Towards a critique of state secrecy:
Uncovering the rhetorical practices of secret keepers and their legitimization by the discourse of law

by

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Abstract

This thesis examines the rhetorical devices that secret keepers in Canada, the United Kingdom and the United States use to justify the non-disclosure of state secrets. It also examines the manner in which judges in these three countries write and speak about state secrets. By embracing the rhetorical devices used by secret keepers and materializing them in reported decisions, judges add legitimacy to the discourse of secret keepers and directly assist in its reproduction and distribution. Taken together, the discourse of the state and the discourse of law on state secrecy sets up the dominant interpretive frames with which any public engagement, whether supportive or critical, must engage. While the persuasive social effect and perceived legitimacy of this combined discourse may ebb and flow, it appears enduring and difficult to challenge despite the existence of counter-discourses and concessions such as the adoption of access to information legislation. This thesis seeks to understand how state secrecy discourse becomes or appears preeminent, and how it reproduces itself, as a first step in formulating a fuller critique of this discourse.
Acknowledgements


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facts and interpretation are mine alone. Finally, my greatest appreciation goes to my wife, Holly Porteous, for her extreme patience, strong encouragement and editorial advice throughout the long journey that led me to this thesis. Finally, I owe a debt of gratitude to Tilley, Bingham, Daphne and Finn, for their kindness and companionship over so many wonderful years: Rest in Peace.
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Chapter 1: Introduction

1.1 Purpose

The language people use when they speak and write about state secrets has an importance that extends beyond mere semantics. As Sally McConnell-Ginet points out, language and words “have a lot of power because they are part of how we do things, how we frame things for one another. They’re part of how we collectively come to think about certain things and the attitudes that we form and share, and what we take to be okay and what we take to be not okay.”1 Robert Cover was even more poignant in arguing that the words of judicial decisions have a violent force—given that what judges say may result in accused individuals losing their freedom, property, and even their lives.2 Language and word choices, indeed, have consequences.

Accepting these premises as theoretically valid, this thesis seeks to identify and examine the discourse of the keepers of state secrets and the legitimization of that discourse by judges. It focuses on the reasons that secret keepers3 in Canada, the United Kingdom and the United States use to sustain the existence and non-disclosure of state

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2 Robert Cover, “Violence and the Word” (1986) 95 Yale LJ 1601 at 1601. As Gewirtz notes, “Cover probably overstated the point when he spoke of the ‘violence’ of the words of a judicial decision; but he was right to underscore that the words of court decisions have a force that differentiates them from most other utterances.” Paul Gewirtz, “Narrative and Rhetoric in the Law” in Peter Brooks & Paul Gewirtz, eds, Law’s Stories: Narrative and Rhetoric in the Law (New Haven: Yale University Press, 1996) 2 at 5.
3 The expression “secret keepers” is not widely used in the literature, but was used recently by Matthew Potolsky, The National Security Sublime: On the Aesthetics of Government Secrecy [London, UK: Routledge, 2019], and me, “The Rhetorical Devices of the Keepers of State Secrets” (2021) 2:2 Secrecy & Society, online: <scholarworks.sjsu.edu/secrecyandsociety/vol2/iss2/6>). I use it throughout this thesis to encompass all state officials entrusted with access to state secrets and the concomitant responsibility to prevent their unauthorized disclosure.
secrets in these societies, where state secrecy is in principle the exception to good governance and democratic accountability, and not the rule.\textsuperscript{4} The analysis of these reasons points to a set of rhetorical devices that secret keepers mobilize and assemble to persuade judges and the public that state secrets should remain undisclosed.\textsuperscript{5} Rhetorical devices are also known as argumentation devices, linguistic devices, textual devices or rhetorical techniques in the scholarly literature. My choice of the term “devices” follows Michel Foucault’s usage: “[R]hetoric provides the speaker with technical devices in order to act upon the audience’s mind, whatever his own opinion is.”\textsuperscript{6} In other words, any methods used to persuade, from figures of speech, compositional techniques, value-oriented and amplifying lexical terms, and types of argument can be termed devices. Used together, they form a coherent discourse on the protection of state secrets.

Discourse is “a particular way of [writing and] talking about and understanding the world (or an aspect of the world).”\textsuperscript{7} A discourse thus “provides a set of possible statements about a given area, and organises and gives structure to the manner in which a particular topic, object, process is to be talked about.”\textsuperscript{8} There are an infinite number of

\textsuperscript{4} The situation is reverse in autocratic systems of government. As Bobbio writes, “[i]n the autocratic state the state secret is not the exception but the rule: important decisions must be taken away from the prying eyes of the public in any shape or form.” Norberto Bobbio, \textit{The Future of Democracy: A Defence of the Rules of the Game}, translated by Roger Giffin and ed by Richard Bellamy (Minneapolis: University of Minnesota Press, 1987) at 87.  
\textsuperscript{5} “When the argumentation is in the first place viewed as aimed at achieving agreement by having the acceptability of the opinion agreed upon by the audience, a perspective is taken that is primary rhetorical.” Frans H Van Eemeren & Peter Houtlosser, “And Always the Twain Shall Meet” in Frans H Van Eemeren & Peter Houtlosser, eds, \textit{Dialectic and Rhetoric: The Warp and Woof of Argumentation Analysis} (Dordrecht: Springer, 2002) 3 at 10.  
\textsuperscript{8} Gunther Kress, \textit{Linguistic Processes in Sociocultural Practice} (Victoria, Australia: Deakin University Press, 1985) at 6-7.
discourses in society, many overlapping or opposing others. As discourses always do something, it is reasonable to say, paraphrasing Stefano Guzzini, that “talking about [state secrecy] is not innocent.” In fact, we live in discourse societies where our socio-cultural lives are constantly engaged in “communicative action through argumentation, even if this is in a very rudimentary and undeveloped form.” Discourses can have a range of social effects, including supplementing people’s perception and experience by socially reproducing historical and generic knowledge through many genres and forms of communication, including judicial decisions.

This thesis, in essence, is about how secret keepers put their arguments against the disclosure of state secrets before an audience, and the extent to which judges embrace and give durability to these same rhetorical devices in their written decisions. This mechanism is important to recognize and understand because of the effect it has on how

9 Think, for example, of the discourse of authors of fiction on state secrecy which overlaps with the discourse of secret keepers. “Fiction,” Melley writes, “is one of the few permissible discourses through which writers can represent the secret work of the state, which the public must ultimately approve ‘sight unseen.’” Foreign and domestic intelligence is thus a major subject of popular culture, central to thousands of films, television serials, novels, comics, and electronic games. Timothy Melley, The Covert Sphere: Secrecy, Fiction, and the National Security State (Ithaca, NY: Cornell University Press, 2012) at 9.


15 As “Aristotle observed long ago […] it is not enough to know what to say; one must know how to say it. The precise translation is, “It is not enough to know what we ought to say; we must also say it as we ought.” [Aristotle, On Rhetoric, translated by H Rhys Roberts (New York: Barnes & Noble Books, 2005) at 397] Brian L Porto, Rhetoric, Persuasion, and Modern Legal Writing: The Pen Is Mightier (Lanham: Lexington Books, 2020) at 1.
societies know, think and act about state secrets, and how it marginalizes other possible discourses on state secrecy.

Canada, the United Kingdom and the United States classify as a state secret any information or material that a state is taking measures to safeguard, deliberately concealing from public view, and refusing to disclose, because to do so would “be contrary to the best interests of the state.”\textsuperscript{16} The degree of protection given to a state secret is, in policy terms, commensurate with the potential injury to the national interest (usually in respect of national security, national defence and international relations) should the secret be disclosed to anyone not authorized to receive it.\textsuperscript{17} Within this construct, the secrets of sub-national governing bodies and information sensitive for reasons other than the national interest (such as private or commercial information) are not state secrets.

While general and standard, this definition reflects the post-World War II bureaucratization and legalization of the state secret in liberal democracies. This is a


\textsuperscript{17} For example, Canada’s Treasury Board Secretariat states that: “Information is categorized as ‘classified’ (that is, ‘Confidential,’ ‘Secret’ or ‘Top Secret’) when unauthorized disclosure could reasonably be expected to cause injury to the national interest: J.2.4.1.1 Top Secret: Applies to the very limited amount of information when unauthorized disclosure could reasonably be expected to cause exceptionally grave injury to the national interest; J.2.4.1.2 Secret: Applies to information when unauthorized disclosure could reasonably be expected to cause serious injury to the national interest; and J.2.4.1.3 Confidential: Applies when unauthorized disclosure could reasonably be expected to cause limited or moderate injury to the national interest.” Treasury Board Secretariat, Directive on Security Management - Appendix J: Standard on Security Categorization, online: Treasury Board Secretariat <www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32614>. In the United States, similar categories are defined in executive orders issued by the president. For example, see Executive Order 13526 - Classified National Security Information, issued by President Barrack Obama in 2009, online: The White House <https://obamawhitehouse.archives.gov/the-press-office/executive-order-classified-national-security-information>. The United Kingdom has similar definitions as well, although it no longer uses the confidential designation. See United Kingdom, Cabinet Office, Government Security Classifications Version 1.1 May 2018.
definition, however, that is not immutable. The use of the reason of state to justify the
existence of state secrets is a relatively recent phenomenon in the course of human
history. The state secret itself, moreover, can be contested. As William Walters noted in
referring to Brian Balmer’s work,18 “actors may disagree as to whether an object actually
is secret, why it is secret, how secret it is and when it is secret.”19 As Walters correctly
sees it, secrecy is something that is named, problematized, governed, contested, shaped
and reshaped, as well as made and unmade by actors according to the situations and
controversies they encounter. Discourse plays a central role in this secretization process,
along with materials, personnel and financial resources,20 and is equally deserving of
examination.21

While this research does not contribute in any significant way to a better doctrinal or
applied understanding of the laws controlling authorized disclosures or punishing the
unauthorized disclosures of state secrets, it gives a greater place to the study of a
professional community that has not yet been the subject of linguistic analysis. In their
edited collection on understanding the rhetoric of professional communities, María
Ángeles Orts, Ruth Breeze and Maurizio Gotti look at how selected communities
persuade and manipulate others.22 While the professional community of secret keepers
was not part of that effort, it could have been, as the discourse of the state on secrecy is

18 Brian Balmer, “A Secret Formula, a Rogue Patent and Public Knowledge about Nerve Gas: Secrecy
19 William Walters in State Secrecy and Security: Refiguring the Covert Imaginary (London, UK:
20 As Walters notes, “secretization within the security domain requires materials, personnel,
equipment and much else, then it always comes at a financial cost.” Ibid at 39.
21 “Rather than imagine secrecy in terms of great binaries, we should examine the heterogeneous
systems, discourses and regimes within which it is produced, managed, circulated and transformed.” Ibid.
22 María Ángeles Orts, Ruth Breeze & Maurizio Gotti, eds, Power, Persuasion and Manipulation in
Specialised Genres: Providing Keys to the Rhetoric of Professional Communities (Bern: Peter Lang, 2017).
embodied by subjects who express it in their workplace, at home and in public. These subjects—the secret keepers—are those state officials formally entrusted with secrets and legally bound to prevent their unauthorized disclosure. They can be studied like any other epistemic and professional community (legal, medical, etc.) that separates its members from outsiders. Through various processes of socialization, members of the epistemic and professional community of secret keepers acquire common knowledge and skills and partake in a similar discourse on state secrecy.\textsuperscript{23} These processes play an important role in the protection of state secrets from unauthorized disclosure. For normative compliance to have a chance of success, social norms—“ought” rules of behaviour—must be internalized (by instilling traditions, habits, routines, and pride in one’s work…). This is done through a mix of socialization agents (e.g., instructors, figures of authority, trusted leaders), techniques (e.g., annual and special performance evaluations, oath and secrecy pledges, polygraph examinations, prior restraint and non-disclosure agreements, indoctrination processes and training programs, codes of ethics, etc.) and individually through payoff comparisons (e.g., being trusted, getting promotions, preserving employment, pension or liberty).\textsuperscript{24} That is, individuals willingly internalize general rules of behaviour because they relieve “the individual from calculating the costs and benefits in each situation” and reduce “the likelihood of costly errors.”\textsuperscript{25}

\begin{flushright}
\textsuperscript{25} \textit{Ibid} at 184.
\end{flushright}
Members of the epistemic and professional community of secret keepers are expressly aware that they have an identity that distinguishes them from other communities and outsiders, that is, those who cannot officially access state secrets. Having access to secrets “leads to differentiation between actors—the insiders and outsiders of secrecy—and thus the formation of the identity of groups and their members.”26 That differentiation is understood as so important that it extends to the private life of its members. As Stanton Tefft notes:

Their profession requires them to maintain strict anonymity about their job and total confidentiality about their job assignments. Then, they must seek their emotional satisfaction within the intelligence community [where the most secrets and the largest number of secret keepers are located] itself, rather than outside it.27

That differentiation is seen as purposeful and necessary to secret keepers. As Robert Baer, a former US Central Intelligence Agency (CIA) case officer, says so well: “At the core of our intelligence system are secrets that must be kept, and the best way to do that is to isolate the guardians of those secrets from the outside world.”28

The expression “I could tell you, but then I’d have to kill you,” which is often uttered by amateurs,29 pundits and occasionally secret keepers themselves as a joke,30

29 “It’s classified,” says Maverick in the movie Top Gun. “I could tell you, but then I would have to kill you.” Quoted by Alasdair Roberts, Blacked Out: Government Secrecy in the Information Age (Cambridge, UK: Cambridge University Press, 2006) at 49.
30 E.g., “I’d tell you what the issue was, but then, as we say, I’d have to kill you.” Rosa Brooks, How Everything Became War and the Military Became Everything: Tales from the Pentagon (New York: Simon
also reflects the notion that secret keepers share an insider identity “that comes with being trusted with secrets.” A uniform’s shoulder patch created for the US Navy’s Air Test and Evaluation Squadron Four is a perfect representation of such a secretive group identity: it simply reads: “Si ego certiore faciam mihi tu delenous eris [I could tell you but then you would have to be destroyed by me].” As part of a community of carefully selected professionals, secret keepers arguably share common objectives, a professional language, interests and norms, characteristics that are mutually reinforcing and which allow for the development of a sense of solidarity and significance (which, of course, does not preclude internal competition, conflict, rivalry and jealousy). These norms include obedience, discipline, dedication, loyalty, patriotism, allegiance, commitment and the duty to protect secrets (to avoid harm to the country, colleagues, family and self).

The inclusion-exclusion effects of secrecy have been widely recognized. For example, Tanya Luhrmann, an anthropologist, recognizes that Possession differentiates. Concealed information separates one group from another and one person from the rest. What I know and you do not demonstrates that we are not identical, that we are separate people. The difference can create a

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32 Clare Birchall, Radical Secrecy: The Ends of Transparency in Datafied America (Minneapolis: University of Minnesota Press, 2021) at 131.
34 Ibid at 277, 279.
hierarchy, wherein secrecy cedes social power to those who control the flow of treasured information.\textsuperscript{35}

This distinction has also been recognized by sociologists, most prominently by Georg Simmel. Simmel argues in his studies of secret societies that those who share secret knowledge develop trust and affective bonds among themselves; they develop a sense of cohesion as they are secluded against the outside of their secret society.\textsuperscript{36} In a similar line of thought, Ronald Dufresne and Evan Offstein stress that

When someone is entrusted to keep a secret, there is a concomitant signal that—along with the entrusted information—the recipient of the secret is valuable. Being a member of the secrecy network, then, can generate a strong affective commitment to the organization and to others in the network. Furthermore, beyond seeing oneself as a valuable organization member, being a secret-holder can lead to an affirmational identity: one who needs to know.\textsuperscript{37}

Pierre Bourdieu applied his notion of symbolic capital to secrecy, further enriching this discussion. For Bourdieu, secrecy is that “rare, scarce resource or valuable commodity, which confers a special kind of prestige and so determines one’s status within a given hierarchy of power.”\textsuperscript{38} Daniel Ellsberg, before he leaked the \textit{Pentagon Papers} in 1971, was once entrusted with highly sensitive US state secrets. He understood quite well the sociological effects of secrecy on individual and group identity. He

\begin{flushright}
\textsuperscript{35} Tanya M Luhrmann, “The Magic of Secrecy” (1989) 17:2 Ethos 131 at 137.
\textsuperscript{37} Dufresne & Offstein, supra note 31 at 105.
\end{flushright}
explained this dynamic to then consultant Henry Kissinger (a future US National Security Adviser and Secretary of State) in terms of symbolic capital:

Henry, there’s something I would like to tell you, for what it’s worth… You’ve been a consultant for a long time and you’ve dealt with a great deal of Top Secret information. But you are about to receive a whole slew of clearances, maybe fifteen or twenty of them higher than Top Secret. I’ve had these myself… and I’ve known people who acquired them, and I have a pretty good sense of what the effects of receiving these clearances are on a person who didn’t previously know they even existed, and of reading the information that will now become available to you.

First, you will feel like a fool for having studied, written and talked about these subjects… for years without having known of the existence of all this inside information… You will feel like a fool, and it will last for about two weeks.

Then, after you read all this daily intelligence input—estimates, analyses and so forth, and become used to seeing what amounts to whole libraries of hidden information… you will forget there ever was a time when you didn’t have it, and you’ll be aware only of the fact that you have it now and others don’t… and that those other people are fools…39

Another sociological effect is the uniformity of conduct that membership in such an epistemic and professional community engenders. A person who fails to abide by its rules of protecting secrets from unauthorized disclosure, beside the possibility of formal

punishment, would usually “meet with general disapproval within their group,” and “sustain damage to his or her reputation.” Betraying secrets, in fact, can have huge costs for those who muster the courage to do such a thing in the first place. As Dina Siegel explains:

It is extremely difficult to break the walls of silence and to come forward with information knowing that such an action will seriously damage one’s reputation, collegiality, friendships and, above all, the trust of others. […] Whistleblowers [and leakers] may have their own interests, but they also have a lot to lose. They will need to overcome their fears, accept the consequences of their actions and be ready to face opposition, threats and exclusion. Their decisions are influenced by all sorts of situational factors, as well as by emotions, daily experiences and personal contacts.41

This brings the point that shame, “the sensitivity to the judgmental gaze of others and to the historical and social setting in which one lives,”42 is an important emotion that sustains compliance:

One of the most important emotions sustaining cooperation is shame, the feeling of discomfort at having done something wrong not only by one’s own norms but also in the eyes of those whose opinions matter to you.43

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Shame, however, is not something that every person necessarily feels. It is also easier to depart from a group if no contact with the other members is anticipated thereafter.

An epistemic and professional community projects its identity, its values and its goals through discourse. Those entrusted with state secrets form such a community. This is a community that has an authorized discourse and authorized speakers, although its discourse is often supported by retired state officials once entrusted with state secrets. Its membership, while constantly fluctuating, is finite and circumscribed (only individuals with an established need to know who pass all the checks are granted security clearances by the state). Entry to membership is strictly controlled, and behaviour monitored. A study of the discourse of secret keepers, who form a distinctive epistemic and professional community, thus adds significant knowledge to the literature on professional communities, and the ways in which it is produced as a discursive formation and circulates as a state-legitimating value.

The discourse of the epistemic and professional community of secret keepers can be observed in public statements and media interviews, and in the courtroom. The purpose of this thesis is to grasp the extent to which judges write about state secrecy in a manner that mirrors secret keepers, thus potentially legitimizing the latter’s manner of speaking and writing (that judges use the exact same rhetorical devices is a strong indicator that

44 “Shame dissolves if one neither knows nor reveres the customs and if one cares naught for the opinion of those around one. Without reverence for others there could be no shame.” Saxonhouse, supra note 42 at 63.
46 Kong, supra note 23 at 7.
this would be the case\textsuperscript{47}). This exercise in legitimization is important to recognize because it facilitates the reproduction and diffusion throughout society of a particular discourse by people in authority (state officials and judges) with the effect of diminishing the place and importance of any other discourse on state secrecy.\textsuperscript{48} Legal systems, Claire Blencowe, Julian Brigstocke and Leila Dawney observe, “have developed over centuries to enable legal authority to become enormously powerful.”\textsuperscript{49}

Legal-rational authority was one of Max Weber’s three types of authority—besides charismatic and traditional—leading to a relation of obedience through an appeal to knowledge legitimacy.\textsuperscript{50} What is therefore at stake in thinking about authority, Leila Dawney reminds us, “is the question of whose and what knowledge is given the legitimacy that enables its authoritative power.”\textsuperscript{51} In Foucauldian terms, this exercise in legitimization determines which “statements are accepted as meaningful and true in a particular historical epoch.”\textsuperscript{52} The resulting discourse fixes boundaries and limits the

\textsuperscript{47} As Taylor writes as well: “[W]e aren’t just trying to see whether our descriptions match a free-standing external reality, following a designative semantic logic; we also need to grasp the meanings this population [the judges] ives (or lived) by, meanings which they defined according to a constitutive semantic logic [in our case a set of rhetorical devices found in the discourse of secret keepers].” Charles Taylor, \textit{The Language Animal: The Full Shape of the Human Linguistic Capacity} (Cambridge, Mass: The Belknap Press of Harvard University Press, 2016) at 255.

\textsuperscript{48} Foucault aptly pointed out at this societal discursive dynamic: “But what is so perilous, then, in the fact that people speak,” asked Foucault, “and that their speech proliferates? Where is the danger in that?” And he proposed an answer: “I am supposing that in every society the production of discourse is at once controlled, selected, organized, and redistributed according to a certain number of procedures, whose role is to avert its powers and its dangers, to cope with chance events, to evade its ponderous, awesome materiality.” Michel Foucault, \textit{The Archaeology of Knowledge} (New York: Pantheon, 1972) at 216, quoted by Didier Eribon, \textit{Michel Foucault}, translated by Betsy Wing (Cambridge, Mass: Harvard University Press, 1991) at 219.


\textsuperscript{51} Leila Dawney, “The Figure of Authority: The Affective Biopolitics of the Mother and the Dying Man” in Blencowe, Brigstocke & Dawney, \textit{supra} note 49, 29 at 31.

\textsuperscript{52} Jorgensen & Phillips, \textit{supra} note 7 at 12.
scope of reasons for non-disclosure to those reasons they are engaging with. By shaping the contents of discussions surrounding the protection of state secrets and guiding collective action through judicial decisions, this discourse exercises power.\textsuperscript{53} In short, it is a discourse that tells “how to articulate our accounts (how to think) and in so doing, [it] insinuates ways of responding (how to act).”\textsuperscript{54} For Foucault, therefore, there are discourses that are preeminent or dominant and others that are subordinated within specific domains of knowledge for certain periods of time. Subordinated discourses, depending on the context and situations within which they are exercised, may be visible to all, backgrounded or suppressed.\textsuperscript{55}

Here, the discourse of law—through the writings of judges\textsuperscript{56}—produces specialized knowledge that plays a part in shaping the understanding of state secrecy in society. It acts as a regime of truth whereby knowledge as power facilitates its reproduction and dominance.\textsuperscript{57} As Alan Hunt and Gary Wickham write, “law is one of the most voluble discourses which claims not only to reveal the truth but to authorize and consecrate it.”\textsuperscript{58} Making a similar point to Foucault, Peter Tiersma is explicit about the influence of

\begin{footnotesize}
\begin{enumerate}
\item See Michel Foucault, \textit{The Archaeology of Knowledge}, translated by A M Sheridan Smith (London, UK: Routledge, 2002).
\item Jorge I Valdovinos, \textit{Transparency and Critical Theory: The Becoming-Transparent of Ideology} (Cham: Palgrave Macmillan, 2022) at 143.
\item As Henderson does, this thesis “characterizes discourse as ‘legal’ when a discourse is employed by actors dealing with questions of interpretation of legal norms and rules.” Laura M Henderson, “Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse” (2018) 47:1 Nethl J of Leg Philosophy 49 at 50, footnote 5.
\end{enumerate}
\end{footnotesize}
judges on legal professionals, who are ready to uncritically accept how judges express themselves:

All that matters, for legal purposes, is what judges write in their opinions. And because they come straight from the horse’s mouth, so to speak, lawyers focus intensely on the exact words of the opinion. [...] Thus words—the exact words—of legal authorities have come to matter very much to the profession.

Recasting an authoritative text in your own words is dangerous, perhaps even subversive. Once established, legal phrases in authoritative texts take on a life of their own [...] [emphasis mine]

More importantly, once ascertained, the legal discourse on state secrecy provides the state with a legitimated perspective from which to discuss state secrecy in a given context. As Rémy Libchaber—also with a logic similar to Foucault’s—argues, the discourse of law epitomized by judges is the only normative discourse—as “the law claims to embody the norms of the community”—that is meant to bring social cohesion and that is official and enforceable, as if it was the only one that is authorized in society. Furthermore, the discourse of law also has for effect to rule out possible alternatives and opposing reasons, and thereby reduces uncertainty as regard the state of our understanding of these reasons. The state, therefore, has everything to gain by

59 Peter M Tiersma, Legal Language (Chicago: The University of Chicago Press, 1999) at 37, 39.
63 This is the effect of asserting: “[M]aking one assertion removes the entitlement to make certain others. It is because of these constraints that assertion can function as a means of representing how the world is: if one assertion did not preclude others, then it would be uninformative as to the way the world is.
appropriating the justifications for state secrecy uttered by the court to defend its position of non-disclosure: Secret keepers use particular rhetorical frames; these are adopted by the courts; this legitimizes and authorizes a certain language, which is then reproduced by secret keepers as a now-authorized set of frames; it creates precedents as well; and it changes the speech of public servants into legal speech. Bourdieu explicitly made that point on the normative impact of judges in his lecture on the state:

[W]ords are not just descriptive of reality but themselves construct reality. This hypothesis, which is highly debatable as far as the [physical] world is concerned, is very true for the social world. That is why struggles over words, struggles about words, are so important. Having the last word [as judges do] means having power over the legitimate representation of reality.\textsuperscript{64} [...] [T]he discourse forms part of the reality, and in this particular case the masters of discourse, that is, the jurists, have the tremendous asset that they can get what they say believed. They have an authority, they have the capacity first of all to speak, and to speak with authority; and having this capacity, they can get people to believe that what conforms to their interests is true [here, the state via its secret keepers]. By making those who have the power to bring the true into existence, that is, the powerful, believe that something is true, they can make what they say real.\textsuperscript{65}


\textsuperscript{65} Ibid at 269.
According to Bourdieu, judges occupy an official position (legislated and institutionalized) from which they exercise a social and technical competence as “legitimate speaker, authorized to speak and to speak with authority.”\textsuperscript{66} When they use language and rhetorical devices that are similar to those of secret keepers, they in effect materialize them in reported decisions (this is how the discourse is reproduced and distributed), which are subsequently used by secret keepers to further justify the manner in which they write about and speak of state secrets, and by law students, lawyers and law professors (from which judges will come from) to learn about state secrecy.\textsuperscript{67} As Marianne Constable aptly observes, “[t]hose who share a common language judge the world in similar ways.”\textsuperscript{68} The discourse of judges, therefore, is the means by which the discourse of secret keepers “declares itself to be authorized, invested, by virtue of its very conformity, with the authority of a body of people [judges] especially mandated to exercise a […] magistrature.”\textsuperscript{69} When secret keepers and judges, in turn, engage the public using a common discourse, they make it very difficult for any counter-discourse to take root as they set the limits to what is considered legitimate and practicable to say.\textsuperscript{70} That discourse, in other words, is preeminent: it constrains in a particular historical period what can be said and the grounds upon which state secrecy should be debated.\textsuperscript{71}

\textsuperscript{67} Ibid at 45.
\textsuperscript{69} Bourdieu, \textit{Language and Symbolic Power}, supra note 66 at 152.
\textsuperscript{70} For a discussion on limits, see Thomas Diez, “Setting the Limits: Discourse and EU Foreign Policy” (2014) 49:3 Cooperation & Conflict 319.
The discourse of secret keepers is important to understand because of the effect it has on how societies know, think and act about state secrets. Secret keepers use a system of rhetorical devices for making known and implementing a specific intention concerning state secrets, namely their non-disclosure. They use language to nudge the judges’ beliefs, intentions and actions toward accepting that same non-disclosure goal and this in turn reinforces its legitimacy, and arguably its effectiveness in shaping broader public opinion. Their repeated use of specific rhetorical devices when highlighting reasons not to disclose state secrets inculcates their audience with this reasoning and sets the terms of discussion. When these regularities of usage are also found in what judges say, state or assert to an audience, the discourse of secret keepers is further legitimized by these authority figures. Teun Van Dijk explains this process as follows:

Knowledge can only be efficiently and reliably reproduced through discourse if speakers are found to be credible. […] [C]redibility is a property assigned to speakers, ‘knowers’ and their actions (discourses). […] Few elements of text and talk are as important—also for the (re)production of knowledge—as the overall topics of discourse, that is, what the discourse is globally about. People may have very different opinions about specific topics, but for the elites it is crucially important that people talk about admissible topics. […] [Hence:] The

72 Judges are in a special position to convey knowledge. As McMyler writes of persons who have theoretical authority, they are “the bearer of certain rights and responsibilities not necessarily had by all.” Benjamin McMyler, *Testimony, Trust, and Authority* (Oxford: Oxford University Press, 2011) at 12. Following Reyes, this process “of legitimization is enacted by argumentation, that is, by providing arguments that explain our social actions, ideas, thoughts, declarations, etc. In addition, the act of legitimizing or justifying is related to a goal, which, in most cases, seeks our interlocutor’s support and approval. This search for approval can be motivated by different reasons: to obtain or maintain power, to achieve social acceptance, to improve community relationships, to reach popularity or fame, etc.” Antonio Reyes, “Strategies of Legitimization in Political Discourse: From Words to Actions” (2011) 22:6 Discourse & Society 781 at 782.
semantic moves [rhetorical devices], thus, tend to be geared towards the goal to enhance the objectivity, the reliability and hence the credibility of speakers and writers.\(^3\)

According to Van Dijk, this process draws upon two closely related axioms. First, that persons of authority matter because most of what people know “is acquired from the spoken and written word, from being told things by people we trust and treat as authorities on these matters.”\(^4\) Secret keepers in liberal democracies rely on their trusted status of state bureaucrats and civil servants to claim legitimacy. That status presupposes that they are objective, neutral, disinterested, accountable, and not acting in support of the particular interest of politicians, political parties or lobby groups.\(^5\) Judges, in a similar context, not only have legal authority bestowed upon them by a legislative act, they also have authority by virtue of their immense and recognized knowledge of the law (which is a factor contributing to their selection).\(^6\) This authority legitimizes judges’ claims about


\(^4\) McMyler, *supra* note 72 at 3. He also writes that: “The simple fact is that we do not always come to our own conclusion about what to think and do, and this is born out by our ordinary practice of deferring challenges to beliefs and actions justified by the directives of other persons in positions of theoretical and practical authority.” *Ibid* at 9. Fairclough makes a similar point. “[T]he discourses/knowledges generated by expert systems enter our everyday lives and shape the way we live them. […] Expert knowledges/discourses come to us via texts of various sorts [such as court decisions].” Norman Fairclough, “Global Capitalism and Critical Awareness of Language” in Annabelle Mooney, Jean Stilwell Peccei, Suzanne Labelle, Berit Engoy Henriksen, Eva Eppler, Anthea Irwin, Pia Pichler & Satori Soden, eds, *The Language, Society & Power Reader* (London, UK: Routledge, 2011) 17 at 21.


\(^6\) This is a long-standing assertion, going back at least to the 15th century. As Goodrich recalls: “Thomas More [1478-1535, English lawyer, judge, social philosopher, author, statesman], Richard Hooker [1554-1600, English priest in the Church of England, theologian], and Edward Coke [1552-1634, English barrister, judge, politician] are the most vehement exponents of the view that the authority of law in general
“what is knowledge, what it is that we know, how we define what we believe and understand.” These claims, in turn, are captured textually in judicial decisions. As James Boyd White observes:

For in every case the court is saying not only, ‘This is the right outcome for this case,’ but also, ‘This is the right way to think and talk about this case, and others like it.’ The opinion in this way gives authority to its own modes of thought and expression, to its own intellectual and literary forms.

Van Dijk’s second axiom is that state institutions in liberal democracies act with the consent of those whom they govern, and that to justify what they do they need legitimization. The discourse of law, which finds its expression through the independent judicial branch of liberal democracies, serves that purpose very well. As María Ángeles Orts and Ruth Breeze write, “the great source of [the] power [of judges] is that it enforces, reflects, constitutes, and legitimizes dominant social and power relations without the need for or the appearance of control from outside.” This thesis, therefore,

and of the judges in particular is predicated upon a concept of law as the proper form of public reason that is paradoxically neither accessible to the public nor open to public dispute. Hooker is again most expansive in his delineation of the errors of unlearned judgments of law. Law is a matter for our ‘Directors’ and not for the ‘vulgar sort.’ Those that challenge the institutions of public reason, even if only by means of discourse, are variously referred to as contentious, divisive, juvenile, academic, tedious, opinionated, perverse, strange, disturbing, superstitious, fantastical, zealous, diseased, foreign, extreme, overconfident, and dissolve. For Coke they are ignorant, superficial, and stupid, ‘and I will not sharpen the nib of my pen against them.’” Peter Goodrich, “Antirrhesis: Polemical Structures of Common Law Thought” in Sarat & Kearns, supra note 62 at 86.

77 John Wilson & Karyn Stapleton, “Authority” in Jürgen Jaspers, Jan-Ola Östman & Jef Verschueren, eds, Society and Language Use (Amsterdam: John Benjamins Publishing Company, 2010) 49 at 50. “Taking legitimation as both a formal and negotiated concept, authority is the legitimation of certain linguistic practices within social life.” Ibid at 64.


is ultimately concerned with the way in which the discourse of law plays a legitimizing role in the reproduction of the discourse of secret keepers on the necessity of maintaining state secrecy. As John Flowerdew and John E Richardson point out, a particular understanding of state secrecy “can come to be accepted as part of common sense through a process of legitimization, that is to say, a set of beliefs and values becomes accepted by virtue of the fact that society accepts the authority of those disseminating them.”

1.2 Approach and method

This thesis follows an approach that is common to social anthropologists and sociolinguists, which is to study the use of specialized language by specific actors through qualitative empirical research. I selected the discourse of secret keepers and its legitimization through the discourse of judges for three principal reasons:

1) As the foregoing discussion on epistemic communities and the literature review in chapter 2 make clear, the discourse of secret keepers has not yet been studied in this manner. We do not know, when consulting this literature, how the discourse of secret keepers is legitimized and reproduced, and the role that law plays in this process. Discourse, as Walters notes, is an important aspect of secretization that is deserving of study.

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2) State secrecy is in direct tension with the normally recognized democratic requirements of transparency, accountability, public scrutiny and procedural fairness. The principle that governments should be open to public scrutiny, including with respect to national security, defence or international affairs is now generally accepted as an essential feature of liberal democracies, albeit a difficult one to apply. Transparency is necessary to ensure that any state institution “can be controlled or regulated by another”—the public, or its elected representatives, and the judiciary—and for the identification of truth and the production of more knowledge. Indeed, insufficient information about state activities reduces the quality and usefulness of public debate on important matters, and prevents the development of fully trusted cooperative

82 “[A]ll acts of government must be open to public scrutiny […] not only […] to permit the citizen to be aware of the acts of those in power and hence control them, but also because public scrutiny is itself a form of control, is a device which allows distinctions to be made between what is permissible and what is not.” Bobbio, supra note 4 at 34. Quite incisively, Larry Alexander writes that, “Cloaking ideas and information in secrecy encourages ignorance, corruption, demagoguery, a corrosive distrust of authority, and a historical memory resembling Swiss cheese. Open discussion, on the other hand, allows verities to be examined, errors to be corrected, disagreement to be expressed, and anxieties to be put in perspective. It also forces communities to confront their problems directly, which is more likely to lead to real solutions than covering them up.” Larry Alexander, Is There a Right of Freedom of Expression? (Cambridge, UK: Cambridge University Press, 2005) at 193. More precisely, “observers have roundly criticized the [US] government’s use of expanded secrecy in various arenas and its prioritization of security interests at the expense of procedural fairness.” Jaya Ramji-Nogales, “A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System” (2008) 39 Colum HRLR 456 at 457. Secret keepers are attuned to these problems. For example, in her response to questions from US senators following her nomination as Director of National Intelligence (DNI), April Haines recognized the dangers of an excess of secrecy: “The over-classification of information not only undermines critical democratic objectives, such as increasing transparency to promote an informed citizenry, but also negatively impacts national security objectives because it can increase the challenges associated with sharing information to address threats and furthermore undermines the basic trust that the public has in the government.” April Haines, “SSCI Additional Prehearing Questions” (answers to questions from the US Senate Select Committee on Intelligence in Washington, DC, 2021) at 17.


relationships between the rulers and the governed. A certain amount of secrecy, however, is also deemed necessary to preserve and perpetuate democratic polities against threats to their existence and the security of their populations. This conundrum points to the importance of better understanding the rationalities (or sets of articulated reasons) that secret keepers in liberal democracies put forward to justify the non-disclosure of state secrets, and the extent to which these reasons are supported in society.

3) Secret keepers, finally, must reflect on their double identity. In a democracy, they are both civil servants and citizens, and they participate in civil society. As they contemplate the secrets in their possession, they may be conflicted between a duty of loyalty to the state and colleagues, and a greater duty to democratic ideals and virtuous principles. It therefore behooves them to identify their material interests and understand how they can be affected and for which purpose. Where I sit as a member of the

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85 As Hilsman writes, a “subtle aspect of secrecy is the way it tends to corrode confidence between the government and the public and the press.” Roger Hilsman, “Review Essay: On Intelligence” (1981) 8:1 Armed Forces & Society 129 at 138.

86 Even the great majority of transparency advocates readily accepts the notion that there is some knowledge that must remain secret. Only a small minority of transparency “radicals” claim that all information should be free. But not everyone fully agrees, seeing different instrumental purposes at play. As Mills writes, “in a formally democratic polity, the aims and the powers of the various elements of this [governing] elite are further supported by an aspect of the permanent war economy: the assumption that the security of the nation supposedly rests upon great secrecy of plan and intent. Many higher events that would reveal the working of the power elite can be withheld from public knowledge under the guise of secrecy. With the wide secrecy covering their operations and decisions, the power elite can mask their intentions, operations, and further consolidation.” C Wright Mills, The Power Elite (New York: Oxford University Press, 2000) at 293.

87 “Critical theory, nevertheless, gives the highest importance to self-criticism; to marking the ethical/political position from which one works in order that such a position can be available for examination by critical readers or other reflective audiences […].” Michael Payne, “Critical Theory” in Michael Payne & Jessica Rae Barbera, eds, A Dictionary of Cultural and Critical Theory, 2nd ed (Malden: Wiley-Blackwell, 2010) 153 at 153.


89 This a Kantian notion. “[K]nowledge never spins frictionless from the pressing, material concerns of the reality we knowers necessarily exist in. Real thinking, then, is the product of material interests, which will remain even in the context of a maximally even-handed debate.” Tom Whyman, “Critique of Pure Niceness” (2019) 44 The Baffler 125 at 133.
epistemic and professional community of secret keepers, and the mindset I have as a result, therefore matters. As a long-standing secret keeper (I obtained my first security clearance in the mid-1980s as a young military intelligence officer, and higher clearances when I joined the Canadian Security Intelligence Service in 1995), I have accumulated a wealth of knowledge and experience on how to handle, protect and speak about state secrets. But I also understand that I have been socially conditioned to accept this standpoint and behave accordingly. Knowing “how” and “why” from the state does not mean, however, that I was well situated to make sense or even offer a rudimentary critique of state secrecy. It is graduate studies that allowed me to see past the discourse, dogmas and received ideas on state secrecy I had absorbed for so many years. That said, I never doubted that my loyalty is to the state, that the state is responsible for the safety and security of its citizens, and that I should obey the law. Dominique Maingueneau’s approach to discourse analysis, and my own position as a long-standing secret keeper propagating and reproducing a discourse I always thought made sense, convinced me of the importance to move beyond a descriptive analysis of the discourse of secret keepers on state secrecy, and contribute to an understanding of its construction and reproduction.\(^90\) This discourse, after all, is not immutable: it is a construct that has not always been what it is today, that is being challenged, and that could perhaps change.

\(^{90}\) “Roughly speaking, I consider a ‘weak’ way as the simple description of structures of texts and talks. I consider a ‘strong’ way as the practice of fully assuming the purpose of discourse analysis, trying to systematically connect text or conversation structures with social practices and places. When choosing the ‘strong’ path, discourse analysts, whether they like it or not, are powerfully critical. Instead of texts being looked at as autonomous, they are perceived as connected to the interests implied by social practices. To analyse religious or scientific discourse, for example, one must take into account not only their contents but also the institutions that make the production and the management of these texts possible. The attention paid to these institutions is more critical that many denunciations that would only apprehend ideological contents.” Dominique Maingueneau, “Is Discourse Analysis Critical?” (2006) 3:2 Critical Discourse Studies 229 at 230.
under certain conditions. For the latter to happen, however, it matters to understand how this discourse privileges “some truths” about state secrets “over others.”91 It is not about determining whether secret keepers are correct in opposing the disclosure of state secrets, but on whether a particular discourse might lead, once legitimized and preeminent, to a quieting of alternatives. It is a critique, one could argue, that favourably compares with the spirit of Patricia Williams’s effort to show that the language of law allows certain things to be sayable and other things erased.92

The method I follow parallels the one that Brian Porto applies in his rhetorical analysis of US Supreme Court justices (Porto extracted from the decisions of five justices the rhetorical devices they used to convey their ideas persuasively). It consists in identifying a relevant corpus of texts from which can be extracted the rhetorical devices secret keepers and judges use to convey their ideas persuasively.93 The stress is not simply on what is written, but, rather, on how it is written and the effect this has.94

The statements selected to highlight the rhetorical devices in use are from print sources: primarily legal documents (judicial decisions, briefs and affidavits), but also media reports and published commentaries by secret keepers. As “there is little hope of a

93 Porto, supra note 15 at chapter 1 (Epub version).
94 How to study discourses is not a straightforward matter. There are as many meanings, focuses of inquiry, and approaches as there are academic sub-disciplines and analysts, and no approach is uniquely right or universally accepted. James Paul Gee, An Introduction to Discourse Analysis: Theory and Method, 3rd ed (London, UK: Routledge, 2011) at 11, James Paul Gee, How to Do Discourse Analysis: A Tool Kit (London, UK: Routledge, 2011) at x, Sara Mills, Discourse (London, UK: Routledge, 1997) at 1, 3, 6, Jorgensen & Phillips, supra note 7 at 1, and Greig Henderson, Creating Legal Worlds: Story and Style in a Culture of Argument (Toronto: University of Toronto Press, 2015) at 161.
single individual grasping all the relevant literatures in their entirety,“95 I focused my
search on the first decade following the tragic events of 9/11, during which time matters
of state secrecy were challenged in American, British and Canadian courts to an extent
never seen before. The American response to 9/11 called for increased security measures
at home and abroad to ensure operational success against the terrorist group known as Al
Qaida. Maintaining secrecy was a key component of these measures and refashioned by
the Bush administration as an essential component in the defence of the American way of
life.96 An indicator of the increase of state secrecy that is often cited is how often the
Bush administration invoked its privilege in civil court proceedings. Whereas the state
secrets privilege had been invoked only six times between 1953 and 1976, it was invoked
no fewer than 48 times between 2001 and 2008.97 There has been a roughly similar
increase in legal proceedings in Canada and the UK. This period also saw the biggest
leaks of state secrets (by US Army Private Bradley [now Chelsea] Manning and National
Security Agency contractor Edward Snowden) ever experienced by a state, with notable
impacts across the globe. In other words, 9/11 and its aftermath was a discursive event
that is subject to research and analysis as any other discursive event.98

version, at chapter 3.
96 Birchall, supra note 32 at 41.
97 Ibid at 42.
98 Discourse theorists call discursive events those events “which are especially emphasized politically,
that is as a general rule by the media, and as such events they influence the direction and quality of the
discourse strand to which they belong to a greater or lesser extent.” Siegfried Jäger, “Discourse and
Knowledge: Theoretical and Methodological Aspects of a Critical Discourse and Dispositive Analysis” in
at 48.
Judicial decisions are the primary textual sources of democratic legal systems.99 Looking at rhetorical devices within these sources “brings into view the rhetoric and form of the opinion in ways traditional legal analysis has tended to ignore.”100 As James Boyd White writes, law can easily be imagined as rhetorical:

To imagine law as rhetorical, then, is to think of it not as a machine-like process of cause and effect, driven by a rationality that is fundamentally instrumental in kind, but as a discourse maintained by the processes of persuasion and argument. These processes work not simply by ends-means rationality but by all the movements of mind and feeling that lawyers and judges display.101

Mining judicial decisions—which does not involve making a distinction between ratio decidendi and obiter dicta—and other legal documents is important for three reasons. First, legal texts give access to evidence concerning the reasons brought forward by secret keepers in supporting the non-disclosure of state secrets. They are the clearest and most accessible corpus of arguments representing the position of secret keepers on matters of disclosure. Most importantly, judicial decisions represent evidence of how the arguments of secret keepers have been incorporated into the discourse of law on state secrecy.102

99 “The opinion is not merely an epiphenomenon to the law, a slight adjunct to the real business of deciding cases and predicting what officials will do, but is central to the activities of mind and character of the law as we know and value it.” White, supra note 78 at 1368.
100 Gewirtz, supra note 2 at 10. Like other forms of legal discourse, court decisions/judicial opinions embody certain rhetorical forms. Indeed, “rhetoric was originally conceived as the art of argument in law courts. When one uses language, there is no escape from rhetoric.” Peter Brooks, “The Law as Narrative and Rhetoric” in Brooks & Gewirtz, supra note 2, 14 at 20.
101 James Boyd White, “Imagining the Law” in Sarat & Kearns, supra note 62, 29 at 37.
102 Walton, Macagno and Sartor similarly justify the use of legal texts: “The choice of a legal context, and more specifically the area of interpretation of statutes, has a specific purpose. Legal discourse and legal discussions about legal texts have some fundamental differences relative to other types of contexts and uses of language. First, in the law we have access to evidence concerning the reasons brought for or against a specific reconstruction of meaning. In this sense, legal discussions about statutory interpretation represent
Second, as Michael Leff and Robert Burns separately argue (correctly, I believe), they contain the fullest range of linguistic practices one can find, the law being the social domain where rhetoric ordinarily occurs amidst the uncertainty and ambiguities of opposing claims. It is important to note, however, that there is a high degree of intertextuality in judicial decisions, as portions of many decisions find themselves incorporated in other decisions, often over long periods of time. This reflects the importance of judicial precedents in common law systems. Judicial precedents are authoritative pronouncements, due historically to the power and prestige of royal judges, used in deciding cases. Practically speaking, the more decisions a person reads on a particular topic, the more they will encounter the same references to important precedents and read and reread the same authoritative quotations. This can also happen with other types of legal documents. Affidavits from secret keepers, for instance, use the clearest and most accessible corpus of interpretative disputes and arguments. Second, these discussions have a result that is justified considering the merits and the weaknesses of the contrary arguments. For this reason, judgments represent evidence of how the interpretative arguments are evaluated and ordered.”


“[T]he places where rhetoric ordinarily occurs— in law courts and legislative bodies […]” Michael Leff, “The Relation Between Dialectic and Rhetoric in a Classical and a Modern Perspective” in Frans H Van Eemeren & Peter Houtlosser, eds, Dialectic and Rhetoric: The Warp and Woof of Argumentation Analysis (Dordrecht: Springer, 2002) 53 at 60. “It is there [in the courtroom] that the fullest range of linguistic practices is in play and the fullest range of sources for persuasion is available. […] If the trial is the heart of the law, then the law is rhetorical, for rhetoric rules where action under uncertainty is necessary. At trial the jury confronts layers of uncertainty, of ambiguities that are resolved – determined in a strong sense – by the judgment.” Robert P Burns, “Rhetoric in the Law” in Walter Jost & Wendy Olinstead, eds, A Companion to Rhetoric and Rhetorical Criticism (Oxford: Blackwell Publishing, 2004) 442 at 444.

“The general idea is that a text does not exist in isolation and cannot be fully appreciated in isolation; instead, a full understanding of its origins, purposes and form may depend in important ways on a knowledge of other texts.” Robert Lawrence Trask, Language and Linguistics: The Key Concepts, ed by Peter Stockwell, 2nd ed (London, UK: Routledge, 2007) at 125.


Judicial precedent refers to the doctrine of stare decisis. “The doctrine of stare decisis asks judges to look back to cases that have been decided as a guide to judging the case before them.” Malcolm Rowe & Leanna Katz, “A Practical Guide to Stare Decisis” (2020) 41 Windsor Rev Legal Soc Issues 1 at 1.
same or similar language from one affidavit to another, a practice explicitly condoned by the US Federal Court.\footnote{As the District of Columbia Circuit noted, there is nothing wrong with the practice of using “the same or similar language in different affidavits” because, “when the potential harm to national security in different cases is the same, it makes sense that the agency’s stated reasons for nondisclosure will be the same.” \textit{Larson v Department of State}, 565 F (3d) 857 at 868 (DC Cir 2009).} Because of this high degree of intertextuality, \textit{Bradford’s Law} rapidly intervenes when a large number of decisions on a similar topic are read.\footnote{Bradford’s law is best explained as follow: “As an analyst codes and compiles the problem representations they will notice an initial exponential increase and then leveling off of them after the 15th to 20th respondent or document, depending on what data is used. After this rapid rise in the number of representations, there will be a very small number of new ones. This is the ‘stopping rule’ of boundary analysis and it is explained by Bradford’s Law, an empirical regularity that states that after searching a few key sources, the analyst will have attained nearly all unique problem representations. The leveling-off of problem representations lets the analyst know he has reached a nearly complete set and can cease trying to bound the problem.” Bertram Brookes, “Bradford’s Law and the Bibliography of Science” (1969) 224:5223 Nature 953.} I directly experienced this phenomenon after I had read approximately 50 decisions out of 700. While the amount of US material easily surpasses that which can be found in Canada and the United Kingdom, the statements highlighting the use of rhetorical devices would not be as poignant without examples from Canada and the United Kingdom. The selection of statements from each jurisdiction (how the selection was made is detailed below) emphasizes the point that the discourse of secret keepers is widely shared across allied democratic systems. As chapter 3 shows, these allies share historical experiences that have shaped the manner in which they handle and protect state secrets today.

Third, judicial decisions play a fundamental role in the legitimization process of state secrecy. This is because of their intrinsic characteristics: not only they have the force of law—as court orders can be enforced by the state’s law enforcement apparatus—they also exhibit finitude and certainty. As Paul Gewirtz explains,

\begin{quote}
Individual judicial opinions are typically marked by a rhetoric of certainty and inevitability, a rhetoric that denies the complexity of the problem before the
\end{quote}
court and drives with a tone of self-assurance to its conclusion. Like the rhetoric of compulsion and pedigree, the rhetoric of certainty seems to result from the perceived need of judges to preserve the institutional authority of the court.\textsuperscript{109}

To capture the discourse of secret keepers, legal sources are supplemented with other genres—including mass media—because these sources also reveal recurrent linguistic behaviours\textsuperscript{110} that have found their way into legal arguments. Moreover, media sources matter for two key reasons: they reflect the social mainstream in carrying preeminent discourses, and their dissemination to large audiences contributes to shaping their understanding of reality.\textsuperscript{111}

Analyzing discourses implies working with what “has actually been said or written.”\textsuperscript{112} In discourse theory, that means working with texts (anything we make meaning from\textsuperscript{113}), which allows empirical access and recovery of discursive components in a manner similar to forensics.\textsuperscript{114} As Mikhail Bakhtin writes, “[w]here there is no text, there is no object of study, and no object of thought either.”\textsuperscript{115} The text, Bakhtin adds, “is the primary given (reality) and the point of departure for any discipline in the human

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\textsuperscript{109} Gewirtz, \textit{supra} note 2 at 11.
\textsuperscript{110} Jürgen Spitzmüller & Ingo H Warnke, “Discourse as a ‘Linguistic Object’: Methodical and Methodological Delimitations” (2011) 8:2 Critical Discourse Studies 75 at 76.
\textsuperscript{112} Jorgensen & Phillips, \textit{supra} note 7 at 21. One must “study individual texts for clues to the nature of the discourse because we can never find discourses in their entirety. We must therefore examine selections of the texts that embody and produce them.” Nelson Phillips & Cynthia Hardy, \textit{Discourse Analysis: Investigating Processes of Social Construction} (Thousand Oaks: Sage, 2002) at 5.
\textsuperscript{114} David Barnard-Wills, \textit{Surveillance and Identity: Discourse, Subjectivity and the State} (Farnham: Ashgate, 2012) at 81.
Therefore, to identify the rhetorical devices that are distinctive and recurrent, hundreds of texts were selected and read. In order to identify candidate judicial decisions, a list of keywords was drawn up to build an initial corpus warranting further scrutiny. These keywords included terms such as “state secret,” “state secrecy,” “national security,” “national security confidentiality,” and “secrets.” In a second step, the corpus—drawn from the databases of the British and Irish Legal Information Institute (Bailii), the Canadian Legal Information Institute (CanLII) and Google Scholar’s Case Law, was reduced by retaining only those decisions within the public law domain from 2001 to 2013. Additional decisions were added from 2013 onward on an ad hoc basis instead of recurring systematic searches (I kept an eye on new decisions as I was reading and writing and included statements in my corpus that were relevant or that showed a new way to say what was said before). Third, upon going through each decision, the corpus was further reduced by eliminating any decision that did not discuss the protection of state secrets. The issue here is essentially empirical. As Sanford Levinson asks: “if we read thousands of judicial opinions, what, if any rhetorical regularities do we find?” I located statements as things written, or said and quoted in written form, that are reasons that secret keepers use to justify the non-disclosure of state secrets. For each statement extracted from its text, I then determined if a particular rhetorical device was used, and

116 Ibid at 113.
117 “Transtextual analysis is […] research for patterns that emerge from multiple texts. Therefore, the analyst needs to watch out for recurrent phenomena. In other words, s/he needs to check which of the phenomena that have been found in individual texts, i.e., on the intratextual layer, systematically re-occur in multiple texts of the discourse corpus.” Spitzmüller & Warnke, supra note 110 at 86-87.
118 “[I]t is common sense among DL [discourse linguistics] researchers that only the analysis of a fairly large collection (i.e., at least some hundreds) of texts (of a multitude of genres) can reveal discursive patterns, since ‘common’ knowledge manifests itself in recurrent linguistic behaviour.” Ibid at 76.
thereafter whether each of the devices initially encountered was recurrent. There is no shortage of manuals containing lists of common rhetorical devices and techniques. To help me identify the devices in use, I used Brooke Noel Moore and Richard Parker’s textbook on *Critical Thinking* (chapters 5 and 6) for a widely accepted list, and Douglas Walton’s *Fundamentals of Critical Argumentation* for a more robust discussion of these devices and techniques.\(^{120}\) From my searches, I isolated a corpus of 700 decisions. I read each decision in no particular order and across jurisdictions. In each decision, I highlighted the portion of text discussing any reason in support of non-disclosure. Each statement containing a rhetorical device in use was pulled (as readers “can see the use of the tactic in that discrete paragraph without having to read the entire document)”\(^{121}\) and the device used identified. I was not looking for any particular device and use the above-noted references to identify them correctly. Those that appeared in fewer than ten decisions per country were not retained (for example, a component of the argument from consequence, that the release of state secrets would damage international intelligence relationships) in order to have a sufficient and interesting range of statements to showcase. I chose statements that would illustrate the different ways the same reason can be expressed, which was not an easy task because of the intertextual character of decisions and Bradford’s Law. The analysis of the rhetorical devices in use shows that, taken as a whole, they function to place a discursive frame—a particular view of state


secrecy—around a position of non-disclosure meant to persuade judges and the public.

This exercise was repeated with the texts capturing the discourse of judges.

Overall, the approach pursued, and the conclusions reached in this thesis, considerably expand on similar work by Laura Henderson. Henderson, using only one example each from Canada, the United Kingdom and the United States, showed that the precautionary language used by politicians when discussing terrorism had found itself adopted by the judiciary in the courtroom.\textsuperscript{122} Henderson, however, did not explore the effect of the rhetorical devices in use (that is, the relations of power they exploit) to explain how legal discourse ended up mimicking the precautionary discourse of politicians. Her small sample also did not allow her to see if there were also points of divergence or difference in degree between the two discourses she looked at. While the foregoing analysis goes beyond Henderson’s, it is also more empirically grounded, with dozens of varied statements for the same three countries.

1.3 Plan

In discourse theory, discourses are treated as contingent and historical constructions.\textsuperscript{123} This means that they do not necessarily last forever, but “can be

\textsuperscript{122} “Contemporary approaches to terrorism are characterized by a turn to a logic of precaution. Political actors speak in terms of risk, and political action has become structured by a desire to avoid this risk at any cost. Yet, this is not just a characteristic of political language. This precautionary turn can be seen within legal discourse as well and the judiciary has proven itself intimately involved with this discourse of precaution, using the same logic of prevention that guides political action against terrorism.” With respect to the “the precautionary turn in the judiciary’s legal discourse […] I show not only that this discourse was adopted by the executive in its public speeches, but also by the judiciary in the courtroom.” Henderson, \textit{supra} note 56 at 49, 50.

\textsuperscript{123} Phillips & Hardy, \textit{supra} note 112 at 19.
displaced [or] changed by other discourses or events beyond their control.”

In a certain site at a certain time, a discourse on state secrecy would therefore assist secret keepers in deciding what to disclose and what to protect from unauthorized disclosure. As Bernard Williams aptly notes, “[a]ll our ways of thinking about the world are conditioned by a given historical context of conventions, manners, and interests; hence also they inevitably change.”

This evidently applies to state secrecy. Clare Birchall clearly makes this point when she writes that secrecy is a malleable, floating signifier that takes “form in certain ways at particular times, harnessed by various actors and rooted within different discourses,” and that contributes to shaping political institutions, realities, and subjectivities. Hence, I show in chapter 3 that state secrecy and the discourse surrounding the protection of state secrets have a history and boundaries that constrained what could be said in speaking of them.

Chapter 3 concludes that modern state secrecy discourses in the 21st century are essentially similar to those of pre-modern governments. Secret keepers today use similar arguments as Machiavelli (the reason of state—“taken in the sense of the will to power and to life on the part of the States”—requires secrecy to be effective) and the

126 Birchall, supra note 32 at 4.
127 “That is: a discourse has a history; is a product of a community; has boundaries that determine what can be said; has characteristic ways of saying things; sometimes gets conventionalized into genres; and often uses specialized lexis and grammar.” Bernard McKenna, “Critical Discourse Studies: Where to From Here?” (2004) 1:1 Critical Discourse Studies 9 at 15. “[…] our relationship to language is always a relationship with the past as well as with the present and the future. As Manguel writes, “[w]hen we use words, we are making use of the experience accumulated before our time in words […].” Alberto Manguel, Curiosity (New Haven: Yale University Press, 2015) at 303.
sovereigns of absolutist states (i.e., the public have incomplete or lack of relevant knowledge to ascertain whether state secrets should be released), and that the discourse of law (because it has the effect of legitimating what it says, states or asserts) is now the “divine word, the word of divine right, which, like the intuitus originarius which Kant ascribed to God, creates what it states [...].”129 There is an important distinction though, because the divine word of Kings was to be accepted simply because the King’s power was ordained by God, whereas the words/judgments of the courts are to be accepted because they reflect the reasoned application of the law. Of course, writing a definitive and compelling history of state secrecy would be extremely ambitious130 and chapter 3 makes no such claim. By limiting the narrative to period overviews, key legal developments and the rationalities advanced to justify the non-disclosure of state secrets, it aims to provide readers sufficient contextual material to appreciate today’s discourses on state secrecy as discourses that can evolve, change and clash with other discourses.

In chapter 4, I identify a set of rhetorical devices that enhance the persuasive capacity of secret keepers. These devices work well together—they are intertwined and mutually reinforcing—and collectively appropriate the principal modes of persuasion: logic (logos), emotions (pathos) and credibility (ethos).131 Those most recurrent involve the use of lists (logos); temporal modifiers and modal auxiliaries (logos); arguments from ignorance (ethos), authority (ethos) and consequences (pathos); and analogical reasoning (logos). Lists flatten complexity by appearing content-homogenized and de-

129 Bourdieu, supra note 66 at 42.
130 How ambitious it would be is noted by Walters, supra note 19 at xiii.
131 Aristotle’s elements of persuasion. Berger & Stanchi, supra note 121 at 5, Porto, supra note 15 at chapter 2 (Epub version).
contextualized. By aggregating the consequences they deem relevant and important, secret keepers seek to amplify the possible degree of harm that unauthorized disclosures would cause. Secret keepers also argue that they are best positioned and have the authority—given their expertise and experience, their knowledge of past harmful disclosures, their access to secrets not available to others and the magnitude of risks—to assess the likelihood of harm. They stress that the consequences of disclosing the secrets they seek to protect, even if innocuous, are fundamentally tied to matters of life and death and national security. The passage of time, they add, is inconsequential: harm could happen tomorrow or a long time from now, and mitigation is assumed to be near impossible. The devices in recurrent use are not numerous or very complex, and devices such as the asyndeton, antanaclasis, anastrophe, antimetabole, alliteration, anaphora, epistrophe, anadiplosis, parallelism or the isocolon are extremely rare to non-existent. No common and popular sayings such as “what happens in Las Vegas stays in Las Vegas” are found to be recurrent either.\textsuperscript{132} This is acceptable as not all rhetorical devices are usable in all contexts or with all audiences.\textsuperscript{133}

In chapter 5, I examine the extent to which in their judicial decisions judges write about state secrecy in a manner that mirrors the rationalities and rhetorical devices employed by secret keepers. I observe that the judges’ own written texts discussing the

\begin{itemize}
\item[132] “‘What happens in Las Vegas stays in Las Vegas’ has become, by far, the most common of the popular sayings that follow the formula.” Charles Clay Doyle, Wolfgang Mieder & Fred R Shapiro, compilers, \textit{The Dictionary of Modern Proverbs} (New Haven: Yale University Press, 2012) (E-Pub version). Other examples of devices that do not matter are those around the rules of legal document preparation: “For instance, by printing part of the text in a salient position (e.g., on top), and in larger or bold fonts; these devices will attract more attention, and hence will be processed with extra time or memory resources, as is the case for headlines, titles or publicity slogans—thus contributing to more detailed processing and to better representation and recall.” Teun A Van Dijk, “Discourse and Manipulation” (2006) 17:3 Discourse & Society 359 at 365.
\item[133] Berger & Stanchi, \textit{supra} note 121 at 9.
\end{itemize}
reasons for refusing to disclose state secrets use the same rhetorical devices as secret
keepers, albeit in some cases critically. Judges understand that certain devices are meant
to persuade them and they moderately push back. However, although some judges push
back, notably in Canada, they do so using the same language, terms and words employed
by secret keepers.

That judges write of state secrecy and use the same rhetorical devices as secret
keepers has a major effect: it further legitimizes the discourse of secret keepers. As
explained through the writings of a dozen authors in the previous section, this
legitimization process is possible because judges occupy a position of authority from
which they can perform performative moves: “The disclosure of state secrets may cause
harm at any time in the future,” said by a judge, can prevent in direct ways the disclosure
of these secrets and, more importantly, confers on secret keepers the status of being right
in writing of state secrets in that manner.134 What judges write in their decision has an
additional and equally important effect: as Edelman explains, a decision “conveys a
reassuring message regardless of its content. […] To the general public, legal language
symbolizes precision and clarity in specifying the will of legislatures and constitutional
conventions.”135 This message is reassuring to the public because in democratic polities
where the judicial system is independent and judges appointed through a fair and

134 As Taylor writes: “[C]ertain moves are performative within the legal order. ‘I pronounce you
guilty’, or ‘I pronounce you man and wife’, said by a judge, sends one person to jail, and confers on a
couple the legal status of married spouses.” Taylor, supra note 47 at 80. As Spitzmüller & Warnke write:
“The key question, thus, is how actors can be positioned, or how they position themselves [claims of
expertise or authority], respectively, in the discourse in question. We assume that this positioning is linked
with social hierarchies. Since discourse is socially stratified, discourse analysis has to consider the issue of
power.” Spitzmüller & Warnke, supra note 110 at 86.
transparent procedure, the public generally has a high degree of trust in what judges decide.\footnote{As Chief Justice McLauglin reminds us: “In his most recent book, *Making Our Democracy Work*, Justice Stephen Breyer of the United States Supreme Court poses a—puzzling question—why does the public accept and follow decisions made by the judiciary, a body he describes as—inoffensive, technical, and comparatively powerless. [Stephen Breyer, *Making Our Democracy Work: A Judge’s View* (New York: Alfred A. Knopf, 2010) at 11] The answer to this question, he suggests, rests in the confidence of the people. This is the ultimate challenge of judging in a diverse society—to ensure that all segments of the community learn to have confidence that administration of justice is fair, independent and impartial.” Beverley McLachlin, P.C., Chief Justice of Canada, “Judging: The Challenges of Diversity” (Remarks before the Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, Scotland, 7 June 2012) at 5. Trust in judges and the justice system can vary tremendously from time to time, country to country and community of people to community of people, “as there are moments when the Court’s authority to order appears [...] threatened by the noncompliance of its audiences that the [court’s] rhetoric of persuasion is tensed in defense of the very notion of the Court’s legitimacy.” Peter Brooks, “The Law as Narrative and Rhetoric” in Brooks & Gewirtz, *supra* note 2, 14 at 21. Overall, though, the degree of trust is positive in comparison to the degree of distrust as recent polls for Canada, the United States and the United Kingdom indicate. See, inter alia, BJ Siekierski, “Vast majority of Canadians trust Supreme Court, including most Tories,” iPolitics (16 August 2015) online: <ipolitics.ca/2015/08/16/vast-majority-of-canadians-trust-supreme-court-including-most-tories/>, Jeffrey M Jones, “Trust in Judicial Branch Up, Executive Branch Down,” Gallup (20 September 2017) online: <news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx>, “Trust in politicians falls sending them spiralling back to the bottom of the Ipsos MORI Veracity Index,” Ipsos MORI (26 November 2019) online <www.ipsos.com/ipsos-mori/en-uk/trust-politicians-falls-sending-them-spiralling-back-bottom-ipsos-mori-veracity-index>.

\footnote{John Ralston Saul, *Voltaire’s Bastards: The Dictatorship of Reason in the West* (New York: Vintage Books, 1992) at 327.}

All this [impartially giving reasons] makes the judge sound very much like someone we know. A mythological figure. A disinterested servant of power and justice. One who is indifferent to lobbying and independent from the opinion of the majority. Who tries to decide with the general good in mind. [...] He is the prince of reason.\footnote{John Ralston Saul, *Voltaire’s Bastards: The Dictatorship of Reason in the West* (New York: Vintage Books, 1992) at 327.}

Chapter 6 offers a second order of analysis. While chapters 4 and 5 are focused on the usage and effect of specific rhetorical devices, chapter 6 discusses the principal avenues that could be pursued to critique the preeminent discourse on state secrecy and their respective chance of succeeding. In so doing, it breaks down the discussion into a critique of the preeminent discourse from within its construct and context, and a critique}
from without by surveying how its underpinnings and means of reproduction could be challenged. The chapter concludes with notes on reflexivity, including on my personal experience as a decades-long secret keeper. Notwithstanding the approach taken, breaking or reducing the dominance of the discourse of secret keepers would be a monumental, but not impossible task. Rhetorical devices are assailable after all, and there are a few secret keepers on record doubting the validity of some of the rhetorical devices in use in certain circumstances.

