules that fit all cases.

Despite these differences in concrete legislative practice, the debates in both cases allowed to identify factors that, in the eyes of MPs, should be present if legislation were to confer legitimacy on executive secrecy. Often, these are inferred from actors' criticism: what they describe as inadequate in practice allows for a deduction of how it *should* work. In criticising legislative practice, actors acknowledge that legislation is a source of legitimation. They demand clear rules on what information can be secret, and what can be done secretly. And they tend to be more accepting of such rules if they consider the decision-making process adequate. Correspondingly, in both case studies, the quality of parliamentary procedure and decision-making was a central issue. Parliamentary decisions on secrecy are not considered to be legitimising per se, but only if they are taken in an inclusive and fair way. Opposition actors demand the room and time to present their views, alternatives and criticisms of the government's suggestions. Often, this is not a question of formal opposition rights, but rather of 'good parliamentary practice'. This matches the idea of second-order publicity as discussed in chapter 2. Actors share the underlying idea of public deliberation on secrecy: decisions about when to allow for secrecy must be taken in an open and democratic process in order to confer legitimacy on simple, first-order secrecy. Opposition actors are certainly aware that they will usually not gain a majority in a legislative vote. Their demand of a fair procedure thus is not about them winning the vote, but about the democratic ideal of deliberation. Whether this criticism is genu-

ine or strategic – opposition actors may resort to procedural criticism precisely because they cannot win the vote – does not change the assessment of legislation as a central mode of secrecy legitimation. In their criticism of existing processes, actors emphasise the crucial role of legislative procedural legitimation irrespective of their motivations to do so.

5.2.2 Parliamentary Scrutiny: Detecting Transgressions

Parliamentary scrutiny is a second crucial source of procedural legitimation. Actors stress its importance, arguing that the existence of oversight mechanisms and their meticulous use provides legitimacy in exactly those areas where there is, or must be, secrecy.

In the following, the practice of parliamentary scrutiny of both cases will be compared. It is shown that parliamentary scrutiny plays two distinct roles: on the one hand, it serves as a mechanism for ensuring that executive actors adhere to the rules defined legislatively. On the other hand, it oversees executive practices in general, and thus also includes what has not explicitly been regulated or foreseen by legislators.

The setup and practice of parliamentary scrutiny in the two analysed cases varied (see Table 8 below; for further information see Annex 4). As with legislation (and because of it), the intelligence agencies case shows a much higher level of institutionalisation of oversight mechanisms. There are permanent committees that scrutinize the intelligence agencies as proxies. By installing proxy committees, the intelligence oversight system is supposed to ensure that secrets are kept while parliamentary scrutiny is guaranteed. This was something that was also stressed by MPs in the plenary debates, especially in discussions about legislation on scrutiny mechanisms and parliamentary rights: as the majority accepts the claim that there are necessary secrets, they seek to establish a system that accommodates these necessities.

Table 8: Bodies of Parliamentary Scrutiny Compared

	Intelligence Agencies	**Public-Private Partnerships**
Parliamentary Scrutiny Bodies	*Parliamentarisches Kontrollgremium* (parliamentary scrutiny of the agencies/government) *G 10 Kommission* (oversight for concrete measures of telecommunication surveillance) *Vertrauensgremium* (subcommittee of the budget committee tasked with deciding about the agencies' budgets in secret) [upon decision and with fixed mandate: committees of inquiry]	Budget committee Policy-specific parliamentary committees (e.g. construction, transportation) Externalised non-parliamentary: *Bundesrechnungshof* (Federal Court of Auditors) [upon decision and with fixed mandate: committees of inquiry]
Type of Body	Specialist Committees (Proxy Monitoring)	Regular Committees + Externalised Proxy Monitoring (Court of Auditors)
Institutionalisation	Medium to high level*	Low level

* There is a range of perspectives on whether intelligence agencies are sufficiently controlled or not. When compared over time, the current level of control is high. However, as some point out, when compared to other policy fields and their level of regulation, e.g. the police and their oversight, intelligence agencies control is still underdeveloped (see MP 6: 6). The finding of a different level of institutionalisation of control also holds if compared to (quantitative) use of different types of scrutiny mechanisms such as different forms of parliamentary questions, committees of inquiry or constitutional court cases (see Annex 4).

The PPP case is very different. Here, there is much less institutionalisation of oversight in the form of specialist bodies. While there are institutions mentioned as overseers, such as the budget committee of the Bundestag or the Federal Court of Auditors, it is less clear who is in charge of the task. Also, these institutions deal with a variety of issues and are not specialists on PPPs only. This is due to the lower level of explicit legislation on scrutiny and information access. One interviewee stressed these differences between the two cases:

> So what's a striking difference is that the whole area of intelligence services is per se secretive or it's clear that a lot of secrecy is involved. That is why the handling of classified information is much more routine, and why the formats are also more established, that is to say the special committees here in Parliament. [...] In the other area, PPPs, it is more diffuse. It depends more on what the specific case is about and who wants to know why (StaffPPP 1: 42).

S/he points out how the PPP case is characterised by less clear responsibilities of scrutiny. Actors suggest different solutions to this problem, e.g. new committees, assigning new tasks to existing committees or strengthening the competences of the Federal Court of Auditors. This indicates that proxy monitoring is a key approach to legitimising executive secrecy through oversight in the PPP case, too, even though it is currently less institutionalised than in the area of intelligence. The idea of installing proxies for overseeing executive secrecy is not limited to the field of intelligence agencies but could be a generalisable parliamentary approach to dealing with secrecy in different kinds of policy fields.

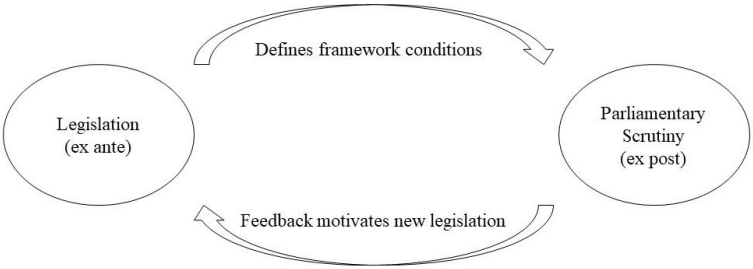
Initially, this study raised the question whether parliamentary scrutiny can be complementary to legislation, by filling legitimising gaps left by sparse or no legislation on an issue. The hypothesis was that scrutiny could provide procedural legitimation where legislation did not. Especially in the PPP case, where legislation played close to no role in legitimising and enclosing executive secrecy, there was a stated gap. The analysis, though, showed that parliamentary scrutiny's strength also depends on its legislative definition: parliamentary scrutiny is stronger where there is more legislation setting rules for secrecy or parliamentary access, institutionalising oversight committees and the like. Thus, while the two can theoretically be thought of as independent mechanisms of procedural legitimation, they empirically are closely linked (see Table 9) in the cases under review. Their respective strength correlates. Legislation creates the opportunity for parliamentary scrutiny.

Table 9: Procedural Legitimation Compared

	Intelligence Agencies	**Public Private Partnerships**
Level of Legislation	Medium	Low
Parliamentary Scrutiny	Institutionalised	Fragmented

But when parliamentary scrutiny *is* defined and institutionalised, it is an important source of legitimacy. This could be seen in the intelligence agencies case, where actors explicitly referred to the legitimising function of parliamentary scrutiny: the oversight committees as parliament's, and the people's proxy for scrutinizing executive secrecy, provide intelligence agencies and their secrecy with legitimation in many political actors' view (an exception is LINKE which considers intelligence secrecy fundamentally undemocratic). In theory, this is also the case for PPPs where actors pointed at the importance of strong parliamentary oversight, too. Due to the fragmented character of parliamentary scrutiny, though, many considered the existing PPP oversight less effective in providing legitimacy.

Figure 3: Two Types of Procedural Legitimation



The two types of procedural legitimation are – despite their interconnections – independent from each other through addressing different issues.

Ideally, thus, legislation ensures the framework conditions for scrutiny, and scrutiny feeds back into improved legislative enclosure of secrecy, as illustrated by Figure 3.

5.3 Why Procedural Legitimation does not Solve all Problems of Executive Secrecy – Structural Limits of Parliamentary Legitimation

The analysis reveals that for legitimising executive secrecy actors consider both substantive and procedural legitimation important, and that the latter can, in general, compensate for disagreement on the matter. Nevertheless, both plenary debates and interviews have raised systematic concerns about the limitations of procedural legitimation.

5.3.1 Secrecy Eludes Effective Enclosure

Secrecy may elude effective legal enclosure for several reasons. First, it can be questioned whether executives can be sufficiently restricted in their resort to secrecy. Setting up rules that are complied with may prove difficult. Second, parliamentary majorities may themselves be reluctant to legally enclose secrecy, thus calling the concept of procedural legitimation in question.

The Problem of Executive Compliance

The idea of legitimation through legislation rests on the assumption that executive secrecy can be enclosed legally so that it is limited to where parliament accepts it. This requires that legislation can adequately anticipate what it seeks to regulate. For example, in order to justify intelligence secrecy, it is necessary to predict security risks that require it. In this case, the question is whether security risks can be correctly predicted. In the case of public-private partnerships, justification requires predicting not only the costs and benefits of projects, but also how these are changed by disclosure or secrecy. In this case, the worry concerns the issue of calculating economic effects in advance, anticipating economic risks.

A second problem arises from executive self-interest. Executives may circumvent legal frameworks. For example, there are practices of informal classification where executives keep information secret outside of formal classification rules. Such unofficial, intra-executive classification (MP 11: 7) calls into question whether secrecy can be legally delimited. Documents thus kept secret completely elude MPs' access. Unofficial classifications are not a German specificity. For the US, Shapiro and Siegel traced this strategy in the unofficial 'Sensitive but Unclassified (SBU)' classification level (Shapiro/ Siegel 2010: 68). A similar observation was made decades earlier by

Halperin and Hoffman (1977: 28) who discussed President Nixon's 'Special National Security' classification. These types of extra-regular classifications illustrate the problem of legislative delimitation particularly vividly and show that it is an inherent crux of all government secrecy, at least potentially.

But even formal and legally binding classification rules leave discretion to their users. Classification decisions are taken by the executive, and '[t]here is no fixed set of criteria based on which one could question [classification decisions]' (StaffIA 1: 24, see also StaffIA 2: 7). Interviewees perceive these decisions to be arbitrary. They argue that documents are often classified that obviously do not deserve to be, for example blank pages or press reports (MP 13: 10). This perception of arbitrariness is further stressed by the observation of changes in classification practice over time. Despite being based on the same rules, the same type of information was classified one year and not classified the next (StaffIA 1: 34). Also, the classification rules may be applied very restrictively (MP 13: 10) and without sufficient case-by-case decisions, classifying whole folders instead of taking the time to assess each document individually (MP 13: 10). Therefore, many are worried that any executive would classify more than was necessary (MP 11: 23). Instead of keeping secrets to serve a policy goal, MPs suspect, government uses secrecy to keep themselves from being criticised (MP 11: 5, MP 2: 35). These concerns question the effectiveness of defining secrecy rules if one cannot expect the executive to be candid about secrecy in practice.[109]

Another example that illustrates the difficulties MPs experience in effectively defining the scope of legitimate secrecy legislatively is their conviction that deciding about the need for secrecy is beyond their competence: while they have access to pieces of information, they lack the 'bigger picture' which emerges only when the pieces are combined and is accessible only to the executive. This reasoning testifies to the so-called 'mosaic theory' of intelligence gathering.[110] The mosaic theory contends

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109 In order to force the executive to provide specific justifications for secrecy as well as for limiting classification, actors for example suggest classifying on the level of paragraphs (as in the UK) rather than of whole documents, as is done in Germany (ExIA 1: 72). This could help avoid over-classification. Another interviewee, though, argued that this was already the case: the *Verschlusssachenanweisung (VSA)* was protecting information, not documents (ExIA 3_1: 36). The reference to the UK illustrates that other countries' best practices are perceived in the German debate and may occasionally serve as examples of alternative designs.

110 The mosaic theory is based on the assumption that even seemingly innocuous information might provide enemies, when combined with other pieces of equally harmless information, with a weapon (see also Gansler/ Lucyshyn 2004: 1). Furthermore, it argues that only executive actors can truly appraise the value of a single piece of information. Judicial deference to executive claims is empirically often justified with the concept (for the US see Fuchs 2006: 135, Pozen 2005, Weaver/ Pallitto 2005/2009: 646). Thus, a need for secrecy may be claimed even in cases where the single document does

that even innocuous information may be worthy of secrecy because combining it with other information may give adversaries an advantage. Thus, one does not just have to appraise the individual pieces, but the whole mosaic of information, the 'bigger picture'. The claim is that only the executive has the proper overview to determine whether a disclosure of any specific information detail risks revealing a broader picture. If this was an adequate description of information's sensitivity, then it would become much more difficult to effectively enclose what to keep secret. The idea of a mosaic of information can also be found in the German debate about secrecy. Executive actors stress the importance of such considerations: in their view, it may not always be visible to others – even for other uninitiated executive employees– what part of a piece of information is sensitive (ExIA 3_1: 32). It follows that sensitivity cannot be assessed by somebody other than the agency (or even the concrete official) filing the information, as the information might prove valuable when connected with other data. Since it is precisely about information that seems not to require secrecy from a layperson's perspective, it eludes both regulation and scrutiny. If one accepts the claim that there may be pieces of information that become sensitive when combined and that, therefore, only the executive can correctly judge their sensitive character, then this means giving up part of the sovereignty of deciding how to justify secrecy.

All these examples may be read as a call for scrutiny mechanisms, and to some extent, powerful scrutiny mechanisms can help attenuate the underlying problems. Nevertheless, they show that there is an inherent limitation of legislation which may never enclose secrecy fully.

Reluctance to Legislate

A second limitation of legislative legitimation of secrecy lies in parliament's reluctance to use its legislative powers. This reluctance is rooted in a conviction that secrecy is beyond legislative regulation, although the reasons for this belief vary. Either, secrecy is considered an obvious necessity, a purely executive responsibility or protected by higher-ranking constitutional law. In the PPP case, there additionally is concern that each PPP project is so individual that general rules are difficult to apply to them.

not in itself qualify for the agreed secrecy grounds: 'The mosaic, not the document, becomes the appropriate unit of risk assessment' (Pozen 2005: 633). This illustrates the difficulties of determining whether secrecy use complies with the rules. On the one hand, the idea of a mosaic may correspond to the spirit of a rule in protecting more complex knowledge that is not in a single document, but scattered across many. On the other hand, though, it can also be seen as an illegitimate stretching of a rule, leading to untraceable and therefore unverifiable classification decisions.

Secrecy is often taken as a given.[111] One of the three drafts on parliamentary oversight for example explains in its introductory section:

> The core objective of this reform is to improve the committee's possibilities for information and action in those areas where this is possible without relativization of the protection of secrecy. The law intends to make the current system of parliamentary scrutiny more effective without causing a fundamental break (Drs. 16-12411).

As a Christian Democrat MP held in the debate about a law on the improvement of parliamentary scrutiny: 'Who strengthens the rights of the competent committee – we want that – has to submit to the rules of the game of the agencies' (MP Uhl, CDU/CSU, 2009b): scrutiny has to be as secret as the agencies themselves. Thus, one can change the legal framework, but not secrecy itself. The current German legal setup is in line with this understanding: classification rules in practice are made by executive order (by the so-called *Verschlusssachenanweisung, VSA*) and then mostly reproduced by parliament (in the *Geheimschutzordnung* of the Bundestag[112]). While 'lawmakers cannot determine that specific information is not sensitive' (ExIA 2: 6), they could nevertheless determine how to deal with sensitive information. Deference to the executive therefore is not without an alternative.

Other secrets are perceived as unchangeable given their roots in constitutional principles. For example, *Kernbereich* of executive responsibility, derived from separation of powers, and private trade and business secrets derived from individual fundamental rights seem to elude legislative enclosure. The constitution simply ranks higher than mere legislation.

Additionally, in the PPP case, there was concern that standardization and general regulation would be impossible given the nature of PPPs. As PPPs are not considered one homogenous type of project, but rather individual cases that each require their own setup and framework, there are inherent limits to generalized regulation. Instead of, for example, standardized contract templates, less-binding tools like handouts and information for decision-makers are advocated (MP Lippold, CDU/CSU,

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111 Also, the executive interviewees were surprised or even irritated by the question about the negotiation of secrecy rules, arguing that there was nothing to negotiate or legislate upon. Since this is something that happened during interviews for both cases, I assume it is a difference in perspective between executive and parliament rather than a case specificity. Due to their – often legal – training and their executive role, executive staff do not think about the rules in terms of how to change them. Nevertheless, one can argue that in the German system, ministries are deeply involved in drafting laws, which could make them more aware of the possibilities of legislative change.

112 The two regulate the classification of documents and how to deal with them. For example, they define the different classification levels (e.g. top secret, secret etc.) and what justifies them (e.g. a danger to the existence of the state for top secret documents).

2005b). While standardization mostly concerns the substantive setup of PPPs – for example, how to calculate or what types of projects to allow for – it could also set rules for what kind of non-disclosure clauses in PPP contracts the state can agree to, thus limiting how much secrecy can be contractually determined.

The Bundestag could be very strong, if it wanted to be (MP 6: 10, ExIA 1: 46[113]), and change the framework for executive secrecy if it wished to do so. However, parliamentary authorization and limitation of executive secrecy requires parliamentary majorities. Government parties have a majority but are often reluctant to legally limit secrecy. Opposition parties may be more inclined to set legal boundaries to secrecy, but they lack the necessary majorities. Thus, there is a tendency in the parliamentary system not to restrict executive powers too much. Despite these inherent limitations, the intelligence agencies case has shown that parliament may overcome the classic government-opposition divide. In this case, government and opposition parties cooperated on legislative drafts because they agreed that secrecy was a parliamentary and not an opposition issue.

5.3.2 Inherent Limits of Effective Scrutiny

Like legislation, parliamentary scrutiny has its limits as a mechanism to legitimise executive secrecy. First, secrecy produces problems of information control that may be limited by setting up the framework adequately, but cannot be eliminated. Second, there are problems of sanctioning wrongdoing if publicity as a sanction is precluded due to classification.

The Problem of Information Control

Parliamentary scrutiny depends on information access: oversight actors can only do their task if they are provided with information. There is a systematic problem, though: executive control of secrets. Those who are being scrutinized are also the ones providing the information. This creates two problems: first, executives can resort to deep secrecy without parliament knowing; second, they can keep illegitimate secrets by incorrectly justifying them with substantive rationales.

These problems arising from executive information control can only be incompletely addressed through parliamentary scrutiny. Overseers are not able to ask for

113 The executive interviewee in addition points out that parliament would also be responsible for assessing the negative effects of mandating disclosure: 'Parliamentarians, if you are dissatisfied, then please change this. But this, of course, has consequences as well. For external relations, the international cooperation of the *Bundesnachrichtendienst* with other intelligence agencies' (ExIA 1: 12).

information unless they have prior knowledge indicating what to ask for (see MP Montag, Grüne, 2009). Interviewees also stressed this problem: 'The whole dilemma becomes clear: Something that I do not know about, I cannot ask tough questions about' (MP 12: 19, see also MP 11: 5). One may travel to the BND headquarters, but without knowledge one would not know what to look for or which files to ask for: 'If I don't know that there *is* an operation, I cannot inquire about it' (MP 11: 23). And without prior knowledge, one can also not enforce access rights, e.g. by suing for the disclosure of files (MP 12: 25) whose existence is unknown. Direct access to electronic databases, as one interviewee suggests with regard to the Dutch oversight system (MP 11: 17), could be helpful in allowing one's own investigations, but still does not solve the problem of knowing where to look. This shows the problem of deep secrecy addressed earlier: if not only the content, but also the existence of a secret is unknown, integration into a democratic setting becomes problematic. Those secrets that scrutiny does not extend to consequently cannot be legitimized through it.

