

United States Senate

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Secrecy in International and Domestic Policy Making: The Case for More Sunshine

United States Senators Daniel Patrick Moynihan and Ron Wyden

October 2000

Foreword

No one has been a more fearless or persistent crusader for greater accountability and less secrecy in government – particularly in the realm of national security and foreign policy – than the senior Senator from New York, Daniel Patrick Moynihan. For decades he has tirelessly and relentlessly pressed the case for greater openness and transparency in government at the national and international levels.

Senator Moynihan eloquently exposed the costs of secrecy in United States foreign policy and national security in his 1998 scholarly book, Secrecy: The American Experience. Among the many costs, he estimates the secrecy imposed by the United States military greatly exacerbated the Cold War and its many effects, such as the arms race; whereas a more open discussion of the Soviet Union and its military-industrial capabilities would have diminished the threat the Americans perceived the USSR to be.

Senator Moynihan's elegant arguments for openness in government seem even more compelling now that economic and financial clout seem to have attained equal footing on ground once reserved exclusively for military might. It is this shift toward a world in which economic and financial institutions and global corporations hold such sway that gave me the impetus to seek out his interest in launching our own joint investigation into the secret practices by federal agencies and the international organizations in which the United States is a member. I have been rewarded many times over in this joint venture by his profound insight and foresight, and for that I am deeply grateful. I hope that in the days ahead, Members of Congress on both sides of the aisle will pick up the torch of openness in government that Senator Moynihan has carried so valiantly.

Ron Wyden
Washington, D.C.
October 10, 2000

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Introduction

The Cold War was a time of war and rumors of war without cease, global ideological conflict, and the possibility of an atomic Armageddon. This age is now past, and major conflict is no longer an imminent possibility. In this new age, it would make sense to expect that the system of government secrecy would change accordingly. But a new way of thinking about secrecy has not emerged, for the most part, in the larger government. In fact, the secret side of government has consistently grown since the end of the Cold War, even as our armed forces have declined considerably.

Secrecy is a form of government regulation. As the Commission on Protecting and Reducing Government Secrecy found in 1997, "Excessive secrecy has significant consequences when policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate."¹

Secrecy also operates on an international level. As economic might becomes a greater currency of power in the post-Cold War era – and thus becomes more central to national interests – the decisions made by international organizations such as the World Trade Organization (WTO) gain greater influence over people's lives. Unfortunately, these decisions are too often made behind closed doors.

We believe it is time to take a fresh look at secrecy and determine whether such secrecy continues to serve the interests of our society. We also believe the burden of proof should be squarely placed on those who would keep the doors barred. Our study focuses mainly on areas other than foreign policy and national security. We begin with a look at important decisions in selected international organizations, such as the WTO and International Monetary Fund (IMF), that may affect the daily lives of Americans. We also consider important decisions in certain Federal government agencies, including the Federal Reserve Board.

Secrecy in International Organizations

Since their creation in the years immediately following World War II, as fora for exchanging ideas and enhancing mutual understanding, many international organizations have begun to transform themselves into standard-setting and regulatory bodies. Multilateral agencies are now actively considering the creation of global standards in areas from the safety of auto seat belts, tires and brakes to the lead content in mineral water, procedures for conducting drug trials to minimum levels of capital banks must hold in reserve to reduce

the risk of global financial panic.

As tariffs have been reduced, there has been a growing emphasis on removing trade barriers. This trend has continued with the creation of the WTO in 1995 where regulatory standards – including those established ostensibly to protect health, safety and the environment – have become a prominent target for dispute settlement challenges by WTO members.

Organizations meet in secret only because their members want or allow them to do so. Official United States policy generally favors openness in such international fora, but we have failed miserably when it comes to persuading other nations to join us in pressing to open the doors in Geneva and around the world. The failure of our policy is painfully evident in last year's attempts to open up the notoriously secretive International Olympic Committee (IOC) – an effort driven in large measure by our own full-blown international embarrassment in the scandal over the Salt Lake City Olympic bid.

World Trade Organization

The World Trade Organization was created on January 1, 1995, following the successful completion of the Uruguay Round of trade negotiations. It replaced the General Agreement on Tariffs and Trade (GATT), which was established in 1948 as a provisional organization. Located in Geneva, Switzerland, the WTO conducts at least 200 meetings of councils, committees and working parties each year, although the Congressional Research Service (CRS) estimates that the actual number "may be much higher."² The 138 Member nations of the World Trade Organization make decisions on an ongoing basis that effect the lives of millions of Americans and billions of citizens around the world. These are decisions related to their employment, health, safety and well-being.

