Ethical Dilemmas of Back-Channel Diplomacy: Necessary Secrecy or a Secret Foreign Policy?

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Summary

Back-channel diplomacy allows participants to hold dialogues with actors with whom they are not prepared to talk openly. The secrecy of back channels can, however, permit a small elite to escape oversight and scrutiny to achieve unaccountable aims. This article examines the ethical dilemmas raised by the secrecy of back channels. It seeks to develop some practical 'tests' that can be used to ask whether a back channel is straying, or has strayed, into dangerous ethical territory. The article advances three such tests for further development, but also concludes that they cannot be 'absolute'; the context in which a back channel operates is the key variable.

Keywords

Introduction

Of the many controversies surrounding the Trump administration, the question of whether secret deals were discussed with Russia during the campaign and before the administration took office has attracted particular attention. In attempting to explain why members of Trump's family and senior campaign officials met secretly with Russian officials, administration figures have noted that back channels are nothing unusual. Others have countered that this may

be true, but beside the point in terms of whether such a discussion is proper; the issue instead is what was discussed and why.[1]

'Back-channel diplomacy' is resorted to when actors do not have relations, or have issues about which they cannot openly negotiate. Many questions surround back-channel diplomacy. For example, to what extent does the exclusion of differing views lead to 'group think' among the small number of people involved? This article considers back-channel diplomacy in the context of debates over the ethics of diplomatic secrecy and then considers whether an ethical framework can be developed for back-channel diplomacy. The article then advances 'tests' whereby those engaged in secret back-channel communications can gauge whether their actions are ethical or not. These tests are intended to serve as a point of departure for further discussions.

Secrecy in Diplomacy

In early 1918, US President Woodrow Wilson advanced his Fourteen Points to provide the American people with war aims beyond political and economic self-interest. Point one stated that there should be 'Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view'.[2] This was a response to popular revulsion with the pre-1914 European system of secret alliances and ententes, which were widely seen as having created an interlocking web of secret commitments, leading to tragic miscalculations in the summer of 1914.[3] While Wilson's overbearing and pedantic style irked many, the Fourteen Points were popular at the time.[4]

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1 In this vein, see, for example, J. Powell, 'Why It's OK to Lie About a Secret Channel. And When It's Not', *The New York Times* (30 May 2017), accessed online at https://www.nytimes.com/2017/05/30/opinion/why-its-ok-to-lie-about-a-secret-channel-and-when-its-not.html.

2 For the text of the Fourteen Points, see online at http://avalon.law.yale.edu/20th_century/wilson14.asp.

3 See, for example, A. Low, 'The Vice of Secret Diplomacy', *North American Review*, vol. 207, no. 747 (1918), pp. 209-220 at p. 207; P.S. Reinsch, *Secret Diplomacy: How Far Can it Be Eliminated?* (New York: Harcourt, 1922); C. Bjola and M. Kornprobst, *Understanding International Diplomacy: Theory, Practice and Ethics* (New York: Routledge, 2013), pp. 24-30.

4 French Prime Minister Georges Clemenceau remarked of the Fourteen Points, 'Even God only had ten'. The pre-First World War British Foreign Secretary, Sir Edward Grey, called the 'new diplomacy' heralded by the Fourteen Points 'a blind alley for thought'. See Viscount Grey of Falloden, *Twenty-Five Years: 1892-1916* (New York: F.A. Stokes, 1925), p. 277. Viewed from a distance, the Fourteen Points appear to be not so selfless, but rather a liberal economic policy

Historically, views on secrecy as an element of diplomacy have waxed and waned.[5] The Greek city-states dismissed secret diplomacy. Relations were carried out by public speeches, delivered by emissaries to the leadership of the other state. However, it was far from efficient, as 'negotiations' devolved into long-winded speech-making, often with neither side willing to explore alternate positions in a public forum. Indeed, emissaries were frequently selected not on the basis of what we might call negotiating skills, but rather their speech-making abilities.[6] Thus, many others argue that secrecy is necessary to diplomacy.[7] Apart from the difficulty of exploring the intricacies of contentious issues in full public view, there are matters of confidence that states may not wish to share — to say nothing of the need to keep one's military and other capabilities away from potential adversaries.

The deeper questions, however, are how much secrecy, and what *kind* of secrecy? The former point raises the question of when a slavish attachment to secrecy becomes self-defeating. The latter point introduces the crucial notion that greater or lesser secrecy are not always more or less of the same thing; there are different types of secrecy, introduced for different reasons. Some have conceived of diplomacy as warfare by other means, in which any degree and type of secrecy is permissible. Nowhere was this better epitomized that in the diplomacy between the constantly suspicious and antagonistic Italian city-states in the seventeenth century.[8] Cardinal Richelieu, while vastly contributing to the professionalization of diplomacy as prime minister of France

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intended to force closed imperial markets to open to US interests. See S. Sofer, 'Old and New Diplomacy: A Debate Revisited', *Review of International Studies*, vol. 14 (1988), pp. 195-211.

5   For a history of secrecy in diplomacy, see P. Sharp, 'Making Sense of Secret Diplomacy from the Late Moderns to the Present', in C. Bjola and S. Murray (eds), *Secret Diplomacy: Concepts, Contexts and Cases* (London: Routledge, 2016). See also chapter 1 of N.P. Momengoh, *Secret Diplomacy: The Practice of Back Channel Diplomacy by Liberal Democratic States*, Ph.D. thesis, Rutgers University (May 2013).

