

This is a very early draft manuscript; feedback is most welcome.

## **National Insecurity: Democracy, War, and Popular Sovereignty**

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It is natural to equate electoral democracy with popular sovereignty—the idea, roughly, that “we the people” govern. The main thesis of this paper is that in the context of modern warfare and national security, there is a fundamental tension between standard electoral democratic systems of government and popular sovereignty. More bluntly: electoral democracy is incompatible with popular sovereignty, a prerequisite of political legitimacy, at least in the arena of national security and military policy. We the people do not govern, we do not control what the government does; we are like dog owners holding a mile-long leash.

The first part of this paper will aim to get clear on the idea of popular sovereignty—what would it be for there to be popular sovereignty? Is there a realistic and attractive ideal of popular sovereignty?

The second part of the paper will present some general problems for representative systems of government in terms of popular sovereignty.

The third part of the paper will identify some particular problems for popular sovereignty in the national security and military context. To preview, I will suggest that four distinct but interrelated factors generate particular difficulties in the national security context. First, *confidentiality*: strategic requirements of confidentiality and secrecy undermine meaningful political accountability. Second, *voter ignorance*: national security policy is technical and complicated to an extent that the average voter lacks the information and competence required to hold elected political officials meaningfully accountable for enacting responsive policy. Third, *voter psychology and electoral pathology*: national security policy is an area—like criminal justice policy—in which low information leads to easy psychological distortion due to voters’ fear, the difficulty of responding rationally to small probability events, the conceptualization of “emergency” and “urgency”, and the salience effects of bad outcomes in the national security context. As a result of these factors, elected officials have dramatically and inappropriately circumscribed policy options, given the electoral repercussions of appearing “weak” on security (like appearing “soft” on crime) and given that many of the most significant costs of ineffective policy are borne by others—either people in other countries or future generations of Americans. Fourth, *money*: national security policy is a “high financial value” policy arena—there is a lot of money to be made by a relatively small number of individuals and corporations, making lobbying and electioneering for certain political outcomes a very high value proposition for those entities. These four factors work together and overlap in complex ways, which I will discuss in this third section.

The fourth part of the paper considers what might be preferable to using elected officials to make national security policy from a perspective of popular sovereignty, given the real-world strategic and practical constraints. I will consider, in particular, the use of what I call “lottocratic” institutions—either in an oversight role or in a policy-making role. These institutions have been used to reform election law and voting systems in Canada and other places, and they consist of lottery-selected individuals charged with making policy and/or with policy oversight, but only after hearing from and interacting with a wide group of relevant “experts.” I will consider some of the advantages and concerns about these institutions, and in particular whether they could lay claim to be institutions that would better achieve popular sovereignty than their electoral rivals.

## I.

*Sovereignty* has often been understood as referring to the property of having supreme authority within a territory or within a political community. *Popular sovereignty* is the idea that somehow the *people* are the supreme authority within a territory. Popular sovereignty is often taken to be a prerequisite for political legitimacy—a necessary condition for a political system to be legitimate is that the people are the supreme authority. Putting more flesh on the bones of the idea of popular sovereignty has proven to be difficult, however.<sup>1</sup> What is required for the people to be the supreme authority? There are at least two dimensions that need clarification: the “people” part and the “supreme authority” part. Here are some candidate interpretations of the idea of popular sovereignty:

Full Consent: Popular sovereignty is fully consensual government. All political institutions and political actors have political power only if and only because all of the people living under those institutions have voluntarily consented to the existence of those political institutions and the empowerment of those political actors.

Of course, as is familiar from the literature on consent as a requirement of political legitimacy, the problem with this account is not that it fails to capture something of the ideal of popular sovereignty—doubtlessly it does. The problem, rather, is that no actual political system can satisfy this requirement (at least not if it is interpreted literally), meaning that no actual political system can claim to satisfy the demands of popular sovereignty. Not *everyone* has consented to the existence of the political institutions. Not *everyone* has consented to the empowerment of those who have political power, even in a perfectly functioning, fully inclusive democratic system. Some have argued that *tacit* consent (a kind of actual consent) is sufficient for legitimacy, and that tacit consent can be inferred from the fact that those living under the system continue to live under it and have not left. For a host of familiar reasons<sup>2</sup>—exit is costly, exit may not be possible, and there may be no better extant systems—tacit consent accounts that rely on this inference are implausible. So one direction of failure stems from construing “the people” to mean literally “all of the people.”

A common weakening strategy is to require something like a *majority* of the people, rather than all of the people. So one might get something like this:

Popular Democracy: Popular sovereignty is popular democracy. Political power is exercised and political action is taken only if and only because a majority of the people living under the political institution consent to or support that exercise of power and the taking of that action.

This is better, in that some systems might seem close to satisfying this demand. One question is what makes it permissible to weaken the requirement from *all* of the people to just *most* of the people. Let us set that aside. A more immediate question, given the operation of modern political institutions, is that Popular Democracy suggests a level of detailed monitoring of and involvement with political action that is completely absent in the modern political context. Every modern democracy uses some system of political representation—where some individuals are politically empowered to make binding political decisions for the rest of us. One way of viewing Popular Democracy as satisfied, even in the modern context, would be to read a vote for a political official as a tacit consent to or support of every action that official takes while in office. But that seems implausible, particularly given that representatives, elected

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<sup>1</sup> For relevant discussion, see Christopher Morris, “The Very Idea of Popular Sovereignty: “We the People” Reconsidered,” *Social Philosophy and Policy*, 17, 1 (Winter 2000), 1-26.

<sup>2</sup> Some pointed out by David Hume in his essay “Of the Original Contract” in 1748.

executives, and appointed officials all have a great deal of leeway in terms of how they decide what they want to do once in office.<sup>3</sup>

Is there another interpretation of popular sovereignty that might more plausibly be satisfied, at least in some instances, by modern democratic states? One candidate ideal of popular sovereignty is “the idea that the ends of a polity should be determined by the interests or desires of its members.”<sup>4</sup> I will recast this ideal in terms of what I will call *responsiveness*.

Responsiveness: Popular sovereignty is responsive government. Political outcomes are responsive to the extent that they track what the people living in the political jurisdiction believe, prefer, or value, so that if those beliefs, preferences, or values were different, the political outcomes would also be different, would be different in a similar direction, and would be different *because* the beliefs, preferences, and values were different.

Responsiveness is a complicated, multifaceted notion. The people living in a jurisdiction will not typically have uniform beliefs, preferences, or values—so there is a question of how these are to be aggregated or measured in order to assess responsiveness. Beliefs, preferences, and values may tell in different directions—is outcome *A* less responsive than outcome *B* because *A* tracks individuals’ expressed preferences, but not their core values (to the extent that this distinction is viable), while *B* does the reverse? Beliefs, preferences, and values change over time—which are the benchmark against which responsiveness is to be assessed? And there are many epistemic issues involved in knowing what people believe, prefer, and value, and which relate to how political problems are framed. Additionally, for some issues—ones of which the people in the jurisdiction are largely unaware—the notion of responsiveness will have to be responsiveness to implicit beliefs or plausible extensions of individuals’ beliefs and values to cover issues and cases that might never have crossed their mind under those particular guises. For the purposes of this discussion, these complexities need not detain us here, although I will return to them a little below. Broadly speaking, the arguments do not turn on any particular understanding of responsiveness being the operative one, or upon any particular resolutions of these complexities.

