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## NOTES

### MECHANISMS OF SECRECY

To what extent should the government keep secrets from the people? Government often needs to operate in secret in order to shape and execute socially desirable policies, and excessive transparency requirements can have an ossifying effect that prevents government from responding in innovative ways to changed circumstances.<sup>1</sup> But transparency helps ensure that governmental actors do not misuse their power; a government that is free to operate in secret is free to do both good and bad things without fear of reproach from the voters. Secrecy is in some areas, such as national security, essential to a nation's ongoing vitality, yet it seems to be strongly in tension with accountability<sup>2</sup> — a necessary element of democracy. There is no easy resolution to this conflict. On one hand are claims such as Cardinal Richelieu's that "[s]ecrecy is the first essential in affairs of state";<sup>3</sup> on the other are those like Jeremy Bentham's assertion that secrecy, being "an instrument of conspiracy[,] . . . ought not, therefore, be the system of a regular government,"<sup>4</sup> or, more recently, the Sixth Circuit's declaration that "[d]emocracies die behind closed doors."<sup>5</sup>

The conflict between transparency and secrecy is a particularly stark instantiation of the principal-agent problem in public law.<sup>6</sup> It is the province of institutional design to come up with effective means to ensure that government actors act in accordance with voters' desires.<sup>7</sup> Much of the time, elections and other disciplining mechanisms (such as impeachment for judges and indirect political control for unelected members of the executive branch) deter official behavior that diverges

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<sup>1</sup> Administrative law scholars have discussed the ossification problem at length in the context of agency rulemaking. The procedural requirements of notice-and-comment rulemaking, designed to make agency decisionmaking more open, discourage agencies from deviating from the status quo. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1396–1403 (1992); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–66 (1995).

<sup>2</sup> See, e.g., Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 910 (2006) ("Clandestine executive efforts to combat terrorism have dramatized tensions between secrecy and accountability.").

<sup>3</sup> Richard Gid Powers, *Introduction* to DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 1, 1 (1998).

<sup>4</sup> JEREMY BENTHAM, *Essay on Political Tactics*, in 2 THE WORKS OF JEREMY BENTHAM 299, 315 (John Bowring ed., Edinburgh, William Tait 1843).

<sup>5</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

<sup>6</sup> See *infra* Part I.A, p. 1559.

<sup>7</sup> See, e.g., Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243 (1987) ("A central problem of representative democracy is how to ensure that policy decisions are responsive to the interests or preferences of citizens.").

too widely from voters' interests, at least over the long term. However, because these traditional incentive-alignment methods require political involvement by the public, they cannot prevent self-interested behavior by political actors if the voters have no way of learning about the malfeasance. Transparency seems essential from this perspective, since it allows voters to monitor the actions of their agents.<sup>8</sup> Transparency and accountability are seen as inherently linked, and secrecy is considered by many to produce large agency costs. The main point of disagreement is where to determine the point at which government operations go from being "open" to being "closed" in order to strike a "balance" between secrecy and accountability.<sup>9</sup>

This Note explores alternatives to this dichotomous conception of secrecy and accountability.<sup>10</sup> It considers the problem of secrecy and transparency from the perspective of the principal-agent relationship and advocates creative approaches that focus on reducing the total agency costs in the relationship between voters and their representatives. Toward that end, this Note explores three mechanisms that could, if used appropriately, minimize agency costs while still allowing the government the freedom to make important decisions or conduct sensitive operations in secret. This Note's goal is not to critique existing secrecy law systematically, nor to propose a feasible replacement system. Rather, it aims to explore new ways to think about the secrecy/transparency dilemma and to suggest that it is worth investigating mechanisms (including, but not limited to, the three suggested here) that capture as many of the benefits of secrecy as possible while minimizing agency costs.

This Note thus attempts to provide a larger conceptual toolkit for thinking about ways to reduce agency costs in government. In doing so, this Note assumes that the goal of any transparency requirement should be to increase societal well-being, not simply to increase the amount of information available for its own sake. Transparency is an

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<sup>8</sup> See, e.g., Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 651-52 (2001) (discussing the need for transparency in legislative decisionmaking); Sidney A. Shapiro & Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, LAW & CONTEMP. PROBS., Summer 2006, 99, 113 (2006) ("[T]ransparency lies at the heart of reducing agency costs in the public sector . . .").

<sup>9</sup> See, e.g., Paul Haridakis, *Citizen Access and Government Secrecy*, 25 ST. LOUIS U. PUB. L. REV. 3, 4 (2006) ("[O]ne thing is certain: finding the proper balance between protecting homeland security and maintaining the integrity and accountability of government bodies comes down to resolving the extent of the public's right to access information necessary to make judgments about government activity.").

<sup>10</sup> Cf. Heidi Kitrosser, "Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1164 (2007) (arguing that the Bush administration's defense of the NSA surveillance program "suggests a false choice between complete secrecy and complete openness").

instrumental rather than intrinsic good.<sup>11</sup> Transparency should not be “the general rule to which secrecy is the occasional exception”<sup>12</sup> unless it is the best agency cost-reducing mechanism across almost all situations. Those who believe that transparency has inherent value, or that it should be the norm, may initially have difficulties with this approach. However, even strongly committed transparency advocates recognize that sometimes the government must be able to operate in secret (for example, in the national security context<sup>13</sup>), implicitly conceding that other interests can outweigh the need for transparency.<sup>14</sup> Thus, even if there is much disagreement about the optimal level of transparency, there is a general consensus that maximizing social welfare is the more important goal, to which transparency must yield if necessary. The important question then becomes what institutional arrangements best maximize social welfare.

Part I evaluates secrecy and transparency in terms of the potential agency costs that each creates. Parts II, III, and IV each explore a different, potentially agency cost-minimizing mechanism of secrecy. Each Part describes the mechanism and its ideal implementation. Each Part also investigates two examples of the strategy in American law: one that is well designed in light of the preceding discussion of optimal implementation, and one that is more poorly designed. Part II explores proxy monitoring, in which one governmental actor (or other third party) polices another governmental actor’s use of secrecy. Part III examines bottom-line disclosure, in which the public is allowed to monitor the performance of the government, but only along a specified “bottom line” metric. Part IV discusses delayed disclosure, in which the government is required to reveal its decisions or actions after a specified period of time.