6   See K. Hamilton and R. Langhorne, *The Practice of Diplomacy: Its Evolution, Theory and Administration* (New York: Routledge, 1995), pp. 7-9; M. Wight, 'The States-System of Hellas', in C. Jonsson and R. Langhorne (eds), *Diplomacy*, vol. 2 of *History of Diplomacy* (London: SAGE, 2004); F.E. Adcock and D.J. Mosley, *Diplomacy in Ancient Greece* (New York: Thomas & Hudson, 1975); and J.-R. Leguey-Feilleux, *The Dynamics of Diplomacy* (Boulder, CO: Lynne Rienner, 2009), pp. 32-33.

7   See S. Sofer, *The Courtiers of Civilization* (Albany, NY: State University of New York Press, 2013), pp. 36-37 for the statement 'Diplomats are fascinated by secrecy and are united in regarding it as being of the utmost importance'.

8   M. Mallet, 'Italian Renaissance Diplomacy', *Diplomacy & Statecraft*, vol. 12 (2001), pp. 61-70; and C.H. Carter, 'The Ambassadors of Early Modern Europe: Patterns of Diplomatic Representation in the Early Seventeenth Century', in C. Jonsson and R. Langhorne (eds),

(1624-1642), developed the doctrine of *raison d'état*.[9] In the service of the state it is not just permissible, but is indeed sometimes necessary to employ secrecy in as aggressive and competitive a manner as required to gain advantage. This can include intentionally misleading others, although one should be very careful in doing this.[10]

Most diplomats and students of diplomacy would argue that this approach is inappropriate. They would support the need for an ambassador's instructions to be kept secret, and also the frank analyses that an ambassador writes for his or her own government. However, they would argue that misrepresenting one's objectives and telling mistruths to gain access or influence behaviour is self-defeating. Thus, contrary to the old quip about an ambassador being 'an honest gentleman sent abroad to lie for the good of his country' (attributed to Sir Henry Wotton in 1604), many practitioners and theorists of diplomacy have argued over the centuries that a high degree of honesty is required.[11] Simply put, being caught in a lie poisons the atmosphere and makes much harder the ongoing collaboration with one's interlocutors that is at the heart of diplomacy. Thus, what emerges from a discussion of secrecy in diplomacy, as explored in this context, is the idea of secrecy as a kind of *discretion*.

Beyond the question of different degrees of secrecy in diplomacy, there is a deeper level of analysis: the question of different *kinds* of secrecy, for different purposes. The diplomatic historian Harold Nicolson accepted the need for secrecy in the conduct of negotiations, but distinguished between what he characterized as secret negotiations, and attempts to conduct a secret foreign policy. The former is a necessity if negotiations are to proceed smoothly, but the latter is an undemocratic use of secrecy to enter into obligations not intended ever to be the subject of public scrutiny or oversight.[12] Geoffrey

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    Diplomacy, vol. 2. On Machiavelli's thoughts, see G.R. Berridge (ed.), *Diplomatic Classics: Selected Texts from Commynes to Vettel* (Basingstoke: Palgrave Macmillan, 2004), p. 42.

9   For more Richelieu, see G.R. Berridge, 'Richelieu', in G.R. Berridge and M. Keens-Soper, *Diplomatic Theory from Machiavelli to Kissinger* (London: Palgrave Macmillan, 2001), pp. 71-87.

10   Justus Lipsius (1547-1606) noted that while diplomats and states should keep their word, it was sometimes necessary to 'distinguish [...] between personal morality and the need to depart from it, if necessary, in the public domain'. See Sofer, *The Courtiers of Civilization*, p. 16.

11   For more on this, see Sharp, 'Making Sense of Secret Diplomacy from the Late Moderns to the Present', especially pp. 38-40; see also S. Murray, 'Secret versus Open Diplomacy across the Ages', in Bjola and Murray (eds), *Secret Diplomacy*.

12   See, for example, H. Nicolson, *Diplomacy* (Oxford: Oxford University Press, 3rd edition 1963); and Berridge and. Keens-Soper, *Diplomatic Theory from Machiavelli to Kissinger*, p. 157.

Berridge and Alan James also sought to create a distinction between different kinds of secrecy in diplomacy. They divided diplomatic secrecy into categories. Broadly speaking, the first of these relates to the need to keep secret the content of negotiations, and/or the fact that negotiations are even taking place, until such time as agreements have been reached, whereupon they should be made public. This is a form of Nicolson's need for secrecy in negotiations. On the other hand, Berridge and James discussed the desire of some states and statesmen to keep secret indefinitely certain actions, negotiations, or even the fact that these actions or negotiations had taken place at all — Nicolson's idea of the desire to run a secret foreign policy.[13]

Building on this analysis, Paul Sharp divided secrecy into three types: strategic secrecy; operational secrecy; and official secrecy.[14] Strategic secrecy is much like Nicolson's idea of individuals within a state attempting to run a secret foreign policy, 'of the same sort that some of the alliances between the great powers of 1914 were said to exemplify'. Operational secrecy is 'of the sort pertaining to the everyday relations of diplomats' and relates to Berridge and James's idea that the content, and even the fact of negotiations, may be kept secret if necessary, but not the results once agreement is reached.[15] Official secrecy relates to efforts to create a situation whereby those 'higher up' know that something is happening, but are insulated from having to admit knowledge of it.