The next chapter, chapter 2, situates the study of secrecy in critical security studies and identifies the scholarly contribution of this thesis by way of a selective review of the existing literature on secrecy and state secrecy. While it assesses this literature and further situates the work undertaken in this thesis, it also surveys what this literature has to say on defining secrecy and state secrecy. Using a variety of authors, it asserts that secrecy is constitutive of the material nature of state power and that it has been increasingly normalized. It also recognizes that secrecy is more than information or material that the state safeguards against disclosure; it is also a social construct subject to symbolic and ritualistic practices that has a political life as much as a formal and legal existence. A reading of chapter 2 benefits the readers’ understanding of state secrecy before they embark on its history.

1.4 Conclusion

This thesis offers an original way to understand the reasons offered by secret keepers to prevent the disclosure of state secrets. By focusing on how secret keepers use particular rhetorical devices as forms of persuasion and how these are deployed and reinforced in legal proceedings, the study illuminates the institutional nature of secrecy
and the broader social power of discourse. It offers one critical explanation of the workings of state secrecy with respect to a disciplinary field of security studies that warrants more attention. It also informs our understanding and conceptualization of the process of secretization in the context of statecraft, and specifically the ways that certain contemporary discourses claim authority and legitimacy in producing secrecy. As “practices of classification powerfully shape the boundaries of public knowledge,” critical attention to the production and reproduction of state secrecy is, this thesis suggests, warranted.\footnote{William Walters & Alex Luscombe, “Hannah Arendt and the Art of Secrecy; Or, the Fog of Cobra Mist” (2017) 11 International Political Sociology 5 at 7.} This thesis also contributes to the study of discourse by characterizing the use of rhetorical devices by particular agents (secret keepers) in relation to a particular discourse (state secrecy) in both a primary site (law) and genre (legal documents). In so doing, it argues that the ubiquity of rhetorical devices is useful to secret keepers in persuading others to make sense of the social world of state secrecy the same way they do. Taken together, the discourse of secret keepers and judges on state secrecy is preeminent in society. It is difficult to challenge its authority and legitimacy, but understanding how it is produced and reproduces itself is an important step towards a critique of state secrecy.
Chapter 2: Literature review

2.1 Introduction

This thesis responds to Walters’s call to critical security theorists and others to fully and innovatively engage with the constitutive practices of secrecy. Given the central place that state secrecy occupies in the liberal-democratic state, particularly as it applies to security practices, Walters wonders, in his seminal work on state secrecy, why critical security studies researchers—in comparison with mainstream intelligence and national security studies researchers—have neglected its study as a core category in security research. To palliate this limitation, he proposes that critical researchers think of secrecy in terms of a flat ontology and materiality. By flat ontology, he simply means that critical researchers should avoid being in awe of the radiance of the exposed secret and of the politics of secrecy and security—since no associated success or failure is naturally pre-ordained and its agents are not supra-historical. Instead, he presses researchers “to explain where the impression and aura comes from, how it is generated and which actors and methods mediate and communicate it,” and insists that researchers “carefully map the various institutions, devices and mechanisms that emerge amidst the politics of secrecy and security, and regard these as intrinsic features in its governance and not merely second-order phenomena […].” By materiality, he refers to all those material, tangible factors and things that can interfere with, or “pose a threshold, limit or challenge

2 Ibid at 65.
3 Ibid at 91.
[to] any project of concealment.”

Think here, for instance, of the mobility of secrets and of all that can impede it, such as a plane crash, a hard drive failure, etc. Critical researchers are hereby invited to think about how a secret is generated, produced, translated, managed, transformed, circulated and moved through things such as containers, envelopes, files, couriers, vehicles, digital devices or any other means—in other words to follow the secret “as it moves across different institutional and professional sites, technical platforms and jurisdictions.”

Studying such secrecy-in-action, Walters recognizes, speaks directly to opening research to multidisciplinary approaches, as geographers, anthropologists, political sociologists, organizational theorists and scholars of science and technology studies would have something of value to contribute to such an effort.

In doing secrecy-in-action research, Walters warns researchers to be cognizant of what he calls the covert imaginary—the set of shared commonplace assumptions, concepts, stereotypes, “affective structures, images and attitudes about political secrecy that prevails at a given time”—because of the limit to understanding and critical analysis such an imaginary entail. More importantly, he encourages researchers to figure out as well how the covert imaginary at a given time and place has come about, while rejecting along the way any notion that all matters of state secrets are necessarily the products of rationality or of coherent thoughts and actions. By focusing on the constitutive practices of secrecy, Walters asks researchers to move from the more conventional focus on law

\[^{4}\text{Ibid at 40.}\]
\[^{5}\text{Ibid at 34.}\]
\[^{6}\text{Ibid at 7.}\]
and policy. He wants them to stop conceiving of secrecy as a dichotomy between a norm of perfect containment and the leak as the exception. As he writes, “things can be messy, imperfect, eventful and often quite ad hoc.” Walters’ approach and concepts of a covert imaginary, flat ontology and materiality open new and innovative avenues of research and enrich our social understanding of state secrecy. Simply stated, he shows the way to make research on state secrecy more interesting and innovative.

By focusing on the discourse of secret keepers and its legitimation by judges, this thesis engages with one of the constitutive practices of secrecy that shapes what Walters refers to as the covert imaginary. In so doing, it explains why the views of secret keepers on the protection of state secrets from disclosure prevail in society. By being unconcerned with the contents of state secrets and the politics of state secrecy, it embraces Walters’s notion of flat ontology. It is critical, finally, because it unveils the power mechanism that gives dominance to the discourse of secrets keepers over opposing anti-secrecy and full transparency discourses.

Having situated my work as a direct response to Walters’s call, I use the following sections to further situate this thesis within the broad interdisciplinary literature on secrecy and offer my assessment of this literature through discussions of the nature of secrecy and state secrecy.

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7 This focus on law and policy was noted has been noted before. For instance, in 1999 Thomson wrote that “[g]overnment secrecy certainly has not been ignored. Many scholars and reformers have examined it critically, and government bodies have investigated the problem. […] Nevertheless, most of the literature on government secrecy neglects the fundamental democratic values underlying the problem and focuses instead on the laws and policies that regulate secrecy, patterns of abuses by individual officials, or particular practices such as executive privilege and national security.” Dennis F Thompson, “Democratic Secrecy” (1999) 114:2 Political Science Quarterly 181 at 181-182.
8 Walters, supra note 1 at 19.
2.2 Assessment of and linkages to the wider literature

Social scientists—anthropologists in particular—have consistently neglected the study of secrecy in complex and large organizations and instead paid a significant amount of attention to the study of non-state secrecy in small organizations, such as secret societies and religious sects. The renewed interest in secrecy and esotericism shown by academics, novelists and popular entertainers in the 1990s only perpetuated this state of affairs. In Hugh Urban’s assessment, “the study of secrecy has remained disappointingly general, universalistic, and largely divorced from social and historical context.” Social scientists, especially, have spent little time theorizing about the “origins, nature, workings, and consequences of secrecy within social systems.” Brian Balmer’s assertion that “[s]ecrecy has never been a major topic of research in social science,


although it has not been entirely neglected,” is indeed correct. So are Walters’s observations with respect to political science and sociology, which have followed a similar pattern.

That said, it should be noted that a distinct field of studies centered on secrecy is being developed and supported by a university-based, peer-reviewed, and interdisciplinary journal entitled *Secrecy and Society*. With its first issue published in 2016, the journal aims at exploring secrecy in its various manifestations and through a variety of theoretical and cultural underpinnings. In so doing, it is building a scholarly community on the subject of secrecy, making it a legitimate and major topic of research.

Where the study of secrecy has *not* been neglected, of course, is in its breach—the very focus on law and policy that Walters has asked researchers to move away from. As Patricia Erickson and James Flynn note, “[s]ecrecy is […] likely to be examined in terms of a deviant form of organizational behaviour; it is the illegal and inappropriate use of secrecy that is emphasized.” This has two angles: employees’ negligence and leakage,

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12 Brian Balmer, *Secrecy and Science: A Historical Sociology of Biological and Chemical Warfare* (Farnham, UK: Ashgate, 2012) at 2. As Walters and Luscombe noted: “Secrecy is a curiously neglected mediator of power/knowledge relations and an under-studied factor in politics within the growing field of IPS. In the wider field of political science, there have been periodic attempts to theorize political secrecy. That said, and despite some important interventions […], political secrecy has not been accorded anything like the depth of critical attention devoted to such questions as sovereignty, the public sphere, or citizenship.” William Walters & Alex Luscombe, “Hannah Arendt and the Art of Secrecy; Or, the Fog of Cobra Mist” (2017) 11 International Political Sociology (2017) 5 at 7.

13 Walters, *supra* note 1 at 25.


15 See “About Secrecy and Society,” online: <scholarworks.sjsu.edu/secrecyandsociety/about.html>.

16 Erickson & Flynn, *supra* note 9 at 252. The large contemporary literature on espionage is a case in point.
and outright espionage. With respect to the former, sociologists of work have argued that keepers of state secrets may have predispositions—because of their personality, experiences (for example of perceived injustice), or motives not to obey the law, but the manner in which they interact with organizational factors (such as culture, norms, procedures, reward system, and attitude toward employees) may either “increase or decrease the probability of deviant behaviours.” With respect to the latter, espionage is the deviant form of behaviour that has most interested scholars and excited popular writers, giving into the imaginary that Walters cautions against.

The means by which foreign nations or other adversaries attempt to obtain state secrets, and how to defeat them, are well covered by counterintelligence experts in the field of intelligence studies and subject of abundant works of fiction (novels and


and conspiracy theories. Such a high degree of attention to espionage by artists, novelists and a much smaller number of academics is perhaps not surprising. After all, in comparison with most other crimes, the unauthorized disclosure of state secrets and its prosecution in most countries (certainly in Canada, the United Kingdom and the United States) are relatively rare events. Given the low number of charges and

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22 In Canada, for example, from the Second World War to 1982, over twenty individuals were charged under the old Official Secrets Act (see chapter 3, pp. 128-31 on the Gouzenko case ramifications). Between 1982, when the Canadian Charter of Rights and Freedoms became part of Canada’s Constitution, and 2001, when the Security of Information Act replaced the Official Secrets Act, the Department of Justice refrained from prosecuting anyone for the unauthorized disclosures of state secrets because of the assumption that the then Official Secrets Act would not be Charter compliant if put to the test. Shortcomings and defects of the then Official Secrets Act are discussed in Canada, Crimes Against the State, Working Paper 49 (Ottawa: Law Reform Commission of Canada, 1986). Of note, the impact of the Official Secrets Act went well beyond the courtroom, in that it powerfully fostered compliance in the public service (pretest for security vetting and surveillance) and had a “chilling” effect there and beyond. As the Canadian Security Intelligence Service (CSIS) noted in a Backgrounder, “[s]ome of the more celebrated cases, including those which were not prosecuted, were Peter Treu (1978), the Toronto Sun (1979), Hugh Hambleton (1982), James Morrison (1986), Stephen Ratkai (1989), Brian McInnis (1994-95).” Ratkai pleaded guilty for violation the Official Secrets Act and was sentenced to nine years in jail by the Newfoundland Supreme Court. Canadian Security Intelligence Service, ARCHIVED: Backgrounder No. 12 - Security of Information Act (Ottawa, n.d.) online: Canadian Security Intelligence Service <https://www.csis-scrs.gc.ca/nwsrm/bckgrndrs/bckgrndr12-eng.asp>. Most notably during that period, two Communications Security Establishment (CSE) employees, Jane Shorten and Mike Frost, had disclosed state secrets related to Canada’s communications intercept operations without authorization. Frost’s revelations were published as Spyworld: Inside the Canadian and American Intelligence Establishments (Toronto: Doubleday Canada Limited, 1994), and Shorten’s discussed in media reports. See, inter alia, Clyde H Farnsworth, “Canadian Agency Is Accused of Spying on Citizens and Allies,” The New York Times (28 December 1995). At the time, CSE was not operating under statute. Its mandate, activities and accountabilities were codified in 2001. See National Defence Act, RSC 1985, c N-5, Part V.1. Since 2001, only one person has been charged or convicted under the Security of Information Act. In January 2012, the Royal Canadian Mounted Police arrested and charged Sub-Lieutenant Jeffrey Paul Delisle, a Canadian Armed Forces intelligence officer, for breach of trust pursuant to section 122 of the Criminal Code of
convictions over the years and the fact that there are millions of current and former secret keepers, it is safe to contend that secret keepers are for the most part law-abiding and resistant to attempts to subvert them “through ideology, blackmail, bribery, and carelessness”\(^{23}\) into betraying the trust placed in them by disclosing state secrets without authorization.\(^{24}\) As members of a specific epistemic and professional community, as well as members of society, secret keepers also seem immune from wider societal influences, such as the breach of “commonly accepted moral standards” cloaked in secrecy,\(^{25}\) that would logically affect their sense of loyalty and duty to obey the law. While this thesis is not interested in the motives of spies and leakers, or how they accomplish their respective deeds, it adds to the literature on espionage by illustrating that secret keepers use, and are exposed to, a discourse on state secrecy that has a high degree of legitimacy, and which

\[\text{Canada}, \text{ and for communicating to a foreign entity (namely Russia) information that the Government of Canada was taking measures to safeguard pursuant to Section 16 of the Security of Information Act. On 8 February 2013, Delisle, who had previously pleaded guilty, was sentenced to a jail term of 20 years. In the United Kingdom, a number of post-World War II high-level spies have not been prosecuted either “because it has been deemed inexpedient to expose to the public (and to Britain’s allies) the extent of Soviet penetration even with the protection possible through secret hearings.” Geoffrey Robertson & Andrew Nicol, Media Law, 4th ed (London, UK: Sweet & Maxwell, 2002) at 556.}\]


\(24\) Frederick Hitz, a former Inspector General of the US Central Intelligence Agency (CIA), lists seven major categories of motivation behind the unauthorized disclosure of classified information, or spying against one’s own country: Ideological commitment; money and treasure; revenge and score settling; sex, intimidation and blackmail; reasons of friendship or ethnic or religious solidarity; and for the sake of the game of spying or doing it. Frederick Hitz, Why Spy? Espionage in an Age of Uncertainty (New York: Thomas Dunne Books, 2008) at vii. MICE (money, ideology, compromise and ego) is a shorter and popular acronym that encapsulates most cases. Robert W Pringle, Historical Dictionary of Russian and Soviet Intelligence (Lanham: The Scarecrow Press, Inc., 2006) at 168.

\(25\) “[T]he prevalence of such secrecy, especially with regard to the breach of commonly accepted moral standards, is corrosive of the basic ideals of a democracy, and productive of cynicism about the political process. Witness the effects of the many, decidedly unnecessary moral enormities (including torture and support for terrorism) committed, without adequate scrutiny, under the rubric of ‘national security’ by so many Western democracies in recent years.” CAJ Coady, “Dirty Hands” in Robert E Goodin, Philip Pettit & Thomas Pogge, eds, A Companion to Contemporary Political Philosophy, 2nd ed, Volume 1 (Oxford: Blackwell Publishing, 2007) 532 at 537.
further reinforces the indoctrination, training and education processes secret keepers are subjected to.

Overall, the literature on secrecy has shown that secrecy in all its forms is pervasive in society and constitutive of the material nature of state power.26 Leakages of state secrets have produced abundant research material to researchers. Most importantly, the study of this research material, reviewed in the next section, has raised questions about the superabundance of state secrets, the ability of oversight and review bodies to regulate any abuse of secrecy, and the effects and transparency costs of secrecy.27 The literature on state secrecy indeed has widely recognized that excessive secrecy can lead to abuses and corruption, undermine the integrity of democratic institutions, affect the human rights of individuals and foster a culture of secrecy and impunity.28 The claims that the state makes to justify the non-disclosure of state secrets and punish those who disclose them are generally accepted by most scholars and other observers as essential to the proper functioning of democracies. Logically for the state, a high degree of secrecy is seen as necessary to defeat an adaptive and evolving adversary that is watching its targets’ every move. If this adversary were to know how it is being tracked and how its actions are going to be counteracted by the state, it could not be defeated. As such, there is

26 The observations in this section are drawn from Stéphane Lefebvre, “State Secrecy: A Literature Review” (2021) 2:2 Secrecy & Society, online: <scholarworks.sjsu.edu/secrecyandsociety/vol2/iss2/9/).
28 This is well argued in Arcadio Diaz Tejera, rapporteur, National Security and Access to Information, Report of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 2013, at paras. 6 & 11.
agreement with the secret keepers of the state that a certain amount of secrecy can be justified; where that threshold is, of course, is subject to intense debate in both the literature and the courts. That being said, the reasons or rationalities that secret keepers use to justify the non-disclosure of state secrets remain understudied, especially where it matters most: the law and its effect. It is a prime domain for such an investigation because it is there that these reasons are most clearly articulated and legitimated.

Although there is an arguably rich, multidisciplinary literature on social secrecy and its effects (particularly in anthropology and cultural studies), Dennis Broeders argues that “[t]he secret is a somewhat forgotten but vital sociological theme into which we should enquire more, especially in light of the fast changes in our digital society.” Walters, as noted above, also calls for secrecy to enter the research mainstream. This thesis speaks to both positions and also represents that special case deserving of a special and separate treatment from other kinds of social secrets that legal scholar Kim Scheppele has called for. This research thus distinguishes itself and adds to the extant literature in its treatment of the discourses of state secrecy by the state and the law. When historian David Gibbs, for example, tried to determine why certain information was classified as secret, he was not attempting to expose the legitimating claims to classify made by the state. Rather, he sought to identify the state’s motive in making this claim and to assess whether this motive was legitimate. In this thesis, it is the specific claims of the state for the continuing existence of state secrecy and the discursive structure of law that

legitimizes state secrecy that are examined in detail. Excluding my own published work, the literature has not studied in any depth what these rationalities are. In the social sciences and humanities, the overwhelming majority of authors on state secrecy are either preoccupied with executive wrongdoing covered up by the state secrets privilege, an executive culture fostering and reproducing secrecy, or the harm caused to democracy and individuals by an excess of state secrecy. There are several hundred of them with their criticism of state secrecy appearing in print, and an even larger number of experts and pundits commenting on social media or involved in advocacy activities against state secrecy. Lawyers and legal scholars, for their part, have not only contributed to these criticisms (as will be further discussed in the next section), but also rigorously studied the minutiae of how the law is understood and applied, and the applicability of judicial precedents to distinct cases or a class of cases. Post-9/11, law journals have been


34 Among advocacy organizations, see the Project on Government Secrecy (1991-2021) at the Federation of American Scientists, online: <fas.org/issues/government-secrecy/>, the National Security Archive at The George Washington University, online: <nsarchive.gwu.edu/> and Public Justice, which fights against court secrecy, online: <www.publicjustice.net/what-we-do/access-to-justice/court-secrecy/>.

literally flooded with articles discussing court cases and specific legal issues related to the protection of state secrets (but significantly more so in the United States than Canada or the United Kingdom, due to the much larger number of cases in US courts). This thesis makes no doctrinal or other law-specific contribution to this literature. That said, it may be of interest to legal professionals (lawyers, judges, paralegals, etc.) interested in the discourse of law and its effect on the discourse of state secrecy.

While there is general agreement among academics that some state secrecy may be justified, the justifications are rarely probed deeply and understood. That the unauthorized disclosures of state secrets might indeed endanger lives or compromise intelligence sources and methods is generally acknowledged, but these are assumptions that are too often taken at face value. By exposing the discourses of secrecy of the state and the law, I go beyond mere generalities to expose the discursive components that presumptively give apparent legitimacy to these general claims.

In this sense, this thesis shows the “systemacity of the ideas, opinions, concepts, [and] ways of thinking” within the state and legal contexts when it comes to the protection of state secrets from disclosure.\(^\text{37}\) It expands upon Willem de Lint, who noted, without elaborating on its specific contents, that state secrecy is subject to discourses that conceptualize it in a particular way both for popular consumption and for those who must protect secrets.\(^\text{38}\) In exposing the contents of these discourses, I am therefore in a position not only to claim—like Lint, Sirpa Virta and Bourdieu did in their comments on the behaviour of the court\(^\text{39}\)—but also to show whether the discourse of the law on state secrecy aligns with the discourse of the state on state secrecy. This speaks to the debate on the issue of deference that the courts are extending to the executive in matters of state secrecy. A close alignment would suggest a higher degree of deference than the reverse, but, more importantly, because the thesis is focused on rationalities, it would expose the justifications put forward by judges as to why they defer as well as the limits they place

on this deference. By studying these discourses in Canada, the United Kingdom and the United States, this thesis strives to enrich our knowledge of the discourses on secrecy in liberal democracies.

2.3 Introduction to the wider literature

The world has no shortage of openly available data to expand its knowledge. While it was once very difficult to know what was happening in remote and shielded areas of the world, social media, commercial data mining and commercial satellite imagery, among others, have opened up new vistas of knowledge.\textsuperscript{40} Compounded by massive leaks of state secrets by Chelsea Manning and Edward Snowden in the 2010s, this new access to data and knowledge has raised a fundamental question about the ability of state officials and political leaders to keep their activities away from prying eyes: Is nothing secret?\textsuperscript{41} Of course, the question is facetious. States worldwide still have plenty of secrets to protect from unauthorized disclosure.

In fact, leakers and spies are vigorously pursued everywhere, and Canada, the United Kingdom and the United States are no exceptions. State officials who disclose without authorization secrets they are entrusted with, especially to an agent of another state, commit a serious crime against their own state. In liberal democracies, such acts are at least considered political offences or at worst treason, and can be severely punished. In

\textsuperscript{40} Austin Carson, “Review of Robert Mandel’s \textit{Global Data Shock: Strategic Ambiguity, Deception, and Surprise in an Age of Information Overload}, H-Diplo, ISSF Roundtable XI-13 (2020) at 5.

comparison with most other crimes, however, the unauthorized disclosure of state secrets and its prosecution in liberal democracies are relatively rare events.

As noted above, US scholars have paid particular attention to state secrets and raised concerns about many issues, especially in the US since 9/11. Most importantly, they have questioned the superabundance of state secrets, the ability of oversight and review bodies to regulate any abuse of secrecy, and the effects and transparency costs of secrecy. For example, in *Democracy in the Dark/The Seduction of Government Secrecy*, legal counsel Frederick Schwarz argues that the United States has entered a “Secrecy Era” characterized by a superabundance of state secrets designed not to protect America but to keep what is reprehensible from Americans and an entrenched and seductive security culture within the walls of the American government. His antidote to secrecy, necessary to buttress democracy, is openness.\(^4^2\) Schwarz’s views accord well with those who believe that governments should be more transparent and that there should be fewer state secrets than there are. In *Secrecy in the Sunshine Era*, political scientist Jason Ross Arnold observes that executive secrecy is as pervasive in Democratic as Republican administrations, predates 9/11, and resists the sunshine era that freedom of information laws were supposed to usher.\(^4^3\)

In *Secrets and Leaks: The Dilemma of State Secrecy*, professor of politics Rahul Sagar argues that the contemporary debate surrounding state secrecy in the United States is not about its legitimacy but instead about whether there is a proper regulatory framework in place to ensure that it will not be abused. Devising such a framework, he

\(^{42}\) Schwarz, *supra* note 27 at 2, 5.

\(^{43}\) Arnold, *supra* note 27 at xii.
contends, is very difficult to do.\textsuperscript{44} Hence, to avoid regulatory capture inherent in any single authority, he further argues that the possibility of unauthorized disclosures of state secrets “provides the most effective and credible guarantee that those who have the formal authority over state secrecy cannot systematically use it to their own advantage,”\textsuperscript{45} even though leaks of state secrets can be done both for good and for ill.\textsuperscript{46}

In \textit{When Should State Secrets Stay Secret?} political scientist Genevieve Lester argues that US intelligence accountability and oversight mechanisms (which largely operate in secret so as not to endanger national security) contribute to greater secrecy instead of expanding public access to intelligence information.\textsuperscript{47} Her analysis of these mechanisms shows that they, in effect, reinforce state secrecy.

Finally, in \textit{Democracy Declassified: The Secrecy Dilemma in National Security}, political scientist Michael Colaresi examines the negative effects and transparency costs of secrecy in foreign policy, and argues, using counterfactual examples, that an excess of authorized disclosures of foreign policy secrets “is likely to undercut the public benefit of the [foreign] policy” under discussion.\textsuperscript{48} Importantly, he acknowledges that keeping secrets may sometimes delegitimize a particular foreign policy, but be that as it may, what remains important is for the state to have significant justifications.\textsuperscript{49} To bridge the gap in accountability created by the existence of state secrets, he argues that combined solutions such as transparency cost deflation (secrets lose their value over time thus

\textsuperscript{44} Sagar, \textit{supra} note 27 at 3.
\textsuperscript{45} \textit{Ibid} at 5.
\textsuperscript{46} \textit{Ibid} at 7.
\textsuperscript{47} Lester, \textit{supra} note 27 at 6.
\textsuperscript{48} Colaresi, \textit{supra} note 27 at 5.
\textsuperscript{49} \textit{Ibid}.
allowing ex-post accountability) and the empowerment of oversight and accountability mechanisms external to the executive branch of government can increase the probability of public consent to the state’s foreign policy choices.50

What these authors tell us is that state secrets are ubiquitous, well entrenched, sometimes necessary for the conduct of state activities, and therefore here to stay. The best that can be hoped for is that states devise and implement adequate and efficient oversight and review bodies to avoid abuses and minimize the costs of secrecy to the state and society.

Despite the general neglect by social scientists for matters of state secrecy noted above, there nonetheless exists a disparate literature on state secrets. The graphic below (called an NGram) shows the relative usage frequency from 1800 to 2008 (the latest date that was available when queried) of the terms “state secrets” in the millions of printed sources digitally available to Google (a corpus of books published in English in the United States).51 The NGram clearly shows that the ascendency of the use of the terms “state secrets” correlates very closely with the advent of the Cold War.

50 One other possible solution is to disassociate the costs of disclosure with threats and instead shift to a risk-based approach. See Marlen Heide, “From Threat to Risk: Changing Rationales and Practices of Secrecy” (2022) 24:3 Public Integrity 254.
Figure 1: Relative usage frequency over time (1800-2008) of the terms “state secrets”


An in-depth and complete review of the literature on state secrecy would take several years of dedicated effort to accomplish and would not serve any clear purpose in the context of what this thesis seeks to accomplish. As a large portion of this literature is on the themes of law and policy and breaches of secrecy (leaks and espionage), I limit the scope of this review to answering two questions: What is secrecy? And what is a state secret? In the next two sections, I use these questions as an organizing framework to review the richness of a very disparate, largely US-centric, but also multidisciplinary literature. This overview of the literature thus looks at how a variety of scholars have answered these questions and in so doing, it highlights the social nature of secrecy and the need for a better understanding of those rationalities and discourses sustaining the non-disclosure of state secrets.
2.4 What is secrecy?

Secrecy, of course, “has a life outside of the demands and desires of the state” and that life has been examined as both a normal and deviant form of personal behaviour. This is the world of the intimacy of everyday life, where emotional, sexual and psychological closeness “has traditionally desired secrecy: the trustworthiness of friends, the discretion of lovers, the enshrined secrecy of the confessional, of the doctor’s surgery and the psychiatrist’s couch.” Human beings keep secrets between themselves and from others as a matter of fact. It is part of their daily routines and, as Joel Feinberg noted, “life would be hardly tolerable if there were no secrets we could keep (away from the ‘street’), no preserve of dignity, no guaranteed solitude.” Prominent sociologists like Georg Simmel and Erving Goffman, and more recently William Ian Miller, a legal scholar, indeed all have argued that most of us intentionally hide or fake things about ourselves in our everyday lives. For Simmel, this secrecy that we exercise is “one of the greatest accomplishments of humanity.” This is the case, he believes, because without secrecy life would just not be the same as “many sorts of purposes could never arrive at

59 Simmel, supra note 55 at 462.
realization."  

Such a sociological interest in secrecy has obviously "existed for some time, although it could not be said that the field is at all coherent, or that it constitutes a disciplinary subfield."  

Philosophers Gilles Deleuze and Félix Guattari pushed this analysis further. They problematize the notion of the secret by asserting that it must have a content in a form that is covered, isolated or disguised, given its role to suppress formal relations. For them as well, the secret is in essence a sociological notion; it is invented and a collective assemblage, and therefore not static (an argument made by Walters, as noted above). In fact, how it is perceived can change and differ from person to person; it secretly influences, spreads and propagates. In short, they write,

the secret, defined as a content that has hidden its form in favour of a simple container, is inseparable from two movements that can accidentally interrupt its course or betray it, but are nonetheless an essential part of it: something must ooze from the box, something will be perceived though the box or in the half-opened box.

Organizational theorists Jana Costas and Christopher Grey opine in a similar direction, but in a slightly more nuanced manner. Keeping secrets, they write, is a social

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60 Ibid.

61 According to the literature review of Miiko Kumar, Greg Martin & Rebecca Scott Bray, “Secrecy, law and society” in Greg Martin, Rebecca Scott Bray & Miiko Kumar, Secrecy, Law and Society (Abingdon: Routledge, 2015) 1 at 9.

62 On suppressing relations: Lane and Wegner argue that secrecy is “rather an antisocial act, in the sense that it is targeted toward some audience to whom the truth is to be denied.” Julie D Lane & Daniel M Wegner, “The Cognitive Consequences of Secrecy” (1995) 69:2 Journal of Personality & Social Psychology 237 at 237.


64 Ibid at 287.
process, while the secret itself is its content or what is intentionally concealed. For secrets to exist, therefore, secret keepers need to be constantly engaged in practices of concealment. These practices can only be carried by social actors in concert and likely involve symbolic and ritualistic practices, such as the signing of a confidentiality agreement or the giving of a promise, marking them as being “in the know.” They also recognize the existence of what Walters calls the covert imaginary:

Indeed, secrecy has potential social consequences (upon those social actors and others) above and beyond the concealment of information, one example being the possible awe and mystery that surrounds them (mysterium) but others include, potentially, shame or guilt or other effects on identity [...].\(^65\)

Secrecy, therefore, would have more than one function. While in the eyes of the state it is about the protection of information or material from unauthorized disclosure for their intrinsic value, for secret keepers it can also be about their protection for symbolic value.\(^66\) Bourdieu noted too that secrecy has a symbolic function: it is “a rare, scarce resource or valuable commodity, which confers a special kind of prestige and so determines one’s status within a given hierarchy of power.”\(^67\) So did Janet Brodie, who explains well the symbolic impact on individuals entrusted with state secrets:

To obtain [a security] clearance carried powerful symbolic meaning, providing access to arcane knowledge and changing the way one regarded others and was, in turn, regarded. Once one obtained access to classified information, those


\(^66\) Ibid at 1429.

without such access appeared uninformed, even ignorant. It changed the way
one regarded peers, colleagues, and the scope of intellectual exchange.\footnote{68}

That secrecy may not encapsulate any valuable state secret, however, has long been
recognized by keepers of state secrets themselves. Celebrated novelist John Le Carré,
who served in British intelligence at the height of the Cold War, explains the symbolic
power that the lure of secrecy had for him:

\begin{quote}
[it provided] a means of outgunning people we would otherwise be scared of; of
feeling superior to life rather than engaging in it; as a place of escape, attracting
not the strong in search of danger, but us timid fellows, who couldn’t cope with
reality one calendar day without the structures of conspiracy to get us by.\footnote{69}
\end{quote}

Oxford historians during their Second World War military service made a similar
point. Hugh Trevor-Roper, then serving with fellow historians in the Radio Security
Service, reported in his personal journal words by his colleague Stuart Hampshire:

\begin{quote}
35:4 Diplomatic History 643 at 652. Garry Wills said as much: “Storing secrets is a source and sign of
power. Allowing access to secrets is a favor that obliges those so favored. It is also a sign of prestige.
‘Clearance’ to see classified documents is a badge of prestige in Washington.” Garry Wills, Bomb Power:
Anthropologists too have recognized the inclusion-exclusion effects of secrecy: “Possession differentiates.
Concealed information separates one group from another and one person from the rest. What I know and
you do not demonstrate that we are not identical, that we are separate people. The difference can create a
hierarchy, wherein secrecy cedes social power to those who control the flow of treasured information.”
particular, this effect was recognized by sociologist Georg Simmel, who argued that those who share secret
knowledge develop trust and affective bonds between themselves; they develop a sense of cohesion as they
are secluded against the outside of their secret society. Georg Simmel, The Sociology of Georg Simmel,
translated and ed by K Wolff (New York: Free Press, 1950) at 348, 369, and Georg Simmel, Sociology:
Inquiries into the Construction of Social Forms, Volume 1, translated & ed by Anthony J Blasi, Anton K
Jacobs & Mathew Kanjirathinkal (Leiden: Brill, 2009) at 337.
\end{quote}

\footnote{69} Quoted by Adam Sissman, John Le Carré: The Biography (Toronto: Alfred A Knopf Canada,
2015) at 184.
Stuart Hampshire observed that S.I.S. [British Secret Intelligence Service, popularly known as MI6] values information in proportion to its secrecy, not to its accuracy. They would attach more value, he said, to a scrap of third-rate and tendentious misinformation smuggled out of Sofia in the fly-buttons of a vagabond Rumanian [sic] pimp than to any intelligence deduced from a prudent reading of the foreign press. And, of course, he’s quite right.\textsuperscript{70}

Guy Debord, a Marxist theorist, added to this discussion on the function of secrecy by arguing that generalized secrecy is a principal feature of the modern capitalist system, that it stands “behind the spectacle, as the decisive complement of all its displays and, in the last analysis, as its most vital operation.”\textsuperscript{71} In other words, he noted later, “[o]ur society is built on secrecy,” with both private sector secrets and state secrets and an increasing number of people “trained to act in secret.”\textsuperscript{72} In such a society, “[t]he spectator is simply supposed to know nothing, and deserve nothing.”\textsuperscript{73} Taking the left-wing terrorist threat of the 1980s to illustrate his argument, he wrote that “[t]he spectators must certainly never know everything about terrorism, but they must always know enough to convince them that, compared with terrorism, everything else must be

\textsuperscript{71} Guy Debord, \textit{Comments on the Society of the Spectacle}, translated by Malcolm Imrie (London, UK: Verso, 1991), section V. Debord defines the spectacle as follow: “Understood in its totality, the spectacle is both the outcome and the goal of the dominant mode of production. It is not something \textit{added to} the real world—not a decorative element so to speak. On the contrary, it is the very heart of society’s real unreality. In all its specific manifestations—news or propaganda, advertising or the actual consumption of entertainment—the spectacle epitomizes the prevailing model of social life. It is the omnipresent celebration of a choice \textit{already made} in the sphere of production, and the consummate result of that choice. In form as in content the spectacle serves as total justification for the conditions and aims of the existing system. It further ensures the \textit{permanent presence} of that justification, for it governs almost all time spent outside the production process itself.” Guy Debord, \textit{The Society of the Spectacle}, translated by Donald Nicholson-Smith (New York: Zone Books, 1995) at 13.
\textsuperscript{72} Debord, \textit{supra} note 71 at section XVIII.
\textsuperscript{73} \textit{Ibid} at section VIII.
acceptable, or in any case more rational and democratic.”

Spectators in fact do accept the existence of secrecy, that “there are inevitably little areas of secrecy reserved for specialists.” But it would be very difficult for them, in any event, to empirically determine whether state secrets are legitimate or not because they are simply not available to them for inspection. Given the foregoing discussion, Simmel was probably correct to say that:

Secrecy is a universal sociological form, which, as such, has, nothing to do with the moral valuations of its contents. On the one hand, secrecy may embrace the highest values […] On the other hand, secrecy is not in immediate interdependence with evil, but evil with secrecy. […] Secrecy is, among other things, also the sociological expression of moral badness.

This observation provides a close linkage to Jodi Dean’s argument that secrecy is inherently something that is political, invoked to “achieve particular political ends.” As an example, she asserts that the way secrecy was invoked after 9/11 was in terms of a crucial element necessary to save lives and prevent future occurrences of terrorist acts. It means, in other words, that “[t]he knowledge contained in the secret is a guarantor of security.” Hence, security would be a byproduct of secrecy. Dean also observes that the same secrecy prevents public debate while serving as a source of legitimization to state action. This serves, of course, the ends of politics, despite the fact that “[p]ublicity is

74 Ibid at section IX.
75 Ibid at section XXI.
77 Simmel, supra note 55 at 463.
79 Ibid.
80 Ibid at 369.
[...] a condition for legitimacy insofar as the secret holds that information decisive for debate.” 81  
Joseph Masco, finally, goes further than Dean by assuming that the ends of politics also include using secrecy to create new realities. He means by that that evoking a secret is in fact a claim to greater knowledge, expertise, and understanding than in fact is possible. 82

The notion of secrecy, overall, is not uniquely tied to the state; it is indeed an integral part of human behaviour which makes it a sociological notion and phenomenon that is never fixed in time and place. It also has social consequences that may be highly personal, social or political, and it performs a number of functions beyond the protection of information or material, the symbolic and political ones probably being the most tangible. This discussion suggests the content of a secret does not matter as much as the ends to which it is used.

2.5 What is a state secret?

The notion of a state secret is arguably intuitively easy to grasp, 83 and like any other secrets it has a social existence. But it also has a formal, legal existence because it is subject to laws and rules adopted by competent authorities (government, parliament) that define “what is to be kept secret and how, who can be entrusted with secrets and what sanctions apply to secrecy breach.” 84  
As Kim Lane Scheppel articulated with respect to

81 Ibid.
84 Costas & Grey, supra note 65 at 1431.
social secrets, a state secret can be shallow (a secret that is known publicly to exist, but not its contents) or deep (a secret that it not publicly known to exist) as well.\textsuperscript{85} In their comprehensive definition of secrecy, secret and secrets, Jan Goldman and Susan Maret also distinguish between various types of secrets, including core (“in which the compromise of would result in unrecoverable failure”), essential (denied to adversaries because of their criticality), and subjective (compact, transparent, arbitrary, changeable, and perishable”) versus objective (the reverse of subjective).\textsuperscript{86} These typologies are interesting in discerning the contents and usefulness of secrets, including those of the state.\textsuperscript{87}

Amy Gutman and Dennis Thompson argue that there could be exceptional reasons for the presumption of publicity for politically relevant information to be rebutted by claims of secrecy. They contend that there are three principal reasons: necessity, liberty and opportunity, and deliberation.\textsuperscript{88} The first reason is that secrecy is necessary if making its contents public would defeat its purpose.\textsuperscript{89} In such few cases, secret keepers would be expected to “give an account of the reasons for the secrets, and respond to demands to

\textsuperscript{85} Scheppele, supra note 30 at 21-22, 75-79, 84-85. A full discussion of this distinction can be found in David E Pozen, “Deep Secrecy” (2010) 62 Stan L Rev 257. He correctly notes that, “the depth of a secret is not necessarily a binary feature; rather, depth is determined by a variety of interrelated factors, according to which any particular secret may be located on a continuum running from maximally opaque to maximally intelligible. Cutoffs may be made along the continuum, but criteria must be developed to do so—and even still, complications will inevitably arise in the application of general standards to a phenomenon as vast and heterogeneous as secrecy. “Deep” and “shallow” can serve profitably as proxies, or heuristics, for the rough location of a secret on the continuum. But it is a conceptual mistake to see them as wholly discontinuous categories.” \textit{Ibid} at 266.

\textsuperscript{86} Jan Goldman & Susan L Maret, \textit{Intelligence and Information Policy for National Security: Key Terms and Concepts} (Lanham, Md: Rowman & Littlefield, 2016) at 505-506.


\textsuperscript{89} \textit{Ibid} at 101.
limit their scope.” The second reason is that unrestrained publicity may negatively affect basic liberty and opportunity, for example when the release of specific and identifiable information violates the personal integrity of officials and citizens. The third reason is that secrecy sometimes better supports democratic deliberation than not, as long as prospective and retrospective accountability is present. In that context, deceptive secrets (concealing information to deceive other people), except perhaps in wartime or against criminals, would hardly ever be justifiable because they could not logically be open to prospective accountability. Often, they are those secrets that hide wrongdoing or questionable policies the state believes are right. Deep secrets, which can also be deceptive in nature, are similarly problematic, as only shallow secrets can be challenged.

David Pozen, for his part, has outlined the various consequentialist arguments in support of “state” secrecy in a small number of categories. First, state secrecy is necessary to prevent adversaries (like spies, terrorists or criminals) from using disclosed secrets in a manner that would harm national interests or negate the effectiveness of the state in the implementation of its policies. That argument speaks directly to the preservation of the state itself (including “acting quickly and decisively against threats, protecting sources and methods of intelligence gathering, and investigating and enforcing the law against violators”). Second, secrecy may be necessary to permit frank and free

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90 Ibid at 105.
91 Ibid.
92 Ibid at 114-115.
93 Ibid at 117-118.
94 Ibid at 121.
95 Pozen, supra note 85 at 277.
“governmental deliberations and decision making,” although, I would note, few of these deliberations, if known publicly, would necessarily amount to a state secret. Third, secrecy may be necessary to protect individual privacy or other associated values, which again do not necessarily involve state secrets. Finally, to keep things secret is seemingly cheaper than creating an administrative structure to promote and enact transparency policies.97

Taking this issue from a very different perspective, Bernard Williams, the renowned philosopher, muses that:

If the right to spy [by the state] is granted at all, then the right to know must be suspended; or if it is insisted upon, then it queries must be met with lies.

Espionage, one must tautologously insist, is supposed to be covert. There are indeed questions [...] about what sort of activity espionage is; what role it plays in national security; and what sorts of games, in the name of national security, are played between nations. But one thing that is clear is that so long as there are such activities, the more the right to know is insisted upon, the thicker the web of even domestic deceit must become.98

He is, of course, very perceptive, and correct in linking secrecy to state activities. Mark Neocleous, a critical theorist, pushes this analysis further by arguing that the creation and keeping of state secrets has much to do with the material nature of state power than anything else.99 It is about the idea of the state as a possessor of knowledge—

96 Ibid.
97 Ibid.
a gatherer “of all necessary information, both overt and secret, that government needs to fashion its policies and do its work”\textsuperscript{100} and which it seeks to protect from unauthorized disclosure—that has its own interests to pursue (reason of state), making secrecy a necessary feature or ritual of state power over the last 500 years.\textsuperscript{101} Eliminating state secrecy therefore makes no sense unless the state itself no longer makes any sense.\textsuperscript{102} This speaks again to the function of secrecy, raised in the preceding section. This observation also is reflective of the linkages between state secrecy and bureaucracies made by a number of preeminent theorists.

Max Weber famously linked the existence of modern state secrets to the bureaucracy of the state:

secrecy is used to sustain the power interests of the bureaucracy. Indeed, the term ‘official secret’ is an invention of the bureaucracy. And nothing is more fanatically protected by bureaucracy than the concept that secrecy is necessary, an attitude which is not objectively warranted outside those specific areas discussed above [e.g., diplomacy, military administration].\textsuperscript{103}

Particularly interested in German politics, Weber argued that the ability of the German parliament at the turn of the 19\textsuperscript{th} Century to control the administration of the state was impeded by parliament’s ignorance of state activities, which he attributed to the

\textsuperscript{100} Ibid at 96.
\textsuperscript{101} Ibid at 89, 92, 94, 98.
\textsuperscript{102} Ibid at 99.
state’s ability to transform official information into secret information to evade parliamentary control.  

The official state secret, from that standpoint, is thus nothing less than a specific invention of the bureaucracy that serves its pure interest. This notion of bureaucratic self-interest suggests that keepers of state secrets would recognize that interest and hence not disclose secrets without authorization because so doing would be against their self-interest. Weber, however, conceded that in some cases (such as technical know-how, military affairs and diplomacy) secrecy can be justified to keep the peace given the competition that exists between countries.

Weber’s thinking was present in the impactful report of the Commission on Protecting and Reducing Government Secrecy. Established by the US Congress in 1994 and chaired by the late Senator Daniel Patrick Moynihan, the Commission described the US secrecy system as a regulatory scheme or form of bureaucratic regulation, with costs and benefits in need of greater accountability and input from Congress.

Marxists, for their part, have doggedly pointed out that state or administrative secrecy is a necessary concealment mechanism that the capitalist state uses to give


legitimacy to an exploitative accumulation process.\textsuperscript{108} Karl Marx made the simple but still powerful point that the control of knowledge, and therefore secrecy, was a fundamental characteristic of the bureaucracy.\textsuperscript{109} Notwithstanding its ideological flavour, Marx’s original point has a lot of currency today. In fact, even non-Marxists can appreciate that secrecy is a bureaucratic characteristic that has become “the reigning force in governments around the world—both elected and non-elected.”\textsuperscript{110} The reasons for that, of course, extend beyond supporting the capitalist mode of production. As B Guy Peters succinctly notes, secrecy is necessary to ensure that public servants remain isolated from short-term political pressures when they make decisions in the public interest.\textsuperscript{111}

Secrecy, the argument further goes, allows bureaucracies to be neutral, and more effective and autonomous than if they were operating with a high degree of transparency.\textsuperscript{112} In a context where their advice is privileged, bureaucrats are more likely to express themselves freely and frankly with both their subordinates, colleagues and superiors: “unless such an exchange of ideas, trying out of proposals, and general

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\textsuperscript{111} B Guy Peters, \textit{The Politics of Bureaucracy}, 5\textsuperscript{th} ed (London, UK: Routledge, 2001) at 309.

brainstorming is kept confidential, the whole process of reaching a reasoned decision is acutely impeded.” Moreover, as Michael Reed points out, official secrecy has allowed bureaucrats to monopolize knowledge and expertise in the protection of their own interests and to become “an independent social and political force within modern capitalist political economies and societies.”

With the advent of the Cold War, the production and protection of state secrets by liberal democracies have become increasingly normalized, with the consequence that national security decisions and activities are increasingly invisible to the public. In an important article in 2008, Lint analyzes the normalization of security and intelligence—and by direct implication, secrecy—in democratic polities. He argues that the intelligence function of the state is increasingly being used within security politics, with the consequence that exclusions and exceptions are becoming a normal course of business, and the basis for decisions that must remain discreet (the use of secret intelligence information in immigration cases in Canada and the United States is a case in point). This is especially becoming apparent in the realm of administrative law and criminal law.

The problem with a security apparatus that has become “intelligencified,” Lint writes, is that it “produces an intelligence anti-politics in which a cloaked knowledge

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justifies, penetrates, and at strategic moments overturns popular and state sovereignty."\textsuperscript{116}

He recognizes the system of exclusion famously expressed by Foucault\textsuperscript{117} that the "intelligencified" practice of knowledge generates, and notes quite rightly that, as a system of knowledge, intelligence is subject to entry controls, and the use of its data subject to hierarchical filtering (security clearances, trust networks, loyalty measures, etc.) to ensure that there is no unauthorized disclosure.\textsuperscript{118} Not too long ago, this filtering excluded categories of individuals (e.g., homosexuals, communists, gamblers, etc.) from government service as an allegedly necessary measure to take to protect state secrecy and a state’s national security.\textsuperscript{119}

The knowledge that makes secrecy so pervasive in national security matters is expressed by national security experts and government lawyers, to whom judges usually show a high degree of deference,\textsuperscript{120} and whose security discourse, to borrow from Lint

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\textsuperscript{116} Lint, supra note 38 at 281.
\textsuperscript{117} In his history of madness, Foucault identified forms of exclusion that shifted alongside other transformations. He saw exclusion as a means of social control against lepers, the poor, the vagrant, the criminal, the alienated, etc. Michel Foucault, History of Madness (London, UK: Routledge, 2006). He developed this approach to study history further in his L’archéologie du savoir (Paris: Éditions Gallimard, 1969).
\textsuperscript{118} Lint, supra note 38 at 289.
\textsuperscript{120} In matters of national security, Canadian courts have usually shown deference to the executive branch because, as Supreme Court Justice Ian Binnie publicly noted, security agencies “have more expertise information and resources on such matters than the courts.” As reported by the Communications Security Establishment Commissioner in his Annual Report 2004–2005 (Ottawa: Minister of Public Works
and Virta, “is conceptualized in ways which privilege finitude, certainty, realism and executive authority so that potentially endless ambiguities may be cut short. Security talk offers a variety of closures when exercised to privilege the dominant discourse.”¹²¹ This notion of finitude and certainty is readily apparent in judicial decisions of the highest court (which cannot be appealed) and of lower courts (when they are not or cannot be appealed to a higher court)¹²²—in their absence interpretive anarchy would reign.¹²³

Unarguably, state secrets exist: they are subject to laws and rules adopted by competent authorities. They can be known and identified once they have been officially disclosed or leaked. Many scholars, however, argue their content does not matter as much as their function: they would not exist without serving a particular purpose. That purpose is a matter of debate and, as Lint argues, shifting. In that sense, and in line with Walters’s point, what a state secret is cannot easily be disassociated from one’s understanding of the notion of secrecy.

2.6 Conclusion

This overview of the literature has shown that secrecy is pervasive in society and constitutive of the material nature of state power. Claims of state secrecy increased in the

¹²¹ Lint & Virta, supra note 39 at 474.
¹²² “[…] the [US] Supreme Court renders decisions that are final— that cannot be changed except through the Court’s own willingness to reconsider its opinion or through the cumbersome process of formal amendment […]” Lawrence Douglas, “Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review” in Austin Sarat & Thomas R Kearns, eds, The Rhetoric of Law (Ann Arbor: The University of Michigan Press, 1994) 225 at 228. Bickel is critical of this notion, arguing that a court decision is final, as a political rule, only after it has been accepted by elected officials. See Alexander Bickel, The Least Dangerous Branch (New Haven: Yale University Press, 1962).
20th century and have been further normalized in a post-9/11 context. A secret, it has been shown, is more than information or material that the state safeguards against disclosure for fear of injury to the national interest (or other undesirable outcomes). It is also a social construct. Regardless of its intrinsic value, a secret’s content is covered, isolated or disguised through symbolic and ritualistic practices, without which revelation would be impossible.\(^{124}\) It has a political life as much as it affects individual and group identities because of its symbolic value. But a secret also has a formal, legal existence as it is subject to laws adopted by competent authorities.

These laws and rules make it a crime to disclose a state secret without authorization. To prevent such disclosure, the law, including the harsh law of treason, supposedly serves as a deterrent. However, as deterrence does not always work, the law is supplemented by a series of social and physical controls to reduce the temptation and the very possibility of secret keepers transgressing the law. The law, in legal proceedings, allows the state to refer to provisions and procedures that, when correctly applied, protect state secrets from legal disclosure.

The literature on state secrecy—to the extent that one can be identified—is disparate, largely US-centric, but also multidisciplinary, and growing. Though a plurality of scholars has addressed many of the questions surrounding social and state secrecy, one question remains unanswered just as secrecy is being normalized: what is the preeminent

\(^{124}\) Hildesheimer has noted too that a state secret may have no intrinsic value and be nothing more than an anecdote, and that to know a secret involves that it be unveiled. “La connaissance historique à posteriori du secret, comme sa divulgation en son temps, passe à travers le dévoilement de sa mise à mots. […] Il faut en effet préciser que tout écrit dit « secret » n’a pas forcément qualité à contribuer à cette histoire, car secret peut alors simplement rimer avec anecdote.” Françoise Hildesheimer, “Le secret de l’État « moderne »,” in Sébastien-Yves Laurent, ed, Le secret de l’État : surveiller, protéger, informer XVIIe-XXe siècle (Paris: Nouveau Monde éditions, 2015) 11 at 11.
discursive aspect of the covert imaginary used to justify the non-disclosure of state secrets? Why is this discourse preeminent? Without knowing how state secrecy claims to oppose disclosure are justified through discourse, a discourse of resistance cannot be properly articulated and deployed, and the current construct of state secrecy changed. Lint and Pozen, the latter with his consequentialist arguments, have started the analysis, but it remains limited to a number of paragraphs. The time is ripe to move the literature forward in a way that will contribute and complement its development at a time of abundant state secrets.
Chapter 3: State secrecy: a meta-historical overview

3.1 Introduction

Given that the concept of the state only made its appearance in the seventeenth century,¹ I use it in this chapter, as Colin Hay and Michael Lister do, “retrospectively to refer to mechanisms and processes of political governance arising in Mesopotamia as early as 3000 BC.”² In the absence to this day of any global and comprehensive history of state secrecy, I do not presume anything as to its origins and beginnings, except that, as Hannah Arendt aptly notes, state secrecy has “been with us since the beginning of recorded history.”³ State and secrecy are indeed intimately linked because no governance is possible without information, including secret information. As Bourdieu noted on this linkage, all forms of political organization that developed in the course of history (a point also made by Carl Friedrich⁴) have been “accompanied by an effort on the part of the public powers to measure, count, assess, investigate. The birth of the state is inseparable

¹ As Skinner observed: “[…] in the opening decades of the seventeenth century, we first begin to encounter widespread references to states, statecraft and the power of states. During this seminal period, the term state was generally used to describe the community or body politic over which rulers hold sway.” In the seventeenth century, he continues, “[t]he term state began to be used with increasing confidence to refer to the union or civil association of those living subject to the authority of a recognised monarch or ruling group.” Quentin Skinner, From Humanism to Hobbes: Studies in Rhetoric and Politics (Cambridge, UK: Cambridge University Press, 2018) at 341, 343.
from an immense accumulation of informational capital,” which only intensified with the “rise and consolidation of the modern territorial-sovereign state.” To that point, the term “secret of the state” first surfaced in Tacitus’s *Annals*, in which it was meant to convey a desire to withhold knowledge and refuse to communicate in order to stabilize and preserve power.⁷

Alain Dewerpe argues that although states in each historical period might have dealt with secrecy—what was kept secret, where secrets were kept, and how secrets were protected, exchanged and disclosed—in their own peculiar and singular forms, there is something about secrecy that appears invariable, unaffected by history: state officials have gathered and protected secrets from others throughout history, as far back as antiquity.⁸ While slow, changes in state secrecy practices (for example, the manner by which the gathering and protection of state secrets were systematized, instituted, technologized, and routinized through various mechanisms⁹) through time are perceptible; they can be linked to the historical social adaptations that ensured their

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reproduction or metamorphosis,”10 “conditioned by time, place, and distinct attributes of different political systems.”11 These practices, as in other spheres of social activities involving secrecy (such as religion, medicine, law, or science), structured power relations between people, here between the sovereigns and their subjects: by intentionally concealing information, sovereigns could operate “negatively and often invisibly to exclude, oppress, and control some knowledges, some peoples, and some discourses over others.”12

This chapter proceeds chronologically, beginning with the earliest forms of historical writings13 and ending with the age of transparency, to capture distinctive communicative practices of state secrecy.14 While the presumption in favour of secrecy has proven enduring in matters of state—particularly as they relate to military operations and foreign relations—over time, state secrets came to be dissociated from the exclusive and mystical purview of power wielders. Sacred and entrusted to an elite capable of understanding and protecting them (not to the profane or the commonplace) in ancient, medieval and early

10 “Any body of knowledge or discipline in the human sciences that claims to produce definitions in its own area of expertise, is today faced with the observation that so-called empirical definitions change historically and discontinuously; that they do not reflect transcendent or universal subjects, meanings, structures, realities, or processes.” Penny Powers, “The Philosophical Foundations of Foucaultian Discourse Analysis” (2007) 1:2 Critical Approaches to Discourse Analysis across Disciplines 18 at 25. As Iordanu writes, “[t]his is particularly pertinent for the study of early modern state secrecy, where a secret in isolation, divorced from the social interactions it generates, is inadequate for producing a thorough historical understanding of the process of secrecy.” Ioanna Iordanou, _Venice’s Secret Service: Organizing Intelligence in the Renaissance_ (Oxford: Oxford University Press, 2019) at 81. See also Lucien Bély, _Les secrets de Louis XIV : Mystères d’État et pouvoir absolu_ (Paris: Éditions Tallandier, 2013) at 21.
11 Friedrich, _supra_ note 4 at xiv.
13 On earliest forms of historical writings, see: Daniel R Woolf, _A Concise History of History: Global Historiography from Antiquity to the Present_ (Cambridge, UK: Cambridge University Press, 2019) at 15-44.
14 Skinner highlighted the value of such an effort: “When we trace the genealogy of a concept, we not only uncover the various ways – the often unfamiliar and surprising ways – in which it was used in earlier times. We also equip ourselves with a means of reflecting critically on how the concept is currently understood.” Skinner, _supra_ note 1 at 379.
Modern Europe, state secrets were re-legitimized by the new concept of the reason of state developed by Niccolò Machiavelli and others (who justified state secrecy as a legitimate instrument of statecraft) during the Renaissance. The Enlightenment challenged the traditional justifications for state secrecy, favouring instead greater public transparency in matters of state.\textsuperscript{15} Finding the proper equilibrium between the legitimate needs of a state for secrets and the needs for public and democratic accountability has been particularly challenging in the centuries that followed. Law, in that context, has evolved to play a pivotal and central role in determining that equilibrium.

### 3.2 Secrecy in the public domain up to the Enlightenment

Before the rise of the modern state, prowess in covertly gathering and safeguarding information was necessary to maintain internal security, protect against potential invaders, attack and seize foreign territories, control populations and protect the personal rule of monarchs.\textsuperscript{16} State secrecy, however, was not always distinguishable from religious secrecy, as matters of state and church were intertwined.

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\textsuperscript{15} This was first noted in print by Birchall: “As Enlightenment philosophies proposed new modes of political accountability, concepts of the transparent subject, and the open application of reason, they positioned secrecy (as well as forms of irrationality and esotericism) as the outmoded other. Enlightenment philosophers privileged transparency (of the state, self, other, and world) as an ideal, and in the process, they ascribed negative value to secrets and secrecy.” Birchall, \textit{supra} note 9 at 15.

\textsuperscript{16} Sheldon, \textit{Espionage in the Ancient World}, \textit{supra} note 8 at 8.
3.2.1 The Ancient Near East

Religion indeed was the first social activity to make extensive use of secrecy, with the royal council in ancient Mesopotamia the social model for ancient ideas about divine knowledge being secret.

State secrets concerned primarily the states and rulers’ enemies, military operations, the control of borders and foreign relations. Spies reporting directly to kings and/or royal advisors gathered these secrets. Evidence suggests that city-states with kings and bureaucracies surfaced around 3,000 BCE, but reliable sources on how these entities used secrecy are almost non-existent. Although the historical record is scant, we know that in the second millennium BCE in Near East palaces, the Babylonians and the Assyrians had

17 Derrida and Kierkegaard both observed that God, in his instruction to Abraham before climbing Mount Moriah, emphasized that his revelation must remain between them and kept secret from his wife, family and community. Noted by Martin McQuillan, Deconstruction without Derrida (London, UK: Continuum, 2012) at 69. As Luhmann writes, “The sacred is not to be found in nature, it is constituted as a secret (later it will be said that it cannot be adequately described in words). Secrecy keeps arbitrariness and irresponsibility in dealing with nonempirical knowledge—a variant of the deception risk—within limits. In this fashion, the knowledge to be kept secret is produced. In other words, knowledge must be protected against communication because it is generated in the first place only through this protection. Otherwise, it would soon be discovered that holy bones are only bones (high religions explain that a mystery cannot be profaned by revelation because what the curious have before them is a triviality, not the mystery itself).” Niklas Luhmann, Theory of Society, Volume 1, translated by Rhodes Barrett (Stanford: Stanford University Press, 2012) at 140.

18 Alan Lenzi, Secrecy and the Gods: Secret Knowledge in Ancient Mesopotamia and Biblical Israel (Helsinki: Neo-Assyrian Text Corpus Project, University of Helsinki, 2008). With travel and commerce, religious mysteries were passed on to the Greeks and later to the Romans, who initiated secret religious assemblies to “interpret those mythological fables and religious rites, the true meaning of which it was thought expedient to conceal from the people.” John Delafield, Mysticism and Its Results; Being an Inquiry into the Uses and Abuses of Secrecy (Saint Louis: Edwards & Bushnell, 1857) at 28. Rome’s Senate, for example, consulted the Sibylline books in the Greek city of Cumae, the home of the Sybil, Apollo’s inspired priestess, “as another way of finding out why things were going wrong with the state.” The contents of these books were classified, that is, they were “kept in a stone chest beneath the temple of Jupiter Optimus Maximus, guarded in strictest secrecy by a special college of two priests.” Sheldon, Intelligence Activities in Ancient Rome, supra note 8 at 17. Unsurprisingly, with the passage of time, priests eventually had to share their hold on mysteries with kings and leaders. Delafield, supra at 40.


bureaucracies and secretive organizations that handled sensitive information. To protect this information from unauthorized access and prevent the tempering of documents, they developed a wide range of artifacts (seals, envelopes, coffers, locked rooms) that are still in use today.\textsuperscript{21} The Persians later emulated and further refined these secrecy mechanisms.\textsuperscript{22} They were especially renowned for their ability to protect the secrets of their kings from the prying eyes of Persia’s enemies.\textsuperscript{23}

We also know that the Neo-Assyrians in the Sargonid dynasty (721-612) understood the necessity of protecting the identity of their spies to ensure both their safety and effectiveness. As Guo explains,

Securing agents within the enemy’s ranks was an effective measure for the Assyrians to gather intelligence. However, if the agent’s identity was exposed or compromised, the channel to collect intelligence would be severed. Therefore, the Assyrians tried to protect the agent’s identity being divulged. The fragmentary letter, SAA I, 13: r.1-14, illustrates that the Assyrians protected the agent’s identity from being exposed by contacting him secretly.\textsuperscript{24}

At the end of the Ancient Near East period, the Greeks believed Cyrus the Great, King of Achaemenid (or First Persian) Empire, to be able to act with as much secrecy as

\textsuperscript{21} Pascal Butterlin, “Hommes de langue, hommes du secret : la question du renseignement en Mésopotamie et ses chausse-trappes” in Denécé & Brun, supra note 19 56 at 59-60.
\textsuperscript{22} Sheldon, Intelligence Activities in Ancient Rome, supra note 8 at 3.
\textsuperscript{23} Russell, supra note 8 at 55, footnote 208. Another example: Between 745 and 612 BCE, the Assyrian Empire, surrounded by enemies, was highly dependent for its survival on its knowledge of their intent and capabilities. Hence, it developed an extensive intelligence network to collect that information, the success of which largely depended on secrecy to protect the lives and activities of its agents hiding on enemy lands. Samuel E Finer, The History of Government From the Earliest Times. Volume I: Ancient Monarchies and Empires (Oxford: Oxford University Press, 1997) at 226-227.
he desired, and to be using a “King’s Eye” to learn from a wide-ranging network of spies of any threat to his person or throne.\(^{25}\) In Babylonia and Assyria in the second and first millennia BCE, kings centrally governed their empires and took most decisions secretly on their own without any visible input from advisers.\(^{26}\)

### 3.2.2 Greek history (fourth to the second centuries BCE)

The ancient Greek world between 500 and 300 BCE, where and when direct democracy was first witnessed,\(^{27}\) was comprised of about 1,000 self-differentiated political entities.\(^{28}\) Athens was the archetypical democracy, but “also an outlier, far removed from any Greek norm, and not to be confused with such.”\(^{29}\) In the city-state of Sparta, which fought against Athens during the Peloponnesian War (431-404 BCE), Thucydides reminds us, secrecy was a significant part “of the very fabric of the Spartans’ society and politics.”\(^{30}\) Sparta regularly banished “resident aliens from within its walls”\(^{31}\)

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\(^{25}\) Lloyd Llewellyn-Jones, *King and Court in Ancient Persia 559 to 331 BCE* (Edinburgh: Edinburgh University Press, 2013) at 47.


\(^{27}\) “Democracy, which means literally ‘the rule of the people’, is commonly supposed to have originated at Athens with the reforms of Cleisthenes in 508/7. The process of democratization was carried forward by Pericles and Ephialtes, so that Athenian democracy reached its most developed form in the latter part of the fifth century.” Richard F Stalley, “Introduction” in Aristotle, *Politics*, translated by Ernest Barker (Oxford: Oxford University Press, 1995) vii at xx.


\(^{29}\) *Ibid* at 146.


to protect its secrets from escaping abroad, leaving behind no literary record, and encrypted its military messages, something which “no other Greek state of the period is recorded as routinely” doing. In Athens, by contrast, transparency was a major feature of the political process whereby the political space, and any document produced by the polity, was available to any citizen. Citizens had equal right to speak in the assembly and to say anything they wanted. In Greek democratic city-states from 403 to 322 BCE, it was the council that was charged with the implementation of decisions taken by the assembly of citizens. Council meetings could be held confidentially in enclosed areas so as to exclude non-council members when matters of state secrets or negotiations with other states were discussed. In these circumstances, members of the council were asked for an oath of secrecy.

32 “Sparta was, after all, renowned for her secrecy, and it would naturally be a priority to prevent the diffusion of information that was damaging to Spartan interests.” Michael Whitby, “Two Shadows: Images of Spartans and Helots” in Anton Powell & Stephen Hodkinson, eds, *The Shadow of Sparta* (London, UK: Routledge, 1994) 87 at 108. But, as Hodkinson notes, “secrecy did not extend to all areas of Spartiate life, nor to all foreign enquirers. Nor […] did secrecy regarding the true state of affairs necessarily imply a total withholding of information; inquisitive visitors might be told or allowed to see precisely what it was expedient for them to know.” Stephen Hodkinson, “‘Blind Ploutos’? Contemporary Images of the Role of Wealth in Classical Sparta” in Powell & Hodkinson, supra 183 at 211.


38 Mogens Herman Hansen, *Athenian Democracy in the Age of Demosthenes* (Oxford: Blackwell, 1991) at 265. Although there is evidence of these practices, they may not have been generally applied. Russell, supra note 8 at 196.
Dissimulation and secrecy could also be observed in other aspects of Greek life at this time. Plato’s texts, for example, concealed knowledge through his use of a “Socratic persona as a mask for his authorship,” which was “accompanied by a stress on secrecy and mystery in many of the dialogues.”  

In the fifth and fourth centuries BCE, Greeks also practiced the covert collection of information. Information obtained from scouts, patrols, deserters and captives was of military value and had to be used within a short period of time to retain any value. Information obtained from envoys, oracles, spies and others was of general strategic value or about future events and had a longer shelf life. Keeping this information secret was considered important if military surprise were to be achieved, just as it was to keep one’s own secrets from the prying eyes of foreigners and internal enemies and conspirators.

3.2.3 Roman historical writing—Republic (509-27 BCE) to Empire (27-476 CE)

After the Greek city-states fell under Roman rule, it was primarily Roman law, customs and political concepts which predominated in Europe until the eighteenth century. As a republic, Rome conducted most of its affairs openly, just as it made

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40 They may have done it before that time but information is “sparse and shrouded in myth.” Russell, supra note 8 at 2. Russell notes as well that: “A prevalent fallacy in the academic and professional worlds holds that the Greeks had little inclination to preserve or penetrate secrecy, since they were democratic […]]. First, many Greek states during the classical period were not democracies but were climates entirely conducive to espionage. Second, even the democracies perceived the need for information beyond the immediate demands of battle.” Ibid at 5, footnote 6.

41 Ibid at 4-5.

42 Ibid at 225. Secrecy also played a role in communications and negotiations between protagonists and in diplomatic matters. Ibid at 150-161. On secret diplomacy, see, inter alia, Sir Frank Adcock & DJ Mosley, Diplomacy in Ancient Greece (New York: St. Martin’s Press, 1975) at 169.

43 Cartledge, Democracy, supra note 28 at 248.
policies, and planned and prosecuted wars. But the Roman Empire that followed established a variety of authoritarian arrangements over the years, “the fundamental aspect of which was the discretionary and secret character of decision-making.” Under Emperor Constantine (who reigned from 306 to 337), secrets were also accumulated in increasingly large numbers by spies, diplomats and traders. Largely, these covert activities aimed at uncovering whether subordinates were plotting against the emperor, but also included information about enemies’ plans and weaknesses in the context of Rome’s frontier policy and quest for supremacy, and any other information deemed of interest.