It is worth noting that *one* way to achieve responsiveness *might* be to implement popular democracy or to operate only via full consent. Whether or not this is the case will depend on the resolution of some of the above complexities. But, importantly, responsiveness as defined is institutionally neutral—many different institutional structures might achieve responsive government. Additionally, we can think of responsiveness—and responsive governments—as coming in degrees, so that there might be perfectly responsive governments, somewhat responsive governments, and so on. I think this is plausible as an interpretation of the ideal of popular sovereignty, with that ideal more closely achieved the closer a political system is to achieving perfect responsiveness. At any rate, whether or not it captures some historical or canonical ideal of popular sovereignty, I will assume that responsiveness is an important normative ideal for political systems—at least as sketched at this very general level; obviously, there would be certain ways of filling in the details that might make it unattractive.

It is also worth stressing that responsiveness would be very controversial as the *only* normative ideal for political systems, since it might be that people’s beliefs, preferences, and values are terribly mistaken or heinous, or that some natural (and even egalitarian) way of aggregating those beliefs, preferences, and values generates terrible and heinous results.

## II.

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<sup>3</sup> For relevant discussion, see Alexander A. Guerrero, *The Paradox of Voting and the Ethics of Political Representation*, PHILOSOPHY AND PUBLIC AFFAIRS (2010).

<sup>4</sup> See Morris, n. 1, p. 12.

In this section, I consider a general problem for representative, electoral democratic systems of government on the grounds that they do poorly from a perspective of responsiveness, at least when dealing with certain classes of political problems. The framing is often in terms of legislative representatives, but many of the same points apply—or apply with even more force—in the case of elected executives and the political appointees of such executives.

The argument I offer in this part goes against some of the standard justifications for systems of democratic representative government. One of the main justifications for systems of democratically elected political representatives is that because representatives are in power as a result of popular election, they will be concerned to do what is in the interests of the people, rather than just what is in their own narrow interest. Systems of elected representatives achieve responsive government, the theory suggests, via mechanisms of accountability: the law they create is responsive to the beliefs and preferences of those over whom they govern. (There is also the view that voters try to elect candidates who are of a “good type”—who will act in their interests even in the absence of electoral sanction. As will become clear, I am skeptical of the viability of this strategy as a means of achieving responsive government.) Representatives may be responsive to their constituents’ preferences in that representatives explicitly defer to their constituents (doing as their constituents prefer), or because they act as guardians of their constituents’ interests (doing what the representative thinks is best for—and what she may hope will come to be seen as best by—her constituents). In most situations, representatives will do a bit of both. People expect their representatives to do more than just follow their lead, but the representatives get too far ahead of their constituents at their own peril. Of course, people can be wrong about what is in their interests, or they can be confused about what policy will best achieve what they prefer. In such cases, a representative might work to convince his constituents of their error, or even depart from what they presently prefer in the hope that they will eventually ‘come around’ to the representative’s own view of the issue. But the notion of responsiveness that is tied to popular election of representatives is, fundamentally, connected to whether constituents themselves believe that some course of action is in their interests.

The suggestion in what follows is that for representative systems of government, the virtue of responsiveness is tied to what I will call *meaningful* accountability. Responsiveness is tied to accountability—we expect democratic systems of government to do well by responsiveness *because* those systems have the particular mechanisms of accountability that they do. But responsiveness is tied only to *meaningful* accountability. Meaningful accountability is distinct from accountability simpliciter in that the former, but not the latter, is connected to *informed monitoring* and *evaluation* practices.

It is a commonplace that political accountability requires free, regular, competitive, and fair elections. Candidate A runs on a platform of doing X, Y, and Z, in opposition to (at least) some Candidate B, who runs on a platform that is at least somewhat different from A’s. If A’s platform is more popularly supported, she will likely win the election. After being elected, she will have many decisions to make while in office. These decisions will be *monitored* and *evaluated* by her constituents, perhaps aided in this by news media of various kinds, and the candidate will be held accountable for decisions made while in office when she next comes up for re-election. If elections are not free, regular, competitive, and fair, these mechanisms of accountability will fail. Without elections of this sort, Representative A might do whatever she likes once in office without fear of electoral punishment. In particular, she would be free to act in ways that go against the preferences and beliefs of her constituents (undermining responsiveness) and she would be free to do whatever might be most personally beneficial to her or to those causes she cares about.

Even in advanced democracies like the United States, there are familiar concerns about the electoral system on the grounds that it is not adequately free, competitive, or fair. Complaints are made about the

financial barriers to running for office; the significant electoral advantages that come with incumbency and legislative rules that favor seniority; the systemic difficulties of mounting viable third-party candidates; the role that corporate money and inadequately-regulated television advertising play in determining who is elected; the hurdles erected to keep poor, marginalized, and unsophisticated citizens from successfully registering and voting; the intentional, competition-reducing bipartisan gerrymandering of districts; and even inadequacies in the mechanics of casting and counting ballots. These are serious difficulties, certainly, and there is no doubt that they play a significant role in reducing the accountability of representatives to those over whom they govern. I think that even if some of these were addressed, problems of accountability would still arise (although the severity of the bad consequences might be lessened), for reasons that I will explain in a moment.

Meaningful accountability requires elections that are free, regular, competitive, and fair. But it also requires that ordinary citizens are *capable* of engaging in informed monitoring and evaluation of the decisions of their representatives. Even if citizens have the mental capability to monitor their representatives, this monitoring of representatives can be thwarted by ignorance: (1) ignorance about *what one's representative is doing* (we can call this 'conduct ignorance') and (2) ignorance about a *particular political issue* (we can call this 'issue ignorance'). Of course, ignorance admits of degrees: one might know something about what one's representative is doing while still remaining largely ignorant of what she is doing. And one can know something about, say, global warming (or health insurance pricing, or the regulation of financial instruments, or whatever), while still remaining largely ignorant of the details of those issues and the various policy alternatives relevant to dealing with them.

In addition to conduct ignorance and issue ignorance, there is a related, third kind of ignorance that also poses a threat to accountability. Even if one knows what one's representative is doing with respect to some issue, one may have no idea (or even belief about) whether what one's representative doing is a *good thing in general* or whether what she is doing will be *good for oneself*. We can call these two kinds of ignorance *broad evaluative ignorance* and *narrow evaluative ignorance*, respectively.<sup>5</sup>

The ways in which issue ignorance, conduct ignorance, broad evaluative ignorance, and narrow evaluative ignorance can all thwart accountability are straightforward: each kind of ignorance can undermine the ability of ordinary citizens to engage in meaningful *monitoring* and *evaluation* of the decisions of their representatives. Issue ignorance and conduct ignorance make monitoring difficult or impossible. If I don't know what you are doing and have done, I can't hold you accountable for it. And if I only know that you've have done A (rather, perhaps, than B, C, or D), but I have no idea what A amounts to (I know nothing about the issue for which A is a candidate proposal), or how it differs from B, C, or D, I might as well not even know that you've done A—my ability to hold you accountable is equally impoverished. The two kinds of evaluative ignorance straightforwardly make meaningful evaluation difficult or impossible. If you don't know whether A or B is better—generally, or for you—it will not be possible to meaningfully hold some representative accountable for picking A rather than B.