The problem of prior knowledge was especially pronounced in the intelligence agencies case. In the PPP case, a similar issue was discussed under the heading of complexity. Often, parliamentary scrutiny deals with complex issues that require significant expertise, for example for comprehending complicated calculations in economic feasibility studies or contracts that are several thousand pages long (e.g. MP Groß, SPD, 2012).[114] Due to the complexity of the projects and the information about them, it is just as difficult knowing what to ask for, even where there are no formally classified documents. While some executive actors contest the notion that PPPs were exceptionally secretive, arguing that their complexity was mistaken for secrecy (ExPPP 1: 15), they acknowledge PPPs complexity. Also, there is awareness that complexity complicates parliamentary scrutiny (e.g. VIFG, ExPPP 3: 27). Even if there is no secrecy such as intentional keeping of information, it is nevertheless a systematic problem if MPs do not understand what they are supposed to oversee. It results in asymmetries between executive and parliament (StaffPPP 2: 36), but also between executive and powerful private partners who have superior access to expertise and lawyers (e.g. StaffPPP 3: 27).[115] To what extent complexity is assessed as a problem partly depends on actors' ideas about parliament's responsibilities for oversight. If actors are of the opinion that parliament should not go into detail but only scrutinize the very general decisions for or against PPP projects, then they usually do

[114] In the intelligence agencies case, though, there were references to complexity as an obstacle for scrutiny, too. For example, the technical backgrounds of secret surveillance are a complex issue that requires computer knowledge to understand.

[115] The VIFG interviewee therefore pointed out that the VIFG's mission was to provide independent expertise for the public sector, e.g. by creating economic feasibility studies.

not consider complexity an exceptionally important issue. If, on the other hand, they argue for a more thorough and detailed scrutiny, then complexity becomes a much more relevant problem. The same holds for the intelligence agencies case along very similar lines.

In addition to genuine executive control of information, there are also scrutiny problems that stem from third party interests. In the intelligence agencies case, such third-party interests take the form of the principle of originator control. In the PPP case, they manifest as private companies' trade and business secrets. Both are inherent limits of parliamentary scrutiny, although they can to some extent be enclosed by contractually providing for access for parliamentary scrutiny. The underlying systemic problem, however, persists. The principle of originator control that governs international intelligence cooperation constitutes a special challenge for access to information. MPs criticise it as a way to keep information from parliamentary oversight (e.g. MP Nešković, LINKE, 2009b). If originator control was accepted as an unquestionable rationale for secrecy, they fear, this would mean that governments could enter into cooperation just to keep secrets (MP 12: 31, MP 11: 5). The German government must not hide behind foreign interests (MP 13: 22). Similar struggles could be seen in the PPP case concerning private partners' trade and business secrets: the legitimacy of keeping information from parliament with reference to such third-party interests was questioned time and again. In both case studies, there was a pronounced fear that the executive could use references to these rationales for their own benefit. By externalising secrecy's justification, they would be depriving parliament of access.

Another limit for parliamentary scrutiny is executive privilege (*Kernbereich exekutiver Eigenverantwortung)*. While it is a constitutionally founded principle, it is another source of executive control of information, including the potential to keep illegitimate secrets.

All these examples illustrate that executive control of information is an inherent limit for legitimation by way of parliamentary scrutiny. While scrutiny specifically serves the purpose of precluding (or at least detecting and sanctioning) wrongful executive secrecy, it cannot entirely prevent government from doing so.

The Paradox of Publicity as a Sanctioning Power

The above-discussed oppositional concerns that governments may keep secrets illegitimately – not for the commonly-agreed upon goals, but for self-serving reasons – substantiates the need for sanctioning mechanisms. Also, as parliamentary access to

secrets often is of an *ex post* nature,[116] not least because of the *Kernbereich* idea of executive deliberation on pending decisions, it offers little opportunity to take remedial measures if wrongdoing is detected. In both case studies, MPs therefore argued that publicity was their strongest sanctioning power for penalising illegitimate secrecy. MPs consider public debate and decision-making central to this task, even if there are committees working in secret and informal bargaining processes. While most consider proxy-monitoring crucial to keep legitimate secrets, they argue that specifically in those cases where a secret or the practice it covers is illegitimate, they lack the power to sanction this within secret committees. In particular, opposition parties, who in practice consider themselves primarily responsible for oversight of government, depend on the majority for sanctioning government wrongdoing. Publicity in their view is the best sanctioning power they have, but it is in obvious tension with secrecy.

The debates about the truck toll illustrate this. MPs were granted access to information in a secret reading room of the Bundestag (*Geheimschutzstelle*). The oppositional Christian Democrats (CDU/CSU), though, were especially adamant in demanding that information not just be accessible to them, but should also be used publicly (e.g. transport committee report, Drs. 15-4821: 3). Therefore, they suggested publishing documents but blacking out passages where legitimate secrets were concerned (CDU/CSU motion, Drs. 15-4391: 2). Rather than assessing classified documents in secret, MPs often prefer limited, but publicly usable information.[117] The Christian Democrat motion illustrates that actors may set different priorities, either on proxy or public monitoring. To do justice to both approaches, access and usability need not be mutually exclusive: MPs may well get full access in secret *and* be able to use redacted versions for public discussions. In practice, this is often not the case. Access does sometimes preclude publicity. The constraining effects of using

116 As scrutiny, for example in the form of court of auditors' reports, often comes too late to have an influence on a project itself and is not perceived as generalisable feedback but case-specific criticism, scrutiny in the critics' view does not have an impact on PPP use in general. One interviewee for example assumes that there is a systematic bias as the feasibility studies by the executive and the court of auditors' review *ex post* do not match (MP 8: 30). However, since a feedback loop is missing that enforces changes, the reviews do not function as sanctions, as the interviewee's comparison suggests. In the intelligence agencies case, there were similar concerns about the *ex post* nature of scrutiny, wrongdoing only being unearthed after the fact, when it is too late to change wrongful practices.

117 While it was politically contested whether the truck toll report was classified because of legitimate secrets or the government's interest in avoiding blame, the court of auditors, according to the interviewee therefrom, generally tried to produce publishable reports either through blacking out sensitive information or by generalizing findings in a way that does not endanger concrete secrets (BRH: 8).

the reading room were addressed several times in both case studies. Not being able to take notes was one major concern. Even more problematic in MPs' view, though, was the fact that accessing information in the reading room bound them to not speak about the topic anymore in public – even if information was already in the public domain. This was considered a serious impediment to parliamentary work:

> I have to put my identity card down there, I have to sign that I was there, and when I have seen something, I am not allowed to use what I have seen. So, what use is going to the secret service to me then? Then I know something, but I'm not allowed to use it! That's why in all the years I didn't enter the secret reading room. Because I then got the information from elsewhere and then was allowed to use it, which was more important (MP 7: 12).

The possibility of being criminally prosecuted for breaches of secrecy further limited the chances of addressing wrongdoing or errors (StaffPPP 3: 5, see also MP 8: 4).

Addressing the public is seen as the foundation of penalizing wrongdoing or bad decisions. However, publicity only has sanctioning power if there is a public debate that punishes political actors for misbehaviour, which is a factor beyond direct parliamentary influence. Especially in the PPP case, actors were concerned that public interest may be lacking. As one interviewee points out, PPPs are only of interest to the public 'once the scandal has reached a certain minimal size' (StaffPPP 2: 26), which is also due to the complexity of the issues at stake (ibid: 30). This also pertains to mass media as the link between politics and the general public. If journalists lack the expertise for understanding a complex topic, this leads to the government not being punished for keeping information from parliament and not answering their questions (MP 8: 18).

All in all, publicity is considered an important mechanism of sanctioning secret government wrongdoing. However – aside from solutions such as the public statements in the intelligence agencies case or the work of case-related committees of inquiry – there remains a conflict between secrecy requirements and publicity.

5.4 Key Findings on Secrecy and its Legitimation

The comparison of the intelligence agencies and PPP cases has proved fruitful for identifying general features of secrecy and how it is dealt with in a parliamentary democracy, but also for pointing out case specifics. Summing up the findings of the analysis and comparison in this chapter, the following main points contribute to answering the research question why and under what circumstances parliament is ready to allow for executive secrecy.

Substantive rationales are the main reference point for actors' acceptance of executive secrecy. In their view, secrecy may be legitimate where it serves a specific goal. Information should be kept secret if its disclosure could obstruct achieving that goal. In the intelligence agencies case, the overarching goal justifying the use of secrecy was security. In the PPP case, there were two such substantive rationales: on the one hand, actors justify secrecy as a means for protecting fundamental rights. Partners' trade and business secrets require the state to protect and keep such secrets on behalf of private partners. On the other hand, actors justify secrecy with regard to effective procurement – keeping secrets then serves to get the best offers from private contractors.

While the dominant substantive rationales in the two case studies seemed very distinct at first sight, there still were shared features. In both cases, substantive arguments in favour of secrecy are presented as urgent and necessary. Thus, while the idea of instrumentality in itself does not require secrecy to be the *only* possibility to achieve a goal, it is nevertheless often presented as such. Second, in both cases, there were references to (a) third-party interests and (b) to the executive's deliberative secret (*Kernbereich*).

Despite actors' argumentations about secrecy's urgency, the analysis has emphasized that references to instrumentality are highly contentious in political practice. Therefore, they have no force to confer legitimacy on executive secrecy. Disagreement spans all aspects of the substantive arguments about secrecy's instrumental value. It concerns the calculations of secrecy's effects, as all arguments about secrecy's necessity are inherently predictive and, thus, to some extent speculative. How dangerous a secret really is to a cause if disclosed – and whether it actually helps attain a goal – is disputed. Furthermore, there is disagreement concerning the weighing of secrecy's benefits against other, competing values such as freedom or transparency. Thus, the debate is not just about whether secrecy helps attain a goal, but also whether that goal is worth it. The main source of disagreement is differences in the ideological positions of the parties, as well as the different institutional roles they occupy viz. government majority and opposition, and between executive and parliament.

It was shown that procedural legitimation has the potential to fill the gap left by the contestation of substantive legitimation. Democratic procedures allow for defining which substantive justifications of secrecy are considered legitimate, at least by a majority, and likely to be accepted by a minority due to the decision being taken according to democratic procedure. The analysis of the two cases has shown that there are attempts at setting boundaries for secret action and secrecy through legislation as

well as defining oversight mechanisms. While scholarship on the democratic legitimation of secrecy has mainly stressed parliamentary deliberation and legislation as a source of procedural legitimation for secrecy, the analysis conducted in this dissertation has revealed the importance of a second dimension of procedural legitimation: parliamentary scrutiny. Actors explicitly labelled parliamentary scrutiny committees a 'legitimising link' to the people. Scrutiny is seen to confer legitimacy on secrecy by providing a link to parliament as the people's representatives. More specifically, it serves as a safeguard against misuse of secrecy for purposes *not* defined as legitimate justifications for secrecy in a democratic process.

The two mechanisms of procedural legitimation are not independent from one another. Legislation is important for defining scrutiny rights and thus enabling procedural legitimation through scrutiny, as the comparison has shown: while there was more legislation in the intelligence agencies case, there also was a more elaborate system of parliamentary scrutiny. And, ideally, experiences from scrutiny in practice feed back into legislation. Nevertheless, they can and should be considered separate mechanisms of procedural legitimation: legislation sets framework conditions *ex ante*, and usually in a more generalized way, while parliamentary scrutiny works *ex post* and deals with concrete issues, cases and conflicts. The two mechanisms therefore serve to satisfy different demands for legitimation. Legislation and parliamentary debate meet the demand for a general, abstract justification for secrecy. Parliamentary scrutiny, on the other hand, meets the demand for the legitimation of concrete instances of secrecy.

The legitimising effect of both mechanisms depends on different factors. The dominant one is inclusiveness: for legislation, this means that parliamentary processes must ensure sufficient time and opportunity for the opposition to present their alternatives or criticism. Quick procedures lacking expert hearings or amendments on short notice are considered impediments to legislation in providing legitimacy. For parliamentary scrutiny, inclusiveness means that all parliamentary party groups demand participation in proxy monitoring committees. Only representative committees, it is argued, provide legitimacy. Other factors that have an impact on the legitimising force of scrutiny include access to information, processing capacities, and sanctioning powers as prerequisites for strong parliamentary scrutiny. Certainly, the concrete implementation of these conditions may be subject to disagreement as well, disagreement that can be pacified by legislative specification to some extent.

But although legislation and parliamentary scrutiny clearly play an important role in legitimising executive secrecy, especially given the lack of agreed-upon substantive legitimation, they have inherent limits. This chapter has identified system-

atic problems of procedural legitimation that arise from secrecy itself, such as executive information control and problems of sanctioning secret wrongdoing. These may be enclosed by certain institutional setups, but cannot ultimately be dissolved. This shows that there remains a residuum that potentially eludes procedural legitimation. It does not dispense with procedural legitimation, but calls for awareness of the imperfections of secrecy's legitimation in a democratic setting.

Since the end of the period under investigation (1998-2013), both policy fields have seen further public debates as well as legislative changes. In the field of intelligence agencies, for example, scandals put the agencies, their competences and secret work on the political agenda. For one, the extensive world-wide surveillance uncovered by Edward Snowden in 2013 raised debates about German assistance or acquiescence in unlawful surveillance practices. Another debate focused on the failures of the domestic intelligence agencies in preventing attacks, both right-wing (e.g. the series of murders and robberies committed by the so-called National Socialist Underground, a right-wing terrorist group) and Islamist ones (e.g. the attack on the Berlin Christmas Fair in 2016). The government introduced two legislative drafts in 2016, aimed at providing a clear legal basis for foreign surveillance (Drs. 18/9041) and at strengthening parliamentary control over services, i.a. by introducing a permanent representative for the Parliamentary Oversight Panel tasked with supporting the committees' investigations (Drs. 18/9040). The most recent debate as of autumn 2020 concerns the introduction of a new oversight body consisting of judges supposed to oversee the *Bundesnachrichtendienst's* foreign surveillance activities under strict confidentiality.[118] As regards the PPP case study, parliament discussed PPPs in infrastructure culminating in an amendment of the German *Grundgesetz* (the German constitution) in 2017 that forbade PPPs for the entirety of the infrastructure network (draft Drs. 18/11131), but, in the critics' view, leaving it relatively unclear what that meant in practice.

These more recent developments do not – a systematic analysis pending – call into question the findings of this study. Rather, they seem to follow the same logics identified in chapters 3 through 5. This is most obvious concerning the intelligence agencies: the more recent changes, just like earlier legislation, aim at improving parliamentary scrutiny without compromising necessary secrecy. The PPP developments also fit in: the debate about setting boundaries to what kind of projects can be implemented picks up on where the earlier discussions stopped. It connects to the discussions about the role of the state and private companies, but also explicitly

118 The suggested amendment is a reaction to a constitutional court ruling that the current lack of control of foreign reconnaissance is unconstitutional (https://www.tagesschau.de/investigativ/ndr-wdr/bnd-353.html, last accessed 28.09.2020).

touches upon issues of secrecy. Secrecy of contracts was discussed as an important factor for the need to limit the fields of application for PPPs. The most recent debate about a new highway toll (see introduction), too, indicates that disagreement about secrecy of contracts and of the calculations made by the government is a recurring issue.

6 Implications for Further Research and Political Practice

Executive secrecy constitutes both a theoretical and a practical problem for democracy. Democratic decision-making and public debate require access to information. Executive secrecy, it seems, has no place in a democracy. In political practice, though, secrecy remains ubiquitous. Therefore, this dissertation raised the question whether and how secrecy may be reconciled with democracy. More specifically, the investigation asked whether and how secrecy is justified by parliament, which should have a special interest in disclosure due to its functions of legislating, creating publicity or ensuring parliamentary scrutiny of government secrecy. Why, then, do parliamentary actors allow for executive secrecy and what limits do they set?

Based on the empirical findings from and the comparison of the two case studies – intelligence agencies and public-private partnerships – this final chapter sets out to indicate implications arising from this study, both for future research and for political practice.

6.1 Comparative Political Science and Political Sociology as Avenues for Further Research

This study provided a starting point for thinking about secrecy not as a technocratic, necessity-driven decision, but as something inherently political (Costas/ Grey 2016). Theoretical contributions have clearly shown the challenges that secrecy poses to democratic systems and their norms of publicity. However, the findings of this dissertation suggest broadening the ongoing theoretical debates about secrecy. Not only is any necessary secrecy a democratic challenge, but *necessity itself* is contested. Thus, this dissertation provides support for the strand of theorizing secrecy that has pointed out the importance of second-order legitimation of secrecy (e.g. Thompson 1999), discussed here as procedural legitimation. Second-order legitimation of secrecy (legislation and scrutiny) not only serves to resolve the tension between necessary secrecy and democratic publicity but also to settle conflicts about necessity itself. Therefore, it deserves further attention in theoretical debates.

Besides these links to theoretical debates, this dissertation is a starting point for further empirical research. In this section, I lay out a research agenda that takes up its findings as a point of departure.

International Comparison of Secrecy Cultures and Frameworks

In the beginning of this dissertation, it was argued that Germany is an exemplary case for analysing parliamentary debates about secrecy. Because the German Bundestag is a comparatively strong parliament, it was assumed that it would be particularly active in seeking to enclose executive secrecy as compared to a 'weaker' parliament. This assumption deserves testing. A research agenda starting from the explorative findings presented here could and should therefore extend to different countries. Such an international comparison could serve to both substantiate the findings for different contexts, and identify country variables that shape how actors deal with executive secrecy. Thus, a comparison would assess whether the findings can be reproduced in different democratic systems or to what extent they are specific for Germany. In addition to the process- and actor-centred approach of this analysis, legal provisions on secrecy should be compared (as, for example, Hazell/Worthy 2010 have done for Freedom of Information Laws and their practice), as well as parliamentary scrutiny practices across different countries. Thus, the role of both legislation and scrutiny for legitimising executive secrecy procedurally would be assessed for different countries. This could for example show whether the strong focus on proxy monitoring of secrecy is a German specificity (cf. Scheppele 2006). Alternatively, a more quantitative assessment with a larger set of countries and possibly a longer timeframe could provide further insights into the practices of secret-keeping and its enclosure.

As far as the selection of countries for the envisaged comparative study is concerned, it is desirable to investigate countries with different party systems (e.g. with different degrees of fragmentation and polarisation or along a classification of consensual and confrontational parliamentary systems). This would allow to compare the battles about the substantive legitimation of executive secrecy (cf. Hollyer et al. 2011 on the link between electoral competition and transparency). These battles are influenced both by party ideologies and by a country's domestic specificities. For example, different security situations should also shift the conflict lines: a higher exposure to terrorism or involvement in an active (military) conflict could shift the acceptance of intelligence secrecy in favour of more secrecy for the sake of security.[119] Different fiscal conditions may also provide a framework for possible policy and procurement decisions.

Like party systems, the institutional-role conflict line between government and opposition, but also between executive and legislature may be developed to a different degree. For example, there may be differences between countries that are more

[119] Israel is an example of a democratic state whose security situation is distinctly different from European democracies, for example (see for example Magen 2015 on the specific Israeli debate on intelligence secrecy).

experienced with minority governments (like Sweden) and others that are not, at least not on the Federal level (like Germany). In addition to such a comparison within the field of parliamentary democracies, a comparison could also include presidential systems that do not feature the same parliamentary logic where a parliamentary majority backs its government. In presidential systems, parliament usually acts more independently of government, even when party affiliation of parliamentary majority and president align. A comparison could show whether these different setups of democratic political systems have an impact on how questions of executive secrecy are processed, or whether there are general features observable across different systems.

In addition, variation may also be rooted in political culture. In general, the literature identifies different 'types' of political culture when it comes to countries' overall approach to transparency and secrecy. Scholars have pointed out that there are countries with a transparency culture like Sweden, and countries with a secrecy culture like the United Kingdom (e.g. Wegener 2006: 299, Roberts 2006a: 65; see footnote 4 in the introduction). While these are established observations for the general conduct of public administration, a more detailed analysis of explicit executive secrecy that exists across all countries, including those labelled as 'transparency cultures', could add to this body of literature on secrecy and transparency cultures. In other countries, there may be different specific characteristics that shape the political culture of secrecy in similar ways. Also, the general level of juridification, that is the density of legislation and regulation, varies between countries and could account for different levels of legislative enclosure of secrecy.