Considerations as to how much and what kind of secrecy are appropriate in diplomacy are far from academic. As Corneliu Bjola shows in his study of the United States' extraordinary rendition programme during George W. Bush's administration, a concerted attempt was made to use both strategic and official secrecy (to use Sharp's typology). A secret programme was launched to allow the United States to escape its human rights obligations (under both treaties and domestic legislation) and to extradite terror suspects to foreign jurisdictions where it was known that they would be tortured, with the United States receiving the 'benefit' of the resulting information.[16] Similarly, the 'Iran–Contra' affair during the Reagan administration in the 1980s, whereby a small group in the White House broke US law and policy by secretly trading arms with Iran in hopes of influencing the release of US hostages in Lebanon, and

13   See G.R. Berridge and A. James (eds), *A Dictionary of Diplomacy* (Basingstoke: Palgrave Macmillan, 2nd edition 2003), p. 239.

14   Sharp, 'Making Sense of Secret Diplomacy from the Late Moderns to the Present', pp. 32-43.

15   Sharp, 'Making Sense of Secret Diplomacy from the Late Moderns to the Present', p. 32.

16   C. Bjola, 'The Ethics of Secret Diplomacy: A Contextual Approach', *Journal of Global Ethics*, vol. 10, no. 4 (2014), pp. 85-100.

then went on secretly to use the proceeds to support Nicaraguan rebels whom Congress had cut off, arguably constitutes a case of the kind of pre-First World War secret diplomacy, and also a form of official secrecy as defined by Sharp.

What is Back-Channel Diplomacy?

These various ideas about secrecy in diplomacy are crucially important in any discussion of the ethics of back-channel diplomacy. They allow us to draw a distinction between back channels that are intended to permit states and statesmen to probe quietly whether a change in policy is possible, which will then be subject to public scrutiny if agreement is achieved, and those back channels that are intended to remain secret forever and may speak to a desire to conduct what Nicolson would have called a secret foreign policy. In a sense, the former are attempts to achieve, in Anthony Eden's quip to Franklin Roosevelt in 1942, 'open covenants, secretly arrived at',[17] while the latter are attempts to run the kind of clandestine foreign policy that is identified with the secret arrangements of the Italian city-states of the Middle Ages, or the European powers prior to 1914.

Crucially, 'back-channel diplomacy' relates to talks that are not merely kept from the view of the public; they are also, and perhaps even more importantly, deliberately kept out of the view of much of the political and bureaucratic structures on each side that would normally be involved in negotiations. This is done for many of the same reasons as these talks are kept away from the public; there are interests and constituencies that resist change, especially on matters of great significance. Importantly, then, back channels are meant to obscure the fact that far-reaching policy changes are being explored, not just from outsiders (the public), but also from insiders (much of the political and bureaucratic elite).

Back channels can be facilitated by intermediaries, or they can be direct conversations; sometimes they will be both at various times.[18] The keys, how-

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17   See A. Eden, *Full Circle: The Memoirs of Anthony Eden* (London: Cassell, 1960), p. 175.

18   For more on those who perform the role of intermediary in back channels, see N. O'Dochartaigh, 'The Role of an Intermediary in Back-Channel Negotiation: Evidence from the Brendan Duddy Papers', *Dynamics of Asymmetric Conflict*, vol. 4, no. 3 (November 2011), pp. 214-225. Duddy was a businessman who had extensive contacts with the Provisional Republican leadership and acted as a go-between from them to the UK government for decades. Another who played this role was Father Alex Reid. More on Duddy and Reid may be found in E. Mallie and D. McKittrick, *The Fight for Peace: The Inside Story*

ever, are secrecy (both from the public and from much of the official structures of the governments involved), and the fact that those participating are explicitly acting on behalf of some in their governments.[19] Often, back channels are denied even as they are happening. Proponents of back-channel diplomacy regard this as essential. Back channels take place between long-standing adversaries who have publicly stated that they will 'never' talk to each other. How shall such states, or other groups, begin to explore whether a change in position might be possible if they would have to repudiate publicly a long-standing and widely-held position in order even to begin such an exploration? It is better, realists would argue, to find a way to begin to talk that does not require such a climb-down before the sides even know whether a new relationship is possible.

A famous case concerned the British government of John Major and the Irish Republican Army (IRA). Responding to a question in the United Kingdom's (UK) Parliament, Major emphatically stated

> If the implication of his remarks is that we should sit down and talk to Mr Adams and the Provisional IRA, I can say only that it would turn my stomach, and those of most Hon. Members; we will not do it. [...] I will not talk to people who murder indiscriminately.[20]

In fact, Major's government had initiated secret discussions through intermediaries, discussions that were shielded not only from the public, but also from most of the bureaucratic structure as well. Indeed, back-channel contacts had been underway since the 1970s.[21] As Major later wrote,

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of the Irish Peace Process (London: Heinemann, 1996). Of course, Duddy and Reid were not the only ones to play this role.

