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Engagement Against/For Secrecy

Abstract This essay discusses engagement *against* state secrecy and engagement *for* secrecy, free from interference. By exploring divisions introduced by state secrecy (through exclusion, subjection and oppression), it identifies the distortions of equal participation in political communities. The author introduces the notion of *pata-politics* in order to describe the false relation to the secrecy effect. Furthermore, the text examines key issues of today's intelligence studies (such as democratic intelligence oversight and the balance of powers doctrine), with special emphasis on the possible limits of a liberal approach. Additionally, the author elaborates a metacritique of the framework in which the private sphere is one-sidedly described as a victim of wrong interference by state institutions.

Keywords: state secrecy, intelligence studies, democratic intelligence oversight, privacy movements, public sphere

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This essay discusses political questions that imply numerous perplexing dilemmas, profound paradoxes and maybe even truly unsolvable aporias. Are intelligence agencies and so-called democratic oversight compatible with each other? Does the existence of state (or simply governmental) secrecy necessarily distort the ideals of legitimacy, equal participation, transparency and accountability? Is civic engagement against increased mass surveillance possible and desirable? Even though we will explore essential problems of contemporary societies, it is important to remark that these issues are mostly still a blind spot in political philosophy. Perhaps the reason lies in the fact that this kind of secrecy dwells in the gray area of 'zone of indistinction' (Gilles Deleuze, Giorgio Agamben)¹ where public and infrapolitical interests are so closely intertwined that the difference between them disappears. In other words, it is obvious that the power connected to state secrecy cannot be dominantly personal (or private). On the other hand, this sort of secrecy cannot become entirely public by definition. Thus, it is neither completely personal or private, nor public, that is, belonging to some land of nowhere. These problems exceed the ordinary framework and preconceptions of political philosophy as they cannot be reduced to the standard question of 'legitimate coercion' or to the often-mentioned dilemma of security and freedom. This is precisely what makes them so difficult to engage with.

1 On conceptual nuances between indistinction and indiscernibility with regard to Deleuzian and Agambenian philosophy see: Gilson 2007: 106.

1. Does state secrecy divide citizens?

In this part we will discuss some basic political concepts (informed consent, state of exception and political enmity) from the viewpoint of state secrecy. It is often believed that mere existence of such secrecy implies certain inequalities among citizens:

- A. Many theories, including that of Jürgen Habermas, suggest that the modern public sphere appeared owing to the refusal of the *arcana imperii* of the absolutist state. Historically, just as the Enlightenment refused the theological-political mysteries of the premodern state, our political predecessors ruled out entirely uncontrollable state secrecy that made truly free public debates impossible. Yet even post-absolutist states distort both discourse and communication in civil societies. State secrecy is by its very nature based on negative communication or potentially manipulated discourse that can make informed consent extremely difficult (as demonstrated by the fake evidence that served as a rationale for the Iraq War). Put differently, there might be an essential tension between public interest in knowing and the state as a discommunicator or self-conscious dis-informant. How can the equally accessible discursive space of the public realm exist in a society in which the head of the state claims that “every morning I start my day with an intelligence report”? (Bill Clinton as cited in: Johnson 2007: 5) (Needless to say, the possibility of unchecked propaganda or calculated lying, astroturfing, systematic infiltration of political parties or civil organizations and psychological operations [PSYOP] are not compatible with an open society either.) To sum up, the existence of state secrecy necessarily implies inequality and hierarchy between the selected few who belong to the discretionary space of the ‘quiet option’ (whose social capital is secrecy itself) and those ‘impure’ citizens who are not supposed to hear state secrets (and who can be defined by this very lack of access to secrecy). This exclusiveness concerning ‘operationally sensitive information’ always already precedes the allegedly equal participation in the public sphere. In addition, within this framework, it might seem that citizens’ consent to the actions of intelligence is necessarily hypothetical and simulated, or, more precisely, that it is sacrificed in advance. As we will see later, this aspect is one of the most important challenges to democratic oversight.
- B. Another kind of inequality is embodied in intelligence agencies which apply the principle of state of exception to the actions of their spies. This does not only mean flexible, legal and executive treatment in times of crisis (when intelligence agencies might be OBE – overtaken by events), but also special laws and special codes that make spies immune from ordinary laws, regardless of the current situation.