Several Roman writers (e.g., Flavius Josephus, Sextus Iulius Frontinus…) produced manuals on stratagems to help generals achieve success on the battlefield. Among these stratagems, deception to attain surprise was central to what generals did,

44 Sheldon, Intelligence Activities in Ancient Rome, supra note 8 at 37.
46 As Sheldon noted, “Citizens were harassed, intensely scrutinized, and executed in the name of state security; to make matters worse, what constituted state security changed with the mental disposition of each emperor.” Sheldon, Intelligence Activities in Ancient Rome, supra note 8 at 7.
50 Byzantine Emperor Maurice did too, c 600 CE, years after the end of the Roman Empire. Maurice, Strategikon: Handbook of Byzantine Military Strategy, translated by GT Dennis (Philadelphia: University of Pennsylvania Press, 1984)]. As Kaegi notes, Maurice “warns against open battles and advises in favor of cunning, guile, caution, and suspicion in war. Defeat and disruption, not slaughter, of the enemy is the objective to achieve by means of secrecy, flexibility, and a readiness to use diverse techniques for fighting different types of opponents.” Walter E Kaegi, Byzantium and the Early Islamic Conquests (Cambridge, UK: Cambridge University Press, 1992) at 58.
but ultimately success depended on solid secrecy.\(^{51}\) Alcibiades, who led soldiers in the Sicilian Expedition (415 BCE), the battle of Abydos (410 BCE), the battle of Cyzicus (410 BCE) and the siege of Byzantium (408 BC), used deception profusely to win over his adversaries by surprise.\(^ {52}\) As secrecy was important, ancient narratives contain many examples of traitors and spies being caught and of secret instructions being given to agents.\(^ {53}\) Vegetius stressed the essentiality of secrecy in military strategy (“Those designs are best of which the enemy are entirely ignorant until the moment of execution. Opportunity in war is more to be depended upon than courage”), as did Pithy, who cited the examples of military commanders Metellus Pius (c. 128-63 BCE) (“If my tunic could tell, I would burn it”) and Crassus (115-53 BCE) (“Are you afraid you'll not hear the trumpet?”), who refused to tell their soldiers of upcoming operations.\(^ {54}\)

Throughout the *Annals* and *Histories*, Tacitus makes many references to secret activities, artifacts and agents (e.g., secret correspondence, plans, discussions, gifts, instructions, meetings, dispatches, emissaries, messengers, places, custody, agreements, ...

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\(^ {51}\) This has been a constant throughout the course of history. “In war, nothing is more important than secrecy. Leadership is an exception to this rule: to be effective, it must operate in the sunlight. […] Secrecy, bluff, feints, and deception are used to obtain surprise. Of all the means that lead to victory, surprise is the most important.” Martin Van Creveld, *More on War* (Oxford: Oxford University Press, 2017) at 72, 93.

\(^ {52}\) “In Alc. 10-15, Alcibiades appears to be a very talented politician (13.1), who is able to assess the situation correctly and always comes up with a solution when he finds himself in trouble (13.7; 14.3; 14.6-12). Time and again, he does not fight openly but has recourse to secret negotiations or pure deception; in fact, he does not even hesitate to break an oath (14.10). As a result of these tactics, his opponents are repeatedly taken by surprise (13.8: Hyperbolus; 14.6 and 14.12: Nicias).” Simon Verdegem, *Plutarch’s Life of Alcibiades: Story, Text and Moralism* (Leuven: Leuven University Press, 2010) at 209.


\(^ {54}\) Cited by Sheldon, *Intelligence Activities in Ancient Rome*, supra note 8 at 128. See also Christopher Allmand, *The De Re Militari of Vegetius: The Reception, Transmission and Legacy of a Roman Text in the Middle Ages* (Cambridge, UK: Cambridge University Press, 2011) at 35.
and military activities involving all manner of state political and military officials). Livy, Marcellinus, Procopius and Appian, in their respective history of Rome, recorded similar things. In *The Histories*, Tacitus, who was eminently opposed to censorship, further elaborated on the importance of secrecy to the Roman leadership by quoting Roman Emperor Otho who in 69 CE justified the need for secrecy to a disgruntled group of soldiers as follows:

> We are now starting for a campaign. Does the nature of things, does the rapid flight of opportunities, admit of all intelligence being publicly announced, of every plan being discussed in the presence of all? It is as needful that the soldiers should be ignorant of some things as that they should know others. The general’s authority, the stern laws of discipline, require that in many matters even the centurions and tribunes shall only receive orders. If, whenever orders


are given, individuals may ask questions, obedience ceases, and all command is at an end.\textsuperscript{58}

Policymaking from the beginning of the Roman Empire was as secretive as military operations and in sharp contrast with the Republic, when everything was reported to the Senate and the people. As Dio writes, all major imperial decisions were taken in private and how they were arrived at kept secret beyond a narrow circle of advisers.\textsuperscript{59} There were also no Roman bureaucracies before Claudius (who ruled from 41 to 54) to keep public records of decisions, or to simply manage the protection and authorized disclosure of state secrets.\textsuperscript{60}

While state secrecy was a constant feature in foreign and military matters in ancient history, practices that reduced the need for secrecy and promoted transparency in matters of state (politics) existed as well, although they appear to have been much more limited and circumscribed in place and time (e.g., the democratic Greek city states and Republican Rome). The practice that has been most studied was called \textit{parrhesia}.\textsuperscript{61} It involved telling the truth about oneself and the polis before others (whether a single interlocutor, the assembly or the king) and was akin to a “mission, a burden, an inescapable commitment to speaking the truth for the good of the polis.”\textsuperscript{62} In contrast to

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\textsuperscript{58} Caius Cornelius Tacitus, \textit{The Histories, Book I} (Chicago: Encyclopedia Britannica, 1952), para 83 at 211.
\textsuperscript{61} It means “speaking truthfully, freely and being up-front in the sense of being open, transparent, engaging and saying everything there is to say about a particular issue in contrast to holding something back, being secretive, covert and manipulative.” Torben Bech Dyrberg, \textit{Foucault on the Politics of Parrhesia} (New York: Palgrave Macmillan, 2014) at 2.
\textsuperscript{62} Louisa Shea, \textit{The Cynic Enlightenment: Diogenes in the Salon} (Baltimore: The Johns Hopkins University Press, 2010) at 179. In its political form, \textit{parrhesia} occurred in the democratic assembly and
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**parrhesia**, during the Roman Empire the art of dissimulation (pretense, compromise, defence mechanism), principally by dissidents of the regime, but also members of the Roman Senate, was observed either to avoid punishment or secure advancement.\(^6^3\) It remains, however, that the predominant feature of state secrecy in democratic Athens and republican Rome largely excluded secrecy in the assembly: affairs of state and dangers were discussed rather fully and openly by the community of citizens. The use of secrecy in matters of public affairs was perceived as “antidemocratic and inherently delegitimizing”\(^6^4\) because it would affect the equality of participation in deliberations.

### 3.2.4 The Middle Ages (fifth to the fifteenth centuries)

In the Middle Ages, the Church influenced and guided governments (which were morally subordinated to the Church) under doctrines formulated by Augustine of Hippo (354-430) and St Thomas of Aquinas (1225-1274), which placed the king as a minister of God on earth.\(^6^5\) The forms and contents of state secrets did not appreciably change during that period, but as the means of warfare evolved, the necessity to protect their fabrication and vulnerabilities from adversaries took on added importance in the world of secrets between the king and his counselor. In the former, it included what we would today refer to as diplomatic communication, whereby Ancient Greek envoys would report and argue in public. Christer Jönsson & Martin Hall, *Essence of Diplomacy* (Houndmills: Palgrave Macmillan, 2005) at 89. In the latter case, the counselor risked death because there was always a danger that the king, exercising personal power, could not accept the truth. Michel Foucault, *The Courage of Truth: The Government of Self and Others. Lectures at the Collège de France 1983-1984*, ed by Frédéric Gros, translated by Graham Burchell (New York: Palgrave Macmillan, 2012) at 57-58.

\(^6^3\) Emperors such as Tiberius, Claudius and Nero also exhibited signs of dissimulation to conceal their maladjustment and political frustration. Vasily Rudich, *Political Dissidence Under Nero: The Price of Dissimulation* (London, UK: Routledge, 1993) at xxvii-xviii.


surrounding rulers. In contrast to ancient Greece and the Roman Republic, but in continuity with the Roman Empire, monarchical states conducted politics in secrecy, “while making conspicuous displays of their status and authority in the public space.”

Spies gathered secrets for monarchs, who were anxious to know the intent of their potential enemies. Like God, the ultimate authority before the modern era, monarchs felt entitled to protect these secrets from disclosure, and expected their subjects to have no secrets from their kings.

During the Middle Byzantine period (c843 to the fourth crusade in 1204), Byzantium was a renowned bureaucratic state. It used spies, diplomats and an array of other sources to gather information on foreign people and keep the emperor abreast of any hostile threats. However, there is little trace of any of the state secrets the Byzantine court had access to. As Anthony Kaldellis explains,

Much of this material was kept in written form. Yet surprisingly little of it turns up in Byzantine texts; almost none of it, in fact, appears in the Byzantine historians, which is where one might most expect to find it. This information was filed in archives and was presumably available to men with access.

Byzantium was, after all, a bureaucratic state. Wherever this material was kept,

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66 For example, Byzantium designed a napalm-like substance that burned in water and that was used twice (678 and 717) to repel Arab invasions. To keep its composition and usage instructions secret, the “Byzantines compartmentalized knowledge of their system so that no one likely to fall into enemy hands would carry more than a fraction of the secret.” With the passage of time and the passing away of those who knew, chaotic succession and weak bureaucracies the secret eventually vanished. Alex Roland, “Secrecy, Technology, and War: Greek Fire and the Defense of Byzantium, 678-1204” (1992) 33:4 Technology & Culture 655 at 664, 677.


like most of the paperwork of the now-lost Byzantine archives it has left a small imprint on the surviving literary sources. Of course, using those archives might not have been easy to begin with, given that the material would not have been stored in a user-friendly way, to put it mildly, and not with the convenience of historians in mind. [...] It is unlikely, however, that only emperors and high-ranking officials had access to these archives, even though it is only in their works that we encounter it. Still, archival traces in the corpus of Byzantine historiography are slight. 69

Throughout the Middle Ages, secrecy remained important for waging wars. Surprise attacks and raids crucially depended on it. 70 Jean de Bueil, who wrote a fictionalized account of his Hundred Years War experiences in Le Jouvencel (circa 1466), was particularly astute in this regard:

When leading a raiding party, the Jouvencel makes sure that the men travel under the cover of night, use only rarely frequented roads or trails, avoid soft ground where hoof tracks could be left, replace hedges trampled under horses and close open gates, and even use a tree branch to sweep the ground and eliminate tracks. Moreover, these efforts to keep raiding activities secret are also reflected in the marching order adopted by raiding parties. They include an almost disproportionate percentage of men in both the vanguard and the

rearguard, since they aimed to ensure the secrecy of the operation as a whole rather than the safety of the men in the main force.\textsuperscript{71}

3.2.5 The Renaissance (fifteenth and sixteenth centuries)

Daniel Jütte calls the Renaissance and Enlightenment periods a veritable age of secrecy.\textsuperscript{72} During the Renaissance, secrecy permeated every domain of life in early modern Europe, priests keeping any discussions of religious mysteries (\textit{arcana Dei}) to themselves, scientists doing the same with their discoveries of nature’s secrets (\textit{arcana Naturae}),\textsuperscript{73} and explorers with their geographical discoveries.\textsuperscript{74} As Jütte argues, people in all walks of life during that the Renaissance were of the view that true and important knowledge was secret by definition. By the same token, he adds, “few of them believed that divulging secrets was per se a good thing […]”.\textsuperscript{75} Monarchs and statesmen, by

\textsuperscript{74} Sean Roberts, \textit{Printing a Mediterranean World: Florence, Constantinople, and the Renaissance of Geography} (Cambridge, Mass: Harvard University Press, 2013). For instance, “[f]rom the accumulated experiences of discovery and later seaborne trade were built up the roteiros, books of sailing directions, giving courses and distances from place to place, navigational hazards, and descriptions by which navigators could recognize salient features of a coast. The roteiros, later imitated by Dutch and English compilers, were the ancestors of the pilot-books of modern times. They were treated as secret documents by the Portuguese government—at least in so far as they dealt with eastern seas—and probably many have perished.” John H Parry, \textit{The European Renaissance: Selected Documents} (London, UK: Macmillan & Co., 1968) at 322.
\textsuperscript{75} Jütte, \textit{supra} note 72 at viii.
contrast, sought to keep their business secret from their population in the belief that, in matters of court, common people lacked the required intelligence and acumen.\textsuperscript{76}

Constraints placed on the availability of translations of Tacitus’s work from 1515 onward illustrate these points well. These translations worried monarchs and members of their courts, who argued that Tacitus’s texts would confuse common people, endanger their own secrets (because common people would ask questions or want to give advice) and more importantly disturb the social order.\textsuperscript{77} Monarchs saw to it that their secrets would remain secure: Italian city states, Philip II’s Spain, Elizabeth I’s England, Louis XIII’s France and the Ottoman Empire all embarked in bureaucratization efforts to do just that by fleshing out their intelligence apparatus.\textsuperscript{78} Likewise, weekly dispatches sent by ambassadors—the earliest forms of printed news—were meant to be secret, although by the late fifteenth century some of the information they contained leaked out of porous communication networks.\textsuperscript{79}

Monarchs who saw secrecy as essential to their ability to govern were vindicated—if not directly influenced—by political thinkers who morally justified it as a legitimate instrument of statecraft.\textsuperscript{80} Renaissance authors indeed have been among the first to reflect

\textsuperscript{76} Venice is a case in point: “[F]or the Venetian government, and especially for the Council of Ten, secrecy ensured confidentiality and embodied harmony and civic concord. It was primarily for both these ‘functional’ and ‘symbolic’ purposes that secrecy was ‘inherent in Venice’s Republican ideology’, and, in consequence, was glorified as one of the government’s most potent virtues. The government’s obsession with secrecy intensified in the fifteenth century, when a string of regulations—that is, legally binding directives or decrees—was issued to potentiate and, ultimately, institutionalize it.” Iordanou, \textit{supra} note 10 at 60. See also Brendan Dooley, “Introduction” in Brendan Dooley & Sabrina A Baron, eds, \textit{The Politics of Information in Early Modern Europe} (London, UK: Routledge, 2001) 1 at 3.

\textsuperscript{77} Saúl Martínez Bermejo, \textit{Translating Tacitus: The Reception of Tacitus’s Works in the Vernacular Languages of Europe, 16th-17th Centuries} (Pisa: Pisa University Press, 2010) at 56-58.

\textsuperscript{78} Iordanou, \textit{supra} note 10 at 38.


\textsuperscript{80} Jütte, \textit{supra} note 72 at 19, Iordanou, \textit{supra} note 10 at 58, and Birchall, \textit{supra} note 9 at 17.
on the role and place of secrecy in matters of state. Francesco Guicciardini (1483–1540), Florentine historian, ambassador to Spain and long-serving papal administrator, accorded secrecy importance in diplomacy and in the personal rule of the monarch. Of the former, however, he conceded that no useful information would be obtained from foreign diplomats if none were imparted in the first place. Of the latter, he wrote that, “[i]t is incredible how useful secrecy is to a ruler. Not only can his plans be blocked or upset if they are known, but what is more, ignorance of them keeps men awed and eager to observe his every move […].”

Giovanni Botero (1544-1617) of Piedmont, a philosophy teacher and vicar, authored the *Ragion di Stato* (Reason of State) in 1589. He agreed with Guicciardini that secrecy was an essential ingredient of successful diplomatic negotiations and that the designs of monarch are most effective when unknown to others. Secretive princes, he thought, were akin to God. Should these designs be known, he argued, enemies of the monarch would be given a chance to obstruct or counter them. He gave as an example the good statesmanship of the Grand Duke Cosimo de Medici, who believed that secrecy was of capital importance to governing and that state secrets should not be communicated to anyone. He also referred to Vegetius and Metellus and exchanges between Peter of

82 Quoted by Berridge, ibid at 47.
85 Botero, *The Reason of State*, supra note 83 at 47.
86 Ibid at 48.
Aragon to Pope Martin IV to emphasize that rulers of experience and good judgment can make their own decisions and keep their own counsel.\textsuperscript{87} He thought that dissimulation, as in ancient times, was a useful means to hide one’s secrets, noting that Louis XI (1461-1483), who excelled at it, thought of dissimulation as an important part of the art of ruling, and that Tiberius was proud of his dissimulation skills. By dissimulation, Botero meant “feigning to be ignorant of what you know, and to be uninterested in what affects you closely, as [by contrast] simulation is pretending and doing one thing in place of another.”\textsuperscript{88}

Niccolò Machiavelli, a contemporary of Guicciardini in Florentine and Chancellor of the Republic from 1498 to 1512, was also a historian and political writer, but one whose popular reputation and historical importance eclipsed both Guicciardini’s and Botero’s. On matters of state secrets, which he discussed at some length in both The Prince and the Discourses on Livy,\textsuperscript{89} Machiavelli advised the prince to value secrecy in order to gain surprise and acquire from others, and to ascertain the secret intentions of other rulers to protect his realm.\textsuperscript{90} For Machiavelli, such intrigues were a matter of necessity, as the prince is in constant competition with other princes. Machiavelli’s impact was significant, as his prescriptions shaped the future production of political discourses and texts. Many of these text were themselves “secret or private works,” which, following

\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
\textsuperscript{90} Harvey C Mansfield, Machiavelli’s Virtue (Chicago: The University of Chicago Press, 1996) at 298. Perhaps, morally unobjectionable to some, actuals rulers, such as Frederick the Great, found Machiavelli’s ideas to match theirs. Friedrich Meinecke, Machiavellism: The Doctrine of Raison d’Etat and Its Place in Modern History, translated by Douglas Scott (New Haven: Yale University Press, 1962) at 298.
Machiavelli, counselled “rulers to dissimulate their intentions and conceal the modes by which they exercise their power,” while their authors often concealed “their own relation to their work, their intentions, and their sources.” Machiavelli was also concerned by dissimulation because of the harms and dangers it could bring to ordinary people and the ruling elites unable to discern between what is good and what is bad. Yet, as he wrote to Guicciardini, Machiavelli himself used dissimulation to avoid offending the Florentine authorities suspicious of his work.

Dissimulation practices flourished and extended to all aspects of social life during the Renaissance. Florentine ambassadors, for example, were “expected to determine whether their counterparts were speaking in earnest, or were using buone parole, parole fitte, and simulatione to cover secret designs.” In parrhesia, the true discourse produced an unspecified risk to oneself, but a risk nonetheless. The elimination of that risk was an intended consequence of the discourse on the art of dissimulation that manifested itself in the early modern Europe of the sixteenth and seventeenth centuries. The emergence of a distinct discourse on dissimulation which affected the practices of self-management and self-control.

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93 “I have not said what I believed, nor do I ever believe what I say, and if indeed I do happen to tell the truth, I hide it among so many lies that it is hard to find.” Quoted by Benner, *ibid* at 70.
97 Jon R Snyder, *Dissimulation and the Culture of Secrecy in Early Modern Europe* (Berkeley: University of California Press, 2009). As Remo Bodei notes, it was “a form of rational and creative resistance to the oppression of a power that was beginning to infiltrate directly into the consciousness […]” Remo Bodei, “From Secrecy to Transparency: Reason of State and Democracy” (2011) 37:8 Philosophy and Social Criticism 889 at 892.
self-representation among the dominant social groups of the Old Regime took place in a period that was marked by the establishment of the modern (then absolutist) state, major social, political, economic and religious changes (e.g., there were six major revolutions in Europe between 1640 and 1650), and, across the board, increased social complexity.98 This discourse on dissimulation, on not “saying something that is or was” and predicated on self-interest, formed a particular culture of secrecy distinguishable from ancient history and the historical period that followed, which was characterized by the Romantic revolution and its rhetoric on sincerity, consensus, contract and transparency.99

The larger discourse on the reason of state100 recognized the need for the prince to exercise prudent control over information—primarily in conversations—in the interest of state security and dynastic stability; after all, the prince’s words and gestures were watched by spies, traitors and enemies of the state, all hoping to discover secrets that would give them an advantage.101 This meant at the very least publicly displaying,

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98 As state and societies grew in complexity, more time was spent in gathering information. This raised a number of interesting questions among commentators at that time. As Snyder remarks, “[i]n this context of ever-increasing circulation, contamination, transformation, and appropriation, how could information best be managed securely and secrets kept by individuals or by governments? Was the truth always to be told? Who was to have the right to keep something hidden, and under what conditions? And how could the practice of secrecy itself be kept secret from others?” Snyder, supra note 97 at 4.

99 As Snyder correctly notes: “Dissimulation has not vanished from our world, but it no longer constitutes an art with its own recognized set of rules: its value is merely operational. Today the media-saturated society of the West, built around the principle of publicity, cannot tolerate even the slightest suspicion of dissimulation in those persons who are chosen to be put (profitably) on display.” Ibid at xx. According to Snyder, the discourse on dissimulation offered a series of techniques—the disciplined use of reticence, taciturnity, diffidence, negligence, omission, ambiguity, irony and tolerance—through which individuals exercised self-censorship in order to avoid disclosing anything about themselves (their real feelings, what they knew) by way of words, gestures or gaze, while simultaneously not lying to others. Ibid at 6-7. This was arduous, especially as dissimulation could not be suspected by others and because of the constant self-examination necessary for self-knowledge, “without which dissimulation was destined to fail.” Ibid at 21.

100 “The first to use the expression ‘reason of state’ in order to demonstrate the impossibility of governing by conscience and by following evangelical principles is Francesco Guicciardini in his dialogue Del reggimento di Firenze [On the Florentine government], composed between 1521 and 1523.” Bodei, supra note 97 at 890.

101 Snyder, supra note 97 at 23-24.
through self-control of passions, body and language, a lack of knowledge or interest in princely matters. But it was not only the prince who was vulnerable. The prince was also empowered to pry secrets—through “interrogations in the guise of conversations, offers of false friendship in order to gain the confidence of the dissimulator, spies to expose the truths of one’s intimate secrets”\(^\text{102}\)—from his subjects to avoid seeing his personal power endangered. The political prudence and dissimulation associated with the reason of state, epitomized by Machiavelli, contrasted with the ancient use of dissimulation, which had to be balanced with *parrhesia*. This was evident, of course, in the area of diplomacy, which saw secrecy in communication becoming the rule.\(^\text{103}\) For Snyder, the key difference between antiquity and early modern Europe was that dissimulation was no longer an invisible and tacit practice but, rather, a practice put into discourse and subject to scrutiny.\(^\text{104}\)

During the period of absolute monarchy in the seventeenth century, secrecy extended to all aspects of monarchical exercise of power, and was particularly entrenched in English constitutionalism.\(^\text{105}\) As Thomas Wilson, a Cambridge scholar, explained in 1600 in his *State of England*, state secrecy was a way to keep power in the hands of a governing elite by keeping the masses ignorant:

\(^{102}\) Noted by Guicciardini, cited in Snyder, *supra* note 97 at 119.

\(^{103}\) Jönsson & Hall, *supra* note 62 at 89.

\(^{104}\) Snyder writes: “In early modernity it was no longer an invisible and tacit practice of powerful political figures and heads of state that might pass unobserved by their rivals or subjects. Rather, dissimulation was open to revision, negotiation, and contestation within the field of reason-of-state doctrine, and thus became part of the public arena.” Snyder, *supra* note 97 at 107.

\(^{105}\) King of England William III (1689-1702) governed by keeping “secrets from the Earl of Portland, his Dutch favorite for a quarter of a century, just as he did from everyone else. Secrecy and a very limited and specific delegation of authority were William’s way of preventing ‘any single one of his servants from achieving too powerful a position.’ Of course, William tried to control all aspects of English government in these ways, not just foreign affairs.” William James Roosen, *The Age of Louis XIV: The Rise of Modern Diplomacy* (London, UK: Routledge, 2017) at 41.
[The governing elite] suffer very few to be acquainted with matters of state for fear of divulging it, whereby their practices are subject to be revealed, and therefore they will suffer few to rise to places of reputation that are skillful or studious of matters of policy, but hold them low and far off so that the greatest politicians that rule most will not have about them other than base pen clerks, that can do nothing but write as they are bidden, or some mechanical dunce that cannot conceive his Master’s drifts and policies.\(^{106}\)

France under Louis XIV (1643-1715) was the most famous of the absolutist states in matters of state secrecy, as the latter pervaded all matters of state and religious activities as well as the private life of the king.\(^ {107}\) For instance, Louis’s ministers and counsellors were held to secrecy (comes consiliorum),\(^ {108}\) akin to the system of cabinet confidences we have today in British parliamentary systems. It was Charles I of England (1625-1649), however, who inaugurated the notion that a crown privilege could be claimed to protect state secrets from public disclosure.\(^ {109}\)

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\(^{107}\) Lucien Bély, “Le secret et le public à la cour de France : un système de gouvernement” in Francine-Dominique Liechtenhan, ed, *Histoire, écologie et anthropologie : trois générations face à l’œuvre d’Emmanuel Le Roy Ladurie* (Paris: Presses de l’université Paris-Sorbonne, 2011) 241 at 243. Like other absolutist monarchs of his time, Louis XIV made his decisions in secret and had no obligation to tell or explain himself to the population at large. The decisions of absolute monarchs (and of other rulers before them) were only made public at their leisure.


\(^{109}\) With the exception of its use in habeas corpus cases denied by the Petition of Right of 1628, the use of the privilege with respect to security-related matters has held largely uncontested by British parliament or the courts since. Sudha Setty, “Litigating Secrets: Comparative Perspectives on the State Secrets Privilege” (2009) 75 Brook L Rev 201 at 227.
Up to the end of the Renaissance in the sixteenth century, the conduct of international affairs, or diplomacy, had tended to be ritualistic and public. The advent of the absolutist age made secrecy a continuing and, arguably, necessary feature of the conduct of international affairs. Diplomacy during the absolutist age essentially became the private domain of the reigning monarchs, who saw themselves accountable only to God. Used in this manner, what is now referred to as “old diplomacy” came to be characterized by its incidental, bilateral, secretive and hierarchical nature.\textsuperscript{110} The significance of secrecy in diplomatic negotiations during the period of the absolutist state can be explained as twofold. It respected, firstly, the political status of the monarch, “protected by the emerging raison d’État, and for whom foreign policy constituted a res privata,”\textsuperscript{111} and, secondly, the fact that all information pertaining to the negotiations was the private property of the monarch: he was the sole recipient and only he or she could authorize its use by others.\textsuperscript{112}

Monarchs and their ambassadors communicated through letters and dispatches. By the mid-sixteenth century, the protection of these secretive communications became an urgent matter as states sought to intercept, decipher and read one another’s documents. So-called “cabinet noir” were created and dedicated to breaking the codes and cyphers


\textsuperscript{111} Aurélien Colson, “The Ambassador Between Light and Shade: The Emergence of Secrecy as the Norm for International Negotiation” (2008) 13 International Negotiation 179 at 185.

\textsuperscript{112} \textit{Ibid.}
used to mask the contents of diplomatic correspondence (for example, the Secret Office as of 1653 in England). These efforts have continued uninterrupted to this day.

Public and secretive administrative practices, Jacob Soll contends in his work on Jean-Baptiste Colbert (1619-1683), were as important as the discourses on dissimulation, prudence and the reason of state to understand early modern political and ethical culture. The advent of the modern, secular and rational administrative state, however, cannot be attributed to the significance of Colbert’s effort alone, notwithstanding the influence and power he wielded and his successes at gathering information. Colbert, as Louis XIV’s *prima inter pares* minister, in particular built upon the traditions of the Church and merchants, the archival practices of the Republic of Venice and the knowledge and expertise of scholars in his quest for centralized information—a central secret state archive—the purpose of which would be to support and further the king’s royal prerogatives and power. His contribution to state governmental culture, Soll asserts, was to show Louis XIV “how he could dominate and use the world of learning not only as a source of public propaganda, but also as a tool of

113 *Ibid* at 190. In 1742, the Secret Committee of the British House of Commons revealed that the Post Office had at least since 1718 operated a secret department, founded by the Crown, to intercept, open, decipher, translate and resell foreign correspondence. The work was carried out secretly on guarded premises. Paul S Fritz, “The Anti-Jacobite Intelligence System of the English Ministers, 1715-1745” (1973) XVI:2 The Historical Journal 265 at 267-268. For a detailed history, see The House of Commons, *Report from the Secret Committee on the Post-Office; Together With the Appendix* (London, UK: 5 August 1844).


116 As Soll notes, “With the resources of a nation-state at his disposal, Colbert the bibliophile administrator, accountant, and founder of academies amassed enormous libraries and state, diplomatic, industrial, colonial, and naval archives; hired researchers and archival teams; founded scientific academies and journals; ran a publishing house; and managed an international network of scholars.” Soll, *The Information Master*, supra note 114 at 7.

117 *Ibid* at 3.
secret government.”118 Colbert’s “new technical type of government expertise,”119 however, was not institutionalized or bureaucratized; it “died with him,”120 at least in France. Upon Colbert’s death, Louis undid Colbert’s centralized state and archives and placed himself at the centre of the state. Divide and rule and secrecy were the principles by which he governed through the remainder of his reign.121 Elsewhere in Europe in the eighteenth century, however, Colbert’s vision of learned administration was emulated by states such as Prussia, Spain, Austria, Tuscany, Portugal and Russia: the idea that large states need centralized information to govern effectively had taken roots.122

3.2.6 The Enlightenment (seventeenth and eighteenth centuries)

The discourse of dissimulation under absolutism did not survive beyond it. As Matthew Potolsky correctly observes, “the combined effects of secularization, the scientific revolution, new information technologies, and […] [new] democratic political theories dramatically undermined the medieval and early modern order of secrecy.”123 Philosophers of the Enlightenment and Romanticism displaced it as a central moral and political concern of dominant social groups,124 “all agreed that prudence was a ‘sotte

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118 Ibid at 7.
119 Ibid at 52.
121 Soll, The Information Master, supra note 114 at 154. As Soll notes: “Although after Colbert’s death, Louis XIV’s ministers were collecting more information than before, the motive behind the collection was clearly not the rational, centralized functioning of the state, but rather a complex set of competing interests between various ministerial lobbies, which had been, to varying degrees, the nature of European state administration since the Middle Ages.” Ibid at 159. As for secrecy, he adds that “the secret royal sphere atrophied into the world of spying, failed finance, and despotic fiat.” Ibid at 165. The importance of secrecy for Louis XIV was also noted by Lucien Bély, “Secret et espionnage militaire au temps de Louis XIV” (2011) 263 Revue historique des armées 28 at para. 3.
122 Soll, The Information Master, supra note 114 at 162.
124 Snyder, supra note 97 at 176.
'virtu' and that dissimulation was immoral.”

In other words, state secrecy was “[n]o longer sacred or privileged.”

Instead, they sought transparency in the workings of political institutions and favoured a return to parrhesia and the public discussion of matters of state, and were assisted in that with the advent of the printing press (which now gave the news the “ability to affect crowds, influence politics, and shape debates in the public sphere” and constitutional monarchy in Great Britain (which served “as a model in the transition from rule by kings to the mandate of the people in other societies”).

In his Essay on Political Tactics, Jeremy Bentham (1748-1832) calls for an end to political secrecy and for publicity in government decision making, a characteristic of good government under representative democracy. But while he clearly sees secrecy as an instrument of conspiracy and as a characteristic of despotic states, he also

125 Soll, Book Review, supra note 115 at 617. “the political practices that existed prior to the Enlightenment were seen as highly irrational, the result of opaque traditions and customs that deflected political affairs from their natural (rational) course. By stripping away these opaque veils, transparency politics was intended to create the conditions required for legitimate government. More than that, however, it was thought that the mere fact of transparency would be sufficient to cause individuals to act in ways that would promote autonomy, liberty, and respect for individuals. By allowing the public free and complete access to the facts, transparency politics would put rationality in command of politics, which would then quite naturally lead to the appropriate political arrangements.” Ajumie H Wingo, Veil Politics in Liberal Democratic States (Cambridge, UK: Cambridge University Press, 2003) at 17.

126 Potolsky, supra note 123 at 39. The “communicative norms of secrecy and privilege in politics and more general social norms that predicate politics on deference and patronage” were directly challenged. David Zaret, Origins of Democratic Culture: Printing, Petitions, and the Public Sphere in Early-Modern England (Princeton: Princeton University Press, 2000) at 42.

127 Raymond & Moxham, supra note 79 at 13.

128 Bodei, supra note 97 at 894. As Snyder observes: “One of the key indices for tracking the shifting ground beneath absolutism is to be found, then, in the growth of the early modern discourse on sincerity. […] anyone in the least ambitious had to know to maintain silence, to wear a mask and to exercise self-dominion in the public domain. However, some did dream of other and better modes of existence, without the endless self-surveillance and wholly instrumental image-management needed to make one’s way in the only world that mattered. One such mode—the sincere expression of self—required a reversal of prevalent attitudes toward truth-telling as they pertained to moral (if not religious) experience.” Snyder, supra note 97 at 161-162.

129 Zaret, supra note 126 at 18.

acknowledges that publicity cannot be an absolute principle as there are circumstances when that principle must be suspended, for instance to prevent an enemy from gaining an advantage, injuring “innocent persons” or inflicting “too severe a punishment upon the guilty.”\textsuperscript{131} Thomas Hobbes (1588-1679) and Benedict de Spinoza (1632-1677) had preceded Bentham in arguing that state secrecy should only be evoked in exceptional circumstances, and that it is preferable, in Spinoza’s words, “for the honest policies of a state to be obvious to its enemies than for the guilty secrets of tyrants to be kept hidden from its citizens.”\textsuperscript{132} Governing in secrecy, Spinoza adds, would be “supreme folly”: the populace would “judge ill of the same” and give “everything an unfavourable interpretation.”\textsuperscript{133} Hobbes, familiar with secrecy in matters of state, thinks that publicity was essential on the part of the sovereign to avoid the people being ignorant or misinformed, but that truth should not be exaggerated so as to preserve peace and stability.\textsuperscript{134} As Noel Malcolm explains, “his ‘principle of publicity’ implied that, as a


\textsuperscript{132} Benedict de Spinoza, \textit{Tractatum Theologico-Politicus}, chapter VII, paragraph 29, in \textit{The Chief Works of Benedict de Spinoza} (London, UK: George Bell and Sons, 1891) at 342.


population became more enlightened and therefore more able to accept the true reasons for government policies, the degree of concealment and misdirection should gradually decline.”

Through concepts such as reason and the rule of law, the Enlightenment ultimately succeeded in displacing state secrets from being the property of the king to being the property of the state and in imposing on monarchs a duty to account for their decisions. This gave rise to modern instruments of open government, such as “parliamentary reporting,” the free press edict [Scandinavia, 1766; France, 1881] and the annual national budget [France, 1780] and the concept of an informed public.

The term “public,” which arose in the fifteenth century, was initially associated with the common good in society. In the sixteenth century, it came to include that “which is manifest and open to general observation.” Yet, in the seventeenth century, the understanding of the term changed slightly again to take its modern form, that of “the activity or authority that was related to or derived from the state” and “open to the scrutiny of anyone.” This power of revelation “claimed for the people over and against


136 In Britain, “[T]he House of Commons had started to nullify his policy of secrecy by releasing the very sort of information he had always tried to withhold from his subjects: in October 1680 and in March 1681, they voted to have their proceedings published daily.” James Sutherland, *The Restoration Newspaper and its Development* (Cambridge, UK: Cambridge University Press, 1986) at 21. Newspapers coverage of parliamentary activities, however, was haphazard and contested by Members of Parliament and Lords during the so-called unreported Parliament of 1768 to 1774. However, once “the next Parliament met in 1774, parliamentary reporting in the newspapers expanded very rapidly.” John Vice & Stephen Farrell, *The History of Hansard* (London, UK: House of Lords, 2017) at 6.


139 Ibid.

the arcane mysteries of monarchy” was “crucial to democracy’s triumph over absolutism […]”\(^{141}\) as it linked public officials, the voices of public official deliberations, with private citizens as voters.\(^{142}\)

Academics, however, do not agree over when the public sphere appeared. Habermas argued it has its origins in the eighteenth century and social elites. Others agree with his temporal argument, but not on the role of social elites, preferring instead to emphasize the role of capitalist development and the involvement of the landed gentry. Yet others see challenges to traditional governance in the local gentry of the sixteenth century or the bourgeoisie of the seventeenth century, or the development of the newspaper and other news media in the late eighteenth century-early nineteenth century.\(^{143}\) Zaret observes, however, that the governance of monarchs was already contested with printed petitions (invoking public opinion) in seventeenth century England, a communicative change wrought by the printing press.\(^{144}\) From Elizabeth I onward, accounts of parliamentary or royal business increasingly found their way beyond the confines of power, despite the secrecy norms\(^{145}\) prohibiting “not only seditious or disrespectful remarks but all public discourse that provoked division per se in religion or politics.”\(^{146}\) Topics that had never been opened to public interpretation and discussion were now within the public sphere.\(^{147}\)

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\(^{143}\) Zaret, *supra* note 126 at 23-24.

\(^{144}\) *Ibid* at 32, 34.

\(^{145}\) *Ibid* at 44, 64.

\(^{146}\) *Ibid* at 50.

The spread of the printing press from the fifteenth century onward (along with concomitant networks of communication—e.g., the post, the train…), played an increasingly important role in publicizing knowledge of the natural and social worlds and in making more transparent the activities of the emerging nation-states. As John Thompson observes,

The rise of the printing industry represented the emergence of new centres and networks of symbolic power which were generally outside the direct control of the Church and the state, but which the Church and the state sought to use to their advantage and, from time to time, to suppress.

Gutenberg’s invention of the printing press was indeed instrumental in the subsequent long-term transformation of “the news” from being the prerogative of political elites to a commercial commodity and an integral part of popular culture. In the first two centuries that followed the invention, merchants were the principal actors in both supplying and consuming news while printers focused their efforts on publishing books that were in manuscript form. By the sixteenth century, the news market in print has slowly taken off with news pamphlets, but its access remained limited to those who

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148 “As for scholarly and scientific news and exchanges between savants previously limited to conversation or hand-written letters, the printed journal also became a method of communication specific to the Republic of Letters. Thus was created Europe’s first high-quality journal in 1665, Denis de Sallo’s *Journal des sçavans* (Journal of Savants), which was published in French in Paris every Monday. Beginning on March 6, 1665, the English launched the organ of the Royal Society of London, Philosophical Transactions, whose prestige was also established almost immediately.” Marc Fumaroli, *The Republic of Letters*, translated by Lara Vergnaud (New Haven: Yale University Press, 2018) at 224.

149 The development of printing “gave rise to a variety of periodical publications which reported events and conveyed information of a political and commercial character.” Thompson, *supra* note 138 at 63. Of course, state censorship and interference of varying degrees did exist from time to time. *Ibid*, at 67-69.

150 *Ibid* at 53.
could afford its products. The first newspapers soon followed, but not before the “end of the eighteenth century would the newspaper become a major agent of opinion-forming.” The availability of the print media was central to the nascent public sphere and its public monitoring of state authority, even though in “the eighteenth century, newspapers were largely read by upper- and middle-class consumers.” Along with other public sites, the print media allowed members of society to share a common space “to discuss matters of common interest; and thus to be able to form a common mind about these” to ultimately influence political decision making. The public could thus conceive of itself as a source of power opposed to “the secret chanceries of the prince.” Popular tribunes from the 1760s onward, such as those of John Wilkes and John Cartwright in Britain, contributed directly to this outcome by promoting the public interest and raising the importance of the public sphere through demands for “more press

151 Andrew Pettegree, The Invention of News: How the World Came to Know About Itself (New Haven: Yale University Press, 2014) at 2-3, 5-7. As Ives writes, “[i]n the short term the advent of the printing press changed little. Instead, explicit justification of political secrecy actually dominated early printed discourse with the theorists and architects of absolutism prominent in its defence. [...] They set great store in the arts of political dissimulation. Practice followed theory in many of these states and the burgeoning business of government (matters of tax and trade, war and diplomacy, patronage and preferment) was gathered ever more resolutely into the privacy of royal councils.” Ives, supra note 137 at 266.

152 Pettegree, supra note 151 at 9. “It is only with the great events at the end of the eighteenth century – the struggle for press freedom in England and the French and American revolutions – that newspapers found a strong editorial voice [...].” Ibid.

153 “[W]ith the modern public sphere comes the idea that political power must be supervised and checked by something outside. What was new, of course, was not that there was an outside check, but rather the nature of this instance. It is not defined as the will of God, or the Law of Nature (although it could be thought to articulate these), but as a kind of discourse, emanating from reason and not from power or traditional authority.” Charles Taylor, “Modernity and the Rise of the Public Sphere” in GB Peterson, ed, The Tanner Lectures on Human Values (Salt Lake City: University of Utah Press, 1993) 203 at 232.


155 Taylor, supra note 153 at 220-221.

freedom and more political engagement with the people.”\textsuperscript{157} The press was indeed, as Jeremy Black writes, both the cause and effect of heightened public political consciousness.\textsuperscript{158}

Quite narrow at its point of origin,\textsuperscript{159} the public sphere encompassed, as it does today in much larger numbers, contestations “in the formation of public opinions” that “are often called ‘public discourses’,\textsuperscript{160} influenced, ideally, by informed discussions and reasoned agreement or disagreement.\textsuperscript{161} Public opinion, in that context, was a product of reflection which emerged from discussion and “an actively produced consensus.”\textsuperscript{162} Central to our understanding of democratic theory, the public sphere is intimately linked to the principle of democratic legitimacy by making the exercise of state power public instead of secret (through the commodification of information, no longer owned by the church or the state and accessible only to authorized people\textsuperscript{163}). This presupposes,

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\item “[T]he press appears as the prime constituent, and indeed creator of, a ‘public sphere’ of politics that, in a teleological perspective offers much of interest. The role of the press in spreading information about parliamentary debates provides an obvious instance of its role as creator of a ‘public sphere’ of politics. Furthermore, there is the more general point that by spreading information and comment, newspapers encouraged people to look for public sources of both and thus enhanced their importance. […] the press can be seen as both cause and effect of heightened public political consciousness.” Black, \textit{supra} note 154 at 51.
\item “Talking about the public sphere however, may seem somewhat misleading since there is clearly a plurality of publics connected to different collectivities (occupational, political, ethnic, religious, sexual) and geographic areas (local, national, regional, global), with different thematic foci (science, politics, economy, arts, sports, fashion) and modes and genres of communication.” Jostein Gripsrud, Hallvard Moe, Anders Molander & Graham Murdock, “Editors’ Introduction,” in Jostein Gripsrud, Hallvard Moe, Anders Molander & Graham Murdock, eds, \textit{The Idea of the Public Sphere: A Reader} (Lanham, Md: Lexington Books, 2010) xiii at xv. “Historically there have been distinct public spheres organized around different political beliefs and geographical locations; and public spheres for other identity groups (such as Black, Spanish and Jewish people) have existed in Western countries at least since the nineteenth century.” Alan McKee, \textit{The Public Sphere: An Introduction} (Cambridge, UK: Cambridge University Press, 2005) at 142.
\item Gripsrud, Moe, Molander & Murdock, \textit{supra} note 159 at xiv.
\item Thomas McCarthy, “Introduction” in Habermas, \textit{supra} note 156, xi at xii.
\item Taylor, \textit{supra} note 153 at 223.
\item McKee, \textit{supra} note 159 at 78. That point was made by Habermas, \textit{supra} note 156 at 36.
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evidently, that all those involved in the public sphere have access to relevant and
important information and ideas.\textsuperscript{164} As Jeremy Black explains, the press
was crucially important for the reconfiguration of the ‘public sphere’ away from
the predominantly oral culture and community and ecclesiastical agencies of
earlier times, towards a culture in which oral transmission was seen as less
consequential than that of the culture of print. […] The culture of print did not
therefore lead in one political direction, but it did transform and widen the
sphere of public debate.\textsuperscript{165}

The Enlightenment period hence witnessed the replacement of the old presumption of
secrecy in matters of state by the presumption of publicity, a movement that was greatly
assisted in eighteenth century England and America with the flourishing of newspapers,
more disclosures of information by the state to parliaments, and the availability of
parliamentary proceedings to the public.\textsuperscript{166} In British North America, however, it was not
until the 1820s that these developments “were comparable to those in Britain in the
1790s.”\textsuperscript{167}

That said, it remained a constant battle to pry information loose from the state
because as news expanded, “it was nonetheless governed by notions of secrecy and
secrets of state.”\textsuperscript{168} The exercise of censorship is a good case in point. As Joad Raymond

\textsuperscript{164} Gripsrud, Moe, Molander & Murdock, \textit{supra} note 159 at xv-xvi.
\textsuperscript{165} Black, \textit{supra} note 154 at 66, 67.
\textsuperscript{166} Daniel N Hoffman, \textit{Governmental Secrecy and the Founding Fathers: A Study in Constitutional
\textsuperscript{167} Barry Wright, “Epilogue: The Canadian State Trials Series in Retrospect” in Barry Wright, Susan
Binnie & Eric Tucker, eds, \textit{Canadian State Trials, Volume V: World War, Cold War, and Challenges to
\textsuperscript{168} Nikolaus Schobesberger, Paul Arblaster, Mario Infelise, André Belo, Noah Moxham, Carmen
and Noah Moxham explain, there is plenty of evidence that pioneers in the development of early modern news media “worked to a significant extent within the apparatus of state, whether with tacit or official permission or with privileged access to information.”

This did not mean, however, that the institutionalization of state secrecy practices by the state that would accelerate in the nineteenth century was accomplished with ease and without contestation. There were indeed important tensions arising between the development of modern secrecy legislation and institutional practices and emerging popular engagement with government and politics from the late eighteenth century onwards in Britain, British North American colonies/Canada and the United States. Popular pressures for accountability by the state were often in tension with the official secrecy discourse of the state (for example on seditious libel prosecutions) and the print media itself had not won complete freedom from the influence of the state. But state secrets, as noted above, did not disappear, remaining as important as ever before in military and diplomatic matters. The difference with prior era, perhaps, was that secrets by then had “accrued negative meanings as part of a far-reaching project of demystification.” As Birchall notes,

169 Raymond & Moxham, supra note 79 at 14.
170 As Ives notes: “In the short term the advent of the printing press changed little. Instead, explicit justification of political secrecy actually dominated early printed discourse with the theorists and architects of absolutism prominent in its defence. [...] They set great store in the arts of political dissimulation. Practice followed theory in many of these states and the burgeoning business of government (matters of tax and trade, war and diplomacy, patronage and preferment) was gathered ever more resolutely into the privacy of royal councils.” Ives, supra note 137 at 266.
Secrets became the markers of courtly rule and outdated, esoteric knowledge—and for Rousseau and his followers, of dissembling and dishonesty. In theory at least, secrets became the apparent enemy of reason, truth, and progress.\textsuperscript{172}

The existence of state secrets now had, as a result of so many contestations, to be justified with more limited and more convincing rationales than the divine rights of kings.\textsuperscript{173} The Enlightenment, however, was quickly eroded by power politics, imperialism and conflicts of the nineteenth century, which re-erected the centrality of secrecy in matters of state, especially in respect of foreign relations and military operations. The law played a key part in the efforts of states to protect their secrets against the growth of an “opposition press,” popular literacy and civic engagement in the late eighteenth and early nineteenth century.

Political offences in English criminal law, applicable in the British North American colonies, were based on King Edward III’s Statutes of Treason of 1351-1352 as amended by the Treason Act, 1696,\textsuperscript{174} and sedition (starting with the Statute of Westminster of 1275, which idolized the divine right of the king, then extended under the Tudors and the Court of Star Chamber from the late fifteenth century to the mid-seventeenth century, with seditious libel becoming the prominent form with the expansion of the press in the eighteenth century). Neither treason nor sedition were primarily designed to deter the public disclosure of state secrets. That said, the disclosure of state secrets (diplomatic,
military and other sensitive government information) to foreign states could be prosecuted as breaches of allegiance, and thus considered treason. English treason law, which had applied in the American colonies, was narrowed after the American Revolution by the US Constitution article 3(3), limiting treason to the head of levying war against the state.

Cases of treason for disclosure of state secrets were rare, although such cases sometimes surfacing during wartime and its immediate aftermath. Disclosures of state secrets could be prosecuted as aiding enemy states at war, but the threshold of proof was very high, especially after the procedural protections introduced by the Treason Act of 1696. Disclosure of state secrets that brought government into “disesteeem” could also be the basis of a sedition prosecution and passing information to foreign powers was occasionally prosecuted as a sabotage offence, but like treason these offences only addressed secrecy breaches indirectly. Laws that directly address state security concerns around secrecy only came with the development of secrecy and espionage legislation in the late nineteenth century.

Disclosure of government information and criticism of public officials was nonetheless an increasing concern for governments in the late eighteenth and early nineteen centuries. In the eighteenth century in England and in colonial America, the offence of sedition, and in particular prosecutions for seditious libel (where the publication of government information could give rise to prosecution of a journalist or editor of a newspaper), saw a significant increase in usage as a means to restrain the

printed press. Britain’s Libel Act of 1792, which applied throughout British North America (though not in Lower Canada), clarified the common law of sedition and attempted to limit its application by empowering the jury to decide on questions of intent but with limited success. However, subsequent legislation in Britain during the French Revolution and colonial legislation such as Upper Canada’s Sedition Act of 1804 (repealed in 1829), actually extended the reach of sedition by making findings of seditious activity the basis for suspensions of habeas corpus and summary deportations. However, by the second quarter of the nineteenth century these extensions were ended, judicial interpretations increasingly limited the applicable common law and legislation such as the 1843 Libel Act (which permitted truth as a defence in cases of seditious libel), narrowed sedition in British jurisdictions to the advocacy of force to overthrow the political order (although the common law developments in the nineteenth and twentieth centuries were not fully reflected in the sedition provisions of the Canadian Criminal Code, and were only fully and explicitly confirmed in Canada by the Supreme Court in the 1951 Boucher case

These legal advances were the foundations for freedom of expression and of the press, and reflected the push for greater government accountability in British North America/Canada and Britain (leading in the late twentieth century to access to information and right to know legislation).


177 Boucher v the King, [1951] SCR 265.

In the nascent United States, criminal law (apart from treason) was a state jurisdiction. As was the case in Britain and in the remaining British North American colonies, new security legislation was enacted in the U.S. during the period of the French Revolution, notably passage by a Federalist-controlled Congress of the Sedition Act of 1798, which forbade individuals from voicing or printing what the government deemed to be malicious remarks about the president or the government.\textsuperscript{179} The controversial legislation was derailed within a couple of years over jurisdictional (the Virginia and Kentucky legislatures passed resolutions declaring federal laws invalid within their states) and interpretative issues over the free speech amendment.\textsuperscript{180} The Sedition Act of 1798, in contrast with English law until 1843, allowed the truth of the matter as evidence in defence. As Wendell Bird explains, the “government wanted power to punish criticism, even if true. [...] it was not just neutral (no justification) that the seditious libel was true, but it was an aggravating factor that the libel was true. True criticism was a worse crime than false criticism!”\textsuperscript{181}

In addition to the law helping the state to protect its secrets in some limited ways, the institutionalization of state secrecy started to take form in the United States in 1774.\textsuperscript{182} In the midst of a revolution, General George Washington understood the need to protect

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  \item \textsuperscript{178} On these developments, see Wright, “Migration, Radicalism and State Security,” \textit{supra} note 178, Greenwood & Wright, \textit{supra} note 174 at 30, 39, Bird, \textit{supra} note 176, chapters 1 and 2.
  \item \textsuperscript{181} Bird, \textit{supra} note 176 at 45.
  \item \textsuperscript{182} Timothy L Ericson, “Building Our Own ‘Iron Curtain’: The Emergence of Secrecy in American Government” (2005) 68:1 The American Archivist 18 at 22.
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sensitive military and diplomatic information from disclosure to the enemy. To wit, during the American War of Independence with Great Britain, Washington and his officers had communicated by marking their correspondence to one another “Secret” or “Confidential,” the earliest instance of the classification system that would later emerge in the West. The Second Continental Congress (1775-1781) itself was preoccupied with matters of state secrecy, adopting an oath of secrecy for its members in 1775 and one for government employees in 1776. That same year a report from Congress’s Committee on Spies also led Congress to resolve and add to the rules and articles of war adopted in 1775 a provision to deter espionage and protect state secrets. The Congress of the Confederation (1781-1789) and the United States Congress were seized as well with matters of state secrecy. In 1784, for example, the former provided that all diplomatic correspondence would heretofore be considered secret, while the latter’s Senate met secretly until 1795. Although the so-called Founding Fathers acknowledged the need for some secrecy—John Jay, for example, writing that secrecy was needed in foreign affairs and treaty negotiations—James Madison and John Adams both warned of its dangers if it left the population ignorant.

185 Halstuk, supra note 184 at 63.
186 In memorable and oft-cited passages, they said, in Madison’s case, that, “Knowledge will forever govern ignorance. And a people who mean to be their own governor must arm themselves with the power that knowledge gives. A popular government without popular information or the means for acquiring it is but a prologue to a farce or tragedy or perhaps both.” Letter from James Madison to W T Barry, 4 August 1822, online: <http://thefederalistpapers.org/founders/madison/james-madison-letter-to-w-t-barry-august-4-1822>. And in John Adam’s case, that, And liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings, and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers. John Adams, “A Dissertation on the
3.3 Modern state secrecy

By the late 19th century, the limitations of the older legal responses centered around treason and sedition had become apparent. The need to wage war successfully and concerns about spies and espionage contributed to the further institutionalization of state secrecy and the introduction of new national security legislation (centered around breach of official trust/official secrecy and espionage offences). Made necessary by the modern state’s new imperatives around secrecy, these developments are the direct precursors of the full scale development of the state secrecy apparatus of the twentieth century.

3.3.1 The nineteenth century

During the nineteenth century, thanks to the steam printing press, the development of railways and the relaxation of censorship, authoritative mass-circulation newspapers expanded in scope and readership. The expansion of the Anglophone press, in particular, contributed to debates within the public sphere engaging British public intellectuals and parliamentarians, and from about 1880 onward, the general public; a

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187 The merging of the old with the new is well illustrated by their inclusion in the 1892 Canadian Criminal Code. See Brown & Wright, supra note 178.

188 “As part of a more general process of global development, the English press benefited greatly in the late nineteenth century from a new regulatory system, from technological changes, and from a marked rise in consumption.” Black, supra note 154 at 91.

189 By 1900, most current publications (dailies, periodicals, fiction) were no longer targeted at a social or intellectual elite, having adapted to mass literacy. Simon Heffer, The Age of Decadence: Britain 1880 to 1914 (London, UK: Windmill Books, 2017) at 534. “However, as well as enabling people to read, education helped them to think for themselves and to be more receptive to the ideas of others. One of the uses of the new mass literacy – other than to line the pockets of speculative publishers – was to acquaint the general public better with the issues of the day, and by so doing to make them more politically aware and engaged. The success of the new mass-circulation newspapers and magazines profoundly affected political
period that Holly Case has called the “age of questions.” This had important effects: being better informed, the public came to challenge the views and policies of monarchs and governments, abandoning along the way a lot of the deference they were expected to show the ruling class, and it encouraged journalists to reach ever wider audiences by publishing information the state wanted to keep secret. Journalists obtained these secrets from the state’s clerical workforce of young working-class men of modest means, “some of whom saw the copying and selling of government papers to a nascent mass media as a way to supplement their meagre incomes.” The immediacy of news available to anyone was by the end of the nineteenth century a known threat to the protection of state secrets.

Reform calls for greater government openness and accountability heard during the Enlightenment continued. In both Britain and British North America, for instance, such calls in the early nineteenth century tended to focus on the battle for responsible cabinet government, with demands that government cabinets be directly accountable to elected legislatures. Advances on that front achieved in Britain (including changes in the appointment of government ministers, the publication of Parliamentary debates by William Cobbett and TC Hansard, culminating in the Reform Act of 1834), were later advocated by reformers in British North America as well (as recommended in Lord debate – politicians realised the propaganda potential of a popular press, and courted and honoured its owners.” Ibid at 534.

191 Heffer, supra note 189 at 541.
193 “Hugh Childers, the War Secretary [1880-1882], admitted […] that he knew only what was in the newspapers: the immediacy of news made this a new sort of war. Childers asked the press to show restraint, because if troop movements became known to the Boers [in South Africa] this ‘cannot but be injurious to the public interests.’” Heffer, supra note 189 at 248.
Durham’s report after the 1837-38 Rebellions in the Canadas) and adopted in 1848 before being further secured in the *British North America Act* of 1867.

These calls for reforms were supported by a variety of arguments (e.g., secrecy drives corruption; secrecy undermines trust between citizens and their governments…), and as a result “there were so many more facts to study”: mass media proliferated and “[…] the European archives had been opened, revealing the political secrets of centuries […]”. Yet, governments continued to carry on some of their work in secrecy (e.g., special police and intelligence investigations, military operations, diplomatic relations), sometimes unofficially and with deniability.

The nineteenth century represents a period which saw state secrecy consolidating its position and importance within the modern state, with the law giving legitimacy to state secrets through the development of a series of mechanisms (for example a state secrecy privilege for the executive and laws punishing unauthorized disclosures). The absolutist state first marked the modern institutionalization of state secrecy with the creation of “cabinet noirs” and secret services in the pay of the king. This process of institutionalization accelerated with the development of the modern state’s military, bureaucratic and legal systems in the nineteenth and twentieth centuries. In the nineteenth century, it was the increasing size of government bureaucracies that had the largest effect (as “government departments grew larger and handled more official information, the

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problem of confidentiality grew more acute") on the entrenchment and institutionalization of state secrecy, whereas in the twentieth century the establishment of professional organizations solely dedicated to the creation and the use of secrets (the intelligence services)\textsuperscript{197} and significant developments in science and technology contributed foremost to this phenomenon. Throughout the nineteenth century, secrecy remained paramount in state activities carried out by the military, the police, diplomats and postal workers (those involved in the cabinet noirs) to secure the state against both internal and external threats.

One of the most important changes related to state secrecy during the nineteenth century had to do with the law. Specific legislation and case law asserted themselves as never before. This was clearly visible in Great Britain. In 1860, the first of two early English decisions that entrenched the state secrets privilege into the common law came in \textit{Beatson v Skene}.\textsuperscript{198} In that case, the court decided that “if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suit or in a court of justice.”\textsuperscript{199} It also determined that the courts should show deference to the Crown in the person of the head of a department before deciding on disclosure. That decision stood until it was revisited in \textit{Duncan v Cammel, Laird & Co}. 82 years later.\textsuperscript{200} In that case, the court granted to the Crown that the privilege was absolute if it was claimed in good faith by the

\footnotesize{\textsuperscript{196} Helen Fenwick, \textit{Civil Liberties and Human Rights}, 3\textsuperscript{rd} ed (London, UK: Cavendish Publishing Limited, 2002) at 336.  
\textsuperscript{197} Dewerpe, \textit{supra} note 8 at 120.  
\textsuperscript{198} (1860) 157 Eng Rep 1415.  
\textsuperscript{199} Quoted by Setty, \textit{supra} note 109 at 229.  
\textsuperscript{200} [1942] AC 624 (HL). Setty, \textit{supra} note 109 at 228.}
government.\textsuperscript{201} Both decisions would later influence how US courts would interpret the privilege.

In 1873, the English Treasury gave teeth to the privilege by publishing in an Internal Circular a minute entitled \textit{The Premature Disclosure of Official Information}, which told civil servants to protect from public disclosure any information in their possession on threat of dismissal. Another minute issued two years later “warned civil servants of the dangers of close links with the press,”\textsuperscript{202} and another one in 1884 specifically prohibited the unauthorized disclosures of government information and threatened dismissal for so doing.\textsuperscript{203} The former minute appeared prescient when in 1878 its contents were reemphasized after secret details on a treaty between England and Russia belonging to the Foreign Office had been leaked to the media.\textsuperscript{204} Because these details had been memorized and no actual papers stolen, neither the existing sabotage offences in criminal law nor the \textit{Statute of Treasons} of 1351 and the \textit{Treason Felony Act} of 1849, which added a lesser non-capital treason offence to English law, could be used against the alleged offender. This gap was covered with the adoption of the 1889 official secrets legislation, which made it an offence (of leakage) for a public servant to disclose without authorization information obtained in the course of his or her employment.\textsuperscript{205} In Canada,

\begin{itemize}
\item\textsuperscript{201} Setty, \textit{supra} note 109 at 229.
\item\textsuperscript{202} Fenwick, \textit{supra} note 196 at 336.
\item\textsuperscript{203} David Vincent, “The Origins of Public Secrecy in Britain” (1991) 1 Transactions of the Royal Historical Society, Sixth Series 229 at 235, 239.
\item\textsuperscript{204} Fenwick, \textit{supra} note 196 at 336.
\end{itemize}
provisions virtually identical to the new British legislation were enacted in 1890 before their incorporation two years later into Canada’s first Criminal Code (sections 76 to 79).206

During the Civil War period in the United States, state secrecy was extended to new technological developments that benefitted the military, such as armoured warships, the steam engine, improved explosives and naval mines and it was during this time that federal legislation secured sedition legislation after the abortive attempt in 1798. In 1869, the Army issued its first peacetime regulations, General Orders No. 35, to protect forts and other military installations by forbidding anyone from taking photographs or making drawings of them.207 Comprehensive espionage legislation was enacted in World War One which created elaborate legal protections for state secrets similar to official secrets legislation developed in Britain and Canada.

3.3.2 The twentieth century

The twentieth century was pivotal for the development of state secrecy. While publicity remained essential to the health of democracies, it had to be restrained and kept at bay to assure allied victories in both world wars. Censorship, for instance, was a major component of the protection of state secrets during both conflicts, and remained a legitimate form of protection for state secrets through the first two decades of the Cold War.208 Both wars saw a gradual convergence of policies and experiences concerning the

206 The Criminal Code, 1892, 55-56 Victoria, c29, s76-78, Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, First Report: Security and Information (Ottawa: Supply and Services Canada, 1979) at 3. For a historical discussion of this development, see Brown & Wright, supra note 178.
207 Ericson, supra note 182 at 29.
handling of state secrets between Western allies, especially between Australia, Canada, New Zealand, the United Kingdom and the United States (now known as the Five Eyes). Secrecy enhancing procedures and protections were applied by allies to the development of new military technologies, starting with the development of the radar around 1930, and applied most dramatically and successfully to the development and deployment of the atom bomb in the 1940s (at least in the initial stages as Soviet spies eventually acquired a range of US nuclear secrets). The Second World War marks the moment when the regime of modern state secrecy begins to take the bureaucratic and expansive shape it has today. Strict secrecy in matters of state in the United States and the United Kingdom started to lose its appeal with a series of spy disasters in the former (e.g., the U-2 incident in the Soviet Union, the Bay of Pigs failed invasion in Cuba and violations of the law by the CIA) and scandals and public enquiries (spies having been

Howe Ransom, “The Intelligence Function and the Constitution” (1987) 14:1 Armed Forces & Society 43 at 52. The literature on censorship during wartime is voluminous. To take Canada as the focus on censorship efforts during wartime, see, inter alia, Mark Bourrie, The Fog of War: Censorship of Canada’s Media in World War Two (Vancouver: Douglas & McIntyre, 2012) and Jeffrey A Keshen, Propaganda and Censorship During Canada’s Great War (Edmonton: The University of Alberta Press, 1996).


210 “The application of serious secrecy to military technology seems to have coincided with the discovery of radar about 1930. During the ensuing decade, the results were not impressive. In the case of radar, secrecy seriously delayed its development, and neither technical nor tactical progress was very appreciable.” Lloyd V Berkner, “Secrecy and Scientific Progress” (1956) 123:3201 Science 783 at 784.

211 “Out of that beginning there grew a conviction that secrecy was an essential prerequisite for national security, and this view was to become firmly fixed as part of the dominant political consensus of the cold war. […] So to the traditional American belief that openness on the part of government was essential to the successful functioning of democracy there came to be added the idea that secrecy was indispensable for both the success of the nation’s foreign policy and the effective operation of the central office of the political system—the presidency.” Francis E Rourke, “United States” in Galnoor, supra note 4 113 at 115.

identified) in the latter. The balance between publicity and secrecy ebbed and flowed throughout the century, with increasing challenges to state secrecy in the post-Cold War era. These challenges, however, were increasingly routed through the judiciary, with legislation being developed in support of the common law.

As leakages continued in the United Kingdom in the early twentieth century, a section 2 crime of strict liability for the unauthorized dissemination of official information, and an extension of the leakage offence beyond public servants to journalists and others, were incorporated in the Official Secrets Act 1911 (its section 13(2) repealing the Official Secrets Act, 1889), which was passed in the course of a single day after failed legislative attempts in 1896 and 1908. At that time, the country was confronted with constitutional and foreign policy crises, and had serious and immediate concerns that enemy agents were engaged in gathering information on the movements of the Royal Navy’s battleships. The extension of criminal liability to the recipients of official information, in particular, caused serious concern to members of the media, just like it had in 1908, but these concerns were not reflected in parliamentary debates when the bill was discussed. In 1912, the media were further aggrieved when the government

214 Over the past 30 years, and especially since 9/11, there has been an exponential growth of judicial review and disclosures battles before the court. Lord Sumption, “Foreign Affairs in the English Courts since 9/11” (Lecture at the Department of Government, London School of Economics, 14 May 2012) at 2, online: <www.supremecourt.uk/docs/speech_120514.pdf>.
instituted a notice system (via D-notices, or requests not to publish or comment) to limit their ability to report on certain issues or subjects at times of danger to the nation.\textsuperscript{217}

The new section 2 in the \textit{Official Secrets Act 1911} was decried for many years because of its excessive scope and the question of whether the information leaked was in the public domain or not.\textsuperscript{218} In the 1950s, Sir Lionel Heald, then Queen’s Counsel and a former Attorney General, explained the ridiculous extent of section 2’s application to American filmmaker Fred Feldkamp:

It was held in the case of \textit{R. v. Crisp and Horewood} that particulars of clothing contracts communicated by a government clerk to a tailor were within the \textit{Act}. Indeed it has been said by a high authority that the language is wide enough to make it a criminal offence for a messenger in the Home Office to inform a press correspondent that the Permanent Under-Secretary is in the habit of taking six lumps of sugar in his tea. Absurd as this may seem, it is the inevitable consequence of creating an offence which is not dependent in any way on the nature or even the materiality of the information, still less on the motive or intention of anyone concerned. So long as it was obtained in the course of government service, the information is treated in effect as a piece of government

\textsuperscript{217} Black, \textit{supra} note 154 at 111. The legal framework in place, including D-notices, proved quite effective in preserving state secrecy during the First World War: "The reality of the conflict was kept from the British public. Dependent on official information which could not be questioned in public, the press provided scant clue to the heavy cost at which only limited success was obtained on the Western Front in 1915–17." \textit{Ibid} at 112.