19   There is confusion over whether 'back-channel diplomacy' and 'track two diplomacy' are the same. I believe that they are not, although there are overlaps, as track two approaches semi-official talks, known as 'track 1.5'. The crucial distinction is that most track-two diplomacy involves non-officials who have influence, but who are not operating under 'instructions'. Rather, they are exploring ideas in confidence to develop new thinking and pass it to those who can use it. Back-channel diplomacy is a secret negotiation whereby those present are *instructed* by a small element within their governments. For more on track two, see P. Jones, *Track Two Diplomacy: In Theory and Practice* (Palo Alto, CA: Stanford University Press, 2015).

20   Cited in A.K. Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns* (Princeton, NJ: Princeton University Press, 2009), p. 35.

21   See, for example, N. O'Dochartaigh, 'Together in the Middle: Back-Channel Negotiation in the Irish Peace Process', *Journal of Peace Research*, vol. 48, no. 6 (2011), pp. 767-780.

We were well aware of the unlikelihood of success, but we felt we had a responsibility [...] to see if the leadership of the Provisionals, if offered fair and equal treatment, had the will and the ability to move away from terrorism.[22]

By contrast, opponents of back-channel diplomacy charge that it is yet another iteration of the secret deal-making that many believe was responsible for the collapse of the European system in 1914. If states have publicly maintained that they will never talk to another group, it is profoundly undemocratic to do so secretly. The people, and other power centres in the states concerned, have a right to be consulted before a *fait accompli* is launched on the public — and, more importantly, so far as the insider opponents are concerned, before a *fait accompli* is launched on *them*. In practice, of course, those opposed to back-channel discussions are often not so opposed to the idea of back-channels *per se*, as to the fact that they were not included in a specific one, or that a position they regard as sacred was compromised in such talks.

Although back-channel diplomacy is a reality, its practice as such has not been widely discussed. Once a back channel becomes known, it is the results — or lack of them — that become a source of public discussion and scrutiny, and not analysis of the process itself.[23] In other cases, back channels are never openly acknowledged. There are notable exceptions to this, and a small analytical literature has developed on back-channel diplomacy.[24] Taken together, these analyses suggest that the main benefits and drawbacks of back-channel diplomacy are:

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22   J. Major, *John Major: The Autobiography* (London: HarperCollins, 1999), p. 443. See also H. Toros, '"We Don't Negotiate with Terrorists!": Legitimacy and Complexity in Terrorist Conflicts', *Security Dialogue*, vol. 39, no. 4 (2008), p. 416.

23   For examples, see M. Heikal, *Secret Channels: The Inside Story of Arab–Israeli Peace Negotiation* (London: HarperCollins, 1996); and W.M. LeoGrande and P. Kornbluh, *Back Channel to Cuba: The Hidden History of Negotiations between Washington and Havana* (Chapel Hill, NC: University of North Carolina Press, 2014).

24   See: A. Wanis-St. John, 'Back-Channel Negotiation: International Bargaining in the Shadows', *Negotiation Journal*, vol. 22, no. 2 (April 2006), pp. 119-144; D.G. Pruitt, 'Back-Channel Communication in the Settlement of Conflict', *International Negotiation*, vol. 13, no. 1 (2008), pp. 37-54; O'Dochartaigh, 'Together in the Middle'; A. Wanis-St. John, *Back Channel Negotiation: Secrecy in the Middle East Peace Process* (Syracuse, NY: Syracuse University Press, 2011); Momengoh, *Secret Diplomacy*; and D.W. De-Wei, 'Public Manifestations of Backchannel Diplomacy: The Case of the 2013 Iranian Nuclear Agreement', in Bjola and Murray (eds), *Secret Diplomacy*.

Pros:

- Greater flexibility, as talks can begin and proceed without preconditions. Back channels reduce the so-called 'entry costs' of a negotiation. Participants do not feel so much pressure to 'play to the gallery' or to be seen as defending long-standing positions, but are able to explore new possibilities informally.
- Back channels can help elites on both sides to take the measure of each other. Often, in situations of long-term conflict, the two sides are captive to myths and narratives about the other. In recounting the secret back-channel talks in South Africa, Nelson Mandela believed that this ability to convince the white leadership directly on a human and psychological level that the anti-apartheid movement was not seeking to destroy South Africa, and that the white community would have a place in the new society, were among the most crucial elements of the eventual breakthrough.[25]
- Back channels provide a degree of 'cover', especially in cases where a political leader confronts a long-standing commitment 'never' to talk to the other side. The 'cover' that is provided to leaders has to do with constituencies on their own side who would make political trouble if news of the talks ever got out — the problem often known as that of 'spoilers'.[26]

Cons:

- The existence of back channels that are known to only a few can generate significant confusion, particularly if they go on for a long time. Among other dangers, this can lead to situations of 'forum shopping', where parties are tempted to go back and forth between different negotiating venues in search of better deals.
- There is a danger that a back channel intended to be an 'end game' becomes, in Anthony Wanis-St. John's term, an 'endless game' — a process whereby parties believe that they do not have to reach agreements because the negotiation is secret, so they avoid confronting the deeper challenges.[27] Sometimes this leads to incremental approaches, whereby one back channel begets another. Secrecy becomes ever harder to maintain, but it is

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25   N. Mandela, *Long Walk to Freedom* (New York: Little Brown, 1994); D. Lieberfield, 'Overcoming Intractability in South Africa and Israel/Palestine: The Role of Semi-Official Meetings', *American Behavioural Scientist*, vol. 50 (2007), pp. 1542-1562.