American taxpayers contributed an estimated \$14 million of the WTO's \$82 million budget in 1999.³ Private citizens, however, have no independent access to the WTO's meetings. As described by CRS, "WTO meetings of councils, committees and working parties are government-to-government meetings. Each government develops its own policy position based on the effects it will have on its own domestic economy . . . It is also important to emphasize that discussions in some WTO committees and councils may require subject matter expertise. Governments may select representatives to the meetings who have the necessary expertise and experience to evaluate the options."⁴ Unlike some other international organizations, however, decisions are made by member governments, not by the WTO bureaucracy.

WTO decisions are usually reached through consensus among the member countries. If a consensus is not possible, the WTO agreement allows for voting, with each country having one vote. A simple majority is the norm, but in some circumstances a three-quarters or two-thirds majority is required. Decisions are made through a Ministerial Conference, which is required by the Marrakesh agreement to meet at least once every two years, but the General Council does the day-to-day work. The Agreement Establishing the

World Trade Organization contains no provisions requiring secrecy or confidentiality in meetings and the release of documents, but Article IV, Sections 2 and 6 gives the General Council and other committees the authority to decide their own rules and procedures, approved by the body to which they report.

Among all the closed meetings of the WTO, the Dispute Settlement Understanding (DSU) is *primus inter pares*. The WTO dispute settlement process has evolved over some 50 years from early GATT procedures; throughout this development, the GATT/WTO process has relied on the confidentiality of dispute settlement proceedings, and some governments even treat their submissions to WTO panels as confidential diplomatic communications. A WTO member who has been found to violate a WTO Agreement is expected to implement the dispute panel's recommendations within a reasonable period of time. If it does not and a compensation agreement is not reached between the disputing parties, the losing Member may be subject to WTO-authorized countermeasures (e.g., additional tariffs placed on its imports by the prevailing party to offset the economic damage) until the dispute is resolved. The DSU expressly states that consultations, panel deliberations and proceedings "shall be confidential." The DSU Working Procedures for panels state that they "shall meet in closed session."

In a 1999 paper reviewing four years of the DSU, the United States Trade Representative (USTR) wrote: "Under the DSU, a party may make its own dispute settlement submissions public, but in many instances a party requests that its submissions be treated as confidential documents. The secrecy of submissions fuels public suspicion of the dispute settlement process and undermines confidence in the WTO. It will not reduce public suspicion if submissions are made public only after the proceeding is over and input from stakeholders is therefore futile. Moreover, because the submissions are not public, the Secretariat describes them at length for the official record in the descriptive part of the panel report. And the submissions remain confidential even after they have appeared, sometimes verbatim, in the panel report. If submissions are public when submitted, the panel reports can be much shorter, and therefore faster and more economical to produce and translate."⁵

The same USTR DSU Review paper observed: "Disputes in the WTO now take place behind closed doors, even though hearings of national courts, and other international tribunals such as the International Court of Justice are open to the public. The lack of public access to dispute settlement hearings makes it more difficult to resolve disputes, due to suspicion of the non-transparent dispute process among private stakeholders. Public mistrust of the dispute settlement system undercuts public support for the WTO."⁶ The U.S. has offered to open every panel meeting in which it has been involved, and has challenged other WTO Members to allow observers at panel hearings. The USTR called for changes in the DSU to require panel and appellate body meetings to be open to observers, except for those parts of meetings that deal with confidential business information.

In response to a question about which WTO meetings should be open or closed, CRS

replied: "Open meetings (presumably to anyone who wants to attend) do not appear to be practical or feasible in most cases . . . In some cases, though, it might be useful to have input from non-governmental organizations (NGOs), who might add another perspective. Also, if NGO observers were permitted at some meetings, it might ease the misunderstandings that often result from closed-door meetings."⁷

The challenge for the United States in this particular international regulatory body is to assure that trade barriers are lowered and the highest international standards are achieved without compromising public health, safety and other consumer protection. USTR currently tries to achieve these twin goals by soliciting public comment on a wide variety of issues at several different stages of WTO consideration. Accomplishment of these goals is surely made more difficult, however, by the lack of transparency and openness at the WTO.

International Monetary Fund

Another international organization with considerable clout is the International Monetary Fund. Created in 1946 as part of the 1944 Bretton Woods conference, the IMF's charter is to promote international monetary cooperation, including exchange rate stability through such means as temporary loans. According to CRS, the IMF's three basic functions are: to make loans to help countries resolve exchange rate crises and stabilize their economies; to monitor national economic and exchange rate policies and reporting its findings to other members and (with the country's permission) to the public; and to serve as a forum for discussing and resolving international financial and monetary problems.⁸ The IMF's principal power is its ability to approve or deny loans.