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<sup>5</sup> There are, of course, views on which these two evaluations collapse, but most plausible views treat them as distinct questions. I distinguish them here so as to avoid taking stands on the proper ethics of voting and support in a democracy—particularly the question of whether one ought to just vote for what is in one's interests, or for what one thinks is best (when these two come apart). What I call 'narrow evaluative ignorance' is related to what Lupia and McCubbins describe as the "knowledge condition," which is "fulfilled if and only if the principal [voters] can correctly infer whether the agent's [representative's] proposal is better or worse for her than the status quo." They develop a model that demonstrates that delegation (of which political representation is one example) will only definitely be better for principals than the status quo if their knowledge condition is satisfied. See ARTHUR LUPIA AND MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 79-93 (Cambridge Univ. Press, 1998). They do not discuss the other kinds of ignorance directly.

We are now in a position to state the main argument that representative systems will fail to bring about responsive or good outcomes. I will present that argument below, explaining and defending the various steps in that argument along the way.

(P1) Systems of democratic political representation tend to bring about outcomes that are responsive to the preferences of some constituency, C, with respect to some problem, P, only if C can hold their representative(s) meaningfully accountable with respect to P.

It should be clear why (P1) is true. In the absence of meaningful accountability, it would just be a kind of good fortune if the actions taken by representatives were responsive to the beliefs, preferences, and values of their constituents. Representatives would have no electoral incentive to act in a responsive way, and they would have no electoral incentive to learn what their constituents wanted. It is true that an elected representative might try to enact responsive policy simply because she thinks it is the right thing to do. The problem here is that, in the absence of meaningful accountability, it becomes electorally costly to act in certain ways—including, perhaps, *responsive* ways—because of the presence and influence of certain powerful interests.

Here is a familiar hypothesis: elected political positions for which the elected officials are not meaningfully accountable to their constituents will be used to advance the interests of the powerful (in a capitalist society, typically the financially powerful). Let us refer to this phenomenon as *capture*: an elected official is captured if he or she uses his or her position to advance the interests of the powerful, rather than to create policy that is responsive (when doing so would conflict with the interests of the powerful). The suggestion, then, is that the absence of meaningful accountability leads to an increase in capture.<sup>6</sup>

There are three possible mechanisms by which the absence of meaningful accountability leads to capture. The first concerns the relationship between accountability to constituents and the value of political offices. The second concerns electoral viability and what it takes to be a viable candidate. The third concerns what we might call *directed positional shift*. Let me say more about each of these.

Political power is more valuable to powerful interests the more that it is untethered from constituent preferences and beliefs. If political officials are free to take a wider range of positions—and, in particular, are free to take positions that are contrary to the interests of the non-powerful—this makes the offices held by those officials more valuable, more worth controlling. Thus, as representatives become less accountable, it becomes more worth the effort to control those representatives or to control who is elected. (In particular, this may be considerably easier and cheaper than trying to alter the beliefs and preferences of the majority of people in a political jurisdiction through advertising and media manipulation—particularly if the interests of the powerful run directly and obviously contrary to the interests of most people in a jurisdiction.)

There are two main ways in which powerful interests can respond to this increased value of political positions. The first is by influencing elections (determining who can be a viable candidate). The second is by influencing those elected (determining the political positions adopted and creating directed positional shifts). Both of these happen in familiar ways, and in addition to there being *more incentive* to take these steps in the absence of meaningful accountability, both are also *easier* to do in the absence of meaningful accountability.

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<sup>6</sup> This is an empirical claim, but one that I think is borne out by, for example, recent U.S. political history, but it would, of course, be good to have sustained and rigorous empirical support for the claim. I leave that to other work. Below, I supply some reasons for expecting the empirical claim to be borne out.

If elections are badly structured (requiring significant financial backing, allowing significant corporate and individual donations, etc.), the powerful will control who can realistically run for office, in which case even meaningful accountability post-election will come too late. If elections are badly structured *and* there is no meaningful accountability—arguably, our current situation in the United States—then political representatives become little more than agents of the powerful (although often in populist disguise). In addition to defense and security spending, which will be discussed at greater length in the next section, consider U.S. policy with respect to agriculture, consumer protection, energy production, environmental protection, health care, financial services regulation, insurance regulation, and so on.

But even if the elections are not so obviously badly structured, there will still be serious concerns about the influence of the powerful in who can be a viable candidate. First, powerful interests can control and shape media presentation of candidates and their positions. This can make meaningful accountability more difficult through the increase in bad information or irrelevant information. But this kind of control is also made easier when the issues are ones already beyond the ken of most voters. If voters don't know much about candidates, their views, and whether these views are good or bad for them, it is much easier to manipulate how individuals feel about the different candidates. Second, if political positions are valuable, it becomes sensible to identify and groom 'controllable' candidates early on, making those who end up as viable candidates likely to be those whose interests or temperament are congenial to the interests of the powerful.

If those elected are already beholden to the powerful, it is obvious that the absence of meaningful accountability means that those beholden representatives will enact policy that is good for the powerful, even if that policy is not responsive or good more generally. But even if those elected are not beholden to the powerful when elected, once they are in office, the absence of meaningful accountability will inevitably lead to positional shifts in directions that benefit the powerful. In the absence of meaningful accountability, representatives will be able to do whatever they want. The worry is that in this "free zone," powerful interests will make it so that there is at least drift, if not outright directed movement, in the direction that those interests favor. This can happen by controlling benefits for people post-office, by influencing (or threatening to influence) perceptions and the political landscape more generally via corporate-owned media, by affecting delivery and content of representative's messages, and by affecting the quality of information available for policymaking. Representatives operating in this free zone will have no electoral incentives to do the right thing if it goes against the interests of the powerful (ex hypothesi, their constituents won't know the difference), and the powerful will provide significant incentives to do what is in their interests. Even more basically, representatives will have little incentive to seek out high quality information regarding what would be best, and there will be lots of easily available bad information that makes it seem that the best thing to do is to do what is in the interests of the powerful. All of this means that even if particular representatives aren't in the pocket of the powerful when they step into office, there is likely to be substantial influence from the powerful to adopt positions congenial to their interests, and it is reasonable to expect the "acceptable" range of policy positions to shift accordingly, and in a direction that is no longer aligned with what would make for good policy (except in those instances in which the interests of the powerful and the interests of everyone are aligned).

We might imagine a benign or well-intentioned class of people who want to serve others, run for office, get elected, and then do what is best for everyone, or for the worst off. The problem is that if this class of people would act in ways that are contrary to the interests of the powerful, the powerful will use their resources to either buy off these people (if they have a price) or to crowd them out and replace them with others who are more congenial to their interests. It is worth stressing that the interests of the powerful are sometimes aligned with the interests of some group of constituents, or even with the good more generally. The concern is that, for a great run of cases, these interests are in conflict.

(P2) The presence of widespread issue, conduct, or evaluative ignorance within a constituency, C, with respect to some issue, P, undermines the ability of members of C to hold their representative(s) meaningfully accountable with respect to P.

In a certain sense, (P2) follows from the definition of meaningful accountability and the relevant discussion of meaningful accountability above. If people are ignorant about some issue, or about what their representative is doing with respect to that issue, or about whether what their representative is doing is good, they cannot monitor or evaluate what their representative is doing with respect to that issue.

Here, some might respond that there are “work-arounds” so that even if one is ignorant in one of these ways with respect to some issue, one can still hold my representative meaningfully accountable.<sup>7</sup> In particular, there are a number of strategies that rely on the use of proxies and signals to overcome issue, conduct, or evaluative ignorance. Most of these strategies amount to a kind of deference to the monitoring and evaluation done by some other individual or group. So, for example, membership in a particular political party, endorsement from activist organizations or media institutions, and contributions and public endorsements from particular individuals might all seem to help individuals overcome personal ignorance to hold their representatives meaningfully accountable with respect to particular political issues.