\textsuperscript{218} As the House of Lords noted in 2002: "Section 2 of the Official Secrets Act 1911, enacted in great haste, was the subject of sustained criticism over many years. Its excessive scope had proved an obstacle to its effective enforcement." \textit{Shayler, R v}, [2002] UKHL 11 at para 9. "In \textit{Boyer v The King} (1948), 94 CCC 195, the accused was convicted of violating our [Canada’s] Official Secrets Act notwithstanding that the information revealed was said to be in the public domain." \textit{Ghahremani v. Canada (Citizenship and Immigration)}, 2009 FC 722 (CanLII) at para 10.
property, marked with the broad arrow, and anyone handling it does so at his [or her] own peril.\(^{219}\)

The *Official Secrets Acts 1911-1939*\(^{220}\) was last used in the Ponting case in 1985,\(^{221}\) but not after it had occupied “the heart of the [British] Establishment’s construction of an edifice designed to enmesh opacity as the modus operandi of the British IC [Intelligence Community].”\(^{222}\) In that case, section 2 was discredited for being too broad in scope, which led to renewed calls to amend the Act.\(^{223}\) More specific prohibitions replaced the catch-all section 2 in the *Official Secrets Act, 1989*, the last time significant amendments were made to the Act.\(^{224}\)

Canada enacted its own *Official Secrets Act* in 1939, which at section 15 repealed sections 85 and 86 (formerly sections 76-79) of the *Criminal Code* and any application of the *Official Secrets Act, 1911* that had been enacted as imperial legislation and was previously in force in Canada.\(^{225}\) Canada’s *Official Secrets Act, 1939* adopted as domestic

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\(^{220}\) The *Official Secrets Acts, 1911*, amended by the *Official Secrets Act, 1920*, and the *Official Secrets Act, 1939*, amending the 1920 act, shall, pursuant to s2 of the 1939 act, be construed as one, and may be cited together as the *Official Secrets Acts, 1911 to 1939*.


\(^{222}\) R Gerald Hughes, “Christopher Andrew and the Myriad Worlds of Intelligence” (2022) 37:2 Intelligence & National Security 281 at 286.


\(^{225}\) The *Official Secrets Act*, 3 George VI, c49, s15. “The 1911 U.K. act was listed in the 1912 Statutes of Canada as an applicable imperial act and so it extended to offences committed in any part of the empire.” Barry Wright, Eric Tucker & Susan Binnie, “Introduction: War Measures and the Repression of Radicalism” in Barry Wright, Eric Tucker & Susan Binnie, eds, *Canadian State Trials, Volume IV:*
law the British *Officials Secrets Act* of 1911 and its 1920 amendment.\(^{226}\) Sections 85 and 86, however, were reintroduced in much shorter form at section 46 of the 1954 revisions of the *Criminal Code* while remaining intact in the Canadian *Official Secrets Act*.\(^{227}\) This last iteration, in the early period of the Cold War, aimed to better protect Canada against espionage, and followed the Gouzenko revelations and associated espionage trials,\(^{228}\) which had resulted from the secret Taschereau-Kellock Royal Commission investigation and recommendations for prosecutions under the *Official Secrets Act*, has been condemned for having worked in secrecy and in violations of the most basic due process rights and judicial norms.\(^{229}\) Only minor amendments were made thereafter to either the


\(^{227}\) *Criminal Code*, 2-3 [1953-1054] Elizabeth II, c51, s46, later incorporated in the RSC 1970, cC-34.


As it happened in the United Kingdom with section 2 (leakage) of its *Official Secrets Act*, the provisions of section 4 (leakage) of Canada’s *Official Secrets Act*, because of their catch-all quality, were considered overly-broad by most observers, causing a chilling effect on the media.\(^{231}\)

The Law Reform Commission of Canada noted that the division of crimes against the state between the *Criminal Code* and the then *Official Secrets Act* was the source of several shortcomings: (1) poor arrangement resulting in overlapping of, and inconsistency between, provisions; (2) excessive complexity and detail; uncertainty as to scope and meaning; (4) out of date provisions lacking in principle; (5) overcriminalization; and (6) possible infringement on the *Canadian Charter of Rights and Freedoms*. The small number of indictments and prosecutions with respect to the unauthorized disclosure of state secrets after the 1950s\(^{232}\) under either set of provisions is indicative that these problems were known to the Attorney General of Canada, who had prosecutorial discretion under the *Official Secrets Act*.\(^{233}\) As the prosecution of spies for espionage and public servants, other sources and journalists for the leakage offence has

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not always been possible (besides legal uncertainties, not all spies and leakers are known and necessarily caught, and prosecutions for the broad leakage offence beyond public servants could be highly controversial), other means to prevent or punish the unauthorized disclosure of state secrets had to be increasingly relied upon.

Foreign spies caught in Canada have historically been dealt with in a number of ways. Some have been expelled, others told to leave the country quietly, and, more recently, a few were placed under a security certificate pursuant to the Immigration and Refugee Protection Act (SC 2001, c 27).\textsuperscript{234} Canadian public servants entrusted with state secrets, however, have a duty to obey the law and could be prosecuted for the breach of official trust offences in the Criminal Code, and after 1911, for espionage and leakage under the Official Secrets Act. Their duty of loyalty and the threat of punishment were considered sufficient for a long time. Given this understanding, Igor Gouzenko’s defection from the Soviet Embassy in Ottawa in September 1945 caused a profound shock not only at home, but also throughout the Western world and directly contributed to the onset of the Cold War (by demonstrating, through Gouzenko’s revelations, and their impacts on the United Kingdom and the United States, that the Soviet Union was definitely not an ally if it ever was).\textsuperscript{235} In response, Canada appointed a secret royal commission (the Taschereau-Kellock Royal Commission) to investigate the facts and


\textsuperscript{235} Whitaker, \textit{supra} note 228 at 125. See also the MI5 documents referenced by Whitaker, which provide “a fairly clear picture of how the British authorities saw the significance of Gouzenko, and thus how the Canadian reaction was shaped.” \textit{Ibid} at 128, and “Appendix 3. Supporting Document: Chapter 3, Whitaker,” in Barry Wright, Susan Binnie & Eric Tucker, eds, \textit{Canadian State Trials. Volume V: World War, Cold War, and Challenges to Sovereignty, 1939–1990} (Toronto: University of Toronto Press, 2022) 513.
circumstances of Canadian officials and others who would have given state secrets to agents of a foreign power. Two Supreme Court of Canada judges headed the commission, which collected evidence and recommended prosecutions under the *Official Secrets Act* of 1939. Prosecutions were recommended for 22 persons named by the commission. Twenty-one were prosecuted in Canada from 1946-1949 resulting in 11 convictions, 10 were acquitted or had charges withdrawn by the Crown. British scientist Alan Nunn May was tried separately under the UK *Official Secrets Act* at the Old Bailey in London in 1946 and received the heaviest sentence of 10 years imprisonment.²³⁶ British scientist Klaus Fuchs was also later convicted, but his alleged connections with associates in the United States could not be substantiated on the basis of Gouzenko’s revelations. That said, the US House UnAmerican Activities committee hounded “fellow travellers,” and prosecutors used the *Alien Registration Act* (popularly known as the Smith Act, enacted in 1940 to criminalize advocating the violent overthrow of the government or to organize or be a member of any group or society devoted to such advocacy) and espionage provisions to secure the convictions, among others, of Alger Hiss (1950) and Julius and Ethel Rosenberg (1952-3).²³⁷

These early Cold War events justified an increasingly harsh culture of government secrecy and covert surveillance in Canada that extended deeply into the public service, scientific research, defence-related industries and government contractors, as well as the labour movement and immigration associations. The Gouzenko Affair, overall, had a significant legal impact beyond the trials held under the *Official Secrets Act*. Espionage

²³⁶ Whitaker, *supra* note 228 at 154 and Falk & Wentzell, *supra* note 228 at 192.
related amendments were made to the Canadian *Criminal Code* in 1951 and its 1953-1954 revisions. Government counter-intelligence activities also expanded to capture government departments dealing with sensitive information, and greater scrutiny was devoted to the immigration process. These activities also took an international character through the Five Eyes countries, and especially in the further development of their wartime signals intelligence cooperation. As recommended by Kellock and Taschereau, domestic wiretapping and surveillance took added importance, but also a “political policing” overtone, eventually leading to abuses by the Royal Canadian Mounted Police (RCMP) Security Service. The Royal Commission on Security (also known as the Mackenzie Commission) in the late 1960s briefly addressed these abuses, while the Pearson-Laskin Accord limited RCMP activities on university campuses.\(^\text{238}\) Nonetheless, RCMP over-reach demonstrated during the early Cold War was renewed in the wake of the October Crisis in 1970, resulting in the “dirty tricks” which led to the McDonald Commission and the creation of the Canadian Security Intelligence Service.\(^\text{239}\)

The Taschereau-Kellock Royal Commission was first to show that, in the then Cold War context, complacency and blind trust were no longer sufficient to ensure the protection of state secrets. Thus, in 1948, the government instituted a security screening process to prevent other espionage cases. In 1952, Cabinet specified that this screening process would only attest to the loyalty and reliability (i.e., the good character) of applicants so as to avoid the process being used for other human resource purposes. In


1955, Cabinet clarified that the screening process would be used only in cases where individuals needed access to classified information (at the time when initial access was required and every five years thereafter). As homosexuals were specially targeted as unreliable, in 1963 Cabinet issued another directive to reconcile the needs of security and individual rights.

From 1966 to 1969, the Mackenzie Royal Commission on Security examined the procedures in place to protect state secrets from unauthorized disclosure and recommended major changes to the *Official Secrets Act* that were not heeded. The Commission also made a series of recommendations on personnel security (including on vetting and background investigation standards and on persons posing particular risks such as homosexuals and subversives), physical, technical and communication security, the security of information and departmental responsibilities. Its recommendations helped to support the Pearson-Laskin accord (which limited RCMP activities at universities) but were otherwise largely ignored (a Security Review Board, for example, was not established to address screening complaints).^{240}

In many respects, the work of the Commission was overdue, as national security screening abuses had been ongoing for decades (and would continue in the decades that followed). Through historical analyses of Canada’s national security activities before and during the Cold War, authors such as Gary Kinsman, Patrizia Gentile, Larry Hannant, Greg Kealey, Reg Whitaker and Gary Marcuse have demonstrated that certain categories of individuals were deemed potentially disloyal to Canada and unfit for government service by the government for no other reasons than their difference from what a normal

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^{240} *Ibid.*
person was supposed to be. The targeting, watching and purging of those who were different was a powerful incentive for those in positions of power and privilege to behave normally. Specifically, Whitaker, Marcuse, Hannant and Kealey have highlighted the role of the RCMP in Canada’s national security state, and how the RCMP focused its investigations and surveillance activities on the Communist Party, the left, Quebec separatists and the union movement, or, in other words, the white, heterosexual-identified men. Kinsman, Buse, Steedman and Gentile have expanded the scope of the latter authors by studying how Canada’s national security state also focused its prying eyes on differences related to ethnicity, race, religion, gender and sexuality.\(^\text{241}\) As such, they showed that “national security was not only about state regulation, but also included a broader form of social and moral regulation and attempts to define ‘proper Canadian’ subjects.”\(^\text{242}\)

After abuses that included alleged illegal and criminal acts committed by the RCMP Security Service in the wake of the October Crisis of 1970, a Commission of Inquiry (Concerning Certain Activities of the Royal Canadian Mounted Police—the McDonald


\(^{242}\) Gary Kinsman, Dieter K Buse & Mercedes Steedman, “Introduction” in Kinsman, Buse & Steedman, supra note 241, 1 at 3.
Commission) again made recommendations to significantly change the *Official Secrets Act*. These recommendations were not heeded, although other recommendations lead to the creation of the Canadian Security Intelligence Service (CSIS) to replace the RCMP security branch, including clearly legislated operational responsibilities and oversight/accountability processes.\(^{243}\) In its first report on security and information, the Commission, after reviewing post-Gouzenko unauthorized disclosures of state secrets, embarked on a detailed analysis of the changes it recommended to the *Official Secrets Act* and what it thought the components of a freedom of information act should be.\(^{244}\) In its second report on freedom and security, the Commission reviewed the security screening process of the government and made recommendations to ensure that it would be used fairly and effectively. It noted that the objective of the screening process was to ensure that individuals granted access to classified information could be trusted. In its second report in 1982, the McDonald Commission pointed out that the security clearance criteria (subversive indices check, fingerprint check against criminal records, field investigation) were still in need of revision.\(^{245}\)

### 3.3.3 Institutionalizing contemporary state secrecy

As noted in the legal overview in the previous section, the impetus for further institutionalizing state secrecy came first from Great Britain, and in particular its military.\(^{246}\) The British War Office in 1853 was first to put in place a *formal* classification

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\(^{243}\) See Kyer, *supra* note 239.

\(^{244}\) Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report, supra* note 206.


system for handling sensitive documents during the Crimean War and their practices were later adopted by the United States without any significant changes. In 1907, the US artillery branch was first to initiate the implementation of a document classification system, followed by the navy two years later. In 1911, these and other measures were consolidated in the Defense Secrets Act—“the first attempt by Congress to protect military information”—which had similarities with the British Official Secrets Act, but with a heavy emphasis on defence installations (it was repealed by the Espionage Act of 1917).

The War Department General Orders No. 3 of February 1912 further established “the first systematic procedures for the protection of national defense information, devoid of special markings.”

In 1913, Royal Navy Lieutenant AC Dewar was probably among the first authors to publicly refer to the mosaic theory, since adopted as a valid argument against the disclosure of state secrets by officials in Canada, the United Kingdom and the United States. Dewar wrote that,

In regard to Press correspondents, one small item written by a Press correspondent may mean nothing, but out of a number of small items a big
mosaic of information can be built up, which may prove a most useful index to
foreign staffs in time of war.\(^{251}\)

The theory waited until 1972 for its first challenge in US courts in *United States v. Marchetti*, a case featuring a book written by a former Central Intelligence Agency employee.\(^{252}\)

The First World War and its aftermath provided a further impetus to strengthening state secrecy.\(^{253}\) During the First World War, British politicians had troubles not leaking cabinet and other secrets to the media.\(^{254}\) The Cabinet Secretariat thus took the responsibility of acting as the custodian of Cabinet secrecy: “The casual approach of the old regime no longer sufficed; a system was required to preserve secrecy and to make government effective.”\(^{255}\) France and the United States adopted a similar approach.\(^{256}\)

After the United States severed its diplomatic relations with Germany and entered the war, the US Congress replaced the *Defense Secrets Act* of 1911 with the *Espionage Act* of

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\(^{251}\) Lieutenant AC Dewar, RN, in Commander Carlyon Bellairs, RN, “Secrecy and Discussion During Peace As Aids to Preparation for War” (1913) LVII: 423 The Journal of the Royal United Service Institution 573 at 595.


\(^{253}\) “If you look at World War I, when a lot of the framing legal structures of secrecy in the United States and Europe were formulated—not because secrecy was invented then, but the structures formulated and bureaucratized.” Peter Galison, Victor S Navasky, Naomi Oreskes, Anthony Romero & Aryeh Neier, “What We Have Learned about Limiting Knowledge in a Democracy” (2010) 77:3 Social Research 1013 at 1013-1014 (Galison).

\(^{254}\) “[G]ossip concerning military operations was common fare in London; security provisions in official circles were lax, by any standards. The Times appeared to specialize in publicizing breaches of Cabinet secrecy, and that body’s discussions at times appeared to be public property […].” Naylor, *supra* note 205 at 10, 40-41.

\(^{255}\) *Ibid* at 42.

\(^{256}\) *Ibid* at 56.
1917,\textsuperscript{257} still in force today, to prohibit and punish the disclosure of national defence-related information to foreign governments.\textsuperscript{258}

The Second World War set the stage for the full institutionalization of state secrecy.\textsuperscript{259} To manage the large volume of secrets and ensure an adequate level of protection was afforded to each, President Roosevelt issued Executive Order (EO) 8381 (1940), which established the Restricted, Confidential, and Secret classifications.\textsuperscript{260} President Truman, with EO10401 (1950), aligned US classification practices with those of its allies (by adding the Top Secret classification), while reiterating most of EO 8381.\textsuperscript{261} In September 1951, President Truman issued EO 10290. It codified the notion that information was classified in the interest of national security instead of the much narrower national defense and extended the authority to classify (to create state secrets) throughout the executive branch rather than the military alone.\textsuperscript{262} Reacting to criticisms that this EO was too discretionary in application, President Eisenhower issued EO 10501 (1953), which reduced by 28 the number of entities authorized to create state secrets, eliminated the Restricted classification, and reintroduced the notion that information was

\textsuperscript{257} Adopted on 15 June, c30, 40 Stat 217.
\textsuperscript{258} For a seminal explanation of that statute and legislative history, see Edgar & Schmidt, \textit{supra} note 248.
\textsuperscript{260} “For reasons not altogether clear, security classification policy and practice became a matter of direct presidential specification in 1940. This development was probably prompted somewhat by desires to clarify the authority of civilian personnel in the national defense community to classify information, to establish a broader basis for protecting military information in view of growing global hostilities, and to better manage a discretionary power seemingly of increasing importance to the entire executive branch.” Relyea, “Government secrecy,” \textit{supra} note 246 at 398.
classified in the interest of national defense instead of national security. Eisenhower, however, had first mandated, in his EO 10450 (1953), that background investigations be conducted for new federal employees to ensure that they are “reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States.”

Despite Roosevelt’s EO, British officials thought that their American counterparts were still incapable of preventing leaks of secrets. Many of these officials were remembering quite vividly US Colonel Yardley’s disclosures of signals intelligence secrets (essentially, that the US broke the diplomatic codes of foreign countries) in a

264 Ericson, supra note 182 at 40. Executive Order 10501 withstood well the test of time. Neither President Nixon’s nor President Carter’s Executive Orders (EO) on classification fundamentally altered its substance. President Reagan’s EO 12356 (1982), however, swung the pendulum the other way by, inter alia, expanding the number of subjects that should be state secrets, reclassifying previously declassified documents, and eliminating automatic declassification. Most importantly, Reagan recognized at law the concept of the mosaic theory (Executive Order 12356, § 1.3(b), 3 CFR 166, 169 (1982), reprinted in 50 USC § 401 (1982) for the purposes of the Freedom of Information Act’s exemption 1, something that his predecessors had not done. Pozen, supra note 252 at 641. Reminiscent of Lieutenant Dewar’s 1913 definition, the Order stated that “[i]nformation that is determined to concern one or more of the [classification] categories […] shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.” In their respective EOs, both Presidents Truman and Eisenhower had specifically rejected the mosaic theory, stating clearly instead that “[d]ocuments shall be classified according to their own content and not necessarily according to their relationship to other documents.” EO 10290, § 26.d, 3 CFR (1949-1953) 789 at 794, reprinted in 50 USC S 401 (Supp V 1952); EO 10501, S 3(a), 3 CFR 979 (1949-1953) 980, reprinted in 50 USC § 401 (1970). When he issued his EO 12958 (1995), President Clinton undid in part what President Reagan did and returned to the more constrained, more transparent approach that Eisenhower, Nixon and Carter had adopted. Relyea, supra note 246 at 400. President Bush, in his EO 13292 (2003) which amended EO 12958, returned to Reagan’s more rigid and less transparent regime by, inter alia, ordering the classification of information when there is doubt as to its secrecy need, adding infrastructures and protection services as categories of classifiable information, and giving the Director of Central Intelligence a veto over declassification decisions made by “the Interagency Security Classification Appeals Panel, unless overruled by the President.” Relyea, supra note 246 at 400-401. As for the mosaic theory, the US Supreme Court had settled the matter in its favour in 1985 in CIA v Sims, and it has since been applied by lower courts more broadly than its intended application to Exemption 1 of the Freedom of Information Act. Pozen, supra at 643.
book entitled *The American Black Chamber* in 1931. In June 1941, Stewart Menzies, the head of the British Government Code & Cypher School (GC&CS), even wrote Prime Minister Churchill that Britain should be careful in its sharing of intelligence with the United States because “the Americans are not in any sense as security minded as one would wish.”

The reference to the GC&CS is apt because it was in World War II that science and technology became permanently embedded into secrecy in a fundamental way. What that meant was that entire domains of knowledge such as cryptography, nuclear physics and rocket science could now be deemed state secrets. To prevent scientific knowledge in these domains from spreading—an objective that was, in principle, abhorrent to scientists—and leaking to possible enemies would require a huge security apparatus. As Gellhorn noted,

> The resolve to try to ‘keep secrets’ was not the act of perverse or irrational men. It was the act of men genuinely and patriotically convinced that secrecy would retard the military development of possible enemies. [...] the attendant expense, effort, and delay were deemed to be positive advantages for the United States.

Already, scientists selected to work on the Manhattan Project to build an atomic bomb had to personally pledge not to disclose any information related to their employment without permission. To that effect, they were “required to read and sign

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267 Quoted in Budiansky, *supra* note 265 at 51.
268 Galison, Navasky, Oreskes, Romero & Neier, *supra* note 253 at 1014 (Galison).
271 Gellhorn, *supra* note 270 at 34.
either the Espionage Act or a special secrecy agreement.” In 1946, the US Army and US Navy, recognizing that leaks about communications intelligence and cryptographic capabilities from World War I to the end of World War II had helped enemies of the United States, recommended new legislation to prevent and punish unauthorized disclosures of such information. To protect information in the nuclear physics domain and sensitive intelligence information from unauthorized disclosure, Congress respectively adopted the *Atomic Energy Act* in 1946 and the *National Security Act* in 1947. The latter gave the Director of Central Intelligence the specific duty of protecting intelligence sources and methods from unauthorized disclosure. In 1949, this was supplemented with specific requirements that intelligence personnel sign non-disclosure agreements as a condition of employment and, with the adoption of the *Internal Security Act* of 1950, with criminal sanctions for unauthorized disclosures. These pieces of legislation illustrate the centrality of state secrets in the Cold War contest pitting the US-led West against the Soviet-led Communist Europe. Military and national security information had to be tightly controlled and any sign of disloyalty uncovered and dealt with. Amplified by the existence of the atomic bomb, this represented a profound shift whereby state secrecy was now essential to the survival of the state. The connection

between secrecy and threat, the secrecy/threat matrix in Joseph Masco’s words, was strongly reemphasized post-9/11.\textsuperscript{276}

If the impetus for further institutionalizing state secrecy came first from Britain, it clearly came from the United States after the Second World War. As Whitaker explains,

It was the United States that emerged clearly in 1947 as the hegemonic force leading the Western bloc against the Soviet bloc. American leadership necessarily involved American influence over its alliance partners. Specifically, it meant American sway in setting security standards, screening criteria, and counter-espionage requirements, especially after the creation of NATO.\textsuperscript{277}

This was quickly realized in Canada. At the end of the Second World War, at a time during which Canadian officials were debating their needs for post-war intelligence organizations, Lieutenant General Charles Foulkes, the Chief of the General Staff, wrote a memo on the establishment of a national intelligence organization in which he clearly articulated the need for state secrecy:

10. A corollary of organization to acquire valuable information is means to safeguard it from foreign powers which will be alertly seeking it. Adequate organization for counter intelligence is required for the following reasons:

(a) We must protect information which is vital to our political and economic interests and our strategic planning,

\textsuperscript{276} Joseph Masco, “‘Sensitive but Unclassified’: Secrecy and the Counterterrorist State” (2010) 22:3 Public Culture 433 at 433.

(b) If we expect to share secret information with friendly powers, the full
confidence of those powers can be enjoyed only if they are satisfied that the
information is protected to no less a degree than they themselves provide,
(c) The fruits of our growing research and development organization, civil and
military will provide a particular target for espionage.

11. No comprehensive coverage of the broad field of secrets of the State is now
provided. It is therefore an essential purpose of this paper to stress its
necessity.278

The Gouzenko case, which involved government officials and scientists, would
quickly prove him right. It comes as no surprise, therefore, that by 1946 Canada’s
wartime National Security Panel had already “developed procedures for classification of
government information, directives for RCMP security screening of public employees
and immigrants, and policies to guide the transition of wartime surveillance and
intelligence operations to deal with perceived Cold War challenges.”279

In 1982, after the loss of CIA officers and sources and in the wake of Philip Agee’s
disclosures of the names of US intelligence operatives, the United States increased their
protection through the Intelligence Identities Protection Act of 1982 (Pub L 97-200) by
making it a crime to reveal their identities (no one to that point had been indicted under
the Espionage Act for such an offence).280 In addition to covering the identities of

278 Lieutenant General Charles Foulkes, “A Proposal for the Establishment of a National Intelligence
Organization” (Ottawa, 22 December 1945) at 2, reproduced in Wesley K Wark, “Creating a Post-War
Intelligence Community,” First Draft, originally written at the Privy Council Office and classified Top
Secret Canadian Eyes Only, released under the Access to Information Act, request A-2011-00527. A copy
was provided to me under request AI-2013-00176 on 28 January 2014.
279 Wright, Binnie & Tucker, supra note 226 at 13.
280 “Agee, the renegade CIA agent, was the main catalyst for the law […]. In 1975, Agee published a
book, Inside the Company: CIA Diary, that revealed undercover CIA operations and named those involved
undercover intelligence officers, it covers as well the identities of intelligence agents, informants and sources.\textsuperscript{281} The latter are now protected in Canada too, but the enabling legislation is very recent,\textsuperscript{282} despite support for such a provision in parliamentary testimonies during the debates that led to the adoption of the \textit{Anti-Terrorism Act} in December 2001.\textsuperscript{283}

After World War II, a number of developments occurred with respect to (1) the assertion by the executive of a state secret privilege before the courts in civil litigation cases, (2) specific handling procedures for state secrets in criminal trials, and (3) a variety of specific state secret exemptions in administrative law. The state secrets privilege is an evidentiary privilege (previously known as a Crown privilege) of the executive that originated in nineteenth-century English jurisprudence in order to protect the common good and which found its way to Canada and the United States.\textsuperscript{284} Blackstone commented, for example, that the duty of a Privy Counsellor requires him “to keep the king’s counsel secret […] [and] to oppose all persons, who shall attempt the contrary.”\textsuperscript{285}

\textsuperscript{281} 50 US Code § 3121. Also, the CIA “shall be exempted from the […] provisions of any other law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.” 50 U.S.C. § 3507.

\textsuperscript{282} Protection of Canada from Terrorists Act, SC 2015, C-9, s 7.

\textsuperscript{283} Anti-terrorism Act, SC 2001, c 41.


Judicial decisions followed that logic through. The next landmark case after *Beatson v Skene*, noted above, occurred in the House of Lords in 1942, establishing the privilege as a very solid precedent. Writing for the majority in *Duncan v Cammell Laird & Co Ltd*, the Lord Chancellor held that an objection to disclose state secrets, because it would be injurious to the public interest, is conclusive if personally considered by a department head (i.e., a minister), but that at all times the decision not to disclose “is the decision of the judge.”  

There has since “been a long history in the UK of judges showing deference to the executive in matters of national security and state secrecy.”  

This was reinforced in 1947 when the *Crown Proceedings Act 1947* gave “the Crown […] a wide privilege of refusing to disclose relevant documents or to answer relevant questions which arise in the course of litigation.”  

However, in 1968, in *Conway v Rimmer* the House of Lords modified *Duncan v Cammell Laird* by determining that a balancing exercise between the public interest of the State and the public interest in the proper administration of justice was necessary and that any non-disclosure “in legal proceedings on the ground that disclosure would damage the public interest should ultimately be decided by the court.”  

Yet, deference to the executive remained an important factor as Lord Reid said: “cases would be very rare in which it could be proper [for a court] to question the view of the responsible minister that it would be contrary to the public interest to make public the contents of a particular document.”

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286 *Duncan v Cammell Laird & Co Ltd (Discovery)*, [1942] UKHL 3 at 11.  
287 Peter Gill, “Reasserting Control: Recent Changes in the Oversight of the UK Intelligence Community” (1996) 11:2 Intelligence and National Security 313 at 320.  
291 *Conway v Rimmer*, [1968] AC 910 at 93G.
The state secrets privilege is equally well entrenched in the United States. It is, some would argue, an implied power deriving from Article II of the Constitution, which allows the president and members of the executive to “withhold information from those who have compulsory power—Congress and the courts (and therefore, ultimately, the public).” Theoretically, it is supposed to strike “a balance between the interests of litigants in vindicating individual rights with the need to safeguard national security interests.” It has been a matter of presidential consideration as early as 1792 when President Washington discussed it with his cabinet with respect to a congressional inquiry into a military matter, but was not recognized judicially as derivative of the president’s powers before the “Watergate-related lawsuits in the 1970s seeking access to President Nixon’s tapes […].” Under the administration of George W. Bush (2001-2009), however, use of the privilege appeared extensive, raising questions “about the parameters of this presidential power.” While the executive privilege is a civil court-exercised presidential power that is limited to information related to the presidential decision-

292 “[E]xecutive branch statements have identified four areas that are asserted to be presumptively covered by executive privilege: foreign relations and military affairs, two separate topics that are sometimes lumped together as ‘state secrets,’ law enforcement investigations, and confidential information that reveals the executive’s ‘deliberative process’ with respect to policymaking.” Morton Rosenberg, “Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments” CRS Report for Congress RL30319 (21 August 2008) at 10. The privilege was used four times between 1953 and 1976, and more than 25 times between 2001 and late 2005. United States of America v. Franklin, Rosen and Weissman, EDVa Case No. 1:05CR225 (Motion for Leave to file Amicus Curiae of the Reporters Committee for Freedom of the Press, 12 October 2005) 3.
295 Rosenberg, supra note 292 at 1.
296 Ibid.
297 Rozell, supra note 293 at 420.
making process and deliberations and that is qualified, not absolute; the state secrets privilege is an absolute privilege (no balancing can occur) meant to protect the United States from harm.

The US Supreme Court has had two landmark and regularly cited cases on the state secrets privilege. The first, known as Totten, recognized that on national security grounds an executive claim of secrecy “is an absolute bar to litigation.” As a general principle, Totten “applies to cases in which ‘the very subject matter of the action’ is ‘a matter of state secret.’” The second case, known as Reynolds, recognized the state secrets evidentiary privilege at common law, but contrary to Totten it does not automatically require dismissal of the case, only the removal of privileged evidence. In both cases, and similarly to the United Kingdom, the privilege belongs exclusively to the executive, must be personally claimed with sufficient details by the department head, and “is not to be lightly invoked.” Whether the claim is accepted is also subject to an

298 Rosenberg, supra note 292 at 2. “[A]s a qualified privilege, the need for secrecy is balanced against the need for disclosure, and if a litigant demonstrates a need for information that outweighs the interests of privacy, the courts will order production.” Pallitto & Weaver, supra note 249 at 93.
299 Pallitto & Weaver, supra note 249 at 93, 99.
300 Totten v United States, 92 US 105 (1876) [Totten].
302 Mohamed v Jeppesen Dataplan, Inc 614 F (3d) 1070 at 1078 (9th Cir 2010).
303 United States v Reynolds, 345 US 1 (1953) [Reynolds].
304 “In some instances, however, the assertion of privilege will require dismissal because it will become apparent during the Reynolds analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” Mohamed v Jeppesen Dataplan, Inc 614 F (3d) 1070 at 1079 (9th Cir 2010).
305 United States v Reynolds, 345 US 1 (1953) at 7. As Page aptly noted: “Yet the Reynolds analysis fails entirely to account for the causal—and sometimes very speculative—inferences required to find public harm from disclosure. Moreover, the Reynolds analysis also fails to account for the magnitude of public harm. For example, strained diplomatic relations might result in a wide range of public harms, from economic recession to nuclear war. In sum, because Reynolds does not require the government to articulate the potential public harm, even in general terms, the likelihood variable of the trigger test is insufficient and the magnitude variable is constrained only by the vague category of ‘national security’ threat.” Michael H Page, “Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims” (2008) 93 Cornell L Rev 1243 at 1259.
independent decision of a judge.\textsuperscript{306} At criminal law, states secret are protected from disclosure pursuant to the \textit{Classified Information Procedures Act} (CIPA) enacted in 1980.\textsuperscript{307} CIPA aims at balancing the discovery rights of a defendant “with the right of the sovereign to know in advance of a potential threat from a criminal prosecution to its national security.”\textsuperscript{308}

In administrative law (access to information), the most important case in today’s context is \textit{Sims}, decided by the United States Supreme Court in 1985.\textsuperscript{309} The majority affirmed the validity of the \textit{National Security Act} of 1947, which obliges the Director of the Central Intelligence Agency to protect sources and methods from disclosure. In so doing, they gave the Director a “broad and unreviewable authority” to exercise his duty and signaled to lower courts to accord the Director a high degree of deference in determining whether something should not be released.\textsuperscript{310}

In Canada, the state secrets privilege derived from British parliamentary and executive practices. Claimed by a minister of the Crown in relation to matters of national security, national defence or international relations, it was, at common law, absolute until 1982.\textsuperscript{311} As noted by Kent Roach, Canada was in fact “one of the last democracies to

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\item \textsuperscript{306} \textit{Al-Haramain Islamic Foundation, Inc v Bush}, 507 F (3d) 1190 (9\textsuperscript{th} Cir 2007) at 1202.
\item \textsuperscript{307} U.S.C. Title 18 app.
\item \textsuperscript{309} \textit{Central Intelligence Agency v Sims}, 471 US 159 (1985) (\textit{Sims}). See its application, inter alia, in \textit{American Civil Liberties Union v Department of Defense}, 723 F (Supp 2d) 621 (SDNY 2010) at 627.
\item \textsuperscript{310} Martin E Halstuk, “Holding the Spymasters Accountable After 9/11: A Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act” (2004) 27 Hastings Comm & Ent /LJ 79 at 83. “It is bad law and bad policy to second-guess the predictive judgments made by the government’s intelligence agencies regarding whether disclosure of [information] would pose a threat to national security.” \textit{American Civil Liberties Union v Department of Justice}, 681 F (3d) 61 (2d Cir 2012) at 70-71.
\item \textsuperscript{311} “This position was codified in the \textit{Federal Court Act}, SC 1970-71-72, c 1, s 41(2) before being amended in 1982. In that year, the Crown privilege provisions were repealed and replaced by section 36.2
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move away from complete judicial deference to governmental claims of secrecy.”

It was not, however, the result of a “selfless desire to share its secrets.” Instead, it was the point at which the executive could no longer “sustain the credibility of the system of absolute privilege […].” This situation had also by then become pressing because of the new *Charter of Rights and Freedoms.* Yet, “old habits of absolute secrecy died hard,” as the Federal Court was quickly seen as reluctant to challenge secrecy claims.

As we shall see in chapter 5, this historical pattern of judicial deference may have begun to change in the post-9/11 era.

In civil litigation, the state secrets privilege, contrary to the United States and the United Kingdom, has rarely and only recently been invoked. When it was first used in 1986, the Federal Court of Appeal held that “the public interest in national security was to be balanced against other public interests, including the fundamental principles underlying the administration of justice.”

### 3.4 “The age of transparency”

The practice that the state ordinarily and necessarily keeps secret is popularly accepted and recognized at law. History professor Hugh Roberts, writing in the *London*
Review of Book, uncritically notes that “states—at any rate, all states that endure—have their hidden depths and, for very cogent reasons, make a point of veiling what they get up to—let’s speak French here—by means of ‘le secret d’État’ [the state secret].”318 That being so, it is also generally agreed that we live in an age of transparency because our modern political democratic culture favours publicity and transparency in public matters and distrusts what cannot be subjected to public scrutiny.319 Yet, aside from the most radical of activists, no transparency advocate goes as far to argue that complete transparency in all matters of state is a public good worth pursuing at all cost.320

When associated with access to information and its free circulation, transparency rests on the assumptions that it is necessary for successful social interactions and the exercise of political power. It stands in opposition to secrecy, corruption and ignorance, and in the face of today’s financial opaqueness, post-truth politics, and algorithmic black-boxes, it remains in high demand.321 Paradoxically, information is highly mediated,322 and calls for transparency tend to conceal the level of political and economic control over

322 “Information needs a technological infrastructure, a legal framework, various forms of social and political organisation, the expenditure of time and energy—it requires people doing work. Once produced, it also needs to be collated, sorted, categorised, and stored, it needs to be put in circulation, combined with other information, edited, altered, translated, and deemed relevant; displayed, advertised, promoted, consumed, and incorporated—in short, we cannot properly assess it without recourse to some form of mediation.” Ibid at 5.
its communication. Moreover, the more abundant information is does not necessarily results in a better informed citizenry and enlightening political deliberations. This section will not resolve this paradox. However, it will lay out the events and legal developments that partially lifted the veil over state secrets.

The road to the “decade of openness,” which lasted up to the events of 9/11, started with the US legal community in the 1930s, which first advocated for less secrecy and greater transparency in matters of state. But it took the end of World War II and the onset of the Cold War for the first organized movement to advocate greater transparency (disclosure was the term commonly used at the time) in matters of state activities and world events. An Associated Press executive in a speech in 1945 was reportedly the first one to popularly advocate for the “right to know” in the name of political freedom. The freedom of information campaign that subsequently ran throughout the late 1940s, the 1950s and the 1960s was comprised of print and broadcast media outlets, members of Congress, the legal establishment, the scientific community and a host of consumer rights

323 Ibid.
324 “Mobilised as a communicational imperative, transparency conflates abundance of information with political deliberation, replacing action with an ever-increasing circulation of messages. The result is paradoxically immobilising: the more information is passed off as communication, the more our voices become submerged in an endless circuit of transient opinions and sound bites.” Ibid at 19.
325 Thomas S Blanton, “Beyond the Balancing Test: National Security and Open Government in the United States” (paper presented at the Symposium on National Security and Open Government, 5 May 2003), p. 19. “Three dynamics slowed and ultimately stopped this cascade of openness by the end of the 1990s. First, Republican partisans in control of the Congress sought revenge for Clinton’s 1996 re-election victory by chasing wisps of conspiracies involving Chinese political contributions and nuclear secrets [Wen Ho Lee]. Second, the CIA’s brief period of attempting greater openness ended with the arrest of double agent Aldrich Ames, who had betrayed numerous CIA assets in Russia; and the CIA reverted to its normal hyper-security. Finally, in 1998, President Clinton went on the defensive in the Monica Lewinski affair […]. By 1999, retrenchment was in full swing.” Ibid at 21.
326 Schudson, supra note 320 at 6-7.
and public interest groups. The first response of government came in the form of the *Administrative Procedure Act* (APA) of 1946, which permitted citizens to request official records from the administration if they were properly and directly concerned by the information sought. But even if they were, the administration remained entitled to refuse the disclosure of any information deemed confidential or requiring secrecy as a matter of public interest.

In the three decades that followed World War II, the democratic state in the US and elsewhere came under increasing pressure not only to account for its behaviour at regular elections, but also in the course of its everyday activities. Public opinion polling, the constant watchfulness of the news media, think-tanks and non-governmental organizations, and the assertiveness of parliamentary watchdogs all contributed to greater openness on the part of the state. This is best exemplified by the Congressional examination in the mid-1970s of a series of illegal activities secretly carried out by the Central Intelligence Agency and in Canada by the examination by a Commission of Inquiry a few years later of abuses of power secretly committed by the Security Service of the Royal Canadian Mounted Police.

Throughout the 1960s and 1970s, the media became more adversarial in nature and engaged in the publication of leaked state secrets (the Pentagon Papers in 1971 being the best-known and most-influential example), showing that secrecy was not always...

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328 Halstuk & Chamberlin, supra note 327 at 522.
329 Ibid.
330 Ibid, supra note 320 at 24-25.
justifiable.\textsuperscript{332} In 1966, pushed by Congress and long after Sweden and Finland had done so, the \textit{APA} was finally replaced with a full-fledged \textit{Freedom of Information Act (FOIA)}. The burden placed on the requester in the \textit{APA} was now placed upon the state, which had now to justify why the information requested could not be released using exemptions built into the \textit{Act}. It took a long time for Canada and the United Kingdom to emulate the United States. Canada adopted its \textit{Access to Information Act} in 1982, taking effect in 1983, and the United Kingdom its \textit{Freedom of Information Act} in 2000, taking full effect only in 2005.\textsuperscript{333} Promised by the Labour Party in the 1997 general elections, the latter superseded a non-statutory \textit{Code of Practice on Access to Government Information}, and introduced a glaring omission in comparison to the American and Canadian acts: it excludes the possibility of requesting any information from or about the intelligence services. Because of “its large number of exemptions and the amount of discretionary power given to ministers,” the Act has been characterized as “a sheep in wolf’s clothing.”\textsuperscript{334}

In the 1970s, the “well-known fact that British authorities are exceptionally secretive”\textsuperscript{335} was shattered a bit when the United Kingdom relaxed its position on the

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\item[333] “Traditionally the central reason for successive British governments rejecting a freedom of information act has been the perception that it would undermine the principle of ministerial responsibility to Parliament.” Mark Evans, \textit{Constitution-Making and the Labour Party} (Basingstoke: Palgrave Macmillan, 2003) at 194.
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secrecy of wartime intelligence. In 1974, it allowed, not without some anxiety, former Secret Intelligence Service officer F. W. Winterbotham to write the first popular history of signals intelligence during the Second World War, whose accomplishments had been previously briefly hinted at.\textsuperscript{336} The impact of Winterbotham’s book was important because it forced revisions of Second World War histories that had not known of the role played by this “most secret source,” and lead the British government to authorize the release of extant materials to the then Public Record Office.\textsuperscript{337} Prompted by the Ponting case, noted above, and the \textit{Spycatcher} affair in 1987,\textsuperscript{338} the adoption of the \textit{Official Secrets Act} in 1989, which finally repealed section 2 of the \textit{Official Secrets Act 1911}, was

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  \item be traced back at least to the 1911 \textit{Official Secrets Act} and which is still firmly established as one of the ruling conventions of conduct in Whitehall.” F Nigel Forman, \textit{Mastering British Politics}, 2\textsuperscript{nd} ed (Houndmills: Macmillan Education Ltd, 1991) at 225. “[…] obsessive addiction to official secrecy which in Britain denies the academic access to much of the basic information […]” Jack Hayward, “Cultural and contextual constraints upon the development of political science in Great Britain” in David Easton, John G Gunnell & Luigi Graziano, eds, \textit{The Development of Political Science: A Comparative Survey} (London, UK: Routledge, 1991) 93 at 99. “[…] the tradition of official secrecy in this country has always been strong […].” Tom Bingham [formerly Master of the Rolls, Lord Chief Justice and Senior Law Lord], \textit{Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law} (Cambridge, UK: Cambridge University Press, 2010) at 76. Wilson argues that such a culture of secrecy cannot be found in the United States: “For decades, the British quietly have accepted a level of governmental secrecy that would have led to rebellion in the United States. It is inconceivable that the United States would ever adopt an Official Secrets Act comparable in scope and severity to that which long has been on the books in Great Britain.” James Q Wilson, \textit{Bureaucracy: What Government Agencies Do and Why They Do It} (New York: Basic Books, 1989) at 301.
  \item A case about a memoir published in Australia by a former intelligence officer that the British government tried to ban. See Peter Wright with Paul Greengrass, \textit{Spy Catcher: The Candid Autobiography of a Senior Intelligence Officer} (New York: Viking, 1987) and Malcolm Turnbull, \textit{The Spy Catcher Trial: The Scandal Behind the #1 Best Seller} (Topsfield: Salem House, 1989).
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also perceived as another sign of relaxation of the United Kingdom’s strong culture of secrecy.\textsuperscript{339} On the other hand, the new \textit{Act} criminalized, in light of \textit{Spycatcher}, any unauthorized disclosure of information by members of the security or intelligence services while denying any possibility of a defence based on public interest necessity or the fact that the information at issue was already in the public domain.\textsuperscript{340}

In Canada, the \textit{Security of Information Act} (SOIA), adopted a few months only after the 9/11 attacks, renamed and revised the \textit{Official Secrets Act}.\textsuperscript{341} It added new provisions on special operational information (permanently binding to secrecy designated public servants having access to such information), acts preparatory to espionage and the harbouring and concealing of individuals involved or expected to be involved in SOIA offences.\textsuperscript{342} Of note, the core espionage and leakage offences from the \textit{Official Secrets Act} were retained in the SOIA and references to terrorist aims were added to section 3 with respect to espionage offences (which refers to political, religious or ideological advocacy for the benefit of a foreign entity or terrorist group).\textsuperscript{343} But like its predecessors, the SOIA was adopted without much parliamentary consideration,\textsuperscript{344} and

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\textsuperscript{340} Evans, \textit{supra} note 333 at 198, 201.

\textsuperscript{341} SOIA was enacted as a component of the \textit{Anti-Terrorism Act}, SC 2001, c 41, part 2. The \textit{Anti-Terrorism Act} also made amended the \textit{Criminal Code}, the \textit{Evidence Act}, the \textit{National Defence Act} (the latter by adding a mandate and review mechanism for the Communications Security Establishment), and other acts.

\textsuperscript{342} Annemieke Holthuis, “Seeking Equilibrium: Canada’s \textit{Anti-Terrorism Act} and the protection of Human Rights” (paper delivered at the 2nd International Forum of Contemporary Criminal Law–Implementing UN Conventions on Criminal Justice, Beijing, October 2007) [unpublished] at 7.

\textsuperscript{343} These latter changes are similar to the changes major made in the United Kingdom by the \textit{Official Secrets Act} in 1989.

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still has offences that are very broad.\textsuperscript{345} Overall, the reform of the \textit{Official Secrets Act} was long-overdue, as Canada, after the \textit{Charter of Rights and Freedoms} was adopted in 1982, had been reluctant to prosecute because of fears of successful challenges and adverse publicity (see chapter 2, note 22 for additional details).

During the 1990s, the global demands for transparency exploded just as the need for the extreme secrecy of the Cold War quickly receded.\textsuperscript{346} The following NGram graph of relative usage frequency over time (1800 to 2008) (see Figure 2 below) clearly shows the dramatic increase in usage of the term “transparency” in the 1990s in books published in English.\textsuperscript{347}

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\textsuperscript{345} Roach notes that “[t]he revamped Official Secrets Act’ also contains some extremely broad concepts and offences. Section 3 of the \textit{Security of Information Act} defines the concept of prejudice to Canada’s safety or interests about as broadly as is humanly possible.” Kent Roach, “Ten Way to Improve Canadian Anti-Terrorism Law” (2005) 51 Crim LQ 102 at 107. See also Forcense, \textit{supra} note 231 at 69-75.


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Several factors may help explain this change. Firstly, international organizations and non-governmental organizations rallied their effort to stem corruption (Transparency International, for instance, was founded in 1993) by promoting transparency and demanding accountability in both the public and private sectors. But it took until 2012 before a political party made that its primary raison d’être. That year in Iceland, the Pirate political party, which has its roots in Sweden, was launched by Internet activists in order to advocate “for real transparency and responsibility in politics, easier access to information, direct democracy, freedom of information and copyright reform.”

Secondly, a host of transparency advocates argued that freeing information from state shackles was a universal democratic standard (Article 19 of the Universal Declaration of

Human Rights and Article 19 of the International Covenant on Civil and Political Rights both create a right to disclosure of information\(^{349}\) and even, in the view of international organizations—including the United Nations General Assembly,\(^{350}\) the Organization of American States,\(^ {351}\) European Court of Human Rights,\(^ {352}\) and the Inter-American Court of Human Rights\(^ {353}\)—a human right\(^ {354}\) (although they each acknowledged that not all information would be appropriate for release, for instance information of a private nature or having to do with national security). Democratic governments have favourably and by now near universally responded to such pressure with the adoption, for example, of access to information legislation.\(^ {355}\) Thirdly, scholars adopted the term and developed

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\(^{349}\) Forcense, *supra* note 231 at 56.

\(^{350}\) United Nations General Assembly Resolution A/RES/59(I), 14 December 1946, and General Comment No. 34 of the United Nations Human Rights Committee, UN document CCPR/C/GC/34, 12 September 2011.


\(^{352}\) Társaság A Szabadságjogokért v Hungary, Application No. 37374/05, 14 April 2009.

\(^{353}\) In the Case of Claude Reyes and ors v Chile, Merits, reparations and costs, IACHR Series C no 151, IHRL 1535 (IACHR 2006), 19 September 2006, Inter-American Court of Human Rights [IACtHR], online: <http://www.corteidh.or.cr/docs/casos/articulos/serie_c_151_ing.pdf>.


\(^{355}\) By 2011, about 90 countries had adopted access to information legislation. David Banisar, “The Right to Information and Privacy: Balancing Rights and Managing Conflicts” (2011) The International Bank for Reconstruction and Development Working Paper, at 3. However, it is fair to observe that “FOI laws are not sufficient for governments to seem (or in fact be) open. Alasdair Roberts outlines numerous methods by which a bureaucracy intent on keeping information out of the public domain may do so. These range from changes in record-keeping practices to restructuring government services to not keeping records at all.” Tom Skladzien, Book Review of Christopher Hood & David Heald, eds, *Transparency: The Key to Better Governance?* (2007) 38:263 Economic Record 491 at 492.
research programs around it, which lead in turn to a large quantity of published materials.

As Ball further explains,

As scholars became aware of transparency, they, in turn, interpreted, reinterpreted, and expanded its meaning from a means to battle corruption to a means to encourage open decision-making and public disclosure, to increase accountability, and as a value to incorporate in policies and by which to evaluate policies.\(^{(356)}\)

The period following 9/11 has not abated demands for transparency and accountability. The leakage of state secrets, however, has now reached a dimension never seen before. We will here recall that the first major leak of state secrets of major significance in terms of its size was that of the Pentagon Papers in 1971 by Daniel Ellsberg and Anthony Russo.\(^{(357)}\) These Papers had been printed in 47 volumes with a total of 7,000 pages, taking Ellsberg and Russo weeks to photocopy and manually provide to the print media. The massive leaks of state secrets in the United States in 2010 by Chelsea Manning, disseminated globally by the online platform Wikileaks,\(^{(358)}\) and in 2013 by US government contractor Edward Snowden epitomize the role of advanced digital


\(^{(358)}\) These included, starting in April 2010, “the uploading of a video (which it titled Collateral Murder) showing a lethal 2007 US Army Apache helicopter attack on a group of men in Baghdad.” It was followed “in July 2010, [by] tens of thousands of classified documents from the war in Afghanistan; in late October 2010, [by] hundreds of thousands of documents about the Iraq war; from late November 2010 through early 2011, [by] diplomatic cables between the U.S. State Department and its diplomatic missions around the world; and in April 2011, [by] files concerning detainees held as suspected terrorists at the Guantanamo Bay military prison. In September 2011, all of the State Department cables were made publicly available in unredacted form after reporters for the Guardian newspaper inadvertently disclosed the encryption key for the files, copies of which were accessible on the Internet.” Mark Fenster, “Disclosure’s Effects: Wikileaks and Transparency” (2012) 97 Iowa L Rev 753 at 762-763.
technology in the clash between state secrecy and transparency proponents and the advent of radical transparency in the area of national security. Voluntary state transparency ensures equitable information flows among citizens, which in turn enables them to judge what the state is doing on their behalf and to hold it to account. When normal voluntary transparency mechanisms are deemed deficient, radical transparency mechanisms forcing total openness often surface, causing controversy and angst. Radical transparency mechanisms cause involuntary transparency by decentralizing and disrupting established communications flows between citizens and the state; in other words, they change “not only the kind of information that is made visible but also, and more crucially, the conditions of visibility in general. Some of Wikileaks’ projects would certainly fulfill those criteria.” These mechanisms, for which Wikileaks is the most notorious, essentially make information protected by the state (or private entities) from unauthorized disclosure abundantly and globally available via the Internet. How this materializes itself takes different forms, as the development, growth and decline of Wikileaks attests.

The Wikileaks platform was initially designed to give an equal and anonymous voice to all in sharing the truth in support of good governance. However, it was quickly superseded by an autonomous platform that exposed massive amounts of state-protected (and private) information, without providing a public forum to discuss the leaks or a

360 Birchall, Radical Secrecy, supra note 9 at 90.
mechanism to engage the media.\textsuperscript{363} Wikileaks’ next iteration targeted subject-matter experts (e.g., human rights activities, journalists) to analyze and comment on the documents posted online by Wikileaks in order to achieve maximum political impact and global media interest. From participatory democracy at the onset, Wikileaks had moved to information discovery and issue representation.\textsuperscript{364} With the posting online of the 2007 Baghdad airstrike video, Wikileaks morphed again, this time into a place devoid of a public space for deliberation, focused instead on particular interests, such as excess state power, and an organization needing financial support for its point of view. From there, it contracted—losing along the way much editorial control—with established media like \textit{The Guardian}, \textit{The New York Times} and \textit{Der Spiegel} to disseminate the US Afghan and Iraqi war logs and the US State Department diplomatic cables. This latter move fractured Wikileaks’s team and vision—now that Wikileaks’s original radical democratic beliefs were colliding “with the neoliberal politics of establishment journalists” who “often work with the state to keep information from the public”\textsuperscript{365}—and ushered a plethora of new transparency platforms, with a couple of dozen mimicking Wikileaks.\textsuperscript{366}

The traditional media duly, if selectively, reported on the State Department diplomatic cables given to Wikileaks by Private Manning, but within a discursive framework that largely painted Wikileaks as a threat to the national security of the United States and its allies for helping terrorists and other adversaries, and its founder, Julian

\begin{footnotes}
\item[363] \textit{Ibid} at 9.
\item[364] \textit{Ibid} 10.
\end{footnotes}
Assange, as a criminal or a terrorist himself. The alternative media, using a radical transparency discourse, by contrast were more nuanced and had no qualms referring to Wikileaks as a whistleblower organization. They did not refrain from pointing out the biased reporting of the traditional media or from criticizing US foreign policy, but in so doing more readily engaged in serious debates between the advocates and opponents of Wikileaks. Parallels were made with the Pentagon Papers leaked by Daniel Ellsberg in 1971, in the sense that what was leaked should have been known by the public in the first place, and that it was not anti-democratic.

The tensions between traditional and new media and the struggles to control information flows show that social power is increasingly constituted in the act of revelation. This is facilitated by the features of the Internet, in particular its resilience, and the inability of the state to erase from the Internet all leaked state secrets without taking the entire Internet itself down. To wit, Manning’s massive leaks were done entirely anonymously via the Tor (The Onion Router) network. It was a former hacker Manning identified herself to who reported her to the authorities. While Wikileaks was targeted by a non-attributable denial of service attack, its ability to keep documents online was not technologically affected (content was rapidly decentralized to other sites and domain names). Instead, Wikileaks saw its capital and other assets targeted through a series of measures (they included a US government letter to Amazon

367 Handley & Rutigliano, supra note 365 at 749-750.
368 Ibid at 750-753.
370 Zajácz, supra note 361 at 491.
371 Ibid at 496.
suggesting that its web hosting of Wikileaks was illegal and should cease; credit cards companies refusing to process donations, issuing subpoena to Twitter to obtain personal information on Wikileaks activists, etc.), and by 2012 its new publication of sensitive official documents reduced to a trickle.\textsuperscript{373}

Curran and Gibson have concluded that Wikileaks failed to live up to its radical ambitions, obfuscated by Wikileaks’s leader Julian Assange’s personal politics and problems,\textsuperscript{374} and also that by massively leaking US state secrets, it ushered a global culture war which, broadly speaking, can be divided into two groups. On the one hand are the forces of state secrecy and institutional power. These forces—exemplified most prominently by the US government—defend the pragmatic necessity of state secrecy in order to preserve the integrity of national security. On the other stands Wikileaks and its allies, who argue that the political agenda should not be dictated from above and that a priori state secrecy is antithetical to the idea of a free and open society.\textsuperscript{375}

It remains that in the age of transparency leaks are considered by many as essential to the preservation of our democratic way of life.\textsuperscript{376} In a post-9/11 context, none of the human rights abuses that surfaced in relation to counter-terrorism activities would have initially been known without them, or lead, in the United States, to the adoption of the Detainee Treatment Act of 2005, which prohibits the inhumane treatment of prisoners by

\textsuperscript{373} Zajácz, \textit{supra} note 361 at 496-499.
\textsuperscript{375} \textit{Ibid} at 303.
\textsuperscript{376} Mika C Morse, “Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers” (2010) 23 Geo J Leg Ethics 421 at 424.
limiting interrogations to the techniques listed in an US Army manual on intelligence interrogation. Because these leaks occurred, a public debate took place and legal safeguards put in place or reinforced. This speaks to Florini’s assertion that transparency in and of itself does nothing. It requires someone to do something with what is out there.

3.5 Conclusion

Secrecy has been an historical invariable, but its practices have varied in form and scope from one historical period to another. For a very long time, the handling of state secrets was easy and straightforward. They were known by few and ultimately belonged to the king, who had the power to punish any transgression of his rules concerning dissemination. The evolution of our political and legal systems along with historical contingencies of various kinds (wars, scientific advances…) have fundamentally altered the management of state secrecy. It is, in our modern times, a complex endeavour to steer, delimit and even comprehend.

In a sense, we have come full circle. Secret keepers today use the same arguments as the sovereigns of absolutist states (the divine rights of kings—judges and the public have incomplete or lack of relevant knowledge to ascertain whether or not state secrets should be released), and as Machiavelli’s reason of state (security, which requires secrecy to be

377 Ibid at 425-426.
378 “Transparency is not always a good thing [national security, individual privacy, trade secrets]. It can be neutral, or even harmful. It merely enables people to acquire information. It does not by itself enable people to do anything with that information. Nor does it convey any understanding of the meaning of the information. It does little good if no one cares to do anything with the information. And sometimes the sheer cost of amassing information far outweighs the public benefit that would accrue from its disclosure.” Ann M Florini, “Increasing Transparency in Government” (2002) XIX: 3 International Journal on World Peace 3 at 15.
effective, is the first responsibility of the state and cannot be denied or ignored). They also use fear (harm will ensue if state secrets are released to the public) and their position of authority (secret keepers are government experts who know better) to assert that state secrets should not be disclosed.\(^{379}\) The discourse of law (because of it has the effect of legitimizing what it says, states or asserts) is now the “divine word, the word of divine right, which, like the *intuitus originarius* which Kant ascribed to God, creates what it states […].”\(^{380}\) The next chapter looks at how this discourse is constructed by secret keepers.

\(^{379}\) As Edelman notes: “Increasingly, public officials cite their specialized knowledge and the need for expert planning as reasons to exclude from politics the decisions that impinge most heavily upon public well-being. Neither the public nor Congress, we are now told, can be trusted to decide when to wage or escalate war because only the executive has the special intelligence [state secrets] to know such things.” Murray Edelman, “Language, Myths, and Rhetoric” (1998) 35:2 Society 131 at 138.

Chapter 4: The semantic practices of the keepers of state secrets, or
how to build a powerful discourse

“You can’t handle the truth! . . .
You have the luxury of not knowing what I know! . . .
My existence, while grotesque and incomprehensible to you, saves lives!”

Colonel Nathan R. Jessup (Jack Nicholson) in the movie A Few Good Men. 1

4.1 Introduction

This chapter examines the rhetorical devices that secret keepers use to argue against the disclosure of state secrets. While the academic literature also refers to these devices as argumentation, linguistic, semantic or textual devices, the rhetorical labelling better encapsulates their intended use by secret keepers, which is to bring others to their point of view. 2 The devices under examination—lists; arguments from ignorance, authority and consequences; temporal devices; and analogical reasoning—identified on the basis of their appearance and recurrence 3 in multiple texts, 4 do not work independently from one another. As the textual statements throughout this chapter show, they are intertwined and, although in any given statement one may dominate over another, mutually reinforcing:

1 Quoted in Melley, supra note 156 at 15.
2 In the liberal arts tradition, “discourse aimed at persuading others to accept the seemingly probable is rhetorical.” James L. Kenneavy, A Theory of Discourse (New York: WW Norton & Company, 1980) at 56. Legal pleading is a classic category of rhetorical discourse and a source for the majority of examples in this chapter. Ibid at 218.
3 “It is common sense among DL [discourse linguistics] researchers that only the analysis of a fairly large collection (i.e., at least some hundreds) of texts (of a multitude of genres) can reveal discursive patterns, since ‘common’ knowledge manifests itself in recurrent linguistic behaviour.” Jürgen Spitzmüller & Ingo H Warnke, “Discourse as a ‘Linguistic Object’: Methodical and Methodological Delimitations” (2011) 8:2 Critical Discourse Studies 75 at 76. “The key question, thus, is how actors can be positioned, or how they position themselves [claims of expertise or authority], respectively, in the discourse in question.” Ibid at 86.
4 “Transtextual analysis is […] first and foremost a research for patterns that emerge from multiple texts. Therefore, the analyst needs to watch out for recurrent phenomena. In other words, s/he needs to check which of the phenomena that have been found in individual texts, i.e., on the intratextual layer, systematically re-occur in multiple texts of the discourse corpus.” Ibid.
read together they give structure and coherence to the manner in which state secrecy is talked and written about, more specifically how it is advocated for and what is put into the balance on the other side if the assumption is disclosure.

Unpacking the semantic practice of secret keepers by disentangling the devices in play allows us to better see the role these devices individually and then collectively perform in shaping our social understanding of state secrecy. With the aid of these devices, secret keepers appeal to logic and rationality, emotion, ethics (in the sense of establishing trustworthiness in the eyes of their audience), and the immateriality of time in order to persuade judges and the public that they are correct in opposing the disclosure of state secrets. Lists flatten complexity by appearing content-homogenized and de-contextualized. By aggregating the consequences they deem relevant and important, secret keepers seek to amplify the possible degree of harm that unauthorized disclosures

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5 As Kress argues, a discourse “provides a set of possible statements about a given area, and organises and gives structure to the manner in which a particular topic, object, process is to be talked about.” Gunther Kress, *Linguistic Processes in Sociocultural Practice* (Victoria, Australia: Deakin University Press, 1985) at 6.

6 I use the term device in this thesis as it is most commonly used, that is, to include what is made or adapted for a particular purpose. Each of the devices under review are used in the discourse carried out by secret keepers for a particular purpose (the nondisclosure of state secrets) and can be adapted as required (in tone, gravity, length, etc.). See Vivien Burr, *An Introduction to Social Constructionism* (New York: Routledge, 1995) at 61.

7 When rhetoric is used, “[i]t seems fairly clear that persuasion has to do with the ‘plausible,’ with apparent proof and seeming logic […].” Kenneavy, *supra* note 2 at 220.

8 Emotional terms and references are usually present in persuasive discourse. *Ibid*. The discourse of law largely differs in this regard as a more measured language is preferred.

would cause. Secret keepers also argue that they are best positioned and have the authority—given their expertise and experience, their knowledge of past harmful disclosures, their access to secrets not available to others and the magnitude of risks—to assess the likelihood of harm. They stress that the consequences of disclosing the secrets they seek to protect, even if innocuous, are fundamentally tied to matters of life and death and national security. The passage of time, they add, is inconsequential: harm could happen tomorrow or a long time from now, and mitigation is assumed to be near impossible. With respect to judges, however, it is important to note, as we did in chapter 1, that emotional language has been shown to be much less persuasive than a measured and objective language, and therefore it appears rarely in legal texts.¹⁰

As a semantic practice, the recurrent use of rhetorical devices produces authoritative meaning: it has by design a truth production component¹¹ about the effects of disclosing state secrets (that is, disclosure can cause harm at any moment) and a prescriptive component about what to do with them (that is, not to disclose). In other words, the recurrent use of rhetorical devices offers a way to secret keepers of structuring their truth claims. By not deviating from these claims, secret keepers appear to speak truthfully, an effect that is reinforced by their claim to expert knowledge and authority in matters of national security. Analyzing the use of these devices allows us to grasp the meanings

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¹⁰ See, inter alia, Ryan C Black, Matthew EK Hall, Ryan J Owens & Eve M Ringsmuth, “The Role of Emotional Language in Briefs before the US Supreme Court” (2016) 4:2 JL & Courts 377 at 377. Of course, emotion does not only occur in literal inflammatory statements or purple prose, but can be produced through a variety of discursive mechanisms.

¹¹ As Hunt noted, Plato views the rhetorician as “presenting to the audience something which at least resembles the truth.” Everett Lee Hunt, “Plato and Aristotle on Rhetoric and Rhetoricians” in A M Drummond, ed, Studies in Rhetoric and Public Speaking (New York: Century Co., 1925) 1 at 37, quoted by Kenneavy, supra note 2 at 219. Aristotle, in turn, sees rhetoric as dealing with what seems probable. Ibid.
secret keepers live by, “meanings which they define according to a constitutive semantic logic.”^{12}

The discourse of secret keepers today, expressed by serving or retired national security experts, is legitimated by legislation enacted to protect certain types of information from disclosure and the reported words of judges in judicial decisions. In Canada and the United Kingdom, judges place more emphasis on interpreting legislation than judges in the United States, where judges must more directly contend with the division of powers between the branches of government and a much higher degree of litigation, suits and charges. Secret keepers in the United States therefore have many more legal sources to draw upon than their counterparts in Canada and the United Kingdom. Legitimated by the discourse of law, the discourse of secret keepers has the ultimate effect of mitigating—if not silencing—the potential influence of alternative discourses on state secrecy. This effect, which is examined through the discourse of law in the next chapter, is important because it connects the texts used in this chapter with the implied interests of secret keepers as they are reflected in social practices.

### 4.2 Lists: flattening complexity and amplifying potential harm

The act of listing is an ancient linguistic expression.^{13} As Urs Staeheli notes, listing as a mode of knowledge and communication promises “order as well as open-endedness, exhaustiveness as well as infinite addition.”^{14} Like other devices, lists produce effects;

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they do not only compile what is already known, they do things.\textsuperscript{15} For instance, they flatten complexity by appearing content-homogenized and de-contextualized (as they can be applied across the board).\textsuperscript{16} They draw things together and make us see connections between divergent items. As lists are part of our everyday lives—they are everywhere—their existence and use for a wide range of purposes do not surprise us.\textsuperscript{17} By omitting such “distracting” details, and by bringing together a set of reasons that are used to make claims for the nondisclosure of state secrets, lists provide a way for secret keepers to describe and pre-empt the harm associated with the social world of state secrecy.

Lists developed by secret keepers conform to the defining characteristics of lists developed by Lena Jayyusi.\textsuperscript{18} First, the items listed have a relationship to each other. Second, the lists have an instrumental purpose (they are meant to persuade judges and the public that state secrets should remain concealed from public view). Third, the reasons listed are specific to what is being argued; they cannot be used for other purposes. Finally, the lists are adequate and relevant in the sense that they meet the stated purpose of their existence: they provide evidence for the non-disclosure of state secrets, and as such are particular kinds of rhetorical intervention to prevent disclosure. They also conform to John Hathorne’s \textit{Rule of Praxis}, which states that “possibilities which ought

\textsuperscript{15} De Goede & Sullivan, \textit{supra} note 14 at 69.
\textsuperscript{16} \textit{Ibid} at 70.
\textsuperscript{17} Liam Cole Young, \textit{List Cultures: Knowledge and Poetics from Mesopotamia to Buzzfeed} (Amsterdam: Amsterdam University Press, 2017) at 9.
not to be ignored in any practical reasoning undertaken by the subject are relevant [...]"\(^{19}\)

Secret keepers use the form of the list to help judges to view their reasons for non-disclosure as standing well together, and therefore bring a high degree of consistency across lists. Because of amplification by aggregation,\(^ {20}\) these reasons give the impression of comprehensiveness and exhaustiveness (what else could possibly go wrong?)\(^ {21}\)

Usually produced as part of affidavits to inform legal proceedings, lists are artificially decontextualized to create the impression of rationality and of universality. They offer a stereotyped and plausible view of the reasons against disclosure, ready to be used in any situation.\(^ {22}\) While these reasons are meant to be seen as comprehensive and exhaustive, their listing is not meant to remove the flexibility and discretion that secret keepers have learned to appreciate (as the reasons can be amended from one brief, affidavit or testimonial to another); rather their listing is meant to amplify the importance of not

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20 “[T]here is a tendency to interpret lists as being comprehensive.” Peter M Tiersma, Legal Language (Chicago: The University of Chicago Press, 1999) at 84.

21 This is a similar situation as that encountered with lists associated with the practice of security more generally. As MacDonald and Hunter have noted: “This strategy of generating lists of disparate practices and processes, gives the impression of a ‘hyper-complexity’ associated with the practice of security, although the precise relations between the disparate elements are often left unspecified.” Malcolm N MacDonald & Duncan Hunter, “Security, Population and Governmentality: UK Counter-terrorism Discourse (2007-2011)” (2013) 7:1 Critical Approaches to Discourse Analysis across Disciplines 123 at 128.

