



### **WINDFALL: THE BOOMING BUSINESS OF GLOBAL WARMING**

BY MCKENZIE FUNK

*The Penguin Press, New York, NY, 2014. 310 pages, \$27.95.*

#### **Reviewed by Christopher C. Faille**

At one point in this multifaceted book, McKenzie Funk treats us to a brief discussion of the philosophy of secession. Under what circumstances should one part of a larger political entity—perhaps a part with boundaries of its own (a province or region) and some degree of autonomy (a capital city and a legislature)—secede from the whole? And when is this wrong?

Sam Houston is the name that always comes to my mind first when I think of such questions, because Houston had the rare experience of playing a prominent role on both sides of the question. He of course worked to secure Texas' secession from Mexico, but, many years later, he was a critical figure among the Unionists of Texas, resisting that state's secession from the United States.

Sometimes secession requires violence in order to be effective, as in the first of the two cases in Houston's life. Sometimes it is attempted violently and fails nonetheless, as in the second. In yet other cases, secession comes about peacefully. One of these was Greenland's secession from Denmark in 2008-2009. Actually, "secession" may be rather too strong a word there, as Greenlanders continue to leave certain foreign-policy functions to the Danes. Still, the two countries are held together only by very loose reins, and we may as well describe the referendum that produced this situation, and the subsequent negotiations, as a successful case of peaceful secession.

#### **A Minute with Minik**

In *Windfall*, McKenzie Funk unequivocally calls the activists who produced this result in Greenland secessionist, and he has discussed the politics of independence, as well as the related politics of melting ice and climate change, with one of those activists, Minik Kleist.

Minik (as Funk calls him) studied political

philosophy at Denmark's Aarhus University. His master's thesis was on "Greenlandic Autonomy or Secession: Philosophical Considerations," and in it he grappled with the work of American philosopher Allen Buchanan.

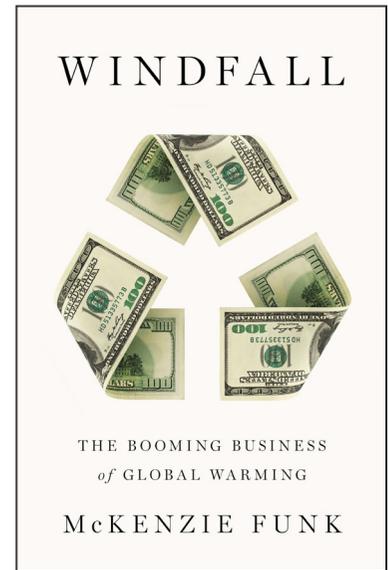
According to Buchanan, secession is right when it is a remedy for serious wrong. Or, as certain secessionists put the point in 1776, prudence dictates "that Governments long established should not be changed for light and transient causes" but may rightly be changed in response to "a long train of abuses and usurpations."

For Minik, the problem with that line of thought is that the Danes have been a relatively benign colonial power. Every Greenlander has had full citizenship, for example, since 1953. Further, Denmark pays to allow Greenlanders such as Minik to attend universities in the mother country, or elsewhere in Europe, and write masters' theses such as his. Minik doesn't believe, though, that he should be expected to point to a long train of abuses and usurpations by the Danes in order to justify secession.

Minik told Funk, "Sometimes you have to view this as a marriage: adults, consenting people, divorcing of their own free will." The no-fault secession seems to have been fueled in part by the positive economic consequences for Greenland of recent changes in climate. The referendum in 2008 and the agreement with Denmark in 2009 together meant that Greenland has taken over control of its own natural resources—and because of climate change these have acquired much greater value and marketability than they had even quite recently. Thus, because of climate change, Greenlanders are persuaded they can go it alone as a country. Parts of the island that had long been inhospitable to oil drilling have become amenable, and suddenly there is what Funk calls "an untapped Gulf of Mexico in the North Atlantic."

#### **What We Know Since 2006**

Greenland's secession is only one of many stories that Funk tells in this book. He isn't especially interested in arguing with people who don't want to believe that climate change is real, and so won't believe it. In his eyes, it is plainly a fact, and a con-



junction of events in 2006 should have made that plain to everyone.

That year saw Greenland lose 100 gigatons of ice, and drought-crazed camels rampaged through an Australian village. Also in 2006, fire consumed millions of acres in Siberia; the Bay of Bengal took over most of Ghoramara Island in India; the Solomon Sea conquered most of the village of Malasiga in Papua New Guinea; and the people of Shishmaref, a village in Alaska, decided to evacuate their homes ahead of a Chukchi Sea inundation.