There are several problems with strategies of this sort. First, the proxies will generally either be too coarse-grained to help with accountability for particular issues, or too fine-grained to save individuals any effort. Membership in a political party, for example, is a very imperfect signal with respect to any particular political issue. A person might be a member of a party because it aligns with their views on A, B, C, and D, although they depart from the party with respect to E, F, and G. (Additionally, in a first-past-the-post, single-member district system like those in the United States, Duverger’s law<sup>8</sup> means that there will be two (or perhaps three) dominant political parties—making that particular signal even cruder, and meaning that the space of positions with respect to any particular political issue may be considerably circumscribed.)

On the other hand, endorsement from an organization that focuses very narrowly on a particular issue will provide a lot of information about that issue, but it will require considerable effort on the part of individuals to learn both which organizations can be trusted to provide reliable assessments and what all of the issue-specific trusted organizations actually say about the candidates. This brings to the fore the second problem with the use of proxies: it can be difficult and time consuming to determine which signals and proxies are credible and reliable, particularly if one wants to find reliable but specific proxies for many different issues. This can take as much effort, and be as intellectually challenging, as doing the research oneself.

Finally, for some issues, there may not be particularly good proxies or signals. In particular, there may be issues that are relatively low profile or do not attract well-funded individuals or groups to do the necessary investigative work, and there may be issues for which powerful interests have a lot at stake, and do everything they can to shape the available information and to obscure the nature of their interests and efforts. More could be said, but it is at least not obvious that there is an easy route to meaningful accountability in the face of individual ignorance.

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<sup>7</sup> See, e.g., the papers in JOHN FERREJOHN AND JAMES KUKLINSKI, EDs., *INFORMATION AND DEMOCRATIC PROCESSES* (1990).

<sup>8</sup> See, Maurice Duverger, “Factors in a Two-Party and Multiparty System,” in *PARTY POLITICS AND PRESSURE GROUPS* (1972), pp. 23-32.

(P3) If a political problem is information intensive—(a) factually complex (requiring knowledge of extensive factual information in order to understand the problem fully) or (b) technical or expertise-driven (requiring advanced education or experience to offer and evaluate possible solutions)—then there will typically be widespread issue, conduct, and/or evaluative ignorance with respect to that problem.

The explanation of (P3) is the standard one about rational voter ignorance (it is rational to remain ignorant given that it is incredibly unlikely that one's vote will make a difference), combined with the sheer difficulty of keeping up on all of the relevant information and training, even if one had reason or desire to do so. It would be useful to have a precise metric to assess how information intensive a particular problem is, but I will not attempt to offer any such metric here. I do think, however, that:

(P4) Many political problems in modern political societies are information intensive.

Obviously, there will be a spectrum of how information intensive problems are. Even relatively straightforward political problems may involve complex factual issues or require one to make complex assessments of the consequences of adopting some course of action. It is also possible to frame issues to be more or less information intensive. For example, we might ask: should we regulate the presence of harmful chemicals in drinking water? Or we might ask: which chemicals that are found in water should we monitor and regulate, and at what levels? The suggestion in (P4) is that, at bottom, many political problems are information intensive. It actually is plausible that *most* political problems are information intensive, but I will endorse only the more modest view.

To complete the argument:

(P5) If a political problem is information intensive, then meaningful accountability with respect to that problem will be undermined.

(P6) If a political problem is information intensive, then systems of democratic political representation will not tend to bring about responsive outcomes with respect to that problem.

(P7) Therefore, for many political problems, systems of democratic political representation will not tend to bring about responsive outcomes with respect to those problems.

(P5) follows from (P2) and (P3). (P6) follows from (P1) and (P5). And (P7) follows from (P4) and (P6).

The above argument might be contested at various steps, and the premises might be bolstered (or undermined) by additional argument or empirical research. The hope, however, is that the argument gives voice to a certain familiar set of concerns about representative democratic systems. These familiar concerns are brought to the fore when one thinks about how little one knows about most of what one's representative does, how little real choice went into the election of one's representative (if one is in a district like most districts), how much deference to the good will of one's favored political party is required, how complex some political issues are, how much of what one believes about various issues is a result of information provided by one of a few powerful media institutions, how much money certain powerful interests have at stake, and how hard it is to create rules to adequately police the influence of these powerful interests.

It is not much of a surprise that the representative system has serious problems. These three features are enough to cause trouble for the enterprise:

Principals and Agents: some small number of X's are chosen by a much larger number of Y's, and the X's are to act on behalf of, or for the sake of, the Y's.

Electoral Accountability: the mechanism that is to ensure or make likely that the X's act on behalf of the Y's is twofold: (a) initial election/selection by the Y's and (b) potential for re-election/selection by the Y's after some period of time.

Complexity and Opacity: whether the X's are or have (a) actually acted or (b) tried to act on behalf of the Y's is not obvious to the Y's in the short-term (the time between election cycles).

These three features generate problems in their own right. But they are combined with two more:

Significance: what the X's do has great significance in terms of regulating (or not) the powerful members of a society.

Open Influence: there are plausible norms that require restrictions on how much regulation of political speech and influence from one Y to another there can be, regardless of the relative power or resources of the individuals.

There are obviously a number of ways in which things could be made better, in terms of regulating campaign finance, post-electoral employment, lobbying, media coverage of elections, and so on. The problem is that these solutions don't address the core problems stemming from complexity and opacity. Those are information asymmetry problems and they are not easily cured.

### III.

The above concerns have been articulated about representative systems of government in general, suggesting that, despite the common equation of representative democratic government with popular sovereignty, this equation may often—or at least for a wide range of political problems—fail to hold. In this part of the paper, I will sharpen and narrow the focus to particular problems for responsiveness in the national security and military defense context. I will suggest that four distinct but interrelated factors generate particular difficulties in the national security context.

#### A. Confidentiality

The above argument, and in particular (P3), suggested that *information intensive* political problems would lead to widespread issue, conduct, and/or evaluative ignorance with respect to that problem, that ignorance of those kinds undermines meaningful accountability, and that the absence of meaningful accountability undermines responsiveness. Problems of national security—whether dealing with the threat of domestic terrorist attacks, terrorist attacks abroad, cyberwarfare, or more conventional nation-state military threats—are undoubtedly information intensive, and so that general concern applies.

Even worse for responsiveness, however, is the fact that much of the detail of national security policy is made in secret, shrouded from public view, for reasons of safety (of those charged with carrying out the policy) and tactical strategy (many tactics only work if hidden from view of those who pose a threat to national security).

It is certainly plausible that much that is currently hidden from view could be made public with little or no adverse affect on safety or effectiveness. (Of course, one of the difficulties this paper is highlighting is that it is hard or impossible for an ordinary citizen to know whether this is *actually* plausible or not.)