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<sup>11</sup> See ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 184 (2007); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 941 (2006) (arguing for viewing “open government [as] a means to improve governance rather than an end in itself”); Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, in *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* 68, 68–69 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008) (noting that “the power of the word [transparency] itself . . . connotes the opposite of secrecy and skullduggery” and thus “diminishes the willingness of many who study transparency to forthrightly consider [its] costs as well as [its] benefits”).

<sup>12</sup> *Contra* Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 816 (2007) (noting that “openness and transparency are heavily favored”).

<sup>13</sup> See, e.g., *id.* (“Since the founding, it has been recognized that the need for secrecy is more acute in matters of foreign policy, military affairs, and other national security functions.”).

<sup>14</sup> For example, Professor Heidi Kitrosser has been a sharp critic of executive branch secrecy and has argued that “there is no such thing as a constitutionally based executive privilege.” Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 493 (2007). However, Professor Kitrosser nonetheless advocates an approach that allows for “micro-secrecy” — the ability of the executive to execute the law in secret in certain contexts. See Kitrosser, *supra* note 10, at 1200–02.

## I. SECRECY, TRANSPARENCY, AND AGENCY COSTS

### A. Agency Costs

Voters and elected officials are involved in an agency relationship.<sup>15</sup> The voters (the principals) delegate power to elected officials (the voters' agents), who are charged with carrying out the voters' wishes. Officials are supposed to act out of public-regarding motives. However, as in all such relationships, the principal's goal and its agents' incentives do not perfectly align. But mechanisms that would allow principals to monitor every action by the agent would defeat any efficiency gains that an agency relationship is supposed to create. In their seminal piece on the topic, Professors Michael Jensen and William Meckling categorize agency costs into three types: monitoring costs, bonding costs, and residual losses.<sup>16</sup> Monitoring costs are the costs to the principal of policing the agent's conduct to ensure that the agent is acting in the principal's interest.<sup>17</sup> Bonding costs are those costs expended by the agent to prove to the principal that the agent is acting appropriately.<sup>18</sup> Residual losses are the costs inherent to the principal-agent relationship because of the inevitable divergence of interests between the principal and the agent.<sup>19</sup> Although one cannot easily point to clearly defined losses (such as lost shareholder wealth) in the voter/elected official context, the agency costs created by the relationship are nonetheless real and identifiable, and they must be taken into account when evaluating institutional arrangements.<sup>20</sup>

### B. The Agency Costs of Secrecy and Transparency

The problems caused by secrecy in government involve all of the agency costs described in the previous section. The key to evaluating transparency regimes is understanding the interplay and tradeoffs among the three kinds of agency costs. Optimal arrangements will not necessarily be ones that maximize public officials' compliance with the public's wishes, but will be those that produce the greatest net bene-

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<sup>15</sup> See, e.g., Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1523–24 (1994); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 546–47 (2007) (“Agency problems dominate relationships between voters and legislators . . .”); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 381 (2004) (“Legislators are agents for their constituents.”).

<sup>16</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); see also Calabresi, *supra* note 15, at 1525.

<sup>17</sup> Jensen & Meckling, *supra* note 16, at 308.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Calabresi, *supra* note 15, at 1525.

fits: the value of public-regarding actions of government minus the costs of monitoring and bonding. An arrangement that increases the opportunity for non-public-regarding behavior by elected officials might nonetheless be desirable if that increased risk were outweighed by greater welfare gains created by giving elected officials some discretion, in terms of both decreased monitoring costs and a greater ability of government actors to engage in desirable conduct. What follows is a brief attempt to catalogue the various agency costs created by both secrecy and transparency.

1. *The Benefits of Secrecy.* — Allowing the government freedom to work in secret is useful and, indeed, is necessary in a number of situations.<sup>21</sup> The most obvious examples of situations in which secrecy is desirable are those, such as national security, in which the principal must be deprived of information in order to prevent a third party from obtaining the information.<sup>22</sup>

There are other reasons why it might be beneficial to deny citizens information, however. Many law enforcement strategies depend on secrecy. If the government could keep no secrets, the use of undercover agents and wiretaps would be impossible. The success of other law enforcement strategies depends on a kind of secrecy — or, at least, a lack of transparency — as well. For example, when the IRS publicizes data on the frequency of some kinds of tax evasion, it leads to higher offending rates.<sup>23</sup> Here transparency is actually counterproductive; apparently when citizens learn that many others are breaking the law, they become more willing to do so themselves.

The criminal law provides another example of beneficial secrecy. While it is commonly argued that criminal law must necessarily be public,<sup>24</sup> this transparency requirement can lead to uncomfortable dilemmas. Allowing certain kinds of defenses, such as duress, may be morally necessary in order to avoid punishing the blameless; yet announcing that those who act under duress will receive no punishment could lead at least a few more people to break the law intentionally. Perhaps in a first-best world, conduct rules aimed at the general public (such as “do not steal”) would be known to all, but decision rules addressed to judges would be secret.<sup>25</sup> Such a regime of “acoustic sepa-

<sup>21</sup> See Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 182 (1999) (“[S]ome policies and processes, if they were made public, could not be carried out as effectively or at all.”).

<sup>22</sup> See Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862, 863 (2005) (“In the political arena, voters may choose to forego information pertaining to national security to prevent hostile countries from learning [it] as well.”).

<sup>23</sup> See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 82–83 (2003).

<sup>24</sup> See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 49–51 (rev. ed. 1969).

<sup>25</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); see also Thompson, *supra* note 21, at 186–88.

ration” could minimize crime while avoiding punishing the morally innocent. Although complete acoustic separation would likely be unworkable in practice, courts occasionally have privately treated defendants leniently while publicly condemning their conduct.<sup>26</sup>

Secrecy can also protect individual privacy.<sup>27</sup> The government has access to extraordinary amounts of information about citizens; disclosure of all tax returns, for example, would destroy the personal financial privacy of all U.S. taxpayers.<sup>28</sup> Police investigating crimes frequently come across sensitive information unrelated to the crime under investigation.<sup>29</sup> If police were forced to reveal everything they learned, people might fear reporting crimes.

Secrecy can be valuable in situations where the government is pursuing a public-regarding goal using means the knowledge of which might prove harmful. For example, while many would agree that the effects of race-based affirmative action — making the distribution of social goods more equal among racial groups — are desirable, these positive effects may be outweighed by the harm created by the knowledge that a person’s race has been taken into account.<sup>30</sup> Perhaps an ideal system would be one in which affirmative action took place, but no one knew that it was happening.<sup>31</sup>

<sup>26</sup> For example, in *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, Lord Chief Justice Coleridge and his colleagues publicly sentenced to death the defendants — sailors who, about to die of starvation, killed and ate a cabin boy when they were adrift at sea in a lifeboat after a shipwreck — while, outside of the public eye, arranging for the defendants to be pardoned and released six months after the trial. See LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 22–25 (1987).