22 Akin to Aristotle’s notion of topic. Cope, using Cicero, makes this particular usage clear: “As in writing, we ought to have the letters that we require to use ready at hand, and not to be obliged to hunt about for them whenever we want them, so when a case is to be argued we should have a stock of arguments all ready classified, arranged in ‘places’ where we can make sure of finding them, and ticketed and labelled as it were in their repository, or like bottles in the bins of a cellar, so that they offer themselves to us at once as soon as they are required ([…] paraphrasing Cicero, de Oratore, II, 30, 130).” Edward M Cope, An Introduction to Aristotle’s Rhetoric with Analysis, Notes, and Appendices (London, UK: Macmillan & Co., 1867) at 126, quoted by Kenneavy, supra note 2 at 246.
disclosing state secrets “by means of diversified details.”

This enumeration of relevant details, given their nature, has the effect of increasing the apparent degree of harm that unauthorized disclosures would cause. As well, a properly constructed list “will almost inevitably color the interpretation of the general category X [in the case at hand, state secrecy]; in fact, some courts have explicitly so held.”

It shall be recognized as well that while lists provide a broad and extensive understanding of the reasons adduced to prevent the disclosure of state secrets, that understanding is not necessarily deep and intense. As there are no apparent selection criteria, the lists are meant to be malleable in the service of their pre-emptive function.

The lists differ slightly from country to country, as one would reasonably expect, but resemble one another in scope and possibilities of harm. They repeatedly make reference to sets of reasons that include the need to protect the identity of intelligence personnel and human sources, the need to protect methods by which state secrets are obtained, the need to protect intelligence relationships with foreign entities, and the need to protect the effectiveness of security and intelligence agencies. If these needs are not met through the disclosure of state secrets, the implications are that a number of negative effects would ensue, potentially causing harm to national security and particular persons.


25 See Mahoney v Baldwin, 543 NE (2d) 435 at 436 (Mass Ct App 1989) and Tiersma, supra note 20 at 85.


27 De Goede & Sullivan, supra note 14 at 73.
In this section, I have selected three statements that are representative of such lists, one each from the United States, the United Kingdom and Canada. Each covers the various reasons that are asserted jointly when listing is used. The first statement, from the United States, is extra-judicial, while the latter two are taken from judicial proceedings. Such lists are regularly used in judicial proceedings dealing with matters concerning the protection of state secrets and their disclosure and are often used verbatim from one case to another. The reason they are so commonly used is that they succinctly and forcefully help secret keepers set the context for the more detailed reasons on particular secrets that follow during judicial proceedings. As the statement for the US illustrates, such lists are easily transferable to the non-judicial discourse of secret keepers.

A George W. Bush administration attorney used a list in his testimony before the US Congress:

Leaks of national security information can compromise all aspects of our national security program. They can compromise specific national security operations, as happened in 2006 with the disclosure of the Treasury Department’s secret program for tracking terrorist finances. They can compromise human sources, as apparently happened when it was recently reported that a Saudi source had helped to foil al Qaeda’s recent airplane bombing plot. And keep in mind that whenever a source’s identity or existence is leaked, it not only negates the effectiveness of that particular source, it also undermines our ability to develop and cultivate sources in the future.Leaks can also compromise our methods, as apparently happened with the recent disclosure of our alleged use of malware to attack the Iranian nuclear weapons
program. They can certainly endanger our government personnel, like the CIA [Central Intelligence Agency] chief of station who was publicly outed and then killed by terrorists in Athens in the 1970’s [sic]. And, importantly, they can weaken our alliances, those operational relationships between us and foreign services that are so vital to our national security operations around the world.28

In this statement, the attorney makes reference to the need to protect the identity of intelligence personnel and human sources, the methods used to obtain state secrets, the intelligence relationships with foreign entities, and the effectiveness of security and intelligence agencies. Of note is his addition of concrete, but very short, examples of past harm to buttress the persuasive effect of this rhetorical device. Such an addition of concrete examples is rare, but when they do appear they make lists more persuasive than lists without any, which is the norm.

In the context of inquest proceedings during which a coroner asked for evidence in the hands of the British Security Service (popularly known as MI5) and the British Secret Intelligence Service (popularly known as MI6), the British Secretary of State signed a Public Interest Immunity certificate in which she listed the following reasons against disclosure:

10. The reason why disclosure of the documents in Bundle A would bring about a real risk as described is that those documents include national security information of one or more of the following kinds:

a) information relating to operations and capabilities of the security forces, law enforcement agencies and security and intelligence agencies, disclosure of which would reduce or risk reducing the effectiveness of those operations or of other operations either current or future;

b) information relating to the identity, appearance, deployment or training of current and former members of the security forces, law enforcement agencies and security and intelligence agencies, disclosure of which would endanger or risk endangering them or other individuals or would impair or risk impairing their ability to operate effectively or their ability to recruit and retain staff in the future;

c) information received in confidence by the security forces, law enforcement agencies and security and intelligence agencies from foreign liaison sources, disclosure of which would jeopardise or risk jeopardising the provision of such information in the future;

d) other information likely to be of use to those of interest to the security forces, law enforcement agencies and security and intelligence agencies in pursuit of their functions, including terrorists and other criminals, disclosure of which would impair or risk impairing the security forces, laws enforcement agencies and security and intelligence agencies in their performance of their functions.

11. It is not possible for me to be more specific in this certificate about the particular information in Bundle A, or the precise harm that its disclosure risks
causing, since my so doing would be liable to risk causing the very damage that
the certificate seeks to avoid.\textsuperscript{29}

In this statement, the Secretary of State equally makes reference to the need to
protect the identity of intelligence personnel and human sources, the methods used to
obtain state secrets, the intelligence relationships with foreign entities, and the
effectiveness of security and intelligence agencies. The order of the reasons differs from
that of the first statement, and instead of providing examples of past harm to buttress the
persuasive effect of listing, the Secretary added the type of harm that would be expected
from public disclosure for each type of information. This added content, however, is
couched in highly speculative and very general terms, making this overall statement less
persuasive than the first statement.

The following list was part of an affidavit submitted to the Federal Court by the
Canadian Security Intelligence Service (CSIS):

[1.] CSIS has the following general concerns in relation to national security
which are engaged by the potential release of information collected during the
course of its investigations in that it may:
(a) identify or tend to identify Service employees or internal procedures and
administrative methodology of the Service, such as names and file numbers;
(b) identify or tend to identify investigative techniques and methods of
operation utilized by the Service;

\textsuperscript{29}Secretary of State for the Home Department v HM Senior Coroner for Surrey & Ors, [2016]
EWHC 3001 (Admin) at para 29.
(c) identify or tend to identify Service interest in individuals, groups or issues, including the existence or absence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations;
(d) identify or tend to identify human sources of information for the Service or the content of information provided by a human source;
(e) identify or tend to identify relationships that the Service maintains with foreign security and intelligence agencies and would disclose information received in confidence from such sources; and
(f) identify or tend to identify information concerning the telecommunication system utilized by the Service.\(^\text{30}\)

In this statement, CSIS also makes reference to the need to protect the identity of intelligence personnel and human sources, the methods used to obtain state secrets, the intelligence relationships with foreign entities, and the effectiveness of security and intelligence agencies. Its list, however, is more explicit about the type of information it seeks to protect from disclosure but does not contain examples of actual or possible harm. As a result, it is the least persuasive statement.

What these lists essentially tell us is that the disclosure of state secrets without the approval of secret keepers would likely compromise all aspects of national security, including the effectiveness of current or future operations; the safety and security of human sources, including the effectiveness of particular sources and the ability to

\(^{30}\) *Canada (Attorney General) v Khawaja*, [2008] 1 FCR 547, 2007 FC 490 (CanLII) at para 132 (quoting an affidavit from the Canadian Security Intelligence Service). For similarly worded lists, see *Khadr v Canada (Attorney General)*, 2008 FC 549 (CanLII) at para 70 (quoting an affidavit from the Canadian Security Intelligence Service), and *Huang v Canada (Attorney General)*, 2017 FC 662 (CanLII) at para 23 (quoting an affidavit from the Canadian Security Intelligence Service).
develop and cultivate sources in the future; the effectiveness of the methods of gathering and protecting intelligence; the safety and security of security and intelligence personnel and their ability to perform their duties; and the viability of international security and intelligence relationships. Given the contents of these lists, it would very difficult for anyone without explicit national security expertise to thoroughly assess the validity of the claims put forward—the reasons, while comprehensive and exhaustive, are not supported by specific evidence in most cases and the criteria by which they were selected are unknown. That information, most likely, is secret itself and cannot be disclosed except in the most general terms. 31 Ultimately, these lists only tell us the types of disclosure that, in the view of secret keepers, who claim the expertise and the duty to do so, would cause injury to the national interest. They do not explain, beyond generalities, why the release of a particular kind of secret would be injurious in a particular case; readers are left to assume a cause-to-effect relationship that is not directly demonstrated but instead anticipated. However, when secret keepers use evidence of past harm to the effectiveness of the national security apparatus or to specific persons or categories of people to “prove” the probability of future harm, the strength of their list and of their argument is reinforced, especially when matters of life and death are raised. With respect to the latter point, it is easier in the United States than in Canada or the United Kingdom to raise and highlight specific statements of past harm resulting from disclosures. This is largely because the public has a much larger knowledge of the failures of its national security agencies, which has been compounded by serial leakages in the media and a higher

degree of openness on the part of former secret keepers. It may also well be that both Canada and the United Kingdom actually do not have as many statements to choose from already in the public domain. Be that as it may, lists are not the only type of devices that secret keepers can use to highlight the potential severity of harm with examples from the past. As well, even though examples of past harm make a list more persuasive, they do not prove or significantly increase the probability that similar harm inevitably would occur sometimes in the future.

The lists used in this section also are characterized by their use of plain English, including the absence of multiple negatives and complex legal terminology, and abundantly use conditional terms such as “if” and “would,” and verbs associated with harm, such as “jeopardize,” “endanger,” “risk,” “weaken,” “lose” and “compromise.” Secret keepers use these verbs to stress the negative consequences of disclosing state secrets by linking disclosures to harm. By using these verbs, they also seek to foster empathy for potential victims of harm, an effective way to rally others to one’s point of view. The reasons are not similarly ordered. In the first statement, they start with potential harm to national security and then address potential harm to individuals. In the other two statements, the reasons move back and forth between concerns for the effectiveness of security agencies and potential harm to individuals. The ordering followed in the first statement makes it perhaps easier for any reader or listener to grasp the importance attached by secret keepers to the protection of state secrets from disclosure. But as these reasons stand together (the probability of harm amplified by aggregation), they have cumulative reference and convey a sense of finality, of completeness.
To anyone unfamiliar with the social world of state secrecy, the effect of listing may be overwhelming: how could so many reasons be rebutted? With so much harm at stake, are these reasons not only necessary but sufficient? If harm can and would result from the disclosures of state secrets that should remain undisclosed, is mitigation even possible? Of course, a single reason may be sufficient for a piece of information to be classified and protected as a state secret. The harm caused in the event of a disclosure, however, can always be much broader than anticipated. The lists bring together the most commonly encountered consequences and in so doing amplify the possibility of harm. Secret keepers claim to have the authority to list these reasons. The next section addresses how secret keepers argue that point.

4.3 Ignorance and authority: secret keepers know best and should be trusted

The argument from ignorance assumes that because we do not know that something is false, then it is true. Secret keepers benefit from this presumptive construction and use it as a rhetorical device textually to argue and persuade others that the disclosure of state secrets would lead to yet unknown but highly anticipated risks of harm.32 As noted in footnote 5, I use the term device here in the same sense as Foucault’s usage: “rhetoric provides the speaker with technical devices in order to act upon the audience’s mind.”33

The official view, James Cornford writes, “is that any disclosure relating to security is potentially damaging and that it is impossible for outsiders to know whether or not the

32 Of course, “[i]n some cases, the argument from ignorance can be completely reasonable.” David Zarefsky, Rhetorical Perspectives on Argumentation: Selected Essays (Cham: Springer, 2014) at 159.
33 Foucault, supra note 9 at 40.
damage is serious and a potential threat to security to have to prove that it is.”

This assertion is not manifestly or systematically false. If it were, what would explain such public utterances that are also used before the courts? Hence, the secret keepers’ argument from ignorance conforms to its traditional structure: 1. Secret keepers do not know for sure—and may have no factual indications whatsoever—that harm would result from the disclosure of particular state secrets (but they supposedly have reasonable grounds to believe that it would). 2. The anticipated consequences of disclosing state secrets, however, would be harmful (among the possible harms, lives could be lost). 3. Therefore, secret keepers and judges should not disclose state secrets in order to prevent harm.

The effectiveness of this rhetorical device is compounded by the additional and joined argument from authority which says that secret keepers and their institutions are best positioned—given their expertise and experience, their knowledge of past harmful disclosures, their access to secrets not available to others and the magnitude of risks—to assess the likelihood of harm that could result from the disclosure of state secrets.

Secret keepers and their institutions, in other words, assert that they are expert authorities


35 That is the “Problem of Error:” “If some fragment of discourse is actually, and systematically, false, why do competent language users employ that way of talking, uttering sentences that do not express what the speakers aim to express, in asserting what they do? What explains the widespread, systematic error being attributed to such (presumably rational) speakers?” James A Woodbridge & Bradley Armour-Garb, “Linguistic Puzzles and Semantic Pretence” in Sarah Sawyer, ed, New Waves in Philosophy of Language (New York: Palgrave Macmillan, 2010) 250 at 255.

36 Zarefsky, supra note 32 at 163.

37 As Kitrosser observes in the US context: “Attempts to diminish this information monopoly [of the state] themselves are frequently blocked by claims that only the President and certain subordinates know when information is too dangerous to be disclosed.” Heidi Kitrosser, “What If Daniel Ellsberg Hadn’t Bothered?” (2011) 45 Ind L Rev 89 at 97.
in the field of state secrecy and that judges and others need only follow their advice. As Hans Hoeken, Ryan Timmers and Peter Jan Schellens note, “[t]he argument from authority can support claims about the desirability of a consequence by stating that the claim is in accordance with the opinion of an expert in this field.”

The fact that the argument from ignorance and the argument from authority are joined and work so well together is, arguably, quite logical. On the one hand, as Mark Jary recognizes, “[t]he fact that someone expresses a belief, even a justified true one, is not in itself reason to attend to it.” Secret keepers, in other words, are not necessarily the bearers of truth statements that must necessarily be acted upon. But on the other hand, if we accept the claim that secret keepers are in a position of epistemic authority and speak and write only of what they authoritatively know, one would need a special reason for doubting the value of their assertions. As Linda Zagzebski explains,

[W]e have the resources to see how trust in certain others gives us the grounds for taking beliefs on their authority. […] If the authority is political, then clearly there is no reason to think that what is commanded is true, but if the authority is epistemic, and the subject recognizes that what the authority tells us to believe is likely to be true, it is no harder to believe on command than to believe

38 “Authority” is often used to refer to the person or institution that has authority. Linda Zagzebski, Epistemic Authority (Oxford: Oxford University Press, 2012) at 103.
41 “The need for a special reason for doubt is also present when we cite authorities or rely on the testimony of others […]” Barry Stroud, The Significance of Philosophical Scepticism (Oxford: Clarendon Press, 1984) at 52.
ordinary testimony […]. […] In any case, there is plenty of evidence that people can believe on the authority of an epistemic authority.42

Per Linell offers a very similar line of thought:

Most of the time, we trust that people know things and act competently and sincerely. We have no other option but this, because we cannot have certain knowledge of everything that might be relevant. Of course, we assume (trust) that ‘everything is normal’ only as long as there are no clear signs that things are not, or might not be, as expected. That is, we rely on others (and ourselves) ‘until further notice.’43

Because “there is a natural tendency to defer to an expert,”44 the joined argument from ignorance and authority has the effect of closing dialogue and debate, as there is conceptually no one with whom to seriously engage.45 As the Central Intelligence Agency (CIA) typically argued in a defence motion: “Only the nation’s intelligence community has a complete picture of which disclosures pose a danger to national

42 Zagzebski, supra note 38 at 99, 101.
44 Douglas Walton, Media Argumentation: Dialectic, Persuasion, and Rhetoric (Cambridge, UK: Cambridge University Press, 2007) at 28. “Scientific disciplines like biology and physics are large domains whose practitioners are not equally expert at all subfields within the discipline, but I might reasonably judge that they are more likely to get the truth about anything in the discipline than I am.” Zagzebski, supra note 38 at 105.
45 One resorts to the argument from authority “when agreement on the question involved is in danger of being debated.” Perelman & Olbrechts-Tyteca, supra note 24 at 308. Too often, German and Stanley write, “courts accept government claims about the potential risk to national security as absolute, without independently scrutinizing the evidence or seeking alternative methods to give plaintiffs or victims an opportunity to discover non-privileged information with which to prove their cases.” Mike German & Jay Stanley, Drastic Measures Required: Congress Needs to Overhaul U.S. Secrecy Laws and Increase Oversight of the Security Establishment (New York: The American Civil Liberties Union, 2011) at 9.
Lack of knowledge, therefore, would disqualify any assessment of harm that contradicts the CIA’s.

The argument from ignorance and authority is most often used succinctly:

In a civil case, the CIA argued that the assessment of harm is properly located with the Agency: “Indeed, given that ‘the assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence,’ […] plaintiff cannot credibly purport that his own judgment about the consequences of disclosure in this case is superior to that of Acting DCI [Director of Central Intelligence] McLaughlin.”

In his brief submitted to the court, a CIA counsel argued that “[c]ourts normally will defer to the expert opinion of the agency [CIA], because Courts ‘lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case.’”

In their Memorandum of Points and Authorities submitted to the court, two US Department of Justice counsels argued that

[recognizing that national security is a uniquely executive purview, courts typically defer to such an agency determination. […]. (‘Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information.’); […] (‘Judges . . . lack the expertise necessary to second-guess [] agency opinions in the typical national security FOIA case’). Thus, the Court

46 Franz Boening v Central Intelligence Agency, Civil Action No. 07-0430 (EGS) at 30 (Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss Under Rule 12 And Motion for Summary Judgment Under Rule 56).
47 Steven Aftergood v Central Intelligence Agency, Civil Action No. 01-2524 (RMU) (DC) at 14 (Defendant’s Cross-Motion for Summary Judgment, 15 September 2004).
48 Jefferson Morley v Central Intelligence Agency, USCA Case #10-5161 (DC Cir 28 February 2012) at 35 (Brief for Appellee).
should defer here to Mr. Bradley’s and Ms. Janosek’s assessments of the likely repercussions to the national security from disclosure of the information withheld [...].

In a British case, the Home Office told the Information Tribunal that “the [Security] Service was best placed, through its experience and expertise, to make the relevant decisions.”

Here the counsel for the British Secretary of State for the Home Department argues to the presiding judge, using judicial precedents just like his counterparts do in the United States, that the executive is, because of its experience and expertise, “in the best position to judge what national security requires, and the correct approach in law is to entrust decision of this sort to them: Rehman v SSHD [2001] 3 WLR 877. Mr Tam also referred to us the decision of Mr Justice David in Ewing (20 December 2002 unreported).”

In each of these five statements, secret keepers assert that their position is credible and solidly backed up by their knowledge, expertise and experience. In the third

49 *Electronic Frontier Foundation v Department of Justice*, Civil Action No. 12-1441-ABJ (1 April 2013) at 21 (Memorandum of Points and Authorities in Support of the Department of Justice’s Motion for Summary Judgment). For additional examples, see *Mattathias Schwartz v Department of Defense et al.*, Case 1:15-cv-07077-ARR-RLM (30 September 2016) at 27 (Defendant’s Memorandum of Law in Support of Their Motion for Summary Judgment), *Electronic Privacy Information Center v Office of the Director of Central Intelligence*, Case No. 17-cv-0163 RC (DC 26 June 2017) at 10 (Defendant’s Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment), *National Security Archive v Central Intelligence Agency*, Case 1:11-cv-00724-GK (26 September 2011) at 7 (Defendant’s Motion for Summary Judgment), and *Electronic Frontier Foundation v Department of Justice*, Case Civil No. 07-00403 (TFH) (DC 25 June 2007) at 6 (Defendant’s Opposition to Plaintiff’s Motion for In Camera Review and Reply in Support of Defendant’s Motion for Summary Judgment).


51 “Mr. Tam pressed the following argument upon us. He submitted that the Service was best placed, through its experience and expertise, to make the relevant decisions.” Para 33 of Annex A of *Hitchens v Secretary Of State For The Home Department* [2003] UKIT NSA5 (4 August 2003).

statement, intertwined with this main expression of the argument from ignorance and authority, is the notion that national security is, in any event, uniquely within the purview of the executive branch. Secret keepers here assert that their position within the executive branch also gives them the authority and credibility to impose their views on matters of state secrecy onto others. This means that when they invoke national security on the basis of knowledge that only they possess, citizens are expected to defer to their authority and sense of duty as civil servants: after all, it is in their interest to do so if they want to be secure in their person and property. Defence counsel Gareth Peirce has framed this process, I believe correctly, as follows:

We still live, in the 21st century, in a world whose political configuration is that of nation-states. For those exercising political power, the matter of a nation’s security, its ‘national security’, is of immense importance. The state is invariably referred to as a source of the security necessary for protection against threats from others, or from internal violence, and this idea is shared by and large by the population. There may be disagreement about the existence or gravity of any alleged threat and the appropriate response to it, but the concept of the state as the protector and guarantor of security is seldom doubted. ‘Security’ is such a dramatic yet ill-defined concept that those in power are able to curb criticism and shut down debate by invoking it and by claiming to possess vital knowledge (which cannot, of course, be safely revealed) to support

53 As Tizard aptly observed: “If you have to try to convince an intelligent person in ordinary life about a subject which is not secret, you can produce all your evidence and have an argument, whereas one difficulty of secret work is that you cannot produce all the evidence, except to a very few people; you must say: ‘Well, you must believe this [...]’” Sir Henry T Tizard, Chair, in R V Jones, “Scientific Intelligence (Lecture on Wednesday, 19th February, 1947)” (August 1947) 97 RUSI Journal 352 at 368.
their actions or policies. Those in power draw on traditions of deference and non-partisanship when it comes to security, making it unnecessary for governments to provide reasoned justification when security is said to be at stake. There is therefore a dangerous circularity to the entire process. Deference is fed in part by ignorance, and ignorance is fed in turn by claims that secrecy is indispensable. The public receives only the barest of justifications, which it is supposed to take on trust, while the government machine ignores or short-circuits normal democratic processes.”

The following four statements are explicit in this regard. In the first statement, a US assistant attorney general argues that:

judicial deference is rooted in three well-established principles. First, the primacy of the Executive Branch in matters of national security and foreign relations is enshrined in the Constitution and in judicial precedent […]. Accordingly, courts have recognized that the Executive Branch’s ability to maintain secrecy is essential. […] Moreover, the Executive Branch’s familiarity with matters of foreign relations and national security means that it has accumulated an expertise on the impact of the disclosure of particular classified information. […]. Second, in contrast to the Executive Branch’s experience, courts have recognized that judges are in no position to second-guess the national security and foreign relations concerns articulated by the Executive

Branch. [...] Third [linkage to the argument from consequence is made, which is covered in the next section].”

In the second statement, an attorney for the CIA stresses that:

it is important to note that the information sought by Plaintiffs directly ‘implicat[es] national security, a uniquely executive purview.’ [...] courts [...] defer to an agency’s determination in the national security context, acknowledging that ‘the executive ha[s] unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record.’ [...] Courts have specifically recognized the ‘propriety of deference to the executive in the context of FOIA claims which implicate national security’.56

In the third statement, US Department of Justice attorney makes the point that “[i]t is well-established that the Judiciary gives the utmost deference to the Executive Branch’s classification decisions, including the Executive’s assessment of the national security risk of disclosing classified information.”57

In a civil (tort) case on appeal, the UK Foreign and Commonwealth Office, the Home Office and the Attorney General “neither admitted nor denied either that they knew where the claimant was being held from time to time or that they knew how he was

56 American Civil Liberties Union v CIA, Civil Action No. 1:10-cv-00436-RMC (DC 1 October 2010) at 6, 10 (Defendant CIA’s First Motion for Summary Judgment). The same reasoning was repeated in the second motion: American Civil Liberties Union v CIA, Civil Action No. 1:10-cv-00436-RMC (DC 9 August 2013) at 10, 22 (Defendant CIA’s Second Motion for Summary Judgment).
57 In Re Motion for Release of Court Records, Docket Number: MISC. 07-01 (Foreign Intelligence Surveillance Court [FISC] 31 August 2007) at 7 (Opposition to the American Civil Liberties Union’s Motion for Release of Court Records).
being treated. They say that they are unable to do so for reasons of national security.”

In other words, because they cannot tell how the claimant was treated for reasons of national security, it must be assumed that their public ignorance does not make it true that the British government mistreated the claimant. Their authority as agents of the state responsible for national security allows them the assert the privilege of neither admitting nor denying any knowledge they may have.

While the mantra of executive responsibility in matters of national security (e.g., “We know that one of the fundamental responsibilities of any government is to keep Canadians safe”59) is not contested, it is important to note here that it acts as an overarching rationale for state secrecy. By reducing matters of state secrecy to the simpler, general and more fundamental notion of national security, secret keepers have an handy and arguably sufficient public explanation to refuse the disclosure of state secrets.60 As nothing arguably is more important than protecting the nation and its citizens, this reductionism deflects any in-depth discussion of state secrecy into a discussion of national security imperatives, which is the exclusive purview of the executive branch.61 Murray Edelman explains this effect in the following terms:

60 Such a move is an act of reductionism whereby “items of some types can be explained in terms of more fundamental types of entities or properties with which they are identical.” Nicholas Bunnin & Jiyuan Yu, The Blackwell Dictionary of Western Philosophy (Oxford: Blackwell Publishing, 2004) at 594. Or the “[t]endency to reduce certain notions, whether everyday ones, like physical object, or theoretical ones in science, like electron, to allegedly simpler or more basic notions, or more empirically accessible ones […]”. Michael Proudfoot & A R Lacey, The Routledge Dictionary of Philosophy (London, UK: Routledge, 2010) at 343.
Security is very likely the primal political symbol. It appeals to what engages people most intensely in news of public affairs [...]. [...] Given the setting of anxiety and ambiguity characteristic of the dilemmas in which people look to government for protection, susceptibility to social cues is strong. The cues come largely from language emanating from sources people want to believe are authoritative and competent enough to cope with threats.\textsuperscript{62}

While this metonymy appears quite effective and compelling when used as part of the argument from ignorance and authority, it is perhaps worth recalling that it may fall flat in any given situation as it is contingent on the politics of the day. As Philip Dorling correctly writes: “After all, national security is ultimately defined by politicians and the definition of what is and is not secret can be rather more flexible than many straight-laced public servants and national security professionals would care to admit.”\textsuperscript{63}

The statements above have illustrated how secret keepers make use of the argument from ignorance and authority in a judicial setting, examined in more details in the next chapter. I have selected two statements that respond to the massive leaks of classified information by Edward Snowden, one on the responsibility of the media for thinking that they know better than secret keepers about the harm that could ensue from publishing classified material, and the other on Snowden, who by virtue of his position as an information technology worker was not in the position of a secret keeper with the knowledge and experience necessary to decide on the disclosure of state secrets. Both statements are typical and representative of several thousand comments made by secret

\textsuperscript{62} Ibid at 132.
keepers on the Snowden case. The tone of these comments, by comparison to the tone expressed in a judicial setting, is much more colourful and harsh. It has emotional appeal, but leaves no doubt as to who knows better.

Former British Foreign Secretary Jack Straw accused the Guardian newspaper of showing “extraordinary naivety and arrogance” for publishing intelligence documents leaked by Edward Snowden, a former US National Security Agency (NSA) contractor. He told the BBC: “They’re blinding themselves about the consequence and also showing an extraordinary naivety and arrogance in implying that they are in a position to judge whether or not particular secrets which they have published are not likely to damage the national interest, and they’re not in any position at all to do that.”

Snowden was criticized for not having the knowledge and expertise to make the decision to leak classified documents. His Booz Allen Hamilton supervisor at the NSA in Hawaii said that Snowden “never actually had access to any of that data. All of the domestic-collection stuff that he revealed, he never had access to that. So he didn’t understand the oversight and compliance, he didn’t understand the rules for handling it, and he didn’t understand the processing of it... In my mind Ed’s not a hero.” As an information technology expert, Snowden did not have the requisite need to know the secrets he leaked. This means that he was not read into specific categories of secrets nor trained in their handling. By looking at the secrets he leaked without fully understanding the context within which they were collected, he could not fully grasp how harmful their

64 Saeed Kamali Dehgahn, Nicholas Watt & Alan Travis, “We Should Talk Sensibly about Spying Clinton,” The Guardian (12 October 2013) 1.

disclosure would be to US national security and the national security of allied countries. In other words, Snowden did not have the authority (the position, knowledge, experience or the permission) that other secret keepers had to make the decision to protect or release the secrets he appropriated without authorization. In both of these statements, secret keepers use the argument from ignorance and authority to delegitimize journalists from the *Guardian* and Snowden by presenting them in a negative light.66

Canada’s secret keepers have adopted a similar position as their American and British counterparts. Statements incorporating the argument from ignorance and authority, however, are sparse, especially in legal documents widely available to the public at large. The following statement, by Stephen Rigby, a recently retired national security adviser to the prime minister, attests to the authority of secret keepers in matters of national security. In the case of two Canadians of Chinese origins fired from their positions at the National Microbiology laboratory in Winnipeg, he said that the disclosure of documents relating to their situation is best left to the judgment and expertise of secret keepers: “You need trained professionals who can take a look at these documents and understand the nuances of national security information and who can decide what can go out without causing any harm to national security.”67 In the same case, three former secret keepers, a former diplomat and two former senior officials at the Privy Council Office, argued that the government should not lose “its ability to judge what information

can be released,” because parliamentarians or law clerks without security clearance do not have the specialized knowledge that government-approved experts have.68

Of course, former secret keepers enmeshed in judicial proceedings may dispute secret keepers’ assertions about their lack of competence or knowledge, or that of judges. In his appellant’s brief, ex-CIA official and leaker Jeffrey Sterling argued, through counsel, that federal judges should not abdicate their responsibility to challenge secret keepers because they too can have required knowledge: “In recent years the US District Court for the Eastern District of Virginia has become one of the most knowledgeable and experienced courts in the country with respect to utilizing and protecting classified information. That knowledge and experience must and should be taken into account.”69

This is not a counter-argument that is often heard from former secret keepers. This particular statement, however, was made by a former secret keeper convicted for leaking state secrets. It was in his personal interest to argue that judges show some independence instead of deferring to the views of the state in matters of disclosure.

By using arguments from ignorance and authority, secret keepers claim to secure a monopoly on the knowledge of state secrets and the potential harm of disclosure, a claim which has the effect of establishing a sharp divide between sacred and profane knowledge and of constituting others as profane.70 This divide is not new. Just like it was in ancient, medieval and early modern Europe, state secrets remain entrusted to an elite capable of understanding and protecting them, the sacred, and kept away from the

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70 This distinction is from Pierre Bourdieu, Language and Symbolic Power, ed by John B Thompson and translated by Gino Raymond & Matthew Adamson (Cambridge, UK: Polity Press, 1991) at 145.
profane or the commonplace. It also speaks directly to the notion that secret keepers, as we discussed in chapter 1, form a tight knit professional and epistemic community. This is evident in the use by secret keepers of terms such as “best placed,” “complete picture,” “unique insights” and superior judgment to contrast their position to anyone else’s, particularly judges who, because they “lack the expertise necessary” to do so, “are in no position,” or “in an extremely poor position to second-guess” the views of secret keepers. The use of those terms indicates that the secret keepers who utter them have solid knowledge and are the right people to advise others on the protection of state secrets.

The argument from ignorance and authority is meant to be compelling, especially when secret keepers can assert their legitimacy through judicial decisions. It is also seemingly compelling because it is framed around the notion of consequences (“severity of,” “repercussions,” “harm”) and national security, which unarguably is a duty of the executive: in emphasizing the primordial nature of their national security duty, governments often refer to the dire potential consequences of a failure to shield citizens from foreign and domestic threats.\footnote{This was argued early on by Adam Smith in 18\textsuperscript{th} Century Britain. Gavin Kennedy, \textit{Adam Smith’s Lost Legacy} (New York: Palgrave Macmillan, 2005) at 216, Richard Stone, “Public Economic Policy: Adam Smith on What the State and Other Public Institutions Should and Should Not Do” in Michael Fry, ed, \textit{Adam Smith’s Legacy: Its Place in the Development of Modern Economics} (London, UK: Routledge, 1992) 65 at 66. While this is a popular view, it is not universally shared. Otteson, for example, has argued that the first duty of the state is to secure justice. James R Otteson, \textit{Actual Ethics} (Cambridge, UK: Cambridge University Press, 2006) at 105. So did François Laurent in the 19\textsuperscript{th} Century in \textit{Droit civil international}, Volume 3 (Brussels, Belgium: Bruylant-Christophe, 1850) at 14, cited in Linda S Frey & Marsha L Frey, \textit{The History of Diplomatic Immunity} (Columbus: Ohio State University Press, 1999) at 341. Those who advocate cosmopolitan citizenship also disagree with this notion. Andrew Linklater, “Cosmopolitan Citizenship” in Engin F Isin & Bryan S Turner, eds, \textit{Handbook of Citizenship Studies} (London, UK: Sage, 2002) 317 at 322.} Indeed, enumerating the harmful consequences of the release of state secrets is key to the discourse of secret keepers. Finally, the argument from ignorance and authority has a secondary effect of delegitimizing others by
presenting them in a negative light.\textsuperscript{72} While secret keepers have good reason to exercise restraint before judges, they use the argument routinely and bluntly to delegitimize others outside the court, as the statements by former the British Foreign Secretary and Snowden’s supervisor at Booz Allen Hamilton attest.

If persons with knowledge and in a position of authority cannot convince others to do what they are asking, then there must be consequences of some kind. Secret keepers are particularly adept at drawing out the potential consequences following the release of classified information. The next section addresses their use of the argument from consequence.

4.4 Consequences: who lives, who dies, who knows what

The argument from consequence is a common rhetorical device drawing on causal reasoning. It requires that plausibly foreseeable consequences be cited in response to a proposed action, which would determine whether it is pursued or not. These consequences can be positive or negative.\textsuperscript{73} Secret keepers stress the negative consequences of disclosing state secrets by linking disclosures to harm. To rally others to their point of view, they seek to foster empathy for potential victims of harm.\textsuperscript{74} Secret

\begin{itemize}
  \item \textsuperscript{72} Cap, \textit{supra} note 66 at 3.
  \item \textsuperscript{73} “This type of argument supports a claim about the desirability of a certain action by pointing out the advantageous outcomes the action may have. Conversely it can also support a claim about the undesirability of a certain action by pointing out its disadvantages.” Hoeken, Timmers & Schellens, \textit{supra} note 40 at 397. See also Douglas Walton, \textit{Fundamentals of Critical Argumentation} (Cambridge, UK: Cambridge University Press, 2005) at 104, and Christopher W Tindale, \textit{Fallacies and Argument Appraisal} (Cambridge, UK: Cambridge University Press, 2007) at 183.
  \item \textsuperscript{74} As Constable aptly notes, “As persuasive utterances, the legal speech acts of representatives of official law as well as the claims of their critics are performative and passionate, designed to evoke in their respective hearers a shared sense of obligation that is not only conventionally performed but also a matter of desire.” Marianne Constable, \textit{Our Word Is Our Bond: How Legal Speech Acts} (Stanford: Stanford Law Books, 2014) at 103.
\end{itemize}
keepers take it as evident—even if “[n]early all of the compelling evidence in support of the argument that leaks are causing serious damage is available only in the classified domain”\(^75\)—that harm would occur if state secrets were disclosed, and they cannot allow that to happen. In making this assertion, they exploit a sense of fear\(^76\) and assume that no one would be so insensitive to the possibility of seeing a fellow human being seriously harmed as to support the disclosure of state secrets. As it happens, there is scientific support behind that assumption:

results from studies within persuasion research suggest that people are more sensitive to differences in desirability [such as that no one be harmed from the disclosure of state secrets] than to differences in likelihood [that such harm would actually occur].\(^77\)

This point is important because the argument from consequence is not logically conditional (if this, then that) in a strict sense. In reality, the conclusion is only a probable one (if this, then maybe that). Secret keepers, therefore, need to construct this argument in a manner that others will see as convincing.\(^78\) This is why they seek to foster empathy and agreement with their position by using value-oriented lexical terms that most people are sensitive to. A heightened sense of fear among those at the receiving end of an argument from consequence has long been seen as increasing the persuasive effect of a

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\(^{76}\) Similar discourses of legitimization involving a threat element have been recognized and studied by Cap, supra note 66. See also Celeste Michelle Condit, Angry Public Rhetorics: Global Relations and Emotions in the Wake of 9/11 (Ann Arbor: University of Michigan Press, 2018).

\(^{77}\) Hoeken, Timmers & Schellens, supra note 39 at 399.

\(^{78}\) On these points, see Dennis Q McInerny, Being Logical (New York: Random House, 2005) at 66.
discourse, up to a point. The effect, ultimately, obfuscates the fact that there may not be a connection between antecedent and consequent in their argument.

4.4.1 Divulging state secrets is a matter of life and death

The consequences of disclosure are frequently framed in the most dramatic of possible terms, as matters, literally, of life and death. I illustrate this with a series of statements below.

A retired CIA case officer here reflects on the need for caution in discussing state secrets:

Only close friends, family, and a handful of hostile foreign intelligence services are aware of my former CIA affiliation. I’ve been careful to avoid revealing information in this book that may enable a hostile foreign intelligence service (or non-state group like [terrorist organizations]) to determine the identities of my foreign contacts or sources, by putting together various pieces of the puzzle […]. The point of this process is not just to protect national security; it’s also for my own protection and that of my family, former agents, and other contacts.  

In her testimony before the US Congress, then CIA case officer Valerie Plame Wilson, whose undercover identity had been revealed by a White House staffer and the Deputy Secretary of State, stresses the gravity of exposing the identity of undercover

81 Because her husband, a former diplomat who was sent to Niger by the CIA, had embarrassed the White House by publicly denying one of its claims about Iraq’s weapons of mass destruction. See Joseph Wilson, The Politics of Truth: Inside the Lies that Led to War and Betrayed My Wife’s CIA Identity (New York: Carroll & Graf Publishers, 2004).
CIA officers: “The CIA goes to great lengths to protect all of its employees, providing at significant taxpayers’ expense painstakingly devised and creative ‘covers’ for its most sensitive staffers. The harm that is done when a CIA cover is blown is grave but I cannot provide details beyond this in a public hearing. But the concept is obvious. Not only have breaches of national security endangered CIA officers, they have jeopardized and even destroyed entire networks of foreign agents who, in turn risked their own lives and those of their families—to provide the United States with needed intelligence. Lives are literally at stake.”

As Roy and Plame Wilson emphasized, it is not only their own safety and that of their “family” and “friends” that is at risk when states secrets are disclosed, but also the safety of all persons who have been involved in gathering state secrets and their families. The emotional overtone is more readily apparent in Plame Wilson’s statement where she refers to the danger faced by family members, in other words everyone’s loved ones. The following statements highlight the dangers faced by human sources and others who help secret keepers.

Hilary Clinton was the US Secretary of State when State Department cables were leaked to Wikileaks by a young US Army secret keeper, Chelsea Manning:

[...] WikiLeaks published more than 250,000 stolen State Department cables, including many sensitive observations from our diplomats in the field. As Secretary of State, I was responsible for the safety of our officers around the world, and I knew that releasing those confidential reports put not only them in

danger but also their foreign contacts—including human rights activists and dissidents who could face reprisals from their own governments. We had to move fast to evacuate vulnerable people, and, thankfully, we don’t believe anyone was killed or jailed as a result.\footnote{Hillary Rodham Clinton, \textit{What Happened} (New York: Simon & Schuster, 2017) at 344.}

CIA case officer Ishmael Jones writes of the threat to his connections as follows:

I have dealt with hundreds of people in countries such as Russia, Ukraine, Iran, Iraq, Pakistan, and Libya. Those who provided secrets to the United States, especially on terrorist organizations, nuclear weapons programs, and organized crime, are at risk once my identity and association with the CIA becomes known. Revealing my identity and thus the connection of these people can result in their arrest and/or execution. Many of the people I have dealt with had no espionage role, such as hotel clerks, visa providers, and social and cover company business contacts, but they too will be suspected of espionage and can be arrested, harassed, and/or executed.\footnote{\textit{United States v Ishmael Jones}, Civil Action No 1:10cv765-GBL-TRJ, (ED Va 2010) at 2-3 (Declaration of Ishmael Jones).}

Both Clinton and Jones in their respective statement make reference to innocent and “vulnerable people” who would unjustly suffer if state secrets were divulged. Such a reference is motivated by the fact that it is relatively easy for anyone to relate to such people (embassy staff, “hotel clerks,” “human rights activists,” businessmen…), which they would have encountered at one point or another in the course of their daily lives or while traveling abroad. In her statement, Clinton also expresses herself as a person in a position of authority with access to specialized knowledge that allows her to warn against
serious potential harm. Here, the argument from consequence (with lexical terms such as “danger”, “reprisal,” “arrest,” “execution,” and “harass) is intimately intertwined with the argument from ignorance and authority (with lexical terms such as “I was responsible” and “I have dealt with”) and as a result is more forceful. Of note, Clinton’s reactions to the disclosure of state secrets by Wikileaks was measured by comparison to other current and former secret keepers. Of course, as Secretary of State she expressed herself with more decorum than retired secret keepers or politicians who had access to state secrets as members of their government. A difference in tone can be expected in line with the position occupied by a current or former secret keeper.

Former senior Federal Bureau of Investigation (FBI) officer Andrew McCabe writes that

\[\text{[i]n the FBI, a confidential informant is someone who regularly provides information to the FBI but whose role as a source can never be revealed. Exposing the informant’s relationship with the FBI could place the source and his or her family in great danger. Protecting the identity of a confidential informant is one of an agent’s most sacred responsibilities.}^{85}\]

In testimony before one of Canada’s Senate committees, the Director of Canadian Security Intelligence Service (CSIS) responded to a question on sources as follows:

I think it is pretty obvious why we need to protect our sources. We’ve talked about it in terms of nobody wanting to cooperate with us if they were putting their life at risk. But I think it’s also very important that we shouldn’t lose sight

\[\text{Andrew McCabe, } \text{The Threat: How the FBI Protects America in the Age of Terror and Trump} \text{ (New York: St. Martin’s Press, 2019) at 58.}\]
that when somebody is cooperating with the Service quite often at the risk of their own security and with the promise of confidentiality, the state has a duty to protect that person and to protect their identity so that we can protect their security—and not just protect them but sometimes their family also.\textsuperscript{86} [...] The first way to facilitate the investigations [...] is the certainty—with a few exceptions—of protecting the identity of the sources. More people would come forward with information. It would be easier for the Service to obtain the cooperation of individuals who would become sources if they were certain that their identity would be protected.\textsuperscript{87}

David Anderson, Britain’s independent reviewer of terrorism legislation, stated that had British prosecutors used key evidence that was classified and in the hands of intelligence agencies against terrorism suspects, it would have endangered the human sources from whom the evidence originated: “The reasons why these people [terrorism suspects] weren’t prosecuted—or were prosecuted without reference to all the intelligence—was more about a reluctance to use human source reporting in an open criminal trial for fear of compromising or even endangering a source.”\textsuperscript{88}

Clinton, McCabe, the Director of CSIS and Anderson each make a point of noting a sense of responsibility, whether it is their sacred duty (“most sacred responsibilities”) or the duty of the state (“the state has a duty to protect”), to protect state secrets. This not only speaks to their position as civil servants entrusted with state secrets, but also to their

\textsuperscript{86} Senate, Standing Committee on Public Safety and National Security, \textit{Evidence}, 41\textsuperscript{st} Parl, 2\textsuperscript{nd} Sess, No 40 (24 November 2014) at 8 and 14 (CSIS Director Michel Coulombe).
\textsuperscript{87} \textit{Ibid}.
\textsuperscript{88} Quoted in “Terrorism Suspects Go Free ‘Because MI5 Won’t Let Spies Speak’,” \textit{The Daily Telegraph} (20 March 2013) 2.
claimed high regard for the value of life (which should not be placed in “grave danger”; “their family also”), which is another emotional linkage to their listeners, who, in response, would arguably be more sympathetic to their motives. In Anderson’s case, the need to protect a human source could go as far as dropping a prosecution, which indicates how serious that duty of care is embraced.

The following statements show how secret keepers have tried to persuade the public with a sharper appeal to fear and emotions. While secret keepers stress the harm to human sources expected to result from major leaks such as those of Manning and a few years later Snowden, they also attempt to demonize—in effect delegitimize—the leakers.

When Wikileaks released the Afghan war logs (over 91,000 battlefield reports, most of them secret) in July 2010, the response of the US government highlighted the possible loss of lives. White House spokesperson Robert Gibbs said that the release of the logs “has a potential to be very harmful” to US and allied military forces engaged in the fight in Afghanistan, and that it “poses a very real and potential threat to those that are working hard every day to keep us safe.”\(^89\) Gibbs was supported by Secretary of Defense Robert Gates, who said that Wikileaks was “morally guilty for putting lives at risk.”\(^90\) In his affidavits prepared for federal court proceedings in *Freedom of Information Act* or secrecy privilege cases, I have not found Dr. Gates using such language, which would not be in line with the decorum expected from the parties involved. Affidavits are rigid with respect to form and contents and avoid judgmental positions resting on value choices.


\(^{90}\) Ibid.
In a released statement, the Obama administration said that the leaks of the Afghan war logs “could put the lives of Americans and our partners at risk, and threaten our national security.” As the argument went, the leaked documents contained the names of Afghans nationals who had collaborated with the United States. This meant, said Admiral Mike Mullen, the Chairman of the US Joint Chiefs of Staff, that Wikileaks’ Julian Assange and his source [Manning] “might already have on their hands the blood of some young [US] soldier or that of an Afghan family.” Zabibullah Mujahid, a spokesperson for the Taliban, certainly gave ammunition to Mullen when he was quoted as saying the Taliban were indeed looking at the logs in the search for Afghan informants: “We knew about the spies and people who collaborate with US forces. We will investigate through our own secret service whether the people mentioned are really spies working for the US. If they are US spies, then we know how to punish them.”

Two weeks after the Afghan war logs were released, a Pentagon spokesperson acknowledged that as of that date no one in Afghanistan had been harmed as a direct result of the unauthorized disclosure, but that it could only be a matter of time because “there is in all likelihood a lag between exposure of these documents and jeopardy in the field.”

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92 The mainstream media redacted names to protect any US source from harm. Wikileaks’ decision not to redact these names was not internally unanimous: “Smart McCarthy, a former Wikileaks volunteer, later told London’s The Independent that even internally at the group there were ‘serious disagreements over the decision not to redact the names of Afghan civilians.’” Greg Mitchell, *The Age of Wikileaks: From Collateral Murder to Cablegate (and Beyond)* (New York: Sinclair Books, 2011) at 53.
93 Nicks, *supra* note 1 at 191-192.
These statements reflect a very evocative language. Appeals to emotions are evident when lexical terms such as “blood” on their hands, “lives […] at risk” and “morally guilty” are used. Although very little time had passed between the disclosures and his statement, the Pentagon spokesperson made the argument assailable by saying that in fact, up to that point, no Afghans had suffered serious harm as a result of the disclosures. This reflects, of course, the speculative nature of any assessment of future harm. Interesting as well, the spokesperson made clear that the harm may materialize at any time in the future. The temporal argument intertwined within this statement is the subject of section 4.5.

The reactions of secret keepers to the unauthorized leak of the Iraqi war logs (391,832 battlefield reports) in October 2010 were similar to the release of the Afghan war logs a few months earlier. Pentagon spokesman Geoff Morell stressed the illegal aspect of the disclosure and the fact that the logs were now in the hands of America’s enemies. As the Taliban claimed to have done with the Afghan war logs, Morell pointed out that the Iraq war logs can be mined as well, thus risking the lives of American and allied soldiers deployed in Iraq; “this security breach,” he said, “could very well get our troops and those they are fighting with killed.”

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With respect to the 251,287 US State Department diplomatic cables (approximately 130,000 were unclassified, 100,000 confidential, 15,000 secret and none top secret) that Manning leaked to Wikileaks, the reactions were equally evocative. Harold Koh, the US State Department legal adviser, told Wikileaks’ Julian Assange that his organization had

96 Mitchell & Gosztola, supra note 89 at 53.
97 Ibid at 60.
obtained the cables illegally and that their release “would place at risk the lives of countless individuals” and endanger the ability of the US government to conduct its business in a cooperation with other states, including with respect to life and death matters such as terrorism, pandemic diseases and nuclear proliferation.\footnote{David Leigh & Luke Harding, \textit{WikiLeaks: Inside Julian Assange’s War on Secrecy} (New York: Public Affairs, 2011) at 192-193.} Again, the use of evocative lexical terms such as “killed” and “risk the lives,” amplified by “countless,” is a clear appeal to fear and emotions on the part of secret keepers.

The Snowden leaks were of a different kind than Manning’s. They were about signals intelligence gathered by the United States National Security Agency (NSA) and allied services for surveillance purposes and revealed the methods used to obtain that kind of intelligence.\footnote{He was motivated by his opposition to automated mass surveillance, which he saw as a threat to democracy, private life and a free Internet. Antoine Lefèbure, \textit{L’affaire Snowden : comment les États-Unis espionnent le monde} (Paris: La Découverte, 2014) at 30, 38.} Most of the leaked documents were of a highly technical nature and difficult for anyone not well versed in intelligence matters to understand. Because Snowden purported to reveal abuses of authority and highlight issues that he believed were matters of general public interest, he received support from an eclectic range of people. Inevitably, secret keepers were Snowden’s harshest critics, due to the high sensitivity of the documents and their classification at the top-secret level. At the time of his leaks, Snowden himself was a secret keeper sworn to uphold his oath of secrecy and loyalty to the United States. He was an insider who, in the eyes of secret keepers, betrayed all. Yet, Snowden had set limits on what he would and would not disclose. He claimed to have had no intent to endanger anyone’s life, such as a CIA human asset: “Most of the secrets the CIA has are about people, not machines and systems, so I didn’t
feel comfortable with disclosures that I thought could endanger anyone.”\(^{100}\) Fully aware as a secret keeper that unauthorized disclosures could cause harm, Snowden was decidedly vocal in expressing concerns for possible harm to others and wanting to avoid any harmful outcomes. So, he claimed to have vetted every document he leaked to ensure he would not cause harm to national security or any individuals.\(^{101}\) In so doing, he assailed the argument that unauthorized disclosures are necessarily harmful. Yet, just like Manning, he was also accused of being a source of great harm. Former CIA Director R. James Woolsey, Jr. bluntly told the media that Snowden “has blood on his hands.”\(^{102}\) (However, at no time did Snowden expose the identity of US intelligence officers operating covertly in violation of the *Intelligence Identities Protection Act*.)\(^{103}\) In his affidavits prepared for federal court proceedings in *Freedom of Information Act* or secrecy privilege cases, I have not found Director Woolsey using such language, which would not be in line with the decorum expected from the parties involved. Affidavits are rigid with respect to form and contents and avoid judgmental positions resting on value choices.

The British government was likewise concerned about the possible consequences of the leaks and went as far as issuing a defence advisory notice (D Notice) to editors, warning them to self-censor their coverage of Snowden’s leaks so as not to “jeopardise

\(^{103}\) Hal Berghel, “Mr. Snowden’s Legacy,” *Computer* (April 2014) at 67.
both national security and possibly UK personnel.”

A few weeks later, David Miranda, an associate and the spouse of then Guardian journalist Glenn Greenwald who had extensively written on the leaks and had copies of Snowden’s documents, was detained while transiting London’s Heathrow airport on his way to Brazil from Germany. Home Secretary Theresa May responded to criticism of Miranda’s detention by directly associating the documents leaked by Snowden with possible harm to peoples’ lives: “I think it is right, given that it is the first duty of the government to protect the public, that if the police believe somebody has in their possession highly sensitive stolen information which could help terrorists, which could lead to a loss of lives, then it is right that the police act. That is what the law enables them to do.”

May was backed by Scotland Yard, which said after taking a look into the contents of Miranda’s electronic devices, that its contents were “highly sensitive,” and “could put lives at risk” if made public.

At a subsequent Divisional Court hearing, Oliver Robbins, UK’s Deputy National Security Adviser, stated that Miranda’s computer’s hard drive had about 58,000 highly classified documents, some with information on British intelligence officers the unauthorized disclosure of which “would result in a risk to the lives of them and their families and the risk their becoming recruitment targets for terrorists and hostile spy

105 Nicholas Watt, Spencer Ackerman, Josh Halliday & Rowena Mason, “U.S. and Britain at odds as NSA Row Deepens,” The Guardian (21 August 2013) 1.
Two different kinds of consequences are combined in this statement. Only one of them would be possible in any given case.

Nick Clegg, the Deputy Prime Minister, similarly justified the destruction by the Government Communications Headquarters (GCHQ) of the Guardian computers’ hard drives containing documents leaked to the newspaper by Snowden:

I believed at the time, and still do, that it was entirely reasonable for the government to seek to get leaked documents back or have them destroyed.

Along with the information the Guardian had published, it had information that put national security and lives at risk. It was right for us to want that information destroyed.\textsuperscript{108}

As the foregoing statements make clear, matters of life and death are easily raised by secret keepers and deployed with the mainstream media. American and British secret keepers are both very clear about threats to the lives of individuals ("loss of lives," "lives at risk," "risk to the lives"). Perhaps because Snowden is an American and the damages greater for the United States than the United Kingdom, the language used by American secret keepers can be very blunt ("blood on his hands"), moreso than the language used by British secret keepers. These differences could also be of a cultural nature, British people in general being more understated in public life and Americans more brash.\textsuperscript{109}

\textsuperscript{107} Quoted by Robert Booth, “Case Reveals British Delays Over Snowden Data,” The Guardian (31 August 2013) 2. Robbins kept the same discourse a few months later during another court appearance: “The compromise of top secret information would be likely to have one or more of the following consequences; to threaten the internal stability of the UK or friendly countries, to lead directly to widespread loss of life.” Quoted by Tom Whitehead, “GCHQ Leaks ‘Damaged UK Security and Risked Lives’,” The Daily Telegraph (10 October 2013) 1.

\textsuperscript{108} Nick Clegg, “A Fine Line We Mustn’t Cross,” The Guardian (24 August 2013) 50.

\textsuperscript{109} A detailed comparison between American and British public cultures is beyond the purview of this thesis.
Matters of life and death are also raised before the court but in much more sober style, as we have seen in the use of lists, which allude to risks to life. The reason why the language used by participants to legal proceedings, such as the state attorneys representing secret keepers and the secret keepers themselves as affiants, is more sober, less provocative, and much less emotional than what secret keepers say in public (beyond the reasons noted in chapter 1) is that there are court rules to that effect. For example, in the Federal Court of Canada, participants in a court proceeding must at all times maintain a respectful attitude, and refrain from showing approval or disapproval of the proceeding or impair the dignity of the court.\footnote{This expected behaviour is noted in Canada’s Federal Courts Rules SOR/98-106, s 466 under contempt.} As well, in preparing motions, briefs and memoranda for the court, lawyers are trained to explain the facts and be persuasive on how the law applies to them. But in so doing, they are expected to “avoid obviously biased language, overt emotional pleas, and self-righteous expressions.”\footnote{Tracy Turner, Legal Writing from the Ground Up: Process, Principles, and Possibilities (New York: Wolters Kluwer, 2015) at 272.}

In 1986, in its first civil case involving an objection to the disclosure of information based on national security, the Canadian Federal Court of Appeal received an affidavit from the government arguing that the disclosure of a source’s identity could cause that source harm: “Human source development is a long process, based on a carefully molded trust that human source identities will be kept in strict confidence by the Service. It is the absolute assurance of anonymity that encourages individuals to contribute to the national security of Canada. If this assurance cannot be upheld, assistance from the public cannot
be obtained. Moreover, public disclosure of the identities of past or active sources could expose them and their families to physical danger or harassment.”

Secret keepers certainly know that history has given them reasons to be worried about the unauthorized disclosure of the names of intelligence officers and sources, either through leakage or espionage. On 23 December 1975, Richard Welch, the CIA station chief in Athens, was assassinated on his doorstep by the terrorist group Revolutionary Organization of November 17. His assassination was the result of a leak that led to the adoption in 1982 of the *Intelligence Identities Protection Act* (Pub L 97-200) (IIPA). In a pre-9/11 context, CIA officer Aldrich Ames’s espionage on behalf of Russia resulted in the executions of at least ten intelligence sources of the FBI and CIA and the imprisonment of others, while the espionage on behalf of Russia of FBI officer Robert Hanssen resulted in the death of at least two intelligence sources. Though both Ames and Hanssen were not charged under the IIPA due to the severity of their crimes, the IIPA has been used twice, both times leading to convictions pursuant to guilty pleas. In the first instance which occurred in the mid-1980s, the CIA attributed the death of a human source to the divulgence/provision of classified information by one of its clerks to

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a Ghanaian agent with whom she was romantically involved.\textsuperscript{115} In the second instance, which concerned the unauthorized disclosure in 2007 of a covert agent’s identity by a CIA officer to a journalist, no loss of life resulted.\textsuperscript{116}

In testimony to Congress in 2012, Ken Wainstein, who had protected secrets as an FBI officer and Assistant Attorney General for National Security, cited Welch’s death to illustrate the point that leaks endanger life:

Obviously, leaks can also prove dangerous or fatal to our [US government] personnel in sensitive positions, as was tragically demonstrated by the murder of the CIA’s Chief of Station in Athens by terrorists in the 1970’s after his outing by a former CIA employee.\textsuperscript{117}

While these facts are unassailable, and dangers of harm always a possibility, less ominous outcomes are as likely. As Peter Strzok explains:

In counterintelligence there is an inherent tension between conducting an investigation and protecting sources and methods. There is a tradeoff: the faster and more aggressive the investigation, the greater the chance of exposing the source of information. At worst, exposure can lead to an overseas source’s imprisonment or even execution. But there are a host of other, lower-stakes negative outcomes, such as inadvertently revealing identifying information


\textsuperscript{116} Elsea, \textit{supra} note 114 at 2.

about an email account we might be monitoring, getting a source fired from his or her job, or scaring away potential sources for fear of exposure.\textsuperscript{118}

Furthermore, the attitude and actions of secret keepers in protecting the identity of intelligence officers and their agents is not always without reproach:

Indeed, there is ample evidence [from former secret keepers in Congressional testimonies] that the identities of covert CIA agents are often well known overseas and within the agency itself. The CIA sometimes purposefully gives agents thin covers so that potential defectors and information sources will know where to go.\textsuperscript{119}

As well, former intelligence sources, once undeterred by the force of law and the fear of retaliation, always remain at personal liberty to disclose their current or past work for intelligence agencies. One obvious example which did not lead to the source suffering any harm is Paul Dibb. Dibb, a government official who eventually occupied senior intelligence positions within Australia’s government, was an agent for the Australian Security Intelligence Organisation (ASIO) from 1965 to 1985, providing comprehensive information about senior Soviet Embassy personnel (including successive ambassadors), their views on matters of strategic interest to Australia, and their political, academic and journalist contacts in Canberra—

\textsuperscript{118} Peter Strzok, \textit{Compromised: Counterintelligence and the Threat of Donald J. Trump} (Boston: Houghton Mifflin Harcourt, 2020) at 139.

as well as the strengths and weaknesses of their personalities with a possible view to securing a defection.\textsuperscript{120}

Despite the length of time he reported on Soviet personnel and his own work within the intelligence community, the Soviet Union did not harm him before or after his work as an agent was revealed. In Canada, the case of Grant Bristow serves as a prominent example. Bristow, who was an agent for CSIS for about ten years, initially reported on activities at the South African Embassy that were inimical to Canada, and subsequently on the far-right movement in Canada. Outed by the media in Toronto in 1994, he initially feared retaliation from his former far-right associates and moved into hiding with the assistance of CSIS. Eventually, he resettled in Alberta and moved on with his life without suffering any harm.\textsuperscript{121}

Secret keepers write and talk of life and death matters in a manner that appeals to emotions such as fear. No one, in theory, should be indifferent to the argument that loved ones could suffer harm. But although secret keepers can be quite forceful in making the argument from consequence, they come up with very little in terms of past examples or actual evidence that future harm is clearly more likely than not. While Welch’s murder is very well known, and the damages caused by Ames and Hanssen extensive, these examples are quickly becoming dated, and as such may be losing some of their persuasive effects. But as we saw in the use of lists, this argument is usually not used in

\textsuperscript{120} Paul Dibb, \textit{Inside the Wilderness of Mirrors: Australia and the Threat from the Soviet Union in the Cold War and Russia Today} (Melbourne: Melbourne University Press, 2018) at chapter 1 (Epub version).

\textsuperscript{121} Andrew Mitrovica, “Front Man” \textit{The Walrus} (12 September 2004), online: <thewalrus.ca/front-man/>. 
isolation from the other arguments used by secret keepers. The argument from consequence is indeed closely linked to the argument from effectiveness.

4.4.2 Effectiveness: mask your capabilities and sources

Intertwined with matters of life and death is the argument that the disclosure of state secrets would directly undermine the ability of secret keepers to carry out their national security duties, especially when disclosures of identities and sources and methods\textsuperscript{122} are in question; intelligence gathering would be unsuccessful if sources and methods were known to adversaries. Following the events of 9/11, the efficiency/secrecy nexus took added importance within the British, Canadian and American multifaceted efforts against terrorism. In exchange for public acceptance of greater state secrecy, efficient national security and intelligence operations that would protect everyone from further harm were promised.\textsuperscript{123} US President Bill Clinton was unequivocal about this, stating:

I agree that unauthorized disclosures can be extraordinarily harmful to United States national security interests and that far too many such disclosures occur. I have been particularly concerned about their potential effects on the sometimes irreplaceable intelligence sources and methods on which we rely to acquire

\textsuperscript{122} The following statement is of general application to security and foreign intelligence organizations: “Intelligence sources and methods are the basic practices and procedures used by the CIA to accomplish its mission. They can include human assets, foreign liaison relationships, sophisticated technological devices, collection activities, cover mechanisms, and other sensitive intelligence tools.” \textit{American Civil Liberties Union v Dept of Justice}, 808 F Supp (2d) 280 at 291 (DC Cir 2011) (Affidavit of Mary Ellen Cole, CIA’s Information Review Officer).

accurate and timely information I need in order to make the most appropriate decisions on matters of national security.\textsuperscript{124}

Here the need to protect sources was intertwined with the consequence of lacking these sources on the gathering of intelligence. As well, the use of amplifying terms such as “extraordinarily” and “particularly” by a president gives additional seriousness to the issue.

David Omand, who served as the highest levels of Britain’s intelligence system, stresses the consequence of losing sources and techniques for the gathering of intelligence:

I understand the argument that the reason the Security and Intelligence Agencies are obsessed with secrecy is because they want to avoid accountability. But as former Intelligence & Security Coordinator and Agency Head I know it to be wrong. Intelligence organisations that cannot protect their techniques and sources will not survive for long. Compromise them and they will dry up [no one will want to be a source and the techniques that are used today will not work], and [as a result] we will be less safe.\textsuperscript{125}

In this statement (included in an opinion piece in a British Sunday paper), Omand uses very evocative lexical terms (“not survive for long,” “dry up” and “less safe”) to

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\textsuperscript{125} Sir David Omand, “Our Security and Intelligence Agencies Must Be Held To Account. But Without Secrecy, a Secret Service Cannot do its Job,” \textit{Independent on Sunday} (3 March 2013), online: <www.independent.co.uk/voices/commentators/our-security-and-intelligence-agencies-must-be-held-to-account-but-without-secrecy-a-secret-service-8517915.html>.\end{flushright}
convey the impact of disclosure on effectiveness. These terms are easy to understand and were used to reach the wider public with effect.

Human intelligence sources providing information to security agencies are always at risk of discovery. In the case of foreign human intelligence sources, their own government, if aware of their identities and activities, can be a source of danger to “themselves, their families, and their associates.” Therefore, before they give information to a security agency or another country, human intelligence sources require assurances that their identity and activities will be protected from public disclosure. If such assurances cannot be provided, or unauthorized disclosures occur, the security agencies relying on these sources would lose credibility and encounter increasing difficulties in recruiting and retaining new sources.

Secret keepers here stress the impact on the effectiveness of CSIS were the identity of a source to be revealed:

[CSIS] maintains covert operatives who observe and report on the activities of various targets [.][T]he disclosure of the identities of these covert operatives would end their continued usefulness to the Service and would seriously prejudice ongoing observations of the targets whose activities they are observing. [Also] the disclosure of their identities could pose a danger to their safety and could affect the recruitment of new overt operatives and the


127 “Having lost a source of intelligence through an error in judgment in terms of protecting that source, we then run the risk that we no longer will be able to attract additional sources. In a sense, in the intelligence world, we lose our credibility; and, having lost our credibility, we lose our capability to attract.” Gail F Donnalley, “Declassification in an Open Society” (1974) 18:3 Studies in Intelligence 11 at 12.
continued servicing of current covert operatives if they were aware their identities were subject to disclosure.\textsuperscript{128}

In this statement CSIS also uses evocative lexical terms (“end their continued usefulness,” “seriously prejudice”) to indicate to the court that there is a “danger” in disclosing state secrets.

Then Deputy Director of the Central Intelligence Agency, Stephen R Kappes, said that:

For example, if an unauthorized disclosure of classified CIA information regarding a human intelligence source were made, that disclosure could jeopardize the source. If the CIA were to officially acknowledge the information, however, that additional step could further jeopardize the source and could deter other clandestine human intelligence sources from cooperating with the CIA. Existing and future human intelligence sources would note that the CIA was willing to confirm publicly a clandestine human intelligence source’s involvement with the CIA. These human sources would factor that additional risk into their own decision on whether to provide information to the CIA and could decide that the risks are too great to cooperate with the CIA.\textsuperscript{129}

In these two statements the lexical terms “blow” and “jeopardize” are used to express the effect of a disclosure. “Jeopardize” is in effect the most commonly used term among secret keepers (and judges, in the next chapter).

Former senior FBI officer Andrew McCabe said that

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\textsuperscript{128}Canada (Attorney General) v Kempo (2004), 294 FTR. 1; 2004 FC 1678 at para 59. \\
\textsuperscript{129}Wilson v CIA, 586 F(3d) 171 at 199 (2d Cir 2009) (Judge Katzmann quoting declaration of Stephen R Kappes, Deputy Director, Central Intelligence Agency).
\end{flushright}
[n]ot giving up your people: This is important. It is crucially important not only to the FBI but to the country’s safety and security. The ability to identify and develop relationships with human sources is oxygen to the FBI. The Bureau cannot live without that. It is the first step toward the activation of any of our other, more sophisticated investigative authorities. You do not get to search warrants, you don’t get to subpoenas, you don’t get to listen in on a subject’s communications through a FISA [Foreign Intelligence Surveillance Act] or Title III court order, without people telling you what they know. And if you can’t credibly tell them that you will protect and conceal their identity if they are willing to go out on a limb, if they are willing to risk their own and their families’ lives and welfare—if they can’t trust that you will protect them—then they will not cooperate with you.130

In this statement, McCabe tries to relate to the public sense of humanity and the links that we all forge with one another as human beings. “Not giving up” on others, “develop relationship” with others and having trust in others are particularly stressed. It is all these human relations that are at risk if state secrets are disclosed.