Why, for example, does the legal rationale offered by the Department of Justice as to the legal permissibility, under U.S. Constitutional law, of the executive summarily ordering the killing of a U.S. Citizen abroad need to be confidential? Why do the details of the process by which one can come to be placed on (or removed from) a kill list need to be confidential? Why is it important that it be confidential whether we are using or would be willing to use certain “interrogation techniques” or to make use of “black sites” or “extraordinary rendition” programs? What is the objection to giving some rough quantification of the extent to which these are used (e.g. there are between 50-100 black sites in operation)? It is also plausible that, in general, the recent trend toward increased classification—some would say over-classification—could be reversed with little cost to safety and strategy.<sup>9</sup> So, too, it would seem that there is plenty of room to reduce the invocations of Executive Privilege and to rein in use (misuse) of the Espionage Act.

But even leaving all of what we might call the “excessive secrecy” to one side, there is surely some amount of appropriate or necessary secrecy. Additionally, whatever level of secrecy might have been required historically, there is reason to think that the rise of the computer and internet, and the storage and transfer of information digitally, might require an overall higher appropriate level of secrecy. Globalization and interconnectedness present opportunities, but they also present risks. The possibility of a WikiLeaks kind of breach, involving the sheer magnitude of information that those breaches have involved, is unimaginable in the brick and mortar, pen and paper, low-tech world.

So, even in the best case, it seems that many political problems in the national security context will be affected by a principle like this:

(P-confidentiality) If a political problem, or some significant aspect of a political problem, must be addressed in a confidential manner, then there will typically be widespread issue, conduct, and/or evaluative ignorance with respect to that problem.

This premise can be slotted in to replace (or to supplement) the above premise (P3), increasing the likelihood that meaningful accountability in the national security context will be undermined.

Of course, it is hardly a new development that national security and military defense policy must be conducted with significant levels of confidentiality imposed. One significant difference in the post 9/11 world (or perhaps even the post-World War II, Cold War-world), however, is that it is not just tactical strategy within a public conflict that is confidential; it is also the details of the conflicts, the nature of the threats and enemies, the broad tactics being employed to gather information about potential threats, the resources being invested, the technology being developed, and so on. There has always been—and arguably always must be—a black box; but the box is much bigger now.

## **B. Voter Ignorance**

One consequence of the widespread use of security classification and confidential policy-making is that voters are largely ignorant of the details of what is being done. One can find out some broad information about the size and scope of the relevant institutions. For example, while for the CIA “[n]either the number of employees nor the size of the Agency’s budget can, at present, be publicly disclosed,” one can learn that, in the 1998 fiscal year, the aggregate intelligence budget was almost \$27 billion.<sup>10</sup> And one can learn that the Department of Defense budget for fiscal year 2011 was around \$740 billion (not

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<sup>9</sup> See “Why is That A Secret?” NYT Op-Ed, Aug. 24, 2011, available at: [https://www.nytimes.com/2011/08/25/opinion/why-is-that-a-secret.html?\\_r=1](https://www.nytimes.com/2011/08/25/opinion/why-is-that-a-secret.html?_r=1) (noting a 40% increase in the number of documents classified from 2009 to 2010).

<sup>10</sup> CIA website FAQ: <https://www.cia.gov/about-cia/faqs/index.html#employeenumbers>.

counting spending related to Veterans Affairs or veteran's benefits), that the Department of Homeland Security spending was around \$50 billion, and that FBI counter-terrorism operations were around \$3 billion.<sup>11</sup> And one could, if so inclined, learn a lot more about the details of the amount of money requested and spent on at least some of the various military programs—around \$11 billion on the F-35 Joint Strike Fighter, around \$5 billion on the Virginia class submarine, around \$3 billion on the V-22 Osprey program, and so on.<sup>12</sup> And, of course, one could learn broader contextual facts, such as that during 2011 the U.S. spent more on its military budget than the next 13 countries combined.<sup>13</sup>

The suggestion here is that, despite this, it is impossible for an average citizen to be even minimally well informed about the size and nature of the threats that we face, how significant the threats are, what measures are needed to contain or eliminate these threats, or whether what we are currently doing is at all effective or necessary to address the threats that exist. Is the world more dangerous now than it was 10 years ago, or 20 years ago, or 50 years ago? Was the significant increase in defense spending from 2001 to 2010 and beyond<sup>14</sup>—even leaving aside the expenses associated with wars in Iraq and Afghanistan—a response to an increase in danger or required by an increase in the costs of prevention? Would we be just as safe if we spent half of what we spend? Is our military spending—in broad strokes, or in its details—more likely to increase or decrease our long-term national security?

Perhaps no one is in a position to give particularly well-informed answers to these questions, although there are certainly many people who claim to be experts on these topics, and there are people who have much more in the way of relevant information. The suggestion in this section is just that voter ignorance in the context of national security is at least as bad as it is with respect to any other category of political problem. All the usual concerns about rational voter ignorance obtain, and there are a host of additional impediments as well.

### **C. Voter Psychology and Electoral Pathology**

When a person doesn't have a lot of information about a political problem, it is easier to manipulate that person into believing something through a combination of misinformation and emotional manipulation. Additionally, there are some policy problems—such as criminal justice policy and national security policy—that generate very strong emotional reactions, that claim to have a certain kind of urgent or emergency status, and which have truly vivid and terrible worst-case outcomes. For these problems, emotional manipulation is both particularly easy and particularly effective.

One concern about these features of national security problems is that the idea of responsiveness can become considerably more complicated—some of the complexities elided earlier might need resolution. In particular, there might well be contradictions in an individual's expressed or superficial beliefs, preferences, and values, and that person's deeper (un-manipulated) beliefs, preferences, and values. Consider the massive amount spent on national security and defense as compared to education or poverty relief. Or there might be beliefs and values that a person comes to adopt for bad reasons, or as a result of rationally inappropriate manipulation, rather than through some other more epistemically commendable process. Consider the belief that it was necessary to force Japanese-Americans into internment camps

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<sup>11</sup> See OMB Fiscal Year 2012 Budget - Historical Tables, Table 3.2.

<sup>12</sup> See United States Department of Defense Fiscal Year 2012 Budget Request, available at: [http://comptroller.defense.gov/defbudget/fy2012/FY2012\\_Weapons.pdf](http://comptroller.defense.gov/defbudget/fy2012/FY2012_Weapons.pdf)

<sup>13</sup> Brad Plumer, "America's staggering defense budget, in charts," Washington Post, January 7, 2013, available at: <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/07/everything-chuck-hagel-needs-to-know-about-the-defense-budget-in-charts/>

<sup>14</sup> See <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/28/defense-spending-in-the-u-s-in-four-charts/>

during World War II. Or the importance placed on whether a politician is “tough on crime”—where that often means pursuing incredibly punitive criminal justice policies with almost no thought to cost. These might reflect our true beliefs and values, but there is at least a worry that a kind of psychological manipulation and distortion takes place; in the latter example, through the electoral process itself.

It will likely not be apparent to an individual that there are these contradictions or poorly grounded or poorly formed attitudes, and so individuals might act based on a contradictory attitude or on a poorly formed or poorly grounded attitude. Of course, it requires argument to establish that (a) some of an individual’s particular beliefs, preferences, and values are “deeper” or “epistemically better” than others of that individual’s beliefs, preferences, and values; and (b) that responsiveness should be responsiveness to the deeper and epistemically better attitudes rather than just whatever attitudes are expressed through votes, simple polls, or other actions. I will not provide those arguments here; I only want to note the concern that this is yet another way that responsiveness—or *real* responsiveness, as we might call it—might be lost in the national security context.