<sup>27</sup> See Marc Rotenberg, *Foreword: Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115, 1126–27 (2002) (discussing scholars who have argued that transparency and privacy are in tension).

<sup>28</sup> See William J. Stuntz, *Secret Service: Against Privacy and Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12, 15 (arguing that the problem with government information gathering is not the collection of information, but the risk of its improper disclosure).

<sup>29</sup> Cf. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2185 (2002) (“If the police can disclose what they find [while investigating crimes], innocent but embarrassing discoveries can be the basis of a kind of blackmail.”).

<sup>30</sup> See DANIEL SABBAGH, *EQUALITY & TRANSPARENCY: A STRATEGIC PERSPECTIVE ON AFFIRMATIVE ACTION IN AMERICAN LAW* 105–15 (2007) (outlining the negative consequences of transparent affirmative action policies). Justice Thomas has been a fervent critic of affirmative action for this reason, among others. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (arguing that “[affirmative action] programs stamp minorities with a badge of inferiority”). This is not to say that Justice Thomas would not oppose affirmative action if no one knew it was taking place, but there probably are *some* opponents of affirmative action who would support it if the stigmatic harm could be eliminated through a “noble lie.”

<sup>31</sup> Some argue that the Supreme Court has crafted its affirmative action jurisprudence with this goal in mind. See SABBAGH, *supra* note 30, at 139–51. Justice Powell’s controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), sent the message (reaffirmed by the conjunction of *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)) that affirmative action in public university admissions programs is permissible only

Other reasons that secrecy can be valuable abound. Secrecy can reduce corruption in some situations. Advocates of secret balloting in elections argued that it would reduce vote selling because it deprives potential vote buyers of the means to know if they got what they had paid for.<sup>32</sup> Secrecy can also be useful to the proper working of checks and balances. Because of fear of reprisal, legislators might be willing to rein in the executive only in a system in which voting was secret.<sup>33</sup> The foregoing list of benefits is not exhaustive; one could think of other reasons why secrecy might be useful in government.

2. *Residual Losses Created by Secrecy.* — But with the benefits of secrecy, so come costs. Because it enables government officials to act without fear of public sanction, secrecy creates opportunities for various kinds of non-public-regarding behavior by political actors, and thus increases the risk of residual loss. Officials might use secrecy as an opportunity to pursue agendas that are not in the public's interest. They might attempt to enrich themselves financially, to aggrandize the power of their offices, to achieve partisan or ideological goals unrelated to the reasons why they were granted the freedom to act in secrecy, or simply to shirk their official duties in order to maximize their leisure time. One branch of government might use secrecy to insulate its authority from the oversight of other branches.<sup>34</sup>

Secrecy creates the opportunity for legislators to engage in log-rolling or horse-trading with one another. To the extent that this practice is undesirable, transparency requirements can ensure that important decisions are made on the basis of principled arguments.<sup>35</sup> Secrecy might lead government officials to pursue public-regarding ends with means that voters would find unacceptable.<sup>36</sup> Secrecy might al-

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when the system in place creates uncertainty about how much of a role race plays in admissions decisions. The doctrine allows admissions officers to use their discretion and informally implement near-quotas so long as they do not create any kind of paper record of what they are doing. *See Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting) (“If honesty is the best policy, surely [an] accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”).

<sup>32</sup> *See* Vermeule, *supra* note 15, at 418.

<sup>33</sup> *See id.* at 416 (“If the constitutional design seeks to minimize agency costs in part by creating institutional competition between branches, then executive aggrandizement and consequent domination of the legislature enabled by legislative transparency increases those costs.”).

<sup>34</sup> *See, e.g.*, ROBERT M. PALLITTO & WILLIAM G. WEAVER, *PRESIDENTIAL SECRECY AND THE LAW* 3 (2007).

<sup>35</sup> Garrett & Vermeule, *supra* note 11, at 75. Whether this result is desirable will depend on the circumstances, as “[b]oth arguing and bargaining are indispensable processes for aggregating judgments or preferences into collective decisions.” *Id.*

<sup>36</sup> For example, if all procedures regarding the interrogation of captured enemy combatants were kept secret, a President might determine that torturing the prisoners would help gather intelligence that could prevent terrorism. Although the goal that the President would be trying to achieve — prevention of terrorism — is public-regarding, citizens might have such a strong distaste for the method of torture used that they would never permit the government to engage in it

low the government as a whole to increase unacceptably its power over the citizenry without the voters' consent, and it plays an important role in maintaining totalitarian societies.<sup>37</sup> Transparency can ensure that either voters or other branches of government (if they have the appropriate incentives) will be able to deter all these various kinds of undesirable behavior by government officials.

Secrecy can also make the government's internal operations less efficient. When a government agency withholds information from the public, it also might withhold information from other government agencies. In a country with a government bureaucracy as vast as that of the United States, government officials and agencies would be able to keep few secrets if every agency's secret information were available to all public employees. This can have unfortunate consequences, however; Senator Daniel Patrick Moynihan argued that in the U.S. government, "[d]epartments and agencies hoard information, and the government becomes a kind of market. Secrets become organizational assets, never to be shared save in exchange for another organization's assets."<sup>38</sup> Some observers argue that the reluctance or inability of federal agencies to share intelligence information with each other contributed to the failure to prevent the 9/11 attacks.<sup>39</sup>

3. *Monitoring Costs and Bonding Costs.* — Transparency requirements represent attempts to reduce the residual losses created by secrecy and the divergence of principal and agent interests. But trans-

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if they were aware of the government's interrogation practices. To take another example, given the widespread support for harsh drug laws, many voters agree that the police should try to prevent drug trafficking. But some police officers choose to pursue this goal by engaging in the systematic racial profiling of motorists, a technique that many find unacceptable no matter its effect on crime. Transparency requirements such as releasing statistics about who is pulled over can be useful to deter these kinds of practices; if the voters disapprove, they will demand change. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 833 (2006). To return to the affirmative action example, some of those who oppose explicit racial considerations in admissions or hiring decisions advocate publicizing statistics about the average qualifications of accepted or hired applicants of different races. See, e.g., Mark A. Adomanis, Op-Ed., *Affirmative Action Returns*, HARV. CRIMSON, Nov. 30, 2006, available at <http://www.thecrimson.com/article.aspx?ref=516072>.