As part of the monitoring and reporting responsibilities, IMF staff prepare a detailed report on their consultations with member countries. "In recent years," according to CRS, "the IMF has been urging countries to allow the public release of these documents."⁹ Beginning in 1998, the IMF began posting Public Information Notices (PINs) which contained the Executive Board's assessment of each country's economic situation, and had released 84 PINs through September 1999. Nineteen countries refused to authorize release of the Executive Board's evaluation.

The CRS observed: "Paradoxically, the IMF has little direct impact on the daily lives of U.S. citizens, yet its activities can affect Americans because of their impact on the world monetary system and world trade. The IMF has its most immediate impact on people when their governments seek to borrow money from the international agency... IMF loans to other countries can have an indirect impact on the U.S. economy and U.S. citizens if those countries are major trading partners or countries that play a major role themselves in the world financial system."¹⁰

The IMF Board of Governors meets formally once a year at the Joint IMF-World Bank Annual Meetings. This year's annual meetings were completed last month in Prague, Czech Republic, where demonstrations against globalization, similar to those against the WTO in Seattle took place. "That meeting is closed to the public," reports CRS, "though

Ironically, both organizations continue to issue such demands largely from behind closed doors.

International Olympic Committee

Another international organization infamous for closed door meetings is the International Olympic Committee. The minutes of the IOC's general sessions are kept secret for 10 years and executive board minutes have been embargoed for 20 years, a policy which the U.S. representative Anita DeFrantz said protected members from seeing their candor displayed publicly.¹⁸

Prompted by reports of bribery, an independent U.S. Olympic Committee (USOC) investigation was launched, headed by former Senator George Mitchell. On March 1, 1999, the Report of the Special Bid Oversight Commission found that Salt Lake City's top officials had engaged in an aggressive program of cash payments and gift-giving – totaling more than \$1 million – to IOC members and their families. Nine IOC officials resigned or were expelled, and as many as 20 others were investigated. As a result of this bidding scandal, the USOC agreed to make public all its meetings, with the exception of its executive sessions. The Mitchell Commission also recommended, among other things, that the IOC make its financial statements available to the public.

However, IOC President Juan Antonio Samaranch has resolutely resisted any institutional reforms, and improvements are slow in coming. A glance at its budget last year reveals that the IOC spent only \$25 million for its anti-drugs program, but allotted \$150 million for a public relations agency to polish its image.

Several bills have been introduced in the 106th Congress since the scandal. Among them are proposals to revoke the IOC's U.S. tax-exempt status and to apply the Foreign Corrupt Practices Act to the organization. (The Foreign Corrupt Practices Act outlaws bribery of public officials overseas.) However, full and swift implementation of the Mitchell Commission recommendations would be the best – and perhaps the only – way the International Olympic Committee could fully restore its integrity and stature.

Secrecy in Federal Agencies

Secrecy is more often the rule rather than the exception in Federal agency decision-making. The way Americans live their lives -- from the number of salmon one can catch or the interest rate on a car loan to the level of protection consumers get from creditors in bankruptcy court to who controls Internet domain names -- all these and more continue to be affected if not decided in meetings closed to the public. Secrecy may be a privilege in a democratic society – a privilege some would say is exercised too freely by many in the Federal Government.

Bankruptcy

In 1994, Congress established a commission to recommend ways to revamp the nation's bankruptcy laws. But in August 1997, the *New York Times* reported that the commission may have violated the Government in the Sunshine Act by holding a secret teleconference meeting. The conference call focused on a hotly contested topic on the group's agenda: proposals to change the requirements by which individuals can seek protection from creditors.¹⁹

Banks, credit card companies, and other businesses strongly opposed these changes and argued that these regulations were not tough enough on debtors. The upshot: These financial institutions could have sued the commission in Federal district court and prevailed because of the panel's violation of Federal open-meeting rules. This, consequently, would have needlessly raised the bar for consumers in bankruptcy court.

Environmental Law

In 1992, an environmental advisory group -- appointed by the U.S. Sentencing Commission to draft recommendations for environmental sentencing guidelines -- was criticized and eventually taken to court for deliberating behind closed doors. Ironically, corporate representatives -- including the pro-business Washington Legal Foundation -- were the ones decrying the closed meetings as "cloak-and-dagger," and they accused the panel of imposing a "gag rule" on communications with outsiders.²⁰

