



NEW PERSPECTIVES IN
GERMAN POLITICAL STUDIES

Executive Secrecy and Democratic Politics

Arguments and Practices
in the German Bundestag

Dorothee Riese

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New Perspectives in German Political Studies

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Far reaching changes are now taking place in Germany. Stability lay at the core of the German model and much of the writing from Peter Katzenstein and Manfred Schmidt onwards sought to explain this enviable stability. Changes in the external environment have created a number of fundamental challenges which pose a threat to that stability. Germany is now Europe's central power but this has generated controversy about how it is to exercise this new power. Although attention is often centred on German power the migration crisis demonstrates its limits. *New Perspectives in German Political Studies* aims to engage with these new challenges and to cater for the heightened interest in Germany. The Editors would welcome proposals for single-authored monographs, edited collections and Pivots, from junior as well as well-established scholars working on contemporary German Politics.

Dorothee Riese

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ABBREVIATIONS

BRH	Bundesrechnungshof (Federal Court of Auditors)
CDU	Political party Christlich Demokratische Union Deutschlands (Christian Democratic Union of Germany)
CSU	Political party Christlich-Soziale Union in Bayern (Christian Social Union in Bavaria)
Drs.	Bundestags-Drucksache (printed matter of parliament). Their numbering makes them identifiable. It consists of the legislative period and a consecutive number
ExIA	Interviewee: Executive, intelligence agencies case
ExPPP	Interviewee: Executive, public-private partnership case
GRÜNE	Political party Bündnis90/ Die Grünen (Alliance 90/ The Greens, or just Greens)
LINKE/DIE LINKE	Political party The Left, formerly PDS (until 2007)
MP	Member of Parliament (Bundestag)—where used with a number, MP X refers to an interview by the author with an MP
PDS	Political party Partei des Demokratischen Sozialismus (Party of Democratic Socialism), later DIE LINKE (from 2007 on)
PlPr	Plenarprotokoll (plenary protocol of a session of the German Bundestag)
PPP	Public-Private Partnership
SPD	Political party Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)

StaffIA	Interviewee: Parliamentary staff, intelligence agencies case
StaffPPP	Interviewee: Parliamentary staff, public–private partnership case
VIFG	Verkehrsinfrastrukturfinanzierungsgesellschaft (Transport Infrastructure Financing Company)

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Introduction: Executive Secrecy and Democratic Politics

Executive secrecy is an obvious impediment to parliamentary practice. Parliaments depend on information to fulfil their roles as the people's representatives, legislators and overseers of the executive. However, plenty of examples of executive secrecy abound. How, then, do parliamentary actors try to reconcile secrecy and the normative demands of an open, democratic society? This study investigates their arguments, conflicts and patterns of agreement around this topic in the case of Germany.

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

executive secrecy reach this level of confrontation, both cases led parliament to set up investigative committees to scrutinise the executive's secret action.

While secrecy is a heated topic of public debate, scholarly research on the topic lags behind (Knobloch, 2017, p. 205; Sarcinelli, 2009, p. 73).¹ Especially the particular empirical patterns of secrecy's public legitimisation are still largely unknown: 'Despite its obvious normative, theoretical, and practical importance, the trade-off between government secrecy and openness has received scant attention in the political science literature' (Shapiro & Siegel, 2010, p. 68). Indeed, one can see a recent surge in interest in the topic (Rittberger & Goetz, 2018; Voigt, 2017b; see for example Abazi, 2019; Knobloch, 2019; Mokrosinska, 2020). However, there still is a desideratum for a thorough analysis of the practice of legitimising secrecy in democratic states, and whether and how parliamentary actors in a democratic polity accept state secrecy.

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

While these lines of research address how secrecy and disclosure rules are dealt with and bypassed by different actors, empirical analyses systematically analysing the decision-making processes about executive secrecy,

¹ All translations of German-language publications and of the German language empirical material are made by the author. For the sake of readability, this is not indicated for every single quote.

however, are largely lacking. Only a few works have done empirical research into rationales that underlie decisions in favour of political secrecy. Such rare works include studies of US political practice (Aftergood, 2008; Gibbs, 2008) or studies of practices of secrecy in the EU (Curtin, 2018; Patz, 2018; Rosén, 2018).

This study strives to fill this gap. In particular, it illuminates how exactly parliaments use their power to discuss and decide on the need and limits of state secrecy, thus providing its public legitimation. It asks how parliaments approach executive secrecy. Why do parliaments allow for executive secrecy and what limits do they set?