<sup>37</sup> Cf. Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 279 (2003) ("Keeping judicial or administrative decisions secret is common practice in totalitarian states . . .").

<sup>38</sup> MOYNIHAN, *supra* note 3, at 73. Senator Moynihan warned that this bureaucratic dimension of government secrecy was inherently self-perpetuating and urged "radical change" to counteract a regime he feared would "never respond to mere episodic indignation." Daniel Patrick Moynihan, *Secrecy as Government Regulation*, 30 PS: POL. SCI. & POLITICS 160, 165 (1997).

<sup>39</sup> See, e.g., THE 9/11 COMMISSION REPORT 78–80 (2004) (describing "the wall," a set of Justice Department procedures that, prior to September 11, 2001, made it difficult for FBI agents to share intelligence with criminal prosecutors), available at <http://www.9-11commission.gov/report/911Report.pdf>; see also ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 25 (2007).

parency requirements do not totally eliminate agency costs; even if some transparency regime could eliminate any residual losses by making sure that public officials at all times act exactly according to what a majority of the populace desires, it would no doubt be vastly socially inefficient because of the massive monitoring costs to the public. Thus, in evaluating transparency requirements, it is essential to consider how expensive (in terms of both time and dollars) those requirements will be to the public and its officials, and to place those costs on the ledger with the benefits on the other side. The distinction between monitoring costs and bonding costs is ultimately not that important. Any costs to government actors — since they will largely be opportunity costs, preventing the government from engaging in more socially beneficial action — are ultimately passed on to the public at large. And, of course, the financial costs of disclosure requirements are paid out of public funds, which come out of citizens' pockets via taxes.

Transparency requirements are costly in a number of ways. They can be financially expensive; in fiscal year 2006, the Freedom of Information Act<sup>40</sup> (FOIA) cost the federal government approximately \$398 million and required the equivalent of 5509 full-time employees to administer.<sup>41</sup> Because the boundaries of open government laws will often be contestable, they can produce costly and time-consuming lawsuits; in 2006, FOIA litigation cost federal agencies nearly \$20 million.<sup>42</sup> Additionally, transparency requirements can require detailed recordkeeping and paperwork by government actors that in turn create an opportunity cost, preventing those officials from engaging in more beneficial activities. If the purpose of transparency requirements is to ensure that the public's agents pursue the public's interests, they will be self-defeating when compliance with the transparency requirements creates burdens larger than any residual loss created by more lax oversight. Transparency laws also create costs to those who seek to make use of them; citizens, newspapers, public interest groups and whoever else is responsible for the more than 21 million FOIA requests submitted each year<sup>43</sup> must spend huge amounts of time and money making the requests and contesting denials in court. Some FOIA cases take many years to get resolved; it notably took twenty-three years of litigation before the FBI would release its complete file on John Lennon.<sup>44</sup>

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<sup>40</sup> 5 U.S.C. § 552 (2000 & Supp. IV 2004), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

<sup>41</sup> U.S. DEP'T OF JUSTICE, OFFICE OF INFO. & PRIVACY, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2006 (2007), <http://www.usdoj.gov/oip/foiapost/2007foiapost11.htm>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Jon Wiener, *The Last Lennon File*, NATION, Jan. 8, 2007, at 4, 4.

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Secrecy creates monitoring and bonding costs, however, that transparency requirements could reduce. When elected officials or their subordinates have substantial power to act in secrecy, worries about abuse of power create ongoing monitoring costs both for voters, who must take candidates' trustworthiness into account when deciding for whom to vote, and for candidates, who must expend effort convincing the public that they will not abuse their power. If a transparency regime makes the public feel more confident that elected officials will not be able to abuse their power, voters can spend more time focusing on the issues that are more important to them.

4. *Residual Losses Created by Transparency.* — In addition to potential bonding and monitoring costs, transparency could also increase residual losses by decreasing the degree to which the government will engage in welfare-maximizing activity. It is conceivable that making every step of government deliberation public would lead to lower quality decisions because government actors would be afraid of saying something that could lead to political repercussions:

Without transparency, agents gain less from adopting positions that resonate with immediate popular passions, so transparency may exacerbate the effects of decisionmaking pathologies that sometimes grip mobilized publics. Transparency subjects public deliberation to reputational constraints: officials will stick to initial positions, once announced, for fear of appearing to vacillate or capitulate, and this effect will make deliberation more polarized and more partisan. The framers closed the Philadelphia Convention to outsiders precisely to prevent initial positions from hardening prematurely.<sup>45</sup>

In addition, even when transparency does make beneficial monitoring by the public possible, there is the danger that transparency will allow for "bad accountability" — the ability of interest groups to distort government decisionmaking and make officials less likely to satisfy the preferences of the general public. Sometimes it is better to let the government deliberate in secret in order to avoid this kind of interference.<sup>46</sup> Professors Elizabeth Garrett and Adrian Vermeule argue that secrecy may be desirable in situations in which organized, narrow interest groups will have advantages over the general public in influencing short-term government decisionmaking, such as when Congress is passing the budget each year.<sup>47</sup>

In short, when evaluating transparency's costs, it is important to consider not simply the costs of monitoring, but also the ways that transparency can prevent the government from accomplishing voters'

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<sup>45</sup> Vermeule, *supra* note 15, at 412 (footnote omitted).

<sup>46</sup> See VERMEULE, *supra* note 11, at 198.

<sup>47</sup> See *infra* Part IV.B., pp. 1575–76.

goals. While transparency can help reduce agency costs in some situations, it can create agency costs in others.

*C. Minimizing Agency Costs*

This Note proceeds on the premise that, if maximizing social welfare is the criterion by which institutions should be judged, secrecy and transparency requirements should be designed with the goal of minimizing total agency costs. Optimal arrangements will be those that ensure a high level of public-regarding behavior by government actors while keeping low the costs of monitoring by the public and bonding by the officials. Transparency is most desirable when the information it makes available will enable beneficial monitoring by voters, and where these beneficial effects will outweigh any costs created by the transparency requirements.