These different approaches for designing an international comparison each focus on validating the findings of this dissertation for other countries and on identifying factors that can explain variations if such should be observed. But there is another angle of comparison worth exploring, i.e. comparison across a larger number of policy fields.

Comparison Across Multiple Policy Fields

The explorative research design of this dissertation has provided findings for two very different policy fields, intelligence agencies and public-private partnerships, allowing to identify shared characteristics. Further research should systematically test the explorative findings across a larger number of policy fields: can the same patterns of legitimising secrecy be observed across other policy fields? Is the role of substantive justification of secrecy as dominant from the actors' perspective in other cases as it was in the two cases under review here? And are the logics of procedural legitimation – *ex ante* legislation and *ex post* scrutiny – the same?

The two cases investigated here have shown that the procedural frameworks are unevenly developed: while the intelligence agencies case showed more legislative enclosure, occasional parliamentary cooperation on setting rules for parliamentary scrutiny and established scrutiny mechanisms, the PPP case was characterised by less cooperation and legislation and less pronounced and specialised oversight frameworks. Investigating further policy fields could systematically assess how these differences can be explained. Several explanatory factors were developed in this dissertation based on the actors' perceptions. First, the differences between the two policy fields – in the actors' perspectives – and similar differences across other policy fields could be the result of different levels of institutionalisation. In that case, the relative 'age' and juridification of a policy field could explain the extent of secrecy regulation. Second, the differences may be founded on the salience of secrecy in each of the fields: intelligence agency secrecy was described by actors as being much more salient than PPP secrecy, because it was seen as more political and less technical.

Another crucial finding presented in this dissertation was the importance of third-party interests in both cases. This aspect could, too, be checked for other contexts: are there also policy fields where there are no relevant third-party references? Or is every policy field as interconnected with non-state or other state actors as to always impact third parties' interests? Also, it might be worthwhile to examinehow third-party interests find their way into the political sphere. It could be traced whether (or under what circumstances) third parties actually actively demand secrecy or whether their interests are already considered in political debate without them actually asking for it.[120] This may also connect to research on lobbying and interest representation, but, as in the case of the intelligence agencies, also to international relations research and how states enforce their claims vis-à-vis each other.

Day-to-Day Executive Practices

While the research approaches described so far are driven by comparisons of more cases and by testing assumptions that can be derived from this dissertation's explorative findings, there is a complementary research strategy that could further investigate the concrete practices of secrecy, particularly on the micro level. Research questions could include, among others, the following: how do public servants decide whether to stamp a certain document classified? Are there differences between, for example, different ministries to be explained by institutional cultures, or are there

120 The strong inclusion of consultants and private interest groups in the preparation of the PPP acceleration act, while not the main focus here, could be an interesting example of how third-party interests find their way into legislation.

differences between individuals? MPs' frequent references to actual executive classification substantiate this interest in a systematic analysis. Their claims about executive secrecy being often arbitrary or self-serving and about the existing rules leaving (too) much discretion, thus, could be explored through in-depth investigation.

Methodologically, such an analysis is challenging, though. It is probably too much to hope for access to classified documents themselves for reviewing claims about over-classification. Even if there was access to such documents, it would be difficult to assess whether secrecy is justified or not. Participating observation could be another way to gain insights, but may face similar access problems. Another possibility is to conduct interviews at the so-called 'street level' of bureaucracy (Lipsky 1969) in order to unearth practices of dealing with information (cf. Shapiro/ Siegel 2010), asking interviewees for their approaches to dealing with secrecy provisions in their day-to-day work (cf. Braat 2021). Such interviews could cover how public servants balance different demands from their own bureaucracy and from parliament, how they calculate the expected harms and benefits of disclosure or secrecy, and how they deal with the inherent leeway in applying general rules to concrete cases. On this course, last but not least, practices – beyond formal rules – of labelling certain information or bureaucratic acts 'secret' or 'classified' could be reconstructed.

Although analysing day-to-day practice is a very demanding endeavour, especially with regard to gaining empirical access, it would provide a micro-level foundation for the findings on parliamentary legitimation of executive secrecy by tracing what is made of abstract rules in political and administrative practice. Such an approach also takes up the sociological strand of secrecy research by looking into the concrete interactions within the executive and its administration, and by examining the social processes underlying classification decisions as well as their substantive rationalisation. Opening up the 'black box' of bureaucracy would, thus, add an important piece to the puzzle of executive secrecy in democratic systems.

Democratic Scrutiny Beyond Parliament

A third starting point for future research is to look into other dimensions of the political system apart from legislative and executive actors. For example, the legitimation of secrecy could also be analysed with a focus on public support (cf. Easton 1975) for secrecy. This perspective would concentrate on whether people accept rationalisations of political secrecy, and whether there are electoral consequences for practices of executive secret-keeping.

Furthermore, there are other important forms of democratic scrutiny besides parliamentary (or opposition) scrutiny (see Lorenz 2010). The role of, for example, media has been touched upon several times throughout this study, for example when

actors stressed the importance of (investigative) media in giving cues for parliamentary scrutiny. Moreover, actors addressed the idea that leaks – while being in conflict with the formal framework of secrecy and disclosure – could take up an important role in holding the executive branch accountable for its secrets. Although they can also be used as a governance tool (see Pozen 2013 on plants and 'pleaks'), leaks can function as a scrutiny and sanctioning mechanism when parliamentary actors use them to publish executive wrongdoing. In any case, their effectiveness depends on the media for dissemination.

In addition to public and media scrutiny of executive secrecy, judicial control is another form of scrutiny in democratic systems. For example, one could analyse conflicts that were decided by the constitutional court. The constitutional court then serves as an arbiter in conflicts between parliament and government on the legitimacy of secrets. While such conflicts were indirectly part of the research presented here – actors referred to it as one mechanism of dealing with secrecy – a systematic evaluation of what kind of conflicts are taken to court and which are not would be another facet of how secrecy is embedded in a democratic setting. Again, this could be done through a cross-country design to account for legal traditions and differences in institutional frameworks and political culture. Also, it may be instructive to empirically trace the decisions taken in order to empirically test interviewees' suggestion that there are cycles of more leeway for executive secrecy and judicial deference to the executive on the one hand, and times of more 'parliament-friendly' court decisions.

The research agenda described here shows that there is still much more to learn about executive secrecy and its place in modern democratic systems. Both comparative approaches that seek to validate the explorative findings of this study and approaches that delve deeper into the practices of executive secret-keeping promise a more fine-grained understanding of secrecy's role in modern democratic systems.

6.2 Potential Consequences for Political Practice

While there are several links for further research resulting from this investigation, the analysis also allows for tentative conclusions for political practice. In the following, these will be mapped out based on the analysis of actors' perspectives and demands. Whereas these conclusions are derived from the analysis of the German case, they can claim broader significance when they address systematic characteristics of parliamentary democracies.

Setting up Proxy MonitoringFrameworks

Given the importance of scrutiny mechanisms, proxy monitoring as a mechanism best known from intelligence oversight[121] may be an approach for overseeing executive secrecy applicable to all kinds of policy fields, and across parliamentary democracies. These proxies, however, need to be policy-specific. As the debates in the PPP case about the role of the Court of Auditors or parliamentary committees have shown, a proxy monitoring institution needs to be adapted to its subject field: there is no 'one size fits all' design. Proxies can be installed within parliament as committees working in secret. But non-parliamentary institutions can be assigned a proxy-monitoring role, too. This may be preferable where special expertise or training are required for scrutinising executive secrets. However, if the proxy monitoring institution is set up outside of parliament, there still needs to be a strong link to parliament, e.g. in the form of reporting duties, in order to unfold a legitimising effect.

Furthermore, as discussed in detail in chapters 3 through 5, setting up scrutiny mechanisms alone is insufficient. For such bodies to effectively oversee secrecy, they need resources, processing capacities and sanctioning powers. First of all, strong information rights that include both reporting duties of the executive as well as investigative rights for overseers are necessary. Here, the distribution of such rights matters, too. As indicated above, inquiry rights should be defined as individual members' or party groups' rights in order to provide opposition parties with tools for fulfilling their role. Second, processing capacities may be improved. Where proxy monitoring is organised within parliamentary committees, the latter often need expert supporting staff. Again, assigning this staff not to the committee as such but to individual members or party groups may strengthen their conviction to acquire the necessary resources. While this may not be much of an issue for the larger parliamentary party groups who have plenty of resources and can distribute tasks over many shoulders, it is especially important for the smaller ones.[122] Furthermore, MPs' capabilities for processing information can be improved by finding (technical) solutions for granting MPs both access to classified information and the possibility to take notes in a secure way.

Moreover, there is a compelling case for defining strong opposition rights when setting up scrutiny mechanisms. Opposition parties, given their institutional role, are more likely to doubt the appropriateness of executive secrecy than a government ma-

121 A parliamentary proxy was for example also introduced for secret decision-making about the European Stability Mechanisms during the financial crisis (see Riese 2015).

122 Since proxy monitoring presupposes that oversight is conducted *in camera,* meaning that all involved are obligated to keep secrets, staff need a security clearance. Therefore, these tasks cannot always be carried out by a Member's regular office staff.

jority. They rather trust the democratic procedures than the government, which substantiates the need for a strong framework of parliamentary scrutiny by the opposition. Furthermore, proxy monitoring requires the conviction that the proxies will fulfil their delegated oversight task as expected. This can best be ensured if all parliamentary party groups are entitled to delegate members to the proxy oversight institution – if it is designed as a political, not an expert committee.

Even governments can benefit indirectly from strong opposition scrutiny rights. If opposition parties command strong scrutiny rights, then eventual government misconduct and abuse of secrecy can be uncovered. In consequence, the existence of such powers instils trust in the procedural enclosure of secrecy. Also, in a democratic setup, government majority parties need to acknowledge the possibility of becoming an opposition party after future elections, and therefore may have an abstract interest in scrutiny rights. Strengthening oversight also does not require parliamentary party groups to find a consensus on the ideologically contested substantive legitimacy of secrecy. Rather, it demands of them to consider the oversight of secrecy a *parliamentary* rather than a *partisan* issue. Where they do, it can become a special source of acceptance of secrecy as shown in the intelligence agencies case.

Solving the Third-Party Problem: Contractual Implications

A third implication of this dissertation's findings is of a contractual nature and concerns the above-discussed problem of third-party rights. Both cases, intelligence agencies and PPPs alike, have shown that third party rights – be they private companies' or other states' interests – put pressure on the idea of democratically legitimising secrecy. References to third-party rights remove a piece of information not only from parliament's grasp, but also from executive responsibility: as secrets grounded in this rationale are not the government's to tell, they take a position of a simple secret keeper instead of a secret's master. They are merely a confidant. Thus, references to third-party rights potentially disable parliamentary scrutiny. Again, this is not an issue that is specific for the German case. As the analysis has shown, different democratic countries also deal with the problem of third-party rights differently, illustrating that there is a variety of possible setups.

In both cases analysed here, there were provisions for consulting the secret's originators (other states or agencies, or private companies) on whether their secret can be disclosed to parliament (or the public) to fulfil parliamentary scrutiny functions. Despite the existence of such consultation procedures, though, actors feared that the reference to third-party rights may be a welcome argument for the state to remove action from the realm of parliamentary scrutiny.

Addressing the third-party problem[123] in political practice could, for example, consist in introducing further contractual provisions. This could either allow for the application of regular transparency rules to third-party secrets, or at least regulate access for parliament. In part, existing consultation procedures with partners are examples of such provisions, but the intense concern about third-party secrecy in the debates and interviews suggests that there is still potential and a need for further development. Here, proxy monitoring again can serve as a mechanism to ensure partners' wishes for secrecy while nevertheless enabling parliamentary scrutiny. Of course, this contractual approach may find its limits if there is a great asymmetry of power between the contracting parties. Some executive interviewees suggested that this is the case for American intelligence agencies who, due to their superior intelligence sources (especially signals intelligence), may have the upper hand for dictating the conditions of cooperation. Similar worries were voiced in the PPP case concerning big companies' and consortia's overwhelming legal expertise. However, this does not release parliament from finding solutions for third party constellations if they want to broadly legitimize secrecy based on partners' interests.

Democratic Discourse on Secrecy as Prerequisite of Legitimising Secrecy

A final implication of my findings is of a discursive nature. Given the ubiquity of secrecy in political life, it seems adequate to openly address the tensions created by secrecy instead of discussing secrecy simply as a deviation. This includes acknowledging the inherent limits of legitimation that lie in the persisting possibility of deep secrecy, for example. This discursive implication concerns both the broader public debate as well as government communication directed at the public or parliament. It also requires a government in a democracy to give specific reasons for keeping a secret – instead of claiming the necessity of secrecy without any further justification.

A public debate about secrecy's justification should also acknowledge secrecy's costs and the balancing with other goals and values. This allows for a deliberation and explanation of why and when secrecy is considered necessary. While it was shown that parliamentary legitimation of secrecy – through decision-making and debate – is crucial, a broader societal debate of how much secrecy is accepted for what ends could complement parliamentary decision-making. This might also better fulfil political theorists' conception of *public* deliberation that does not end in *parliamentary* deliberation.

123 This has also been discussed in the literature on PPPs and privatisation: one incentive to cooperate with private partners in the first place, it is argued, is to extend spheres of executive action outside of parliamentary scrutiny competences (Trute 2014: 118, see also Hood 2006: 20).

Literature

Abazi, Vigjilenza (2013): 'Unveiling the Power over Europol's Secrets', in: Amsterdam Centre for European Law and Governance Working Paper Series 4/2013.

Abazi, Vigjilenza (2019): Official Secrets and Oversight in the European Union. Law and Practices of Classified Information, Oxford: Oxford University Press.

Ackerman, John M./ Sandoval-Ballesteros, Irma E. (2006): 'The Global Explosion of Freedom of Information Laws', in: Administrative Law Review 58:1, pp. 85-130.

Aftergood, Steven (2009): 'Government Secrecy and Knowledge Production: A Survey of Some General Issues', in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 296-304.

Amm, Joachim (2020): 'Bundesrat: Architektur und föderative Symbolisierungselemente des deutschen Bundesrates', in: Schwanholz, Julia/ Theiner, Patrick (eds.): Die politische Architektur deutscher Parlamente. Von Häusern, Schlössern und Palästen, Wiesbaden: VS Verlag, pp. 405-423.

Andeweg, Rudy B. (2014): 'Roles in Legislatures', in: Martin, Shane/ Saalfeld, Thomas W./ Strøm, Kaare W. (eds.): The Oxford Handbook of Legislative Studies, Oxford: Oxford University Press, pp. 267-285.

Arendt, Hannah (1967/2013): Wahrheit und Lüge in der Politik. Zwei Essays, München: Piper.

Assmann, Aleida/ Assmann, Jan (1997): 'Das Geheimnis und die Archäologie der literarischen Kommunikation. Einführende Bemerkungen', in: Assmann, Aleida/ Assmann, Jan (eds.): Schleier und Schwelle. Geheimnis und Öffentlichkeit. Archäologie der literarischen Kommunikation V,1, München: Wilhelm Fink Verlag. pp. 7-16.

August, Vincent (2018): 'Theorie und Praxis der Transparenz. Eine Zwischenbilanz', in: Heibges, Maren (ed.): Transparenz Schlüsselbegriff einer politischen Anthropologie der Gegenwart, Berliner Blätter | Ethnographische und ethnologische Beiträge Sonderheft 76 / 2018, pp. 129-156.

Bail, Christopher A. (2015): 'The Public Life of Secrets: Deception, Disclosure, and Discursive Framing in the Policy Process', in: Sociological Theory 33:2, pp. 97-124.

Bakker, Ryan/ Hooghe, Liesbet/ Jolly, Seth/ Marks, Gary/ Polk, Jonathan/ Rovny, Jan/ Steenbergen, Marco/ Vachudova, Milada Anna (2020): 2019 Chapel Hill Expert Survey. Version 2019.1. Available on chesdata.eu. Chapel Hill, NC: University of North Carolina, Chapel Hill.

Banisar, David/ Fanucci, Francesca (2013): 'Wikileaks. Secrecy, and Freedom of Information: The Case of the United Kingdom', in: Brevini, Benedetta/ Hintz, Arne/ McCurdy, Patrick (eds.): Beyond WikiLeaks. Implications for the Future of Communications, Journalism and Society, Basingstoke: Palgrave Macmillan, pp. 178-190.

Benoit, Kenneth/ Laver, Michael (2007): 'Estimating party policy positions: Comparing expert surveys and hand-coded content analysis', in: Electoral Studies 26:1, pp. 90-107.

Bieber, Christoph (2014): 'WikiLeaks und Informalität', in: Bröchler, S./ Grunden, Timo (eds.): Informelle Politik, Wiesbaden: VS Verlag, pp. 351-372.

Bieber, Christoph (2016): 'Towards an Ethics of the Leak? WikiLeaks as a Programmed Public Sphere', in: Baxmann, Inge/ Beyes, Timon/ Pias, Claus (eds.): 'Social Media – New Masses', Zürich/ Berlin: diaphanes, pp. 285-306.

Birchall, Clare (2011): 'Introduction to 'Secrecy and Transparency'. The Politics of Opacity and Openness', in: Theory, Culture & Society 28:7-8, pp. 7-25.

Blank, Lisa (2009): 'Two Schools for Secrecy: Defining Secrecy from the Works of Max Weber, Georg Simmel, Edward Shils and Sissela Bok' [2008], in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 59-68.

Blanton, Thomas (2002): 'The World's Right to Know', in: Foreign Policy 131, pp. 50- 58.

Blanton, Thomas S. (2003/2009): 'National Security and Open Government in the United States: Beyond the Balancing Test' [2003], in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 600-626.

Blomgren, Magnus/ Rozenberg, Olivier (2012): Parliamentary Roles in Modern Legislatures, London/ New York: Routledge.

Bodei, Remo (2011): 'From secrecy to transparency: Reason of state and democracy', in: Philosophy and Social Criticism 37:8, pp. 889-898.

Bogner, Alexander/ Littig, Beate/ Menz, Wolfgang (2014): Interviews mit Experten. Eine praxisorientierte Einführung, Wiesbaden: Springer VS.

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

Boot, Eric (2017): 'Classified Public Whistleblowing: How to Justify a Pro Tanto Wrong', in: Social Theory and Practice 43:3, pp. 541-567.

Bossong, Raphael (2018): 'Die nachrichtendienstlichen Schnittstellen der EU-Sicherheitspolitik. Optionen für einen Ausbau des Informationsflusses und der fachlichen Aufsicht', in: SWP Aktuell 66/2018.

Boulanger, Christian (2013): 'Rollen und Funktionen der Verfassungsgerichtsbarkeit – eine theoretische Annäherung', in: Christian Boulanger, Anna Schulze, Michael Wrase (eds.): Die Politik des Verfassungsrechts. Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten, Baden-Baden: Nomos, pp. 67-89.

Braat, Eleni (2021): 'Self-reinforcing secrecy: cultures of secrecy within intelligence agencies', in: Mokrosinska, Dorota (ed): Transparency and Secrecy in European Democracies. Contested Trade-Offs, London: Routledge, pp.118-134.

Bräuninger, Thomas/ Debus, Marc (2009): 'Legislative agenda-setting in parliamentary democracies', in: European Journal of Political Research 48:6, pp. 804-839.

Brandt-Elsweier, Anni (2008): 'Parlamentarische Kontrolle der Nachrichtendienste', in: Morisse-Schilbach, Melanie/ Peine, Anke (eds.): Demokratische Außenpolitik und Geheimdienste. Aspekte eines Widerspruchs in Deutschland, Großbritannien, Israel, USA und Frankreich im Vergleich, Berlin: Verlag Dr. Köster, pp. 131-142.

Brevini, Benedetta/ Hintz, Arne/ McCurdy, Patrick (2013) (eds.): Beyond WikiLeaks. Implications for the Future of Communications, Journalism and Society, Basingstoke: Palgrave Macmillan.