Further, in 2006 scientists reported that a 40-square-mile ice shelf had broken off Ellesmere Island in the Canadian territory of Nunavut, and that a European satellite showed a crack in the ice pack that led all the way from northern Russia to the North Pole. The crack was temporary, but indicative nonetheless. Beyond that year, "[s]keptics would continue loudly doubting the overwhelming scientific consensus, but they were a smoke screen," Funk tells us.

Because Funk considers that argument over, the book isn't about that. Nor is it about a plan to head off global warming at the level of intergovernmental cooperation. Funk quotes Jeroen van der Veer, an analyst working for Shell Oil Company, who has written rather wistfully of the possibility that, after the expiration of the Kyoto Protocol, which at the time he wrote this analysis was set for 2012, "a meaningful international carbon-trading framework

with robust verification and accreditation [might emerge] from the patchwork of regional and city-city schemes.”

But Funk doesn't hold out much hope for such a result. We should observe here that most parties to the protocol have agreed to its extension until 2020. Canada—an arctic power that is reaping the same benefits as Greenland from warming trends—has pulled out of this second round. So far as I can tell, Funk is right on this and van der Veer's speculation was wrong.

Instead, what this book is chiefly about is the way in which people all over the world—people who never cross the cognitive radar of newspaper editors or readers—are adjusting to the fact of climate change, “so if there's a glimpse of the future in these pages, it's only because we're the ones making it.” Minik is making the future in his manner, but so are the hundreds of entrepreneurs Funk has met who are each convinced that there is profit to be made from climate change.

### Towing Bags of Water

One of the important features of the near future is that hydrological maps—our ideas of where fresh water may be found, and where it is needed—will have to change. Droughts will hit unaccustomed places, and places that previously had droughts as fluctuating temporary conditions will now become permanently dry.

Terry Spragg is one of the entrepreneurs who hopes to benefit from this. The trick is to make a profit off ways in which water can be carried about more efficiently than it has been. Thus, the “Spragg bag” came into existence: this is a water-transport bag of fabric that can be attached to other Spragg bags (to form a long towable train) with a special patented zipper.

The Spragg bag and like inventions may give some people hope that in the end the human race will muddle through the coming climate changes without disastrous consequences—that we will learn to adapt and that the profit motive will be the motor of the adaptation.

Some people may be hopeful, and some may even have their hopes lifted by parts of this book. In fairness to Funk, though, we have to say: he isn't hopeful. He is as pessimistic about private-sector adaptations to the consequences of global warming as he is about public-sector efforts at mitigation. His bottom line is one of gloom.

He concludes his discussion of the Spragg bags, typically, with a comic opera note. “In 1996 [Spragg] completed a successful drag across Puget Sound to Seattle, only to have a tugboat run into his docked prototype.” Funk's prose is sufficiently lively, and Funk takes us so stylishly through a wide range of fascinating subjects (human, political, and technological) as such an amiable guide, that we hardly notice the deep gloom of his bottom line.

Nonetheless, *Windfall* is a sign of a healthy shift in the way we talk about global warming, and the Spraggs of this world will never be as gloomy as the Funks, though lots of prototypes get busted on the way to adaptation. ☉

*Christopher Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.*

### **BURNING THE REICHSTAG: AN INVESTIGATION INTO THE THIRD REICH'S ENDURING MYSTERY**

BY BENJAMIN CARTER HETT

*Oxford University Press, New York, NY, 2014. 413 pages, \$29.95.*

### Reviewed by Christopher C. Faille

Whodunnit? Stormtrooper Heini Gewehr, with help from Marinus van der Lubbe and, quite possibly, others.

That's the spoiler. Here's the crime. The German parliament building, the Reichstag, caught fire just after 9 p.m. on Feb. 27, 1933, with calamitous consequences for Germany and the world.

When that fire began, Adolf Hitler was the leader of a shaky coalition within a constitutional republic. Before the ashes had cooled, Hitler was more than that: He had assumed dictatorial powers in order to resist the alleged Communist menace that, he proclaimed, the fire represented.

Marinus van der Lubbe, a Dutch citizen found inside the building while it burnt, soon confessed. Until his execution 11 months later, he took all the guilt upon himself. He adhered to this consistently, with one possible exception (to which I'll return). Many distinguished historians have agreed with him, contending that this fire

was not the work of a conspiracy at all, but the work of a lone wolf, and an act upon which the Nazis then seized to consolidate their power. Hitler got lucky, according to this reasoning, because van der Lubbe gave him just what he needed. Hans Mommsen and A.J.P. Taylor are prominent among those historians who have taken this view.