This Note also assumes that the current distribution of secrecy and transparency in government may not optimally reduce agency costs.<sup>48</sup> If elections functioned like truly competitive markets, government activity would be transparent to the extent that transparency was socially desirable, and no further. But in reality the political market might be oversupplying secrecy in some areas and undersupplying it in others. Government officials may overestimate the optimal level of secrecy because secrecy helps them pursue their own agendas,<sup>49</sup> and asymmetric information might lead voters to credit their claims more often than they should. Alternatively, abuse of power scandals might lead voters to overreact and demand a higher-than-optimal level of transparency in certain domains.<sup>50</sup> Voters might overestimate transparency's benefits or underestimate its costs. These observations suggest that the current system might provide too much secrecy in some areas or at some times and too little in other areas or at other times.

There are situations in which first-best, agency-cost minimizing strategies embrace limits on the disclosure of important information. The next three Parts explore three such strategies and the circumstances under which each could be most effective. The following mechanisms could, under some circumstances, minimize agency costs by enabling the government to serve the public effectively without sac-

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<sup>48</sup> Cf. Garrett & Vermeule, *supra* note 11, at 69 (“[T]here is no reason to believe that the degree of transparency reached by political actors on their own would necessarily be optimal from society’s point of view.”).

<sup>49</sup> See MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 233–34 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

<sup>50</sup> See Fenster, *supra* note 11, at 931 (“When significant segments of the public believe that corruption or conspiracy permeate government, their desire for transparency becomes obsessive and their ability to rationally sort and interpret information suffers as a result.”).

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rificing too much in the way of accountability, while keeping low monitoring costs to voters and bonding costs to government actors.

## II. PROXY MONITORING

### A. *The Strategy*

One mechanism that balances accountability and secrecy is proxy monitoring. In such an arrangement, someone whom the public trusts is installed as a proxy and monitors the behavior of government actors. The proxy is expected to notify the public if the monitored actors violate their obligations to act in the public's interest. For this mechanism to be effective, the proxy must be able to effectively represent the principal's interests, while not disclosing any information that is irrelevant to whether the agent is acting within the scope of his duty.

There are two kinds of proxy monitoring. In the first group are arrangements in which the proxy stands in no particular relationship of authority over the government officials whose behavior is monitored. This approach works on the premise that the monitor will alert the public if the monitored party behaves in a way that would displease the public. This kind of proxy monitoring is a variation on a strategy that Congress itself uses to police its own agents, administrative agencies: "fire alarm" oversight.<sup>51</sup> Political scientists have observed that Congress has in many cases chosen to forego "police patrol" oversight — close, active monitoring of administrative agencies to determine whether they are achieving the legislature's goals.<sup>52</sup> Instead, Congress relies on a form of decentralized, passive monitoring. Congress makes sure that citizens and interest groups will have access to administrative agency decisions, and then its members direct their attention elsewhere. If an agency violates its legislative mandate or acts contrary to the public's interest, legislators will find out because citizens and interest groups will pull the proverbial fire alarm by publicly challenging the agency and lobbying Congress to overturn an unpopular decision.<sup>53</sup> Congress need not closely monitor its agents because it knows that there are third parties that have the appropriate incentives to do the monitoring work instead.<sup>54</sup>

The second type of proxy monitoring is one in which the proxy is delegated some kind of power over the monitored officials. Whereas, with the first type, the principal wants to be alerted by the proxy if the

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<sup>51</sup> See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

<sup>52</sup> *Id.* at 176.

<sup>53</sup> *Id.* at 166.

<sup>54</sup> See *id.*

agent does not follow the principal's commands, in the second type of proxy monitoring the principal wants the proxy to make complicated decisions in accord with how the principal would make them. The United States Foreign Intelligence Surveillance Court (FISC), created by the Foreign Intelligence Surveillance Act<sup>55</sup> (FISA), was designed to act as this second type of proxy monitor. The court has the power to authorize warrants for law enforcement officers to wiretap suspected foreign intelligence agents in the United States.<sup>56</sup> As is discussed below, it is a matter of debate whether the FISC effectively monitors the executive, and whether it is properly designed to do so.

### B. Optimal Design

The main difficulty with both types of proxy monitoring is that they may compound rather than solve the underlying agency problem. For a proxy monitoring system to work, the proxy must represent the public's interest better than the officials whom the proxy is supposed to monitor. Further, the public must trust the proxy to do so. Proxy monitoring is thus likely to be successful only when the proxy will have the incentives to monitor the government officials' conduct in ways that the public would find desirable. Designing a proxy monitoring system requires accurately understanding the incentives of the monitor. Simply setting up one branch of government to monitor another will work only when there is reason to think that the monitor actually will police the other branch's activities effectively.<sup>57</sup> Political actors from different branches may often have weaker incentives against collusion if, for example, they are members of the same political party and have similar policy preferences.

It is important to note that the proxy need not be selfless or truly public-spirited. The proxy's motives are irrelevant, so long as his or her incentives align with those of the public. To take an example from corporate law, scholars have argued that the takeover market creates effective monitoring of manager performance on behalf of sharehold-

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<sup>55</sup> Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801-1862 (West 2003 & Supp. 2007)).

<sup>56</sup> See Kitrosser, *supra* note 10, at 1188-89.

<sup>57</sup> See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). Relatedly, Professor Fenster observes that "[n]on-judicial resolution of government information disputes, by contrast, has served the often contentious arguments between Congress and the President over presidential and executive branch information reasonably well, at least in those instances in which the branches are controlled by different political parties or when Congress acts independently of the executive branch's wishes." Fenster, *supra* note 11, at 945.

ers.<sup>58</sup> Third parties who might make takeover bids have no reason to care about other shareholders, but they do have incentives to try to identify firms that are being poorly managed. Third-party investors' monitoring and the accompanying threat of takeover reduce agency costs for shareholders despite the fact that the monitoring investors do not actually have shareholders' interests at heart.

In public law, proxy monitoring regimes that are likely to be successful are those in which the monitor has a clear political incentive to report any violations of the public's trust by the monitored party. An obvious way to achieve this would be to, as Professors Daryl Levinson and Richard Pildes suggest, separate "parties, not powers"<sup>59</sup> — that is, to create arrangements in which members of one political party monitor members of another. Because political parties are in competition with each other, members of one party have strong incentives to alert the public if they become aware of behavior by the other party of which the public would disapprove.