26   S.J. Stedman, 'Spoiler Problems in Peace Processes', *International Security*, vol. 22, no. 2 (1997), pp. 5-53.

27   Wanis-St. John, *Back Channel Negotiation*, pp. 198-260.

simultaneously harder to reveal the back-channel process, as it has become so loaded down with multiple aspects that its revelation becomes even more potentially explosive.

- Just as back channels can permit a negotiation to avoid the problem of spoilers, so too can they lead to a particularly vociferous mobilization of spoilers when their results become public. Those opposed to the concessions required to reach a deal will oppose them whether they are reached in open diplomacy or via a back channel, but there seems to be a particularly strong opposition to secret deals based on talks from which those opposed to the idea were deliberately and successfully excluded.

Can the Secrecy of Back-channel Diplomacy Be Ethical?

Although back channels are used regularly, their ethics are seldom discussed. Most who consider back channels take an essentially transactional approach: did a back channel work or not? Where the morality of back channels is raised, it is often by people who either agree or disagree with the results of a case. However, there are many ethical and practical issues that are raised by back channels. For example, do they accentuate the problem of 'group think' by cutting out the layers of oversight and challenge? Do they allow leaders suffering from megalomania to indulge those impulses in ways that could spell disaster?

This article is concerned with the ethical questions arising from the secrecy of back channels. Of course, secrecy raises broader ethical questions. As Sissela Bok notes, secrecy in itself is neither good nor bad; it can mean the idea of confidentiality, which is common to many occupations beyond diplomacy, such as the law and medicine. However, secrecy can also mean a reliance on 'stealth, furtiveness, lying and denial'.[28] Moreover, secrecy requires inequality — that is, some are privy to the secret, but most are not. Why? Who decides? And on what basis?

While these questions may excite the passions of philosophers, the considerations of secrecy with which officials concern themselves are more prosaic. If we accept that some degree of secrecy is required, even in a democracy — as most officials would, or they would not be very good (or loyal) officials — the question becomes how this secrecy shall be managed in order to prevent some power centres within a government from achieving their objectives by systematically relying on clandestine and unaccountable means. These are

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28   S. Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage Books, 1984), p. 6; see also Bjola, 'The Ethics of Secret Diplomacy', p. 89.

important considerations, and especially so for democracies. The very founda-
tion of democratic societies is that they make policy, and especially on matters
of importance, by means of discussion leading to an open and accountable
decision by the people's representatives. Allowing a small elite to decide im-
portant matters based on their preferences and privileged access to secret in-
formation is the antithesis of democratic government.[29] But does this mean
that a small group cannot quietly explore the possibility of new approaches
to difficult problems? Is this so fundamentally opposed to the very notion of
democracy as to be always unethical? Much would depend on how and why
they did it — the dreaded 'circumstances'.

   This leads us to the slippery but necessary area of 'contextual ethics' — what
Hilary Putnam has called 'ethics without ontology'.[30] In rejecting absolute eth-
ics, Putnam opens the door to ethical frameworks that are more subjective,
and are based on a combination of enduring ethical principles and the values
and experiences of the individuals concerned, along with the circumstances
in which they find themselves.[31] In this case, the ways in which people recog-
nize and categorize the ethical issues that they confront become central to the
matter, as these allow them to make trade-offs — that is, to consign some ethi-
cal questions greater or lesser status based on what they perceive to be more
important. In respect of back-channel diplomacy, this can mean approaching
the ethical question of whether it is right for a small elite to explore important
matters in secret by placing that question in the context of the bigger issue of
whether one can use secret talks under certain circumstances to achieve what
most would regard as a greater good — perhaps a peace treaty or the avoid-
ance of war.[32]

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29   J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category
      of Bourgeois Society* (Cambridge, MA: MIT Press, 1989). Similar issues are explored by:
      D. Thompson, 'Democratic Secrecy: The Dilemma of Accountability', *Political Science
      Quarterly*, vol. 114 (1999), pp. 181-193; and A. Ku, 'Boundary Politics in the Public Sphere:
      Openness, Secrecy and Leak', *Sociological Theory*, vol. 16, no. 2 (1998), pp. 172-192.
30   H. Putman, *Ethics Without Ontology* (Cambridge, MA: Harvard University Press, 2004).
31   Others who have explored this territory include: A.W. Price, *Contextuality in Practical
      Reason* (Oxford: Oxford University Press, 2008); and M. Timmons, *Morality without
      Foundations: A Defence of Ethical Contextualism* (Oxford: Oxford University Press, 1998).
32   This question of how such a contextual approach to ethics may be developed is further ex-
      plored in Bjola, 'The Ethics of Secret Diplomacy'. Bjola draws on many in developing this
      line of thinking, including: Putman, *Ethics Without Ontology*; G. Dworkin, 'Unprincipled
      Ethics', *Midwest Studies in Philosophy*, vol. 20, no. 1 (1995), pp. 224-239; and M. Kornprobst,
      'The Agent's Logics of Action: Defining and Mapping Political Judgement', *International
      Theory*, vol. 3, no. 1 (2011), pp. 70-104.