Parliaments are not unitary actors. Within parliament, there are different roles to fulfil, such as being in opposition or supporting one's government while simultaneously adhering to voters' interests (see for example Hohendorf et al., 2020; Klüver & Spoon, 2016; Sagarzazu & Klüver, 2017). Roles as institutionalised expectations concerning a certain position (see Dahrendorf, 2006) provide the link between institutions and concrete political actors 'by focusing on the subjective interpretation of the normative strategic constraints and opportunities' that institutional positions provide (Andeweg, 2014). Actors may behave differently from case to case, adapting their actions to different role expectations. Role theory may help understand the various and sometimes conflicting logics of action of political actors (Boulanger, 2013). Parliamentary roles have been the subject of political science analyses (see for example Müller & Saalfeld, 1997) as 'patterns of attitudes and/or behavior' (Blomgren & Rozenberg, 2012). Each entails certain expectations and images of how one usually behaves in each of these roles. Therefore, when focusing on parliamentary decision-making, this study disaggregates the positions that political actors in parliament take on executive secrecy. It differentiates the different roles they occupy, specifically the roles as party politicians, as government and opposition and as parliamentarians and executive actors. It traces the internal conflict lines about the legitimate scope of executive secrecy arising from the different roles of individuals or parties within parliament.

The ideological positions of parties may vary concerning the value ascribed to transparency on the one hand, and to the goals to be achieved through secrecy on the other hand. If the role of party politician is the dominant frame of reference, then such ideological conflicts will dominate the debate about secrecy (on partisan theory, see for example Hill & Jones, 2017; Schmidt & Ostheim, 2007; Wenzelburger & Zohlnhöfer,

2021). There are many, mostly quantitative analyses measuring parties' policy positions within the ideological space (see the party manifesto project and the extensive body of literature based on the data² or the Chapel Hill Expert Survey, see Bakker et al., 2020)³. Studies have estimated their effects, for example on spending (e.g. McManus, 2019; Savage, 2019; Wenzelburger, 2015) or policy-making in traditional policy fields (e.g. Heffington, 2016 on foreign policy; Lutz, 2021 on migration and integration policy; or Schmitt & Zohlnhöfer, 2019 on economic policy). However, we have less empirical data regarding topics such as secrecy. This study aims to fill this research gap.

In addition to party-political ideology, disagreement about secrecy may be shaped by institutional roles: first of all, there is the conflict line between government and opposition. Often, this is the dominant conflict line in parliamentary democracies (e.g. Hix & Noury, 2016). In parliamentary democracies, conflict largely runs between government—supported by the government parliamentary party groups—and opposition (e.g. Steffani, 1991, p. 19). Empirical findings demonstrate that opposition and government parties' activity in parliaments usually varies (e.g. Bräuninger & Debus, 2009; Hohendorf et al., 2020; Louwse et al., 2017).

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

² An overview of all publications that use party manifesto data can be found on <https://manifesto-project.wzb.eu/publications/all>.

³ A special issue of *Electoral Studies* (26:1) discussed the strengths and weaknesses of different forms of gathering data on party positions (e.g. expert, manifesto, and survey data) (e.g. Benoit & Laver, 2007).

and usability of information is crucial for parliamentary performance. This could produce genuine *parliamentary* perspectives on secrecy that diverge from those of the executive.

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

In considering both party politics and institutional conflicts, this study connects partisan and government studies. Such an in-depth analysis, however, makes it necessary to focus on a small number of cases. Germany makes an interesting case for studying the debate on secrecy. The German parliament, the Bundestag,⁴ is a relatively strong one (e.g. Sebaldt, 2009; Sieberer, 2011) making it more likely that its assessment of the merits and demerits of executive secrecy is independent of government pressure. At the same time, as in any other parliamentary democracy, parliamentary majorities regularly support the government. Furthermore, Germany has been described as a country with a ‘tradition of secrecy’ (e.g. Wegener, 2006, p. 407; Holsen & Pasquier, 2012).⁵ Secrecy has long been the

⁴ While there is a second legislative body, the Bundesrat, the latter is not a parliament (Amm, 2020, p. 405; Beyme, 2017, p. 380). It is constituted of delegates of the *Länder* executives.

⁵ Sweden and the United Kingdom are often mentioned as the polar cases (Düwel, 1965, 113 f.; see also Grønbech-Jensen 1998, p. 185; Rösch, 1999, p. 129) concerning secrecy and transparency. Sweden with its early adoption of its press freedom law in 1766 (e.g. Swanström, 2004) is mentioned as exemplary for the idea of publicity by default (Wegener, 2006, p. 299). Great Britain, on the other hand, has long been seen as ‘a country notorious for official secrecy’ (Roberts, 2006a, p. 65) with its Official Secrets Acts and Defence Advisory Notices (DA Notices, see Banisar & Fanucci, 2013). With the rise of transparency laws even British secrecy practices have been moderated to some extent (Wegener, 2006, p. 407).

default option for administrative action (*Amtsgeheimnis*, see Düwel, 1965; Müller, 2005, p. 19). In recent decades, observers have acknowledged the beginning of a paradigm shift expressed in the introduction of freedom of information laws, first in the federal states (Redelfs & Leif, 2004) and later at the federal level with the so-called *Informationsfreiheitsgesetz* (German Freedom of Information Law) in 2005. Thus, Germany is exemplary of most democratic states, their established realms of executive secrecy and more recent turns towards more transparency, as ambivalent as they may be.