### C. Examples

1. *(Potentially) Ineffective Proxy Monitoring: The Foreign Intelligence Surveillance Court.* — Perhaps the best known example of a secrecy proxy monitor in American public law is the FISC. The court has the authority to grant or reject warrant applications by executive branch officials who wish to surveil suspected foreign intelligence agents in the United States.<sup>60</sup> Its proceedings are secret. In some observers' view, the FISC exercises little oversight over the executive branch, as it virtually never rejects warrant applications.<sup>61</sup> There are several reasons why the court's judges could have little incentive to reject applications. Perhaps most obviously, the judge might perceive the consequences of mistakenly rejecting a warrant application to be severe because doing so could prevent the government from thwarting a terrorist attack. The judge might likewise perceive the risk of error in the other direction to be much smaller; the result of a wrongly granted warrant is that someone's privacy will be violated, which seems minor in comparison to the risk of a terrorist attack. Nor would the public ever learn of a decision to rebuke the executive. Thus the judge has nothing to gain in terms of a reputation for objectivity by

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<sup>58</sup> See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 171–73 (1991).

<sup>59</sup> See Levinson & Pildes, *supra* note 57.

<sup>60</sup> See Kitrosser, *supra* note 10, at 1188–89.

<sup>61</sup> See, e.g., Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2154 (2005) (reviewing MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)) ("Evidence available already suggests that, in practice, the Foreign Intelligence Surveillance Court has provided no demonstrable check on administrative requests.").

rejecting the warrant applications. This is not to say that FISC judges do not take their jobs seriously, but it is unclear if their incentives to monitor the executive adequately align with the public's preferences.

2. *Well-Designed Proxy Monitoring: "The Credible Executive."* — A more successful example of proxy monitoring might be the methods, identified by Professors Eric Posner and Adrian Vermeule, that presidents have used in the past to create political credibility while maintaining secrecy.<sup>62</sup> Past presidents have made their policy choices credible to the public not by revealing all the facts underlying those choices — which in many cases would undermine the policies themselves — but rather, among other methods, by bringing members of the opposite party into the government to “signal” their good intentions to the public.<sup>63</sup> The opposite-party member serves as a proxy monitor, ready to blow the whistle if it appears that the President is abusing his privilege of secrecy. In this example, the public feels comfortable allowing the President to operate in secret because it knows that its monitor will ensure that the President will not use secrecy to mask inappropriate goals. An opposite-party proxy might be more likely to monitor at the optimal level than would judges, who are far more commonly used as proxies in American law. The informal strategy that Professors Posner and Vermeule describe could, in theory, be formalized: For example, one could imagine an arrangement in which the leadership of the opposition party would get to choose a person to serve in a high-level position in the Department of Justice, whom the Attorney General would be required to keep apprised of all secret investigations.<sup>64</sup>

### III. BOTTOM-LINE TRANSPARENCY

#### A. *The Strategy*

Making the provocative claim that transparency is a “disease[]” that threatens the possibility of “effective, active government,”<sup>65</sup> Professor William Stuntz recently proposed a novel secrecy mechanism. He claims that transparent *procedures* paralyze government, and sug-

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<sup>62</sup> See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 887–88 (2007).

<sup>63</sup> *Id.* at 900–02.

<sup>64</sup> This suggestion is merely a hypothetical designed to explore the best use of proxy monitoring; this Note does not address the constitutionality of this proposal. However, even if the arrangement were unconstitutional, the Executive might follow it on comity grounds, just as the President routinely follows mandates to maintain a partisan balance on some commissions. See David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rule-making*, 7 ADMIN. L.J. AM. U. 309, 321 n.62 (1993).

<sup>65</sup> William J. Stuntz, *Secret Service: Against Privacy and Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12, 15.

gests that voters should allow government to keep procedures more secretive in exchange for publicizing “bottom lines”<sup>66</sup> — that is, the outputs of governmental decisionmaking, not the inputs.<sup>67</sup>

This bottom-line disclosure resembles the “business judgment” rule in corporate law. Under the rule, shareholders may not, in most cases, challenge the decisions of managers<sup>68</sup> — the process by which the managers try to achieve desired outcomes — because, it is thought, the shareholders are already protected by their ability to monitor the bottom line: the firm’s profits. While the business judgment rule is a liability rule, not a transparency rule, it has much in common with bottom-line disclosure. The justification for the rule mirrors Professor Stuntz’s criticism of procedural transparency in public law: The rule enables managers to act without fear that their actions will be subject to second-guessing by litigation, leaving them free to innovate.<sup>69</sup> Forced disclosure may deter innovation in politics just as much as fear of litigation deters innovation in the business world — transparency requirements might prevent risk-averse government officials from trying untested but potentially beneficial strategies, for fear of alienating voters wary of new methods.

Scholars working on improving government efficiency have reached similar insights about the value of focusing on bottom lines. Regulatory theorists have in recent years argued that regulation is more effective where governmental regulators focus on specifying outcome goals to regulated entities, rather than dictating means via traditional command-and-control methods.<sup>70</sup> And the same may be true of voters as well. Advocates of the “reinventing government” movement argue that government will be more efficient if “accountability for inputs gives way to accountability for outcomes”<sup>71</sup> — that is, if voters act not as ongoing monitors of government procedures and decisions, but as judges of whether government has succeeded in achieving desired goals. In both cases, the party with the appropriate incentives to

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<sup>66</sup> *Id.*

<sup>67</sup> See Garrett & Vermeule, *supra* note 11, at 71.

<sup>68</sup> *E.g.*, *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (holding, in suit brought by shareholders, that “unless the conduct of the [managers] at least borders on [fraud, illegality, or conflict of interest], the courts should not interfere”).

<sup>69</sup> See Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 675 (2005); see also Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

<sup>70</sup> See, *e.g.*, Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 297 (1996) (“Often the problem with federal regulation is that the government lacks knowledge of the least expensive means of producing the preferred regulatory end.”).

<sup>71</sup> SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 16 (2007) (quoting DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 181 (1992)).

choose a desirable goal dictates the ends, while the party with a comparative advantage at innovating is given control of means.