This is obviously dangerous territory, best summed up by the tyrants' favourite phrase 'the end justifies the means'. However, it is also the territory on which decisions are often made. Wishing it were not so will not make it go away. Instead, a practical response to this reality would be to explore whether decisions made in a framework of contextual ethics can be subject to scrutiny on the basis of certain ethical tests. In the case of secrecy and back-channel diplomacy, one can use these ideas to try to develop ethical frameworks involving tests intended to probe whether or not those undertaking a back-channel exercise did so for reasons that can be defended. These tests will not offer an absolute guarantee, but they can be useful, both in decisions to launch a back channel, and also, as that channel evolves, in order to permit one to make 'course corrections' if one's ethics are in danger of straying. They can also be useful in a retrospective analysis of a back channel.

After much reflection, I believe there are at least three tests, all of which can be applied at the beginning of a back channel, while it is in progress, and retrospectively.

Are You Trying to Run a 'Secret Negotiation' or a 'Secret Foreign Policy'?

This is perhaps the simplest and most obvious test, and draws from the work of Nicolson and others in making distinctions between different kinds of secrecy for different purposes. This is all very well on paper, of course, but the line between the different kinds of secrecy is apt to be blurry in real life. Moreover, it is likely to evolve with time in each case. History shows that back channels can last decades, and that their fortunes will wax and wane over that time. This is the case with the UK–IRA and Israeli–Palestinian back channels, and with the on-again, off-again back channel between India and Pakistan.

The question to be applied over time by those managing such a back channel is whether it remains an avenue whereby the secrecy that it affords is helpful in allowing them to consider new ways to address the key problems (ways that could not be explored via more open means), or whether it has degenerated into a mechanism that allows the space for management of the difference by small, secret groups with no interest or ambition in trying to change it. In the latter case, the back channel becomes an exercise in secret diplomacy as defined by Nicolson (or Sharp's 'strategic' secrecy), in so far as a back channel becomes a mechanism that helps those who run it to avoid confronting the key differences between them.

The difference between the two could be exquisitely nuanced over time, but may still be discernible. It may be that a long-standing conflict will go through periods when 'management' of the problem is all that can be achieved given other factors, even if there is a desire on one or both sides to try to resolve it. In such circumstances, a back channel that appeared to have become more about secret diplomacy than secret negotiations could still be ethical. The key would lie in the intent of those involved. Were they genuinely desirous of openly entering into a new relationship, but just not able to act upon this for the time being and so were using the back channel to reduce the prospects for violence until a new relationship was possible; or were they cynically using the back channel to maintain at an 'acceptable' level of cost a dispute from which they benefited in some way, with no intention of really trying to change the relationship and without ever having to confront the need to make their efforts public?

At the least, this test requires those involved in a back channel to question regularly their objectives and methods; it requires them to question whether their back channel is an extraordinary response to the situation, but is not intended to remain secret for ever, or whether it has become a regular 'way of doing business'. The former may be ethical, even if it lasts for a long time; the latter speaks more to an elite that wants to escape scrutiny and debate over foreign policy choices and methods, by circumventing the need within democratic systems to consider the views of other power centres that is imposed by whatever 'checks and balances' have been established to prevent abuses of power.

Are There Mechanisms to Reduce Secrecy Over Time?

This test, which builds on the considerations outlined in test 1, recognizes that secrecy is at once one of the keys to a back-channel's success, but that it is also one of its most pernicious aspects. Simply put, this test is another way of asking the following question: is the secrecy of the back channel a time-limited expedient, or a permanent end? The additional challenge that this test advances is whether those running the back channel accept that its results will ultimately have to be subjected to public scrutiny, and whether they plan for such an eventuality as part of the design and operation of the back channel.

This test requires those running a back channel to confront the need to envisage and plan for its transition to a diplomacy that is subject to scrutiny. As such, they must recognize and resist the danger represented by Wanis-St. John's

concept of the 'endless game' — that is, the tendency of long-standing back channels to become their own self-sustaining processes wherein each successive iteration of the back-channel discussion spawns its own successor and continued discussion can only take place in secret. When a back channel has reached this point, or is in danger of reaching this point, a critical appraisal is required.

One way to tell whether a back channel has, as part of its design, an idea that its results will be subjected to public scrutiny is whether the actors involved deliberately and consciously begin to prepare for a public discussion of the results of the back channel, even as it is under way and still secret. For example, in the run-up to the 2013 Joint Comprehensive Plan of Action between Iran and six world powers to limit Iran's nuclear programme, the United States and Iran launched a secret back channel outside the established negotiating platform. This back channel met in Oman.[33] Using discourse analysis of the public statements made by the two sides during the period when this back channel was operating, David Wong De-Wei shows that a calibrated strategy was in place to soften the ground publicly for the breakthrough that was to come, even as the Oman talks remained secret and the outcome remained uncertain until the last minute.[34]

Implicit within this attempt to change the public narrative on both sides, such that the new approach being worked on in the back channel might find acceptance, was a recognition that: a) the back channel in question was not meant to be unlimited in duration; and b) that it was meant to develop a proposal that would have to be 'sold' through a public process on each side to much broader constituencies. This back channel thus met tests 1 and 2 in that it was consciously designed to be of limited duration and not forever secret, and that its results were always intended to be subject to public scrutiny and acceptance by the democratic process. Of course, this back channel was working on a relatively specific and discreet difference between two well-defined actors. Moreover, this back channel built on years of other back channels and