An additional concern is that national security policy, like criminal justice policy, only easily moves in one direction. There are two main reasons for this. One, it is very low cost, electorally speaking, to do more, whereas it can be high cost to do less. This is so in part because the emotion pushes in the direction of beefing up safety and security; the human cost is paid by others, and those others are either non-voters or politically disempowered. (This is particularly true given the post-conscription military era we are now living in.) The financial cost—and the opportunity cost—is paid by all of us, but that has considerably less emotional resonance, particularly in a low information context such as this one; it can be completely obscure what is enough, what is necessary, and what is wasteful, even given some fixed view about the proper level of risk.

A second reason, or at least a second possible reason, involves institutional dynamics. Bill Stuntz makes this point regarding the criminal justice context:

“A large part of the answer [to the one-way ratchet aspects of criminal law] involves not the politics of ideology and public opinion, but the politics of institutional design and incentives. Begin with the basic allocation of power over criminal law: legislators make it, prosecutors enforce it, and judges interpret it. In this system of separated powers, each branch is supposed to check the others. That does not happen. Instead, the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones. This dynamic does not arise out of any particular ideological stance, and does not depend on the partisan tilt of the relevant actors. Criminal law seems to expand as much, and as fast, under Democrats as under Republicans. Rather, it arises out of the incentives of the various actors in the system. Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious. And given legislative supremacy - meaning legislatures control crime definition - and prosecutorial discretion meaning prosecutors decide whom to charge, and for what - judges cannot separate these natural allies.”<sup>15</sup>

One can replace “prosecutors” with “the Executive and military officials” and “broader crimes” with “broader military, detention, and surveillance powers and authorization.” The details here are different, of course, since it is even less clear that there is legislative supremacy in this realm, given the move away from formal declarations of war, the almost complete inefficacy of the War Powers Resolution (and its

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<sup>15</sup> William J. Stuntz, “The Pathological Politics of Criminal Law,” 100 MICH. L. REV. 505, 510 (2001).

questionable constitutionality<sup>16</sup>), and the President's standing as commander-in-chief of the military. The basic point, the point about institutional collusion (or, less pejoratively, cooperation), is that, if true responsiveness is eroded (as suggested above), we can expect the direction of excess to be in the direction of more expenditures on military forces and national security and greater expansion of executive power to take steps to protect us. Why? Basically, because of the issues of confidentiality and voter ignorance described above, the only electoral benefits that elected officials can obtain in this realm are (a) being seen as doing whatever is possible—over-protecting, if necessary—to prevent a high salience, public attack, or at least not being seen as having in any way impeded such prevention; (b) being seen as pushing for aggressive policy, which plays well for the emotion/manipulation reasons described above; and (c) doing what is financially beneficial to those special interests most active in this arena—defense contractors and those who produce and invent military and surveillance technology—a point we will turn to next. (There are, of course, some people who care a lot about the violation of civil liberties, the possibly excessive nature of the “military industrial complex,” and the devastation wrought upon distant peoples over the course of our recent military history. The suggestion is that those people have had a very uphill climb since 9/11, although expense arguments have gained significant traction since the economic collapse.) As a result, it behooves elected officials to allow for more spending and more power, or at least that is the suggestion.

#### **D. National Security as Big Business**

Above, I noted a number of reasons to think that this premise was true:

(P1) Systems of democratic political representation tend to bring about outcomes that are responsive to the preferences of some constituency, C, with respect to some problem, P, only if C can hold their representative(s) meaningfully accountable with respect to P.

One main reason to think this premise was true was the possibility of capture by special interests, and the suggestion that this possibility was more likely to be realized in the absence of meaningful accountability. Another factor that increases the likelihood of capture is, of course, the value to individuals of capturing the policymaking in a particular policy area. National security policy is a “high financial value” policy arena—there is a lot of money to be made by a relatively small number of individuals and corporations, making lobbying and electioneering for certain political outcomes a very high value proposition for those entities. The sheer amount of money spent on military technology makes it an incredibly valuable area to influence. Additionally, most of the corporations that manufacture and develop military equipment get a huge percentage of their revenue from defense contracts, meaning that those corporations can devote a huge percentage of their attention to lobbying and exerting political influence. Lockheed Martin, the corporation with the largest total defense revenue (around \$44 billion in 2011), gets 94% of its revenue from defense contracts.<sup>17</sup> Boeing, the second largest corporation (around \$31 billion), gets 45%. General Dynamics is at 78%, Raytheon is at 93%, Northrop Grumman is at 81%, L-3 Communications is at 83%, SAIC is at 80%, and so on. Thus, it is no surprise that 3 of the 15 largest lobbying entities in terms of total lobbying expenditures in the entire United States over the last decade are Lockheed Martin, Boeing, and Northrop Grumman (behind, among others, such giant entities as the US Chamber of Commerce, AARP, and the American Medical Association).<sup>18</sup>

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<sup>16</sup> See, e.g., Philip Bobbitt, “War Powers: An Essay on John Hart Ely’s *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*,” 92 Mich. L. Rev. 1364 (1994).

<sup>17</sup> See [http://special.defensenews.com/top-100/charts/rank\\_2011.php](http://special.defensenews.com/top-100/charts/rank_2011.php)

<sup>18</sup> See <http://www.opensecrets.org/lobby/top.php?indexType=s>

#### IV.

No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time. -Winston Churchill<sup>19</sup>

It is natural to both feel the force of the argument so far (perhaps), and particularly the concern for responsiveness in this context, and to still agree with Churchill. This next section introduces the idea of what I call “lottocratic” institutions, and provides some reasons to think that the lottocratic government would be better than representative systems of government in terms of responsiveness, at least for some kinds of political problems, such as national security and military policy. Read this section as a kind of thought experiment, or as a tentative idea as to how to reinsert popular sovereignty into the realm of national security.

The kind of institution that I will describe in this section is unusual in that it employs selection of political officials by lot, rather than by election. It is worth mentioning that there is some historical precedent for this kind of method, referred to as “sortition” (among other names). For example, in ancient Athens, from 441-397 BCE, lot was used to select officials and political actors in three of its four major governmental institutions; both the *brevia* and the *scrutiny*, employed in late medieval and early renaissance Italy, incorporated selection by lot; and, more recently, Citizens’ Assemblies (in which citizens were chosen at random to serve on the assembly, and in which citizens heard from experts prior to coming up with their own proposals) in British Columbia and Ontario were used to reform election law.<sup>20</sup>

The key features of a lottocratic institution are:

- (1) that the legislative institution focuses just on one policy area—in this case, it could be National Defense, or there could be two such institutions, divided into, say, Homeland Security and Global Security—or one task;
- (2) that the members of this single-issue legislature are chosen by *lottery* from the relevant political jurisdiction; and
- (3) that the members of the single-issue legislature hear from a variety of *experts* on the relevant topic at the beginning of (and perhaps at various stages throughout) each legislative session.

More concretely, imagine that the single-issue legislature consists of around 200-500 people (depending on the size of the jurisdiction), and that people come to serve on a legislature by being chosen, via random lottery, from the adult citizens of the political jurisdiction. For ease of discussion, let us focus on a system with a 300-person legislature, and specify the following details. Each person chosen serves for a three-year term. Terms are staggered so that on each year 100 new people are chosen, and 100 people finish their terms. All adult citizens in the political jurisdiction are eligible to be selected. People are not legally required to serve if selected, but the financial incentives could be considerable,<sup>21</sup> efforts would be

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<sup>19</sup> Speech in the House of Commons, The Official Report, House of Commons (5<sup>th</sup> Series), 11 November 1947, vol. 444, cc. 206-07.