Bröhmer, Jürgen (2004): Transparenz als Verfassungsprinzip. Grundgesetz und Europäische Union, Tübingen: Mohr Siebeck.

Buchstein, Hubertus (2000): 'Geheime Abstimmung und Demokratiebewegung. Die politischen Ziele der Reformbewegung für das „Australian Ballot" in den USA', in: Politische Vierteljahresschrift 41:1, pp. 48-75.

Burke, John P. (1986): Bureaucratic Responsibility, Baltimore/London: The Johns Hopkins University Press.

Buzan, Barry/ Waever, Ole/ de Wilde, Jaap (1998): Security. A New Framework for Analysis, Boulder & London: Lynne Rienner Publishers.

Clarke, Adele E. (2012): Situationsanalyse. Grounded Theory nach dem Postmodern Turn, Wiesbaden: Springer VS.

Coghill, Ken/ Holland, Peter/ Kinyondo, Abel/ Lewis, Colleen/ Steinack, Katrin (2012): 'The functions of Parliament: reality challenges tradition', in: Australasian Parliamentary Review 27:2, pp. 55–70.

Colby, William E. (1976/2009): 'Intelligence Secrecy and Security in a Free Society' [1976], in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 477-486.

Corbin, Juliet/ Strauss, Anselm (1990): 'Grounded Theory Research: Procedures, Canons and Evaluative Criteria', in: Zeitschrift für Soziologie 19:6, pp. 418-427.

Corbin, Juliet/ Strauss, Anselm (2008): Basics of Qualitative Research. Techniques and Procedures for Developing Grounded Theory 3e, Los Angeles u.a.: Sage Publications.

Coser, Lewis A. (1963/2009): 'The Disfunctions of Military Secrecy' (1963), in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 311-321.

Costas, Jana/ Grey, Christopher (2014): 'Bringing Secrecy into the Open: Towards a Theorization of the Social Processes of Organizational Secrecy', in: Organization Studies 35:10.

Costas, Jana/ Grey, Christopher (2016): Secrecy at Work. The Hidden Architecture of Organizational Life, Stanford: Stanford Business Books.

Cotterrell, Roger (1999): 'Transparency, Mass Media, Ideology and Community', in: Cultural Values 3:4, pp. 414-426.

Cox, Gary W./ McCubbins, Mathew D. (2005): Setting the Agenda. Responsible Party Government in the U.S. House of Representatives, Cambridge: Cambridge University Press.

Curtin, Deirdre (2011): 'Top Secret Europe'. Inaugural Lecture delivered upon appointment to the chair of Professor of European Law at the University of Amsterdam on 20 October 2011.

Curtin, Deirdre (2013): 'Secrecy regulation by the European Union inside out', in: Cole, David/ Fabbrini, Federico/ Vedaschi, Arianna (eds.): Secrecy, National Security and the Vindication of Constitutional Law, Cheltenham/Northampton: Edward Elgar, pp. 302-321.

Curtin, Deirdre (2018): 'Second order secrecy and Europe's legality mosaics', in: West European Politics 41:4, pp. 846–868.

Dahrendorf, Ralf (2006): Homo Sociologicus. Ein Versuch zur Geschichte, Bedeutung und Kritik derKategorie der sozialen Rolle 16. Auflage, Wiesbaden: VS Verlag.

Daun, Anna (2009): ‚Die deutschen Nachrichtendienste', in: Jäger, Thomas/ Daun, Anna (eds.): Geheimdienste in Europa. Transformation, Kooperation und Kontrolle, Wiesbaden: VS Verlag für Sozialwissenschaften.

Daun, Anna (2011): 'Nachrichtendienste in der deutschen Außenpolitik', in: Jäger, T. et al. (eds.): Deutsche Außenpolitik, Wiesbaden: VS Verlag, pp. 171-197.

Daun, Anna (2018): 'Entwicklungen und Herausforderungen der deutschen Intelligence Community im letzten Jahrzehnt', in: Zeitschrift für Außen- und Sicherheitspolitik 11:4, pp. 467–478.

DBT [Deutscher Bundestag], Wissenschaftliche Dienste (2013): 'Ausarbeitung. Reichweite des parlamentarischen Fragerechts bei der Vergabe öffentlicher Aufträge an öffentliche Unternehmen', in: WD 3 - 3000 – 161/13.

De Fine Licht, Jenny/ Naurin, Daniel (2015): 'Open Decision-Making Procedures and Public Legitimacy: An Inventory of Causal Mechanisms', in: Elster, Jon (ed.): Secrecy and Publicity in Votes and Debates, Cambridge: Cambridge University Press, pp. 131-151.

Depenheuer, Otto (2002): Selbstdarstellung der Politik. Studien zum Öffentlichkeitsanspruch der Demokratie, Paderborn/ München: Ferdinand Schöningh.

Dörr, Alexander (2015): Informationsansprüche gegenüber dem Staat zuzurechnenden Unternehmen, Hamburg: Verlag Dr. Kovač.

Düwel, Peter (1965): Das Amtsgeheimnis. Schriftenreihe der Hochschule Speyer Bd. 23, Berlin: Duncker & Humblot.

Easton, David (1975): 'A Re-Assessment of the Concept of Political Support', in: British Journal of Political Science, 5:4, pp. 435-457.

Epps, Daniel (2008): 'Mechanisms of Secrecy', in: Harvard Law Review 121:6, pp. 1556-1577.

Fairbanks, Jenille/ Plowman, Kenneth D./ Rawlins, Brad L. (2007): 'Transparency in government communication', in: Journal of Public Affairs 7:1, pp. 23-37.

Fenster, Mark (2006): 'The Opacity of Transparency', in: Iowa Law Review 91, pp. 885-949.

Fenster, Mark (2010): 'Seeing the State: Transparency as Metaphor', in: Administrative Law Review 62:3, S. 617-672.

Fenster, Mark (2014): 'The Implausibility of Secrecy', in: University of Florida Levin College of Law Legal Studies Research Paper Series 15-41.

Fenster, Mark (2015): 'Transparency in search of a theory', in: European Journal of Social Theory 18:2, pp. 150-167.

Fenster, Mark (2017): The Transparency Fix. Secrets, Leaks, and Uncontrollable Government Information, Stanford: Stanford University Press.

Finel, Bernhard I./ Lord, Kristin M. (1999): 'The Surprising Logic of Transparency', in: International Studies Quarterly 43:2, pp. 315-339.

Friedrich, Carl J. (1973): Pathologie der Politik. Die Funktion der Mißstände: Gewalt, Verrat, Korruption, Geheimhaltung, Propaganda, Frankfurt: Herder & Herder.

Fuchs, Meredith (2006): 'Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy', in: Administrative Law Review 58:1, pp. 131-176.

Fung, Archon (2013): 'Infotopia: Unleashing the Democratic Power of Transparency', in: Politics and Society 41:2, pp. 183-212.

Gadinger, Frank/ Yildiz, Taylan (2016): 'Transparenz/Intransparenz. Zur Ambivalenz einer neuen Leitunterscheidung demokratischen Regierens', in: Zeitschrift für Politikwissenschaft 26:2, pp. 199-209.

Gansler, Jacques S./ Lucyshyn, William (2004): The Unintended Audience: Balancing Openness and Secrecy. Crafting an Information Policy for the 21st Century, Center for Public Policy and Private Enterprise. School of Public Policy, University of Maryland.

Genschel, Philipp/ Zangl, Bernhard (2007): 'Die Zerfaserung von Staatlichkeit', in: Aus Politik und Zeitgeschichte 20-21/2007, pp. 10-16.

Gersen, Jacob E./ Joseph O'Connell, Anne (2009): 'Hiding in Plain Sight? Timing and Transparency in the Administrative State', in: The University of Chicago Law Review 76:3, pp. 1157-1213.

Gerstlberger, Wolfgang/ Siegl, Michael (2011): 'Öffentlich-Private Partnerschaften. Ein Konzept für die zukünftige Gestaltung öffentlicher Aufgaben?', WISO-Diskurs Dezember 2011.

Gibbs, David N. (1995/2009): 'Secrecy and International Relations', in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 360-380.

Gibson, Dirk C. (1987): 'Secrecy: The Communication Dilemma of CIA', in: Public Relations Review 13:2, pp. 27-38.

Gingras, Anne-Marie (2012): 'Access to information: An asset for democracy or ammunition for political conflict, or both?', in: Canadian Public Administration 55:2, pp. 221-146.

Göke, Konrad (2017): 'Das Geheimnis in der Politik. Die Genese der Arkanpolitik bei Niccolò Machiavelli und Giovanni Botero', in: Voigt, Rüdiger (ed.): Staatsgeheimnisse. Arkanpolitik im Wandel der Zeiten, Wiesbaden: Springer VS.

Gowder, Paul (2006/2009): 'Secrecy as Mystification of Power: Meaning and Ethics in the Security State', in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 674-694.

Grimsey, Darrin/ Lewis, Mervyn K. (2002): 'Accounting for Public-private Partnerships', in: Accounting Forum 26:3, pp. 245-270.

Groddeck, Victoria von/ Wilz, Sylvia Marlene (eds.) (2015): Formalität und Informalität in Organisationen, Wiesbaden: Springer VS.

Grønbech-Jensen, Carsten (1998): 'The Scandinavian tradition of open government and the European Union: problems of compatibility?', in: Journal of European Public Policy, 5:1, pp. 185-199.

Gusy, Christoph (1998): 'Privatisierung und parlamentarische Kontrolle', ZRP 7/1998, pp. 265-270.

Gusy, Christoph (2011): Grundrechte und Verfassungsschutz, Wiesbaden: Springer VS.

Habermas, Jürgen (1962/1990): Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft, Frankfurt am Main: Suhrkamp.

Hahn, Alois (1997): 'Soziologische Aspekte von Geheimnissen und ihren Äquivalenten', in: Assmann, Aleida/ Assmann, Jan (eds.): Schleier und Schwelle. Geheimnis und Öffentlichkeit. Archäologie der literarischen Kommunikation V,1, München: Wilhelm Fink Verlag, pp. 23-40.

Hahn, Alois (2002): 'Geheim', in: Engel, Gisela/ Rang, Brita/ Reichert, Klaus/ Wunder, Heide (eds.): Das Geheimnis am Beginn der europäischen Moderne, Frankfurt am Main: Vittorio Klostermann.S. 21-42.

Halperin, Morton H./ Hoffman, Daniel N. (1977): Top Secret. National Security and the Right to Know, Washington: New Republic Books.

Hazell, Robert/ Worthy, Ben (2010): 'Assessing the performance of freedom of information', in: Government Information Quarterly 27:4, S. 352-359.

Heald, David (2006): 'Transparency as an Instrumental Value', in: Hood, Christopher/ Heald, David (eds.): Transparency. The Key to Better Governance? Oxford/ New York: Oxford University Press, pp. 59-73.

Hechelhammer, Bodo (2014): 'Das Geschichtsprojekt des BND – Möglichkeiten und Grenzen der wissenschaftlichen Erforschung eines geheimen Nachrichtendienstes', in: Zeitschrift für Außen- und Sicherheitspolitik 7, pp. 289-300.

Heffington, Colton (2019): 'Do Hawks and Doves Deliver? The Words and Deeds of Foreign Policy in Democracies', in: Foreign Policy Analysis 14:1, pp. 64–85.

Herman, Michael (1996): Intelligence Power in Peace and War, Cambridge: Cambridge University Press.

Hill, Andrew J./Jones, Daniel B. (2017): 'Does partisan affiliation impact the distribution of spending? Evidence from state governments' expenditures on education', in: Journal of Economic Behavior & Organization 143, pp. 58–77.

Hirsch, Burkhard (2007): 'Effizienz und Kontrolle', in: Smidt, Wolbert K./ Poppe, Ulrike/ Krieger, Wolfgang/ Müller-Enbergs, Helmut (eds.): Geheimhaltung und Transparenz. Demokratische Kontrolle der Geheimdienste im internationalen Vergleich, Berlin: Lit Verlag, pp. 50-53.

Hix, Simon/ Noury, Abdul (2016): 'Government-opposition or left-right? The institutional determinants of voting in legislatures', in: Political Science Research and Methods 4:2, pp. 249-273.

Hohendorf, Lukas/ Saalfeld, Thomas/ Sieberer, Ulrich (2020): 'Oppositional Strategies Between Cooperation and Conflict: An Analysis of Opposition Party Voting in the German Bundestag, 1949–2013', in: Bukow, Sebastian/ Jun, Uwe (eds.): Continuity and Change of Party Democracies in Europe, Wiesbaden: Springer VS, pp. 309-342.

Hollyer, James R./ Rosendorff, B. Peter/ Vreeland, James Raymond (2011): 'Democracy and Transparency', in: The Journal of Politics 73:4, pp. 1191-1205.

Hood, Christopher (2006): 'Transparency in Historical Perspective', in: Hood, Christopher/ Heald David (eds.): Transparency. The Key to Better Governance? Oxford/ New York: Oxford University Press, pp. 3-23.

Hood, Christopher/ Fraser, Ian/ McGarvey, Neil (2006): 'Transparency of Risk and Reward in U.K. Public-Private Partnerships', in: Public Budgeting and Finance Winter 2006, pp. 40-58.

Hood, Christopher (2007): 'What Happens When Transparency Meets Blame-Avoidance?', in: Public Management Review 9:2, pp. 191-210.

Horn, Eva (2006): 'Actors/Agents: Bertolt Brecht and the Politics of Secrecy', in: Grey Room 24, pp. 38-55.

Horn, Eva (2008): 'Schweigen, Lügen, Schwätzen. Eine kurze Geschichte der politischen Unwahrheit', in: van Loyen, Ulrich/ Neumann, Michael (eds.): Tumult Nr. 34: Unter uns - Formen der Diskretion, pp.112-122.

Ismayr, Wolfgang (2001): Der Deutsche Bundestag, Wiesbaden: VS Verlag.

Jahn, Gerhard/ Engels, Dieter (1989): '§20 Geheimschutzordnung des Bundestages', in: Schneider, Hans-Peter/ Zeh, Wolfgang (eds.): Parlamentsrecht und Parlamentspraxis, Berlin/ New York: De Gruyter, pp. 619-641.

Jahn, Detlef (2011): Vergleichende Politikwissenschaft, Wiesbaden: VS Verlag.

Jay, Martin (2010): The Virtues of Mendacity. On Lying in Politics, Charlottesville/ London: University of Virginia Press.

Jerschke, Hans-Ulrich (1971): Öffentlichkeitspflicht der Exekutive und Informationsrecht der Presse. Schriften zum öffentlichen Recht Bd. 153, Berlin: Duncker & Humblot.

Jestaedt, Matthias (2001): 'Zwischen Öffentlichkeit und Vertraulichkeit – Der Staat der offenen Gesellschaft: Was darf er verbergen?', in: Depenheuer, Otto (ed.): Öffentlichkeit und Vertraulichkeit. Theorie und Praxis der politischen Kommunikation, Wiesbaden: Westdeutscher Verlag, pp. 67-110.

Kantorowicz, Ernst (1955): 'Mysteries of State. An Absolutist Concept and its Late Medieval Origins', in: The Harvard Theological Review 48:1, pp. 65-91.

King, Anthony (1976): 'Modes of Executive-Legislative Relations: Great Britain, France, and West Germany', in: Legislative Studies Quarterly 1:1, pp. 11-36.

Kitrosser, Heidi (2005): 'Secrecy and Separated Powers: Executive Privilege Revisited', in: University of Minnesota Law School Legal Studies Research Paper Series 06-01.

Kitrosser, Heidi (2008): 'Classified Information Leaks and Free Speech', in: University of Illinois Law Review 60:3, pp. 881-932.

Kloepfer, Michael (2011): Informationsfreiheitsgesetz und Schutz von Betriebs- und Geschäftsgeheimnissen - Betriebs- und Geschäftsgeheimnisse in verschiedenen Rechtsgebieten und verschiedenen Kontexten. Rechtsgutachten im Auftrag des Bundesbeauftragten für den Datenschutz und die Informationsfreiheit.

Klüver, Heike/ Spoon, Jae-Jae (2014): 'Who Responds? Voters, Parties and Issue Attention', in: British Journal of Political Science 46:3, pp. 633-654.

Knobloch, Jörn (2011): 'Politiknetzwerke und das Geheimnis. Die Legitimation der Nicht-Öffentlichkeit in der Demokratie', in: Zeitschrift für Politikwissenschaft 21:1, pp. 5-32.

Knobloch, Jörn (2017): Demokratie und Geheimnis, in: Voigt, Rüdiger (ed.): Staatsgeheimnisse. Arkanpolitik im Wandel der Zeiten, Wiesbaden: Springer VS, pp. 205-224.

Knobloch, Jörn (2019) (ed.): Staat und Geheimnis: Der Kampf um die (Un-)Sichtbarkeit der Macht, Baden-Baden: Nomos.

Koch, Bettina (2017): 'Das monarchische arcana imperii Prinzip versus das demokratische Transparenzprinzip Zum Verhältnis von Staat und bürgerlicher Freiheit nach Snowden', in: Voigt, Rüdiger (ed.): Staatsgeheimnisse. Arkanpolitik im Wandel der Zeiten, Wiesbaden: Springer VS.

Korte, Karl-Rudolf (2010): 'Strategie und Regierung: Politikmanagement unter den Bedingungen von Komplexität und Unsicherheit', in: Raschke, Joachim/ Tils, Ralf (eds.): Strategie in der Politikwissenschaft. Konturen eines neuen Forschungsfelds, Wiesbaden: VS Verlag, pp. 211-231.

Krieger, Wolfgang (2007): 'Die historische Entwicklung der Kontrolle von Nachrichtendiensten', in: Smidt, Wolbert K./ Poppe, Ulrike/ Krieger, Wolfgang/ Müller-Enbergs, Helmut (eds.) (2007): Geheimhaltung und Transparenz. Demokratische Kontrolle der Geheimdienste im internationalen Vergleich, Berlin: Lit Verlag, pp. 15-29.

Krumm, Thomas/ Mause, Karsten (2009): 'Public-Private Partnerships als Gegenstand der (Politik-)Wissenschaft', in: PVS 50, pp. 105-129.

Krumm, Thomas (2013): 'Parlamentarische Kontrolle von öffentlich-privaten Partnerschaften', in: der moderne staat 6:2, pp. 393-410.

Kumar, Miiko/ Martin, Greg/ Scott Bray, Rebecca (2015): 'Secrecy, law and society', in: Kumar, Miiko/ Martin, Greg/ Scott Bray, Rebecca (eds.): Secrecy, Law and Society, Abingdon: Routledge, pp. 1-19.

Lange, Hans-Jürgen/ Lanfer, Jens (eds.) (2016): Verfassungsschutz. Reformperspektiven zwischen administrativer Effektivität und demokratischer Transparenz, Wiesbaden: VS Verlag.

Lauth, Hans-Joachim/ Pickel, Gert/ Pickel, Susanne (2015): Methoden der Vergleichenden Politikwissenschaft, Wiesbaden: VS Verlag.

Lerche, Peter (1981): 'Geheimschutz und Öffentlichkeitsinteresse', in: Bundesministerium des Inneren (ed.): Verfassungsschutz und Rechtsstaat. Beiträge aus Wissenschaft und Praxis, Köln u.a.: Carl Heymanns Verlag KG, pp. 117-132.

Leutheusser-Schnarrenberger, Sabine (2015): 'Ein paradigmatischer Wandel vom Amtsgeheimnis zum gläsernen Staat', in: Arnim, Hans Herbert von (ed.): Transparenz contra Geheimhaltung in Staat, Verwaltung und Wirtschaft. Beiträge auf der 16. Speyerer Demokratietagung vom 23. bis 24. Oktober 2014 an der Deutschen Universität für Verwaltungswissenschaften Speyer, Berlin: Duncker & Humblot, pp. 13-25.

Lever, Annabelle (2015): 'Privacy and Democracy: What the Secret Ballot Reveals', in: Law, Culture and the Humanities 11:2, pp. 164-183.