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33   See, for example, J. Solomon, 'Secret Dealing with Iran Led to Nuclear Talks', *Wall Street Journal* (28 June 2015), accessed at http://www.wsj.com/articles/iran-wish-list-led-to-u-s-talks-1435537004; B. Klapper, M. Lee and J. Pace, 'AP Exclusive: Clandestine Meetings between US and Iran Set Stage for Nuclear Deal', *Associated Press* (23 November 2013), accessed at http://www.news1130.com/2013/11/23/ap-exclusive-clandestine-meetings-between-us-iran-set-stage-for-nuclear-deal/; and L. Rozen, 'Exclusive: Burns Led Secret US Back Channel to Iran', *Al Monitor* (24 November 2013), accessed at http://backchannel.al-monitor.com/index.php/2013/11/7115/exclusive-burns-led-secret-us-back-channel-to-iran/.

34   De-Wei, 'Public Manifestations of Backchannel Diplomacy'.

track two (and 1.5) discussions, which allowed the two sides to get to know each other and explore the issues.[35] Many back channels do not have these luxuries. Nevertheless, this test, particularly when used in conjunction with test 1, provides a means whereby those engaged in a back channel can subject their actions, and their reliance on secrecy, to scrutiny and critical examination.

Of course, not everyone will agree with this test. In particular, for some practitioners and scholars of diplomacy, it is the maintenance of international 'order' that is the paramount objective of diplomacy. In an anarchic, ever-shifting and frequently violent international reality, steps taken to maintain order can be regarded as ethical and selfless, even if they involve making sometimes difficult choices with regard to other objectives, such as transparency. In this respect, some might argue that an ongoing, permanent back channel can be an ethical act if it prevents the deterioration of order. This argument, of course, depends on how one defines order. Is the maintenance of a kind of stability (and a favourable balance of considerations) for an extended period of time preferable to dealing with concerns arising from an over-reliance on secret diplomacy? Critics would answer that such an approach may have been acceptable in the age of empires and secret diplomacy made by and for elites, but this is no longer the case.[36]

Does the Back Channel Exist to Allow Actions that Would Not Otherwise Be Legally or Politically Possible?

This third test raises the issue of the *substance* of the back channel in question. What are these secret talks or actions trying to achieve? Are you, for example, seeking to use back-channel talks to negotiate agreements that enable you secretly to extradite people to face torture, or other penalties, in contravention of your own country's laws? Of all the tests advanced in this article, this would seem to be the most straightforward. Actions are either legal or they are not.

Things will rarely be so clean in reality, however, and subjective judgements will often have to be made. As a concrete example, critics of the systematic and extensive use of secret channels that were characteristic of the Nixon

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35   See P. Jones, 'US–Iran Track Two from 2005 to 2011: What Have We Learned? Where are we Going?', *Negotiation Journal*, vol. 30, no. 4 (October 2014), pp. 347-366.

36   See Sofer, *The Courtiers of Civilization*, p. 14, for 'It was, at least until the rise of modern dictatorships, the moral obligation of the great powers to preserve the world order. This is the only way to consider the diplomacy of Metternich, Bismarck and Kissinger as a benevolent act'.

presidency, and largely carried out by Henry Kissinger, might say that these were an example of the Nixon administration's desire to avoid democratic scrutiny in order to carry out actions that would never be sanctioned if they were made public, and might even be regarded as illegal. Given the extensive and widespread use of back channels during this period, some argue that these methods became a *de facto* attempt to run a secret foreign policy of the kind warned about by Nicolson.[37] Defenders of the Nixon administration's actions respond to this charge by stating that the administration was faced with an extraordinary moment in world history. Nixon and Kissinger had to negotiate fundamentally new relationships with both the USSR and China simultaneously, while ending the war in Vietnam and dealing with a period of severe social and economic upheaval at home. Nothing would have been accomplished, in terms of the enormous and inter-locking revisions required across multiple policy areas, had it been necessary that each be openly debated within the deeply fragmented US political system, even as these changes were being explored. Yet action was desperately required in all of these areas for the good of the country.[38]

Even this, however, is not so clear-cut. For example, many could well regard as having been justifiable and necessary Kissinger's extensive use of back channels to explore whether an agreement to end the United States' involvement in Vietnam was possible. Certainly, the Norwegian Nobel Committee thought so when it awarded Kissinger a share of the Nobel Peace Prize for the outcome of these talks. However, many of the same people who applauded these secret talks might also say that the Nixon administration's decision secretly to expand the fighting in South-East Asia to include the bombing of Laos and Cambodia — even though Congress and the American people were never consulted — was not only wrong, but illegal. Yet Kissinger and others maintain that the secret talks would not have been possible, much less have succeeded,

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37   For one of the most vociferous, see C. Hitchens, *The Trial of Henry Kissinger* (New York: Verso Books, 2001). For a less polemical discussion, but one that still questions Kissinger's ethics, see G. Grandin, *Kissinger's Shadow: The Long Reach of America's Most Controversial Statesman* (New York: Metropolitan Books, 2015).