### Another View

There has also always been another view: that the Nazis created their own opportunity, and that they enlisted or tricked van der Lubbe into helping them. In *Burning the Reichstag*, Benjamin Carter Hett, professor of history at Hunter College, has now revived the case for the latter theory, freshening up some old arguments with new evidence. He doesn't profess to know how the Nazis enlisted or tricked van der Lubbe. He says that, because “[d]eath has long since taken anyone who knew ... this part of the mystery seems destined to stay with us.”

Here's an intriguing question: what was van der Lubbe doing between 6 p.m. and 9 p.m. on Feb. 27? His confession said that he had been waiting around since 2 p.m. for the cover of darkness. But it gets dark in late February in Berlin by 6 p.m. Why did the arsonist dawdle for another three hours before acting?

As Hett observes, “The evidence of the regular rounds of Reichstag employees—the mailman, the porters, the lighting man—showed that there was a window of opportunity between 9:00 and 10:00 when there would be no one inside the building to disturb an intruder.” It beggars belief that van der Lubbe stood about, in the already dark streets of Berlin, for three hours, doing nothing at all on a freezing evening (6 degrees below centigrade), and then broke in just as the best time to do so had arrived, without someone having tipped him off as to when that best time was.

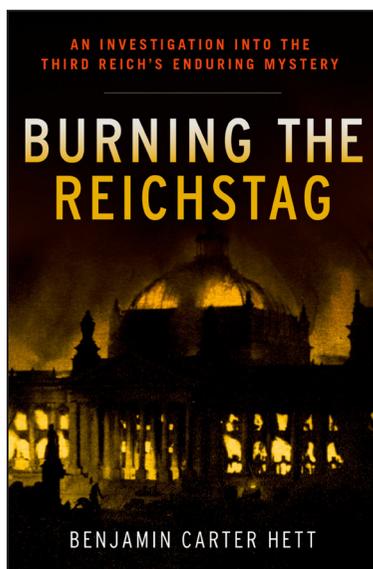
Above I observed that van der Lubbe's consistent insistence that he was a lone-wolf arsonist did have one arguable exception. That came during his trial. The presiding judge, Wilhelm Büniger, asked van der Lubbe where he'd spent the day before the fire, which was Sunday, Feb. 26. The defendant said, “At the Nazis.” Everybody did a double take. Büniger asked again, “With whom, did you say?” This time van der Lubbe went back on script and replied, “No one.” The next day, the propaganda ministry ordered

the German press to limit its coverage of the remainder of the proceedings.

### Rudolf Diels

Much of Hett's book focuses on the life and actions of Rudolf Diels, the commander of the political department of the Berlin police at the time of the fire. That April, his office would acquire a new name, *Geheimes Staatspolizeiamt*, a mouthful that is better known as the Gestapo, which was administered by the *Schutzstaffel*, or SS. Diels doesn't cut a large figure in most history books—he would be dismissed from his post a year after the name change, and control of that agency would go to Heinrich Himmler and Reinhard Heydrich, both of whom do cut large figures.

But Diels was responsible for the investigation of the arson and for van der Lubbe's interrogation. At a press conference on March 3, 1933, Diels told reporters that van der Lubbe was "one of the arsonists in the attack on the Reichstag" [Hett's emphasis]. From this time on, there was a good deal of ambiguity in Nazi ranks about how to portray the fire. If they painted it as a plot, alleging that van der Lubbe had assistance (as Diels had implied), then they would open themselves to the charge that they were themselves the ones who had provided that assistance. Yet, if they stuck to the view that Diels was a lone wolf, then, even given van der Lubbe's real Communist connections and possible ideological motivation, he would seem an inadequate bogeyman to justify the dictatorial powers that Hitler had already seized.



Accordingly, although the government indicted four co-conspirators along with van der Lubbe, the indictment itself showed, in Hett's words, "ambivalence" on "the question of what those co-defendants might actually have done. How they had specifically been involved in the fire was, said the indictment, irrelevant."

Skipping forward a number of years, in 1946, Diels wrote to the British occupation authorities. He was unhappy about the fact that a former associate of his, Hans Bernd Gisevius, had written a book telling a story that implicated Diels himself in the fire. So Diels wrote to finger someone else:

As I have been informed by the defense counsel for the SA, the former SA Leader Heini Gewehr, who in Gisevius's book *To the Bitter End* is identified as the chief culprit in the burning of the Reichstag and is also held by me to be so, is presently in an American internment camp. In the interest of determining the extent of Göring's responsibility, and in light of the considerable interest of the German public in the clearing up of this first crime of the National Socialists, but also because Gisevius brings my name into immediate connection with this event, I ask that Heini Gewehr be interrogated.