Paradoxically, these are 'legal lawbreakers' who can act as micro-sovereigns, under the pretext of protecting order. This is exactly how Carl Schmitt described the ambivalent nature of state secrecy in his theory of sovereignty: it might ignore the law in order to make it truly effective (Schmitt 1995: XVIII). Or, seen from the opposite point of view, state secrecy might undermine the very rule of law that it is supposed to stabilize. Once again, it is as if the institution of intelligence agencies split citizens into two parts: those who are extralegal or supralegal and those subjected to the first group's discretionary power.

- C. The politics of enmity is at the heart of the logic of state secrecy. Obviously, what makes such secrecy justifiable is first of all the need for protecting order in the political community. Counter-terrorism, counter-espionage and counter-radicalization policy as the identification and elimination of inner (or semi-inner or potentially inner) enemies always already divide citizens into 'innocents' and suspects. The functioning of an intelligence agency as the extension and institutionalization of martial mechanisms presupposes a pre-political, *ex ante* decision regarding what can be substantially harmful and what cannot. (To illustrate, let us recall the fact that the FBI treated the Occupy movement as a potential terrorist and criminal threat, or recall the death of Jean Charles de Menezes who was mistakenly killed by Scotland Yard in 2005.) Taking advantage of terrorism fears in states of emergency or the exploitation of extreme tragedies only confirms an already existing practice. Intelligence is always already "haunted by the powerful phantasm of 'the enemy'" (Horn 2013: 38) and it often seems to be forced to defend the conditions of democracy by undemocratic means. By spying on some of its own citizens, the state defends itself – thus prolonging the inner state of war. In certain cases this conflict appears as a competition between different types of secrecy, for instance when the institutions of state secrecy oppress secret societies (the conspirative *Stillen im Lande*, to quote Schmitt again) (Schmitt 1938: 92). Secrecy assures the existence of the political community and, at the same time, makes it impossible.

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The call for absolute transparency in the private lives of citizens as well as the desire for absolutely secret state mechanisms are complementary threats to democracy. To summarize, the existence of institutions of state secrecy implies a number of asymmetrical divisions among citizens. Nevertheless, these founding inequalities with regard to exclusion, subjection and oppression effectively contribute to the undermining of the exoteric ideals of civic ethos, public reason and equal participation. Thus, the latent or opaque side of power might have affective-corporeal consequences (fear and vulnerability) and perceptive-cognitive side effects (mistrust and political paranoia).

Hence, before thematizing engagement against state secrecy (or certain of its forms), one should first pay attention to pata-political mechanisms that pose a threat to engagement as such. Put simply: how could one freely and equally engage in a political system in which state secrecy seems to endanger the very coordinates of free and equal political action? What is more, the secrecy effect implies a certain *Unbehagen*, a hardly eliminable distrust or despair that could make even modest forms of civic activism ineffective and meaningless.

2. The danger of pata-politics

As mentioned, the post-absolutist logic of secrecy is in sharp contrast to the *arcana imperii* with regard to the question of legitimacy. Here is Eva Horn's description of this change:

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"Whereas the logic of *arcanum* regards secrecy as a legitimate dimension of government, a modern logic of *secretum* is marked by an inextricable dialectics between the withdrawal and communication of knowledge, between secrecy and publicity. Here, the secret is not so much a piece of withheld knowledge as a 'secrecy effect' that binds the realm of secrecy to the public sphere by a dialectics of permanent suspicion and scandal. ... As a result of modern democracy's ideal of transparency and of the moralization of politics, secrecy has become precarious and problematic, something seen as both necessary and noxious, something constantly in need of legitimization yet never really legitimate. ... That's the political secret today: a thing spoken of *ad infinitum*." (Horn 2011: 1–3)

This purely non-substantial definition of contemporary secrecy as 'secrecy effect' (heavily influenced by Jacques Derrida) rightly suggests that the obscure side of state power has a much broader, virtual scope than the brute facts concerning intelligence agencies. According to this vision, secrecy and transparency cannot be separated.² Paradoxically, in today's societies 'secrecy' appears in broad daylight as well. We might illustrate this with the architecture of intelligence agency buildings: as indicators of the operative-ness of power, they are imposingly monumental; however, they must also be carefully closed and extremely secured. Indeed, the relation between state secrecy and the public sphere deepens this paradox and makes it more complicated: state secrecy constantly shifts between the mechanisms of self-concealing (secrecy tends to be secret) and the permanent need to legitimize itself (as its existence and its actions are not self-evidently justifiable).