38   For a defence of Kissinger's legacy, see, among others, R.D. Kaplan, 'In Defense of Henry Kissinger', *The Atlantic* (May 2013), accessed at http://www.theatlantic.com/magazine/archive/2013/05/the-statesman/309283/. For a sympathetic and revisionist history of the man himself, see N. Ferguson, *Kissinger, 1923-1968: The Idealist* (New York: Penguin, 2015). This is the first of a two-volume biography. Kissinger describes the policy approach in chapter 28 of his book: H. Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994).

in the absence of 'secret' military actions to pressure the North Vietnamese to the table.[39]

To take another example, the back channel run by US National Security Advisor Robert McFarlane and Lieutenant Colonel Oliver North during the Reagan administration had two elements. The first was an effort to secure the release of American hostages held by Hezbollah by clandestinely dealing with Iran (including arranging for weapons' shipments to Iran by Israel) in the hopes that Iran might use its influence with Hezbollah. This back channel may well have been misguided, but had an objective that was limited in terms both of its desired outcome and the envisaged timescale of the discussions. Many might thus consider it ethically defensible. However, then using the funds generated by the arms' sales as the foundation for an operation to funnel support to the Nicaraguan 'Contras' was clearly illegal, in that it contravened the 'Boland Amendment', which prohibited US support for the Contras. Furthermore, destroying documents relating to what was known as 'the Enterprise', so that Congressional investigators would be stymied in their attempts to uncover the truth, was a crime. Those who believe strongly that the Nicaraguan government of the day was immoral might argue that even this was an ethical objective. Yet the American people clearly did not agree, as US President Reagan's popularity tumbled dramatically after the scheme was revealed, even though he disclaimed all knowledge that it was happening.[40]

Of the three tests advanced in this article, this third test is thus perhaps the most difficult to apply consistently. While the first two tests concern the reasons for which a back channel is kept secret, and how long its secrecy should be maintained, the third test attempts to assess the *actions* undertaken in the back-channel's name, or as a result of its existence. Contextual ethics can find themselves stretched to their breaking point in such an exercise. Nevertheless, it is important to retain this test as a means of forcing those involved in running and assessing back channels to confront these issues, even if the answers might often not be so clear cut as one might want.

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39   In reality, these 'secret' actions did not remain so for very long. For Kissinger's own and not surprisingly sympathetic account, see H. Kissinger, *Ending the Vietnam War: A History of America's Involvement in and Extrication from the Vietnam War* (New York: Simon & Schuster, 2003); and chapter 27 of Kissinger, *Diplomacy*.

40   The Report of the Independent Counsel appointed to investigate the scandal may be found at https://fas.org/irp/offdocs/walsh/. A useful summary of the Report into what *The New York Times* called a 'Secret Foreign Policy' may be found at 'The Iran Contra Report: Excerpts from the Iran Contra Report; A Secret Foreign Policy', *The New York Times* (19 January 1994), accessed at http://www.nytimes.com/1994/01/19/world/iran-contra-report -excerpts-iran-contra-report-secret-foreign-policy.html?pagewanted=all.

Conclusions

The tests developed in this article provide mechanisms to explore the ethical foundations of secret back-channel exercises, but they are not absolute. Even things accomplished by back channels that would unambiguously be regarded as intrinsically worthy cannot always meet all three of the tests elaborated above. For example, at the height of the Cuban Missile Crisis in October 1962, President Kennedy used a back channel to negotiate the secret withdrawal of US missiles from Turkey as part of a package that formed a *quid pro quo* for the Soviet withdrawal of missiles from Cuba. However, Kennedy could not admit that he had done this, as US political and public opinion would not likely have accepted anything other than the appearance of an unambiguous Soviet climb-down. Thus, the withdrawal of US missiles from Turkey was negotiated in a back channel; was deliberately done in secret; and was intended to remain secret for many years, if not forever. As such, it fails tests 1 and 2 outlined in this article. However, it probably would pass test 3, as nothing Kennedy did was illegal or beyond his power as president. Does the fact that his actions 'failed' two of the three ethical tests outlined in this article mean that Kennedy's use of a secret back channel, which itself was intended to remain secret, was ethically wrong? In view of the stakes that Kennedy faced when he had to make his decisions, including the very real possibility of a nuclear war, many would say not, even if his actions do not meet two of the three tests advanced.

Thus, the tests developed in this article do not claim to be perfect. Ultimately, they have to be applied by fallible people in contexts that are murky. Moreover, these tests place the onus for their implementation on those running the back channel, at least if they are applied as the back channel is operating. There is no alternative to this because, by definition, only those operating the back channel know of its existence. This presents something of a 'fox in charge of the hen house' problem. On the other hand, these tests, if implemented conscientiously, do permit at least the beginning of an ongoing assessment while a back channel is operating. They certainly assist us in retroactively assessing back channels that have eventually become public.

At the end of the day, back channels will happen. Experience shows that they have proven too useful too many times for statesmen and diplomats to dispense with them. The ethical dilemmas that back channels raise, particularly with respect to the question of secrecy and especially for democracies that use them, are real, but they are not enough to prevent them from happening. What we can do is to examine back-channel diplomacy dispassionately and question whether or not at least some ways can be found to allow those engaged in back channels, and those who study them once they have become

known, to hold their actions up to some form of scrutiny. This will be a scrutiny that will likely always rely on ethical standards that are subjective and contextual, but it will be a degree of scrutiny, at least. This will not satisfy ethical purists, but it may well be the most that can be accomplished in the rough and tumble of the real world of conflict and diplomacy.

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