### B. *Optimal Design*

The central problem with the bottom-line approach is figuring out exactly what the bottom lines to be publicized should be. In the corporate law context, this task is easy; managers have one job — maximizing profits — that is easy to measure and evaluate. But “[t]here is no single benchmark equivalent to firm value for evaluating the performance of government.”<sup>72</sup> What does the bottom-line approach tell us about the government’s response to, for example, the war on terror? Is the bottom line the number of terrorist attacks that have occurred in the United States since 9/11? Certainly not, since this bottom line would give the government nearly limitless power. Other measures seem just as problematic. As Professors Posner and Vermeule note:

[T]hreats to national security . . . typically [do] not produce a clear outcome while the president is still in office. . . . Bush’s war-on-terror policies might be optimal, insufficient, or excessive; we will not know for many years. And the public cannot enter a contract with the president that provides that he will receive a bonus if national security is enhanced and will be sanctioned if it is not enhanced.<sup>73</sup>

Given that there is no universal measure of societal value by which one can evaluate government performance across the board, the bottom-line method cannot provide a generalized approach to secrecy and transparency. But while there never will be an available figure as useful as overall firm value, in some situations there may be some bottom lines that would provide enough information to voters so that bottom-line disclosure minimizes agency costs. Specifically, bottom-line transparency is useful in situations where a metric is available that does not destroy the benefits of secrecy by revealing too much, but at the same time provides enough information to voters that they can exercise some oversight over their representatives that would deter the worst abuses of secrecy. Because of the lack of a big-picture measure of social welfare that can be disclosed, the situations in which bottom-line disclosure might work will be isolated and specific. The next section explores two examples of bottom-line disclosure regimes, both relating to the government’s use of especially invasive investigatory techniques.

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<sup>72</sup> Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 356 (2000).

<sup>73</sup> Posner & Vermeule, *supra* note 62, at 881.

### C. Examples

1. *Ineffective Bottom-Line Disclosure: FISA Warrant Disclosure.* — One use of bottom-line transparency is found in FISA. While the monitoring of executive officials seeking wiretaps is delegated to the FISC as a proxy, the public is able to monitor the FISC itself through a kind of bottom-line disclosure requirement. The court must publish information on the number of FISA warrant applications granted and denied;<sup>74</sup> records show that the court denied only 5 out of nearly 23,000 warrant applications in the twenty-seven years after FISA's enactment.<sup>75</sup> Critics of FISA argue that these numbers suggest the court is not adequately monitoring the executive branch.<sup>76</sup> As a bottom-line disclosure regime, this measure is not particularly well designed. Voters cannot fully assess how the FISC is performing with such limited information. It could be the case that warrant applications are rejected so rarely not because the court is being excessively deferential,<sup>77</sup> but because the circumstances under which the court will grant a warrant are clear to executive officials *ex ante*, so they do not waste their time with applications that will not be successful. The disclosure scheme might actually create agency costs if it causes the public to lose confidence in a program that in theory could be providing the adequate level of monitoring.

2. *Well-Designed Bottom-Line Disclosure: PATRIOT Act Searches.* — Then-Attorney General John Ashcroft employed an unofficial bottom-line disclosure strategy in 2003. Section 215 of the USA PATRIOT Act<sup>78</sup> amended FISA to allow the executive to obtain secret warrants to request documents and other “tangible things,” including library records, “for an investigation to protect against international terrorism or clandestine intelligence activities.”<sup>79</sup> Amidst public criticism and a court challenge to the provision, Attorney General Ashcroft declassified the number of times that the DOJ had used the section 215

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<sup>74</sup> 50 U.S.C. § 1807 (2000).

<sup>75</sup> See Elec. Privacy Info. Ctr., FISA Orders 1979–2006, [http://www.epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://www.epic.org/privacy/wiretap/stats/fisa_stats.html) (last visited March 8, 2008).

<sup>76</sup> See, e.g., Minow, *supra* note 61, at 2154.

<sup>77</sup> For an argument that the FISA oversight process is more rigorous than some critics have claimed, see Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. & POL'Y REV. 531, 535 (2006) (observing that, while prior to 2001 “[c]ivil liberties groups understandably viewed the FISA Court as little more than a rubber stamp . . . [,] various post-9/11 inquiries opened a window on the FISA process and revealed it to be much more demanding than outsiders had imagined”).

<sup>78</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

<sup>79</sup> 50 U.S.C.A. § 1861 (West 2007).

process, which turned out to be zero.<sup>80</sup> By showing that the procedure had never been invoked, Attorney General Ashcroft may have assuaged some voters' fears of executive abuse of power. It is possible their confidence was misplaced, as it was later revealed that the Justice Department had repeatedly obtained information it could have obtained using section 215 under the less-demanding "National Security Letter" administrative subpoena procedure.<sup>81</sup> But to the extent that the bottom line is not easily manipulable, one could imagine this strategy being an effective mandatory procedure. If the voters felt that extreme circumstances called for giving the government a particularly invasive investigatory technique, they could require disclosure of how often the technique is used.<sup>82</sup> This bottom-line disclosure strategy is well designed because it provides information that is actually useful to voters' evaluation of the executive's performance. The voters will not know the facts underlying the Executive's decision to use the power at issue, but they probably will have some sense of when the Executive is using his or her power too much. If, for example, a mandatory bottom-line disclosure regime were in place and the Attorney General were forced to admit that the government had used its section 215 powers thousands of times, voters might conclude that the critics were right and the power should not have been granted. Being aware of this possibility, the Executive would be more likely not to abuse his or her power in the first place.

#### IV. DELAYED DISCLOSURE

##### A. *The Strategy*

Yet another technique that can allow for secrecy while still minimizing agency costs is delayed disclosure,<sup>83</sup> or "temporary secrecy"<sup>84</sup> — releasing information to the public about government actions, but only

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<sup>80</sup> See Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1172 (2007); Minow, *supra* note 61, at 2146.

<sup>81</sup> See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

<sup>82</sup> On a related note, Professor Alan Dershowitz partially bases his argument that there should be a legal procedure by which executive branch officials can obtain warrants authorizing the use of torture on the claim that the publicity of the warrant process would create political accountability. See Alan M. Dershowitz, Op-Ed., *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/01/22/ED5329.DTL>.

<sup>83</sup> This Part owes a great deal to the discussion of delayed disclosure in VERMEULE, *supra* note 11, and Garrett & Vermeule, *supra* note 11.

<sup>84</sup> Thompson, *supra* note 21, at 184.

after a specified amount of time has passed. There are many situations where the government only has an interest in keeping information secret for a short period of time; forcing disclosure once secrecy is no longer essential allows for voter monitoring without undermining the benefits of secrecy. If the delay is calibrated properly, this strategy could both give government officials the ability to take socially desirable action that would be difficult without secrecy and provide them with the appropriate incentives not to act out of self-interest.