Nuclear Energy

A more recent, August 1999 case involved Tri-Valley Cares, a Livermore, Calif. watchdog group, and the Department of Energy (DoE). Tri-Valley Cares accused the DoE of lying about operations changes at the Lawrence Livermore national laboratory and the need for a site-wide environmental review. Claiming that the DoE planned to shift its nuclear weapons upgrade work from Los Alamos to Livermore, the watchdog group raised safety and environmental concerns because of the facility's proximity to the heavily populated San Francisco area. "This plan has gone forward in secret, and the public has been inappropriately excluded from any decision-making role... In a democracy, we should not have nor should we tolerate nuclear weapons projects being built, augmented and operated in the dark," said the executive director of Tri-Valley Cares.²¹

In early 1999, issues relating to restarting a test reactor (the Fast Flux Test Facility, or FFTF) at the Hanford nuclear reservation in Washington State and the decision-making process itself became contentious. From 1983 to 1992, the reactor operated as a test site for nuclear fuel and components but had been in "stand-by" mode since 1993. A Hanford watchdog group, Heart of America, argued that it would be unlawful to restart the reactor because the Nuclear Energy Research Advisory Committee (NERAC) had ignored Federal requirements for open meetings and public comment.

Internet Domain Names

The Commerce Department in July 1999 ordered the Internet Corporation for Assigned Names and Numbers (ICANN) – the nonprofit governing body responsible for registering and overseeing Internet address registrations -- to open its board meetings to the public immediately and eliminate a \$1 fee on Internet address registrations.²² As Jeri Clausing wrote in the *New York Times*: "They (ICANN) are mysteriously appointed, they meet behind closed doors and they have questionable public accountability. Yet members of the interim board of the Internet's new oversight body are beginning to make decisions and shape policy that could ultimately affect everyone who uses the global network."²³

ICANN had held closed meetings since its formation, but it came under increased criticism in the Spring of 1999 when it began making policy decisions. One resulted in a call to collect domain registration fees -- funds that would be used to finance ICANN's \$5.7 million annual budget. Critics contended the board was overstepping its authority and ignoring a mandate to create a transparent, bottoms-up organization. Instead, the board was working behind the scenes with powerful international corporate and government interests in a top-down hierarchy. The Commerce Department letter said: "ICANN should immediately open its board meetings to the public. Transparency is critical to establishing trust in decision making. And trust is essential for ICANN's ultimate success."

The evolution of ICANN is a good example of the positive effects of an open-door policy. The group responded positively to pressure from key members. By implementing internal reforms and throwing open the doors to its meetings, ICANN has gone a long way toward improving accountability and defusing its critics' concerns.

Fisheries

The way in which the United States and Canada apportion the annual harvest of sockeye, chinook and other salmon has long been bitterly disputed. Fishermen of both nations catch salmon born in each other's streams. But the Canadians argue they will not stop fishing U.S. stocks until Alaska slows down its harvest of British Columbia stock. Alaska, on the other hand, says it has good natural runs and should not have to cut back its harvest because of dams, habitat loss, or other conditions that it did not cause.

Past Canadian and U.S. efforts to fairly apportion the harvest have often ended in acrimonious stalemate. While the displays of anger are usually very public, reported *The Oregonian*, "as they have been in the past, the negotiations this week were conducted behind closed doors..."²⁴ Some observers believe a more open process, as is the case with the Northwest Power Planning Council – the only forum in which (Northwest) fish issues are debated in public – would provide greater accountability and incentive to reach agreement.

Federal Reserve Board

From Robert Reich on the liberal side of the spectrum to Robert Novak on the conservative, policy analysts agree that to a great extent America's prosperity is driven

by Alan Greenspan, Chairman of the Federal Reserve Board, and the Federal Open Market Committee (FOMC). The judgments Mr. Greenspan makes daily affect the number of jobs in America and the wages of those who hold them. The man widely viewed as the second most powerful person in Washington, D.C. conducts most of his business around a mahogany table behind closed doors. Alan Greenspan can throw markets into tumult with a few words.

The Fed's main role is managing the nation's money supply. Through its open market operations, the Fed buys and sells U.S. Treasury securities, which expands or tightens the money supply, and thereby lowers or raises the price of money from Wall Street to Main Street. The supply of money can affect GDP growth, employment and the rate of inflation. In a world of flexible exchange rates and highly mobile capital, it can be argued that the monetary policy adopted by the Fed is more important than the fiscal policy set by Congress and the Executive Branch in determining growth in GDP and employment.

The inherent conflict between the Fed's accountability to Congress and its independence or need to be insulated from political and private pressures has more often than not been resolved in favor of the latter. The *Los Angeles Times* wrote in February 1996 that the Fed "continues to conduct key policy meetings behind closed doors. It releases summaries several weeks later but waits five years to disclose the full minutes of the meetings, contending that earlier disclosure would have a chilling effect on its internal debate."²⁵ The Fed "plays such an enormous role out of the spotlight in the well-being of average American households that when it comes to running the economy, the Fed, which operates independent of even the President, now looms as important as the White House and Congress... Through its management of interest rates, the Fed can influence the price of everything that is bought on credit, from new factories to dishwashers."²⁶ The Fed's management of the money supply helps determine the costs of home loans, car loans, credit card rates and every other type of debt, but the Fed still waits five years to release redacted details of its closed door meetings on interest rate policy.