After the war, Diels also repeatedly told journalist Harry Schulze-Wilde that the chief culprit in the Reichstag fire was this same fellow, Heini Gewehr. He told him in 1947 and 1952, and, then, in 1957, elaborated that he, Diels, knew what chemical solution Gewehr had used. That is important, because it indicates that Gewehr didn't merely encourage van der Lubbe, or tell him that 9 p.m. was a good time for such a deed—Diels was suggesting that Gewehr was *in the building using that solution*.

Schulze-Wilde seems never to have published these interviews. A letter he wrote to a friend, in 1961, describing them, like the Diels' letter to the British occupation authorities quoted above, are among the fascinating new pieces of evidence that Hett's study of this controversy has brought to light.

### Believing Diels

One might be inclined to take Diels' statements with a grain of salt. After all, everybody who had been part of the German government during the Nazi period was telling such tales to the occupation officials at the time. They were all saying things such as, "I was against Hitler, the dictatorship, the war, and the Holocaust from the beginning—but I had to go along to save myself—the real culprits were [insert names here.]" Why is Diels' statement different?

If I understand Hett, he believes that Diels' charge is credible for four reasons. First is the physical evidence. Out of considerations of space, I have not discussed this matter, but Hett does a good job with it. As interpreted by credible experts, the physical evidence indicates that van der Lubbe could not have done everything in the time available to him for which he took credit or blame. Somebody else had to have been there.

Second, Gewehr was, in Hett's words, "the SA's recognized expert in the deployment of phosphorus for political arson," having done analogous deeds before.

Third, Gewehr had no alibi. If he wasn't inside the Reichstag around 9 p.m. on Feb. 27, then logically he must have been someplace else. Where? He "was never able to give a consistent and plausible account of where he had been that night." Other otherwise-plausible suspects (including, if you're wondering, Diels) did have alibis.

Fourth, the fact that Diels was agreeing with Gisevius in attributing the crime to Gewehr is itself important. Diels and Gisevius hated each other. Diels had pushed Gisevius out of the SS in a power struggle.

To Americans, all this is reminiscent of debates about the Kennedy assassination. Lee Harvey Oswald is our van der Lubbe, a man with real Communist connections and who did in fact have *something* to do with a violent crime. But neither of those points closes down the argument that there is more to the story, and that the government that investigated the crime also may have contained elements within itself that had committed the crime.

### The Chain of Command

Among those who accept that notion with respect to the Reichstag fire, the question arises, how far up the chain of command did government participation extend?

Hett notes that Diels, in the 1946 letter mentioned above, had suggested that the Nuremberg tribunal ought to inquire into the responsibility of Hermann Göring, a Hitler intimate. Diels was agreeing with Gisevius in fingering *Gewehr* in order, as he said, to help the occupiers explore the extent of Göring's responsibility.

Göring is best remembered as the commander-in-chief of the Luftwaffe (air force). He didn't assume that post, though, until 1935. In 1933, the year of the fire, he was Minister of the Interior for Prussia, and in that capacity he occupied a residence that was connected to the Reichstag by a tunnel. That tunnel is crucial, because it means that poor van der Lubbe might have sincerely believed himself the sole arsonist. He need never have seen *Gewehr* or anyone with *Gewehr*. They may have come and gone already, through the tunnel, by the time van der Lubbe arrived.

The official residence was behind the Reichstag, and a boiler house was behind that. The tunnel connected each of the three buildings. Anyone attempting to enter the Reichstag's basement this way would have had to open iron doors, and that would have required master keys.

Hett considers it "possible, though unlikely, that the SA carried out the attack on the Reichstag entirely on its own initiative, with no orders from higher up." SA personnel could, for example, have entered the tunnel through the boiler house, and made their way along the tunnel quietly enough so as not to alert anybody in the residence. But it seems more likely that Göring was responsible, and (given the speed with which the propaganda ministry reacted to early reports of the fire) that Goebbels had at least received a heads-up.

As to Chancellor Hitler, Hett says there is little or no evidence, direct or indirect, that he knew of the fire, much less that he ordered it.

But that matters little. To return to the issue of historically freighted "luck" for a final thought: Even if the fire came as a surprise to Hitler, if Hett is right, then it becomes absurd to say that Hitler was lucky to have received this opportunity to seize dictatorial powers. Members of his inner circle offered him a gift. He simply unwrapped it. ☉

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*William James has taught him that the only way we humans can find out "by what sort of conduct the maximum amount of good can be gained" is by analyzing the record of our species' experiments.*

## **FLASH BOYS: A WALL STREET REVOLT**

BY MICHAEL LEWIS

W.W. Norton & Co., New York, NY, 2014. 274 pages, \$27.95.