Lipsky, Michael (1969): 'Toward a Theory of Street-Level Bureaucracy', retrieved from https://www.irp.wisc.edu/publications/dps/pdfs/dp4869.pdf (last accessed 27.12.2019).

Lorenz, Astrid (2007): Föderalismusreform & Co. Warum ändert sich das Grundgesetz? Berlin: Humboldt-Universität 2007

Lorenz, Astrid (2010): 'Schutz vor der Mehrheitstyrannei? Parlamentarische Opposition, Bundesverfassungsgericht und Bundespräsident als Kontrolleure der Zweidrittelmehrheit', in: Bukow, Sebastian/ Seemann, Wenke (eds.): Die Große Koalition Regierung – Politik – Parteien 2005 – 2009, Wiesbaden: VS Verlag, pp. 59-84.

Louwerse, Tom/ Otjes, Simon/ Willumsen, David M./ Öhberg, Patrik (2017): 'Reaching across the aisle: Explaining government–opposition voting in parliament', in: Party Politics 23:6, pp. 746-759.

Luhmann, Niklas (1978): Legitimation durch Verfahren, Frankfurt: Suhrkamp.

Luhmann, Niklas/ Fuchs, Peter (1989/1992): Reden und Schweigen, Frankfurt am Main: Suhrkamp.

Lutz, Philipp (2019): 'Reassessing the gap-hypothesis: Tough talk and weak action in migration policy?', in: Party Politics Online, https://doi.org/10.1177/1354068819840776.

MacCoun, Robert J. (2006): 'Psychological Constraints on Transparency in Legal and Government Decision Making', in: Swiss Political Science Review 12:3, pp. 112-123.

Machiavelli, Niccolò (1513/1990): Der Fürst, Frankfurt am Main: Suhrkamp.

Magen, Clila (2015): 'Media Strategies and Manipulations of Intelligence Services: The Case of Israel', in: The International Journal of Press/Politics 20:2, pp. 247–265.

Maravic, Patrick von (2012): 'Limits of knowing or the consequences of difficult-access problems for multi-method research and public policy', in: Policy Sciences 54:2, pp. 153-168.

Marschall, Stefan (2004): 'Beziehungsspiele zwischen Parlament und Regierung – 'Rules of the Game' und ihre Reform', in: Holtmann, Everhard/ Patzelt, Werner J. (eds.) (2004):

Kampf der Gewalten? Parlamentarische Regierungskontrolle – gouvernementale Parlamentskontrolle. Theorie und Empirie, Wiesbaden: VS Verlag für Sozialwissenschaften.

Marsh, Kevin (2011): 'The Illusion of Transparency', in: The Political Quarterly 82:4, pp. 531-535.

Martin, Georg (2009): Recht auf Lüge, Lüge als Pflicht? Zu Begriff, Ideengeschichte und Praxis der politischen 'edlen' Lüge, München: Herbert Utz Verlag.

McCubbins, Mathew D./ Schwartz, Thomas (1984): 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarm', in: American Journal of Political Science 28:1, pp. 165-179

McManus, Ian P. (2019): 'The Re-Emergence of Partisan Effects on Social Spending after the Global Financial Crisis', in: Journal of Common Market Studies 57:6, pp.1274-1291.

Meade, Ellen/ Stasavage, David (2006): 'Two Effects of Transparency on the Quality of Deliberation', in: Swiss Political Science Review 12:3, pp. 123-133.

Meuser, Michael/ Nagel, Ulrike (1991): 'ExpertInneninterviews – vielfach erprobt, wenig bedacht: ein Beitrag zur qualitativen Methodendiskussion', in: Garz, Detlef/ Kraimer, Klaus (eds.): Qualitativ-empirische Sozialforschung: Konzepte, Methoden, Analysen, Opladen: Westdt. Verl., pp. 441-471.

Mokrosinska, Dorota (2020): 'Why states have no right to privacy, but may be entitled to secrecy: a non-consequentialist defense of state secrecy', in: Critical Review of International Social and Political Philosophy 23:4, pp. 415-444.

Mokrosinska, Dorota (2021) (ed.): Transparency and Secrecy in European Democracies: Contested Trade-offs, London: Routledge.

Möllers, Christoph (2011): 'Zur Dialektik der Aufklärung der Politik, in: Geiselberger', Heinrich (ed.): WikiLeaks und die Folgen. Netz – Medien – Politik, Berlin: Suhrkamp, pp. 193-200.

Morisse-Schilbach, Melanie/ Peine, Anke (eds.) (2008): Demokratische Außenpolitik und Geheimdienste. Aspekte eines Widerspruchs in Deutschland, Großbritannien, Israel, USA und Frankreich im Vergleich, Berlin: Verlag Dr. Köster.

Mühlenkamp, Holger (2011): 'Ökonomische Analyse von Public-private Partnerships (PPP) – PPP als Instrument zur Steigerung der Effizienz der Wahrnehmung öffentlicher Aufgaben oder als Weg zur Umgehung von Budgetbeschränkungen?', in: Ziekow, Jan (ed.): Wandel der Staatlichkeit und wieder zurück? Die Einbeziehung Privater in die Erfüllung öffentlicher Aufgaben (Public-private Partnership) in/nach der Weltwirtschaftskrise, Baden-Baden: Nomos, pp. 67-106.

Müller, Thomas (1991): Exekutivischer Geheimnisschutz und parlamentarische Kontrolle, München: Verlag V. Florentz.

Müller, Wolfgang C./ Saalfeld, Thomas (eds.) (1997): Members of Parliament in Western Europe. Roles and Behaviour, London: Frank Cass.

Müller, Katja (2004): Informationsfreiheit im Vereinigten Königreich als Vorbild für Deutschland? Official Secrecy and Access to Information, Hamburg: Kovač.

Nedelmann, Birgitta (1985): 'Geheimnis. Ein interaktionistisches Paradigma', vorgänge 24:6, pp. 38-48.

Nedelmann, Birgitta (1995): 'Geheimhaltung, Verheimlichung, Geheimnis – einige soziologische Vorüberlegungen', in: Kippenberg, Hans G./ Stroumsa, Guy G. (eds.): Secrecy and Concealment. Studies in the History of Mediterranean and Near Eastern Religions, Leiden: Brill, pp. 1-16.

Pannes, Anna-Tina (2015): Informalität. Theoretische und empirische Dimensionen informeller Entscheidungsprozesse in Regierungsformationen. Ein Analyseansatz, Wiesbaden: Springer VS.

Parry, Clive (1954): 'Legislatures and Secrecy', in: Harvard Law Review 67:5, pp. 737-785.

Pasquier, Martial/ Villeneuve, Jean-Patrick (2007): 'Organizational barriers to transparency: a typology and analysis of organizational behaviour tending to prevent or restrict access to information', in: International Review of Administrative Sciences 73:1, pp. 147 -162.

Patz, Ronny (2018): 'Leaking, leak prevention, and decoupling in public administrations: the case of the European Commission', in: West European Politics 41:4, pp. 1049-1071.

Popitz, Heinrich (1968): Über die Präventivwirkung des Nichtwissens. Dunkelziffer, Norm und Strafe, Tübingen: J.C.B. Mohr (Paul Siebeck).

Pozen, David E. (2005): 'The Mosaic Theory, National Security, and the Freedom of Information Act', in: Yale Law Journal 115:3, pp. 628-679.

Pozen, D. E. (2010): 'Deep Secrecy', in: Stanford Law Review 62:2, pp. 257-340.

Pozen, David E. (2013): 'The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information', in: Harvard Law Review 127, pp. 512-635.

Przyborski, Aglaja/ Wohlrab-Sahr, Monika (2014): Qualitative Sozialforschung Ein Arbeitsbuch, München: Oldenbourg.

Raab, Charles D. (2012): 'Privacy, Social Values and the Public Interest', in: Busch, Andreas/ Hofmann, Jeannette (eds.) (2012): Politik und die Regulierung von Information. PVS Sonderheft 46, Baden-Baden: Nomos, pp. 129-151.

Redelfs, Manfred/ Leif, Thomas (2004): 'Mehr Transparenz wagen: Warum die Informationsfreiheit unverzichtbar ist – und die Politik sich damit schwer tut', in: Hart, Thomas/ Welzel, Carolin/ Garstka, Hansjürgen (eds.): Informationsfreiheit. Die 'gläserne Bürokratie' als Bürgerrecht? Gütersloh: Verlag Bertelsmann Stiftung, pp. 19-27.

Reynaers, Anne-Marie/ Grimmelikhuijsen, Stephan (2015): 'Transparency in Public-Private Partnerships: Not So Bad After All?', in: Public Administration 93:3, pp. 609-626.

Riese, Dorothee (2015): 'Secrecy in Times of Crisis', in: Baptista, Luís, Jenny Preunkert and Georg Vobruba (eds.): Aftermath. Political and Urban Consequences of the Eurocrisis, Lisbon: Edicoes Colibri, pp. 49-67.

Riese, Dorothee (2019): 'Grenzen der Transparenz – Geheimhaltung in demokratischen Systemen', in: August, Vincent/ Osrecki, Fran (eds.): Der Transparenz-Imperativ. Normen, Strukturen, Praktiken, Wiesbaden: VS Verlag.

Riese, Dorothee (2021): 'Secrecy and the Preservation of the Democratic State – The Concept of Raison d'état in the German Bundestag', in: Mokrosinska, Dorota (ed): Secrecy in European Democracies, London: Routledge.

Risse, Thomas/ Lehmkuhl, Ursula (2007): 'Governance in Räumen begrenzter Staatlichkeit', in: Aus Politik und Zeitgeschichte 20-21/2007, pp. 3-9.

Rittberger, Berthold/ Goetz, Klaus H. (2018): 'Secrecy in Europa', in: West European Politics, 41:4, pp. 825-845.

Ritzi, Claudia (2017): 'Das Geheimnis und die Demokratie. (In-) Transparenz als politische Herausforderung im digitalen Zeitalter', in: Voigt, Rüdiger (ed.) Staatsgeheimnisse. Arkanpolitik im Wandel der Zeiten, Wiesbaden: Springer VS, pp. 179-204.

Roberts, Alaisdair (2006a): Blacked Out. Government Secrecy in the Information Age, Cambridge u.a.: Cambridge University Press.

Roberts, Alasdair (2006b): 'Dashed Expectations: Governmental Adaption to Transparency Rules', in: Hood, Christopher/ Heald, David (eds.): Transparency. The Key to Better Governance? Oxford/ New York: Oxford University Press, pp. 107-125.

Roberts, Alaisdair (2012): 'WikiLeaks: the illusion of transparency', in: International Review of Administrative Sciences 78:1, pp. 116-133.

Robertson, K.G. (1982): Public Secrets. A Study in the Development of Government Secrecy, London/Basingstoke: The Macmillan Press Ltd.

Rösch, Ulrich (1999): Geheimhaltung in der rechtsstaatlichen Demokratie. Demokratietheoretische Überlegungen zum Informationsverhältnis zwischen Staat und Bürger sowie zwischen den Staatsgewalten, Baden-Baden: Nomos.

Rosén, Guri (2011): 'Can You Keep a Secret? How the European Parliament Got Access to Sensitive Documents in the Area of Security and Defence', in: RECON Online Working Paper 2011/22. URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html

Rosén, Guri (2018): 'Contestation and co-optation: why secrecy in EU external relations varies', in: West European Politics, 41:4, pp. 933-957.

Rossi, Matthias (2015): 'Informationsfreiheit – Anspruch und Wirklichkeit', in: Arnim, Hans Herbert von (ed.): Transparenz contra Geheimhaltung in Staat, Verwaltung und Wirtschaft. Beiträge auf der 16. Speyerer Demokratietagung vom 23. bis 24. Oktober 2014 an der Deutschen Universität für Verwaltungswissenschaften Speyer, Berlin: Duncker & Humblot, pp. 43-57.

Rourke, Francis E. (1957/2009): 'Secrecy in American Bureaucracy' [1957], in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 404-420.

Rourke, Francis E. (1960): 'Administrative Secrecy: A Congressional Dilemma', in: The American Political Science Review 54:3, pp. 684-694.

Rozell, Mark J. (2010): Executive Privilege. Presidential Power, Secrecy, and Accountability, Lawrence: University Press of Kansas.

Russell, Meg/ Cowley, Philip (2018): 'Modes of UK Executive–Legislative Relations Revisited', in: The Political Quarterly 89:1, pp.18-28.

Sadofsky, David (1990): Knowledge as Power. Political and Legal Control of Information, New York: Praeger Publishers.

Sagar, Rahul (2007): 'On Combating the Abuse of State Secrecy', in: The Journal of Political Philosophy 15:4, pp. 404-427.

Sagar, Rahul (2011): 'Das mißbrauchte Staatsgeheimnis. Wikileaks und die Demokratie', in: Geiselberger, Heinrich (eds.): WikiLeaks und die Folgen. Netz – Medien – Politik, Berlin: Suhrkamp, pp. 201-223.

Sagar, Rahul (2012): 'Executive Privilege', in: Coates, David (ed.): The Oxford Companion to American Politics, Oxford: Oxford University Press, pp. 351-3.

Sagar, R. (2013): Secrets and Leaks. The Dilemma of State Secrecy, Princeton: Princeton University Press.

Sagarzazu, Iñaki/ Klüver, Heike (2017): 'Coalition Governments and Party Competition: Political Communication Strategies of Coalition Parties', in: Political Science Research and Methods 5:2, pp.333-349.

Samuel, Peter (1972): 'Government Secrecy', in: The Australian Quarterly 44:2, pp. 5-8.

Sarcinelli, Ulrich (2009): Politische Kommunikation in Deutschland, Wiesbaden: VS Verlag, pp. 69-83.

Sarcinelli, Ulrich (2011): 'Reden oder Schweigen? Zum Verhältnis von Publizität und Diskretion im demokratischen Prozess', in: Die Politische Meinung. Zeitschrift für Politik, Gesellschaft, Religion und Kultur 504/2011, pp. 9-14.

Savage, Lee (2019): 'The politics of social spending after the Great Recession: The return of partisan policy making', in: Governance 32:1, pp. 123-141.

Scharpf, Fritz W. (1999): Regieren in Europa, Frankfurt am Main: Campus Verlag.

Scheppele, Kim Lane (2006): 'We Are All Post-9/11 Now', in: Fordham Law Review 75:2, pp. 607-629.

Schirrmeister, Claudia (2004): Geheimnisse. Über die Ambivalenz von Wissen und Nicht-Wissen, Wiesbaden: Deutscher Universitäts-Verlag.

Schmidt-Eenboom, Erich (2010): 'Kontrolle der Nachrichtendienste? Vom Unwert demokratischer Prinzipien für den Erfolg in der Außenpolitik', in: Zeitschrift für Außen- und Sicherheitspolitik 3, pp. 33-45.

Schmidt, Manfred G./ Ostheim, Tobias (2007): 'Die Lehre von der Parteiendifferenz', in: Schmidt, Manfred G./ Ostheim, Tobias/ Siegel, Nico A./ Zohlnhöfer, Reimut (eds.): Der Wohlfahrtsstaat. Eine Einführung in denhistorischen undinternationalen Vergleich, Wiesbaden: VS Verlag, pp. 51-62.

Schmitt, Carina/Zohlnhöfer, Reimut (2019): 'Partisan differences and the interventionist state in advanced democracies', in: Socio-Economic Review 17:4, pp. 969–992.

Schoenfeld, Gabriel (2010): Necessary Secrets. National Security, The Media, And The Rule of Law, New York/ London: W.W. Norton & Company.

Schulhofe, Stephen (2013): 'Oversight of national security secrecy in the United States', in: Cole, David/ Fabbrini, Federico/ Vedaschi, Arianna (eds.): Secrecy, National Security and the Vindication of Constitutional Law, Cheltenham/Northampton: Edward Elgar, pp. 22-43.

Schuppert, Gunnar Folke (2008): 'Von Ko-Produktion von Staatlichkeit zur Co-Performance of Governance. Eine Skizze zu kooperativen Governance-Strukturenvon den Condottieri der Renaissance bis zuPublic-private Partnerships', in: SFB-Governance Working Paper Series 12/2008.

Sebaldt, Martin (2009): Die Macht der Parlamente, Wiesbaden: VS Verlag.

Shapiro, Jacob N./ Siegel, David A. (2010): 'Is this Paper Dangerous? Balancing Secrecy and Openness in Counterterrorism', in: Security Studies 19:1, pp. 66-98.

Shils, Edward (1956): The Torment of Secrecy. The Background and Consequences of American Security Policies, London: William Heinemann Ltd.

Sieberer, Ulrich (2011): 'The Institutional Power of Western European Parliaments: AMultidimensional Analysis', in: West European Politics, 34:4, 731–54.

Siefken, Sven T. (2018): Parlamentarische Kontrolle im Wandel. Theorie und Praxis des Deutschen Bundestages, Baden-Baden: Nomos.

Siemiatycki, Matti (2007): 'What's the Secret? Confidentiality in Planning Infrastructure Using Public/Private Partnerships', in: Journal of the American Planning Association 73:4, pp. 388-403.

Sievers, Burkhard (1974): Geheimnis und Geheimhaltung in sozialen Systemen. Studien zur Sozialwissenschaft Bd. 23, Opladen: Westdeutscher Verlag.

Simmel, Georg (1906): 'The Sociology of Secrecy and of Secret Societies', in: The American Journal of Sociology 11:4, pp. 441-498.

Simmel, Georg (1923): Soziologie. Untersuchungen über die Formen der Vergesellschaftung, München/ Leipzig: Duncker & Humblot.

Smidt, Wolbert K./ Poppe, Ulrike/ Krieger, Wolfgang/ Müller-Enbergs, Helmut (2007) (eds.): Geheimhaltung und Transparenz. Demokratische Kontrolle der Geheimdienste im internationalen Vergleich, Berlin: Lit Verlag.

Steffani, Winfried (ed.) (1991): Regierungsmehrheit und Opposition in den Staaten der EG, Opladen: Leske + Budrich.

Stehr, Nico/ Wallner, Cornelia (2010): 'Transparenz: Einleitung', in: Jansen, Stephan A./ Schröter, Eckhard/ Stehr, Nico (eds.): Transparenz. Multidisziplinäre Durchsichten durch Phänomene und Theorien des Undurchsichtigen, Wiesbaden: VS Verlag, pp. 9-19.

Stiglitz, Joseph E. (1999/2009): 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life' [1999], in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 697-717.

Stiglitz, Joseph (2002): 'Transparency in Government', in: World Bank Institute (ed.): The Right to Tell. The Role of Mass Media in Economic Development, Washington: The World Bank, pp. 27-44.

Stok, Wilhelm (1929): Geheimnis, Lüge und Missverständnis. Eine beziehungswissenschaftliche Untersuchung. Beiträge zur Beziehungslehre II/1929, Leipzig/ München: Duncker & Humblot.

Stolleis, Michael (1980): Arcana Imperii und Ratio Status. Bemerkungen zur politischen Theorie des frühen 17. Jahrhunderts, Göttingen: Vandenhoeck & Ruprecht.

Strübing, Jörg (2011): 'Zwei Varianten von Grounded Theory? Zu den methodologischen und methodischen Differenzen zwischen Barney Glaser und Anselm Strauss', in: Mey, G./ Mruck, K. (eds.): Grounded Theory Reader, Wiesbaden: VS Verlag für Sozialwissenschaften, pp. 261-277.

Swanström, Kjell (2004): 'Schweden: Die Kultur der Offenheit – Informationszugang als wirksames Mittel zur Kontrolle der öffentlichen Machtausübung', in: Hart, Thomas/ Welzel, Carolin/ Garstka, Hansjürgen (eds.): Informationsfreiheit. Die 'gläserne Bürokratie' als Bürgerrecht? Gütersloh: Verlag Bertelsmann Stiftung. pp. 71-83.

Tacke, Veronika (2015): 'Formalität und Informalität. Zu einer klassischen Unterscheidung der Organisationssoziologie', in: Groddeck, Victoria von/ Wilz, Sylvia Marlene (eds.): Formalität und Informalität in Organisationen, Wiesbaden: Springer VS.