Within this framework, secrecy always already implies a surplus of secrecy. As state secrecy appears as a known unknown which could even hide unknown

2 This is why Clare Birchall (Birchall 2011) introduced the terms "transparency-as-secrecy" and "secrecy-as-transparency".

unknowns, it necessarily produces weakly-grounded suspicions, semi-fictional hypotheses, overdramatized paranoia, profound distrust of imaginary groups, speculative catastrophisms and all-embracing superconspiracy theories. This is what we call pata-politics³ – an alternative relation to politics which has depoliticizing effects in many ways. By exclusively seeking the ‘deeper’ truth of power and the hidden souterrain of the ‘Big Other’, it underestimates and leaves uncriticized what is going on in the exoteric dimensions of politics. Furthermore, by presenting unfalsifiable theories, it undermines the argumentative field of the public sphere. In addition, even though pata-politics often has certain anti-elitist aspects (as it identifies the ‘Enemies Above’), its exponents are ‘exclusively included’ in relation to secrecy – they themselves somehow belong to the extraordinary citizens who know. Finally, pata-politics leaves in fact unquestioned the very power it intends to criticize: instead of a truly effective institutional analysis, it tends to disarm criticism by magnifying the irrational and hopelessly uncontrollable character of intelligence. According to this, engagement against state secrecy must be aware of the depoliticizing danger of pata-politics. Its practitioners should reject “the common Romantic nonsense which has the magic of ‘secret’ at its center” (Tamás, internet), that is to say, they should relentlessly demystify secrecy, without being naïve.

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3. *Aude, vide, tace!* – the aporias of democratic intelligence

Theoreticians of intelligence studies often emphasize that the catchword ‘democratic intelligence’ (or more precisely: ‘democratic intelligence oversight’) appeared only recently. Regardless whether or not this expression is a true oxymoron, it is easy to understand why it took so long to initiate any democratization in this field. Obviously, when state secrecy becomes accessible to all, it is not simply compromised – it loses its function. In this light, democratization, that is the inclusion of the people, seems impossible. Further, there is enormous fear of a state within a state (*statum in statu*), as a ‘no-go’ zone for democratic scrutiny by ordinary citizens, a special power with a life of its own and accountable only to itself. “Veiled under the shroud of non-communication, non-documentation and non-reporting” (Horn 2011: 14), such an entity would possess various possibilities for an abuse of

3 We introduce the term ‘pata-politics’ in order to conceptualize the possible ideological and affective consequences of state secrecy. *Pata* means ‘above’ or ‘beyond’, and thus pata-politics refers to distorted political discourses that usually do not engage in political parties or movements and seek to unveil power mechanisms behind the surface of ordinary politics. The term ‘pata-politics’ is also useful because it connotes ‘pathological’ (thus, phenomena like political hysteria or paranoia). It is not a synonym for ‘parapolitics’ that refers to the ‘deep politics’ of the state (as in Peter Dale Scott’s theory) or to the conceptualization of the margins and founding principles of politics (as in Raghavan Iyer’s theory).

power, such as extra-legal surveillance missions, monitoring electronic conversations, collecting sensitive data, bodily or house searches, and so on. Then again, what does it mean when something essential is revealed only *in camera*, that is to say, non-publicly and in chambers? Similarly, what does it mean when a region like Greenland or Åland gains autonomy, except for autonomy with regard to mainland intelligence agencies? Likewise, what would it mean if an even more uncontrollable, common European intelligence agency were created? (Wetzling: 2009)