<sup>20</sup> See, e.g., OLIVER DOWLEN, *THE POLITICAL POTENTIAL OF SORTITION: A STUDY OF THE RANDOM SELECTION OF CITIZENS FOR PUBLIC OFFICE* (Imprint Press, 2008); MARK WARREN AND HILARY PEARSE, EDs., *DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS’ ASSEMBLY* (Cambridge Univ. Press, 2008).

<sup>21</sup> Pay could be a high significant sum for everyone or a scale that paid people some multiple of their regular income.

made to accommodate family and work schedules (including providing relocation expenses and significant legal protections so that individuals or their families are not penalized professionally for serving), and the civic culture could be developed so that (unlike modern-day jury duty) serving is seen as one of the most significant civic duties and honors. There should be some mechanism of removing people from service for consistent bad behavior—failing to attend meetings, speaking out of turn, showing up intoxicated or otherwise incapable of participating fully—but this mechanism should be structured so as to protect those who simply are personally disagreeable or who have divergent views. There could be a requirement that eligible individuals must have either completed high school or a GED, but that requirement might also allow for individuals to pass some sort of reading comprehension and basic mathematical fluency examination as an alternative. There could be a requirement that the person selected not have been convicted of certain crimes that might raise concerns about his or her suitability for making policy regarding national security; perhaps there could be some way of being “reinstated” as eligible even if one has been so convicted.

In general, there is a more ambitious and a more modest way of introducing lottocratic legislative elements: one might have them *supplement* the existing legislative institutions, perhaps serving in an oversight or veto role, or one might have them *replace* those institutions. There could be a lottocratic institution charged just with deciding how much of the budget should be spent on National Security (perhaps determining the broad percentages to be spent on different topics out of the discretionary spending), or which would determine the allocation of spending to different aspects of National Security. There could be a lottocratic institution tasked with one particular issue, such as reconsidering some aspect of domestic surveillance law, or deciding whether to engage in some particular military intervention. There could also be a lottocratic institution which would simply review the decision made by some existing institution, the basis of review simply being whether the people comprising the institution thought that, given what they had heard, it seemed like a good decision.

The single-issue focus is important because it would allow for greater learning and in-depth engagement with the particular problems—this is particularly important given the range of backgrounds that members would bring to the institutions, and given the fact that these individuals would be amateurs at the particular task of making policy and deciding on legislation.

Given that they aren’t elected, there is a question of how the randomly chosen individuals should think of their roles. Importantly, the lottocratic system is not a normal representative system, although there is a way in which some of its value comes from its representativeness. In particular, members of the SILLs are what Philip Pettit has called “indicative representatives.” As he puts the idea of indicative representation:

The essential difference between responsive and indicative representation is easily stated. In responsive representation, the fact that I am of a certain mind offers reason for expecting that my deputy will be of the same mind; after all, she will track what I think at the appropriate level. In indicative representation things are exactly the other way around. The fact that my proxy is of a certain mind offers reason for expecting that I will be of the same mind; that is what it means for her to serve as an indicator rather than a tracker.<sup>22</sup>

The basic thought behind the lottocratic system is that members of the SILLs will be—at least over a long enough run of time—broadly descriptively and proportionately representative of the political community, simply because they have been chosen at random. But they will not have in mind the idea that they are to represent some particular constituency. Rather, the fact that an individual member of a SILL comes to

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<sup>22</sup> Philip Pettit, “Representation, Responsive and Indicative,” *Constellations* 17 (2010), pp. 427-28.

have certain views about an issue, after hearing from experts and engaging in consultation and deliberation, is a kind of evidence that members of the political community who share contextually salient characteristics with that individual would also come to have those views, had they gone through the same experience.

The hope is that this would generate policy that is more truly responsive—responsive perhaps to the counterfactual beliefs and preferences that individuals would have if they had more information about the issue (information which, *ex hypothesi*, they cannot have, because of requirements of confidentiality).

There are obviously many choice points about how to structure these institutions. In what follows, I will briefly discuss a few aspects of these institutions, just to give some sense of how they might operate.

One central component of the lottocratic institution is that the lottery-selected individuals will hear from experts on the topic at hand. Obviously, there will need to be some process by which a person is allowed to speak to a SILL as an expert. This requires both a process to determine whether a person counts as an expert (the *qualification assessment* process) and a process to determine which of the qualified experts are given an opportunity to speak (the *expert selection* process). The point of expert presentations is to have policymaking and lawmaking informed by the best available knowledge relevant to the policy area at issue. One of the main comparative advantages of this alternative system is that it blends the virtues of policy making by ordinary people with policymaking based on expertise. The hope is that by requiring experts to explain complex ideas or confidential concerns to non-experts, this will allow for a kind of general comprehension, authorization, and endorsement of policy in technical or confidential areas that is not present if experts are simply empowered to decide directly, while at the same time having policy that is made through epistemically responsible procedures. Additionally, this alternative does not require deferring entirely to experts, nor does it put quite as much significance on the process by which one comes to be counted as an expert.

It is a well-known problem with what have been called epistocratic forms of government—rule by the knowers—that for many political questions, who counts as a knower, who is an expert, is precisely what is at issue. (There are other problems, such as Estlund’s “you might be right, but who made you boss” problem,<sup>23</sup> but given the smaller role that experts play in the system under discussion, this problem seems less of a concern.) Here, because whether an individual an expert or not does not bear on whether they have political authority, the stakes involved in determining whether someone counts as an expert are lessened. Still, the importance of the details of the qualification assessment should be clear. For many issues, it will be relatively uncontroversial whether someone counts as an expert. Expertise might be recognized based on relevant advanced degrees; years of professional experience; formal professional credentials or accreditation; publication of research in independent, peer-reviewed journals; and so on. For other issues, it may be controversial whether there are experts or what the bases of expertise might be. Whatever process is used, it will likely be important that experts explain the basis of their expertise, describe their credentials, and disclose any conflicts of interest (or possible conflicts) due to sources of funding or employment. One possibility would be to borrow some of the insights gleaned from years of qualification assessment in the context of judicial proceedings, although it is not clear that this is a particularly good model. Obviously, a full defense of this alternative would have to do more to specify the details of the qualification assessment process.

Finally, it will also be important that if there are people who qualify as experts through the qualification assessment process on each side of the whether question, then there should be substantial time for experts on each side to speak. For particularly controversial issues, it is probably worth allowing more time for the expert presentation phase so as to allow ample time for experts to speak.

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<sup>23</sup> DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 41 (2008).

After hearing from experts, for at least some issues (ones where meaningful discussion could be had while respecting appropriate levels of confidentiality), SILL members will engage and consult with non-members. There are a number of different ways this might happen. One is to have the members return to the geographic area (town, county, state—depending on the scope over which the legislature governs) from which they came, and to hold town-hall style meetings, in which individual members or multi-member panels talk through the items on the agenda, talk about what the experts told them, and solicit questions and comments from those in attendance. A second option is to use various technological methods to inform those living in the jurisdiction of the specific issues under discussion and to solicit feedback and input through these methods. These methods could be modeled on the existing notice-and-comment process used in administrative rulemaking. Additionally, both could be informed by the experience of those who served on the Citizens’ Assembly bodies that were created to reform election law in British Columbia and Ontario, since those individuals returned to speak with members of their communities during the process.<sup>24</sup>

For all of these different efforts at consultation with non-members, there are two main purposes: (1) to inform non-members about the issues and proposals under discussion, and (2) to gather information from members of the community.