In addition to protecting its human sources, the United States has also stubbornly fought any disclosure that could help its adversary to assess its capabilities. One post-9/11 example is the detention sites operated by the CIA in foreign countries. Conscious that information concerning the existence of these sites would eventually come out in public (as it did), CIA warned of the implications for the continuous use of that method of gathering intelligence. In an internal memorandum, CIA officials explained that: “As

130 McCabe, supra note 85 at 60.
captured terrorists may be held days, months, or years, the likelihood of exposure will
grow over time [...]. Media exposure could inflame public opinion against a host
government and the US, thereby threatening the continued operation of the facility.”
In other words, if the facility shuts down, it would reduce the effectiveness of the US
government in handling detainees and preventing them from causing harm to Americans.

Case in point: Later learning that the media had information about a detainee being in a
specific country, the CIA preventively shut down that country’s detention site. After
leaks on detention sites occurred anyhow, another country asked that the CIA detention
centre on its territory be closed within hours.

The following statement concerns the identity of an intelligence officer and future harm to US national interests and the effectiveness of the CIA were it to be made public.

In a lawsuit launched against Ishmael Jones, a pen name, who authored The Human
Factor: Inside the CIA’s Dysfunctional Intelligence Culture without prepublication review, the CIA argued that if the identity of its officers were known: (1) these officers would not be able “to effectively and securely collect foreign intelligence and conduct clandestine foreign intelligence activities around the world [...].” (2) “foreign
governments, enterprising journalists, and amateur spy-hunters would be able to
reconstruct” their travels and where they lived, possibly causing anger, embarrassment or hostility against the United States in other countries. Actions these countries could take

131 Memorandum for DCI from J Cofer Black, Director of Counterterrorism, via Deputy Director of Central Intelligence, General Counsel, Executive Director, Deputy Director for Operations and Associate Director of Central Intelligence/Military Support, entitled, “Approval to Establish a Detention Facility for Terrorists.” Quoted in US Senate, The Senate Select Committee on Intelligence Report on Torture (Brooklyn: Melville House, 2014) at 29.
133 Ibid at 138.
include “limiting joint endeavors, reducing intelligence sharing, deferring negotiations on matters of importance to the United States, or demanding that CIA officers known or declared to the foreign government leave the country. (3) “foreign governments; enterprising journalists, and amateur spy-hunters would be able to unearth and publicly disclose the cover methods” CIA officers use to conceal their true status as CIA officers, and in so doing prevent the CIA from using these methods in future and putting publicly unknown officers operating undercover at risk of discovery.\(^{134}\)

In the following statement, the CIA asserts future harms to its effectiveness to work with other countries and methods of operations, including the recruiting of human sources:

if the CIA released the information related to foreign governments, those government may be less willing and able to assist the CIA in the future—and the CIA’s breach of trust may affect the willingness of potential future sources or entities to assist the CIA. Additionally, if the CIA disclosed particular activities, sources, or methods, they would become less effective and their continued use by the CIA would be jeopardized.\(^{135}\)

In this statement, the lexical terms used by the CIA are much weaker and much less definitive in tone (“maybe less willing,” “may affect the willingness,” and “less

\(^{134}\) United States v Ishmael Jones, Civil Action No 1:10cv765-GBL-TRJ (ED Va 2010) at 4-6 (Declaration of Ralph S DiMaio, Information Review Officer, National Clandestine Service, Central Intelligence Agency).

\(^{135}\) Declaration of Antoinette B Shiner, Information Review Officer for the Litigation Information Review Office at the CIA, quoted in Mattathias Schwartz v Department of Defense et al, Case 1:15-cv-07077-ARR-RLM (30 September 2016) at 22 (Defendant’s Memorandum of Law in Support of their Motion for Summary Judgment).
effective") than those used in the preceding statements, diluting the impact of the
statement.

Canadian secret keepers have also emphasized that the future effectiveness of their
security services would be affected if state secrets concerning its sources and operations
were disclosed. Before the McDonald Commission of Inquiry into the alleged criminal
and illegal acts committed by the RCMP Security Service described in chapter 3, the
Quebec government had initiated a provincial inquiry into RCMP “dirty tricks” in the
aftermath of the October 1970 Crisis. In an affidavit filed by the Canadian government,
the Solicitor General referred to effectiveness in objecting to the release of specific files
of the RCMP Security Service, asserting that their disclosure “would seriously jeopardize
the effectiveness of the current and ongoing investigations being carried out by the
RCMP’s Security Service, and might thwart the operations being conducted by the […]
Security Service in accordance with the mandate it has been given by the Government of
Canada.”136 In this statement, the lexical term “jeopardize” is also used, amplified by
“seriously,” as well as “thwart,” both conveying the potential effects of a disclosure.

Three post-9/11 Canadian statements reflect the concerns of secret keepers with
effectiveness. At a public summit on security in 2014, the Director of CSIS drew the
implications for Canada’s national security and intelligence agencies of the massive leaks
committed by Manning and Snowden: “The relative ease with which such colossal caches

136 AG of Que and Keable v AG of Can et al, [1979] 1 SCR 218 at 233, For context and the
relationship of the Keable and McDonald Commissions, see Ian Kyer, “The McDonald Commission
Investigates the RCMP Security Service, 1977–83” in Barry Wright, Susan Binnie & Eric Tucker, eds,
Canadian State Trials. Volume V: World War, Cold War, and Challenges to Sovereignty, 1939–1990
(Toronto: University of Toronto Press, 2022) 341.
of information were stolen is sobering. This vulnerability affects every sector and industry. Even the secretive world of security and intelligence is at risk.”

In a post-9/11 affidavit submitted in a civil litigation case, CSIS argued that:

The disclosure of information which would identify or assist in identifying subjects of investigations, thereby confirming the [...] Service’s current or previous interest in the target, could jeopardize the efficacy of the operations and investigations of the Service by prompting the targets to take counter-measures to thwart the investigation by the Service and to introduce false or misleading information in the investigative process [thus] nullifying the usefulness of human or technical sources. [The disclosure of targets] would also provide those engaged in activities constituting a threat to the security of Canada with information that could enable them to access the depth, deployment and sophistication of the resources, as well as the degree of expertise of the Service. [...] [the] disclosure of the use of a technical source could seriously prejudice the efficacy of any future use of this technique against the same subject or other individuals associated with the target as it would enable them to devise means of rendering ineffective the use of the technical source.

In its unclassified damage assessment from the Ortis case (Ortis is accused to have provided state secrets to persons not authorized to receive them and was awaiting trial as


of this writing), Canada’s Communications Security Establishment (which protects Government of Canada cyber systems and exploit those of foreign countries for intelligence purposes) made the point that its ability to protect classified sources and methods is critical. The loss of such hard-won and costly capabilities would render Canadian and allied agencies less able to produce valued intelligence for national decision makers. Analysis of the content of these documents could reasonably produce significant conclusions about allied and Canadian intelligence targets, techniques, methods and capabilities. Countermeasures taken as a result of these insights (real or perceived) by those seeking to evade Canadian or allied authorities could be extremely damaging to a broad range of intelligence efforts. Furthermore, the unauthorized disclosure of such information would undermine the confidence of Canada’s allies in sharing sensitive intelligence, including SI [Special Intelligence], with Canadian security and intelligence partners, limiting Canada’s ability to support key government priorities, with negative repercussion for Canadian national security.139

These three Canadian statements are very rich in the variety of terms used. To express the effect of disclosures on effectiveness, lexical terms such as “jeopardize,” “thwart,” “prejudice,” “undermine,” “nullifying,” and “limiting are used together with an equally wide range of amplifying terms, including “colossal,” “sobering,” “every,” “seriously,” “hard-won,” “critical,” “costly” and “significant.” These choices of terms...

leave no doubt as to the seriousness secret keepers seek to evoke if their ability to fulfil
their organizations’ mission is seen as imperiled by the disclosure of state secrets.

While secret keepers never go into detail about past and future damages in cases of
unauthorized disclosures, media discussions and speculations often force their hand.
Illustrative of this situation is the response given by the UK Cabinet Office to questions
about the impact of Snowden’s disclosures: “It is obviously not possible in an open
statement to go into detail about the real and serious damage already caused by the
disclosures based on Mr. Snowden’s misappropriations, nor about what further damage
may follow. However, given the volume of media reporting published over the past three
months, and public statements from the UK and US Governments, I can say with
confidence that the material seized [by Snowden] is highly likely to describe techniques
that have been crucial in life-saving counter-terrorism operations, the prevention and
detection of serious crime, and other intelligence activities vital to the security of the UK.
The compromise of these methods would do serious damage to UK national security, and
ultimately put lives at risk.”140 In this statement, the Cabinet Office describes as
“crucial,” “vital” and “life-saving” the methods used and the activities undertaken by
national security and intelligence agencies, all of which have presumably been
compromised by Snowden’s leaks.

140 Miranda v Secretary of State for the Home Department & Ors [2014] EWHC 255 (Admin), at para
52 (Affidavit from Mr Robbins, Deputy National Security Adviser for Intelligence, Security and
Resilience).
4.4.3 Analytical summary

A language of fear expressed through the argument from consequence further legitimizes the position of secret keepers against the disclosure of state secrets. Current and former secret keepers expressing themselves within and outside the legal process engage in this process by describing the threats and types of harm that would result from disclosure and proposing preventive actions to counter these threats. From what they say and write and their use of value-oriented and amplifying lexical terms (such as “sacrosanct,” “sacred,” to appeal to their sense of morality; “disaster,” “death,” “incarceration,” “dangerous,” “killed,” “execution,” “destroyed,” and “fatal” to highlight severity; “lives,” “families,” and “life-saving” to further resonate with the audience; and qualifiers such as “great deal,” “grave,” “serious,” “huge,” “very,” “crucial,” “vital,” “tremendous,” “worst,” “real” and “extraordinarily”), it seems that few people are not under threat, which in and of itself is a source of social anxiety for many people. This is compounded by a rhetoric that is at times also very personal, referring to loved ones, family members, friends and acquaintances—yet at other times also highly underspecified or vague (“countless” lives or the lives of “Americans and our partners” are made). But even if none of these people are directly known to the audience, everyone can imagine—even when the affidavits and testimonies of secret keepers and their legal representatives are more measured and adjusted to respect the decorum and rules of the court in their use of value-oriented and amplifying lexical terms—the impact on them if they were their loved ones, family members, friends and acquaintances. As Bourdieu notes, the authoritative discourse of an authorized spokesperson “is more subject to the norms of official propriety than any other, and it condemns the occupants of dominated
positions either to silence or to shocking outspokenness [...].”\textsuperscript{141} The intended effect is a higher likelihood that secret keepers and their audience would share a common perception of reality as well as a desire to protect state secrets from disclosure, which require effective security and intelligence agencies.

Secret keepers in Canada, the United Kingdom and the United States share common concerns about the reduced effectiveness of their respective national security and intelligence apparatus where state secrets are released against their advice. This is not surprising, as they share common tradecraft from years of working closely together. This goes as well for their concerns for matters of life and death, as each of these countries has intelligence agencies making use of human assets (their own officers and agents) to gather intelligence. Their concerns on both counts simply reflect how national security and intelligence work within democratic systems.\textsuperscript{142} On this count, the argument from consequences is linked to the national security metonymy encountered in section 4.3. It is widely accepted that a fundamental responsibility of any state is to ensure the security of its citizens. If a state’s national security and intelligence apparatus were ineffective and causing, because of disclosures it did not authorize, harm to its own citizens or others, it would fail to fulfil its national security remit. But there are clear examples in the public domain and statements by secret keepers, as noted above, showing that risks to life and limbs can be exaggerated. It is not because harm is possible or has occurred in the past that it will inevitably occur every time a state secret is disclosed without authorization.

\textsuperscript{141} Bourdieu, supra note 9 at 138.
Secret keepers, however, argue that temporal interval between the assertion of potential and actual harm is indeterminate: harm could happen tomorrow or a long time from now.

4.5 Protecting secrets for an indefinite period of time

The best-case scenario for secret keepers is to maintain the secrecy of what they want to keep from foreign adversaries, criminals and the public forever, without challenge, and left entirely to their discretion. In arguing for the protection of secrets, they offer a particular sense of time that frames our understanding of the anticipated effects of disclosures.143 These effects are based on past experiences that are known to secret keepers, and “used to explain (foresee) the future,” a future that has no delimitations, and which is built out of instances of anticipation.144 As Paul Chilton notes, “the future is inherently unknown, though it is mentally representable because of the cognitive phenomena of intending, planning and expecting.”145 These instances of anticipation, expressed as linguistic indeterminacies, work as legitimating devices embedded within the discourse of secret keepers. As Dunmire writes:

The future, I contend, is a discursive construct that rhetors embed within and project through the linguistic design of their texts, and, which, thereby, functions as a means of persuasion. […] I see representations of the future in

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143 As May and Thrift note, “the nature and experience of social time is multiple and heterogeneous, so it follows that the manner of its construction—the means by which a particular sense of time comes into being and moves forward to frame our understandings and actions—is in turn both multiple and dynamic.” Jon May & Nigel Thrift, “Introduction” in Jon May & Nigel Thrift, eds, *Timespace: Geographies of Temporality* (London, UK: Routledge, 2001) 1 at 3.


policy documents as a type of legitimation device used in institutional contexts to shore up an institution’s call for particular near-term policies and actions.\textsuperscript{146}

Secret keepers refer to time in an eschatological manner.\textsuperscript{147} The temporal interval between the assertion of potential and actual harm is indeterminate: harm could happen tomorrow or a long time from now and mitigation is assumed to be near impossible. Secret keepers do not differentiate with respect to when (or where) the harm resulting from the disclosure of state secrets they believe should remain undisclosed could occur.\textsuperscript{148} But by generally invoking an indefinite dimension of time, secret keepers exclude other “equally plausible understandings of temporality,”\textsuperscript{149} such as the notion that “secrecy does not necessarily need to persist for lengthy periods of time, and certainly not in perpetuity.”\textsuperscript{150} The position of secret keepers on the temporal indeterminacy of state secrets further clashes with access to information legislation in Canada and the United States (national security and intelligence agencies in the United

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{147} “Eschatology […] suggests a sudden, disruptive occurrence such that when it happens is irrelevant. The eschatological event could happen tomorrow or centuries from now.” David Couzens Hoy, \textit{The Time of Our Lives: A Critical History of Temporality} (Cambridge, Mass: The MIT Press, 2009) at 141. The possibility of harm to an individual after death—for instance, by publishing sensitive documents concerning that person—is considered a possibility in Booning’s philosophical treatise on the subject. See David Boonin, \textit{Dead Wrong: The Ethics of Posthumous Harm} (Oxford: Oxford University Press, 2019).
\item\textsuperscript{148} As Wells notes, “[o]fficials make no genuine attempt to identify the danger, or even possible alternative dangers, posed by the information. Rather, the government’s argument suggests in some sort of shadowy way that the very existence of the information poses the danger; thus, it cannot fall into the wrong, or any, hands.” Christina E Wells, “CIA v. Sims: Mosaic Theory and Government Attitude” (2006) 58 Adm L Rev 845 at 873.
\item\textsuperscript{149} Lee Jarvis, \textit{Times of Terror: Discourse, Temporality, and the War on Terror} (New York: Palgrave Macmillan, 2009) at 17.
\item\textsuperscript{150} Bryce Clayton Newell, “Technopolicing, Surveillance, and Citizen Oversight: A Neorepublican Theory of Liberty and Information Control” (2014) 31:3 Government Information Quarterly 421 at 429. Melley makes a similar point, arguing that over time big secrets tend towards disclosure: “Whereas small operations often remain secret, larger initiatives are more difficult to conceal, particularly over time. Secrecy, that is, has a temporal dimension.” Melley, \textit{supra} note 1 at 13.
\end{itemize}
\end{footnotesize}
Kingdom are not subject to access to information legislation) and archival declassification rules in the United States and the United Kingdom (at the time of writing, Canada was developing processes and rules for the declassification of national security information). The eschatological approach of secret keepers on the protection of state secret thus opens a limited avenue for critique.

In 2005, Jim Bronskill, a journalist with the Canadian Press, requested a copy of the RCMP dossier—going back to the 1930s—on Tommy Douglas, a Canadian politician deceased in 1986, held by Library and Archives Canada. After he received the documents he requested, Bronskill noted that sections of the dossier were withheld on national security grounds. He took legal action to have the sections withheld released. During the legal proceedings in Federal Court, an affiant for CSIS testified that files that would reveal confidential sources or intelligence agents, even if they are long dead and the information decades old, must remain secret “perhaps not forever” but “maybe longer” than 100 years. In response to a question, the affiant responded that the dossier on Douglas was “still quite contemporary,” and linked the refusal to disclose to harm that could still occur decades after the dossier was closed: “These people [who provided information to the RCMP on Douglas] still have families and reputations. How are you going to recruit somebody if you can’t guarantee their anonymity?”


152 See Bronskill v Canada (Canadian Heritage), 2011 FC 983.

Secret keepers, of course, do not shy away from submitting to the courts that such underspecified and undifferentiated temporal impact is normal: “The articulation of threatened harm in the future always will be somewhat speculative and a showing of actual harm is unnecessary.”154 Secret keepers nonetheless insist on the seeming probability or plausibility that harm will ensue if state secrets are disclosed.

In this statement, giving voice to a US assistant attorney, future harm is highly speculative due to the age of the documents in question, dating to the presidency of John F. Kennedy:

The name of a clandestine human intelligence source classified as secret was withheld from a JFK document. [...] Even today, such a disclosure would provide foreign intelligence services with valuable insights into the CIA’s activities, sources, and methods. Moreover, the disclosure of the source’s identity also could endanger the source and his or her family and associates and subject them to reprisals, even if the source is deceased. [...] With regard to intelligence sources and methods, as was recognized in Sims, 471 US at 175, the ‘forced disclosure [by the courts] of the identities of its intelligence sources could well have a devastating impact on the Agency’s ability to carry out its mission’.155

154 Jefferson Morley v Central Intelligence Agency, USCA Case #10-5161 (DC Cir 28 February 2012) at 35 (Brief for Appellee).
155 Jefferson Morley v Central Intelligence Agency, USCA Case #10-5161 (DC Cir 28 February 2012) at 33 (Brief for Appellee).
The appeal to emotion and fear is intertwined with temporality quite explicitly in this statement: the danger is temporally indefinite as it extends beyond the death of a source to threaten his or her relatives at any moment.

In a *FOIA* case concerning a request for the disclosure of Presidential Daily Briefs (PDBs) produced during the Johnson Administration in the 1960s, an affiant for the CIA told the Federal Court that the passage of time had not vitiated the CIA’s interest in maintaining the secrecy of the requested PDBs. He added, without any details, that harm was possible were the PDBs released because “[i]ndividual people may have long lives and careers, and foreign governments and intelligence services may exist in perpetuity.”

In another *FOIA* case, concerning records that were referred to the CIA by the Federal Bureau of Investigation, an affiant for the CIA told the court, without additional details, that “the revelation of the CIA’s intelligence activities in a particular country or with a foreign liaison service could, even after the passage of time, harm the United States’ relationship with that country or result in countermeasures.” In the following case, an affiant for CSIS “acknowledged that the information in this case dated back to 2008 and 2009 but his evidence was that passage of time should not be determinative of the question of injury. He stated that investigations in the national security field can be lengthy, that individuals who cease to be of interest at one point may come to the attention of the Service again in the future […].”

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156 *Berman v CIA*, 501 (F) 3d 1136 at 1145 (9th Cir 2007).
157 *Schoenman v FBI*, 841 (F Supp) 2d 69 at 81 (DC Dist 2012) (Supplementary Declaration by Elizabeth Anne Culver, Information Review Officer for the CIA’s National Clandestine Service).
158 *Canada (Attorney General) v Ader*, 2017 FC 838 (CanLII) para 56.
As noted in the previous section, secret keepers certainly know that history has given them reasons to be worried about the disclosure of state secrets. But as past concrete examples of harm are not readily found in open court or the public square, there are limits to the amount of material available for analysis. Secret keepers therefore portray harm as plausible but speculative, abundantly using “would” and “could.” As Tetlock aptly notes, a term like “could” is ambiguous by definition:

When you ask research subjects what ‘could’ means, it depends enormously on the context: ‘we could be struck by an asteroid in the next 25 seconds,’ which people might interpret as something like a .0000001 probability, or ‘this really could happen,’ which people might interpret as a .6 or .7 probability. It depends a lot on the context. Pundits have been able to insulate themselves from accountability for accuracy by relying on vague verbiage. They can often be wrong, but never in error.159

By using temporality in the manner in which they do, secret keepers want the court and the public to understand that at “every moment time consists of several possibilities for a future course of [harmful] events.”160 The use of lists amplify these possibilities and the use of temporal modifiers and modal auxiliary invoke this indefinite dimension of time. As secret keepers want to affect the future (by preventing harm resulting from the disclosure of state secrets), they see it as alterable and up to the court to defer to their judgment. Their access to privileged knowledge of what has happened in past instances

gives them authority and legitimacy in assessing what would likely happen if the state secrets they want to keep undisclosed are disclosed. In other words, it is from the understanding of their respective—specific and exclusive—domain of knowledge that secret keepers derive their views on temporality.\footnote{This aligns with Aristotle’s principles in making argument about possible futures. Patricia L Dunmire, “The Rhetoric of Temporality: The Future as Linguistic Construct and Rhetorical Resource” in Barbara Johnstone & Christopher Eisenhart, eds, \textit{Rhetoric in Detail: Discourse Analyses of Rhetorical Talk and Text} (Amsterdam: John Benjamins Publishing Company, 2008) 81 at 84.}

That said, statements on the temporal indeterminacy of state secrets are based on a number of assailable assumptions. The most obvious one is that methods used by intelligence agencies do not change, as if the use of invisible ink was still in common use today. The advent and impact of new technologies in making redundant older ones do not enter into the discussion. While it may be correct in specific instances to assert that revealing a particular technique may affect future effectiveness, it is a rather weak argument when used as a generic statement relevant to all instances. To the point that methods may become obsolete, it is interesting to note that formulas for making and uncovering invisible ink dating from 1917 were finally released to the public in 2011, once it was determined that their disclosure would no longer endanger national security.\footnote{Laurie Ure, “Spy Agency Reveals Invisible Ink Formula,” CNN (19 April 2011, online: \textless www.cnn.com/2011/US/04/19/cia.invisible.ink/index.html\textgreater).} It is doubtful that agencies such as the CIA used invisible ink into the 21\textsuperscript{st} century.

The other obvious assumption is that revealing the identity of human sources, whether they are alive or dead, may harm their offspring, relatives or close associates at any future point in time. But as statements in section 4.3 have shown, sometimes nothing
at all happens to human sources of their loved ones once and long after their identity is revealed. As a general statement, the possibility of future harm must be taken seriously; but unless it subsequently takes into account the totality of the specific circumstances of those implicated by a disclosure of state secrets, its persuasive force will remain limited. In Riel’s case, would there really be a threat to the descendants of those who informed on him? The possibility exists, but it is rather remote. Unless the temporal indeterminacy of state secrets argument is linked to a reasonable expectation of probable harm and is not abstract or speculative, it is assailable. Indeed, secret keepers themselves may have diverging opinions on the effect of the passage of time on the possibility of harm. In *National Security Archive v CIA*, a *FOIA* case, the CIA affiant noted in his declaration to the court that “the CIA does not want to discourage disagreement, of which there was clearly much in this instance, among its historians.” 163 This was a very rare admission. 164

4.6 Analogy: thinking of puzzles and mosaics

The use of analogies in discourses, particularly as a “method of argumentation in the social and political arena,” is pervasive. As a mental tool that assists reasoning, analogies help make sense of the world by making the unfamiliar more

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163 *National Security Archive v CIA*, 859 (F Supp) 2d 65 at 72 (DC Dist 2012) (Declaration of Dr. David S Robarge, the Chief Historian for the CIA).

164 In 2010, secret keepers in the United States found themselves constrained by Executive Order 13526—Classified National Security Information, which states that, “except for information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, […] No information may remain classified indefinitely.” 75 Fed Reg 707 (2010).

comprehensible. Analogies do so by comparing one thing to something else where there are components, or relationships between these components, that play comparable roles. Such comparisons may cross knowledge domains. Analogies can be instructive, but also manipulative in favour of their users’ ends. This is particularly so when they are used as a problem-solving tool that offers a “top-down mechanism for constructing mental models.” As Holland and his colleagues explain,

In the case of problem solving, analogy is used to generate new rules applicable to a novel target problem by transferring knowledge from a source domain that is better understood. The usefulness of an analogy depends on the recognition and exploitation of some significant similarity between the target and the source.

Secret keepers use an interdomain analogy, which they and academics now refer to as the mosaic theory or the mosaic effect (these terms are used interchangeably in the literature), as an argument to protect state secrets from disclosure. Secret keepers use the everyday knowledge that people have about solving traditional jigsaw/picture puzzles and apply it to state secrecy (each individual secret being a piece of the puzzle or a picture).

In so doing, secret keepers want judges and the general public to understand the possible harmful effects that the release of innocuous state secrets (individually or grouped

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168 “We swim in a vast ocean of analogies, which we both manipulate for our ends and are unwittingly manipulated by.” Pedro Domingos, The Master Algorithm (New York: Basic Books, 2018) at 200.


170 Ibid at 287.
together) could cause. The analogy works because it can stand on its own: it is simple and easily understood by an audience that understands what a puzzle is.\(^ {171} \) It also works because it is rooted in the experience, expertise and exclusive knowledge of secret keepers, all of which gives them the authority necessary to determine which state secrets fall under the analogy.\(^ {172} \) The mosaic theory also “holds that the executive branch is best qualified to ascertain the importance of discrete bits of information as part of ‘the whole picture’ in matters of national security.”\(^ {173} \) Specifically, the theory posits that

Disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts. In the context of national security, the mosaic theory suggests the potential for an adversary to deduce from independently innocuous facts a strategic vulnerability, exploitable for malevolent ends. […]

\(^ {171} \) “The persuasive value of analogy derives from its ability to help people understand experiences and think through problems by drawing on their reserves of knowledge.” Linda L Berger & Kathryn M Stanchi, Legal Persuasion: A Rhetorical Approach to the Science (London, UK: Routledge, 2018) at 89. As Spangenberg notes in the context of a trial with jury, “the greatest weapon in the arsenal of persuasion is the analogy, the story, the simple comparison with a familiar object,” since “nothing can move the jurors more convincingly than an apt comparison to something they know from their own experience is true.” C Spangenberg, “Basic Values and the Techniques of Persuasion” (1977) 4 Litigation 13 at 16, quoted by Robert P Burns, “Rhetoric in the Law” in Walter Jost & Wendy Olmstead, eds, A Companion to Rhetoric and Rhetorical Criticism (Oxford: Blackwell Publishing, 2004) 442 at 449.

\(^ {172} \) “In law as in life, analogical argument is a valid, albeit undemonstrable, form of reasoning that stands on its own and has its own credentials, which are not derived from abstract reason but are rooted in the experience and knowledge of the lawyers and judges who employ it.” See Lloyd L Weinreb, Legal Reason: The Use of Analogy in Legal Argument, 2nd ed (Cambridge, UK: Cambridge University Press, 2016) at 11.

The relevant pieces of information might come from the government, other public sources, the adversary’s own sources, or any mixture thereof.\textsuperscript{174} 

The mosaic theory is commonly asserted in the United States, the United Kingdom and Canada, typically in legal disputes regarding access to information requests. Secret keepers in the United States are particularly fond of the mosaic effect. They have described it as a reconstituted jigsaw puzzle that can give a complete picture of a state secret that must be protected. Of note, although secret keepers consistently use the analogy as an argument by describing its effects, they sometimes omit reference to the term “mosaic” or “puzzle,” which is simply implied.

In an affidavit submitted to the US Federal Court, a counsel for the National Security Agency writes that “[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, [each detail] may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.”\textsuperscript{175} In the following statement, former senior CIA and FBI officer Philip Mudd writes of the mosaic theory as follows: “On the surface and in isolation, some of the information we collected might be viewed as minutiae, bits of data collected for their own sake. This judgment misses the crux of the intelligence work we did: the fragment of a name from a training camp years ago, matched with other data, might yield the beginnings of an identification of that


\textsuperscript{175} Wilner v NSA, 592 (F3d) 60 at 73 (2d Cir 2009) (Affidavit from the National Security Agency), subsequently quoted in American Civil Liberties Union v. Dept. of Justice, 681 F (3d) 61 at 71 (2d Cir. 2012).
individual. In the world of intelligence, this is gold.”\textsuperscript{176} In these first two statements, we are meant to understand that the components of a state secret may not be easily identified by the non-initiated (they are, after all, “minor details,” “bits of information” and “bits of data”). These components are not necessarily obvious and often are simply pieces of information that appear insignificant. Only persons who truly understand the world of intelligence would recognize these bits for what they are: important and in need of protection.

In order to fully avoid the mosaic effect, the CIA has stressed before the court that indirect references to sources and methods should be protected from disclosure. After all, adversaries of the United States “have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the CIA’s collection efforts. [...] Thus, even seemingly innocuous, indirect references to an intelligence source or method could have significant adverse effects when juxtaposed with other publicly-available data.”\textsuperscript{177} In a declaration submitted in the course of a \textit{FOIA} civil action, the FBI used the mosaic argument to prevent the release of file numbers and subfile names: “Applying a mosaic analysis, suspects could use these numbers (indicative of investigative priority), in conjunction with other information known about other individuals and/or techniques, to change their pattern of activity to avoid detection, apprehension, or create alibis for suspected activities, etc.”\textsuperscript{178} In the

\textsuperscript{176} Philip Mudd, \textit{Takedown: Inside the Hunt for Al Qaeda} (Philadelphia: University of Pennsylvania Press, 2013) at 63.
\textsuperscript{177} American Civil Liberties Union v Dept of Justice, 808 F Supp (2d) 280 at 291 (DC Cir 2011) (Affidavit of Mary Ellen Cole, Information Review Officer for the CIA’s National Clandestine Service).
\textsuperscript{178} Laura Poitras v United States Department of Justice, \textit{et. al.}, Case 1:15-cv-01091-KBJ, at 40 (Declaration of David M Hardy).
preceding two statements, explicit references are made to persons having the required knowledge to make sense of bits of information. In the first instance, these persons are secret keepers from adversarial countries, and in the second instance criminals well versed in figuring out how to evade detection and capture. Once again, persons without the necessary specialized knowledge would not be in a position to understand why seemingly insignificant bits of information should not be disclosed.

To prevent the identity and/or location of FBI units involved in an investigation from being released, the FBI has asserted the following: “The office location and units are usually found in the administrative headings of internal FBI documents. These headings identify the locations of the office and unit that originated or received the documents. Disclosure of the location of the units conducting the investigation would reveal the targets, the physical areas of interest of the investigation, and when taken together with the other locations if identified, could establish a pattern or ‘mosaic’ that identification of a single location would not. If the locations are clusters in a particular area, it would allow hostile analysts to avoid or circumvent those locations, especially if one or more location appeared with frequency or in a pattern. This would disrupt the method of the investigative process and deprive the FBI of valuable information. The withholding of the units involved is justifiable as well under a similar rationale.”

In the preceding statement, what is of particular interest is the emphasis on the notion that adversaries would gain more than the sum of every bit of information disclosed, something which was also mentioned, but briefly, in prior statements. To see more than the sum requires

179 Laura Poitras v United States Department of Justice, et. al., Case 1:15-cv-01091-KBJ, at 41 (Declaration of David M Hardy).
domain expertise and experience that only other secret keepers or specific groups of individuals possess.

Secret keepers in the United Kingdom have used the mosaic argument several times over the years. In the highly publicized *Spycatcher* case, which continues to be relied upon to this day, counsel for the government argues that

> [t]he dangers could arise notwithstanding that the information disclosed was unclassified and is on its face and in isolation apparently innocuous. Such information may take on a wider significance if put together with other information in possession of other persons and thereby, for example, enable them to check the veracity of their sources of information. Furthermore, information which appears to be innocuous at a particular date or to a particular officer may at a later date become significant.\textsuperscript{180}

In 2007, the Director of Information (Exploitation) at the British Ministry of Defence asserted in an access to information case that the government had “an active concern about what he called the ‘mosaic effect,’ i.e., the risk that pieces of information released in different contexts could be joined together in order to build up a larger picture.”\textsuperscript{181} In the preceding two statements, the notion that adversaries would gain more than the sum of every bit of information disclosed is articulated in terms of the wider significance of a larger picture and extant risks. The former adds that the disclosure of tidbits of information may do more than helping adversaries understand the larger picture: it may


help them check the veracity of what they already know. Also, the timing of any impact resulting from a disclosure is indeterminate: it may be quickly felt or await decades (as noted above, rhetorical devices are commonly intertwined, here connecting with the temporal argument).

In 2014, the UK Cabinet Office argued in favour of the mosaic effect too, this time dismissing the notion that a journalist could pass judgment on this argument: “Indeed it is impossible for a journalist alone to form a proper judgment about what disclosure of protectively marked intelligence does or does not damage national security... The fragmentary nature of intelligence means that even a seemingly innocuous piece of information can provide important clues to individuals involved in extremism or terrorism.”182 Here, as with a few of the preceding statements, the argument is intertwined with the arguments from ignorance (impossible to form judgment, seemingly innocuous) and authority (clues are for those with necessary expertise). This statement, by comparison to the others, is quite explicit about a category of persons who would not know of the impact of disclosing tidbits of information. Here the mosaic effect is intertwined with the arguments from ignorance and authority. Journalists, in short, do not possess the right knowledge and are not in the position of secret keepers to form a proper judgment.

Secret keepers in Canada have argued for the mosaic effect just like their counterparts in the United States and the United Kingdom. They also relied on Canadian

and American jurisprudence recognizing the validity of the mosaic effect as an argument. In a litigation case in 2004, an affidavit from CSIS stated that:

assessing the damage caused by disclosure of information cannot be done in the abstract or in isolation. It must be assumed that information will reach persons with a knowledge of Service targets and the activities subject to this investigation. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source.

The mosaic effect was described again in very similar terms in a CSIS affidavit in the context of an application under Canada Evidence Act in 2008:

[...] in the hands of an informed reader, seemingly unrelated pieces of information, which may not in and of themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. By fitting the information disclosed by the Service with what is already known, the informed reader can determine far more about the Service’s targets and the depth of its knowledge than a document on its face reveals to an uninformed reader. In addition, by having some personal knowledge of the Service’s

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183 See, inter alia, Henrie v Canada (Security Intelligence Review Committee), [1989] 2 FC 229 (TD), affirmed 140 NR 315 (FCA).

184 Canada (Attorney General) v Kempo (2004), 294 FTR 1; 2004 FC 1678 at para 62-63 (Affidavit of Ivan Sylvain, Director General, Operations Support of CSIS). This was repeated word for word in subsequent CSIS affidavits, e.g., Canada (Attorney General) v Almalki, 2010 CF 1106, [2012] 2 FCR 508 at 564 (Affidavit of Bradley Evans of CSIS).
assessments and conclusions on an individual or the depth, or lack, of its information regarding specific threats would alert some persons to the fact that their activities escaped investigation by the Service.\textsuperscript{185}

That same year, also in the context of an application under the \textit{Canada Evidence Act}, the government argued in its affidavit that the mosaic effect should protect state secrets from disclosure, but conceded in oral argument, a rare occurrence, “that there is some level of difficulty in applying this [the mosaic effect] in practice.”\textsuperscript{186}

The two Canadian statements bring together the arguments from ignorance and authority and the argument from consequences (alerted persons would know whether they are under investigation and change their behaviour accordingly, hence preventing CSIS from collecting further intelligence) as well as the notion that adversaries would gain more than the sum of every bit of information disclosed. Of note, the admission by CSIS—a rare concession—that the mosaic effect is hard to apply in practice makes the analogy assailable.

As a harm-based justification to prevent the disclosure of state secrets, the mosaic theory further legitimizes the position of secret keepers. Through its use, secret keepers seek to show that they alone fully understand what they are referring to, including the harm that could ensue following disclosure. They contend that they can easily explain it or make it clear to others—alogies, after all, help people think through what they would not otherwise intuitively understand. The use of the mosaic theory is closely intertwined with the argument from ignorance and authority, which requires audiences to

\textsuperscript{185} \textit{Canada (AG) v Canada (Comm. of Inquiry—Arar)}, 2007 FC 766, [2008] 3 FCR 248 at 275.
\textsuperscript{186} \textit{Canada (Attorney General) v Khawaja}, [2008] 1 FCR 547, 2007 FC 490 (CanLII) at para 135.
trust the expertise and experience of secret keepers to protect them from harm. The use of the mosaic theory is closely intertwined with the argument from consequences. The mosaic effect gives adversaries the possibility to build a larger picture and to verify their own information for veracity, with the end result of reducing the effectiveness of a state’s own national security and intelligence agencies.

Analogical reasoning is a familiar form of legal reasoning in common law systems.\textsuperscript{187} The manner in which it is used by secret keepers, however, is much simpler than comparing the applicability of a decided case to a new one for which there is no precedent yet available. Instead, it refers to a concept that would be easy for children to grasp, which presupposes its acceptance by adults on the grounds that it is so obvious (jigsaw puzzles can be solved at a very young age). The mosaic theory provides secret keepers with a simple mental model, but one that is cognitively undemanding. If every tidbit of information can be a source of harm if disclosed, then, logically, nothing innocuous should ever be disclosed. This is, on the face of it, an untenable position. This perhaps explains the concession made by CSIS on the difficulty of applying such a mental model, despite its long acceptance among secret keepers (as noted in chapter 3, it was argued as early as 1913). Because they are so successful at using it, secret keepers are often chastised by observers when they arguably apply it to prevent embarrassment or hide violations of the law.\textsuperscript{188}


\textsuperscript{188} “Not surprisingly, the mosaic theory, among other legal doctrines, leads to abusive efforts by presidents to keep information secret to prevent embarrassment or the exposure of violations of the law.” Pallitto & Weaver, \textit{supra} note 122 at 18.
4.7 Conclusion

The rhetorical devices discussed in this chapter are part and parcel of the discourse of secret keepers, which give meaning to the social world of state secrecy. Taken together, they form a linguistic practice that is reproduced from one case of disclosure to another in court and in the public sphere, and from one generation of secret keepers to another. More importantly, these devices provide secret keepers means by which to assert their knowledge and expertise, and to legitimize their position on the nondisclosure of state secrets. As noted above, by using arguments from ignorance and authority, secret keepers claim to secure a monopoly on the knowledge of state secrets (they claim to know better than judges and just about anyone else) and their potential harm if disclosed, a claim which has the effect of establishing a sharp divide between sacred and profane knowledge and of constituting others as profane.

The discourse of secret keepers asserts that state secrecy is necessary for the security of all citizens and the effectiveness of security agencies. It alleges benefits for all and for the nation such that listeners are required to believe that the protection of state secrets from disclosure is in their own interests, regardless of the veracity of this proposition. It constructs the state as the protector, primarily through themes of responsibility and authority and use of rhetorical strategies that employ emotional appeals and appeals to reason. In particular, it stresses that judges, and by implication the public, either lack or have incomplete relevant knowledge (which precludes counter-arguments and induces acceptance of the secret keepers’ position on non-disclosure), and that—in protecting the security of the state and its citizens through the invocation of fear—it is fulfilling a fundamental responsibility that cannot be challenged. Because they seek to protect lives,
secret keepers are a force for good; because their exclusive access to knowledge affords them superior understanding, they should be trusted.

The use of the temporal argument has at least two major effects: first, it is used for a clear moral purpose, that is, to avoid harm. Second, it purports to reflect how the actual world of state secrecy was, is or will be “causally hooked up.”189 Claiming future harm, for instance, manufactures fear (ultimately, you see, someone could die) and raises the first duty of the state, which should not be interfered with but, rather, honoured by the court. In the end, the linguistic devices used by secret keepers are means by which they can manage their credibility while convincing others (judges and the public) of the necessity of sharing their viewpoint and proposed course of action on nondisclosure.190

The claim of future harm is central to the argument from consequences.191 The severity of harm (people could die, including domestic agents, foreign agents or informants, and their family members) and its temporal uncertainty (harm could arise even if the state secrets disclosed are very old or seemingly harmless) give secret keepers the self-assurance and knowledgeableness (which they vigorously assert) necessary for using the argument from consequence with effect. They use verbs and adjectives evoking fear and emotions and the loss of national security protection effectiveness to claim that

190 As Cap aptly remarks, “In the words of Habermas ([The Theory of Communicative Action]1981), public communication—including state political discourse as well as voices of various non-governmental bodies and ‘grass-roots’ initiatives—has the continual goal of maximizing the number of ‘shared visions’, that is, common conceptions of current reality as well as its desired developments.” Cap, supra note 65 at 2.
191 As we will see in the next chapter, temporal uncertainty (i.e., the mere possibility of future, unspecified harm) also fosters uncertainty in the minds of judges who may consider ordering the disclosure of state secrets. While it may appear clear that there is not present harm from disclosure, judges may refuse to disclose based on a fear of causing future harm that they cannot predict.
harm can be avoided and everyone kept safe by the nondisclosure of state secrets. To that
effect, secret keepers have used a wide range of value-oriented lexical terms to increase
the likelihood that their audience would see the necessity of shielding state secrets the
same way they do.

To impress on their listeners how important it is not to release what appears to be
innocuous states secrets, secret keepers resort to a basic analogy, referred as the mosaic
theory, that can be understood by just about anyone. Once again, the primary purpose of
using this analogy is to show judges and the general public that the disclosure, in this
case of apparently innocuous state secrets, could lead to harmful consequences.

The rhetorical devices secret keepers use in court and in the public sphere all have
indeterminate temporal and spatial elements. The harmful consequences that could result
from the disclosure of state secrets could be imminent or far off into the future. Spatially,
these harmful consequences could be felt very close at home or in a far distant location
(whatever secret keepers, human sources and their families, and physical methods of
gathering intelligence are located). In other words: if not now, then tomorrow; if not here,
then over there. Ultimately, the possibility of harmful consequences is always going to be
contingent and indeterminate. For secret keepers, there is only one course of action open
in such a circumstance: do not disclose.

Rhetorical devices have by design a truth production component about the effects of
disclosing state secrets and a prescriptive component about what to do with them. Secret
keepers expect their reasons to keep secrets concealed to be acceptable to judges and the
public under certain conditions: when they represent the official position of the state,
when the official position of the state has a recognized status before the court and before
the public, and when the representatives of the states speak with authority and within the confines of their recognized responsibilities. Ultimately, “[I]t matters what one says and how one says it, [...] the power of words is both in their message and their form.”

The latter point gives added importance to the very rare instances when secret keepers themselves have expressed doubts about the validity of their own arguments. While it is widely accepted that there are consequences when state secrets are disclosed against the will of secret keepers, not every single disclosure result in harm to individuals or the state. Harm can take different forms and may vary in degree of severity. While harm may be remote temporally and spatially from the time and place of a disclosure, it stretches credulity that it may indefinitely extend on both counts. The arguments from ignorance and authority have validity at face value, but in a democratic polity may appear condescending and giving too much leeway to non-elected officials. The ability of secret keepers to be candid publicly—by providing specific reasons in each case instead of generalities—is hampered, of course, by secrecy. But such secrecy could be somewhat reduced by increased transparency and the use of more contemporary examples of likely harm (e.g., most people today would never have heard of the CIA’s Richard Welch murder in 1975). Appeals to emotions when grave harm is expected is understandable, but as in the statements on the Manning and Snowden cases show, such appeals may disguise other (particularly political) motives. These rare examples of doubt expressed by secret keepers ultimately remove a tiny part of the veil over state secrecy. More importantly, they give some credibility to counter-discourses and contestations.

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This chapter broke down the rhetoric of secret keepers on the need to protect state secrets from disclosure into discrete devices. Each device used by itself is in one way or another assailable. But as so many of the statements make clear, it is very hard to disentangle one device from another. The reason is that secret keepers rarely restrict themselves to using one and not the others. The use of lists makes this abundantly clear. What gives strength to the rhetoric of secret keepers is the intertwined use of these devices and the fact that secret keepers have access to the public as figures of authority and public servants who work at protecting their security and that of their country. It is hard for the general public to contest and counter a discourse from experts in positions of authority on a subject that few people understand or even care about (except arguably when the rhetoric of state secrecy is used to mask gross negligence, incompetence or waste). This is especially the case when the current discourse of secret keepers has not changed much over recent times, anchored in the world ushered by the onset of the Cold War. The views of secret keepers, repeated over time and heard very loudly when there are major leaks (such as those of Manning and Snowden, or Ellsberg in the 1970s), are easily ingrained in the perception of state secrecy by the general public (this, however, does not exclude the existence of counter-discourses as members of the public may espouse opposite values such as transparency, openness, etc.). The reason of state, it seems, prevails in matters of state secrets. The discourse of the secret keepers, however, is further reinforced, and even more difficult to assail when the concordant discourse of judges, who are important and independent figures of authority, is taken into account.
Chapter 5: The semantic practices of judges on state secrecy, or how to legitimize the discourse of secret keepers

“It matters what one says and how one says it, […] the power of words is both in their message and their form.”

Barbara Stoler Miller to Ann Laura Stoler, 
Race and the Education of Desire
(Durham: Duke University Press 1994) at xiv

5.1 Introduction

Secret keepers use an assortment of rhetorical devices to persuade judges in the courtroom, as well as the broader public, that state secrets must not be disclosed. To increase their persuasiveness, secret keepers benefit from the authorized and legitimizing discourse of judges, who codify—or materialize—their rhetorical devices in reported decisions. By speaking a language that directly mirrors the language of secret keepers, judges—as “legitimate speaker[s], authorized to speak and to speak with authority” by the state—give status to the secret keepers’ discourse.2 Once materialized and circulated, rhetorical devices “are subsequently used to teach the next generations of lawyers from which judges will come,”3 a process which further reinforces the authority of secret keepers to speak of state secrecy as they do. The discourse of judges on state secrecy is therefore performative within the legal order. When a judge pronounces something to be a state secret, a judge confers protection from disclosure to that secret.4 It is a speech act. As Bourdieu writes, “[I]legal discourse is a creative speech which brings into existence

2 Ibid at 152.
3 Ibid at 45.
that which it utters. […] In other words, it is the divine word, the word of divine right, which, like the *intuitus originarius* which Kant ascribed to God, creates what it states […].”⁵ Because judges are “unlike most others who pronounce in the public domain,” Lord McCluskey further opines, “judges appear to offer, and to deliver, clear and definitive answers.”⁶ John Ralston Saul, thinking of this assertion, clearly sees the authority figure of the judge: “All this makes the judge sound very much like someone we know. A mythological figure. A disinterested servant of power and justice. One who is indifferent to lobbying and independent from the opinion of the majority. Who tries to decide with the general good in mind. [...] He is the prince of reason.”⁷ In an ideal world, judges would live up to such lofty pronouncements. However, as anyone can observe in everyday life, judges are not beyond reproach. This is readily apparent in the United States where a number of judges are elected or selected more for their particular viewpoints than claims of absolute objectivity.

That said, it remains that what judges write and say is not without effects, even if they are contested: judges are authorized and entitled to act performatively and their authority is largely recognized by society⁸ (a recognition that should last as long as society retains confidence that judges act fairly, independently and impartially⁹), and

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⁵ Bourdieu, *supra* note 1 at 42.
⁷ Saul, *supra* note 6 at 327.
⁸ “Most of the conditions that have to be fulfilled in order for a performative utterance to succeed come down to the question of the appropriateness of the speaker—or, better still, his social function—and of the discourse he utters. A performative utterance is destined to fail each time that it is not pronounced by a person who has the ‘power’ to pronounce it […] in short, each time that the speaker does not have the authority to emit the words that he utters.” Bourdieu, *supra* note 1 at 111.
because the speech act they perform is recognized in the form of an executable judgment or decision.\textsuperscript{10} As Andrei Marmor writes, “[l]aw is one of those domains in which the saying so (by the appropriate agent under the appropriate circumstances) makes it so.”\textsuperscript{11} It is difficult to discursively contest the non-disclosure of state secrets with secret keepers when the latter’s discourse is mirrored and reproduced in the discourse of judges. Secret keepers and judges, in other words, share a common knowledge of state secrecy that is reflected in a shared understanding of words and their uses—generally speaking, as there could be exceptions, they comprehend the world of state secrecy in similar ways.\textsuperscript{12} A high degree of deference to the state in matters of national security facilitates this shared understanding. As secret keepers and judges set limits “to what is considered legitimate and practicable”\textsuperscript{13} through their respective discourse, struggles over meaning are significantly weakened and discursive battles rarefied.

In this chapter, I examine how judges employ the rhetorical devices that secret keepers use in arguing against the disclosure of state secrets. Out of 700 post-9/11 court decisions from the United States, the United Kingdom and Canada mentioning either

\begin{footnotesize}

\textsuperscript{10} An effect must be recognized as such, here in the form of the judgment. The authority of the legal discourse goes beyond the authority and status of the judges in society and resides “in the social conditions of production and reproduction of the distribution between the classes of the knowledge and recognition of the legitimate language.” Bourdieu, \textit{supra} note 1 at 113.

\textsuperscript{11} Andrei Marmor, \textit{The Language of Law} (Oxford: Oxford University Press, 2014) at 77.


\textsuperscript{13} Thomas Diez, “Setting the Limits: Discourse and EU Foreign Policy” (2014) 49:3 Cooperation & Conflict 319 at 321.
\end{footnotesize}
“national security” or “secrecy,” I highlight several statements that reflect the various ways judges engage with the stated reasons for non-disclosure.

5.2 Lists: there is no list like one from a secret keeper

Although judges occasionally quote a list provided by secret keepers in an affidavit or in testimony (see the statements in section 4.1 which were all quoted verbatim by judges), they rarely make use of lists of reasons themselves with their own words. One notable exception is the list of types of information and methods in Henriette that must be protected and that have been consistently repeated and applied to national security cases by Canada’s Federal Court:¹⁴

[I]n security matters, there is a requirement to not only protect the identity of human sources of information (CSIS d) but to recognize that the following types of information might require to be protected […] information pertaining to the identity of targets of the surveillance whether they be individuals or groups (CSIS c), the technical means and sources of surveillance (CSIS d), the methods of operation of the service (CSIS b), the identity of certain members of the service itself (CSIS a), the telecommunications and cipher systems (CSIS f) and, at times, the very fact that a surveillance is being or is not being carried out (CSIS c).¹⁵

I indicated in parenthesis the matching item from the list provided by CSIS and quoted by the court in section 4.2. While the order and the phrasing are different, the elements from

¹⁴ As noted in Kanyamibwa v Canada (Public Safety and Emergency Preparedness) 2010 FC 66, [2011] 1 FCR 423 at 443.
¹⁵ Henriette v Canada (SIRC), [1989] 2 FC 229
both lists are the same, the judge in *Henrie* only omitting item e from the CSIS list pertaining to the relationships that CSIS maintains with foreign security and intelligence agencies.

In my sample of 700 cases, I did not find, besides *Henrie*, any recurrent use of a list similar to the one used by secret keepers in court affidavits—except for those that were direct quotes of these affidavits. Judges, of course, make an abundant use of lists, some very long and complicated, others very short. A *ratio decidendi*, for instance, may include a list of several legal principles upon which a particular decision is founded. Judges list the arguments of both parties in a case, too, before undertaking their own analysis of these sets of arguments. While judges rarely use short lists of reasons opposing the disclosure of state secrets, they do address these reasons at various lengths in cases at bar, which negates the use of these short lists. Each argument put forward by parties is scrutinized at length over many pages, and short lists, if they are used, are simply used to summarized the arguments put forward by secret keepers, such as those in section 4.1 and a few others flagged in statements chosen for the sections that follow. What is interesting is that the statements I found for section 4.1 show judges quoting verbatim the lists submitted by secret keepers. Of the rhetorical devices covered in this chapter, lists are the least used. As judges do not explain why, I can only surmise that it is because of the lists’ general and universal character and of their intended purpose from being included in the affidavits of secret keepers: to impart general knowledge and inform the discussion between parties. So, instead of building their own lists using their own words and understanding of the claims made, judges implicitly trusted that the lists provided in affidavits and declarations by secret keepers were adequate for discussing the
issues at bar. This clearly shows a ready acceptance by judges to engage with the claims of secret keepers through the terms and notions used by secret keepers. The result is that judicial decisions uncritically carry this language.

### 5.3 Ignorance and authority: judges, too, know something

When secret keepers claim that state secrets should not be disclosed in the name of national security, they expect judges to exercise a duty of deference, particularly with respect to the executive’s assessment of harm that could result from disclosure. This is necessary, they argue, because secret keepers are best positioned—given their expertise and experience, their knowledge of past disclosures that were harmful, their access to secrets not available to others and the magnitude of risks—to determine the likelihood of harm resulting from the disclosure of state secrets. The practice of deference expected of judges by secret keepers is not absolute, however, as the courts—not the executive—are the ultimate decisionmakers. Further, the courts—not the executive—are best positioned to balance conflicting interests.\(^{16}\) In matters of law *stricto sensu*, the courts and judges exercise a high degree of authority—judicial decisions issued under their authority conferred by law must be respected and can be enforced to the extent necessary.\(^{17}\)

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\(^{16}\) “She [the judge] must struggle to enunciate the values at issue. Then she must attempt to strike the balance between the conflicting values which most closely conforms to justice as society, taken as a whole, sees it. […] the judge can attain a level of detachment which enables him or her to make decisions which are in the broader interests of society. […] The willingness of judges to speak out must be tempered by a constant awareness of lines that cannot be crossed, if the judiciary is to remain above the political fray and continue to effectively discharge its role of neutral, impartial, and independent decision-making. Judges are not politicians. Nor are they advocates. Judges are, quite simply, impartial decision-makers.” Beverley McLachlin, “The Role of Judges in Modern Society” (Remarks delivered at the Fourth Worldwide Common Law Judiciary Conference, Vancouver, 5 May 2001) [unpublished] online: <http://www.scc-csc.ca/judges-juges/spe-dis/bm-2001-05-05-eng.aspx>.

\(^{17}\) We saw in chapter 4 that secret keepers and their institutions claim to be figures of authority on matters of state secrecy. “Authority” is also used to refer to the normative power that that person or institution has, here judges and the courts. The focus of this section is focused on whether judges recognize
Judges frequently refer to a duty of deference to the executive in matters of national security.\(^{18}\) Despite differences in the nature of the polities involved (Canada and the United Kingdom are constitutional monarchies with parliamentary legislative systems whereas the United States is a republic with a congressional legislature and with a rather different relationship between the executive and judicial branches), and differences in the laws governing each country, it remains the responsibility of the state in each democracy to protect its national security and the security of its citizens. Because of the separation of powers that exists between the executive, the legislature and the judiciary in both types of polity, tensions and conflicts over where the exact locations of the boundaries between the three branches are far from uncommon. This is particularly evident in the United States where the relationship between the branches is more formalized and the exact boundaries of the executive privilege and of the state secret privilege are regularly tested in court. In both Canada and the United Kingdom, deference to the executive in matters of national security and defence is generally well-recognized and of long-standing, as seen in examples such as the Kellock-Taschereau Commission described in chapter 3, although far from absolute and evolving in a post-9/11 context. Despite being regularly tested in court, this inclination to deference is equally strong in the United States\(^{19}\)—

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whether on the finding of facts, policy decisions, matters of law, or executive action in foreign affairs—and becomes even more pronounced during times of perceived and real emergencies.

Then US Supreme Court Justice Antonin Scalia colourfully and unequivocally made that point three years after 9/11: “The Supreme Court does not know diddly about the nature and the extent of the threat. It’s truly stupid that my court is going to be the last word on it.”

Judges, however, have acknowledged that the definitions of national security and of state secret are unclear. Lord Dyson, then Justice of the Supreme Court of the United Kingdom, aptly observed in 2012 that “national security issues continue to present difficult challenges to the courts.” The post-9/11 world has indeed generated more challenging national security-focused court cases than in any other historical period. Paradoxically, advanced democracies have made little notable progress in defining—both exhaustively and precisely—what “national security” means at law and in judicial decisions. That being said, courts in the United States, the United Kingdom and Canada

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21 Ibid at 314. US “federal courts, which have adopted a deferential posture to the executive branch on national security matters, almost never overturn agency classification decisions. There are no more than a few dozen FOIA cases over the past thirty years in which an agency’s assertion of a classification exemption has been overruled by a court. Even then the decision was reached primarily on technical rather than substantive grounds.” Steven Aftergood, “Reducing Government Secrecy: Finding What Works” (2009) 27 Yale L & Pol’y Rev 399 at 407.
22 Quoted in “The Kalb Report - Ruth Bader Ginsberg & Antonin Scalia,” (2014, 17 April) 36:18 The Kalb Report, online <www.youtube.com/watch?v=z0udJkJGq&feature=share&t=36m18s>. The US Supreme Court reprised the argument in 2010 in Holder v Humanitarian Law Project 130 S Ct 2705 at 2727 (2010): “when it comes to collecting evidence and drawing factual inferences in this area [national security], ‘the lack of competence on the part of the courts is marked,’ Rostker, supra, at 65, 101 S Ct. 2646, and respect for the Government’s conclusions is appropriate.” This particular quote surfaced more recently in 2018 in Trump v Hawaii, US Supreme Court docket No. 17-965, decided 26 June 2018, at 31-32 (Trump v Hawaii, 585 US__(2018) (slip op)).
24 As an indication, Black’s Law Dictionary, widely in use in the United States and elsewhere, has no entry for national security, even though one of its latest edition came out as far as eight years after 9/11. See Bryan A Gardner, ed, Black’s Law Dictionary, 9th ed (St. Paul: Thomson Reuters, 2009).
share the view that national security in its very essence “deals with threats that have the potential to undermine the security of the state or society.”

In section 4.3, we saw that secret keepers equate secrecy with national security and assert that national security is the exclusive purview and first responsibility of the state. Courts have written of that duty of the state in a similar language, also stressing that in matters of national security they should recognize the authority of the state. Judges also have made a clear connection between the national security imperative and the need to keep some information concealed.

Here, in an immigration case before the House of Lords, Lord Hope is unequivocally clear in asserting the primacy of the state in matters of national security: “It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle.” In a Federal Court of Canada immigration case, Justice Yves de Montigny, relying on judicial precedents, also explicitly links the responsibility of the state in matters of national security with the protection of state secrets:

The Supreme Court of Canada and other courts have repeatedly recognized the importance of the state’s interest in conducting national security investigations

25 These words are from Securing an Open Society: Canada’s National Security Policy (Ottawa: Privy Council Office, 2004) at 3.

26 A v Secretary of State for the Home Department (No 1), [2004] UKHL 56 at para 99. Referred to in Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs, [2009] EWHC 152 (Admin) at para 106. A similar view was expressed in Canada’s Federal Court years before: “[N]ational security is involved for the simple reason that the very existence of our free and democratic society as well as the continued protection of the rights of litigants ultimately depend on the security and continued existence of our nation and of its institutions and laws.” Henrie v Canada (Security Intelligence Review Committee) [1989] 2 FC 229 at para 18, affirmed (1992) 5 Admin LR (2d) 269 (FCA) [Henrie].
and that the societal interest in national security can limit the disclosure of materials to individuals affected by the non-disclosure. *In Ruby v. Canada (Solicitor General)*, [2002] 4 SCR 3, the Court encouraged a deferential standard of judicial review if the Minister is able to demonstrate that disclosure reasonably supports a finding of danger to Canada’s security.27

Notwithstanding how precisely national security is defined at law, it is widely recognized and accepted as “a national interest of the first importance”28 that requires a certain degree of secrecy.29

In an immigration case before Canada’s Supreme Court, then Chief Justice McLachlin writes that

The protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. […] The facts on this point are undisputed. Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality.30

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29 As Canada’s Federal Court Justice MacKay (as he then was) wrote: “The public interest served by maintaining secrecy in the national security context is weighty.” *Singh v Canada (Attorney General)*, 2000 CanLII 15563 (FC) at para 23.
30 *Charkaoui v Minister of Citizenship and Immigration*, 2007 SCC 9 at para 66, [2007] 1 SCR 350. At para 1, she also stated that: “One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security.”
Her colleagues on the US Supreme Court, too, in a contractual breach case, agrees that “protecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret.”

In the first statement Lord Hope clearly recognizes that the duty of the state is a matter of life and death. Justice de Montigny, speaking specifically on state secrecy, recognizes that there is a strong societal interest in national security, and that deference can find justification when there is a danger to Canada’s security. In both instances, judges are well attuned to the possible consequences to the lives of both countries’ citizens. In the third statement, Chief Justice McLachlin also speak of consequences with respect to the effectiveness of national security and intelligence agencies. Canada’s national security would be affected by the loss of information essential to the security and defence of Canada resulting from disclosure. The fourth statement states that the protection of secrets is a necessary condition for the protection of US national security. Taken together, the judges quoted in these statements clearly acknowledge that there exist potentially grave consequences if no deference is accorded to the state in matters of national security. They recognize the responsibility of the state in matters of national security, and that to fulfill this duty the state must be given some leeway in preventing the disclosure of state secrets.

In the following statements, judges further acknowledge that secret keepers are in a privileged position to determine the degree of harm that could occur following the disclosure of state secrets. Judges use words such as “lack of competence,” “poorly positioned,” “ill-equipped,” and “second-guessing role” to describe their own situation in

31 *Gen Dynamics Corp v United States*, 131 US 1900 (SCt 2011) at 1905.
contrast with secret keepers who are “well-suited” and in “a position superior to that of the courts,” have access to “sophisticated” tools and “expertise” and the “responsibility” to determine potential harm. We saw in section 4.3 that secret keepers use similar terms to describe their respective position: judges “lack the expertise necessary to second-guess,” do not “have the skill or experience to weigh the repercussions” of disclosing state secrets whereas secret keepers are “best placed,” in the “best position to judge,” because they have “unique insights.”

In the United States, the key judicial precedent is the Supreme Court’s 1985 opinion in Sims. Since then, Sims’s key point has been regularly reiterated by the Supreme Court and lower courts. In its most succinct rendering by the Supreme Court: “When it comes to collecting evidence and drawing inferences” on questions of national security, “the lack of competence on the part of the courts is marked.” In a FOIA case, Judge Fischer recognizes Sims when he writes that “[b]ecause of the broad deference we are to give the CIA under Sims, and because judges are poorly positioned to evaluate the sufficiency of the CIA’s intelligence claims […] we defer to its judgment.” Here, going beyond simply paraphrasing or quoting Sims, Judge King, in a civil action case against the CIA, speaks directly to the matter of expertise as a reason for deferring to secret keepers:

Such deference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information. In the related context of confidentiality

33 Berman v CIA, 501 F (3d) 1136 at 1142 (9th Cir 2007).
classification decisions, we have observed that ‘[t]he courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.’ [reference omitted] The executive branch’s expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis […]. In the same vein, in those situations where the state secrets privilege has been invoked because disclosure risks impairing our foreign relations, the President’s assessment of the diplomatic situation is entitled to great weight.34

Here, Judge Cabranes is quite categorical in a FOIA case that the expertise of secret keepers should not be challenged: “Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to ‘second-guess the predictive judgments made by the government’s intelligence agencies,’ regarding questions such as whether disclosure of terrorist-related surveillance records would pose a threat to national security.”35 Here, Judge Huvelle, in another FOIA case, rejects a second-guessing role for his court:

The Court will uphold the government’s claim of exemption because it is mindful of the ‘long-recognized deference to the executive on national security issues,’ and the need to accord ‘substantial weight’ to an agency’s affidavit

35 Wilner v National Sec. Agency, 592 F (3d) 60 at 76 (2d Cir 2009). In 2013, the court repeated the same reason as 2003: “It is well understood in this Circuit that ‘the judiciary is in an extremely poor position to second-guess the executive's judgment in the area of national security.’” (Quoting from Center for Nat Sec Studies v. Dept of Justice, 331 F (3d) 918 at 928 (DC Cir 2003) cert. denied, 540 US 1104 (2004).) National Security Counselors v Central Intelligence Agency, 960 F (Supp 2d) 101 at 170 (2013).
attesting to the classified status of documents implicating security issues. [omitting reference]. Indeed, the Court of Appeals in this Circuit has cautioned that the ‘judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security,’ and has counseled deference to executive affidavits predicting harm to national security. [omitting reference] Thus, although ‘deference is not equivalent to acquiescence,’ [omitting reference], it is the responsibility of the executive, not the courts, to ‘weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the agency’s intelligence-gathering process.’ [omitting references].

The two preceding statements not only distinguish the differences in competence between secret keepers and judges, but also the competencies assigned to the executive and judicial branches in a democracy.

In a terrorism-related case, Judge Sentelle uses evocative language (“strong,” “abundantly clear,” a real “enemy,” “extremely poor”) to justify deference in order to prevent harm to national security:

The need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore. Exemption 7(A) [of the Freedom of Information Act] explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it ‘could reasonably be expected’ that the harm will result. […]. It is

36 American Civil Liberties Union v US Department of Justice, 321 F Supp (2d) 24 (DC 2004).
abundantly clear that the government’s top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security. […] We therefore reject any attempt to artificially limit the long-recognized deference to the executive on national security issues. Judicial deference depends on the substance of the danger posed by disclosure—that is, harm to the national security—not the FOIA exemption invoked.\(^{37}\)

These strongly-worded assertions are meant not only to exclude the national security expertise a judge may have, but also the expertise of a particular litigant.\(^{38}\)

Courts in the United Kingdom have long\(^{39}\) taken positions similar to those of the United States. While UK courts “have not simply acquiesced” to the intrusion of an increased degree of secrecy in proceedings, they, post-9/11, “have slowly retreated as the culture of secrecy has spread from statute to common law.”\(^{40}\) As in the United States, judges in the United Kingdom see it as normal to defer to the views of secret keepers

\(^{37}\) Center for Nat. Sec. Studies v Department of Justice, 331 F. (3d) 918 at 928 (DC Cir 2003).

\(^{38}\) For example: “Essentially, the plaintiff invites the court to conclude that the plaintiff is more knowledgeable than the ADCI [Acting Director of Central Intelligence] about what disclosure of information would harm intelligence sources and methods. The court declines the plaintiffs invitation. […] The fact that the plaintiff subjectively believes that releasing the requested budget information would not compromise sources and methods of intelligence is of no moment. The DCI is statutorily entrusted with making that decision, not the plaintiff.” Aftergood v Central Intelligence Agency, 355 F (Supp 2d) 557 at 563 (Col 2005).

\(^{39}\) British courts have long recognized a duty to the executive to assess whether the disclosure of state secrets would prejudice national security. Lord Dunpark, for example, said it well: “[…] the right per se of the Crown to object to the disclosure of confidential information is no different from the right of a citizen, but in the enforcement of that right the Crown alone may plead that disclosure would prejudice the preservation of national security. It is the duty of the Crown alone in the interests of the state to do its best to maintain the secrecy of state secrets. That duty, in my opinion, arises in relation to the disclosure of information which relates to the practical operation of what is known colloquially as the secret service.” Lord Advocate v Scotsman Publications, [1989] UKHL 7, [1989] 2 All ER 852.

when national security is invoked. They use words similar to their American counterparts that also align closely with the discourse of secret keepers. They include terms such as: giving “great weight,” and “pay close attention” to the “views” and “expertise” of secret keepers—as this is “self-evidently right”—who are in the “best position” and “far better informed,” whereas judges have “no special expertise” and “material perforce limited” to make decisions. They also recognize the separation of powers between the executive and the judiciary in matters of national security by using terms such as the executive has “constitutional responsibility for it.”

In an immigration case involving national security, Lord Steyn agrees to defer to the views of secret keepers: “It is well established in the case law that issues of national security do not fall beyond the competence of the courts […]. It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security.”