### B. Optimal Design

The main problem with delayed disclosure is that it only works when the public still cares about a decision or action at the point of disclosure, and when the government actors whose actions are disclosed care what the public thinks at that future time. The proper delay period will be different depending on the government actors whose conduct the disclosure is meant to regulate and the importance of the issue about which disclosure will be mandated. Understanding the discount rate, or time horizon, of the actors whose conduct the disclosure is meant to shape is essential. Releasing information about legislative or executive activities several election cycles later would in many cases be fruitless, because of the short time horizons of voters and politicians.<sup>85</sup> But some issues might be so salient or important that voters might care about them many years later, and some governmental actors might have especially long time horizons. For example, presidents might have reasons to care about their legacies even if they will never run for elected office again.<sup>86</sup>

In an example of an optimal delayed disclosure regime, Professors Garrett and Vermeule argue that delayed disclosure could effectively maintain “good accountability” while reducing “bad accountability.”<sup>87</sup> They contend that while transparency in the Congressional budget process is good insofar as it provides information to the public as a whole about Congress’s dealings, it can be harmful because it also enables powerful interest groups — who are better equipped than the diffuse public to affect the budgetmaking process — to extract expenditures that are harmful to public welfare during Congressional nego-

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<sup>85</sup> See Ben Depoorter, *Horizontal Political Externalities: The Supply and Demand of Disaster Management*, 56 DUKE L.J. 101, 111 (2006) (“Because politicians are concerned with getting re-elected, they have limited time horizons . . .”); Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, YALE L. & POL’Y REV., Symposium Issue 1996, at 149, 161 (1996) (“[V]oters have notoriously limited time horizons.”).

<sup>86</sup> See Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 857 (2004) (“A first-term President cares about re-election and a second-term President cares about his legacy.”).

<sup>87</sup> Garrett & Vermeule, *supra* note 11, at 83–87; see also VERMEULE, *supra* note 11, at 198.

tiations.<sup>88</sup> They propose that to remove organized interest groups' advantage, it is best to keep committee sessions closed during the initial allocation process, but then to disclose their details "a few weeks before the first primary elections for congressional seats."<sup>89</sup> This delayed disclosure would give voters enough time to react and potentially punish representatives, but not give interest groups the time to mount a full-scale public relations assault.<sup>90</sup> A longer delay would increase agency costs because it would give legislators too much freedom to shape the budget without having to face accountability from the voters; a shorter delay would not capture any of secrecy's benefits because it would not prevent interest group interference.<sup>91</sup>

### C. Examples

1. *Ineffective Delayed Disclosure: Mandatory Declassification.* — The federal government made moves toward embracing a delayed disclosure strategy in 1995, when President Clinton signed an executive order that mandated declassification for classified records "determined to have permanent historical value" and more than twenty-five years old, with a number of exceptions.<sup>92</sup> Subsequent executive orders delayed this provision's implementation for more than a decade,<sup>93</sup> while extending the Executive's ability to prevent documents from being declassified.<sup>94</sup> Even if fully implemented, however, the policy would do little to reduce agency costs (despite providing an invaluable resource for historians). Few political actors will be deterred from self-interested behavior by the possibility that their actions or decisions will become public in twenty-five years. A quarter-century is well beyond the normal time horizons of both politicians — most of whom will have long left office in that time (especially executive officials) — and voters, most of whom will have long forgotten or ceased to care

<sup>88</sup> Garrett & Vermeule, *supra* note 11, at 77–80.

<sup>89</sup> *Id.* at 86; see also VERMEULE, *supra* note 11, at 207.

<sup>90</sup> Garrett & Vermeule, *supra* note 11, at 86.

<sup>91</sup> In this way, delayed disclosure resembles legislative timing rules, which Professors Gersen and Posner argue can, by delaying legislation, "weaken the relative power of interest groups, and thus increase the probability that public-spirited legislation will be enacted." Gersen & Posner, *supra* note 15, at 571.

<sup>92</sup> Exec. Order No. 12,958, 3 C.F.R. 333 (1996).

<sup>93</sup> James T. O'Reilly, *FOIA and Fighting Terror: The Elusive Nexus Between Public Access and Terrorist Attack*, 64 LA. L. REV. 809, 821 (2004). Other declassification provisions in the order did go into effect immediately, however, and had a significant impact. According to former Clinton Chief of Staff John Podesta, in the nine years after the order went into effect, 930 million pages of documents were declassified, compared to only 188 million in the fifteen years prior to the order. John Podesta, *America's Secret History: Securing Our Future by Embracing Open Government*, Remarks at Princeton University (Mar. 10, 2004), available at [http://www.cjog.net/speaking\\_john\\_podesta\\_march\\_2004.html](http://www.cjog.net/speaking_john_podesta_march_2004.html).

<sup>94</sup> See Exec. Order No. 13,292, 3 C.F.R. 196 (2004).

about the issue in question, and who in any case will have little ability to express their displeasure, given that the politicians in question will almost certainly no longer be in office. Perhaps some political actors' concern for their legacies could cause the risk of eventual disclosure to change their behavior, but a more effective mandatory declassification policy would utilize a shorter delay.

2. *Well-Designed Delayed Disclosure: Witness Information.* — The DOJ's United States Attorneys' Manual states that prosecutors must typically disclose impeachment evidence to the defense "at a reasonable time before trial" but provides that "other significant interests . . . such as witness security and national security" may justify delaying the disclosure until the witness testifies.<sup>95</sup> This delayed disclosure strategy is well designed because the delay is only as long as is necessary to protect the government's interests without creating significant agency costs. Allowing prosecutors never to disclose impeachment information to defendants would create too great of a risk that a prosecutor could railroad an innocent person in pursuit of his or her own selfish goals, but requiring disclosure before trial in all cases would create a danger that defendants could intimidate witnesses, or that national security interests would be harmed.

#### CONCLUSION

Transparency is one agency cost reduction strategy, but this Note has attempted to show that it is by no means the only one, or the most effective one in all situations. Optimally designed institutions can sometimes ensure a high level of government accountability without depriving the government of the ability to keep information secret. This Note has explored three alternative strategies that could, more effectively than transparency, minimize agency costs under certain circumstances. While there are scattered examples of all three strategies at work in government today, none has been put to its most effective use. Better secrecy policies would more effectively experiment with strategies like the three suggested here, and do so with an understanding of the incentives of political actors and the abilities of voters to monitor their agents. While at times secrecy and accountability will be in tension, with more creative institutional design they need not be at war.

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<sup>95</sup> U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001.D.2 (2006) (referencing 18 U.S.C. § 3500), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/5mcrn.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrn.htm).