It should be acknowledged at the outset of this section that, because no lottocratic system like the one described above has ever existed, it is hard to do more than draw attention to some of the possible virtues of the lottocratic system, and to note those features of the system that are untested and whose virtues remain somewhat more speculative. There have been a number of somewhat similar experiments where something like a SILL was used to reform election law in British Columbia, Ontario, and the Netherlands; and the constitutional convention in California used some similar structural elements.<sup>25</sup> The performance reviews of these various experiments have been mixed, although some of them have performed quite well.<sup>26</sup> But none of them approximate the scope of the system proposed here, nor have any of them had quite the same structure or design.

The most obvious reason to think that the SILL system would generate outcomes that are at least as responsive as a representative system is that capture would be considerably more difficult in the SILL system. This is true for several reasons. First, because SILL members are chosen at random from the jurisdiction and don’t need to run for office (once, or repeatedly), there will be no way for powerful interests to influence who becomes a SILL member, or to ensure that the only viable candidates are those whose interests are congenial to their own. Second, because there is no need to raise funds for re-election, it should be easier to monitor members of the SILL to ensure that they are not having contact with or receiving funds from powerful interests both during and after their service. If this is possible with juries in high profile cases, it should be possible in the case of SILLs as well. One could simply ban lobbying, except perhaps to allow some special interests and stakeholders an opportunity to speak either as experts (if they have some claim to expertise) or during the community consultation phase. Third, because SILL membership rotates regularly and predictably, the cost of “buying off” particular SILL members would be much higher; it would not be possible to just capture politicians who were virtually unbeatable (coming from sharply partisan districts with considerable incumbency advantages) and count on them being an ally for 20 or 30 years.

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<sup>24</sup> For detailed description and analysis of this process, see the articles in MARK WARREN AND HILARY PEARSE, EDs., *DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS’ ASSEMBLY* (Cambridge Univ. Press, 2008).

<sup>25</sup> See MARK WARREN AND HILARY PEARSE, EDs., *DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS’ ASSEMBLY* (Cambridge Univ. Press, 2008).

<sup>26</sup> *Id.*

There are two SILL-specific capture concerns worth addressing. First, it is true that because SILLs focus on single issues, this might, in theory, make it easier for powerful interests to focus their attention on the SILL most relevant to them. This concern is misguided, however, since modern legislative process basically gives small committees responsibility for most detailed policymaking, and these committees are considerably easier to capture than a much larger, unelected SILL with regular complete turnover would be. A second concern is that powerful interests might try to influence who is identified as a qualified expert and who is selected as an expert to speak to a particular SILL. This is a concern, certainly, but a surmountable one. In particular, if there are significant non-political hurdles to becoming an expert in a particular field (advanced degrees from nationally accredited educational institutions, peer-reviewed publication, and so on) and if there are strict disclosure requirements mandating that experts disclose sources of funding, employment, resources, and so on, this particular concern should be lessened. Additionally, the issue is the comparative question: would be the SILL be worse on this score than a representative system.

Leaving aside the SILL systems advantages with respect to capture, there are additional reasons to think that the policy outcomes of the SILL system would be at least as responsive to individual's beliefs and values as representative democratic systems are. First, because individuals are chosen at random from the political jurisdiction, they are more likely to be a politically, demographically, and socioeconomically representative sample of the people in the jurisdiction than those individuals who are capable of successfully running for office. This doesn't ensure that they will create policy that is responsive, but it does mean that the range of perspectives involved in making policy is likely to be similar to the range of perspectives of the polity as a whole, which makes responsive policy at least somewhat likely. Additionally, SILLs are likely to include individuals with a much greater range of life experiences and vocational skills than a representative system. Second, because the SILLs focus on one issue area at a time, it is less likely that non-responsive policy will result from inattention to a particular issue, or low visibility for a particular issue. With a generalist legislature, there is a real concern that a few issues will draw all the attention, with other issues left to the shadows, where policy can be created that is not responsive to the beliefs and values of the constituents without any attendant electoral consequences.

There are several outcome-quality related worries about the SILL system that are worth addressing (it might be unimportant if SILLs would do well by responsiveness if they would lead us to disaster). First, there is a worry about entrusting people chosen at random with the task of making expert-informed policy. One worry in this vein is that they will not be intelligent or educated enough to make good policy, even if they hear from experts—perhaps *especially* if they hear from experts. They might misunderstand what the experts have said, or become confused by what the experts have said, or simply fail to get anything out of the expert presentations and subsequent discussions. A second worry is that a few well educated or rhetorically skilled individuals will come to dominate the discussions. A third worry is that people will defer to the experts too much, perhaps because they feel that they don't know very much.

A few responses are relevant. First, it is worth stressing that it is not clear that the average member of Congress is better equipped to understand complex and technical issues. Members of Congress may have no scientific or technical training, they may not have done well in school or reached high levels of education, or they may have spent most of their time learning about and engaged with law and politics, rather than with other domains of knowledge. This is, of course, an empirical question, but it is not obvious that elected officials are better positioned than citizens chosen at random with respect to these kinds of tasks. Second, one advantage to the SILL system is that it requires experts to explain things to non-experts in a way that will make sense to the non-experts. This is useful in part because it makes the discourse about complex policy issues something that even non-experts can understand, opening up the possibility for better-informed and transparent policymaking. Third, at least for those issues over which voters still have some means of holding politicians accountable (perhaps high salience issues), even if not

*meaningfully* accountable, the views of ordinary people currently play a significant role in determining what policy options are viable. At least with the SILL system those ordinary views become somewhat better informed—or at least that is the hope. Fourth, it might not be the worst thing if people deferred somewhat more to experts than they currently do—particularly for those policy areas where this kind of ‘over’-deference would be most natural; namely, those areas in which there is an expert consensus on the matter. Fifth, in response to the concern that a few individuals will dominate discussions, there are ways to structure discussions within the discussions and deliberation stage so as to lessen these concerns. There might also be a case for sometimes—or even always—allowing binding votes without prior discussion. But this is a matter that would have to be considered anew once the SILL system is up and running. Sixth, the actual evidence about the performance of Citizens’ Assemblies suggests that at least some of these worries are unfounded. Finally, one salutary side effect of the SILL system is that they make evident the need for excellent public education for all citizens, not just for the wealthy or politically connected members of the citizenry. It may be true that presently, a high school education does not mean very much. But this is something that should itself be the object of reform, not a reason to reject a proposed reform to the political system.

There are also many more worries, of course. Worries about the legitimacy of lottocratic institutions, how they might come to be implemented (if they seemed like a good idea), how requirements of confidentiality would be enforced (although we might query whether it would need to be very different than the current system for Congresspersons), whether they satisfy demands of political equality (given that not everyone is given an equal say in selecting the individuals chosen), and whether a political system could achieve adequate synchronic and diachronic policy coherence with institutions populated and empowered in this narrow and limited way. In this article, I have merely tried to raise a number of worries about standard electoral representative systems of government in terms of whether those systems can claim popular sovereignty, particularly in the realm of National Security policy. I have suggested that an alternative kind of institution, a lottocratic institution, might do better in terms of enabling responsive policymaking. There is, of course, much more that could be said—both to defend representative systems and to raise concerns about lottocratic institutions. I leave both tasks for future work.