### **Reviewed by Christopher C. Faille**

Michael Lewis' books are Events.

Lewis is the author of, for example, *Moneyball* (2003), a book on the economics of baseball, the book that became the basis for a successful 2011 movie of the same name, starring Brad Pitt. Lewis also wrote *The Blind Side* (2006), which was reviewed in the May 2007 issue of *The Federal Lawyer*, and is about the evolution of football's offensive strategies. A subplot in this book treats of the life of Michael Oher, from his impoverished childhood through his draft as a right tackle by the Baltimore Ravens. The Oher storyline became a movie in 2009, and Sandra Bullock won an Academy Award for playing Oher's adoptive mother.

Lewis is also the author of *The Big Short* (2010), which looked at the financial crisis of 2007 through the eyes of certain savvy investors who made a lot of money on the short side of the Collateralized Debt Obligation (CDO) bubble. In less technical terms, Lewis' small band of protagonists accurately predicted and bet that many people would default on their home mortgages. They made a fortune on their bet.

Michael Burry, one of the central figures in *The Big Short* (and I'm guessing the central character if a movie is made) has Asperger's Syndrome. This has worked out well for him, because the capacity for long hours of solitude, and an inability to become bored with a problem once fixed on it—two common features of Asperger's—were precisely the traits that allowed Burry to analyze the fine print of CDOs. Burry's hedge fund, Scion Capital, earned \$750 million in 2007 as a consequence.

### **Simplicity and Lamentation**

Perhaps unsurprisingly, Lewis' protagonists in *The Big Short* seemed more like

villains than heroes to some of its reviewers. Some complained that shorting activity can help sustain the bubble off which it profits, so Burry and others Lewis portrayed in a positive light were actually part of the problem. Even if they weren't, it seems counterintuitive to celebrate people for the profits they made by building a funeral parlor just before a deadly plague hit town. Janet Tavakoli, an expert on CDOs and the principal of Tavakoli Structured Finance Inc., wrote in a review of *The Big Short* that Lewis had "mangled the facts in his eagerness to create a story."

Lewis is also the author of *Boomerang* (2011), which is probably the weakest of his books. Here he peddles the overly broad thesis that just about everybody is to blame for the financial crisis in the United States in 2007-2008 and, for that matter, the subsequent crises in the rest of the industrialized world. As he says in the introduction to *Boomerang*, after "I wrote the book about the U.S. subprime mortgage crisis and the people who had made a fortune from it, but [then] began to travel to these other places, just to see what was up." The book is as scattershot as that introduction suggests. It turns out that many other things were up.

Trying to tie it all together, he tells us that cheap credit "offered entire societies the chance to reveal aspects of their characters they could not normally afford to indulge. ... Americans wanted to own homes far larger than they could afford. ... Icelanders wanted to stop fishing and become investment bankers. ... The Germans wanted to be even more German; the Irish wanted to stop being Irish."

Yet even this second-tier Lewis book was an Event of sorts. It catalyzed a lengthy lament in *The New Republic* about how the notion that everybody is to blame has become "the big lie of the post-crash economy." And now we have a new Michael Lewis book, *Flash Boys*.

### **And, Yes, It Is an Event**

The odds are good that most readers of *The Federal Lawyer* have some knowledge of the broad outlines of the book by now. Its subject is the newness of stock market structure and mechanics in the second decade of the 21st century. The days of market specialists in colorful jackets, the guys who used to stand on a trading floor and yell at each other, accompanying their yells with vigorous hand gesture—those

days are long gone. Some trading floors still exist, but they are kept alive more for nostalgia than for function. Trading happens in black boxes, at incomprehensible speeds, through the use of ever more sophisticated computer algorithms, and the very meaning of such terms as “stock exchange” is up for grabs. And, yes, given these circumstances, new ways for some people and institutions to cheat others have arisen.

In my own writing, I’ve touched upon many of the issues that Lewis does here. Indeed, I discussed structural issues in the January/February 2013 issue of *The Federal Lawyer*, in my review of *Broken Markets*, by Sal. L. Arnuk and Joseph C. Saluzzi.

Lewis brings his own brand, and he brings his habit of putting a striking individual at the center of the story. The evolution of football strategies yielded Michael Oher; the subprime mortgage bubble yielded Michael Burry; and, in *Flash Boys*, algorithmic trading gives us Brad Katsuyama. Katsuyama is a Japanese-Canadian whose grandparents were interned in prison camps in the west of Canada during World War II. Until recently, Katsuyama traded technology and energy stocks on Wall Street on behalf of the Royal Bank of Canada (RBC).