In an August 2, 1999 Barron's story, Robert Auerbach wrote: "In fact, rapid publication of FOMC data would reduce its potential value to the few who see it early. Markets work best with full and accurate information, rather than with rumors and leaks. Even more important is the need for prompt accountability by individual officials, whose actions can have widespread economic effects and thus a major impact on the lives of millions of Americans."²⁷

Government in Sunshine Act

Much of the controversy surrounding Federal activities carried out behind closed doors has to do with the 24-year-old Government in Sunshine Act and the 28-year-old Federal Advisory Committee Act. These two laws require open business meetings of all collegially-headed Federal boards and commissions, including all committees appointed by the President.

The Government in Sunshine Act also requires, with few exceptions, open meetings among members of multi-member agencies and commissions (i.e., Securities and Exchange Commission, and the Federal Trade Commission) after at least seven days' advance public notice. A "meeting" is defined as the "deliberations of at least the number of agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." The law does not, however, restrict the administrator of an agency from having a nonpublic meeting with senior staff at any time. Congress focused on multi-member agencies rather than departments headed by a single official, according to the *Legal Times*, so the public could benefit from the collective deliberation of those with differing political philosophies, experience, and expertise.²⁸

Some critics of the Sunshine Act argue that it has actually worked at cross-purposes: It has impeded collegial deliberation and lowered the quality of decision-making, while failing to provide meaningful public access. The result, some say, is that real decision making devolves to staff, who are not subject to the Sunshine Act.

Critics contend that the fault lies not with the law or process, but with the agency members themselves. They are, after all, public officials, and should therefore deliberate in the open. The Society of Professional Journalists' Freedom of Information Committee warned in 1995 that "the people who are covered by the law [should] change – not change the law to accommodate the people who may be offended or intimidated by its contents."²⁹

Joseph Stiglitz, former chief economist at the World Bank, is even more pointed. In his January 27, 1999 Oxford lecture "On Liberty, the Right to Know, and Public Disclosure," he asked "Given that the public has paid for the gathering of government information, who *owns* the information? Is it the private province of the government official, or does it belong to the public at large? I would argue that information gathered by public officials at public expense is owned by the public - just as the chairs and buildings and other physical assets used by government belong to the public."³⁰ Stiglitz went on to stress that compelling public interest arguments for openness in government tend to run up against the powerful, private incentives of government bureaucrats. "Secrecy provides some insulation against being accused of making a mistake... The second incentive that public officials have for pursuing secrecy is that secrecy provides the opportunity for special interests to have greater sway... Secrecy is the bedrock of [this] persistent form of corruption, which undermines confidence in democratic governments in so much of the world."³¹

Ironically, a 1995 review of the Government in Sunshine Act by a special committee of the Administrative Conference of the United States (ACUS) made recommendations for more secrecy. Its recommendations for modifying the Watergate-era law, to be carried out on a five- to seven-year trial basis, included allowing agency members to meet in private, provided that all votes were public and all meetings memorialized by a detailed summary -- to be made public no later than five days after the meeting. The ACUS believed this would improve transparency over the current system, where staff deliberate behind closed

doors.

The ACUS report neglected to address the Sunshine Act's 10 exemptions to its open-meeting rule. Meetings may be closed under the Sunshine Act for one or more of the following reasons: "security classified, internal personnel matter, specific statutory protection, trade secret, personal privacy, law enforcement investigatory records, regulatory or supervisory information, financial speculation, premature disclosure," or "adjudication matter." Notices of closed meetings must be published in the *Federal Register*.

To gain a better understanding of the use of these exemptions, we asked the CRS to examine a sample of closed meetings for which exemption notices were filed in the *Federal Register*. In 1998, they found notice of 1,524 closed meetings, of which 1,292 (85 percent) cited the authority of the Sunshine Act as the basis for closing the meeting.³² No specific statutory authority was cited for 12 percent of the closed meetings, and the remaining three percent were attributed to other statutory authority, including the Federal Election Commission, the Federal Advisory Committee Act, and the Trade Act of 1974.