Justice Nicol, relying on judicial precedent in a civil action case against British intelligence agencies, acknowledges the duty of the court to defer to the expertise of secret keepers:

[N]ecessarily the Court is having to make an assessment as to the future [with respect to the disclosure of classified documents]. Since the subject matter of that assessment is the consequence for national security of taking a particular course, the Court is also obliged to pay close attention to the views of those who have both expertise in that matter and constitutional responsibility for it, namely

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the intelligence services and the ministers under whom they work [reference
omitted].

In a data protection case, Justices Evans, Beloff and Goudie write of the need for
deferece when national security is involved:

Where the context is national security judges and tribunals should supervise
with the lightest touch appropriate; there is no area (foreign affairs apart) where
judges have traditionally deferred more to the executive view than that of
national security; and for good and sufficient reason. They have no special
expertise; and the material upon which they can make decisions is perforce
limited.

In this statement, Justices Evans, Beloff and Goudie make a specific reference to judges
lacking access to the full range of state secrets relied on by secret keepers (assuming they
have any, which may or may not be the case) to determine potential harm. The next three
examples also make explicit references to the privileged access enjoyed by secret
keepers.

Lord Slynn, in an immigration case before the House of Lords, observes that:

In conclusion, the [Special Immigration Appeals] Commission […] must give
due weight to the assessment and conclusions of the Secretary of State in the
light at any particular time of his responsibilities, or of Government policy and
the means at his disposal of being informed of and understanding the problems

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42 Abdule & Ors v The Foreign and Commonwealth Office & Ors [2018] EWHC 3594 (QB) at para

36.

43 Baker v Secretary Of State For The Home Department [2001] UKIT NSA2 (01 October 2001) at

para 76.
involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him.\textsuperscript{44}

Lord Neuberger, slightly more explicitly in a civil action case against the British foreign secretary, observes that:

In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.\textsuperscript{45}

In a criminal case involving national security information, Justice Létourneau of the Canadian Federal Court of Appeal also writes on the special access to sources of information secret keepers have:

It is a given that it is not the role of the judge to second-guess or substitute his opinion for that of the executive [...] This means that the Attorney General’s submissions regarding his assessment of the injury to national security, national defence or international relations, because of his special access to special information and expertise, should be given considerable weight by the judge

\textsuperscript{44} Secretary of State for The Home Department v Rehman, [2001] UKHL 47 at para 26.
\textsuperscript{45} Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs, [2010] EWCA Civ 65 at paras 131-132 (Lord Neuberger).
required to determine, pursuant to s. 38.06(1) [*Canada Evidence Act*] whether the disclosure of the information would cause the alleged and feared injury.\footnote{R v Ribic 2003 FCA 246 (CA) at para 19, quoted by Kent Roach, “Ten Way to Improve Canadian Anti-Terrorism Law” (2005) 51 Crim LQ 102 at 114.}

Canadian judges’ written observations echo those of their American and British colleagues. The position of the Federal Court is to “show a certain deference to the decision-maker, given the executive’s institutional expertise with regard to national security.”\footnote{Canada (Information Commissioner) v Canada (Transport), 2016 FC 448 at para 20.} The Federal Court has further asserted that it “cannot substitute its view for that of CSIS, or the Solicitor General, about the assessment of the reasonable expectation of probable injury.”\footnote{Ruby v Canada (Royal Canadian Mounted Police), [1998] 2 FC 351.} This is what Justice Létourneau meant by second-guessing, a term used also by other judges. What counts, therefore, is not a judge’s assessment of potential harm, but instead the assessment of secret keepers—they can accept that assessment at face value or question it, but not replace it with their own. Judges are not competing with secret keepers to eventually figure out who was right or wrong; as noted by many judges, they do not have access to the secret keepers’ databases and the special type of information they have on threats to the security of Canada or specific individuals. The Supreme Court of Canada has been clear on these points in *Suresh*, citing both Canadian and British decisions:

> the relative expertise of the decision-maker, again favours deference. As stated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, ‘[t]he fact that the formal decision-maker is the Minister is a factor militating in favour of deference’ (para 59). The Minister, as noted by Lord

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\[46\] \[47\] \[48\]
Hoffmann in *Secretary of State for the Home Department v Rehman*, [2001] 3 WLR 877 (HL), at para 62, ‘has access to special information and expertise in ... matters [of national security].’

In *Arar*, the Federal Court qualified that position as trite law in Canada and other common-law jurisdictions, citing the controlling decisions from the Supreme Court of Canada (*Suresh*) and Canada’s Federal Court of Appeal (*Ribic*), the US Supreme Court (*Reynolds*) and the House of Lords in the UK (*Rehman*):

> It is trite law in Canada, as well as in numerous other common-law jurisdictions, that courts should accord deference to decisions of the executive in what concerns matters of national security, national defence and international relations, as the executive is considered to have greater knowledge and expertise in such matters than the courts [references omitted].

By trite law, the court meant that this point has long been familiar to the courts of each of the three countries and that it is no longer original or deserving of deep attention and interest.

Although judges in the United States, the United Kingdom and Canada have readily accepted the primacy of the state in matters of national security and recognized the access

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50 *Canada (AG) v Canada (Comm. of Inquiry—Arar)*, 2007 FC 766, [2008] 3 FCR 248 at 276 [*Arar*].

51 In Canada, it is only the designated judges of the Federal Court, pursuant to the *Canada Evidence Act* (CEA), who can determine whether information can be disclosed: “The CEA is clear: where the Federal Court is seized with an application to determine whether information can be disclosed under section 38.04, the Court after applying the criteria set out at section 38.06 makes a determination as to whether the information in question should be disclosed. This wording indicates that the Court’s role under sections 38.04 and 38.06 of the CEA is to rule on whether particular information can be disclosed. *This judicial obligation cannot be delegated.*” (emphasis mine) *Canada (AG) v Canada (Comm. of Inquiry—Arar)*, 2007 FC 766, [2008] 3 FCR 248 at 271.
and expertise of secret keepers in matters of state secrets, not everyone agrees that judges are automatically incompetent in matters of national security.\footnote{“Although involved executive branch officials would have a better and more nuanced understanding of national security issues than federal judges, the conclusion that judges are thus incompetent to play any significant role in the application of an evidentiary privilege—even with the protections of in camera review—does not follow.” Sudha Setty, “Litigating Secrets: Comparative Perspectives on the State Secrets Privilege” (2009) 75 Brook L Rev 201 at 223.} In the next two statements, former judges claim that their former colleagues have sufficient expertise in matters of national security to engage with the claims of secret keepers.

Patricia Wald, a former US Court of Appeals Judge, testified in a Congressional hearing that “the \textit{FOIA} example makes a basic point that judges do deal with national security information on a regular basis and can be entrusted with its evaluation on the relatively modest decisional threshold of whether its disclosure is ‘reasonably likely’ to pose a national security risk.”\footnote{US, \textit{Reform of the State Secrets Privilege: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary}, 110\textsuperscript{th} Cong (2008) at 29 (Patricia Wald).} William Webster, a former Federal Judge and Director of both the FBI and the CIA, confirmed that position in the same Congressional hearing:

judges can and should be trusted with sensitive information and they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege. Judges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security.\footnote{US, \textit{Reform of the State Secrets Privilege: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary}, 110\textsuperscript{th} Cong (2008) at 56 (William H. Webster).}

In these two statements, the former judges stress that sitting judges can deal with national security and they should be trusted, the basis of that trust being their experience (they
deal with national security issues on a regular basis) and qualifications (they are well qualified). Their assertions, however, lack important details, including the length of time and the volume of cases needed to recognize a judge as experienced, and the type of qualifications that are required.

In the following statements, serving Canadian judges recognize their own expertise in matters of national security and state secrecy, which suggests some departure from the historical pattern of judicial deference to (and close complicity with) government executive security deliberations. In *Sogi*, an immigration case, Justice Rothstein observes that Canada’s designated “Federal Court judges are experts in assessing the advisability of disclosing security intelligence information.” Justice Rothstein, however, provides a limited reason in support of his claim:

Parliament has given the task of deciding how much security intelligence information can be disclosed without unduly endangering national security to the Chief Justice of the Federal Court and other Federal Court judges designated by the Chief Justice […]. Parliament has precluded not only administrative tribunal members but even judges of provincial superior courts from this task. It appears that, in a number of legislative contexts, Parliament considers Federal Court judges best-suited to determine the appropriateness of disclosing information that could be injurious to national security. Justice Rothstein did not elaborate on the meaning of “well-suited.”


But be that as it may, the designated judges of the Federal Court of Canada who deal with national security cases have since 9/11 developed considerable subject-matter expertise. As Justice Mosley of the Federal Court said, “I think I can say with some confidence that the courts have learned a great deal over the course of the past decade about the operations of the Executive and the security agencies.”\(^{57}\) This increased expertise—which has had the benefit of further ensuring the courts’ independence from the executive—has been the result of designated Federal Court judges undertaking training and education initiatives.\(^ {58}\) Therefore, although “some deference has to be given,” it cannot be “to the point of neutralizing the role of the judiciary as provided for by the legislation.”\(^ {59}\) Justice Noël concurred in \(X\) (Re): “It is my opinion that designated judges, over years of work, have reached an appropriate level of judicial insight and experience into the field of national security.”\(^ {60}\)

Not unlike their Canadian counterparts, judges in the US and the UK have too warned against an excess of deference to the executive by the courts. As noted above, deference was never absolute, especially in the United States where a long-standing bill of rights provided more means to challenge the state, but for a very long-time deference remained very strong and unchallenged. Because of a lack of sustained cases prior to the

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\(^ {59}\) Bronskill v Canada, 2011 FC 983, [2013] 2 FCR 563 at 603.

\(^ {60}\) \(X\) (Re), 2017 FC 136 at para 46. “Having a small group of [Federal Court] judges hearing national security matters limits the potential for the inadvertent dissemination of highly sensitive information. And limiting the number of judges doing this work also allows for the development and concentration of subject-matter expertise.” Mosley, \textit{supra} note 57 at 3.
events of 9/11, very few judges (arguably more so in Canada and the UK than the US) had the opportunity to develop an in-depth degree of familiarity with national security issues. When judges warn against an excess of deference, they do not reject the claim of the secret keepers: they need the latter’s expertise and experience. Instead, in so doing they reassert their role as the ultimate decision maker who is in a position of determining the value of a particular claim against disclosure because they too have expertise and experience in dealing with national security matters. This is a balancing act that some judges feel more strongly about than other judges. That said, there is no intent on the part of any judges to have the judicial branch take over the responsibility of the executive in matters of national security. The following statements from US and British judges address these points.

In a civil action case against the CIA, judge King writes that “the state secrets doctrine does not represent a surrender of judicial control over access to the courts.”61 He also reaffirms the test the court must follow:

[I]t is the court, not the Executive, that determines whether the state secrets privilege has been properly invoked. In order to successfully claim the state secrets privilege, the Executive must satisfy the court that disclosure of the information sought to be protected would expose matters that, in the interest of national security, ought to remain secret. […] The state secrets privilege cannot

61 El-Masri v US, 479 F (3d) 296 at 312 (4th Cir 2007). Also: “We take very seriously our obligation to review the [government’s claims] with a very careful, indeed a skeptical, eye, and not to accept at face value the government’s claim or justification of privilege […]” Al-Haramain Islamic Foundation, Inc v Bush, 507 F (3d) 1190 at 1203 (9th Cir 2007). Years before, the Court of Appeals had declared that “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.” Ellsberg v Mitchell, 709 F (2d) 51 at 58 (DC Cir 1983).
be successfully interposed, nor can it lead to dismissal of an action, based merely on the Executive's assertion that the pertinent standard has been met.\textsuperscript{62}

Like his American colleague, Lord Neuberger, in a civil action case against the British foreign secretary, writes that the judiciary, not the executive, is the ultimate decision-maker:

\textit{[T]he ultimate decision whether to include the redacted paragraphs into the open version of the first judgment is a matter for judicial, not executive, determination. Ever since the decision of the House of Lords in Conway \textit{v} Rimmer [1968] AC 910, it has been clear that the question whether a document should be exempted from disclosure in legal proceedings on the ground that disclosure would damage the public interest should ultimately be decided by the court. That is because it is ultimately for a judge, not a minister to decide whether a document must be disclosed, and whether it can be referred to, in open court. That decision is for a judge, not a minister, not least because it concerns what goes on in court, and because a judge is better able to carry out the balancing exercise [reference omitted].}\textsuperscript{63}

Whether or not judges are competent or experts in matters of national security, they speak of knowledge, competence, experience and expertise using value-oriented lexical terms and lexico-grammatical ploys that mirror those used by secret keepers. In chapter

\begin{footnotesize}
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\item \textsuperscript{62} \textit{El-Masri v US}, 479 F (3d) 296 at 312 (4th Cir 2007).
\item \textsuperscript{63} \textit{Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs}, [2010] EWCA Civ 65 at paras 131-132. Lord Hoffman had said: “the critical point appears to me to be that material can be withheld only if a judge has decided that disclosure would be contrary to the public interest. It is a judicial decision and not that of the Secretary of State.” \textit{Secretary of State for the Home Department \textit{v} MB}, [2007] UKHL 46 at para 50.
\end{itemize}
\end{footnotesize}
secret keepers assert that courts should not second guess them and instead defer to their experience and expertise because national security is within their exclusive purview. In the examples above, judges use language that delegitimizes their own position, giving great weight to the secret keepers’ argument that secret keepers know better: judges have a “lack of competence” and “no special expertise;” they are “poorly positioned” and “ill-equipped; and, therefore, are in an “extremely poor position to second-guess” and instead “should have [the] lightest touch.” Secret keepers, on the other hand, are in “a position superior” to that of judges, with an expertise that is “particularly important” and well-suited;” therefore “great weight” should be given to their views, as it is “bad policy to second guess” them. When the views of judges and secret keepers are as well aligned as the foregoing seems to suggest, their discourse facilitates the secretization of what the state knows and does. Whatever the secrets may be in a particular case, there is little scope on the part of other participants in the judicial process to problematize, contest, share or reshape them. The secrets are made not to be unmade. These participants are therefore left to find other sites, situations and controversies to challenge the dominant discourse. This dynamic reflects the importance that Walters accords to the role that discourse plays in this secretization process.

The language and qualifiers judges use matter because they ultimately determine the degree of deference they will give to the views of secret keepers. As they serve to justify that degree of deference, they have a persuasive effect that aligns with the intent of secret keepers.64 Secret keepers have used argument from ignorance and authority to their

64 “Judges do not merely issue orders; they write opinions giving reasons to justify their orders. Indeed, much of the rhetoric of the judicial opinion is designed to persuade the reader that the opinion does not merely reflect the judge’s personal opinion or wishes but is instead a faithful account of “what the law
advantage. However, with the events of 9/11 now decades in the past, a counter-argument has gained traction. While this counter-argument serves to legitimize the administrative authority\textsuperscript{65} of judges in matters of national security, it also highlights the weight of their responsibility should a decision be rendered that results in harm to individuals or national security. This may partially explain why judges, for the most part, are quite content to continue to defer the executive.\textsuperscript{66} That reticence is well explained by Lord Hoffman:

\begin{quote}
It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.\textsuperscript{67}
\end{quote}

\textsuperscript{65} “[A]n administrative authority has a right to exercise command or influence over another party subject to that authority. The pronouncement of an administrative authority can be legally binding but can also be subject to appeal, and disobedience can have penalties.” Douglas Walton, Fabrizio Macagno \& Giovanni Sartor, \textit{Statutory Interpretation Pragmatics and Argumentation} (Cambridge, UK: Cambridge University Press, 2021) at 238.


If Lord Hoffman is correct with respect to the separation of powers and the responsibility of an elected executive, then it remains uncertain how far from near absolute deference judges will ultimately position themselves. While some judges may disagree with the “overtones of cringing abstention to superior status” brought by the notion of deference, deference is trite law. The limited pushback, or recalibration, seen on the part of a few judges with respect to deference makes the arguments from knowledge and authority assailable, but it is extremely unlikely that it will be overturned in the near future.

5.4 Consequences: judges, too, care about who lives and national security

Judges have recognized that the disclosure of state secrets could lead to severe consequences for particular individuals or public safety, and negatively affect the effectiveness of the national security and intelligence apparatus in carrying out its mission. That judges are affected in their discourse by appeals to emotions such as fear and the loss of loved ones is perhaps not surprising. Former Chief Justice of the US Supreme Court Hughes was certainly convinced that emotions play a role in judging, telling Justice Douglas, who years later conceded the statement to be true: “Ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.”

Cognizant of the prime responsibility of the state for national security, judges generally accept secret keepers’ assertions of harm—as human beings judges are not insensitive to matters of life and death. Like secret keepers, judges use value-oriented

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lexical terms and lexico-grammatical ploys to indicate to their audiences that harm to real individuals or to the effectiveness of national security agencies is something that could reasonably happen.

In the first sub-section, judges write of harm that could result from the disclosure of state secrets to the lives of intelligence officers, and their agents and sources. In the second sub-section, judges write of how disclosures of state secrets could harm the operational ability of national security and intelligence agencies to fulfil their respective mandate.

5.4.1 Life and death: this is a serious matter

Intelligence personnel, and especially those in sensitive positions or operating undercover to investigate national security threats, live their lives in anonymity. The identities of undercover intelligence officers are protected at law in many jurisdictions. For example, the United States has enacted protective provisions through the Intelligence Identities Protection Act of 1982 (Public Law 97-200) that apply to both the identities of undercover intelligence officers, agents, informants and sources.69 The Canadian Security Intelligence Service Act (RSC, 1985, c C-23) also prohibits the disclosure of the identity of a human source and the identity of an employee who was, is or is likely to become engaged in covert operational activities, or the identity of a person who was an employee engaged in such activities. Protecting the identity of a human source is directly tied at law with matters of life and death: “18.1 (1) The purpose of this section is to ensure that the

69 50 US Code § 3121. Also, the CIA “shall be exempted from the [...] provisions of any other law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.” 50 U.S.C. § 3507.
identity of human sources is kept confidential in order to protect their life and security and to encourage individuals to provide information to the Service.”

The following statements capture judges highlighting risks to life and limbs. In the Plame Wilson case (introduced in chapter 4), Judge Tatel, referring to congressional concerns, recognizes the risk of physical harm that unauthorized disclosure may cause to both intelligence officers and their human sources:

An alleged covert agent [of the CIA], Plame evidently traveled overseas on clandestine missions beginning nearly two decades ago. […] Her exposure, therefore, not only may have jeopardized any covert activities of her own, but also may have endangered friends and associates from whom she might have gathered information in the past. Acting to criminalize such exposure of secret agents […] Congress has identified that behavior’s ‘intolerable’ consequences: ‘[t]he loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure.’ S.Rep. No. 97-201, at 10-11 (1981), [reference omitted].”

Lord Denning in the United Kingdom, pre-9/11, directly linked the disclosure of a source of intelligence to its potential physical disappearance:

The information supplied to the Home Secretary by the Security Service is, and must be, highly confidential. The public interest in the security of the realm is

70 Canadian Security Intelligence Service Act, RSC 1985, c C-23, s 18.1(1).
71 In Re Grand Jury Subpoena, Judith Miller, 397 F. (3d) 964 at 1001(DC Cir 2005).
so great that the sources of information must not be disclosed, nor should the nature of the information itself be disclosed, if there is any risk that it would lead to the sources being discovered. The reason is because, in this very secretive field, our enemies might try to eliminate the source of information.\footnote{R v Home Secretary ex p Hosenball, [1977] 1 WLR 766, [1977] 3 All ER 452 (CA) at 460.}

In these two statements, a clear emphasis is placed on indicating a high degree of importance to the protection of intelligence officers, human agents and sources. Lexical terms such as “vital,” “intolerable” and “great” are evocative of the degree of risk involved in the disclosure of identities, while lexical terms such as “jeopardized,” “endangered,” and “eliminate” (used instead of kill) leave no doubt as to the seriousness of consequences for human lives.

In a post-9/11 immigration case, Lord Justice Brooke stresses, in a short list of conditionals, the risk of harm to human sources: “If the security of the nation may be at risk from terrorist violence, and if the lives of informers may be at risk, or the flow of valuable information they represent may dry up if sources of intelligence have to be revealed, there comes a stage when judicial scrutiny can go no further."\footnote{A, X and Y, & Ors v Secretary of State for the Home Department [2002] EWCA Civ 1502 at para 87.} Here, Canada’s Justice Mosley, in a criminal case involving national security information, makes a clear reference to the family of a CSIS intelligence officer: “Any information that would identify the affiant or from which his identity could be inferred would also present a risk of harm to him and his family and preclude his employment as a covert operative.”\footnote{Huang v Canada (Attorney General), 2017 FC 662 (CanLII) at para 61.}
family) is made explicit. In the former statement, the judge is also cognizant that when it comes to the loss of lives and the security of the nation, the role of the judiciary must have a limit, a clear reference to deference to the executive in matters of national security.

Here, Canada’s Justice Dawson, in an immigration case involving national security information, considers that revealing the identity of a CSIS intelligence officer would be contrary to national security and put at risk the personal safety of that officer:

[16] In the present case, I am satisfied that it would be injurious to Canada’s national security if the officer’s name was made public [REDACTED].

[17] The significance of this is two-fold. First, [REDACTED]. This would be injurious to Canada’s national security.

[18] Second, and more importantly, [REDACTED].

[19] In view of my conclusion on this point it is not necessary for me to consider the stated concerns with respect to the safety of individuals [REDACTED].

[20] [REDACTED] I am satisfied that, as a matter of general principle, Canada’s national security does require that CSIS officers who engage, or will engage, in operational activities not be hindered or prevented from continuing such activities, or be put at risk, because their identities are disclosed in court proceedings. [REDACTED].75

75 Jaballah (Re), 2009 FC 279 at paras 17-20.
In this statement, Justice Dawson reiterates the danger to actual persons, but also introduces the impact on the continuous effectiveness of CSIS, whose officers would be prevented from continuing operational activities if their identities were known.

Matters of life and death are indeed often intertwined with matters of effectiveness, which is covered in more depth in the next sub-section. Here are two additional statements where both matters are intertwined. Here, in a list format, Britain’s Justice Carswell, in a judicial review case, adopts the position of the secret keepers on the risks to the life of informants and the ability of national security agencies to recruit future informants:

The reasons for adopting and adhering to the NCND [neither confirm nor deny] policy appear from paragraph 3 of Sir Joseph Pilling’s affidavit. To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger (a comparable proposition may be found in paragraph 35(3)(a) of the decision of the Information Tribunal in Baker v Secretary of State for the Home Department (2001) […]). If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government
statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy.\textsuperscript{76}

In this statement, Justice Carswell paraphrases directly from an affidavit submitted by a secret keeper, and hence uses their terminology and argument. This allows him to provide a rather detailed explanation of the potential risk to lives and effectiveness.

Second, Judge Sentelle, in a \textit{FOIA} case, recognizes the two main types of consequences in a case about the identities of individuals detained by the United States for national security reasons:

More importantly, some detainees may not be members of terrorist organizations, but may nonetheless have been detained on INS [Immigration and Naturalization Service] or material witness warrants as having information about terrorists. Terrorist organizations are less likely to be aware of such individuals' status as detainees. Such detainees could be acquaintances of the September 11 terrorists, or members of the same community groups or mosques. [reference omitted]. These detainees, fearing retribution or stigma, would be less likely to cooperate with the investigation if their names are disclosed. Moreover, tracking down the background and location of these detainees could give terrorists insights into the investigation they would otherwise be unlikely to have. After disclosure, terrorist organizations could attempt to intimidate these detainees or their families, or feed the detainees false statements.

\textsuperscript{76} \textit{Scappaticci, Re an application for Judicial Review} [2003] NIQB 56 at para 15.
or misleading information. It is important to remember that many of these detainees have been released at this time and are thus especially vulnerable to intimidation or coercion. While the detainees have been free to disclose their names to the press or public, it is telling that so few have come forward, perhaps for fear of this very intimidation.  

What is interesting in this statement is that the risks that normally are associated with the disclosure of the identity of intelligence officers, agents and human sources are here applied in an equitable manner to prisoners. These prisoners having been involved in terrorist groups, it is imperative for secret keepers that their status remain unknown so as not to jeopardize national security investigations into these organizations.

Overall, judges consider risks to human lives very seriously and find the reasons provided by secret keepers against disclosure to be powerful (Justice Carswell above) and compelling. Although it is more sober, less provocative, and much less emotional than what secret keepers say in public, the language judges use is also evocative, and sometimes very direct with respect to the possibility that specified lives could be lost. Judges use a wide range of lexical terms to portray potential harm, including “jeopardize”, “endangered,” “eliminate,” “dry up,” “preclude,” “injurious,” “intimidate” and “danger,” and amplifying terms such as “so great,” “less,” “grave” and “gravely” to further characterize harm. By comparison, in chapter 4, secret keepers use lexical terms such as “disaster,” “death,” “incarceration,” “dangerous,” “killed,” “execution,” “destroyed,” and “fatal” to highlight severity; “lives,” “families,” and “life-saving” to further resonate with the audience; and qualifiers such as “great deal,” “grave,” “serious,”

77 Center for Nat. Sec. Studies v Dept of Justice, 331 F (3d) 918 at 930 (DC Cir 2003).
“huge,” “very,” “crucial,” “vital,” “tremendous,” “worst,” “real” and “extraordinarily”). The majority of these lexical and amplifying terms were used by secret keepers outside the court, which is the reason why they are seemingly more evocative and emotionally more appealing. Despite this difference in tone and the use of amplifying terms, which is contextual, there is no major divergence between the two discourses as they say the same thing: lives and effectiveness are at risk when state secrets are disclosed without the approval of the state. Claims to these effects must be taken very seriously. As well, the loss of lives does not appear to be a responsibility judges are willing to take, and as such there is no reflection on reducing the degree of deference claimed by secret keepers. Although we are separating them in this chapter, the consequences for human lives and the effectiveness of national security and intelligence agencies are usually discussed together. Judges see them going hand in hand.

5.4.2 Effectiveness: the state must fulfil its duties

Secret keepers consider the protection of sources and methods essential to the effectiveness of national security organizations. A targeted entity that knows the identities of human sources of information and techniques used to investigate and obtain information about national security threats is well positioned to render these assets ineffective through countermeasures. Replacement of these compromised assets would be operationally necessary and, in all likelihood, costly for the national security organization that relies upon them.78 This potential loss of effectiveness has long been recognized by

78 Fitzgibbon v CIA, 911 F (2d) 755 at 762 (DC Cir 1990): “[A]long with sources, methods constitute ‘the heart of all intelligence operations.’ It is not the province of the judiciary . . . to determine whether a source or method should be disclosed . . .”. See also Al Odah v United States, 608 F. Supp. (2d) 42 at 45 (DC 2009).
the courts. Simply put, for secret keepers, and especially those involved in intelligence activities, “to operate effectively, at least much of their work is secret and must remain so as a matter of necessity.”

In an immigration case, Canada’s Justice de Montigny writes of the detrimental effects on effectiveness that could result from the disclosure of state secrets:

The state has a considerable interest in protecting national security and the security of its intelligence services. The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada’s national security. Indeed, this Court recognized in *Henrie v. Canada* (S.I.R.C.), [1989] 2 FC 229, that information related to national security ought not to be disclosed is an important exception to the principle that the court process should be open and public.

Here, Canada’s Justice Mosley, in a civil action case against the Government of Canada, notes the adverse effect on CSIS if the identities of its human sources were unveiled:

With respect to the issue of human sources, [reference omitted] I accepted as a general proposition that the identity of covert human sources and information provided by such sources that would tend to identify them would be subject to public interest privilege and that an order to disclose such information would have an adverse effect on the ability of CSIS to recruit such sources.

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81 *Canada (Attorney General) v Almalki*, 2015 FC 1278 at para 33.
Here, in a public speech, Canada’s Justice Mactavish makes a point similar as her colleague Mosley:

Some information, however, is gathered by covert means. This is necessary to assess the threats posed by hostile groups and regimes that are clandestine in their operations. Put simply, secrecy is required in order to counter the activities of those who operate in secret. […] If it is determined that information cannot be disclosed—for example—because it concerns an ongoing investigation where the disclosure of the information would alert those working against Canada’s interest and allow them to take evasive action—or where it would identify an informant.  

In the three preceding statements, judges recognize the potentially “adverse effect on the ability” of national security and intelligence agencies to carry out their respective mandate if adversaries were put in a position to take “evasive action.” The need for secrecy against those who operate in secret is acknowledged.

In the following statement, Britain’s Lord Nicholls, in a case concerning the confiscation of a spy’s property, agrees with his Canadian colleagues on the necessity to protect human sources:

It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and

82 Mactavish, supra note 58.
dangerous operations, would jeopardise the effectiveness of the service. An absolute rule against disclosure, visible to all, makes good sense.83

Here, US Justice Henderson, in a FOIA case, points to the adverse costs of disclosure: “It is plausible that either confirming or denying an [Central Intelligence] Agency interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities, thereby providing foreign intelligence sources with a starting point for applying countermeasures against the CIA and thus wasting Agency resources.”84

In the following statement, Judge Rogers, in a complaint against the US government alleging a violation of the fourth amendment, is categorical with respect to the protection of sources and methods: “[A]ll discussion of intelligence sources, capabilities, and the like” must be protected from disclosure.85 In a different complaint against the US government concerning the seizure of financial assets, his colleague, Judge McKeown, agrees: “[T]he means, sources and methods of intelligence gathering” should not be disclosed to the litigant because it “would undermine the government’s intelligence capabilities and compromise national security.”86 Here, Judge Carney is more explicit than his District of Columbia colleagues. In dismissing a civil action against the government, he reaffirmed the state secrets privilege and provided details on how the effectiveness of the FBI would be affected if state secrets were disclosed:

83 Attorney General v Blake, [2001] 1 AC 268 at 287E.
84 Wolf v CIA, 473 F (3d) 370 at 377 (DC Cir 2007).
85 In re Sealed Case, 494 F (3d) 139 at 152 (DC Cir 2007).
86 Al–Haramain Islamic Foundation v Bush, 507 F (3d) 1190 at 1204 (9th Cir 2007).
The disclosure of the reasons and results of counterterrorism investigations would unquestionably compromise national security because it would reveal to those involved in plotting terrorist activities what the FBI knows and does not know about their plans and thereby enable them to evade detection. The disclosure of the methods and sources would endanger national security because it could reveal the identities of particular subjects and the steps taken by the FBI in counterterrorism matters, thereby effectively disclosing a road map to adversaries on how the FBI detects and prevents terrorist activities.  

In the following statement, US Judge Sentelle relies—as is the case in most FOIA cases—on well-established judicial precedents that recognized the viewpoints of secret keepers:

The Supreme Court has acknowledged the paramount importance of protecting intelligence sources for precisely the reasons detailed by the CIA: ‘If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place.... “The continued availability of [intelligence] sources depends upon the CIA’s ability to guarantee the security of information that might compromise them and even endanger their personal safety.”’ [reference omitted]  

In the following statement, Britain’s Investigatory Powers Tribunal, which at law must protect the methods used by British agencies to carry out surveillance or intercept

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87 Fazaga v FBI, 884 F Supp (2d) 1022 at 1044 (CD Cal 2012).
88 Larson v Department of State, 565 F (3d) 857 at 863 (DC Cir 2009).
communications, warns of the countermeasures adversaries could take if state secrets of that nature were disclosed: disclosures “might give an indication of the means by which the information was obtained by the Intelligence Agency, or enable a person who is legitimately subject to surveillance or interception to take measures to make such surveillance or interception more difficult to achieve in the future.” As Lord Kerr writes, this is logical: “The entire point of surveillance is that the person who is subject to it should not be aware of that fact.” Here, Judge Carney, in a civil action case alleging a violation of the first amendment, subscribes to the same logic as Lord Kerr:

Disclosure of subjects under investigation [or surveillance] would undoubtedly jeopardize national security. This is because persons under investigation would be alerted to the FBI’s interest in them and cause them to flee, destroy evidence, or alter their conduct so as to avoid detection, which would seriously impede law enforcement’s and intelligence officers’ ability to determine their location or gain further intelligence on their activities. [citing the state’s affiant in support] Disclosure of those not under investigation by the FBI is, likewise, dangerous because individuals who desire to commit terrorist acts may then be motivated to do so upon discovering that they are not being monitored. Information about who is being investigated while the status of others are unconfirmed may be manipulated by individuals and terrorist groups to discover whether they or any of their members are being investigated [citing the state’s affiant in support].

91 Fazaga v FBI, 884 F Supp (2d) 1022 at 1044 (CD Cal 2012). A similar, if shorter, explanation was provided by District Judge Ellis: “While a public admission of the alleged facts would obviously reveal sensitive means and methods of the country's intelligence operations, a denial of the alleged facts would
The necessity to protect methods lest they become unusable was also made explicit in cases where litigants claimed damages for security clearance revocation and civil court. Lord Hope in a Supreme Court Decision, writes that

To be effective security vetting will usually, if not invariably, require to be carried out in secret. Its methods and the sources of information on which it depends cannot be revealed to the person who is being vetted. Those who supply the information must be able to do so in absolute confidence. In some cases, their personal safety may depend on this. The methods, if revealed to public scrutiny, may become unusable. 92

These statements above showcase a strong commitment on the part of judges to protect classes of secrets from disclosure. In asserting that point, they use evocative lexical terms to portray potential harm, including “undermine,” “jeopardize,” “damage,” “impede,” “adverse,” “dangerous,” “compromise,” and “unusable,” and amplifying terms such as “more difficult,” “considerable,” “unquestionably,” “seriously” and “undoubtedly.” In assessing the potential damage that may occur as a result of the disclosure of state secrets, judges also use terms that confirm that the potential for serious consequences provides an almost absolute level of deference, using terms such as “unquestionably”, “undoubtedly”, and “paramount.” It is clear that judges understand the implications of disclosure in terms similar to those use by secret keepers. The term

also be damaging, as it may raise an inference of veracity in those cases where the government does not deny similarly sensitive allegations but asserts the state secrets privilege instead. For this reason, the CIA has appropriately adopted the policy of neither admitting nor denying allegations regarding the means, methods, persons, entities or countries used in its foreign intelligence operations.” El-Masri v Tenet, 437 F (Supp. 2d) 530 at 538 (ED Va 2006).

“jeopardize” is readily shared between judges and secret keepers, who used, in the statements chosen in chapter 4, lexical terms such as “less,” “more” and “extraordinarily” for amplification, and “dry up,” “would not be able,” “difficulties,” “end,” “harmful” and “threatening” to portray potential harm. Judges do not divergence from the argument made by secret keepers—“it makes good sense,” and it is of “paramount importance” Lord Nicholls and Judge Carney respectively tell us—despite a varied use of terms and adjectives. These terms and adjectives all point to the same potentially negative effects.

5.4.3 Analytical summary

In discussing possible consequences from the release of state secrets, judges use value-oriented lexical terms and lexico-grammatical ploys when referring to matters of life and death. If state secrets were to be released without the authorization of secret keepers, lives could be “jeopardized” and friends and associates of intelligence officers or their human sources “endangered.” Lives could be at “risk of harm,” and adversaries may “eliminate the source.” The effectiveness of national security agencies, on the other hand, would suffer from “adverse” effects, as it is a “matter of necessity” to protect from disclosure their sources and methods. Revealing sources and methods would “unquestionably compromise,” “impede” and “undermine” the ability of these agencies to fulfill their mandate. The “detrimental effect” of a loss in ability would make it “more difficult” to recruit other sources and well as “wasting Agency resources.” By comparison with the lexical terms and lexico-grammatical ploys used by secret keepers, those of judges are not as amplified and driven by emotions. While the tone and selection of terms are more sober and aligned with the expected decorum, civility and neutrality.
expected of judges (and of any trial participants), they are meant to equally persuade audiences that personally and organizationally recognizable harm is possible if state secrets were released. Unlike what they had to say about knowledge and authority, judges here have not opened the door to assail the argument from consequences. Indeed, in some circumstances, they have used terms that reflect complete acceptance of the discourse of secret keepers using terms such as “unquestionably” and “undoubtedly” to describe the assertions of the consequences that may result from disclosure. Be that as it may, the argument from consequence is as assailable here as it was with respect to secret keepers in chapter 4. While fully acknowledged by judges, risks to life and limbs can be exaggerated. It is not because harm is possible or has occurred in the past that it will inevitably occur every time a state secret is disclosed without authorization. Judges have addressed this argument too.

5.5 Protecting secrets for an indefinite period of time

Judges recognize the eschatological character of the temporal device used by secret keepers. They understand and acknowledge that harm resulting from the disclosure of state secrets could happen, not only in the immediate period following disclosure, but also at any other future point in time, barring a legally mandated time limit on the prohibition against disclosure. They further understand that the assessment of harm is

93 Rules of civility, courtesy and professionalism before the court are discussed by Todd Archibald, Geoff Hall, Jacqueline King, Gary Luftspring, Jason Sacha & Sam Sasso, The Trial Book (Toronto: Thompson/Reuters, 2020) at Part I, chapter A.

94 A judge has said that in situations where there is not a time limit, one may need to be found in light of an Executive Order that took effect in 2009: “The plaintiffs are certainly correct that information properly classified in the past is not necessarily properly classified today. See, e.g., E.O. 13526 § 1.5(d) (providing that “[n]o information may remain classified indefinitely”), § 3.5(3)(c) (directing “[a]gencies conducting a mandatory review for declassification [to] declassify information that no longer meets the
projected into the future and that it carries a certain degree of uncertainty. As Lord Mance writes, “the life of the law is not just past experience, it is often closely related to an assessment of the future consequences of what will be decided.”95 When it comes to an assessment of future consequences, judges, as illustrated in previous sections, defer to a large extent to the experience and expertise of secret keepers. They thus frequently discuss temporal matters in conjunction with the arguments from consequence and ignorance and authority.

In the United States, judges have used temporality along the same lines of argument as secret keepers. They have rejected the notion that the older particular state secrets are, the less likely they would necessarily cause harm if they were disclosed (they may, or they may not). In a long obiter observation in a FOIA case, US Judge Campbell accepts the temporal argument and explicitly ties it to the argument from ignorance and authority and the argument from consequence:

We do not agree […] that merely because the information here is thirty years old, it cannot detrimentally reveal intelligence sources or methods. […]

Reluctance stems from recognition that it is virtually impossible for an outsider to ascertain what effect the passage of time may or may not have had to mitigate the harm from disclosure of sources and methods [argument from ignorance and authority]. Such is true, certainly, as to events that have occurred well within the careers of living persons […]. The CIA, not the judiciary, is better able to weigh

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95 Lord Mance, “The Role of Judges in a Representative Democracy” (Lecture given during the Judicial Committee of the Privy Council’s Fourth Sitting in The Bahamas, 24 February 2017) (no page numbers).
the risks [argument from ignorance and authority] that disclosure of such information may reveal intelligence sources and methods so as to endanger national security [argument from consequence].

In a post-9/11 FOIA case, US Judge Sentelle explicitly accepts, referring to judicial precedents, the logic of the temporal argument, whether the timeframe in question is as short as three years or as long as thirty:

In its affidavit, the CIA also explained why the passage of time—‘whether three or thirty years’—did not alter the need to assure sources of the government’s ability to maintain confidentiality, and we have credited the logic of that explanation. See Wolf, 473 F.3d at 377 (‘[I]t is logical to conclude that the need to assure confidentiality to a foreign source includes neither confirming nor denying the existence of records even decades after the death of the foreign national.’) [reference omitted].

In these statements, the indeterminacy of time is noted in several ways: “whether three or thirty years,” “decades after,” the “passage of time” and “within the careers of living persons.”

In the following statement, US Judge Fisher, quoting the temporal language of a secret keeper in a FOIA case, first cautions that the assertion of a threat at an indeterminate time in the future must be plausible:

Buroker [CIA affiant] explains […] that the passage of time has not vitiated the CIA’s interest in maintaining the secrecy of the requested PDBs [Presidential

96 Maynard v CIA, 986 F (2d) 547 at 569 endnote 6 (1st Cir 1993).
97 Larson v Department of State, 565 F (3d) 857 at 864 (DC Cir 2009).
Daily Briefs]. In this regard, some of Buroker’s explanations are little more than truisms—for example, that ‘[i]ndividual people may have long lives and careers, and foreign governments and intelligence services may exist in perpetuity’—without any indication that these particular PDBs involve sources who could be threatened by disclosure at this late date, or who could not be protected by redactions. If a source were threatened, the CIA’s concerns would be quite compelling, but we cannot discern that from such generalizations.98

Judge Fisher, however, continued his analysis by conceding to secret keepers that the disclosure of 40 years-old information could in fact cause harm to the ability of the CIA to recruit new human sources (argument from consequence). In this case, the consequence, not to actual individuals but to the organizational effectiveness of the CIA, was necessary for the temporal argument to work as intended by secret keepers:

Nonetheless, Buroker does raise a related concern that the revelation of sources that are even 40 years old could hinder the CIA’s current efforts to recruit individuals or governments as sources [argument from consequence]. Such potential sources may be frightened off if they believe promises of confidentiality are subject to an implicit time-based sunset clause at the discretion of the judiciary. [argument from consequence] Courts have permitted the CIA to maintain the secrecy of similarly dated material based on this concern. […] Following Sims’ instructions, other courts have permitted the CIA to maintain the secrecy of fairly old documents.99

98 Berman v CIA, 501 F (3d) 1136 at 1144 (9th Cir 2007).
99 Ibid at 1145.
In these statements judges recognize that the temporal argument made by secret keepers is logical and acceptable, but warned that it simply cannot be stated as “little more than truisms” or “generalizations.” It “must be plausible.” But they also recognize that they are not in a position, as “outsider,” to assess the potential for future harm.

In the following statement, the majority of British judges in an access to information case ask, in the same spirit as Judge Fisher in his statement above, the question of “how long is enough” before information could be disclosed. In their response, they tie temporality to the argument from consequence, warn against an excess of deference and compare the case at bar with the case of informants during the English Civil War:

The difference arises from the significance to be given to the age of the information. All agree that there must come a time when the disclosure of the identity of an informant who operated in the distant past would not have an effect on the confidence of a current day informant. […] To take an extreme example, if a potential informant were to be discouraged from co-operating by the fear that his or her activities would be disclosed after, say, three hundred and fifty years […], then one might conclude that his or her paranoia was so intense and irrational that it would not be safe for the police to pursue the recruitment process. Conversely, as […] MI5 [British Security Service] […] suggests […] it would certainly be premature to disclose today information about those acting as informants or agents during the Second World War. But, as one extends further back in time than that, those seeking to retain confidentiality must shoulder a greater burden of demonstrating that the risk of real danger, or of a rational perception of danger, has not diluted to such an extent that the public
interest in maintaining secrecy loses much of its weight. In that context it is not just the seniority and experience of those giving evidence that must be considered. The Tribunal must assess the reasoning of an expert witness, no matter how eminent, experienced and knowledgeable he or she may be.

43. […] The deliberate disclosure of a batch of names […] would have a greater impact than the occasional loss of control over a single name and would be seen as an important precedent. The majority view is that the risk of descendants being traced and targeted should not be ignored. It may be quite small, but the nature of the harm that could result (serious injury or death) is so serious that even a small percentage chance of identification should be avoided. This is so because of both the danger to those descendants and the fact that current day informers would be justified in fearing that at some time in the future their own descendants may be harmed, and their reputation within their community tarnished.100

This statement also makes clear that secret keepers must provide a proper rationale for arguing that the passage of time is not a factor to be considered when a request to disclose the identity of past informers is made. While judges may be outsiders not well positioned to make an assessment, it does not mean that they have to defer to anything secret keepers say. They have the duty to ensure that the rationale put forward makes sense.

In the following statement, Canada’s Justice Noël, in an access to information case, relies on judicial precedent to affirm that the passage of time is not necessarily irrelevant; rather it adjusts according to the factual circumstances and it remains one factor among others whose importance may differ from a case to another.\(^{101}\) He quotes _Bronskill v Canada (Canadian Heritage)_ at length to support his viewpoint:

While the passage of time is to be considered in the assessment of the injury resulting from disclosure […], it is also to be considered under the prism of whether discretion should be exercised. […] As such, if injury is present [argument from consequence], yet at a lower end of the spectrum, the passage of time may be an important factor. This is the case because as the times change, so do the bases of ‘reasonable expectation of probable harm,’ save for the protection of human sources, current operational interests and similar issues. Justice Strayer also commented on the passage of time in the case of _X v Canada (Minister of National Defence)_ , […]: ‘I can only say that it appears to me quite unreasonable to conclude that the information in these documents which all bear dates of 1941 or 1942 and relate to a time when Canada was engaged in a world war, could reveal anything pertinent to the conduct of Canada’s international relations and its national defence over 50 years later in time of peace.’\(^{102}\)

Taking Justice Noël at his words means that the temporal argument of secret keepers must be sufficiently detailed in its supporting analysis for judges to fully agree with its

\(^{101}\) _Canada (Information Commissioner) v Canada (Transport)_ , 2016 FC 448 at paras 109-110.

\(^{102}\) _Bronskill v Canada (Canadian Heritage)_ , 2011 FC 983 at para 218.
logic. As Justice Kane writes, while speculative, the anticipated harm must be must more than a mere possibility, it must be probable: “The use of the word ‘would’ [instead of ‘could’ in assessments of future harm] signals that the AGC [Attorney General of Canada] must establish that the resulting injury is probable.” To minimize such concerns, secret keepers usually embed the temporal argument with other rhetorical devices. The following statements show that this approach resonates with some judges. In a FOIA case, Judge Rothstein writes that,

Indeed, ‘[t]his is necessarily a region [determining damage to national security] for forecasts in which informed judgment as to potential future harm should be respected.’ [reference omitted]; Ultimately, ‘[t]he test is not whether the court personally agrees in full with the [CIA’s] evaluation of the danger—rather, the issue is whether on the whole record the Agency’s judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert and given by Congress a special role.’ [reference omitted].

A court, therefore, must defer to the expertise of secret keepers responsible for articulating predictive judgments of potential harm to national security. Hence, Judge Roberts writes in a FOIA case, citing precedent, that “[a]s per Wolf v. CIA, 473 F.3d 370, 374 (DC Cir 2007): ‘Courts should accord agency affidavits expressing national security

103 “The Minister bears the burden of establishing that disclosure “would” be injurious to national security, or endanger the safety of any person. This is an elevated standard compared to the use of the permissive ‘could’ in the determination of whether a closed hearing is necessary.” Soltanizadeh v Canada (Citizenship and Immigration), 2018 FC 114 at para 21.
104 Canada (Attorney General) v Meng, 2020 FC 844 at para 40.
105 Labow v US Dept of Justice, 66 F Supp (3d) 104 at 117 (DC Dist 2014).
concerns substantial weight and take account of the fact that harm to national security
cannot be predicted with precision but rather will always be somewhat speculative in
nature.”

In chapter 4, statements from secret keepers invoke an indefinite dimension of time
by using lexical terms such as “passage of time,” “even today,” “long lives,” “exist in
perpetuity,” “even if they are long dead” and “decades old.” Like secret keepers, judges
write of future harm in eschatological terms (e.g., “whether three or thirty years,”
“decades after,” the “passage of time” and “within the careers of living persons”), but do
not (particularly in Canada) readily accept generalities as a valid argument in specific
cases. They prefer to think of future harm as something that is probable instead of only
possible. Justice Strayer is quite evocative on this point in his statement. However, they
are sensitive, just like their American and British counterparts, to the expertise and
responsibility of secret keepers to make this determination. They use linguistic
indeterminacies to discuss future harm (“passage of time” is prevalent) and recognize the
validity of the temporal argument under certain conditions. It is clear from these
statements that the temporal argument is assailable when it is underspecified, too general
or too speculative. Deference, with respect to the temporal argument, is once again not
seen as absolute by judges (this is seemingly the case more so in Canada and the UK than
the US).

106 CIEL v Office of US Trade Representative, 845 F Supp (2d) 252 at 256 (DC Dist 2012).
5.6 Analogy: the mosaic is a bit shaky

Analogy is prominent in common law’s legal reasoning and appears with regularity in lawyers’ briefs and judges’ opinions.\textsuperscript{107} Judges, Lloyd Weinreb has observed, have no compunction about relying “on analogical arguments routinely and display no doubt about their merit.”\textsuperscript{108} As the former Chief Justice of Canada’s Supreme Court McLachlin puts it: “Of course, logical argument—reasoning by deduction, induction and analogy—plays a prominent role in judging.”\textsuperscript{109}

As demonstrated in chapter 4, the mosaic theory holds that terrorists, spies and criminals could use disclosures of “seemingly innocuous pieces of information to build a composite picture” of an investigation, an intelligence viewpoint, an organization or even of a particular person, such as an informant.\textsuperscript{110} In the United States, post-9/11 judicial decisions all refer to \textit{longstanding judicial precedents} accepting the validity of the analogy.\textsuperscript{111} The next two statements capture these judicial precedents. According to Judge Robb, the mosaic effect is obvious:

\begin{itemize}
  \item \textsuperscript{107} Lloyd L Weinreb, \textit{Legal Reason: The Use of Analogy in Legal Argument}, 2\textsuperscript{nd} ed (Cambridge, UK: Cambridge University Press, 2016) at 5, 10. See also Patrick Nerhot, ed, \textit{Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics} (Dordrecht: Springer, 1991).
  \item \textsuperscript{108} Weinreb, \textit{supra} note 107 at 75.
  \item \textsuperscript{109} McLachlin, \textit{supra} note 9 at 7. She added the next page: “We tend to think that reasoning by induction and analogy constitute—good judging, and decision-making on gut-feeling or instinct is bad judging.”
  \item \textsuperscript{110} Matthew Groves & HP Lee, \textit{Australian Administrative Law: Fundamentals, principles and doctrines} (Cambridge, UK: Cambridge University Press, 2007) at 125.
  \item \textsuperscript{111} As Greenlee notes: “Between 1972 and 2001, only one court rejected outright an agency’s mosaic argument involving an FOIA request. Since 2001, one other court has rejected an agency mosaic argument implicating the FOIA. In addition, three courts have rejected mosaic claims when considering the constitutionality of government actions restricting First Amendment rights. As was discussed earlier, \textit{Doe I} and \textit{Library Connection} rejected mosaic claims supporting the unconstitutional application and enforcement of nondisclosure orders. The Sixth Circuit in \textit{Detroit Free Press} also found unconstitutional a mosaic intelligence argument concerning the closure of certain immigration removal proceedings under the ‘Creepy Directive’.” Michael J Greenlee, “National Security Letters and Intelligence Oversight” in Russell A Miller, ed, \textit{US National Security, Intelligence and Democracy: From the Church Committee to the War on Terror} (London, UK: Routledge, 2008) 184 at 196.
\end{itemize}
It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.\textsuperscript{112}

In his opinion on an employer-employee contract involving a secret keeper, US Jude Robb quotes Judge Haynsworth, who writes that:

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.\textsuperscript{113}

In these statements, judge Robb thinks of the analogy as obvious and that an adversary would gain “startling clarity” on the whole if innocuous information embedded in state secrets is disclosed. He also recognizes the limits of his knowledge (“ill-equipped”) and implicitly defer to the assessment of the executive. In \textit{Sims}, the US Supreme Court affirmed the mosaic theory, quoting a series of Court of Appeals decisions. Chief Justice

\textsuperscript{112} \textit{Halkin v Helms}, 598 F (2d) 1 at 8 (Col Cir 1978).
\textsuperscript{113} \textit{United States v Marchetti}, 466 F (2d) 1309 at 1318 (4th Cir 1972) cert. denied, 409 U.S. 1063
Burger writes that: “the very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data ‘may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.’ [reference omitted].”

The use of the mosaic analogy is equally well entrenched in the United Kingdom, as Lord Brown writes in an immigration case: “Viewed in the context of myriad other pieces of information, it may be seen to form part of a jigsaw or mosaic (one is well familiar with the concept) whereby such risks come to be recognised.” Decades earlier, in the famous *Spycatcher* case, Lord Griffiths rebukes a former secret keeper (identified as “writer”) using the analogy: “There is, in my view, no room for an exception to this rule [of not disclosing state secrets] dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency.”

All these statements show how well entrenched the idea of a mosaic and its effect are. If an adversary is presumed to be able to make sense or use seemingly “innocuous,” “trivial” or “insignificant” “bits and pieces” of information, then there is ground not to release this information. The lexical terms used of long date by judges are very similar to those used by secret keepers in the statements chosen for chapter 4, such as “minor details,” “bits of information,” “bits of data” and “disparate details.” The notion these

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these elements are “seemingly innocuous” or “apparently innocuous” is equally shared by both judges and secret keepers.

In a post-9/11 context, the mosaic analogy still has strong currency, especially in the United States. In the following statement, Judge Sentelle, in a FOIA case, confirms a lower court’s understanding of the mosaic theory:

As the district court noted, identification of the source is the only purpose served by the details Portillo-Bartow seeks about the source, and identification is the very danger against which the Executive Order protects. Minor details of intelligence information may reveal more information than their apparent insignificance suggests because, ‘much like a piece of jigsaw puzzle, [each detail] may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.’ ... ‘The CIA has the right to assume that foreign intelligence agencies are zealous ferrets.’ [reference omitted].

His colleague, Judge Wesley, also in the context of an FOIA case, explicitly links the mosaic analogy to the argument from consequence with respect to effectiveness:

And even if the redacted information seems innocuous in the context of what is already known by the public, ‘[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, each detail may aid in piecing together other


118 Larson v Department of State, 565 F (3d) 857 at 864 (DC Cir 2009).
bits of information even when the individual piece is not of obvious importance in itself.’ [references omitted]. Again, it is both logical and plausible that disclosure of the redacted information would jeopardize the CIA’s ability to conduct its intelligence operations and work with foreign intelligence liaison partners.”

Another colleague, US Judge Pauley, relying on a series of quoted precedents, explicitly links together the mosaic analogy with the arguments from consequence and from ignorance and authority, a move which is quite standard in Federal Court decisions on access to information:

Despite the searching inquiry this Court will give the Government’s segregability determinations, the Government’s affidavits are entitled to deference on whether disclosure of certain information would harm national security. In the national security context, a court ‘must accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.’ [reference omitted]. ‘Minor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, [each detail] may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.’ [reference omitted]. ‘Recognizing the relative competencies of the executive and judiciary, . . . it is bad law and bad policy to “second-guess the predictive judgments made by the government's intelligence agencies” regarding questions such as whether disclosure of terrorist-related

119 American Civil Liberties Union v Dept. of Justice, 681 F (3d) 61 at 71 (2d Cir 2012).
surveillance records would pose a threat to national security.’ [reference omitted].

Lord Justice Laws also explicitly links together the mosaic analogy with the arguments from consequence and from ignorance and authority:

Mr Greenwald’s account [...] of the ‘many ingredients to the sensible reporting of very sensitive information’ is insubstantial; or rather, mysterious – the reader is left in the dark as to how it is that ‘highly experienced journalists and legal experts’ [...] or ‘[e]xperienced editors and reporters’ [...] are able to know what may and what may not be published without endangering life or security. There may no doubt be obvious cases, where the information on its face is a gift to the terrorist. But in other instances the journalist may not understand the intrinsic significance of material in his hands; more particularly, the consequences of revealing this or that fact will depend upon knowledge of the whole ‘jigsaw’ (a term used in the course of argument) of disparate pieces of intelligence, to which the classes of persons referred to by Mr Greenwald will not have access. [...] Mr Robbins [government affiant] says this: ‘Indeed it is impossible for a journalist alone to form a proper judgment about what disclosure of protectively marked intelligence does or does not damage national security... The fragmentary nature of intelligence means that even a seemingly innocuous piece of information can provide important clues to individuals involved in extremism or terrorism.’ In the result, I conclude that nothing said for the claimant qualifies or puts in doubt the evidence of Mr Robbins and DS [Detective Sergeant]

120 American Civil Liberties Union v FBI, 59 F Supp (3d) 584 at 592 (SD New York 2014).
Goode as to the dangers inherent in the release (or further release) or dissemination of the material in the claimant's possession. Neither the claimant nor Mr Greenwald is in a position to form an accurate judgment on the matter.\textsuperscript{121}

All these statements reinforce the preceding set statements, using the same lexical terms (“minor details,” “bits of information,” “disparate pieces”), but making clear that there are consequences if that type of information is released. Deference to the executive is evident, with one secret keeper being directly quoted. These statements make the mosaic analogy hard to assail. But as we have seen with the arguments from knowledge and authority, it is no longer the case, according to some judges, that the court is totally helpless in matters of national security.

Canadian judges, like their American and British counterparts, have readily embraced the mosaic analogy, and used it often in conjunction with other rhetorical devices. However, one judge has not shied away from expressing a bit of skepticism and disappointment at the evidence presented.\textsuperscript{122} This was based on the validity of the

\textsuperscript{121} \textit{Miranda v Secretary of State for the Home Department & Ors} [2014] EWHC 255 (Admin) at paras 58.

\textsuperscript{122} The key judicial precedent is \textit{Henrie}, affirmed by the Federal Court of Appeal: “It is of some importance to realize than an ‘informed reader,’ that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security. That being said, though it is important to keep this underlying principle in mind when assessing whether or not information could be injurious if disclosed, in light of the difficulty of placing oneself in the shoes of such an ‘informed reader,’ by itself the mosaic effect will usually not provide sufficient reason to prevent the disclosure of what would otherwise appear to be an innocuous piece of information. Something further must be asserted as to why that particular piece of information should not be disclosed. \textit{Henrie v Canada (Security Intelligence Review Committee)}, [1989] 2 FC 229 (TD) at 242-243; affd (1992), 1992 CanLII 8549 (FCA).
evidence presented alone and not the result of any differences between judicial systems or differences in the separation of powers between the executive and the legislature in Canada and the US.

Justice Noël, in a case concerning the release of classified documents to a commission of inquiry, recognizes the merit of the analogy, linking it to the argument from consequence:

Assessing an opinion on injury and the likelihood of damage to national security resulting from disclosure of information cannot be done in the abstract or in isolation. Under the ‘mosaic’ principle, it must be assumed that the information will reach people with knowledge of service targets and its activities. An informed reader of the disclosed information, however trite or simple it might appear to a casual reader, may infer therefrom a more comprehensive view of a situation and thus affect current or future investigations. The more intelligence information disclosed at the same time, the greater the mosaic effect. Releasing subjects of investigation or service interest, the information collected and assessments made is injurious.\(^\text{123}\)

Justice Mosley, in the case of a civil action against the Government of Canada involving national security information, accepts the mosaic analogy, but contends that its use must be based on more than generalities or the simple assertion of its presumed effect:

The mosaic effect may be one of those statements of the obvious that are difficult to prove or disprove. The problem arises in its application. How does

\(^{123}\) Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials), 2009 FC 1317 at para 107.
the Court discern whether disclosure of a particular item of information will fill a gap in the knowledge of another person? Apart from reciting the principle, the witnesses heard in this and other cases have generally been unable to assist the Court to resolve that conundrum. In Khawaja, […] I said that ‘…by itself the mosaic effect will usually not provide sufficient reason to prevent the disclosure of what would otherwise appear to be an innocuous piece of information. Something further must be asserted as to why that particular piece of information should not be disclosed.’ That continues to be my view.124

Justice Mosley’s point is similar to the point made by other judges with respect to the temporal argument: secret keepers should not claim a mosaic effect on the basis of generalities alone. These generalities should be accompanied with reasonably specific and pertinent details to show that the asserted harm in a particular case is more than imaginative. Judge Mosley, however, tempered his skepticism seven years later in a criminal case involving national security information:

In considering the evidence on the question of injury I have taken into account what is often referred to as the Mosaic Theory. This theory contends that individual pieces of information which appear to be innocuous on their face, may, when assembled with other pieces of information, present a picture that

124 Canada (Attorney General) v Almalki, 2010 FC 1106 at para 118. “Simply alleging a ‘mosaic effect’ is not sufficient. There must be some basis or reality for such a claim, based on the particulars of a given file.” Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials), 2007 FC 766 at para 84. “[T]he Attorney General must present evidence to back up the injury claims. Witnesses from the intelligence community may take the mosaic effect theory as an article of faith, relying upon it as a complete answer to the release of information they consider sensitive or potentially harmful. As stated by Justice Noël in Arar, at paragraph 84, ‘[s]imply alleging the effect is not enough. There must be some basis or reality for such a claim based on the particulars of a given file.’” Khadr v Canada (Attorney General), 2008 FC 549 at para 77.
would be harmful to Canada’s security interests. While I have expressed skepticism about this theory in previous decisions, I accept that it is a factor to consider when dealing with [redacted] a sophisticated nation state. This is particularly true in the modern era when extraordinarily powerful computer systems can be employed in assessing the assembled bits of information.125

The mosaic theory as a plausible analogy has received wide acceptance among judges in the United States, the United Kingdom and Canada. Judges recognize that to see more than the sum requires domain expertise and experience (and now sophisticated computer programs), which they may not necessarily have. Judges understand, explain and apply the mosaic theory to state secrecy without problem: it is no different than the everyday knowledge that people have about solving traditional jigsaw/picture puzzles. In so doing, judges can highlight, in their own words or in quoting secret keepers, the possible harmful effects that the release of seemingly innocuous bits of information (individually or grouped together) could cause. The analogy works because it can stand on its own: it is simple and easily understood by an audience that understands what a puzzle is. However, it is a rhetorical device that is best used in conjunction with other devices, such as the arguments from consequence and from ignorance and authority, which strengthen its validity.126 Although there are differences in the degree of deference judges will grant secret keepers in a particular case, the use of the mosaic analogy by judges is well aligned with how it is used by secret keepers. But just like the temporal

125 Huang v Canada (Attorney General), 2017 FC 662 at para 65.
126 “Mosaic theory turns this lack of information and speculation to the government’s advantage by explicitly casting the judge as an outsider, ill-suited to understanding the bigger picture. It also uses the judge's lack of expertise as a reason to refuse to provide information that might educate the judge (on the never-quite spoken assumption that it would be mishandled) […].” Wells, supra note 117 at 854.
argument, it is assailable if based solely on generalities. This point should perhaps matter more in the discourse of judges and critics. Otherwise, anything at all can be deemed sensitive and in need of protection.

5.7 Conclusion

Judges write on state secrecy by employing the same set of rhetorical devices as secret keepers. This is visible in the choice of value-oriented lexical terms and lexico-grammatical ploys that judges use to cement their position on contentious disclosure issues. While less emotional in tone, the terms and words judges use convey a message that recognizes the value and legitimacy of the reasons advanced by secret keepers to prevent the disclosure of state secrets. That said, judges are generally reluctant to accept the validity of these rhetorical devices if they are simply asserted or based on generalities. Judges expect, in most cases, that they be accompanied with reasonably specific and pertinent details to show that the asserted harm in a particular case is more than imaginative. While deference to the state in matters of national security is accepted, it does not amount to judges blindly accepting the reasons of secret keepers to preserve secrecy. On the basis of the statements chosen for this chapter, US judges are seemingly more deferent to the executive than Canadian or British judges in matters of national security. But this is only a matter of degree rather than alignment, and ultimately a matter related to the separation of powers between the executive and the judiciary, which play differently in each country according to the evolution of their respective polities, legal systems and constitutional precedents.

The use of temporality as a rhetorical device frames the disclosure of state secrets as a future-oriented problem. The harm that could result from disclosing state secrets has
certainly not yet occurred—when asserted by secret keepers, it is “concerned with future possibilities.” The “passage of time” or “the mere passage of time in itself,” judges note, may not eliminate or mitigate the possibility of future harm. While there is uncertainty associated with the assessment of future harm, secret keepers know of past harm caused by disclosure and can argue analogically that harm is probable. Ideally, they would have clear and specific knowledge to the effect that harm is likely to result from the disclosure of state secrets. When the assessment of harm by secret keepers is not highly speculative, conjectural or purely imaginary, judges tend to be very sympathetic to the argument from ignorance and authority, and hence to defer to those endowed with the authority to protect national security.

The argument from ignorance and authority is a rhetorical device that has a prominent place in the discourse of judges. Judges use value-oriented lexical terms such as “uniquely,” “significant” “great weight,” “well-suited” and “first importance” in recognizing, accepting and legitimizing the duty of the state in protecting state secrets for national security reasons. After all, as one judge says, “in matters of national security, the cost of failure can be high.”\(^{127}\) This argument is used with effect in conjunction with the argument from consequence, which considers secret keepers best positioned in “predicting” future harm if state secrets are disclosed. Judges use a variety of terms to speak of consequences, including “protection,” “prejudice,” “enemy,” “risks,” “adverse effect,” “disrupt,” “damaging,” “undermine,” “jeopardize,” “impede,” “compromise,” “endanger,” and “devastating impact,” and specifically refer to matters of life and death by employing terms like “endangered friends and associates,” “our enemies might try to

\(^{127}\) Secretary of State for the Home Department v Rehman, [2001] UKHL 47 at para 62.
eliminate the source of information,” “country should be destroyed,” and “the lives of informers may be at risk.” The use of the analogy to a mosaic serves judges well to highlight the consequences of disclosing state secrets that may seem trivial when considered in disaggregate form. The terms they use mirror those used by secret keepers, including “innocuous,” “bits of information,” “minor details,” “bits of data,” “seemingly innocuous” or “apparently innocuous” and “jigsaw.” The simplicity of the analogy is stressed as well, and often linked to the other arguments.

Judges’ word choices matter. As Marianne Constable made clear in *Our Word Is Our Bond*, “understanding words and their uses corresponds to a common knowledge of naming on the part of speakers and hearers. Those who share a common language judge the world in similar ways.”¹²⁸ By understanding and using the rhetorical devices of secret keepers, judges show that they have a common knowledge with secret keepers of the reasons why state secrets should not be disclosed (of course, this does not mean they will prohibit disclosure, as this determination is made on the basis of the strength of the evidence adduced). By codifying—or materializing—these devices, judges assert that they are valid and demand recognition from others.¹²⁹ Their success in this task has the effect of ensuring that secret keepers’ discourse on state secrecy pushes out other contending discourses.

While present in the discourse of judges, lexical terms speaking to emotions and fear in discussing the consequences of disclosing state secrets against the wishes of the state

¹²⁸ Constable, *supra* note 12 at 77.
¹²⁹ “Unlike most others who pronounce in the public domain, judges appear to offer, and to deliver, clear and definitive answers.” McCluskey *supra* note 6 at 326.
are far from being expressed as vividly and passionately as secret keepers. Terry
Maroney explains this well when he writes that:

Emotion typically is both banished from legal discourse about judging and
presumed to be absent within the discourse of judging. Traditional legal
discourse about judging presumes a standard of ‘dispassion’, reflecting a
normative judgement that judges should not feel emotion or allow any such
feelings to affect their decisions. The discourse of judging has developed to
satisfy that norm, such that judges often suppress or disguise the influence of
emotion in their actions and words.¹³⁰

Notwithstanding any standard of ‘dispassion,’ it can be argued that judges do not
need to evoke fear vividly or passionately. As Paul Virilio reminds us, fear is “now an
environment, a surrounding, a world [that naturally] occupies and preoccupies us” on a
constant basis and that must be managed by the state. Once directly linked to “localized,
identifiable events that were limited to a certain timeframe [such as] wars, famines,
epidemics,” fear now attaches itself to anything bad that can happen at any time (a view
that overlaps very well with the rhetoric of secret keepers).¹³¹ Judges, in other words, do
not need to over-emphasize the sense of fear (of climate chaos, stock market panics, food
scares, pandemic threats, economic crashes, congenital anxiety, existential dread, etc.)
that everyone now instinctively can appreciate going about their daily lives. As members
of society, they are also aware of the many controversies surrounding secret state

¹³⁰ Terry A Maroney, “Emotion and the Discourse of Judging” in Heather Conway & John Stannard,
activities (such as extraordinary rendition, torture, the denial of due process, racial profiling, etc.) affecting the rights of individuals.