Tefft, Stanton K. (1979): 'The Politics of Secrecy', in: Society May/June 1979, pp. 60-67.

Thompson, D. F. (1999): 'Democratic Secrecy', in: Political Science Quarterly 114:2, pp. 181-193.

Truschkat, Inga/ Kaiser-Belz, Manuela/ Volkmann, Vera (2014): 'Theoretischeses Sampling in Qualifikationsarbeiten: Die Grounded-Theory-Methodologie zwischen Programmatik und Forschungspraxis', in: Mey, Günter/ Mruck, Katja (eds.): Grounded Theory Reader, Wiesbaden: VS Verlag, pp. 353-379.

Trute, Hans-Heinrich (2014): 'Parlamentarische Kontrolle in einem veränderten Umfeld – am Beispiel der Informationsrechte der Abgeordneten', in: Die Verfassungsgerichte der Länder Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thüringen (eds.): 20 Jahre Verfassungsgerichtsbarkeit in den neuen Ländern, Berlin: Berliner Wissenschafts-Verlag, pp. 167-199.

Uhrlau, Ernst (2009): 'Modernisierung und Zukunftsfähigkeit. Die Strukturreform des Bundesnachrichtendienstes', in: Zeitschrift für Außen- und Sicherheitspolitik (ZFAS) 2/2009, pp. 449-453.

Ulbricht, Lena (2014): 'On the paradox of parliamentary control over services operating secretly', in: Internet Policy Review, retrieved from: https://policyreview.info/articles/news/paradox-parliamentary-control-over-services-operating-secretly/346 (last accessed 02.01.2020).

Vaughan, Diane (2009/1997): 'Structural Secrecy' [1997], in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited, pp. 460-467.

Voigt, Rüdiger (ed.) (2017): Staatsgeheimnisse. Arkanpolitik im Wandel der Zeiten, Wiesbaden: Springer VS.

Voigt, Rüdiger (2017): 'Arcana Imperii. Das Staatsgeheimnis als Instrument der Arkanpolitik', in Voigt, Rüdiger (ed.): Staatsgeheimnisse. Arkanpolitik im Wandel der Zeiten, Wiesbaden: Springer VS, pp. 5-30.

Von Beyme, Klaus (2017): Das politische System der Bundesrepublik Deutschland, Wiesbaden: Springer VS.

Wagner, Edgar (2015): 'Die Geschichte der Öffentlichkeit in Theorie und Praxis', in: Arnim, Hans Herbert von (ed.): Transparenz contra Geheimhaltung in Staat, Verwaltung und Wirtschaft. Beiträge auf der 16. Speyerer Demokratietagung vom 23. bis 24. Oktober 2014 an der Deutschen Universität für Verwaltungswissenschaften Speyer, Berlin: Duncker & Humblot, pp. 131-144.

Waske, Stefanie (2009): Mehr Liaison als Kontrolle. Die Kontrolle des BNDdurch Parlament und Regierung1955 – 1978, Wiesbaden: VS Verlag.

Weaver, William G./ Pallitto, Robert M. (2005/2009): 'State Secrets and Executive Power' [2005], in: Maret, Susan L./ Goldman, Jan (eds.): Government Secrecy. Classic and Contemporary Readings, Westport & London: Libraries Unlimited. pp. 632-656.

Weber, Max (1978): Economy and Society, Berkeley u.a.: University of California Press.

Wegener, Bernhard W. (2006): Der geheime Staat. Arkantradition und Informationsfreiheitsrecht, Göttingen: Morango.

Weidemann, Stefan (2014): 'Freiheit unter Beobachtung?', in: Aus Politik und Zeitgeschichte 64:18-19, pp. 3-8

Weiß, Alexander (2011): Theorie der Parlamentsöffentlichkeit. Elemente einer Diskursgeschichte und deliberatives Modell, Baden-Baden: Nomos.

Wenzelburger, Georg (2015): 'Parties, Institutions and the Politics of Law and Order: How Political Institutions and Partisan Ideologies Shape Law-and-Order Spending in Twenty Western Industrialized Countries', in: British Journal of Political Science 45:3, pp. 663-687.

Wenzelburger, Georg/ Zohlnhöfer, Reimut (2020): 'Bringing agency back into the study of partisan politics: A note on recent developments in the literature on party politics', Party Politics Online, https://doi.org/10.1177/1354068820919316.

Westerbarkey, Joachim (1991): Das Geheimnis. Zur funktionalen Ambivalenz von Kommunikationsstrukturen, Opladen: Westdeutscher Verlag.

Wieck, Hans-Georg (2007): 'Geheime Nachrichtendienste', in: Schmidt, Siegmar/ Hellmann, Gunther/ Wolf, Reinhard (eds.): Handbuch zur deutschen Außenpolitik, Wiesbaden: VS Verlag, pp. 259-268.

Wieck, Hans-Georg (2008): 'Demokratische Außenpolitik und Geheimdienste – ein Widerspruch? Anmerkungen aus der Praxis', in: Morisse-Schilbach, Melanie/ Peine, Anke (eds.): Demokratische Außenpolitik und Geheimdienste. Aspekte eines Widerspruchs in Deutschland, Großbritannien, Israel, USA und Frankreich im Vergleich, Berlin: Verlag Dr. Köster, pp. 43-62.

Wise, David/ Ross, Thomas B. (1964): The Invisible Government, New York: Bantam Books.

Wise, David (1973): The Politics of Lying. Government Deception, Secrecy, and Power, New York: Vintage Books.

WBBMF [Wissenschaftlicher Beirat beim Bundesministerium der Finanzen] (2016): Chancen und Risiken Öffentlich-Privater Partnerschaften, in: Gutachten des Wissenschaftlichen Beirats beim Bundesministerium der Finanzen 2/2016.

Wolff, Heinreich Amadeus (2010): 'Der nachrichtendienstliche Geheimnisschutz und die parlamentarische Kontrolle', in: Juristen Zeitung 65:4, pp. 173-180.

Worthy, Ben (2010): 'More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government', in: Governance: An International Journal of Policy, Administration, and Institutions, 23: 4, pp. 561-582.

Worthy, Ben/ Bourke, Gabrielle (2011): 'The Sword and the Shield: The use of FOI by Parliamentarians and the Impact of FOI on Parliament', in: UCL Constitution Unit 154, pp. 1-38.

Ziekow, Jan (2011): 'Wandel der Staatlichkeit und wieder zurück? PPP im Kontext der deutchen Diskussion um die Rolle des Staates', in: Ziekow, Jan (ed.): Wandel der Staatlichkeit und wieder zurück? Die Einbeziehung Privater in die Erfüllung öffentlicher Aufgaben (Public-private Partnership) in/nach der Weltwirtschaftskrise, Baden-Baden: Nomos, pp. 43-65.

Documents

Bundesverfassungsgericht (2009a), BVerfG, 17.06.2009 - 2 BvE 3/07 (Untersuchungsausschuss Geheimgefängnisse)

Bundesverfassungsgericht (2009b), BVerfG, 01.07.2009 - 2 BvE 5/06 (Überwachung von Bundestagsabgeordneten)

Bündnis 90/ Die Grünen (1998): Programm zur Bundestagswahl 98. Grün ist der Wechsel, retrieved from: https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/publikationen/1998_Wahlprogramm_Bundestagswahl.pdf?dimension1=division_agg (last accessed 17.12.2019).

Bündnis 90/ Die Grünen (2002): Grün wirkt! Unser Wahlprogramm 2002-2006, retrieved from: https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/publikationen/2002_Wahlprogramm_Bundestagswahl.pdf?dimension1=division_agg (last accessed 01.01.2020).

Partnerschaft Deutschland (2018): Überblick zu ÖPP-Projekten im Hoch- und Tiefbau in Deutschland, retrieved from: https://www.ppp-projektdatenbank.de/fileadmin/user_upload/181231_Projektdatenbank_PPP-Projekte_Dt__Stand_Ende_Dezember_2018_kurz.pdf (last accessed 02.01.2020).

PKGr [Parlamentarisches Kontrollgremium] (2018): Geschäftsordnung, Fassung vom 18.05.2018, retrieved from: https://www.bundestag.de/resource/blob/537938/d52afbcb73b53eea59511515a1dd40a5/go_pkgr-data.pdf (last accessed 16.09.2020).

SPD und Bündnis 90/ Die Grünen (1998): Aufbruch und Erneuerung -Deutschlands Weg ins 21. Jahrhundert.KoalitionsvereinbarungzwischenderSozialdemokratischen Partei Deutschlands und Bündnis 90/Die GRÜNEN, retrieved from: https://www.spd.de/fileadmin/Dokumente/Beschluesse/Bundesparteitag/koalitionsvertrag_bundesparteitag_bonn_1998.pdf (last accessed 01.01.2020).

Plenary Speeches[124]

Austermann, Dietrich (2004), CDU/CSU, PlPr 15-149: 13975ff.

Beck, Volker (2001), Grüne, PlPr 14-209: 20752ff.

Benneter, Klaus Uwe (2009), SPD, PlPr 16-215: 23421f.

Benneter, Klaus Uwe (2006), SPD, PlPr 16-58: 5716ff.

Binninger, Clemens (2006), CDU/CSU, PlPr 16-71: 7110f.

Bonde, Alexander (2009), Grüne, PlPr 16-211: 22925f.

Bonde, Alexander (2004), DIE GRÜNEN, PlPr 15-102: 9253f.

Bosbach, Wolfgang (2006), CDU/CSU, PlPr 16-58: 5713f.

Brandner, Klaus (2005), SPD, PlPr 15-184: 17346f.

Bürsch, Michael (2005), SPD, PlPr 15-181: 17120f.

Claus, Roland (1999a), PDS, PlPr 14-27: 2257

Claus, Roland (1999b), PDS, PlPr 14-30: 2540f.

Dobrindt, Alexander (2004), CDU/CSU, PlPr 15-102: 9257f.

Dressel, Carl-Christian (2006), SPD, PlPr 16-58: 5719f.

Friedrich, Hans-Peter (2011), CDU/CSU, PlPr 17-127: 15002f.

Friedrich, Horst (2005), FDP, PlPr 15-184: 17345f.

Friedrich, Horst (2004), FDP, PlPr 15-149: 13971f.

Fuchs, Michael (2003), CDU/CSU, PlPr 15-64: 5530ff.

Göbel, Ralf (2006), CDU/CSU, PlPr 16-71: 7092f.

Groß, Michael (2012), SPD, PlPr 17-181: 21577ff.

Hajduk, Anja Margarete (2005), Grüne, PlPr 15-184: 17344f.

Hartmann, Michael (2009), SPD, PlPr 16-225: 24906f.

Hinsken, Ernst (2011), CDU/CSU, PlPr 17-112: 12855f.

Hinsken, Ernst (2005), CDU/CSU, PlPr 15-181: 17127f.

Hofmann, Frank (2006), SPD, PlPr 16-58: 5709f.

[124] The speeches listed here are the ones that have been quoted in the thesis for illustrative reasons. Other speeches that were analysed but are not explicitly referred to are not listed. Thus, the body of analysed material exceeds the listed speeches.

Holmeier, Karl (2012), CDU/CSU, PlPr 17-181: 21583f.

Jelpke, Ulla (2001a), PDS, PlPr 14-168: 16482f.

Jelpke, Ulla (2001b), PDS, PlPr 14-161: 15795f.

Kahrs, Johannes (2011), SPD, PlPr 17-112: 12843f.

Koppelin, Jürgen (1999), FDP, PlPr 14-30: 2538f.

Korte, Jan (2011), DIE LINKE, PlPr 17-127: 15006ff.

Korte, Jan (2006), DIE LINKE, PlPr 16-71: 7097ff.

Krüger-Jacob, Jutta (2005), Grüne, PlPr 15-181: 17123f.

Lippold, Klaus W. (2005a), PlPr 15-184: 17343f.

Lippold, Klaus W. (2005b), PlPr 15-181: 17122f.

Lippold, Klaus W. (2004), PlPr 15-149: 13967ff.

Lühmann, Kirsten (2012), SPD, PlPr 17-162: 19218f.

Marschewski, Erwin (2001a), CDU/CSU, PlPr 14-168: 16478ff.

Marschewski, Erwin (2001b), CDU/CSU, PlPr 14-209: 20750ff.

Marschewski, Erwin (1999a), CDU/CSU, PlPr 14-27: 2255f.

Marschewski, Erwin (1999b), CDU/CSU, PlPr 14-30: 2537f.

Mayer, Stephan (2009), CDU/CSU, PlPr 16-215: 23425f.

Montag, Jerzy (2009), Grüne, PlPr 16-215: 23411

Nešković, Wolfgang (2009a), LINKE, PlPr 16-215: 23415f.

Nešković, Wolfgang (2009b), LINKE, PlPr 16-225: 24900

Oppermann, Thomas (2009a), SPD, PlPr 16-215: 23413ff.

Oppermann, Thomas (2009b), SPD, PlPr 16-225: 24899

Pau, Petra (2011), DIE LINKE, PlPr 17-136: 16263f.

Pau, Petra (2009), DIE LINKE, PlPr 16-215: 23422f.

Pau, Petra (2006), DIE LINKE, PlPr 16-58: 5710f.

Pau, Petra (2001), PDS, PlPr 14-209: 20756f.

Philipp, Beatrix (2004), CDU/CSU, PlPr 15-149: 13948ff.

Piltz, Gisela (2012), FDP, PlPr 17-187: 22397ff.

Piltz, Gisela (2006), FDP, PlPr 16-71: 7093ff.

Röttgen, Norbert (2009a), CDU/CSU, PlPr 16-215: 23409ff.

Röttgen, Norbert (2009b), CDU/CSU, PlPr 16-225: 24903ff.

Schäuble, Wolfgang (2006), CDU/CSU Interior Minister, PlPr 16-58: 5706f.

Schmidt-Jortzig (1999), FDP, PlPr 14-27: 2254

Schulz, Werner (2003), Grüne, PlPr 15-64: 5532

Sendker, Reinhold (2013), CDU/CSU, PlPr 17-237: 29675f.

Sendker, Reinhold (2012), CDU/CSU, PlPr 17-181: 21579f.

Stadler, Max (2009a), FDP, PlPr 16-215: 23411ff.

Stadler, Max (2009b), FDP, PlPr 16-225: 24897f.

Stadler, Max (2006), FDP, PlPr 16-58: 5714ff.

Stadler, Max (2005), FDP, PlPr 15-179: 16955f.

Stadler, Max (2001), FDP, PlPr 14-209: 20755f.

Ströbele, Hans-Christian (2009a), Grüne, PlPr 16-215: 23416f.

Ströbele, Hans-Christian (2009b), Grüne, PlPr 16-215: 23423ff.

Ströbele, Hans-Christian (1999a), Grüne, PlPr 14-27: 2254f.

Ströbele, Hans-Christian (1999b), Grüne, PlPr 14-30: 2539f.

Tiefensee, Wolfgang (2011), SPD, PlPr 17-112 12851ff.

Toncar, Florian (2011), FDP, PlPr 17-112: 12853f.

Uhl, Hans-Peter (2009a), CSU, PlPr 16-215: 23417f.

Uhl, Hans-Peter (2009b), CDU/CSU, PlPr 16-225: 24896f.

Wiefelspütz, Dieter (2011), SPD, PlPr 17-127: 15012f.

Wiefelspütz, Dieter (2006), SPD, PlPr 16-71: 7104ff.

Wiefelspütz, Dieter (2001a), SPD, PlPr 14-168: 16483f.

Wiefelspütz, Dieter (2001b), SPD, PlPr 14-209: 20748ff.

Wiefelspütz, Dieter (1999a), SPD, PlPr 14-27: 2253f.

Wiefelspütz, Dieter (1999b), SPD, PlPr 14-30: 2537

Wieland, Wolfgang (2011), Grüne, PlPr 17-127: 15009f.

Wieland, Wolfgang (2006a), Grüne, PlPr 16-58: 5711ff.

Wieland, Wolfgang (2006b), Grüne, PlPr 16-71: 7099ff.

Wolf, Harald (2011), LINKE Berlin Senator, PlPr 16-112: 12836ff.

Zeitlmann, Wolfgang (2001), CDU/CSU, PlPr 14-209: 20761ff.

Annexes

Annex 1: List of Motions in the Intelligence Agencies Case

Date (printed matter)	Title	Content	drafted by	decision
01.12.1998 (14/89)	Überlassung der Akten der Hauptverwaltung Aufklärung des Ministeriums für Staatssicherheit der ehemaligen DDR durch die Regierung der Vereinigten Staaten von Amerika	demands to ask US government for data on GDR intelligence Staatssicherheit	CDU/CSU	accepted
27.01.1999 (14/325)	Einsetzung des Vertrauensgremiums gemäß § 10 a Abs. 2 der Bundeshaushaltsordnung	composition of the secret sub-committee of the budget committee tasked with intelligence budgets	Bü90/Grüne CDU/CSU FDP SPD	accepted
23.06.1999 (14/1218)	Einsetzung des Parlamentarischen Kontrollgremiums gemäß §§ 4 und 5 Abs. 4 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes	composition of the Oversight Panel	Bü90/Grüne CDU/CSU FDP SPD	accepted
08.11.2000 (14/4500)	Erkenntnisse der Verfassungsschutzbehörden von Bund und Ländern zur Verfassungswidrigkeit der 'Nationaldemokratischen Partei Deutschlands'	demands from the committee on home affairs with a recommendation based on findings of the intelligence agency for the interior on the right-wing NPD's unconstitutionality	SPD Bü90/Grüne	accepted

09.10.2001 (14/7065)	Sicherheit 21 - Was zur Bekämpfung des Internationalen Terrorismus jetzt zu tun ist	suggests changing the legal provisions for the agencies' competences, more resources for counterterrorism	CDU/CSU	rejected
03.12.2002 (15/142)	Einsetzung des Parlamentarischen Kontrollgremiums gemäß §§ 4 und 5 Abs. 4 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes	composition of the Oversight Panel	Bü90/Grüne CDU/CSU FDP SPD	accepted
03.12.2002 (15/146)	Einsetzung des Vertrauensgremiums gemäß § 10a Abs. 2 der Bundeshaushaltsordnung	composition of the secret sub-committee of the budget committee tasked with intelligence budgets	Bü90/Grüne CDU/CSU FDP SPD	accepted
24.11.2005 (16/85)	Überwachung von Journalisten durch den Bundesnachrichtendienst	demands reports on surveillance of journalists	Bü90/Grüne	rejected
13.12.2005 (16/169)	Einsetzung des Parlamentarischen Kontrollgremiums gemäß §§ 4 und 5 Abs. 4 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes	composition of the Oversight Panel	Bü90/Grüne CDU/CSU FDP SPD DIE LINKE	accepted
13.12.2005 (16/181)	Einsetzung des Vertrauensgremiums gemäß § 10a Abs. 2 der Bundeshaushaltsordnung	composition of the secret sub-committee of the budget committee tasked with intelligence budgets	Bü90/Grüne CDU/CSU FDP SPD DIE LINKE	accepted
08.03.2005 (16/836)	Befragung von Gefolterten und Nutzung von Foltererkenntnissen ausschließen	demands conditions for the use of partner agencies' intelligence, especially not using information gathered through torture	Bü90/Grüne	void due to termination of legislative period