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In fact, what is usually meant by ‘democratic intelligence’ refers to the careful combination of the branches of power, sometimes including all of them (executive, parliamentary and judiciary accountability). Generally speaking, the balance of power doctrine should not blur the line between the real, direct empowerment of people and the system of electoral-representative or ‘aristocratic’ institutions that are not responsible to the people (that is the case with non-governmental state institutions in many countries, e. g. the central bank or the ombudsman). However, it seems that the logic of state secrecy requires additional depoliticization. Hans Born and Thorsten Wetzling illustrate this point well: “introduction of more transparency and public accountability leads to a better system of checks and balances on the services. On the other hand, the services and their activities are becoming part of the normal political debate, which leads to the danger that the actors in that political debate will use the services and their work for their own benefit” (Born and Wetzling 2007: 325). In other words, there is even a built-in fear of indirect democratization and it seems that the pre-political and infrapolitical character of intelligence services must be defended. As if politicization is to be excluded precisely in the place where it should enter the field of intelligence, by virtue of the aporetic character of state secrecy. The very same concerns may lead to diametrically opposite conclusions: for instance, parliamentarians may be prevented from pursuing intelligence oversight precisely in order to prevent the politicization of intelligence; but the same fear resulted in the restriction of the executive’s influence on intelligence and the increase of bipartisan parliamentary oversight, in order to prevent the politicization of intelligence. Moreover, while many theorists claim that political parties may take advantage of intelligence oversight, others suggest that there is insufficient motivation for parliamentarians to engage in proactive oversight given the fact that there is no direct reward from voters for closed committee sanctuaries. When there is an input relation and direction, that is to say, an *ex ante* relation between the executive and the intelligence services, there is a danger that state secrecy will be governed by arbitrary political preferences, far beyond political neutrality. On the other hand, when there is an output relation and control, that is to say, an *ex post* relation between parliamentarians and intelligence services, there is a danger that *ex post facto* accountability will be merely reduced to a feeble putting out of fires. All of

which is to say that there is always a meta-dilemma of de-politicization and political decisions. Thus, intelligence agencies must not be political: “no intelligence agency shall exert influence over the institutional, political, military, police, social and economic situation of the country and the existence of legally formed political parties” (cited in Estévez, internet); yet, there are necessarily matters of political sensitivity and the executive has to be involved in the decision-making. Therefore intelligence agencies are constantly vacillating between self-depoliticization and excessive ‘open-door’ politicization, pure autonomy as re-arcanaization and heteronomy as the betrayal of pure secrecy.

Very similar difficulties appear with regard to other branches of power. For instance, it is claimed that “too intrusive control by the judges carries them into the executive sphere, that is to say, it blurs the separation of powers between the two branches of the state” (Leigh 2007: 76). So, who guards the guardians? Obviously, administrative, parliamentary or executive oversight is possible only to the extent that intelligence agencies want to subject themselves to outer control and report even on their most dubious actions they have taken within their own walls. And vice versa, oversight can be put into effect only to the extent that there is institutionally assured interests in controlling state secrecy. As demonstrated by a case study on Poland’s oversight practices, the parliamentary access to sensitive information remains dependent on the discretion of intelligence agencies (Zybertowitz 2005).

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4. The intelligence factory and the possible limits of a liberal approach

Given that normative opposition to the abuse of power by intelligence is dominated by liberal theorists, let us pay attention to certain liberal assumptions and interpretative models. These theorists do not only mention the balance of power doctrine, but rather also speak of defending privacy as the outstanding victim of intelligence agencies. Even though intelligence, after the so-called open-source revolution, overwhelmingly relies on sources that are potentially accessible to everyone, the conflict between privacy and state secrecy still exists. As far as state secrecy and liberalism are concerned, Alain Dewerpe summarized his own position categorically: “‘The social contract’ abolishes any possibility of secrecy in the execution of power, any lack of transparency in the intentions of the sovereign, any excess in carrying out government business, and any legal threshold region that would allow for the employment of clandestine means. All power will be dominated by the principle of publicity. Liberal thought ... censures the space of the secret” (Dewerpe 1994: 78). Obviously, this statement is an exaggeration. Nevertheless, Dewerpe rightly emphasizes that state secrecy should be treated as unacceptable or highly problematic within liberalism, at least from a strongly normative point of view. Furthermore, the defense

of privacy cannot be reduced to the demand for transparent and accountable power. Derived from the right to private property, the defense of privacy exceeds the question of regulating state institutions.