Katsuyama became persuaded that the markets were rigged against him, and against RBC, by traders on the cutting edge of technology. Wall Street had become an arena of haves and have-nots, where the haves are defined by the speed with which they execute their trades, their possession of the latest and most sophisticated algorithms, and their employment of the limited number of coding geniuses capable of devising and maintaining the fanciest machines. RBC was a have-not, and this limited Katsuyama’s ability to serve the interests of his clients. So he left his job at RBC and started a dark pool, called at first “Investors’ Exchange” and later just IEX.

### What’s a “Dark Pool”?

“Dark pool”: That is a dramatic way of describing the fact that many trades of exchange-listed companies take place way off the exchanges, outside of any circuitry with which the exchanges have anything to do. Dark pools developed a few years ago in part through brokerage-house internalization. That is, if a broker knows that one of

his clients is ready to buy Widget Enterprise stock at the same price at which another client is willing to sell it—why involve the exchange at all?

Also, there are institutional investors who deal in large chunks of stock who like their liquidity dark, because they can avoid tipping their hand—disclosing their investment strategies.

According to many of the people who think regularly and clearly about market structure issues, the proliferation of dark pools is part of the problem. They have given us a world in which there is no longer such an entity as “the market as a whole.” Indeed, in certain passages of *Flash Boys*, Lewis himself seems to share the view that this is an important part of the problem.

Thus, there is some irony in the fact that he also presents IEX—a dark pool—as the solution. Apparently, the fragmentation of the public-corporation equity marketplace is a good thing when one of the fragments involved is addressing other pieces of the puzzle. But Lewis can make nothing of the irony there, because irony is not part of his brand. Good guys versus bad guys: that’s his brand.

So powerful was the immediate impact of *Flash Boys* that, the week it appeared, two of the business eminences discussing it on a program on CNBC were speaking to each other sounding like street toughs circling each other with knives in hand. “So if you want to do this, let’s do this.”

### Let’s Do This

One of these eminences was William O’Brien, the president of BATS Global Markets, a stock exchange that is accommodating of high-frequency traders. The other was Katsuyama himself. Lewis had attributed to Katsuyama the notion that the markets were “rigged.” O’Brien took particular exception to that word, and wanted Katsuyama either to own it or disown it.

Katsuyama tried to back off the term. “It’s disgusting that you’re trying to parse your words now,” O’Brien told him. Katsuyama decided to own the word then.

“I believe the markets are rigged. ...”

“Okay, there you go.”

“And I also believe that you’re a part of the rigging. So if you want to do this, let’s do this.”

The heated discussion that followed generated little light, though it surely sold books. It also helped raise the profile of IEX

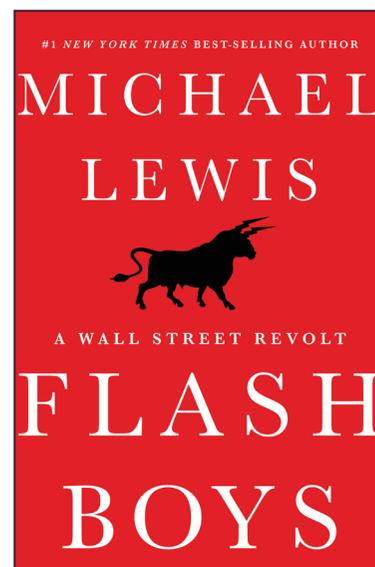
as a place where investors—personal and institutional—who see themselves as part of the technological have-not class can kick their shoes off and feel at home.

Will there be broad reforms as a consequence of the attention that issues of market structure are now receiving? I don’t know. Should there be? Yes, I can think of a few good suggestions. But I fear that if regulators get rushed into Doing Something because of a big publishing event and subsequent brouhaha then they are likely to do more harm than good.

This fear was exacerbated on the morning of April 11th when I saw an op-ed piece by Burton Malkiel and Arthur Levitt in the *Wall Street Journal*, addressing what they describe as the “firestorm of criticism” of high-frequency trading. Those are both names with which to conjure, and they confirm the bigness of this publishing Event. Malkiel was a director of the Vanguard Group for more than a quarter century. He has also been dean of the Yale School of Management and chairman of the economics department at Princeton. Levitt is now on the board of Bloomberg LLP and was chairman of the Securities and Exchange Commission from 1993 to 2001.

### Scalping

Malkiel and Levitt propose an expansion of the scope of insider-trading enforcement. Those aren’t their words, exactly. Much of the essay is devoted to the claim that the fuss Lewis has kicked up is excessive. But they also say that one of the real problems with high-frequency trading is that well-positioned traders “can see trade orders from other investors before they are



executed,” and can execute their own purchases “just ahead of those orders and run the price up just a bit, pocketing the difference.” This scalping, they say, amounts to insider trading, and the SEC should address it under that rubric.