The *Federal Register* contained notice of 122 closed meetings in June 1998. Sunshine Act exemptions based on trade secrets or personal privacy were cited 50 times (41 percent) and no statutory authority was given in 24 cases (20 percent). These 24 cases involved meetings of the Assassination Record Review Board, Consumer Product Safety Commission, the Federal Aviation Administration, the Federal Election Commission, the Federal Reserve Board, the Securities and Exchange Commission, the U.S. Enrichment Corporation and other entities. CRS conducted fact-finding research on several of these closed meetings where no reason was given.

- The Assassination Records Review Board deliberated in closed session over the immediate or later disclosure of assassination records.
- The closed meeting of the Consumer Product Safety Commission was one of its monthly staff briefings for panel members on staff determinations of substantial product hazard defects and cases on non-regulated products.
- The FEC's three closed meetings in June 1998 included a status report from the general counsel's office on a matter requiring no action, approval of investigatory action relating to several alleged campaign violations, and a decision to direct the general counsel to file a motion in district court to remand a case to the FEC.
- The Federal Reserve Board held five closed meetings in 1998 and early 1999, with no reason given for closure. Among the topics were approval of the appointments of two directors to fill unexpired terms at the Atlanta branch, designation or reappointment of chairmen at 11 Federal Reserve Banks, approval of written guidelines on investments held by members of the Federal Open Market Committee, and matters related to minimum capital requirements under the Basle Committee on Banking Supervision.
- The Securities and Exchange Commission refused to share any information about

the topic of its June 1998 closed meeting, telling CRS it must file a formal request for such records under the Freedom of Information Act.

- The closed meetings of the U.S. Enrichment Corporation discussed proprietary and financial information relating to its plans for an initial public offering.

The examples provided thus far have not touched on national security or foreign policy – two areas where the need for secrecy has traditionally been tolerated as necessary, if not imperative. According to a 1996 report from the House Permanent Select Committee on Intelligence, the Federal government spends at least \$5.6 billion a year to keep national security information classified. This enormous sum of money is even more startling when one considers that only 1 percent of this goes toward the declassification of obsolete documents. It also excludes the secret classification budget of the Central Intelligence Agency (CIA).

The sheer volume and level of classification (e.g., Limited Official Use, Confidential, Secret, Top Secret, etc) have been the subjects of much scholarly debate. In a March 1999 address, Senator Moynihan noted that of the 6,610,154 secrets created in 1997, only approximately 1.4 percent were created pursuant to statutory authority. The rest were "pure creatures of bureaucracy," spawned by Executive Orders.³³

The recent declassification of documents related to the disappearance of two Americans, Charles Horman and Frank Teruggi, during the 1974 coup in Chile vividly reinforces Mr. Stiglitz' proposition that secrecy provides bureaucrats or, in this case diplomats, insulation against public criticism. American officials at the time categorically denied any role in the young men's deaths, which became the subject of the 1982 movie "Missing." In 1980, pursuant to a Freedom of Information Act request, the government released heavily-censored results of classified, internal investigations. The investigations appeared to clear the American and Chilean governments of any responsibility. Now that some of the redacted material has been unveiled, "some of those documents make clear for the first time that the State Department concluded almost from the beginning that the Pinochet government had killed the men... The investigators speculated, moreover, that the Chileans would not have done so without a green light from American intelligence."³⁴

"With most of the blacked-out portions now restored, the documents declassified by the State Department illustrate how exemptions in the Freedom of Information Act – a law that was meant to reduce secrecy – can be misused. Two principal exceptions that the department used allow the government to withhold information on the grounds of national security and executive privilege."³⁵ But the National Security Archives dissented; preventing embarrassment is not an exemption clause. A senior State Department official told the *New York Times*, "Classification should not be used to prevent embarrassment of government agencies or officials, which would be the principal reason for withholding when one gets down to the bone."³⁶

National security and foreign policy are the motherload of controversy over classified materials, from the Nixon Administration's attempt to prevent the publication of the

Pentagon Papers to the Iran-Contra Affair. A proper balance must be struck between the public's right to know and protecting our national interest. Our system of secrecy has yet to achieve it.

CONCLUSIONS AND RECOMMENDATIONS

The subject of government secrecy brims with paradox in a democratic society. The Framers of the United States Constitution met in secret for months at a time and did not publish the minutes of their meetings until decades later. Yet, they specifically rejected secrecy as a *modus operandi* for the government that they created. As James Madison argued in 1822, "A people who mean to be their own governors must arm themselves with the power that knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."³⁷

Secrecy encroaches on the people's right to meaningful participation in the democratic process and renders public accountability problematic. If "knowledge itself is power," as Francis Bacon believed, then government secrecy facilitates the concentration of power and control in the hands of the few. And, as Stiglitz observed, "secrecy breeds more of itself."

