Enclosing executive secrecy: arguments and practices in the German Bundestag

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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.