That would be an expansion of the idea of “insider trading,” insofar as there is no fiduciary duty that has been breached when an algorithm runs in front of someone else’s bid in such a way. Still less is there a clear duty between the actual human beings involved who benefit from the pennies accumulated in this way, on the one hand and the traders, and their clients, getting scalped, on the other.

I don’t wish to make light of the scalping, but to call it “insider trading” looks like a significant expansion of an already worrisomely vague enforcement mandate. A better approach might be to roll back some of the recent regulatory changes that have empowered these robots and robot masters. Here’s a thought: some of the key changes that require a rollback took place under Levitt’s watch.

For those who have been drawn into the subject of market structure and mechanics for the first time by Lewis’ book, please get a copy of Arnuk and Saluzzi’s *Broken Markets*, a far better though not so well written account. ☺

*Christopher Faille is a prolific author of online book reviews for The Federal Lawyer.*

## **SPYING ON DEMOCRACY: GOVERNMENT SURVEILLANCE, CORPORATE POWER, AND PUBLIC RESISTANCE**

BY HEIDI BOGHOSIAN

*City Lights Books, San Francisco, CA, 2013. 349 pages, \$18.95.*

### **Reviewed by David Gespass**

On March 8, 1971, the FBI office in Media, Pa., was burglarized. The perpetrators learned of, and exposed, the Bureau’s Counterintelligence Program (COINTELPRO) of spying on and subverting individuals and organizations it perceived as political opponents. Back then, pundits and elected officials at least had the good grace to be stunned and appalled that a government agency was spying on American citizens engaged in lawful activity. Congressional

hearings were held, not about the burglary, but about the FBI’s invasion of that most fundamental of rights, famously identified by Louis Brandeis as the right to be let alone. The FBI had violated that right with impunity, and Congress was having none of it, or at least less of it. It seemed the country would not tolerate unwarranted government intrusions into the private lives of the citizenry.

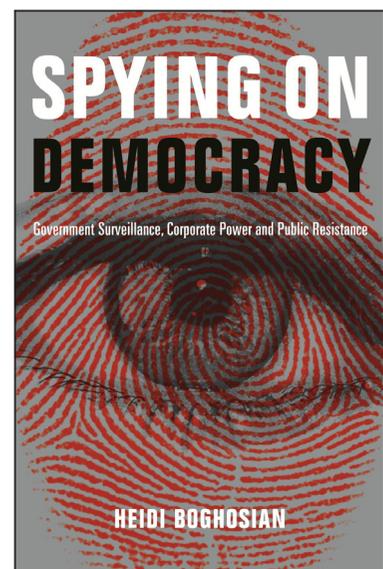
Times have changed. With the world connected to the Internet and vast numbers of people with smart phones and ever more sophisticated surveillance technology, the ability of any government to spy on its people has expanded exponentially. Since the events of Sept. 11, 2001, the willingness of the U.S. government to do so, of many to accept such intrusion, and of elected officials to countenance it, has opened the doors to a new era of U.S. government spying. Revelations about such spying, such as the fact that the National Security Agency has kept information about every telephone call made in the country—and its director’s having lied about it before Congress—do not elicit the universal condemnation that COINTELPRO did. Hardly a whimper of opposition could be heard in Congress as many gave full-throated support to the program. These included President Obama, whose experience as a professor of constitutional law gave him not a moment’s pause before he declared that, because no one was actually *listening* to the calls, he could not understand why there was any fuss. He has, in the face of vocal resistance from defenders of civil liberties, slowly and grudgingly agreed that the data should not be kept by the NSA but maintained in private hands until asked for. It requires splitting the finest of hairs to perceive the difference. Parenthetically, the argument that, if such a program had been in place before Sept. 11, the attacks could have been prevented, has always struck me as disingenuous. After all, it has been acknowledged that our intelligence agencies knew that calls were being received by al Qaeda abroad, but they did not know the source of those calls. Why the sources could not have been located, however, remains a mystery unexplained by defenders of the NSA.

In the Senate, defense of the NSA and other spy agencies was led by California Senator Dianne Feinstein, who was later shocked—*shocked*—to discover that the CIA had been hacking into computers of members of her staff on the Senate Intelligence Committee. As a politics professor of mine in

undergraduate school was fond of pointing out, the key political animal in the United States is neither the elephant nor the donkey, but the gored ox. It is one thing to spy on 300 million people living in the United States but, to Senator Feinstein, it is quite another to spy on the 20 or so working for her.