An analysis of the negotiation of secrecy rules in Germany is still missing. Legal studies have covered their legal qualities and their location and integration into the legal system, not their genesis. Political science analyses tend to focus on other issues, such as the practices of violations of secrecy, namely over-classification by governments and unauthorised disclosures by whistle-blowers, or transparency. Thus, the present study is not only an investigation of an understudied topic, it also provides new empirical evidence in the case of Germany.

The analysis of parliamentary decision-making regarding executive secrecy in the German Bundestag conducted in this book focuses on two German cases chosen for in-depth comparative analysis. The first case under investigation is intelligence. Intelligence work is a classic example of executive secrecy, and one that comes to mind quickly when political secrecy is mentioned. Intelligence agencies are the realm of classic statehood. Nevertheless, much remains unexplored. While there is a striking number of practitioners' accounts in journals and edited volumes on the German intelligence agencies⁶ as well as some research in history (Hechhammer, 2014; Krieger, 2007) and jurisprudence (Gusy, 2011), German political science has 'almost completely ignored the topic' (Krieger, 2007, p. 25) for a long time.⁷ More recently, intelligence has received more

⁶ Examples are the former BND heads Ernst Uhrlau (2009) or Hans-Georg Wieck (2007, 2008). Equally, Members of Parliament provide their views (e.g. Brandt-Elsweier, 2008; Hirsch, 2007; Neumann, 2007). Edited volumes also often include a mixture of scholarly contributions and practitioners' perspectives (e.g. the edited volumes by Smidt [2007] or by Morisse-Schilbach and Peine [2008]). Such first-hand accounts are invaluable for understanding the agencies, especially given their 'difficult access' nature (Maravic, 2012). Nonetheless, practitioners' accounts should be regarded as primary sources rather than secondary literature.

⁷ Krieger does not consider this just a gap in research, but also sees it as a lack of scrutiny, considering scientific scrutiny a part of general oversight (Krieger, 2007, p. 25).

scholarly attention (e.g. Bossong, 2018; Daun, 2009, 2018; Lange & Lanfer, 2016; Waske, 2009). The existing academic literature on intelligence agencies has convincingly pointed out the tension between the secret work of intelligence agencies and the democratic principles of publicity and accountability (Daun, 2009, p. 74; Morisse-Schilbach & Peine, 2008, 28 f.; Ulbricht, 2014). What is missing, though, is an empirical study of how (or whether) political actors perceive these tensions and how they address them.⁸ How they weigh values or make a cost–benefit calculation remains largely unknown.

The second case investigated here is Public–Private Partnerships (PPP). As a relatively recent instrument of public procurement in Germany, PPPs are an example of a new type of ‘dissolving’ statehood. The formerly clear-cut boundaries of the state—intelligence agencies being a prime example—become blurred by various types of cooperation and commissioning between the state and private companies. Here, too, questions of secrecy arise, for example from private companies’ claims for trade and business secrecy. It has been pointed out that PPP secrecy may constitute a problem for parliamentary oversight (Krumm, 2013; Krumm & Mause, 2009; Siemiatycki, 2007) and provides opportunities for political actors to hide their ulterior motives as well as cloak inefficiency in PPPs.⁹ Secrecy could allow them to circumvent new disclosure rules (e.g. Birchall, 2011, p. 15; Roberts, 2006a) or the so-called ‘debt brake’ that obliges the state not to incur new debts (e.g. Wissenschaftlicher Beirat beim Bundesministerium der Finanzen, 2016) while still realising projects that promise electoral success (Mühlenkamp, 2011, p. 69). In addition to this, there is a debate on whether PPPs decrease transparency (e.g. Gerstlberger & Siegl, 2011, p. 38; Hood et al., 2006) or whether they increase

⁸ Legal scholars often aim to identify a formal hierarchy of norms for deciding whether secrecy is warranted (e.g. Bröhmer, 2004, p. 374). Often, though, they also point out that these decisions finally have to be made case-by-case and cannot be solved in the abstract (e.g. Lerche, 1981, p. 118; Schulhofer, 2013).

⁹ A large proportion of existing research on PPP has focused on the question of efficiency. The findings are diverse: to actually compare classic and PPP procurement is difficult. Assessing the risks and costs in the future depends on how they are calculated (e.g. Grimsey & Lewis, 2002, p. 247; Wissenschaftlicher Beirat beim Bundesministerium der Finanzen, 2016, p. 9). For example, several scholars point out that transaction costs, meaning the costs arising from having to negotiate and control complex contracts, have to be considered in addition to the direct procurement costs (e.g. Gerstlberger & Siegl, 2011, p. 38; Krumm & Mause, 2009, p. 119; Mühlenkamp, 2011, p. 77). Capturing transaction costs, however, is difficult as they are not inherently suitable for quantification.