Liberal theories of secrecy are mostly one-sidedly focused on the defense of the private sphere which they oppose to the realm of 'legitimate coercion' that has to be limited and controlled, because otherwise it becomes tyrannical, absolutist or totalitarian. Put differently, liberal theories operate within the binary opposition of an authentic private sphere and dangerous state institutions – the right to secrecy as freedom from interference is contrasted with state secrecy. However, the very framework of this approach is problematic. First of all, it repeats the standard liberal attitude, according to which the questions of equal participation, symmetry and transparency can be posed only with regard to the sphere of 'legitimate coercion'. Subsequently, this understanding remains blind to the increasing intertwinement of state institutions and the private sphere. Today's open-source intelligence may serve as an illustration of this: "OSINT is changing the traditional conception of intelligence; by 2015 most small or medium sized states will be able to acquire intelligence from a diverse range of commercial satellites. This development will progressively lead to the importance of the private sector in intelligence. The technological revolution in general and OSINT in particular are multiplying the competition in intelligence production. There are now more actors in intelligence, which has consequently led to the concept of an 'intelligence factory'" (Díaz Matey, internet). Indeed, the true danger does not come from the possibility of a state within a state, but from the intelligence factory that blurs the line between the private sphere and state institutions. The problem of increased mass surveillance within the private sphere and the challenge concerning the 'intelligence-industrial complex' remains a blind spot for liberal theories of secrecy to the extent that they glorify the private sphere as the innocent realm of free contractual relations.

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5. Changing engagement perspective

What conclusion could be drawn from the previous suggestions, without providing any patronizing directives for movements? Indeed, today it is much easier to thematize intelligence issues than it was ten years ago, owing to whistleblowers and activists like Edward Snowden, Julian Assange and Chelsea Manning. However, their achievements often go hand-in-hand with romantic ideas of 'outlaws who rewrite the law' and 'heroes speaking truth to/about power', instead of paying attention to systematized, institutionalized accountability and transparency, with particular emphasis on external reviews by independent civil society organizations.⁴ Is it not naïve

4 According to Hans Born and Thorsten Wretzling, "civil society organizations may curtail the functioning of intelligence services by giving an alternative view (think tanks),

to think that in the long run illegitimate activities could be effectively prevented from a purely informal or moralistic or defensive standpoint? Furthermore, we should think of checks and balances that would be able to provide pluralistic, flexible accountability mechanisms within today's 'disaggregated sovereignty' and 'networked governance', beyond merely internal intelligence control that is not open to public negotiation.

As discussed earlier, there are many risk factors for engagement against/for secrecy. Even though we should not underestimate practical suggestions concerning safe internet usage (privacy-enhancing technologies, such as uncrackable encrypted communications), we should keep in mind that a merely defensive strategy only prolongs an essentially asymmetrical framework in which ordinary citizens cannot influence intelligence. What is more, as we argued earlier, pro-privacy movements and digital rights groups should not be blind to the fact that the private sphere is not an innocent realm opposed to potentially illegitimate state mechanisms. Thus, engagement against/for secrecy should fight against naivety in two directions: on the one hand, it should take into consideration that the private sphere is itself a field that significantly contributes to the increase of mass surveillance (according to this, it should put pressure on private companies as well), and on the other hand, it should also be aware of dangers within the public sphere (from manipulated public discourse and the 'security theater' to pata-politics). Freedom from domination by the intelligence factory is not merely a question of privacy as a lack of wrong interference, or the possibility of public contestation – it is the common good of the effective control of power. It is a political question. Needless to say, the role of today's whistleblowers could not be more important. Yet, without creating new institutions or transforming the existing ones their torch bearing efforts will only remain solitary actions. It is impossible to change the world of state secrecy without taking power within it, at least in a certain way. And maybe one day even a post-secret politics will become imaginable.