08.03.2006 (16/843)	Für eine wirksamere Kontrolle der Geheimdienste	demands amendment of law on Parliamentary Oversight Panel, strengthening scrutiny	Bü90/Grüne	rejected
29.06.2006 (16/2071)	Schaffung einer gesetzlichen Grundlage für die Anti-Terror-Dateien unter Beibehaltung der Trennung von Polizei und Nachrichtendiensten	demands legal basis for counterterrorism database	Bü90/Grüne	rejected
29.06.2006 (16/2081)	Anti-Terror-Gesetz - Zeitliche Befristung beibehalten und Rechtsschutz der Betroffenen verbessern	demands evaluation of temporary security legislation & deletion of several agency competences	Bü90/Grüne	rejected
19.07.2006 (16/2260)	Konstitutive Zustimmung des Deutschen Bundestages zu Beobachtungen von Abgeordneten durch Geheimdienste	demands agencies' surveillance of Members of Parliament to be subject to Bundestag approval	Bü90/Grüne	void due to termination of legislative period
20.09.2006 (16/2624)	Erhaltung des Trennungsgebots - keine Errichtung gemeinsamer Dateien von Polizeibehörden und Nachrichtendiensten des Bundes und der Länder	demands to refrain from introducing a shared database	DIE LINKE	rejected
29.11.2006 (16/3622)	Justizpolitische Agenda für die deutsche EU-Ratspräsidentschaft 2007	suggests an agenda for justice policy during the German council presidency, i.a. preventing criminal prosecution by intelligence agencies	FDP	void due to termination of legislative period
29.11.2006 (16/3619)	Zugriff von Geheimdiensten auf das Schengener Informationssystem der	demands the government to veto intelligence agencies' access to the	DIE LINKE	rejected

	zweiten Generation verhindern	Schengen System on the European Level		
13.12.2006 (16/3809)	Notwendigkeit einer Defizitanalyse des bestehenden Sicherheitssystems	demands i.a. to report on cooperation practice between intelligence agencies and other authorities	FDP	void due to termination of legislative period
08.03.2007 (16/4631)	V-Leute in der NPD abschalten	demands the interior intelligence agencies to abandon their informants within the right-wing NPD	DIE LINKE	rejected
23.05.2007 (16/5455)	Überwachung von Abgeordneten durch den Verfassungsschutz beenden	demands ending intelligence agencies' surveillance of Members of Parliament	DIE LINKE	rejected
04.07.2007 (16/5966)	Das Schengen Informationssystem im europäischen Raum der Freiheit, der Sicherheit und des Rechts transparent und bürgerrechtsfreundlich gestalten	demands from government upholding the principle of separation between intelligence agencies and police concerning the Schengen Information System	Bü90/Grüne	rejected
09.08.2007 (16/6217)	Ermächtigung zur Strafverfolgung von Journalisten gemäß § 353b Abs. 4 StGB im Zusammenhang mit dem 1. Untersuchungsausschuss der 16. Wahlperiode zurücknehmen	demands withdrawal of authorization of President of the Bundestag for criminal investigations against journalists for betrayal of secrets in connection with the BND investigative committee	FDP	rejected
23.10.2007 (16/6772)	Telemediengesetz verbessern - Datenschutz und	demands i.a. deleting provisions on	DIE LINKE	rejected

	Verbraucherrechte stärken	intelligence agencies' access to telemedia data		
25.04.2008 (16/9007)	V-Leute in der NPD abschalten	demands the interior intelligence agencies to abandon their informants within the right-wing NPD	DIE LINKE	rejected
12.11.2008 (16/10880)	Informationsfreiheitsgesetz konsequent weiterentwickeln	demands i.a. the further development of the German FOI law, i.a. abolishing the general exception of the intelligence agencies and requiring classification to be limited to absolutely necessary secrets	Bü90/Grüne	void due to termination of legislative period
11.02.2009 (16/11918)	Europäische Innenpolitik rechtsstaatlich gestalten	demands the government to uphold the principle of separation between intelligence agencies and police while negotiating European rules	Bü90/Grüne	void due to termination of legislative period
03.08.2009 (16/13865)	Entscheidungen des Bundesverfassungsgerichts zur Stärkung der Parlamentsrechte unverzüglich umsetzen	demands disclosure of files after a constitutional court ruling on investigative committee's scrutiny rights	FDP	rejected
16.12.2009 (17/208)	Einsetzung des Parlamentarischen Kontrollgremiums gemäß Artikel 45d des Grundgesetzes	composition of the Oversight Panel	Bü90/Grüne SPD CDU/CSU FDP DIE LINKE	accepted

04.05.2010 (17/1556)	Alle BND-Akten zum Thema NS-Vergangenheit offenlegen	demands disclosing all BND files on Nazi Past of BND-employees & scientific investigation	DIE LINKE	rejected
26.01.2011 (17/4586)	Verantwortlichkeit der Bundesregierung für den Umgang des Bundesnachrichtendienstes mit den Fällen Klaus Barbie und Adolf Eichmann	demands an unclassified report on the BNDs knowledge of the whereabouts of Klaus Barbie and Adolf Eichmann	Bü90/Grüne	rejected
12.04.2011 (17/5483)	Evaluierung befristeter Sicherheitsgesetze	demands evaluation of temporary security legislation	SPD	declared void
06.07.2011 (17/6501)	Militärischen Abschirmdienst einsparen	demands abolishing military intelligence agency (MAD) and transferring its tasks to other authorities	Bü90/Grüne	rejected
30.11.2011 (17/7981)	V-Leute in der Naziszene abschalten und Unabhängige Beratungsstelle Rechtsextremismus, Rassismus, Antisemitismus einrichten	demands shutting down informants (V-Leute) in the right-wing extremist scene after their involvement in the murders of the so-called National Socialist Underground, a right-wing terrorist group	DIE LINKE	void due to termination of legislative period
18.01.2012 (17/8376)	Nach 40 Jahren - Berufsverbote aufheben und Opfer rehabilitieren	demands lifting professional bans that were introduced 40 years earlier based on intelligence findings on supposed radicalism	DIE LINKE	rejected

29.02.2012 (17/8797)	Beobachtung und Überwachung von Mitgliedern des Bundestages durch deutsche Geheimdienste	demands that Members of Parliament be protected from intelligence agencies' surveillance except with support of a parliamentary committee (like immunity from criminal prosecution)	Bü90/Grüne	void due to termination of legislative period
29.01.2013 (17/12168)	Erkenntnisse der Verfassungsschutzbehörden von Bund und Ländern zur Verfassungswidrigkeit der 'Nationaldemokratischen Partei Deutschlands'	demands a report from two parliamentary committees on existing information in unconstitutionality of right-wing NPD	SPD	void due to termination of legislative period
23.04.2013 (17/13225)	Rechtsextremismus entschlossen bekämpfen	demands measures against right-wing extremism	CDU/CSU FDP	accepted
24.04.2013 (17/13240)	Rechtsextremismus umfassend bekämpfen	demands measures against right-wing extremism (i.a. memorandum on use of informants/ V-Leute)	Bü90/Grüne	rejected
02.09.2013 (17/14676)	PRISM, Tempora und die Schutzverantwortung der Bundesregierung	demands investigation of NSA scandal & i.a. humanitarian asylum for Edward Snowden	Bü90/Grüne	void due to termination of legislative period
02.09.2013 (17/14677)	NSA-Affäre aufklären - Grundrechte schützen	demands investigation of NSA scandal & protecting fundamental rights	SPD	void due to termination of legislative period

02.09.2013 (17/14679)	Beenden der nachrichtendienstlichen Kooperation mit den USA und Großbritannien, unabhängige Überprüfung der derzeitigen Praxis und der internationalen Verträge und Abkommen, die den Datenaustausch regeln	demands ending intelligence cooperation after Snowden revelations, disclosure of contracts etc.	DIE LINKE	void due to termination of legislative period

Based on a database search in the http://dipbt.bundestag.de/dip21.web/. Search for 'Anträge' (motions) with the search terms Nachrichtendienst, Geheimdienst, Bundesnachrichtendienst, Verfassungsschutz, BND, VS, MAD, Abschirmdienst.

Annex 2: Interview Partner Acquisition and Conducting of Interviews

Interviewees were chosen after the analysis of the plenary documents. Actors with the most contributions in plenary debates were approached for interviews first. Thus, those actors who dominated the public debate – and therefore the public justification of secrecy – were addressed primarily. Furthermore, interviewees were asked for recommendations for further interviewees at the end of the interviews to access networks and identify relevant actors that were not at the forefront of plenary debates. As a third strategy, possible interview partners were contacted based on their (former) committee membership or departmental association and, thus, their institutionalized competence. In this, people that especially qualify as experts were chosen, not just by virtue of being members of parliament, but based on their practical expertise in the respective area (on the status of an expert see Meuser/ Nagel 1991). In a few instances, the respective parliamentary party group was asked whether they could identify experts after not being able to acquire an interviewee.

Prospective interview partners were contacted in writing and asked for participation given their expert status. They were informed that the interviews would be anonymized before quoting from them.[125] If they did not answer, their offices were phoned in addition to reminders.

[125] Some interviewees explicitly requested to be quoted anonymously, while others did not care. To protect those who wished for anonymity, all interviews are used anonymised. Anonymity was granted from the first interview request. While this might have been an assurance for some, it might also have deterred some from participating, as the anonymity might make this type of interview unattractive for an MP who expectedly is interested in communicating with her constituency.

The interviews were conducted at a place of choice of the interviewees. Often, this was their office, in some cases they suggested public cafés (this was the case for former MPs). Two interviews were conducted over the phone upon interviewee request. The course of the interviews was roughly structured by the prepared interview guideline. Interviewees were encouraged to tell what they considered relevant. Often, the initial question on their experiences with secrecy and information access was a sufficient stimulus that got the interviewees talking about several of the issues proactively. Therefore, the course of the interviews varied depending on how much the interviewees spoke on their own initiative. Some interviews just required a few explicit questions from the guideline as interviewees talked about the issues proactively. Nevertheless, the guideline was important for two reasons: to make sure that the same topics were covered in order to make the interviews comparable to some extent, and to present oneself as a competent conversation partner to the interviewees (Bogner/ Littig/ Menz 20014: 52).

Still, interviewees' experiences are not equivalent since their parliamentary careers differ greatly. Their personal biographies, prior knowledge, committee membership (and its duration), workload (smaller factions might have less resources to focus on a specific topic) and Bundestag membership (some interviewees still were members of parliament, others had long dropped out) vary greatly. Thus, their perspectives are likely to be shaped by this different background. However, taken together, the interviews provide insights from a great variety of perspectives and plenty of material to answer the research question.

Example Guideline

Vorstellung der Interviewerin und des Projekts
Aufnahme + Transkription, Anonymisierung, Ziel: gemeinsame Auswertung mehrerer Interviews, im Text der Dissertation dann nur ausschnittsweise anonymisierte Zitate

Mich interessiert Ihre Praxisperspektive, erzählen Sie mir alles, was Ihnen wichtig erscheint.

- [Personalisierte Einstiegsfrage zum Tätigkeitsfeld, z.B.: wie lange sind sie schon ...]
- Hatten Sie als Parlamentsmitglied für Ihre Arbeit alle Informationen, die sie aus Ihrer Sicht benötigt haben?

Wie läuft im Parlament die Aushandlung über Geheimhaltungs- und Offenlegungsregelungen in Gesetzen?

- Wo gab es Konflikte? (Wie) Wurden diese gelöst?
- Wie funktioniert die Abwägung? Was spielt dabei eine Rolle? [Risiken einschätzen, Verhandlung mit anderen Akteuren im Parlament oder in der Exekutive]
- [Konkrete Fälle besprechen (Gesetzgebung) – Perspektiven, Positionen (individuell, Partei)]
- Welche Bedeutung hat ihr Status als Oppositions-/Regierungspartei?
- Wie wird Geheimbedürftigkeit und Offenlegung diskutiert [anlassbezogen, dauerhaft, Interaktionsmodus]?

Wie funktioniert parl. Kontrolle in geheimhaltungsbedürftigen Bereichen in der Praxis?

- Wie in Bereichen der Kooperation [international oder mit priv. Partnern]?
- Wie sind Sie damit umgegangen, geheime Informationen zu kennen, aber nicht offenlegen zu können? [... öffentlich, parteiintern etc.]
- Welche Bedeutung haben aus Ihrer Sicht Gerichte?

Wann ist Geheimhaltung aus ihrer Sicht notwendig/ gerechtfertigt?

- In welchem Verhältnis steht Geheimhaltung zu Kontrolle

- Was muss aus Ihrer Sicht wer wissen? (Arten von Information, wann, Modus der Übermittlung)

Hat sich aus Ihrer Sicht die Diskussion über die Zeit verändert?

Schlussfrage: Meine Fragen sind soweit beantwortet. Gibt es aus Ihrer Sicht noch wichtige Punkte, die Sie noch ansprechen würden?
Ggf. Gesprächspartner empfehlen?

Note: This core guideline was used for all interviews and marginally adjusted for the different interviewees based on case-specifics or individual positions (Members of Parliament, executive or parliamentary staff).

Annex 3: Adapting Grounded Theory Coding

This dissertation draws on Grounded Theory methodology as discussed by Corbin and Strauss (1990, 2008). It relies on open coding as the 'methodic centerpiece of Grounded Theory' (Bogner/ Littig/ Menz 2014: 77). In other respects, Grounded Theory methodology has been adapted to fit the specific research project.

Open coding procedures were designed by Grounded Theorists, who developed Grounded Theory as a systematic approach to qualitative research. Coding is done inductively from the material and in this differs greatly from the deductive concept of coding in qualitative content analysis (Bogner/ Littig/ Menz 2014: 77). In the process of coding, simple codes are condensed and abstracted to larger categories. This way, the coding process 'breaks open' the text analytically (Corbin/ Strauss 1990: 423) and identifies central aspects irrespective of the text's sequentiality (Meuser/ Nagel 1991: 453). Of course, an interview guideline like the one used here already constitutes some theory-led working categories (Meuser/ Nagel 1991: 454). Empirical analysis then either confirms those categories to be central or causes them to be discarded as irrelevant.

While the study's data evaluation method is based on Grounded Theory open coding, other aspects of Grounded Theory have been adapted to fit the specific research project. In particular, my sampling mechanism was more theory-driven than Grounded Theory's 'theoretical sampling', meaning an interplay of data collection and analysis (see Corbin/ Strauss 2008: 145 ff.) and following up on new leads[126] instead of applying, for example, a predetermined interview guide. The choice of the two policy fields was based on theoretical considerations (see chapter 2.5), and the empirical material was systematically chosen to include all relevant legislative processes. Despite these preliminary decisions, there was some interplay between coding and sampling: the plenary documents were analysed first and a first round of possible interview partners derived from this; also, some further interview partners were identified using a snowball system of recommendations. Data collection and analysis were done in parallel and motions were included in the analysis after finding in the analysis that legislation was insufficient in the policy field of public-private partnerships. Thus, while there are some aspects of theoretical sampling, I still chose the cases and the types of material in general for theoretical reasons, and used an interview guide (cf. Corbin/ Strauss 2008: 57). This theory-driven selection of cases of

126 This would have meant, for example, to follow up on interviewees' suggestions to look into cases like the Deutsche Bahn as an interesting case of executive secrecy by way of organisational privatisation.

material – including borrowing from theoretical sampling in order to effectively access the field – fits my purpose best.[127]

A common misconception of Grounded Theory is that it requires researchers to be a 'blank sheet' (see Strübing 2011). This would mean that one should explicitly *not* review the state of research in order to be able to approach the subject in an unbiased manner. While this demand may have been true for Glaser's rather positivist approach (see Strübing 2011 on the two strands of Grounded Theory), assuming that there can be a 'tabula rasa' and inductive recognition of an existing social reality, being a 'blank sheet' (Clarke 2012: 55; Przyborski/ Wohlrab-Sahr 2014: 196), Strauss and Corbin's approach manages to integrate prior knowledge and research but demands reflection on how that influences analysis. They see a researcher's knowledge as helpful for contextualizing findings and for asking relevant questions (Corbin/ Strauss 2008, see also Truschkat et al. 2014: 359, Clarke 2012). Therefore, instead of aiming to be a 'tabula rasa' (which one never can be) their tradition demands researchers to constantly call findings – and their prior knowledge – into question, checking them against the empirical material (see Corbin/ Strauss 1990: 423) and constantly comparing (Strübing 2011: 264) as a more promising approach to reaching intersubjective comprehensibility. This is a question of how to conduct the analysis instead of disavowing prior knowledge and interest in a research field. A vivid example of what this reflection of literature and prior knowledge can mean is the focus on necessity. While my project initially also assumed a functional perspective on secrecy, over time it turned out that this conception was inadequate, which led me to a stronger focus on the social dimension of secrecy (see Costas/ Grey), conceptualising this dimension less as a deficit and more as an independent aspect of (executive) secrecy.

[127] A more 'orthodox' application of Grounded Theory, including its sampling mechanisms, might be in place for subsequent research. Investigating classification decisions of the 'street level bureaucracy', for example, might warrant a more interwoven process of sampling and analysis.

Annex 4: Use of Different Mechanisms of Parliamentary Scrutiny 1998-2013

Type	**Intelligence Agencies**	**Public-Private Partnerships**
Parliamentary Questions*	589 (search terms: Verfassungsschutz, Bundesnachrichtendienst, BND, BfV, Nachrichtendienst, Geheimdienst	149 (search terms: PPP, ÖPP, 'public-private partnership', 'Öffentlich-Private Partnerschaft')
Committees of Inquiry*	2	0
Constitutional Court Proceedings**	2	0

* Source: DIP database of the German Bundestag (expert search). For the search, I chose the period under investigation (14.-17. Legislative period). As parliamentary questions I included written and oral questions, small and major interpellations, urgent questions, questions of the government. For the second row, I chose committee of inquiry instead of the types of questions. Note: the data is tentative as I did not cleanse it. Therefore, individual hits may be erroneous, as it is simply based on the search terms.

** Source: Organstreitverfahren (inter-organ proceedings) based on a search in the constitutional court database https://www.bundesverfassungsgericht.de/DE/Verfahren/verfahren_node.html

English Summary

Parliaments in democratic systems serve as the people's representatives, legislators and overseers of the executive. They have the power to define the framework in which the executive can act and must report about its action. For parliaments to fulfil their roles, though, they depend on access to information. Executive secrecy is an obvious impediment. How, then, do parliamentary actors try to reconcile secrecy and the normative demands of an open, democratic society? The study investigates their arguments, conflicts and patterns of agreement around this topic for the case of Germany.

While secrecy is a heated topic of public debate, scholarly research on the topic lags behind. Especially the particular empirical patterns of secrecy's public legitimation are still somewhat unknown – despite a recent surge of interest in the topic. The existing literature on over-classification, unauthorized disclosures (whistle-blowing, leaking) or transparency frameworks has only rarely focused explicitly on the decision-making processes *about* executive secrecy. Legal scholarship, in turn, has analysed the existing legal frameworks, but by nature of the discipline has not focused on its genesis. This study addresses this gap. In particular, it illuminates how exactly parliaments use their power to discuss and decide on the need and limits of state secrecy, thus providing its public legitimation. How do parliaments approach executive secrecy? Why do parliaments allow for executive secrecy and what limits do they set?

These questions are addressed through the example of the German Bundestag. Germany makes for an interesting case for studying the debate on secrecy. On the one hand, its parliament is relatively strong. On the other hand, it is – like many countries – a parliamentary democracy and therefore characterised by parliamentary majorities that regularly support their government. Concretely, two German policy fields were chosen for in-depth comparative analysis. The first policy field under investigation is intelligence agencies. Intelligence work is a classic example of executive secrecy, and one that comes quickly to mind when political secrecy is mentioned. Intelligence agencies are the realm of classic statehood. The second policy field investigated is the Public Private Partnerships (PPP). As a relatively recent instrument of public procurement in Germany, PPPs are an example of a new type of 'dissolving' statehood. The formerly clear-cut boundaries of the state – of which intelligence agencies are a prime example – become blurred by various types of cooperation and commissioning between the state and private companies. Here, too, questions of secrecy arise, where for example contracts and calculations on the benefits of PPPs are

kept secret. These two very different cases allow to identify the common characteristics of justifying executive secrecy offered in parliamentary debates as well as case-specific ones. Empirically, the study is based on the complementary analysis of parliamentary documents (such as legislative drafts and plenary protocols) and of expert interviews with MPs, staffers and executive actors as MPs' discursive counterpart. Parliamentary documents allow tracing decision-making processes as well as the justifications for secrecy that actors address to a broader public – and to each other – while anonymised expert interviews provide background information and context.