The costs of secrecy in U.S. foreign policy and national security have been well documented.³⁸ Secrecy in the U.S. military greatly exacerbated the Cold War and its many effects, such as the arms race. We also may have been able to avoid some of McCarthyism's worst excesses if our government had been more open. In 1946, the Army Security Agency began deciphering some of the Soviet Union's diplomatic traffic sent between New York and Moscow. Code named "Venona," this operation proved that hundreds of Americans were working for Soviet intelligence. Although the Soviets learned of this break in their codes almost as soon as we began breaking them--they had their own agents inside the facility where the codes were being cracked--the Army and the FBI did not divulge the names of the Americans implicated, because they did not want the Soviets to know their codes had been broken. Ironically, when Senator Joseph McCarthy charged in 1950 that he had proof that droves of Communists were working for the Federal government, the Soviets had already shut down their spy networks because in 1946 the code was broken.

Secrecy also has economic costs. Economists generally hold that reliable, timely information makes for better, more efficient resource allocations. Secrecy breeds inefficiency by providing cover for the influence of special interests and opening the door to corruption and bribery. Stiglitz contrasts the discipline exercised by private firms in the marketplace with the absence of a comparable discipline in public organizations. But the latter can only be achieved if fully informed public discourse – and hence, full accountability – is possible.

Behind closed doors, there is no guarantee that the most basic of individual freedoms will

be preserved. And as we enter the 21st Century, the great fear we have for our democracy is the enveloping culture of government secrecy and the corresponding distrust of government that follows.

In an open, democratic society, the ability to meet behind closed doors is not a right but a privilege. The privilege is usually – though not always – conferred with the understanding that those who meet there will be accountable for their actions. Without transparency, one must turn to accountability. Whether those who are given this privilege are in fact accountable, and whether they are actually held accountable are the weakest points in the system. Should transparency and openness be reinstated as the rule rather than the exception in Federal decision making, or can accountability be strengthened in a way that permits a limited number of doors to remain closed?

With respect to international organizations, the prospects are much less rosy for opening meetings to public observation, let alone public participation. At the global level, the U.S. advocacy of openness can be reinforced by more positive actions at home. It is difficult, for example, for the United States Trade Representative to argue credibly for public participation in Geneva, when so many Federal agency meetings – particularly in the economic arena – remained closed at home. The United States should lead by example.

Since the end of the Cold War, the number of active duty U.S. military personnel has declined from more than two million to 1.3 million, but the secret side of government just keeps growing. Secrecy is a form of regulation and can be stifling. In a new century we should get a hold on this and open up our government. Alfred Marshall, the great English economist, wrote more than a century ago: "Government is the most precious of human institutions, and no care can be too great to be spent enabling it to do its work in the best way."³⁹ To which we add, the best way is not in the dark.

What follows are several recommendations that would constitute a significant step toward pulling back the curtain of secrecy on some of the agencies and organizations we have discussed.

Amend the rules of procedure of the WTO, IMF and World Bank to require open meetings and timely release of the minutes of meetings. As the largest contributor to the IMF and World Bank and as the world's largest trading nation, it is in the United States national interest to take the lead in advocating sunshine-in-global-decision-making. The goal should be to shift the burden of proof from those who advocate openness to those who would keep the doors locked. The United States should seek changes in the charters or governing rules of international organizations in which it is a member so that open business meetings would be the norm. Public participation or observation of meetings should become the rule rather than the exception. Minutes of meetings, rather than press communiques, should be issued immediately. Some limited exceptions could be allowed for national security, foreign policy or the discussion of proprietary business information in trade disputes, but such exceptions should require a large majority of

members to vote to close a meeting because of national security, foreign policy or proprietary business reasons. Trade negotiations themselves and the actual deliberations of WTO panelists would similarly be exempted from the openness requirements.

At the next meeting of the General Council, the United States delegation to the WTO should propose under Chapter II, Rule 3 of the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, that the agenda of the General Council and next Ministerial Conference include an item calling for a change in the rules of procedure to require open meetings. This would signal the United States' intent to propose the change again at the next Ministerial, which must be held before the close of 2001.

Specifically, the United States should propose amending Chapter X, Rule 32, of the Rules of Procedure for the Ministerial Conference, which reads "The meetings of the Ministerial Conference shall ordinarily be held in private. It may be decided that a particular meeting or meetings should be held in public," so that meetings would ordinarily be held in public. The proposal should extend to Rule 33, which allows the Chairperson to issue a communique to the press after a closed meeting, requiring that the minutes of the meeting be released promptly to the public. For the General Council, the United States delegation to the WTO should propose comparable amendments to Chapter X, Rule 37 (which reads: "The meetings of the General Council shall ordinarily be held in private. It may be decided that a particular meeting or meetings should be held in public.") and to Rule 38, which allows for the issuance of press communiqués after private meetings.