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Bibliography

- Birchall, Clare (2011), "Introduction to 'Secrecy and Transparency', The Politics of Opacity and Openness", *Theory, Culture & Society* 28 (7–8): 7–25.
- Born, Hans, Wetzling, Thorsten (2007), "Intelligence accountability: challenges for parliaments and intelligence services", in Loch K Johnson (ed.), *Handbook of Intelligence Studies*. London / New York: Routledge, 315–329.

disclosing scandals and crises (media), or by raising complaints concerning wrongdoing (citizens)" (Born and Wretzling 2007: 317). Yet, maybe alternative mechanisms are imaginable that could be institutionalized in such a way that citizens would be able to control intelligence more directly. For instance, special delegates could represent the people (or at least human rights organizations) within the parliamentary control of intelligence, independently from the usual alternation of political parties in power.

- Dewerpe, Alain (1994), *Espion. Pour une anthropologie du secret d'État contemporain*. Paris: Gallimard.
- Díaz Matey, Gustavo (2005), "Intelligence studies at the dawn of the 21st century: new possibilities and resources for a recent topic in international relations", (internet) available at: <https://www.ucm.es/data/cont/media/www/pag-72533/Gustavo2.pdf> (viewed 12 March, 2016).
- Estévez, Eduardo E., "Developments of the democratization of intelligence in Argentina: Trends in secrecy policy. Implications for comparing transitional settings", (internet) available at: <https://fas.org/irp/world/argentina/trends.pdf> (viewed 12 March, 2016).
- Gilson, Erin Cunniff (2007), "Zones of Indiscernability: the Life of a Concept from Deleuze to Agamben", *Philosophy Today* 51 (Supplement): 98–106.
- Horn, Eva (2011), "Logics of Political Secrecy", *Theory, Culture & Society* 28 (7–8): 1–20.
- Horn, Eva (2013), *The Secret War. Treason, Espionage and Modern Fiction*. Evanston, IL: Northwestern University Press.
- Johnson, Loch. K. (ed.) (2007), *Handbook of Intelligence Studies*, London / New York: Routledge.
- Leigh, Ian (2007), "The accountability of security and intelligence agencies", in Loch K Johnson (ed.), *Handbook of Intelligence Studies*, London / New York: Routledge, 67–82.
- Schmitt, Carl (1938), *Der Leviathan in der Staatstheorie des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols*. Hamburg.
- Schmitt, Carl (1995), *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*. Berlin: Duncker and Humblot.
- Tamás, G. M., "Orbán és én nem tartjuk egymást hülyének", (internet) available at: http://mno.hu/nagyinterju_magazinban/tgm-orban-es-en-nem-tartjuk-egymast-hulyenek-1331675?utm_source=mandiner&utm_medium=link&utm_campaign=mandiner_201603 (viewed 12 March, 2016).
- Zybertowicz, Andrzej (2005), "An Unresolved Game. The Role of the Intelligence Services in the Nascent Polish Democracy", in Loch K Johnson and Ian Leigh (eds.), *Who's watching the spies? Establishing intelligence service Accountability*, Washington: Potomac Books, 145–159.
- Wetzling, Thorsten (2009), "European intelligence cooperation and accountability", in S. Gustavsson and C. Karlsson (eds.), *The Illusion of Accountability in the European Union*. London / New York: Routledge, 96–111.

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Angažman protiv tajnovitosti i za tajnovitost

Apstrakt

Ovaj rad je posvećen angažmanu protiv državne tajne odnosno angažmanu za tajnovitost, slobodnu od uplitanja. Kroz analizu podela koje proističu iz postojanja državne tajne (u obliku isključivanja, potčinjavanja i tlačenja) identifikuje se način na koji tajnovitost iskrivljava jednako učešće u političkim zajednicama. Autor uvođi pojam patapolitike ne bi li opisao pogrešan odnos prema efektu tajnovitosti. Nadalje, u radu se tematizuju ključna pitanja savremenih *intelligence studies*-a (npr. demokratska kontrola tajnih službi ili doktrina o ravnoteži vlasti), sa posebnim osvrtom na moguće granice liberalnog pristupa. Na kraju, autor izražuje metakritiku okvira u kojem se privatna sfera idealizuje kao puka žrtva pogrešnog uplitanja.

Ključne reči: državna tajna, *intelligence studies*, demokratska kontrola tajnih službi, pokreti za privatnost, javna sfera