By materializing the linguistic devices used by secret keepers in judicial decisions, judges ultimately produce specialized knowledge on state secrecy that plays a part in shaping the understanding of state secrecy in society. Judges have this effect for a number of reasons. First, their discourse appeals to rationality and the raison d’État (state secrecy is a matter of national security, which is within the exclusive purview of the state). Second, the evidence they display on the necessity of not disclosing state secrets is provided by experts from the executive and judges speak in favour of that evidence as figures of authority. Third, they are cognizant of the post-9/11 environment and of the terrorist and multiple other threats to advanced democracies. Fourth, judges speak and write formally, assiduously avoiding use of an emotional tone. Fifth, they certainly write to convince anyone that they are attached to the rule of law and other sound legal principles, despite the high degree of deference they at times show to the executive. Sixth, the evidence judges employ is rarely purely anecdotal. It mixes factual evidence with historical and counterfactual (what if?) evidence, and the sworn affidavits and testimonies of secret keepers (Canadian and British judges in certain matters have access to special advocates cleared to see and test secret evidence). That said, there is such a degree of uncertainty about what may happen in the future that no piece of evidence can reduce the risks of disclosure to nothing or prove convincingly that something will as a matter of fact happen at a certain place at a certain time. Precedents are an easy way out.

132 “Most modern opinions [judgments] have a relatively formal tone […] […] the objective tone suggests that the outcome is the only rational conclusion in light of the law and the facts.” Peter M Tiersma, *Legal Language* (Chicago: The University of Chicago Press, 1999) at 139.
from dealing with uncertainty and the evidence adduced to either reduce or increase it. As many matters have long been settled, precedents are repeated from case to case, having a sort of “echo chamber” type effect: once a rhetorical device or argument advanced by secret keepers is adopted by judges, its impact is amplified as it gets quoted by judges in other cases. In US civil cases, the use of precedents alone is sufficient for judges not to see the state evidence. Assertion to that evidence in an affidavit is sufficient for an action to be rejected.

Taken together, these elements make the discourse of law a credible one. Its social effects as a result are numerous: the discourse of law on state secrecy, once synthesized into doctrine, is arguably educational and can be used in the indoctrination processes that new keepers of state secrets go through. It is governing and commanding because it has the full force of the state behind it when it comes to the implementation of court decisions. Because it is backed up by judicial precedents and statutory provisions limiting disclosures (e.g., access to information legislation), this is a discourse that is not easily amenable to anyone wishing to argue on evidentiary bases and reasons different than those associated with it. As a result, this is not a discourse from which revolutionary changes in the handling of state secrets are likely to arise.

The sense of finitude associated with the discourse of law, however, masks a number of flaws. For example, claims to state secrecy can be abused to the detriment

133 “The policy of the law strongly favours finality of court orders to ensure the judicial process’ integrity: Nu-Pharm Inc v Canada (Attorney General) (1999), [2000] 1 FC 463, 179 DLR (4th) 531 (CA).”

134 “Rules of law based on a system of precedent are therefore likely to exhibit characteristics of certainty, consistency, and uniformity. But such rules, depending on the practices of the courts, are, by the same token, liable to prove difficult to remove or modify.” The Lord Mackay of Clashfern, “Can Judges Change the Law?” (Remarks delivered for the Maccabaean Lecture in Jurisprudence, 2 December 1987), (1987) LXXIII Proceedings of the British Academy 285 at 289.
of respect for human rights and the repression of criminal behaviour (e.g., when wrongdoing by officials is shielded by state secrecy). In a rare dissent on appeal, Judge Hawkins writes that the state secrecy privilege is a danger to the rule of law:

   But the [state secrets] doctrine is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government’s essential secrets.\textsuperscript{135}

The high degree of deference believed to have been shown by US courts has also come under the criticism of legal scholars and a few judges, as some judges are seen as too easily agreeing with the views and determinations of the executive.\textsuperscript{136} As Wayne McCormack notes, although judges would not under any circumstances take directions from the executive, “time and again, the courts have yielded to arguments that decision in a case would jeopardize national security interests when a neutral observer would be hard-pressed to see how that could be possible.”\textsuperscript{137}

Belief shown by the courts in the mosaic effect has also come under attack. Pozen, for example, argues that US courts have applied the mosaic effect argument in ways that are unfalsifiable and deeply susceptible to abuse and overbreadth; they have created in the mosaic theory a latently subversive basis for

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\textsuperscript{135} Mohamed v Jeppesen Dataplan, Inc., 614 F (3d) 1070 at 1093 (9th Cir 2010).
\textsuperscript{136} McCormack, supra note 20 at 306-308.
\textsuperscript{137} Ibid at 322.
\end{flushright}
withholding information. When courts accord heightened deference to agencies' mosaic claims, moreover, they contravene the text and purpose of FOIA.\textsuperscript{138}

These criticisms serve to illustrate that the discourse of law is not infallible or unassailable, despite its allure of authority and finitude. It is a social practice, after all, that responds to its social context. But it is also a social practice that ultimately decides, in the eyes of the population, which story is heard over others; as Ernesto Laclau and Chantal Mouffe aptly note that “there are always multiple competing discourses” in society.\textsuperscript{139}


\textsuperscript{139} David Barnard-Wills, \textit{Surveillance and Identity: Discourse, Subjectivity and the State} (Farnham: Ashgate, 2012) at 67.
Chapter 6: Could a critique change or displace the preeminent discourse on state secrecy?

The previous chapters examined the discourse of the keepers of state secrets and the legitimization of that discourse by judges by focusing on the reasons that secret keepers in Canada, the United Kingdom and the United States use to sustain the existence and non-disclosure of state secrets in these societies. The analysis of these reasons in chapters 4 and 5 points to a set of rhetorical devices that secret keepers deploy to persuade judges and the public that state secrets should remain undisclosed. Judges have embraced the use of these rhetorical devices in their written decisions and in so doing have given legitimacy to the manner in which secret keepers write and speak about state secrets. This mechanism is important to understand because it sets the dominant interpretive frames through which any consideration of state secrecy will be viewed.

The persuasive effect of these frames, however, may ebb and flow, as several factors may affect the position, status, authority and legitimacy of secret keepers and judges (e.g., leaks exposing wrongdoings, abuses of authority, how much the audience cares, ideological positions…),¹ and sometimes open more public space, but not necessarily

¹ “Rhetorical argument, no matter how well constructed, cannot always succeed in achieving its end. Too many chance factors enter into the persuasive situation for the art to control success in any particular case, and so rhetoric cannot always succeed by words.” Michael Leff, “The Relation Between Dialectic and Rhetoric in a Classical and a Modern Perspective” in Frans H Van Eemeren & Peter Houtlosser, eds, *Dialectic and Rhetoric: The Warp and Woof of Argumentation Analysis* (Dordrecht: Springer, 2002) 53 at 55. “Although the extent to which an audience may be open to persuasion depends on the surrounding context, including how much the audience member cares about the issue, there are a number of offsetting considerations. These factors affect whether the audience member will deliberate carefully or whether she will use a decision-making shortcut. Audiences in general, and judges in particular, simply may not have enough time to carefully deliberate. And in life as well as judging, there are nonobvious shortcuts, including reliance on the judgment of others around the decision maker.” Linda L Berger & Kathryn M Stanchi, *Legal Persuasion: A Rhetorical Approach to the Science* (London, UK: Routledge, 2018) at 8.
more legal space, for other discourses.² As discussed in chapter 3, there is a long-standing counter-discourse arguing for transparency, and a more radical one calling for information to be free; as well, democratic states have made partial concessions to subordinate social forces, for example by implementing access to information legislation. But these other discourses do not have the same degree of legitimacy and persuasiveness as the discourse of secret keepers or the discourse of law on state secrecy. While not systematically silenced, they remain marginalized.³ As Goodrich correctly notes, to challenge the form, authority, or the reason of law is very difficult. It requires questioning how each of these elements reproduce themselves as well as the nature of rhetoric. It is for this reason, he adds, while taking a contemporary example, “that when critical legal studies or feminist legal theory question the character and legitimacy of legal judgment they are met with the full, though unconscious, rhetorical force of the antirrhetic [the lineage or genealogy of the law as its source of authority].”⁴ This unconscious reaction reflects the notion that most people tend to comply with a preeminent discourse not because they necessarily agree with it, or because it is in their interests, but because they may not even be conscious of complying with a preeminent discourse to start with.⁵ That

² “Unlike Parliament, the court cannot examine the effects of a range of alternative options, having regard to a multiplicity of interests. Secondly, it must frame a judgment between the competing claims of the opposing parties.” The Lord Mackay of Clashfern, “Can Judges Change the Law?” (remarks delivered for the Maccabaean Lecture in Jurisprudence, 2 December 1987), LXXIII Proceedings of the British Academy 285 at 293.


preeminent discourse is the one promoted by secret keepers in all manners of medias and venues, as the penetration of the majority of court decisions among the wider public is difficult to determine beyond the most impactful decisions.

Secret keepers themselves are poor candidates to turn their own discourse around. The likes of Manning, Snowden and a few others are notable exceptions out of the many millions of current and former secret keepers permanently bound to secrecy.\(^6\) Secret keepers form a tight epistemic and professional community that is well adapted to its discursive environment and if some secret keepers think that they have views that do not accord with the majority, they tend to remain silent. This is the spiral of silence that further reduces, within public opinion, the presence of any divergent views that would emanate from secret keepers.\(^7\) That said, a few secret keepers have offered comments that make several arguments assailable, to an extent. Unauthorized disclosures do not always result in the infliction of harm on individuals, methods used by national security and intelligence agencies can become obsolete, the passage of time can reduce the possibility of harm ever being inflicted on individuals, and arguments couched in mere generalities and truisms are generally too underspecified to convince judges of their merit. These assertions are plain common sense and easy to demonstrate, but only emanate from a very small pool of people. Their effect, however, is variable, as each disclosure must be assessed on its own merit, on the basis of the evidence adduced. Moreover, it is not these

\(^6\) For example, “secrecy was maintained throughout World War II about America’s success in breaking German and Japanese encryption systems. Clearly, when the U.S. government wants to keep its capabilities secret, it can do so even when the secret must be harbored by many people and multiple agencies.” Lance deHaven-Smith, \textit{Conspiracy Theory in America} (Austin: University of Texas Press, 2013) at 35.

assertions that are repeated by secret keepers in public or in affidavits, declarations, or testimonies before the court.

The marginalization of alternative discourses, of course, is problematic. As civil libertarians, concerned jurists and human rights activists argue, state secrecy may harm individuals and negatively impact the integrity of democratic systems.\(^8\) Closed trials, for example, may prevent justice from being seen, a long-established principle of common law and British constitutional principles.\(^9\) Secret extraordinary rendition or torture may affect the lives of shielded individuals in very dire terms. Modern democratic states’ national security claims to shield state secrets therefore can clash with the normally recognized democratic requirements of transparency, accountability, public scrutiny and procedural fairness. Yet, in a post-9/11 context, reliance on state secrecy has expanded exponentially, in particular its coverage in the areas of economics and science and technology.\(^{10}\) State secrecy practices understood from the perspective of the secret keeper


\(^{10}\) This has certainly been observed in the United States. Benjamin W Cramer, “The Power of Secrecy and the Secrecy of Power: FACA and the National Energy Policy Development Group” (2008) 13 Comm L & Pol’y 183 at 226; Jacob N Shapiro & David A Siegel, “Is this Paper Dangerous? Balancing Secrecy and Openness in Counterterrorism” (2010) 19 Security Studies 66 at 67-68; Ann Florini, “Behind Closed Doors: Governmental Transparency Gives Way to Secrecy” (2004) 26:1 Harv Int’l Rev 18 at 20; Jodi Dean, “Secrecy Since September 11” (2004) 6:3 Interventions 362 at 367. The successful application of state secrecy to scientific publications is doubtful: “Whether the current method of only using classification to limit the dissemination of fundamental research results is the best or most effective method of maintaining national security is an open question. It is unclear whether classification will be effective when applied to research areas that have not historically been classified, nor is it clear that a system of classified research will be embraced by scientists working in these areas.” Dana A Shea, “Balancing Scientific
are also strongly embedded in popular culture, where matters of life and death and national security (in)efficiency are portrayed in “novels, films, television series, and electronic games, for fiction is one of the few discourses in which the secret work of the state may be disclosed to citizens.”¹¹ These cultural artifacts are key components of Walter’s covert imaginary because they captures on a massive scale (who does not know James Bond?) those shared commonplace assumptions, concepts, stereotypes, affective structures, images and attitudes about state secrecy that prevail today. That imaginary breeds further public familiarity with the discourse of secret keepers and helps reproduce its preeminent character.¹² Notwithstanding the national security claims made by the state in matters of state secrecy, it remains the norm in democratic systems that “the knowledge(s) that are claimed by state actors in making policy must be subjected to questioning, contestation, and critique.”¹³

Legislative and judicial institutions have tried to balance the tension between state secrecy and transparency, but a satisfactory balance has not yet been achieved.¹⁴ As there


¹² Melley argues this point as follows: “The projection of strategic “fictions,” in fact, is a primary goal of clandestine agencies. […] I frequently distinguish between state institutions—which constitute the covert sector of government—and the broader cultural arena of the covert sphere. […] The covert sphere is thus much more than simply the cultural “reflection” of real covert actions or a collection of diversionary fantasies about secret government. It is an ideological arena with profound effects on democracy, citizenship, and state policy.” Melley, *supra* note 11 at 6.


are no definitive or widely accepted normative theories to help one decide when more
transparency is preferable to more secrecy, a critique of the preeminent discourse is
imperative. The first step in formulating such a critique is to understand how a discourse
becomes preeminent and how it reproduces itself (an effort to which this thesis has
directly contributed). This suggests, as a second step, two possible critiques: one from
within the constraints set by the preeminent discourse and its enabling institutions and
agents, and the other from outside these boundaries. In the case of an internal critique, the
exercise is about fault finding and system corrections, an effort which involves academic
researchers, lawyers and law professors, whistleblowers, and civil society organizations
on an ongoing basis, whereas in the case of an external critique the exercise is about
critiquing the system as a whole by unveiling its underpinnings and means of
reproduction and/or seeking its replacement.

Tried to Keep Its Iraq War Secrets” (2020) 51:1 Security Dialogue 77. Thomas argues that there is “is no
balance at all. It is profoundly one-sided because security only features on one side.” Ibid at 77.

15 Even Alasdair Roberts, in one of the few in-depth analyses of government secrecy in the
information age (Alasdair Roberts, Blacked Out: Government Secrecy in the Information Age [Cambridge,
UK: Cambridge University Press, 2006]), did not offer “a workable theory for when transparency is
appropriate in the face of the competing demands for homeland and national security.” Peter P Swire, Book
Sci & Tech 92 at 92. Daniel Epps has offered a principal-agent relationship approach (Daniel Epps,
“Mechanisms of Secrecy” (2008) 121 Harv L Rev 1556) while Shapiro & Siegel have explained the
“complex trade-offs policy makers face in deciding how much openness is right in a world where
protecting the people from terrorists has become a central duty of government” (Jacob N Shapiro & David
Security Studies 66 at 66).

16 “[C]ritique means not only fault finding but setting up a line of opposition, one that deals not just
with the detail but rather with the whole system. Faults are not the result of mistakes, correctable once they
are pointed out, but are the result of the workings of established systems. Critique begins to challenge
whole systems rather than identify failings.” Tim Dant, Critical Social Theory (London, UK: Sage, 2003) at
7. I refer to this type of critique as an external critique.
6.1 Critique I: challenging constraints

An internal critique of state secrecy can take many forms. One is to rely on laughter, parody, literary satire, fiction and grotesque realism. While Mikhail Bakhtin thought of his carnivalesque approach in the context of totalitarian political regimes, its use in mainstream democratic culture, where comical opportunities of ridiculing the powerful abound, is well recognized and far less dangerous to implement. The effect of the carnivalesque, however, may not be revolutionary as “those in power […] can always point to the [Bakhtinian] genres used as providing a kind of free zone for radicals, clowns or ‘madmen’ who cannot be taken seriously in the arenas where real decision-making takes place.” To wit, of the many cartoons printed in major newspapers at the time of Snowden’s disclosure, none had for effect to change the discourses of secret keepers and judges on state secrecy (several cartoons in fact poked fun at Snowden’s newly found situation in Russia instead of the secret keepers of the state). As Bruno Latour argues in his analysis of power, the act alone of denouncing what one considers illegitimate is rarely sufficient to change anything: it must be accompanied by political empowerment to avoid despair.

17 Bakhtin’s opposition of the “the carnivalesque to official discourse” was conceptualize in Mikhail Bakhtin, *Rabelais and His World*, translated by Helene Iswolski (Bloomington: Indiana University Press, 1984) at, *inter alia*, 14, 424.
20 I base these comments on my collection of 50 cartoons published in the days, weeks and months following Snowden’s initial disclosure.
As Barry Wright, Susan Binnie and Eric Tucker also observe, in the historical context of political trials and the recently completed five-volume *Canadian State Trials* series that has examined the Canadian experience of such proceedings, the “courts could be a platform for opposition causes, providing opportunities to express grievances and challenge authority.” Such “counter-hegemonic’ resistance in the courtroom,” they add, has often occurred in cases involving the prosecution of “high” political offences such as treason or sedition or more “routine” criminal offences committed for political purposes. Effective defences were possible in response and, in such cases, government security justifications were sometimes cast into reasonable doubt, or were demonstrated to entail unacceptable overreach in the context of formal state claims about due process, rights or political liberties. And despite the context of judicial deference to, and compliance with government security concerns, jury trials further enhanced the possibilities of such counter hegemonic success. In a similar way, secrecy claims can be effectively challenged in the courtroom, particularly where proceedings involve a jury.

The use of carnivalesque or more serious forms of counter-hegemonic responses to state secrecy case before the court is certainly a possibility. But it would require a large mediatic effect to resonate with the public and ultimately cause changes in state secrecy practices or discourses. Assange or Snowden, should they ever go to trial in the United States, would have the opportunity to test a carnivalesque or counter-hegemonic approach, probably up to the point where its toleration would stop “amusing” the court.

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The FLQ trials saw wide resort to punitive contempt of court proceedings in response to the disruptive courtroom tactics of the defendants. The impact of such trials in the future is at this point hard to discern, but the long history of state secrecy would lead most astute observers to surmise that state secrecy would continue to live and prosper, justified as essential to the national security of states and the safety of their citizens.

Another possible avenue is to redefine the issue in a more constrained manner that does not directly attack both the political and the legal authority of the state. This could take the form of an opposing discourse that would confront the variety of past and possible disclosure experiences to come up with different categories, or reasons to explain why secret keepers want to keep their secrets concealed. Rather than protecting the state and its citizens against harm, secret keepers would instead be said to oppose non-disclosure in order to protect incompetence, criminal activities, embarrassment, frivolities, mismanagement, etc. Statements to that effect already abound, for example: Sam Adler-Bell, a well-published New York City writer, writes that “[g]overnment officials—whoever resides in the White House—are professional liars. They lie haughtily in the interest of ‘national security,’ sheepishly in the interest of saving face, and passionately when their jobs are on the line.” Institutional whistleblowing programs in liberal democracies already capture these kinds of reasons with substantive and usually

well-documented cases, but the corpus of whistleblowing cases has not yet disturbed the prevailing notion that state secrecy is fundamentally at the service of the common good.\textsuperscript{25}

In situations where institutional whistleblowing programs may not be available of up to the task of uncovering wrongdoing, secret keepers, such as Manning and Snowden, have acted on their own and leaked state secrets without authorization. Athina Karatzogianni has called this phenomenon “leaktivism.”\textsuperscript{26} While Manning’s and Snowden’s disclosures did not affect state secrecy core practices or discourses, Snowden’s disclosures had a significant and discernable impact in associated domains. For instance, the Obama administration made public highly classified authorizations of the United States Foreign Intelligence Surveillance Court (FISC) and reinvigorated its Privacy and Civil Liberties Oversight Board (PCLOB), both measures contributing to greater oversight of intelligence gathering activities by the legislative branch and civil society. Although greater transparency and accountability have resulted from Snowden’s disclosures, the methods and sources of intelligence gathering remain protected from unauthorized disclosures as solidly as before. In the clash opposing transparency and secrecy, national security won the day. To wit, the types of documents leaked by Manning and Snowden are not proactively disclosed today: they remain state secrets just as their predecessors were before they were leaked. Manning, moreover, was convicted on 17 of 22 charges, including on five counts of espionage and theft, while Snowden, still


\textsuperscript{26} “[... ] Edward Snowden (2013) as significant examples of what is fast becoming the decade of ‘leaktivism’. In normative terms, the ‘internet’ is used to obtain, leak and spread confidential documents with political ramifications, with the aim to expose corruption, wrongdoing and inequality, potentially enhancing accountability in the democratic process, through greater transparency.” Athina Karatzogianni, “Leaktivism and its Discontents” in Graham Meikle, ed, \textit{The Routledge Companion to Media and Activism} (London, UK: Routledge, 2018) 250 at 250.
under indictment, is now living in Russia. Former CIA software engineer Joshua Schulte is also paying the price (convicted in July 2022, his sentence was pending as of this writing) for his March 2017 leak to WikiLeaks of documents detailing the use of malware tools by the CIA (known as the Vault 7 case, the largest leak of CIA documents ever).\(^{27}\) Considered extremely damaging to US national security, this case, too, did not have any discernable impact on state secrecy practices or discourses. The methods by which intelligence agency conduct their activities remain protected by legislation and judicial precedents. The “leaktivism” practiced by secret keepers turned whistleblowers has for now been discredited: while Schulte’s unauthorized disclosure were out of spite for the CIA, other major leaks purporting to expose wrongdoings since 2016 have been linked to the work of Russian intelligence services.\(^{28}\) Manning, Snowden and Schulte nonetheless showed that protecting state secrets in a digital world is extremely challenging. As Karatzogianni has quipped, “[i]t is a world of hack or be hacked.”\(^{29}\)

In addition to institutional whistleblowing programs and leakages from secret keepers, pressures on state secrecy practices from “leaktivism” can be applied by civil society organizations (CSOs), such as human rights groups. CSOs typically hold the state to account by gathering, analyzing and disseminating information about state activities independent of what the state says it is doing. In drawing the attention of society at large,


\(^{28}\) These include the June 2016 DCLeaks of US of military and government emails, the July 2016 DNCLeaks, through WikiLeaks, of the emails of key figures in the Democratic National Convention. Karatzogianni, *supra* note 26 at 252, 253. Karatzogianni argues that “the main discontent with leaktivism is that corporate-funded leaktivist organizations of various descriptions tend to be involved in aspects of disrupting government intelligence, as well as other civil society organizations funded by either corporate or government actors.” *Ibid* at 255.

\(^{29}\) *Ibid* at 255.
the media, and sometimes international organizations to instances of state crime, CSOs seek to strengthen collective self-awareness and solidarity, and to stimulate resistance (i.e., public protest). The exposure of the extraordinary rendition of suspected terrorists to black sites by the United States and its allies is a case in point. The pressure applied by CSOs led in increased transparency in some cases and redress in courts in others, but did not fundamentally affect state secrecy practices or discourses. Extraordinary rendition activities, should they have continued after their public exposure, are still shrouded in state secrecy.

Within the context of a courtroom both of these critiques (the carnivalesque approach and leaktivism) would be challenging to implement. Besides the fact that Bakhtin’s carnivalesque approach has no proper place in a courtroom, participants in a legal process may not be in a position to resist the preeminent discourse. As Teun Van Dijk points out, resistance can be difficult in this context because participation may be limited to specific roles: People may only be allowed to participate as passive listeners (for instance as jurors in trials in the USA), and not as active speakers, or they may only be allowed to speak at specific moments, as is the case for witnesses, or only as engaging in specific speech acts (making statements, and not as asking questions or making accusations.

31 For a case study of the positive role of CSOs, see Stéphane Lefebvre, “Lithuania, the CIA, and Intelligence Reform” (2012) 25:3 International Journal of Intelligence and CounterIntelligence 571. See also Suzanne Egan, *Extraordinary Rendition and Human Rights: Examining State Accountability and Complicity* (Cham: Palgrave Macmillan, 2019).  
This point speaks directly to the fact that there are authorized and recognized experts in any legal process. Practically, this means that not everyone’s knowledge has the exact same value or opportunity to be shared (as expert knowledge is more prominent in courtrooms than experiential knowledge, which is limited to the voices of witnesses), and that there are unequal material conditions affecting the power of different actors (such as entry barriers, costs, etc.).33 Opening the court to different individual or collective voices—beyond the traditional *amici curiae*—and more dialogue rather than merely declaration of claims and their justification for adjudication, could potentially challenge or alter the preeminent discourse. This approach, however, may add costs and time to, and reduce the efficiency of, judicial proceedings, and lead to serious and lengthy debates on the selection and merit of these other voices (how remote should they be, for instance, from those affected by the resulting decisions of judges?).

Judges, moreover, have roles within the legal system that they cannot change out of their own volition. American, British and Canadian judges operate within an adversarial legal system where the judge is meant to arbitrate between two opposing parties—typically choosing the arguments/evidence advanced by one party as opposed to those advanced by the other party. In so doing, they are constrained by laws and rules adopted by competent authorities that define what is to be kept secret and how, who can be entrusted with secrets and what sanctions apply to secrecy breaches. They are bound by precedents—unless they are compelled to supersede any one of them—and by the separation of powers between the executive and the judiciary. As a party to judicial

33 The point that material conditions may affect the range of possible outcomes is from Peter Graefe, “Political Economy and Canadian Public Policy” in Michael Orsini & Miriam Smith, eds, *Critical Policy Studies* (Vancouver: UBC Press, 2007) 19 at 31.
proceedings, secret keepers represent the state in the form of a well-organized epistemic and professional community. They speak and write with the authority of the state and as public servants are dedicated to protecting their country’s national security and the security of their co-citizens. Their position is not lost on judges, who recognize that the key duty of a state is to protect its people, public safety and the public order. In recognition of the separation of powers, the rule of law, and the accountability of the government before the electorate, they accord secret keepers a high degree of deference. While deference to secret keepers is not absolute, it is not about to be displaced by deference to other parties to judicial proceedings, which are more disparate (from individuals, human rights organizations to public interest groups) and without the financial and cognitive resources of the state to knowingly, competently and professionally discuss matters of national security. As noted in chapter 1, there is a very high degree of intertextuality between decisions because of the role of precedents in common law systems. To break this process would require a reversal of the precedents discussed in chapter 3, and a new set of laws, rules and policies (all developed by secret keepers) that would change the lexical terms, definitions and discourse through which the need to protect state secrets from disclosure is discussed. But as long as the state faces potential existential threats (such as a nuclear war), this is unlikely to happen. No defence against such threats is possible if an adversary knows how a state will defend itself against it.

With respect to system corrections, one avenue of critique would be to accept reasons for non-disclosure only if they were supported by tangible evidence that would significantly reduce the degree of uncertainty concerning the prospect of future harm.
That would require secret keepers, for example, supplementing analogies with well-known past incidents where harm was inflicted by adducing evidence that is specific to the case at bar. How good that evidence would need to be—and how much marginal weight should remain for unknown and uncertain factors—would be a highly debated issue among stakeholders.\(^{34}\) But at a very minimum, such an approach could reduce the number of cries to “threat to national security!”\(^{35}\) although it may not displace the need the state has to respond to threats that are unknown or unknowable.\(^{36}\) A few judges in chapter 5 have specifically warned against truisms and generalities. However, there is no empirical evidence on the strength of the evidence presented by secret keepers across the universe of cases in any country. In part, this is because some of that evidence is a state secret.

Secret keepers, in particular, would resist an aggressive approach to evidentiary standards. The preeminent discourse on state secrecy starts from the assumption that the state is indispensable to the provision of security to its citizens, and that a certain amount

\(^{34}\) The secret keepers’ assertions of harm are rarely challenged in judicial proceedings as their justificatory burden is easily met with broad but reasonable expectations of danger. A recent and rare disagreement on the extent to which that burden was met by the CIA was expressed in dissent by US Supreme Court Justice Gorsuch in *United States v Zubaydah* 595 US__(2022) (slip op) at 11.

\(^{35}\) A similar point along this line of thought is made by Murphy and Coleman: “When the United States government kept the press from being present during the invasion of Grenada in 1983, it justified doing so on the ground that the secrecy of its operation—vital to its success—would have been compromised by press presence. Suppose (though this is controversial) that the government here cited the correct principle. Should they still not have a burden of presenting good evidence that the principle is satisfied? If not, it would seem that government could stifle the press or speech simply by crying ‘Threat to national security!’ every time it wants to stifle the flow of information.” Jeffrie G Murphy & Jules L Coleman, *Philosophy of Law: Introduction to Jurisprudence*, revised ed (Boulder: Westview Press, 1990) at 103.

\(^{36}\) The precautionary principle, which originated in environmental science, has made serious inroads in criminal justice and national security domains over the past twenty years. Faced with uncertainty, the state uses this principle (“better Safe than Sorry”) to justify things such as preventive detention, no-fly decisions and so on, even if the gravity of harm is not of the highest degree. See, inter alia, Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (London, UK: Routledge, 2014) at 21-23.
of secrecy is required to minimize risks and prevent harm. Secret keepers oppose the disclosure of state secrets because it would cause injury to national security, including to the sources, methods and effectiveness of national security and intelligence organizations. Reduced to a matter of national security, these reasons against disclosure take the form of a security meta-frame, which epitomizes an imaginary loss of control and a possible-at-any-moment threat to national security or the safety of any individual whose identity has been revealed to others. As the desire for individual safety is a constant and the state is responsible for keeping society secure, promising security is a tenable position for secret keepers to take. Granted, there is no universally accepted definition of national security. Its meaning is mutable and expansive, and therefore open to challenge. As well, secret keepers’ claims of future harm are un-particularized and applied to all relevant cases (the use of lists and the mosaic theory are the best examples of that practice), and therefore “impossible to prove, or disprove.” Lists, in particular, have become ubiquitous in the


38 Media have imposed such a security meta-frame with respect to migration to Germany in 2015. Alexandra Schwell, “Imaginaries of Sovereignty: Visualizing the Loss of Control” in Hans Karl Peterlini & Jasmin Donlic, eds, Jahrbuch Migration und Gesellschaft/Yearbook Migration and Society 2020/2021 (Bielefeld: Transcript Verlag, 2021) 123 at 126.

39 “The purpose of the classification system is to prevent disclosure of information that could damage our national security. This straightforward definition, however, begs several questions: What is national security, if not the vitality of its democratic institutions that would be hobbled by secrecy?” Steven Aftergood, “Reducing Government Secrecy: Finding What Works” (2009) 27 Yale L & Pol’y Rev 399 at 401. “The problem is, however, that “national security” defies clear definition and is therefore vulnerable to mutable and very elastic meanings.” Craig Forcese, “Canada’s National Security ‘Complex’: Assessing the Secrecy Rules” (2009) 15:5 IRPP Choices 1 at 6.

40 Luke Harding, The Snowden Files: The Inside Story of the World’s Most Wanted Man (London, UK: Guardian Books, 2016) at 318. “[C]ontinuing disputes over classification policy are inevitable due to the inherently subjective character of the classification process. It would never be possible to programme a computer to decide what information should be classified, since there is no precise, objective definition of
post-9/11 security world, encompassing no-fly lists, kill lists, lists of sanctioned entities and individuals, lists of suspected terrorists, and so on and so forth. These lists can have an immediate effects on the individuals or entities they target. Both these lists and the secret keepers’ list of reasons are “oriented pre-emptively toward catastrophic futures” and constructed in such a way that any uncertainty and contingent factors remain hidden. Such lists tell us that individuals we can relate to, love, cherish and value, could die, and that the ability of the state to defend them and other citizens could be negatively altered if state secrets are disclosed.

Secret keepers, however, also face a paradox. If they are to be taken at their word that harm would result from the disclosure of state secrets, then the fact that they are so often the source of both “authorized” and “unauthorized” leaks must be questioned.

what constitutes unacceptable ‘damage to national security’ that would justify such decisions. Instead, classification decisions must be based on judgment and experience. On matters of judgment, there are always likely to be disagreements.” Steven Aftergood, “If in Doubt, Classify?” (2008) 37:4 Index on Censorship 101 at 107. “[S]ome claims about damage are not terribly plausible and seem to be based on circular reasoning: it leaked, it was classified, therefore the leak was damaging. Or, the claims may be an example of confirmation bias, in which officials are already prone to believe that leaks cause damage.” Jeffrey T Richelson, “Intelligence Secrets and Unauthorized Disclosures: Confronting Some Fundamental Issues” (2012) 25:4 Intln’l J Intelligence & CounterIntelligence 639 at 666. “[T]he classic mosaic argument against disclosure runs: An unidentified adversary might at an unspecified time use this information alongside other unknown information to help construct a mosaic that will threaten national security in an unpredictable way. As Professor Jane Kirtley has commented, such a theory is ‘impossible to refute... because who can say with certainty that it's not true?’ There are infinite possible informational mosaics that could be constructed from the release of any record, the expected impact of each one of which has a distinct probability and magnitude. Evaluating what harms ‘reasonably could be expected to result’ from disclosure—the legal standard by which judges evaluate the propriety of classification decisions—becomes especially problematic in the context of a theoretical construct so characterized by uncertainty. Given courts’ baseline of deference in national security cases, the predictable result is that they have rejected only the most fantastical mosaic arguments: […]. The practical unfalsifiability of highly speculative mosaic claims not only problematizes judicial review; it also makes the mosaic theory ripe for agency opportunism and abuse.” David E Pozen, “The Mosaic Theory, National Security, and the Freedom of Information Act” (2005-2006) 115 Yale LJ 628 at 672.

42 Ibid at 69.
Former White House Press Secretary McClellan captures such a paradoxical moment well:

Well, I think that one episode I recount in the book is when I learned that the President had secretly authorized the Vice President to get out some information of the—the [sic] National Intelligence Estimate on Iraq to reporters and do it anonymously. We had decried the selective leaking of classified information for years, the President and myself as the spokesman, and so that was certainly something that caught me by surprise and was a very disillusioning moment for me, to say the least.\(^{44}\)

Critics argue as well that much of what the state holds to be secret is already known to segments of the public. National security agencies’ outreach activities, leaks, espionage scandals and cultural artifacts have already placed in the public domain the traditional tools of espionage (the kind of sources and methods that are used to gather state secrets from targeted individuals, organizations and states), “thereby diminishing some of their value.”\(^ {45}\) This is compounded by the advent of commercial technologies\(^ {46}\) that are on par or exceeding those available to national security agencies (e.g., data mining, artificial intelligence, space imagery, etc.) and adversaries who enjoy a similar degree of sophistication in their use of sources and methods. In his discussion of the impact of Snowden’s leaks, Robert Dover nicely brings these points together:

\(^{44}\) Revelations by Former White House Press Secretary Scott McClellan: Hearing Before the House Committee of the Judiciary, 110th Cong (2009) at 18 (Scott McClellan).
\(^{46}\) Ibid.
Those involved in serious activities against Western interests would already be acutely aware of the insecurity of electronic communications and data trails. This is why jihadists at various stages during the 2000s switched to small, cellular structures, away from telecommunications, to voice-over-internet-protocol communications, to ‘burner phones’, and satellite phones, from electronic money transfers and bank-holdings to cash-passed-on in person and, in the case of bin Laden, to accommodations with high walls, and cloth drapes for outside shade to evade overhead surveillance—no longer out in the wilderness but conspicuously in the suburbs, just away from the prying overhead eye. So, those engaged in these activities in a serious way would already have been avoiding (as far as they could) the techniques being deployed by the US and allies. Those self-radicalising or partaking in less well-planned activities might have gained some kind of additional wisdom, but the actual risk or threat posed by these actors is difficult to assess and is likely to be small.47

As well, whether harm would result from the intentional or inadvertent disclosure of state secrets is highly contingent on recipients doing something with these secrets. The following anecdote from then General Colin Powell, then Chairman of the Joint Chiefs of Staff, with regards to the classified plan to counter Iran’s invasion of Kuwait in 1990 makes this point very nicely:

“Colin, I cannot tell you how difficult it is to tell you this.” The caller was a British colleague. General Sir Richard Vincent, vice chief of the defense staff.

“Yes, Dick,” I said. “What is it?”

“You see. Air Chief Marshal Patrick Hine met with the prime minister to brief him on the plan.”

So far, no problem.

“After the meeting, Paddy turned his briefcases and laptop computer over to his executive officer . . .”

“And?” I held my breath.

“It seems the executive officer parked his car and did a bit of shopping . . . and the briefcases and the computer were stolen.”

“What was in them?” I asked with a sinking heart.

“We’ve recovered the briefcases. No need to worry. But the hard disk in the computer may have contained the battle plan.”

“When did this happen?” I asked, in disbelief.

“That’s the second thing I dread telling you,” Vincent said. “About a week ago.”

“A week ago!” I said. “And now you’re telling us!”

Most alarming, the British tabloids had gotten hold of the story. For the next few days, we held our breath. My press officer, Colonel Smullen, monitored the British and European media for signs that the information had fallen into the wrong hands. *Nothing appeared. Our thief was either a patriot, not about to*
divulge the secrets of her majesty’s government for personal gain, or a crook so out of touch he did not even read the news.\textsuperscript{48} (emphasis mine)

Secret keepers are quite concerned that exposure of the identity of colleagues operating undercover would cause harm. Given that undercover officers may be required to operate in hostile states, this is a reasonable and commonsensical argument. Even so, some have expressed doubts about this assertion. Duncan Clarke and Edward Neveleff have asked the question:

But does the identity disclosure itself create this danger, or is the covert agent’s cover very often so thin that disclosure is a superfluous act? […] Indeed, there is ample evidence that the identities of covert CIA agents are often well known overseas and within the agency itself. The CIA sometimes purposefully gives agents thin covers so that potential defectors and information sources will know where to go.\textsuperscript{49}

All these criticisms addressed at the preeminent discourse and its institutional representations are valid and debatable. And they all point to the most important and perplexing question about the state secrecy system:

who should decide which information to reveal or conceal? Or, formulating the question with an eye to institutional design: how should the decision-making


process be organized to increase the chances that choices about concealment will be relatively reasonable, rather than whimsical and capricious?50

Secret keepers currently make the decisions to reveal or conceal, subject to judicial oversight or review (depending on the jurisdiction), and, at times, public—and even parliamentary—opprobrium. The constitutional separation of powers in liberal democracies affords them that prerogative.51 However, as many of the examples in chapter 5 show, some judges see limits to the deference they are expected to show the executive in matters of state secrecy. While secret keepers may possess institutional and personal expertise on matters of state secrets, “they have no legal or constitutional authority to police their own statutory boundaries.”52 Arguably, an excess of deference to the expertise of secret keepers diminishes the independence of the judiciary. The noted post-9/11 increase, in chapter 5, in the expertise of judges has helped counter any past excesses. But absent strong societal pressures and a political willingness to change key elements of the system in response to the foregoing line of questioning, it will continue to

51 “[D]eference” which, as others have pointed out, has unfortunate overtones of forelock-tugging craveness. But it is a perfectly acceptable word, so long as one remembers that the judge is not deferring to the minister. He is deferring to the constitutional separation of powers which has made the minister the decision-maker, and not him. The courts already, by and large, observe this convention in certain areas of policy-making. The classic examples are decisions on foreign affairs and national security.” Jonathan Sumption QC, “Judicial and Political Decision-Making: The Uncertain Boundary” (Remarks delivered at the F.A. Mann Lecture, 9 November 2011) [online: <http://www.pem.cam.ac.uk/wp-content/uploads/2012/07/1C-Sumption-article.pdf> published as “Judicial and Political Decision-making: The Uncertain Boundary. The FA Mann Lecture, 2011” (2011) 16 Judicial Review 301.
52 Mark P Mancini, “Two Myths of Administrative Law” (2019) 9:1 West J Legal Stud 1 at 15. “[...] as Justice Rothstein pointed out in Khosa [Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12], one cannot easily transfer such policy expertise over to the legal context because there is no necessary empirical link between these two types of knowledge. In fact, a decision-maker with subject-matter expertise ‘will tend to overestimate the importance of that area and underestimate the significance of others.”’ Ibid at 18.
reproduce itself, supported by the persuasive rhetoric of secret keepers and its legitimization by the judiciary.

The areas opened to critique in this section can be qualified as tactical. Whether any one of the possible critiques is enacted would not change the fundamental nature of the world of state secrecy; it would only affect it at the margins and possibly at great costs. As discussed in the introduction to this chapter, the state and its representatives are figures of authority, supported by coercive means and the ability to make laws, who use a discourse on state secrecy that finds further legitimacy in judicial precedents. As a strong site of power with unparalleled resources as its disposal, the views of the state are hard to displace, disturb and dismiss. The next section explores possible avenues for a critique that contemplate a very different exercise of state secrecy.

6.2 Critique II: can we displace or replace the state secrecy system?

In light of the observations made in section 6.1, an external critique thus perhaps imposes itself, despite the utopian or dystopian (depending on one’s point of view) overtones such an exercise necessarily conveys. It starts by questioning the central protective role of the state in how our societies are governed. As Mark Neocleous reminds us in chapter 2, because secrecy has been a necessary feature or ritual of the state throughout history, eliminating state secrecy makes no sense unless the state itself no longer makes any sense. But is emancipation towards a stateless society possible? How would it come about? How would the security of stateless collectivities and individuals be assured? More importantly, would a stateless society have no needs for secrets? As the
modern state is a relatively recent construct, other forms of polity are certainly possible\textsuperscript{53} (as shown in chapter 3, we have had empires and city-states over the course of history, and each of these two models of political organization protected secrets from disclosure). But as Andrew Vincent argues, “We are though, State-creatures whose development, welfare and future cannot be divorced from the state. It is not something that we can shrug off.”\textsuperscript{54} Although the modern state has displaced different forms of past polities, there remains no dearth of ideologies (from anarchism to Marxism to cosmopolitanism) to draw from to reshape societies’ political, economic and legal organization. However, the historical survey in chapter 3 has made clear that state secrecy throughout history, while materializing itself in different ways, has been a long-established feature of any organized society and polity. One exception, perhaps, was the decentralized, fragmented and complex hierarchies of lords and vassals that briefly existed in northern France and England in the eleventh to thirteenth centuries. These hierarchies, based on personal loyalties, land tenures and the privatization of government functions,\textsuperscript{55} are unlikely to be replicated in our modern world. Another, proposed by Peter Bos, has never been enacted. In his book on the \textit{Road to Freedom and the Demise of the Nation States}, Bos proposes a global network of free-trade cities and communities built on individual sovereignty and freedom. His decentralized economic democracy would let individuals vote for the products and services they want, including security and legal constraints to their action.\textsuperscript{56}

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\textsuperscript{54} Andrew Vincent, \textit{Theories of the State} (Oxford: Basil Blackwell, 1987) at 224.
\textsuperscript{55} Norris, \textit{supra} note 63 at 41.
\textsuperscript{56} See Peter B Bos, \textit{The Road to Freedom and the Demise of Nation States} (Research Triangle: Free Trade Press, 2015).
As of this writing, no known political organization with such an agenda was identified. It therefore remains to be seen whether current challenges to the unified modern sovereign state would affect state secrecy practices.\(^{57}\)

Less utopian or dystopian, perhaps, would be for our societies to become fully transparent by eliminating privacy, and thus all types of secrets. Dave Eggers, in his 2013 novel, explores such a world orchestrated by the Circle, a Silicon Valley corporation.

Jacek Smolicki describes it well in his doctoral dissertation:

> As the founders of the Circle believe, privacy paves the way for secrecy, which instigates most of the problems that humanity has to confront today. Secrecy is an evil to be eliminated, replaced by complete openness, to be achieved through a disciplined and continuous use of self-surveilling technologies, such as automated wearable cameras and life-logging services that the Circle develops. Personal data from these devices and services is captured and subsequently aggregated by TrueYou, a meta-social media platform […]. The so-called ‘democratic distribution’ of mass-produced, self-surveilling technologies (under the slogan ‘sharing is caring’) is believed to be the most efficient way of counteracting and ultimately eliminating all kinds of misbehavior that secrecy might be making room for: criminality, corruption, injustice, inequality, racism, child abuse, and poverty. In other words, in order to establish a perfectly

\(^{57}\) As Wright, Binnie and Tucker aptly observe: “In the twenty-first century, contested and divided sovereignties from below and broader global forces are challenging the prospects of the unified modern sovereign state, and such pressures are not unique to Canada. This in turn raises questions about the laws designed to protect sovereign authority, the safety of the state, and public order, about the legitimacy, shape and administration of political offences, and about national security laws in the future.” Wright, Binnie & Tucker, supra note 22 at 27.
functioning, democratic, and unambiguous society, the members of the Circle believe that complete openness is what needs to be a part of every human act in the ever-more tightly interconnected and ‘coveilling’ world.\(^{58}\)

There is a major problem with this approach. Personal private information are not state secrets. Of course, there are a few exceptions, such as the identity of intelligence officers and of intelligence sources and things like the location of senior state officials at any given time. But as the state would still be in existence, secrets that bear no connection to individuals would likely remain so under such a scenario. Individuals requiring cover and protection for their activities would not self-surveillance and post online their every move for anyone to watch. It would be a matter of life and death and national security efficiency for the state to retain state secrets. A delimited kind of full transparency, perhaps, would have a better chance of drawing traction. This could take the form of Bentham’s prescription to end secrecy with respect to foreign matters because “in order to diminish the chances of engaging in war, it is necessary to abolish the practice of secrecy within the Foreign Office and allow citizens to confirm that foreign policies are in line with their interests.”\(^{59}\) But as we have seen in chapter 3, the conduct of diplomacy, dictated by the reason of state, has particularly been shrouded in secrecy up to this day. Yet, there have been instances since the 1960s when the state secrets of adversaries were made public to avert war.\(^{60}\) The most recent example is the United


States in February 2022 revealing its secret assessment that Russia would imminently invade Ukraine.\textsuperscript{61} Such an attempt at transparency, however, did not persuade Russian President Vladimir Putin to stop his efforts to subjugate Ukraine.

Instead of everyone becoming totally transparent, Clare Birchall thinks that there is another way to deal with transparency. That approach requires that the notion be turned on its head. Instead of serving agendas that may not be transparent and of calling for the sharing of secrets to further promote equitability and democratization, the discourse on transparency would instead be instrumentalized to show that disclosed secrets are in fact not equally distributed and “compromised by certain conditions of access and the necessity for mediation and translation.”\textsuperscript{62} In essence, Birchall advocates for a transparency discourse that would “highlight inequalities, rather than make inequitable systems work more efficiently.”\textsuperscript{63}

Who could push such radical changes? Judges are the least likely, as they uphold the principle that “the law is a force for stability and predictability in society,”\textsuperscript{64} and prefer to leave changes to the law to elected parliamentarians. Citizens, for the most part, are passive and “all too willing to give their leaders excessive leeway out of the belief that those leaders know how to keep them safe.”\textsuperscript{65} So we are left with the true radicals, but,


\textsuperscript{62} Clare Birchall, \textit{Radical Secrecy: The Ends of Transparency in Datafied America} (Minneapolis: University of Minnesota Press, 2021) at 191.

\textsuperscript{63} Ibid.


even for them, there is uncertainty as to what actions to take on the basis of their critique of state secrecy. One step they could undertake is to redirect our epistemic knowledge towards a different way of writing and speaking about state secrecy. Wikileaks, through its founder Julian Assange, was for a brief period representative of such an effort. Assange considered state secrecy to be antithetical to the idea of a free and open society, and aspired to achieve radical truth-telling by stripping states of their ability to control information. The effect, he hoped, was to free all resistance to state secrecy and allow people to rule themselves. Although some believe Assange was acting for the greater good of humanity, his attempts to force states to operate in absolute transparency, and change what can and cannot legitimately be said, were not successful.

In Foucauldian terms, he was not recognized:

> It is not that it is impossible to say certain things. The limitation is not a physical or a legal one. It is, rather, epistemic; that is, it has to do with knowledge. If certain unacceptable things are said, or if things are said that might be acceptable if uttered by the right authorities but not by this particular person, they will simply not be recognized. It would be like a spectator’s getting up in a courtroom to declare an accused person either innocent or guilty. Such a gesture would not be recognized. These regularities function as rules of a sort.

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68 Wikileaks’ Julian Assange is the modern figurehead for a new world order defined by openness, transparency and Internet freedom. He fights the corner for the ‘liberation of conspiracies’ through new technologies, a partisan contributor to an ongoing dialogue about neutrality and accountability that has debated since the Internet began. Aleks Krotoski, “Wikileaks and the New, Transparent World Order” (2011) 82:4 The Political Quarterly 526 at 526.
[...] they are unconscious structurings of discourse, setting the character and boundaries of how debate and discussion can happen.”

Or, from a Gramscian perspective, he simply could not change the epistemic dominance of the state, and “the philosophy of the masses, who accept the morality, the customs, the institutionalized behaviour of the society they live in.” But all is not lost, as people can be found who will always distrust the state’s secrecy practices and want more information. The digital dissidents that remain in the wake of Assange’s departure from the radical scene are a case in point. Giovanni Ziccardi explains their motivation:

[There are] digital dissidents around the world who risk their liberty to protest and to oppose repressive forms of government and strategies aimed at controlling the behavior of the population. [...] [They are] dedicated to the development of techniques to circumvent surveillance and filter technologies and to hide, encrypt, anonymize and disclose information, they are constantly tracked by the authorities of their countries. Using smartphones, cameras, laptops and handheld video cameras, they transmit in real time the facts of the societies in which they live. They act to eradicate filters; they fight to tear down codes of silence and to elude censorship software; they refute the theory of secrecy surrounding matters of public interest, while prizing it above all else in their own private lives; they aim to erode media monopolies and to disprove

71 Fenster, supra note 21 at 932.
false state truths. They create web sites to divulge reserved documents, and update blogs with the sole aim of making the world more transparent. Last, but not least, they write complex source code, honing their skills daily, with one single mission: resistance. The common thread, mentioned above, thus comes even more sharply into focus: these activists constitute a new breed of hacker […].72

Radical transparency and digital dissidents cause controversy and angst in the ranks of secret keepers, who do not wish to see the communications flows between citizens and the state decentralized and disrupted. Digital dissidents are especially well positioned to refute any authoritative statement issued by the state that keeps important details hidden, challenge its legitimacy, and offer alternative theories (including conspiracy theories).73 While an external critique of state secrecy is possible and arguably necessary, if only to cause changes from within its current construct, it is difficult to fully and convincingly articulate, let alone emancipate its proponents. The overarching reason is straightforward: the democratic state, despite all its flaws, is still a legitimate source of power.74 The positions advocated by anarchists, proponents of radical transparency or digital dissidents are not those of the majority and remain incompatible with the first duty of the state, which requires a certain amount of secrecy to be fulfilled. The possibilities of a critique nonetheless offer avenues for further research as extreme political movements are making

73 Latour, supra note 31 at 15.
74 That said, it is worth noting that trust in government and Canada and the United States is now under 30 percent from a high above 50 percent in the 1960s. Frank Graves, “Commissioned Paper: Social Cleavages Series Understanding the Freedom Movement: Causes, Consequences, and Potential Responses” (paper prepared for the Public Order Emergency Commission, Ottawa, 2022) at 4.
inroads in democratic countries where the distance between the traditionally elected and the electorate is said, in their view, to be increasing.

6.3 Reflexivity: thinking of my own position as a secret keeper

Secret keepers, finally, must reflect on their double identity.75 In a democracy, they are both civil servants and citizens, and participate in civil society.76 As they assess secrets in their possession, they may be conflicted between a duty of loyalty to the state and colleagues, and a greater duty to democratic ideals and virtuous principles. It therefore behooves them to identify their material interests and understand how they can be affected and for which purpose.77 Where I sit as a member of an epistemic community, and the mindset I have as a result, therefore matters.

As a long-standing secret keeper (I was granted my first security clearance in the mid-1980s), I never doubted that my loyalty is to the state, that the state is responsible for the safety and security of its citizens, and that I should obey the law. But I also understand that I have been socially conditioned to accept this standpoint and behave accordingly. To be a secret keeper and maintain that status requires any individual to be screened for loyalty and reproachable behaviour at regular intervals, take an oath, pass regular polygraph examinations (to access the most sensitive secrets), accept prior

75 “Critical theory, nevertheless, gives the highest importance to self-criticism; to marking the ethical/political position from which one works in order that such a position can be available for examination by critical readers or other reflective audiences […].” Michael Payne, “Critical Theory” in Michael Payne & Jessica Rae Barbera, eds, A Dictionary of Cultural and Critical Theory, 2nd ed (Malden: Wiley-Blackwell, 2010) 153 at 153.
77 This a Kantian notion. “[K]nowledge never spins frictionless from the pressing, material concerns of the reality we knowers necessarily exist in. Real thinking, then, is the product of material interests, which will remain even in the context of a maximally even-handed debate.” Tom Whyman, “Critique of Pure Niceness” (2019) 44 The Baffler 125 at 133.
restraint and non-disclosure agreements, and to be subject to continuous surveillance ("aftercare"). Through indoctrination and training processes, secret keepers are informed of the severe penalties for unauthorized disclosures, and told how to apply special physical standards to avoid the mishandling of secrets. More importantly, secret keepers are repeatedly reminded of the harm that unauthorized disclosures can cause.

Throughout my career, I never doubted the necessity for the state to have secrets. I also have never personally seen any egregious abuse of the state secrecy system, and if I ever had any doubt, I knew who to confide into within the institution. As an indoctrinated member of the epistemic and professional community of secret keepers, I was already well versed at the onset of this thesis in the discourse of the state on state secrecy. More specifically, the variety of my life experiences as a secret keeper within Canada’s national security and intelligence community gave me the experiential authority necessary to approach the subject in a coherent and knowledgeable manner.  

As a social scientist, I have also been deeply intrigued by the question of social control and its intersection with law. I was equally puzzled to know why I thought the discourse I had been internalizing for decades was just plain common sense and the right one to reproduce and convince others to adopt. So, I shed light where illumination matters most: on a particular feature of state secrecy—its discourse—that had remained largely unexamined. At the end of this thesis, my sense of loyalty has not changed. I have the same (selfish) material interests to preserve (employment, a pension, work satisfaction, and an abiding interest in state secrets) as before. However, my

78 On experiential authority, see Claire Blencowe, Julian Brigstocke & Leila Dawney, Authority, Experience and the Life of Power (London: Routledge, 2015).

79 Ibid.
understanding of the discourse has changed. I know and understand that it is a construct, that it is not immutable, and that it has effects, which may be detrimental to the health of our democratic polity and the well-being of select individuals. I understand the mechanisms that make it preeminent over other discourses.

Only my sense of right or wrong in the advent of an egregious event may one day convince me to take a radical posture on state secrecy. In the meantime, I will remain unemancipated from the constraints of the state and its secrecy system, but enlightened as to its functioning and finality. I presume my efforts to illuminate the reproduction of state secrecy through discourse to have been sincere, and driven by the desire to do justice to the challenge at hand, as expected of academics. If, as a result of my membership in the epistemic community of secret keepers, I unconsciously left relevant analytical points or ideas out of this thesis, this is my responsibility alone.

6.4 Conclusion

Accepting that the discourse on state secrecy is a construct with social effects opens the door to its deconstruction. But as Bruno Latour correctly, in my view, suggests, it comes a point where doing a critique can degenerate into a hermeneutics of suspicion. If the reasons of secret keepers can be only viewed as suspicious—as, sometimes, they undeniably are—for a critique to gain validity, then there is no state secrecy construct left, no ground on which to stand to prevent the disclosure of state secrets which could

reasonably be expected to have harmful consequences. This is why the world of state
secrecy is so fertile for conspiracy theorists. As a secret keeper myself, I do not take any
normative position in favour of emancipation or of radical social change. Although I have
material and moral motives to remain unemancipated, I also believe that taking side is not
necessary to analyze the discourse of state secrecy. While most if not all critical
approaches are normative, they serve the purpose of challenging the status quo and
ensuring that the dominance of a particular discourse is justifiable, within bounds, and as
harmless as possible.\textsuperscript{82}

\textsuperscript{82} For a discussion of these positions, see Mariaelena Bartesaghi & Kate Pantelides, “Why Critique
Should Not Run Out of Steam: A Proposal for the Critical Study of Discourse” (2018) 18:3 Review of
Communication 158.
Chapter 7: Conclusion

Secret keepers and judges use a similar language to discuss the reasons justifying the non-disclosure of state secrets. In each of their sphere of activities, they have developed relatively stable types of discursive practices to express these reasons. As the many statements contained in chapters 4 and 5 show, they use simple utterances as opposed to long explanations, models or theories, which require more complex utterances. The particular rhetorical devices they use to express themselves give a standard form to their discourse on state secrecy. Politicians and retired secret keepers, as examples in chapter 4 show, are far less restrained in how they express themselves than judges and state officials. This standard form is respectively reproduced through judicial decisions bound by legal precedents and the indoctrination process undertaken by secret keepers, and is thus very stable.¹

The effect of these processes, as Bakhtin writes, is that “[i]n each epoch, in each social circle […] there are always authoritative utterances [discourses] that set the tone – […] to which one refers, which are cited, imitated, and followed.”² Indeed, for both secret keepers and judges, their “utterances are not only […] signs to be understood and deciphered; they are also signs of authority, intended to be believed and obeyed” as “it is clear that not anyone can assert anything […]”³ Secret keepers and judges can have these expectations because they are legitimate representatives of the state (the former of the

¹ This description of the discourse on state secrecy follows Bakhtin’s approach. See Mikhail M Bakhtin, Speech Genres and Other Late Essays, ed by Caryl Emerson & Michael Holquist, translated by Vern W McGee (Austin: University of Texas Press, 1986) at 60, 62, 63, 66, 79.
² Ibid at 88.
executive branch, the latter of the judicial branch), each instituted as a medium between their respective institution and the social world, and each “with the signs and the insignia aimed at underlining the fact that he is not acting in his own name and under his own authority.” The discourse of secret keepers and judges on state secrecy therefore marginalizes other discourses as their understanding of state secrecy counts more than others. The contribution of this thesis is to have unveiled the ways in which judges have adopted the discourse of secret keepers in many respects, giving enough prominence and credibility to the discursive practices of secret keepers to shape our collective understanding of the necessity to protect state secrets from disclosure. As such, it is one explanation responding to Walters’s call for researchers to map the devices and mechanisms that form the intrinsic features of secrecy’s governance in modern democratic states and how it has come about. What secret keepers say about the reasons for not disclosing state secrets is a key component of the covert imaginary of state secrecy as it exposes the set of shared commonplace assumptions and concepts that prevails today, and which limit our understanding and critical analysis of the state secrecy imaginary.

The preeminent discourse on state secrecy we find in Canada, the United Kingdom and the United States presumably frames society’s understanding of the subject. Its

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4 Ibid at 75.
5 As Henderson reminds us, “[f]or Laclau and Mouffe, our conception of reality is created through discursive struggle. Because discourse is that which produces meaning, all identities, social practices and social meaning are radically contingent upon the particular power relations that go into supporting various discourses that manage to gain enough prominence and credibility to order social, religious, political and economic life.” Laura M Henderson, “Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse” (2018) 47:1 Nethl J of Leg Philosophy 49 at 53. See Ernesto Laclau & Chantal Mouffe, Hegemony and Socialist Strategy: Towards a Radical Democratic Politics (New York: Verso, 1985).
preeminence, however, cannot mask the existence or the possibility of “counter” discourses and forms of resistance to state secrecy. The study of discourse, after all, should not be reduced to its linguistic features (as we discussed in chapter 1, discourses have social effects). Here, the process by which the discourse of secret keepers is authorized and legitimized structures knowledge production, circulation and reproduction, establishing as “facts” the reasons for not disclosing state secrets. The statements of secret keepers, authorized and legitimized by their status as agents of the state, may be enough to establish these “facts” about the need to protect state secrets from disclosure. But it is the move of judges, who pick them up, that give them their preeminent status as a discourse, and consolidate the position of secret keepers at the top of the hierarchy of knowledge in matters of state secrets. As Latour argues, “the fate of a statement depends on others’ behavior. […] The total movement of […] a statement […] will depend to some extent on your action [the secret keepers’] but to a much greater extent on that of a crowd [the judges] over which you have little control.”

The secret keepers’ preeminent discourse on state secrecy exercises power by giving meaning to the social world of state secrecy, and nudging everyone toward the non-disclosure rather than the disclosure of state secrets. It tells its audiences how to think about the need to protect state secrets from disclosure, and insinuates or prescribes how to act. Through the use of lists, to which it may add or subtract, it fixes the boundaries and limits the scope of reasons for non-disclosure to those reasons they are engaging

6 On the importance of understanding this kind of process from studying discourse, see Reiner Keller, “Has Critique Run Out of Steam? On Discourse Research as Critical Inquiry” (2017) 23:1 Qualitative Inquiry 58.
with. Through the use of other devices, it shapes the contents of discussions surrounding the protection of state secrets. This discourse is powerful because it forms a linguistic practice that the epistemic community of secret keepers reproduces through its own indoctrination and security practices and the material use of judicial precedents. Its current form relies on the reason of state and the reasoned application of the law.

While debates may be had on whether a specific state secret is actually a secret, why it is secret, how secret it is and when it is secret, the focus of secret keepers in these debates is on the effects of disclosing it or not. As we observed in chapter 4, the discourse of secret keepers asserts that state secrecy is necessary for the security of all citizens and the effectiveness of security agencies. It employs the arguments from ignorance, authority and consequence, all having indeterminate temporal and spatial elements, along with a wide range of value-oriented lexical terms to construct the state as the morally responsible, knowledgeable and trusted protector of all. All the state wants to do with its secrets, it claims, is to prevent harm to its fundamental interest of protecting the country and its people. But as we have noted along the way, the arguments of secret keepers are not always unassailable, and there are very rare instances when secret keepers themselves have expressed doubts about the validity of their own arguments. Also, while the unauthorized disclosure of state secrets may lead to harmful consequences, harm can take different forms, vary in degree of severity, and express itself outside reasonably expected temporal and spatial expectations. These facts give an opening and some credibility to counter-discourses and contestations. These moves, however, face an uphill battle when the discourse of judges, who are important and independent figures of authority, is taken into account.
The discourse of judges produces a specialized and respected knowledge on state secrecy. It is a discourse that is authorized, official and enforceable, and that embodies the norms of the community. By materializing the language and rhetorical devices used by secret keepers in reported decisions, judges play an essential part in the reproduction, distribution and acceptance of the discourse of secret keepers on state secrecy throughout society (that said, it is important to recognize that besides secret keepers, and judges and lawyers interested in national security or, along with others, access to information, most people do not access or read judicial decisions). They also make it difficult for possible alternatives and opposing reasons to become preeminent. Once materialized in reported decisions, secret keepers use these decisions to further justify the manner in which they write about and speak of state secrets. As we noted in chapter 5, the discourse of judges, therefore, is the means by which the discourse of secret keepers can be recognized as authorized and legitimate not only by the state but, more importantly, by a body especially mandated to exercise a magistrature. This does not mean, of course, that deference to the state in matters of national security is without limit. Deference is a matter of degree and it varies between judges and jurisdictions. The reasons adduced by secret keepers in a particular case cannot simply be asserted as highly speculative, conjectural or purely imaginary or based on generalities.

The discourse of judges is a credible and impactful one. By codifying—or materializing—the rhetorical devices used by secret keepers, judges assert that they are valid and demand recognition from others. This happens in a number of ways: once synthesized and incorporated into doctrine and the indoctrinated processes of secret keepers, it takes an educational role. Once a judge directs something to be done, it is
governing and commanding because they have the full force of the state behind them to ensure implementation. Because it is backed up by judicial precedents and statutory provisions limiting disclosures, this is a discourse that is not easily amenable to anyone wishing to argue on evidentiary bases and reasons different than those associated with it. As a result, this is not a discourse from which revolutionary changes in the handling of state secrets are likely to arise. But as we noted in chapter 5, the discourse of law is not infallible or unassailable, despite its allure of authority and finitude. It is a social practice, after all, that responds to its social context. But it is also a social practice that ultimately decides, in the eyes of the population, which story is heard over others.

The discourse analysis undertaken has thus been an attempt to observe, unravel and critique how society’s prevailing understanding of state secrecy is constructed by secret keepers and reproduced and legitimized by judges. As that understanding is not immutable and the discourses of secret keepers and judges totally unassailable, a number of critiques are possible, although not likely to overturn the preeminent discourse as long as societies are organized in the form of sovereign states responsible for the security of their citizens and acting in their own interest, and our legal systems deferential to the state and judicial precedents in matters of national security. Measuring the effectiveness of judicially-legitimated secrecy discourse on public attitudes and social impacts warrants further scholarly attention. One avenue for future research is to heed Walters’s advice to better understand counter-secrecy practices, discourses, and alternative modes of political

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organization. Although research has been done in the more general context of counter-hegemonic struggles in the face of national security proceedings and political trials in Canadian history, much remains to be done in the specific area of secrecy.

This thesis begs another equally relevant question for future research. While it shows a correlation between the discourse of secret keepers and the discourse of judges on state secrecy, it remains unclear, beyond the constraints I enumerate in the last chapter, why judges use the same rhetorical devices as secret keepers in their judicial opinions: Is it because these rhetorical devices are really effective, thus causing judges to adopt them over the secret keepers’ court opponents, whose rhetorical devices would be less persuasive? In other words, we do not know much about what persuades judges to form a discourse that aligns very well with the discourse of secret keepers.

Finally, it would be important to better understand—because of societal pressures to increase transparency and the iniquitous effects of secrecy on democratic accountability and human rights—why secret keepers have the discourse that they have on state secrecy. Certainly, the simple model of crime control of classical criminologists—deterrence through punishment or instrumental compliance—cannot be the only system of social control at play. An understanding of these other forms of social control acting over the

9 “Our thinking about political secrecy remains dominated by the figure of the state. Future research could address the history of these counter-secrecies.” William Walters, State Secrecy and Security: Refiguring the Covert Imaginary (London, UK: Routledge, 2021) at 148.
11 That point was most recently made by Brian Leiter, who said: “Law sometimes guides conduct, often attempts to guide conduct, but it can not claim that as its distinguishing essential function, since it shares guidance and attempted guidance with too many other normative systems, and, itself, discharges other functions.” Brian Leiter, “Why Legal Positivism (Again)?” (Paper delivered at the annual meeting of the Australian Society of Legal Philosophy at the University of Sydney, 16 August 2013), [unpublished] online: Social Sciences Research Network <http://lsolum.typepad.com/legaltheory/2013/09/leiter-on-legal-positivism.html>. Of note, “[S]tudies suggest that deterrence sometimes significantly influences law-related behavior, and sometimes does not.” Tom Tyler, Why People Obey the Law (Princeton: Princeton University
discourse of secret keepers would be instrumental to the success of any counter-secrecy strategy.

From my own experience writing this thesis and as a secret keeper for the state, I realized that no amount of social control, while necessary, is sufficient to prevent the unauthorized disclosure of state secrets. The temptation to brag about what you know, to show off to others because you belong to an exclusive professional and epistemic community, or to personally benefit from special access to classified material is never far away. To maintain normative compliance with your duty as a secret keeper, you must believe that the discourse surrounding the need to protect state secrets from unauthorized access is legitimate, authoritative, credible and reliable. Strong convictions, a sense of duty to the state cannot come about without a targeted discourse and extant social controls working hand in hand. Both are necessary if the state is to protect its secrets and prevent harm. Part of that belief, as some secret keepers have realized, is a leap of faith.

In future, besides investigating the assemblage of social controls restraining the behaviour of secret keepers, I would be interested in investigating more closely the archeology of the discourse of state secrecy. A better understanding of its exact formation would help identify the potential paths to its transformation into something else. My journey, finally, has reinforced my belief that there is a need for state secrets. This is perhaps, a professional bias, but if only you knew what I know…

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