For the International Financial Institutions, Section C-3 of the IMF's By-Laws, Rules and Regulations states that the meetings of the Executive Board "shall be held in executive session whenever the Managing Director or any Executive Director so desires." Article XII, Section 2(g) of the IMF Articles of Agreement specifies that the Board of Governors (consisting of one governor from each member country) and the Board of Executive Directors (22 members, including one each from the United States, France, Germany, Japan and the UK) "may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Fund." Because the Governing Board has adopted rules closing its sessions and meetings of the IMF and Financial Committee to the public, the U.S. Executive Director would need to propose an item for the agenda of the IMF Board of Executive Directors and of the IMF Board of Governors seeking to amend Section C-3 of the By-Laws to require a special, super-majority vote in order to conduct meetings in executive session and seeking adoption of a rule, pursuant to Article XII, Section 2(g) requiring that IMF sessions and meetings be open to the public.

The U.S. Governor should propose such an item for the agenda under Section 6(c) of the IMF Rules and Regulations, which says "Any Governor may request the Board of Governors at any time to place a subject on the agenda of any meeting of the Board of Governors." Amendment of the IMF Articles of Agreement would require approval by three-fifths of the members having 85% of the total voting power (Article XXVIII(a)). The United States Executive Director to the World Bank would take similar steps to get a

proposal on the World Bank's agenda.

While the United States seeks to move the burden of proof for closed international meetings squarely to the shoulders of those who want locked doors, proponents of openness should seek to harness technology in the service of democracy. Just as C-SPAN coverage of Congress has revolutionized Americans' view of their legislative body, the way Americans and other peoples view multilateral agencies could be revolutionized through global broadcasts. Why not create a global C-SPAN to show the proceedings of international organizations?

A global C-SPAN could beam the deliberations of the WTO's SPS Committee on possible health threats of imported products into homes in Buenos Aires and Boston would not only better educate Argentines and Americans on the issue but enable them to hold their delegates more accountable. Observing the often dreary dialogue that dominates many international gatherings would also demystify much of what takes place there, encouraging the media to focus even greater public attention on the more controversial issues. Critics of globalization may actually be more surprised than horrified by what really goes on behind the closed doors of multilateral agencies. This, in fact, could contribute to more focused and productive meetings as constituencies around the world question the cost of supporting their delegates spending weeks in expensive European cities engaged in seemingly endless speechifying.

Shift the burden of proof for closed Federal agency meetings. In determining the nature of their meetings, Federal agencies should presume openness and place the burden of proof on those who would favor secrecy. Congress should review the Sunshine in Government Act with an eye toward strengthening the incentives for open meetings and paring down the number of exceptions officials may use to justify closing the doors. In particular, these agencies should presume media and public access to all Federal meetings that are now covered by the Sunshine in Government Act. At the same time, the United States should advocate comparable media accessibility for all meetings of international organizations in which the United States is a member.

Open the records of the Federal Open Market Committee. It is ironic that in a nation where investors demand transparency in financial markets, Wall Street firms must spend huge sums on "Fed watchers" because our most influential government financial institution lacks transparency and has steadfastly fought efforts to make it more so. How can the average American understand the Fed's policy decisions if they do not have timely access to the arguments that produced them? As an active daily participant itself in the credit markets, a call for full public access to FOMC meetings – the most powerful body in the United States in monetary policy – is not appropriate. This would force the Fed to reveal its own trading strategy in advance, enabling other traders to use the information and adjust their own portfolios accordingly while weakening the Fed's ability to control the money supply and interest rates.

It does not appear, however, that the Fed's trading strategy and effectiveness would be

compromised by a requirement that it make public a transcript of FOMC deliberations several months after its meetings. Why should Americans not be told what happened at a FOMC meeting in plain English and what the Governors hoped to accomplish? Such information – even delayed by a few months – would be a modest step forward in public education and accountability. It could make the FOMC more sensitive to the competing trade-offs of its decisions, and it could raise the level of economic debate. When the Fed, for example, signals that it wants the economy to slow down, our guess is that the American people would grasp the message better and more quickly if they knew what the Fed knows.

In the short span of time since the Berlin Wall fell, marking the symbolic end of the Cold War, economic might has established a place alongside military prowess as a force to be reckoned with in the 21st Century. As Americans living in the capital of capitalism, we bear a special responsibility to heed the chorus of cries for economic justice. Whether we use our economic might to better the lives of many or enrich the lives of few will be determined to a large extent by institutions examined here. Open doors, more transparency and greater public accountability will certainly give us a better vantage point from which to judge our success.

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