The analysis starts out with a theoretical discussion that introduces secrecy as a political concept and traces it back to its medieval origins, where it was taken to be proof of the prince's superior and God-given knowledge. The Enlightenment and the rise of modern democracies, however, rendered political secrecy in need of justification. Two concepts of legitimising secrecy now exist: there is the idea of substantive legitimation where executive secrecy is justified by its value for achieving a goal, and there is the idea of procedural legitimation that assumes that executive secrecy can be authorized if decided upon democratically.

The empirical analysis of the two case studies shows that substantive rationales are the main reference point for actors' acceptance of executive secrecy. In their view, secrecy may be legitimate where it serves a specific goal. Information should be kept secret if its disclosure would obstruct achieving that goal. In the intelligence agencies case, the overarching goal justifying the use of secrecy is security. In the PPP case, there are two such substantive rationales: on the one hand, actors justify secrecy as a means of protecting fundamental rights. Partners' trade and business secrets require the state to protect and keep such secrets on behalf of private partners. On the other hand, actors justify secrecy with regard to effective procurement – keeping secrets then serves to get the best offers from private contractors.

While the dominant substantive rationales in the two case studies seemed very distinct at first sight, there were still shared features. In both cases, substantive arguments in favour of secrecy are presented as urgent and necessary. Thus, while the idea of instrumentality in itself does not require secrecy to be the only possibility for achieving a goal, it is nevertheless often presented as such. Second, in both cases, there were references to (a) third-party interests (be they other states or private companies) and (b) to the executive's deliberative secrecy (so-called *Kernbereich exekutiver Eigenverantwortung*).

Despite actors' argumentations about secrecy's urgency, the analysis has emphasized that references to instrumentality are highly contentious in political practice. Disagreement spans all aspects of substantive arguments about secrecy's instrumen-

tal value. It concerns the calculations of secrecy's effects, as all arguments about secrecy's necessity are inherently predictive and, thus, to some extent speculative. How dangerous a secret really is to a cause if disclosed – and whether it actually helps attain a goal – is disputed. Furthermore, there is disagreement concerning the weighing of secrecy's benefits against other, competing values such as freedom or transparency. Thus, the debate is not just about whether secrecy helps attain a goal, but also whether that goal is worth it. The main source of disagreements are differences in the ideological positions of the parties, as well as the different institutional roles they occupy viz. government majority and opposition, and between executive and parliament.

Procedural legitimation has the potential to fill the gap left by the contestation of substantive legitimation. Democratic procedures allow for defining which substantive justifications of secrecy are considered legitimate, at least by a majority, and likely to be accepted by a minority when the decision is taken according to democratic procedure. The analysis of the two cases shows that there are attempts at setting boundaries for secret action and secrecy through legislation as well as defining oversight mechanisms. While scholarship on the democratic legitimation of secrecy has mainly stressed parliamentary deliberation and legislation as a source of procedural legitimation for secrecy, the analysis conducted in this dissertation revealed the importance of a second dimension of procedural legitimation: parliamentary scrutiny. Actors explicitly labelled parliamentary scrutiny committees a 'legitimising link' to the people. Scrutiny is seen to confer legitimacy on secrecy by providing a link to parliament as the people's representatives. More specifically, it serves as a safeguard against a misuse of secrecy for purposes not defined as legitimate justifications for secrecy in a democratic process.

The two mechanisms of procedural legitimation are not independent of one another. Legislation is important for defining scrutiny rights and thus enabling procedural legitimation through scrutiny as the comparison has shown: while there was more legislation in the intelligence agencies case, there was also a more elaborate system of parliamentary scrutiny. And, ideally, experiences from scrutiny in practice feed back into legislation. Nevertheless, they can and should be considered separate mechanisms of procedural legitimation: legislation sets framework conditions *ex ante*, and usually in a more generalized way, while parliamentary scrutiny works *ex post* and deals with concrete issues, cases and conflicts. The two mechanisms therefore serve to satisfy different demands for legitimation. Legislation and parliamentary debate meet the demand for a general, abstract justification for secrecy. Parliamentary scrutiny, on the other hand, meets the demand for the legitimation of concrete instances of secrecy.

The legitimising effect of both mechanisms depends on different factors. The dominant one is inclusiveness: for legislation, this means that parliamentary processes must ensure sufficient time and opportunity for the opposition to present their alternatives or criticisms. Quick procedures which lack expert hearings, and amendments on short notice are considered impediments for legislation to provide legitimacy. For parliamentary scrutiny, inclusiveness means that all parliamentary party groups demand participation in proxy monitoring committees. Only representative committees, it is argued, provide legitimacy. Other factors that have an impact on the legitimising force of scrutiny include access to information, processing capacities, and sanctioning powers as prerequisites for strong parliamentary scrutiny. Certainly, the concrete implementation of these conditions may be subject to disagreement as well, disagreement that can be pacified by legislative specification to some extent.

But although legislation and parliamentary scrutiny clearly play an important role in legitimising executive secrecy, especially given the lack of agreed-upon substantive legitimation, they have inherent limits. These arise from secrecy itself, such as executive information control and problems of sanctioning secret wrongdoing. Such limitations may be enclosed by certain institutional setups, but cannot ultimately be dissolved. This shows that there remains a residuum that potentially eludes procedural legitimation. This does not dispense with procedural legitimation, but calls for awareness of the imperfections of secrecy's legitimation in a democratic setting.

Finally, based on the empirical results, some conclusions can be drawn both for further research and political practice. In research, two major strands should be pursued. First, there is a need for further comparative analyses that include both more policy fields and contextualise the German findings by way of a country comparison. Second, this comparative approach should be complemented by in-depth analyses of executive practices of secret-keeping in order to trace what executives make of the frameworks set by parliament, how they interpret and navigate them. For political practice, the analysis suggests that proxy monitoring is a worthwhile setup for enclosing all kinds of executive secrecy, not just intelligence secrecy. Furthermore, it shows that procedural legitimation by way of parliamentary scrutiny depends on empowering opposition parties. Otherwise, scrutiny holds less of a legitimising effect in parliamentary' actors' view.

Samenvatting

Parlementen in democratische systemen dienen als vertegenwoordigers van het volk, wetgevers en controleurs van de uitvoerende macht. Zij hebben de macht om het kader te definiëren waarbinnen de uitvoerende macht mag acteren en zijn gehouden daarover te rapporteren. Voor het vervullen van hun rol zijn parlementen afhankelijk van toegang tot informatie. De vraag is dan: hoe trachten parlementaire actoren geheimhouding te verenigen met de normatieve eisen van een open, democratische maatschappij? De studie onderzoekt hun argumenten, conflicten en patronen van overeenstemming over dit onderwerp in de Duitse casus.

Waar er een verhit publiek debat woedt over geheimhouding, blijft wetenschappelijk onderzoek over dit onderwerp achter. Met name de specifieke empirische patronen van de publieke legitimatie van geheimhouding zijn nog altijd enigszins onbekend – ondanks een recente toename van interesse in het onderwerp. De bestaande literatuur over bovenmatige classificatie, ongeautoriseerde onthullingen (klokkenluiden, lekken) of transparantiekaders is slechts zelden expliciet gericht op de besluitvormingsprocessen over executieve geheimhouding. De rechtswetenschappen hebben op hun beurt de bestaande juridische kaders geanalyseerd, maar door de aard van hun discipline lag de focus niet op het ontstaan van executieve geheimhouding. Deze studie bespreekt dit gat. Meer specifiek belicht zij hoe parlementen precies hun macht gebruiken om de behoefte aan en de grenzen van staatsgeheimhouding te bespreken en hierover besluiten te nemen, waardoor in de publieke legitimatie wordt voorzien. Hoe benaderen parlementen executieve geheimhouding? Waarom staan parlementen executieve geheimhouding toe en welke grenzen stellen zij?

Deze vragen worden besproken met als voorbeeld van de Duitse Bundestag. Duitsland vormt een interessante casus om het debat over geheimhouding te bestuderen. Aan de ene kant is het parlement relatief sterk. Aan de andere kant heeft Duitsland – zoals veel landen – een parlementaire democratie is wordt derhalve gekarakteriseerd door parlementaire meerderheden die regelmatig hun regering steunen. Meer concreet zijn er twee Duitse beleidsvelden gekozen voor een diepgaande vergelijkende analyse. Het eerste beleidsveld dat wordt onderzocht betreft de inlichtingsdiensten. Het werk van inlichtingsdiensten vormt een klassiek voorbeeld van executieve geheimhouding en komt snel in de gedachten op wanneer het gaat om politieke geheimhouding. Het tweede onderzochte beleidsveld betreft het publiek-private samenwerkingsverband (PPS). Als een relatief recent instrument van overheidsaanbestedingen in Duitsland zijn PPS-en een voorbeeld van een nieuw type 'oplossende' staat. De voormalige eenduidige grenzen van de staat – waarvan

inlichtingendiensten een uitstekend voorbeeld zijn – vervagen door verschillende typen van samenwerking en opdrachtverstrekking tussen de staat en private organisaties. Ook hier rijzen vragen over geheimhouding, bijvoorbeeld de geheimhouding van contracten en berekeningen over de voordelen van PPS-en. De hiervoor genoemde twee zeer verschillende casussen maken het mogelijk om de gemeenschappelijke karakteristieken te identificeren van de rechtvaardiging van executieve geheimhouding zoals gegeven in zowel parlementaire als casus-specifieke debatten. Empirisch is deze studie gebaseerd op de complementaire analyse van parlementaire documenten (zoals wetsontwerpen en plenaire protocollen) en op interviews met experts zoals parlementsleden, parlementaire stafleden en uitvoerende actoren als discursieve tegenhangers van de parlementsleden. Parlementaire documenten maken het mogelijk besluitvormende processen te volgen, evenals de rechtvaardigingen voor geheimhouding die de actoren richten aan een breder publiek – en elkaar – terwijl geanonimiseerde interviews met experts voorzien in achtergrondinformatie en context.

De analyse begint met een theoretische discussie die geheimhouding introduceert als politiek concept en haar middeleeuwse origine achterhaalt, toen zij werd gezien als bewijs van de koninklijke superieure en door God gegeven kennis. De Verlichting en de opkomst van moderne democratieën maakten rechtvaardiging van politieke geheimhouding nodig. Er bestaan nu twee concepten van de legitimatie van geheimhouding: het idee van inhoudelijke legitimatie, waarin executieve geheimhouding wordt gerechtvaardigd door haar waarde voor het behalen van doelen, en het idee van procedurele legitimatie waarin de aanname is dat autorisatie van executieve geheimhouding mogelijk is wanneer hiertoe democratisch wordt besloten.

Uit de empirische analyse van de twee casusstudies blijkt dat, voor de actoren, inhoudelijke bestaansredenen het voornaamste referentiepunt vormen voor de acceptatie van executieve geheimhouding. In hun visie kan geheimhouding legitiem zijn waar zij een specifiek doel dient. Informatie moet geheim blijven wanneer de onthulling ervan het bereiken van dat doel zou belemmeren. In de casus van de inlichtingendiensten is veiligheid het overkoepelende doel dat het gebruik van geheimhouding rechtvaardigt. In de PPS-casus zijn er twee zulke inhoudelijke bestaansredenen. Aan de ene kant rechtvaardigen de actoren geheimhouding als een middel om fundamentele rechten te beschermen. De handels- en bedrijfsgeheimen van partners vereisen dat de staat deze geheimen bewaart en beschermt uit naam van de private partners. Aan de andere kant rechtvaardigen de actoren geheimhouding met betrekking tot effectieve inkoop – in dat geval dient geheimhouding het doel om de beste aanbiedingen te krijgen van private opdrachtnemers.

Hoewel de dominante inhoudelijke bestaansredenen van de twee casusstudies op het eerste gezicht sterk van elkaar verschillen, zijn er gedeelde eigenschappen. In beide gevallen worden inhoudelijke argumenten ten gunste van geheimhouding gepresenteerd als urgent en noodzakelijk. Terwijl het idee van instrumentaliteit op zichzelf geen geheimhouding vereist als enige mogelijkheid om een doel te bereiken, wordt zij desalniettemin toch vaak als zodanig gepresenteerd. Ten tweede waren er in beide casusstudies referenties naar (a) belangen van derde partijen (andere staten of private bedrijven) en (b) de geheimhouding van de beraadslagende uitvoerende macht (de zogenaamde Kernbereich exekutiver Eigenverantwortung).

Ondanks de argumentaties van betrokken actoren over de urgentie van geheimhouding, benadrukt de analyse dat referenties aan instrumentaliteit sterk omstreden zijn in de politieke praktijk. Meningsverschillen overkoepelen alle aspecten van inhoudelijke argumenten over de instrumentele waarde van geheimhouding. Deze betreffen de berekeningen van de effecten van geheimhouding, omdat alle argumenten over de noodzaak van geheimhouding inherent voorspellend zijn en dus, tot op zekere hoogte, speculatief. Hoe gevaarlijk een onthuld geheim in werkelijkheid is voor een doel – en of zij daadwerkelijk helpt een doel te bereiken – wordt betwist. Daarnaast is er een verschil van mening over de weging van de voordelen van geheimhouding met andere, concurrerende waarden zoals vrijheid of transparantie. Derhalve gaat het debat niet alleen over de vraag of geheimhouding helpt om een doel te bereiken, maar ook over of dat doel het waard is. De belangrijkste bronnen van onenigheid zijn de verschillen in de ideologische posities van de partijen, de verschillende institutionele rollen die zij bekleden ten aanzien van de regeringsmeerderheid en verschillen tussen kabinet en parlement.

Procedurele legitimatie kan in potentie het gat vullen dat wordt veroorzaakt door de betwisting van inhoudelijke legitimatie. Democratische procedures maken het mogelijk om te definiëren welke inhoudelijke rechtvaardigingen van geheimhouding legitiem worden geacht, althans door een meerderheid, en waarschijnlijk geaccepteerd worden door de minderheid wanneer een besluit is genomen conform de democratische procedure. Uit de analyse van de twee casussen blijkt dat er pogingen zijn om geheime acties en geheimhouding te begrenzen door middel van zowel wetgeving als het definiëren van toezichtsmechanismen. Waar de wetenschap van democratische legitimatie van geheimhouding parlementaire deliberatie en wetgeving hebben benadrukt als bronnen van procedurele legitimatie van geheimhouding, onthult de analyse in deze dissertatie het belang van een tweede dimensie van procedurele legitimatie: kritisch parlementair onderzoek. De betrokkenen bestempelden parlementaire onderzoekscomités expliciet als 'legitimerende link' naar het volk. Kritisch onderzoek brengt volgens hen legitimiteit

van geheimhouding over door te voorzien in een link naar het parlement als volksvertegenwoordiging. Meer specifiek dient kritisch onderzoek als beveiliging tegen misbruik van geheimhouding voor doeleinden die niet zijn gedefinieerd als legitieme rechtvaardigingen voor geheimhouding in het democratisch proces.

De twee mechanismen van procedurele legitimatie zijn niet onafhankelijk van elkaar. Wetgeving is belangrijk voor het bepalen van rechten voor kritisch parlementair onderzoek, waarmee procedurele legitimatie door nauwkeurigheid mogelijk wordt zoals uit de vergelijking blijkt: tegelijk met een grotere hoeveelheid wetgeving in het geval van de inlichtingendiensten, was er een uitgebreider systeem van kritisch parlementair onderzoek. Idealiter voeden de ervaringen hiermee de vorming van wetten. Toch kunnen en moeten zij worden beschouwd als separate mechanismen van procedurele legitimatie: wetgeving geeft de kadercondities ex ante, meestal in een meer algemene wijze, waar parlementair nauwkeurigheidsonderzoek ex post met concrete issues, zaken en conflicten werkt. Daarom dienen de twee mechanismen verschillende legitimatiedoelen. Wetgeving en parlementair debat komen tegemoet aan de vraag naar een algemene, abstracte rechtvaardiging van geheimhouding. Kritisch parlementair onderzoek, aan de andere kant, komen tegemoet aan de vraag naar de legitimatie van concrete gevallen van geheimhouding.

Het legitimerende effect van beide mechanismen zijn afhankelijk van verschillende factoren. De dominante factor is inclusiviteit: in het geval van wetgeving betekent dit, dat parlementaire processen moeten voorzien in voldoende tijd en kansen voor de oppositie om hun alternatieven en kritieken te presenteren. Snelle procedures zonder hoorzittingen met experts en korte-termijnamendementen worden beschouwd als hindernissen voor wetgeving die het voorzien in legitimatie beoogt. In het geval van kritisch parlementair onderzoek betekent inclusiviteit dat alle parlementaire partijen deelname eisen in gevolmachtigde toezichthoudende comités. Alleen comités van afgevaardigden verschaffen legitimatie, stelt men. Andere factoren die een impact hebben op de legitimerende kracht van kritisch onderzoek, zijn toegang tot informatie, verwerkingscapaciteit en bekrachtingsbevoegdheden als voorwaarden voor sterk parlementair kritisch onderzoek. De concrete implementatie van deze conditie is mogelijk eveneens onderwerp van meningsverschillen, hoewel deze tot op zekere hoogte kan worden stilgelegd door specificaties in de wetgeving.

Maar hoewel wetgeving en kritisch parlementair onderzoek duidelijk een belangrijke rol spelen in de legitimatie van executieve geheimhouding, vooral gezien het gebrek aan inhoudelijke legitimatie waarover consensus bestaat, hebben ze inherente beperkingen. Deze komen uit geheimhouding zelf, zoals executieve controle van informatie en problemen met het sanctioneren van geheime

overtredingen of wangedrag. Zulke beperkingen zijn mogelijk omgeven door bepaalde institutionele structuren, maar kunnen uiteindelijk niet worden weggenomen. Hieruit blijkt dat er een residu resteert dat mogelijkerwijs ontsnapt aan procedurele legitimatie. Dit maakt procedurele legitimatie niet overbodig, maar vraagt om bewustzijn van de imperfecties van de legitimatie van geheimhouding in een democratische setting.

Ten slotte zijn er, gebaseerd op de empirische resultaten, enkele conclusies mogelijk over verder onderzoek en de politieke praktijk. Verder onderzoek van twee hoofdstromingen is kansrijk. Ten eerste is er de behoefte aan verdere comparatieve analyse, zowel van meer beleidsvelden als van de contextualisering van de vindingen in Duitsland vergeleken met andere landen. Ten tweede kan deze vergelijkende aanpak worden aangevuld door diepgaande analyses van executieve praktijken van geheimhouden teneinde te kunnen traceren hoe executieve actoren omgaan met de door het parlement gestelde kaders, hoe zij deze interpreteren en daarin hun weg vinden. De analyse suggereert dat gevolmachtigde toezichthouding in de politieke praktijk een lonende structuur is om alle soorten van executieve geheimhouding te omvatten, niet alleen de geheimhouding door inlichtingendiensten. Voorts blijkt uit de analyse dat procedurele legitimatie door middel van kritisch parlementair onderzoek afhankelijk is van het machtigen van oppositiepartijen. Bij gebrek daaraan heeft kritisch onderzoek een kleiner legitimerend effect in de visie van parlementaire actoren.

Curriculum Vitae

Dorothee Riese was born in Jena, Germany, on 11 June 1988. She attended primary school in Jena and went to Adolf-Reichwein-Gymnasium Jena, where she obtained her *Abitur* in 2006. From 2006 to 2013, she studied political science at Leipzig University, obtaining her B.A. in 2010 and her M.A. in 2013 with a thesis on European Union citizenship. During her graduate studies, she spent an exchange semester at Sciences Po Paris (M.A. European Affairs). After her graduation, she worked from 2013 to 2018 for Prof. Dr. Astrid Lorenz at the Institute of Political Science at Leipzig University as a researcher, teacher and coordinator of the M.A. programme "European Integration in East Central Europe". In 2014, she began working on her PhD on the legitimation of executive secrecy in the German Bundestag. A paper on one of her PhD case studies won the ECPR Rudolf-Wildenmann-Prize in 2017. In 2018, she began working as a PhD researcher on the ERC-funded project "Democratic Secrecy" led by Dr. Dorota Mokrosinska at Leiden University.