Which brings me to *Spying on Democracy*, a survey of the multifarious ways in which government and transnational corporations use their powers to subvert democratic rights. The author, my friend and colleague, Heidi Boghosian, is the longtime executive director of the National Lawyers Guild, of which I have been a member all my professional life, dating back to law school in 1969. I worked particularly closely with her on NLG organizational matters for my three years as its president from 2009 to 2012. I know how much of my time was taken up with Guild affairs and can only imagine how much more of hers was, so the fact that she found the time to write a book about government surveillance came as a welcome surprise. We can be grateful she did, because the Guild has long been a leading voice in opposition to government intrusiveness and in defense of First Amendment rights. Consequently, her day job makes her particularly well qualified to address the subject. All of us who, like Ben Franklin, are unwilling to trade essential liberty for the illusion of safety should be grateful she found the time.

Subtitled *Government Surveillance, Corporate Power, and Public Resistance*, the book argues that the former two are conjoined twins of repression and the latter the only viable defense against it. Indeed, the scope of the book and its understand-



ing and exposure of the many and various ways in which individual liberties are being attacked is its chief virtue. It is all too easy to lose sight of the forest by focusing on a single tree. Those who concentrate on government surveillance may, for example, fail to note the pervasiveness of corporate power (though the Supreme Court has certainly emphasized that with its *Citizens United* and *McCutcheon* decisions). And few may be aware of the many ways in which the federal government, in cooperation with local police agencies, interferes with people's exercise of their First Amendment rights.

The power brokers in the United States are well aware of how these many strands serve the same end of maintaining their wealth and power, and have been fairly successful in hiding their interrelatedness and synergy. *Spying on Democracy* explains this with clarity and with well-researched and documented examples, opening with the story of New York police choppers, presumably needed for counterterrorism, hovering above a group of Critical Mass bicyclists. Thus begins the story of how the government now conflates terrorism with protest and how private entities take up the slack when government is constrained by what remains of the First Amendment. Thus, we learn how corporations hire private firms to infiltrate and otherwise spy upon activists, and then share the intelligence they glean with the government. Joseph Sordi, CEO of Strategic Security Corporation, for example, feels free to proclaim: "Law enforcement agencies can be somewhat inhibited as to what they can and can't do by First Amendment rights and civil liberties, but as a private contractor, we are uninhibited by departmental bureaucracy and can maintain data bases of individuals."

Despite Sordi's frankness, too few recognize the pervasiveness of government and corporate spying in our age. But, as Heidi Boghosian reveals, it touches virtually every aspect of our lives, almost from the time we are born. Children are now taught that surveillance is natural and necessary. Lawyers' formerly privileged and private meetings with their clients are subject to eavesdropping. Personal information about consumers, gleaned by corporations, is shared with the government. "Fusion centers" join with federal and local police agencies, military units (even though the Posse Comitatus Act is still supposed to prohibit the military from engaging in domestic law enforcement), and private contractors, again for the alleged pur-

pose of better combating terrorism. In fact, their main accomplishments seem to be to arrest people planning to protest at "National Special Security Events" such as political conventions, World Trade Organization meetings, presidential speeches, and anything else the government feels like designating. A principal result has been recovery of hundreds of thousands of dollars in damages for police violations of people's constitutional rights—violations that the government seems to see as a necessary cost of doing the business of restricting those rights.

But all is not lost in Heidi Boghosian's world, because of those she calls the "custodians of democracy"—individuals and organizations who resist and, by resisting, protect and defend us all. They expose the intrusions, they represent the victims, they refuse to submit.

All manner of people across the political spectrum are fond of comparing one or another aspect of contemporary life with Nazi Germany. Indeed, those analogies are so commonplace as to be devoid of all meaning, so it is with some trepidation—and the need for explanation—that I mention fascism. But, while Nazism is a particularly virulent form of fascism, it is not the only form. In its essence, fascism merges the political state with monopoly capital. It does not suddenly emerge full-blown on a dreary day. It comes step by step, with each step more or less hidden and rationalized. One must look not at the steps themselves, but their trajectory. The fascist threat in the United States is not the threat of Nazism, but of the increasing identity of the U.S. government working with private businesses. Hence, my lack of enthusiasm for the idea of maintaining phone records with telecom giants rather than the NSA.

The threat of fascism hardly means it is inevitable. It does mean we have to arm ourselves with knowledge and actively resist. As Karl Marx said, the point is not simply to understand history, but to change it. The enemies of democracy have learned this lesson all too well. In *Spying on Democracy*, Heidi Boghosian calls on all its custodians, of which she is surely one, to do the same. ☉

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