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# Judicial Formalism and the State Secrets Privilege

Sudha Setty
*Western New England University School of Law*, ssetty@law.wne.edu

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Sudha Setty†



## I. INTRODUCTION

The state secrets privilege has received a tremendous amount of scholarly attention in the United States in the last decade. The focus started early in President Bush's second term with the emergence of a pattern of the administration seeking dismissals of lawsuits during the pleadings stage, even when the suits dealt with allegations of gross human rights violations and last resort attempts of gravely injured individuals to vindicate their rights.[1]

† Professor of Law, Western New England University School of Law. J.D. Columbia Law School, A.B. Stanford University. I owe thanks to Matthew H. Charity and Adam Tomkins for reviewing earlier drafts and discussing the ideas in this Essay with me, to law librarian Renee Rastorfer for her valuable research assistance, and to the board of the *William Mitchell Law Review* for inviting me to write this Essay. I also thank participants at the Conference on Secrecy, National Security, and the Vindication of Constitutional Law, hosted by the International Association of Constitutional Law Research Group on Constitutional Responses to Terrorism in December 2011, and participants at my February 2012 talk at the Brennan Center for Justice at New York University School of Law, whose questions and suggestions helped strengthen this Essay. Portions of the analysis in this Essay are drawn from a previous work: Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201 (2009).

1. Press Release, Office of U.S. Sen. Edward M. Kennedy, Kennedy

Congress has, in the last few years, toyed with the idea of attempting to rein in the executive's increasing reliance on the state secrets privilege as a means of escaping the possibility of accountability: It debated the State Secrets Protection Act of 2008 in response to Bush Administration invocations of the privilege in high-profile cases in which plaintiffs alleged extraordinary rendition, torture, and prolonged detention by the U.S. government and its allies.[2] Although this proposed legislation lapsed after the election of President Barack Obama, Congress reintroduced nearly identical reform legislation in February 2009[3] after the Obama Administration appeared to adopt the Bush Administration's stance in favor of a broad and sweeping invocation and application of the privilege.[4] The proposed legislation again lost momentum after the Obama Administration released a new policy for the Department of Justice in September 2009 that mandated a more rigorous internal administrative review prior to invoking the state secrets privilege.[5]

Introduces State Secrets Protection Act (Jan. 22, 2008) (internal quotation marks omitted), *available at* 2008 WLNR 1256008; *e.g.*, Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade."); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 100 (2005) (claiming that the Bush Administration is using the state secrets privilege with "offhanded abandon"); *see also* William G. Weaver & Danielle Escontrias, *Origins of the State Secrets Privilege*, SELECTED WORKS OF WILLIAM G. WEAVER 3–4 (Feb. 10, 2008), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=william_weaver (describing the state secrets privilege and how important of a tool it is for the executive branch); *cf.* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1252 (2007) (claiming that a survey of the invocation of the state secrets privilege in the post-*Reynolds* era indicates that "recent assertions of the privilege are not different in kind from the practice of other administrations").

2. 154 CONG. REC. S198-201 (daily ed. Jan. 23, 2008) (statement of Sen. Kennedy on the State Secrets Protection Act).

3. *See* Press Release, Office of U.S. Sen. Patrick Leahy, Leahy, Specter, Feingold, Kennedy Introduce State Secrets Legislation (Feb. 11, 2009), *available at* http://www.leahy.senate.gov/press/press_releases/release/?id=81a196e2-692e-498d-bf80-96ba81e252b5.

4. Editorial, *Continuity of the Wrong Kind*, N.Y. TIMES, Feb. 11, 2009, at A30 (disagreeing with the Obama Administration's decision to continue the Bush Administration invocations of the state secrets privilege to try to have litigation against the government dismissed at the pleadings stage).

5. *See* Memorandum from Eric Holder, Attorney Gen., on Policies and Procedures Governing Invocation of the State Secrets Privilege to Heads of Exec. Dep'ts & Agencies (Sept. 23, 2009) [hereinafter Holder Memorandum], *available*

However, in the two years since the new policy took effect, it appears as though this internal review process has resulted in little difference between the Bush and Obama Administrations with regard to the invocation of the privilege at the pleadings stage in cases that allege serious constitutional violations and human rights abuses.[6]

One high-profile case, that of Binyam Mohamed and other plaintiffs claiming that they had been subject to extraordinary rendition, torture, and prolonged detention, illustrates three important dynamics: continuity in approach between the Bush and Obama Administrations; the deferential attitude of the reviewing court, the Ninth Circuit Court of Appeals, which, although appalled by allegations of government abuse, used a rigid, formalistic analysis that denied Mohamed the right to proceed with his case; and the distancing in the approach of U.S. courts from those in England that were confronted with the same plaintiff and set of facts.[7]

The use of judicial formalism[8] in *Mohamed* illustrates the judiciary's internal struggle to determine its appropriate role when

*at* http://legaltimes.typepad.com/files/ag-memo-re-state-secrets-dated-09-22-09.pdf (establishing layers of internal review within the Department of Justice and including a new executive branch policy to report to Congress any invocations of the state secrets privilege).

6. *See* Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 257–58 (2009) (identifying the continuity between the Bush and Obama Administrations in their approach to the state secrets privilege).

7. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008).

8. Judicial formalism can be conceived in numerous ways, but I use it here to refer to a judicial methodology that gives primacy to narrow rule-following rather than consideration of the role of the courts to act in a way that is infused with morality when necessary to preserve individual rights. *See* Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 612–16 (1999) (describing one form of formalism as "apurposive rule-following"). Other commentators have described the constraints of judicial formalism as "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary." Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983). On the other hand, Justice Antonin Scalia has supported the use of a formal approach to maximize stability and credibility in the Supreme Court's decision-making, opining that a "discretion-conferring approach is ill suited . . . to a legal system in which the supreme court can review only an insignificant proportion of the decided cases." *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

confronted with constitutional rights questions during a time of war or perceived emergency[9]—a dilemma that has been confronted by courts in constitutional democracies around the world.[10] The *Mohamed* litigation offers evidence of a disturbing trend of U.S. courts retreating to formalistic reasoning to extend unwarranted deference to the executive branch in security-related contexts.[11] In this Essay, I limit my analysis to the recent jurisprudence surrounding the state secrets privilege. I place the formalist decision-making of the *Mohamed* court in juxtaposition with other nations' jurisprudence—including the English courts that dealt

9. In *Minimalism at War*, Cass Sunstein analyzes three categories of judicial decision-making in wartime: national security maximalism, in which courts defer broadly to executive branch claims of Article II authority without weighing the cost in terms of constitutional liberty interests; liberty maximalism, in which courts maintain a peacetime approach to the protection of constitutional liberty interests; and minimalism, in which courts use constitutional avoidance theory, statutory authority, and a narrow approach to creating precedent to weigh security and liberty interests. *See* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50–52 (2004). Sunstein views national security maximalism as inadequately accounting for fundamental liberty principles and liberty maximalism as unrealistic and unwarranted given the need for greater government intrusion into liberties during wartime, concluding that minimalism is the most appropriate judicial approach during wartime. *Id.* I suggest that *Mohamed* and similar decisions should be conceived of differently, reflecting a formal and narrow adherence to procedures and rules as a means of enabling deference to executive secrecy claims and avoiding real engagement in the civil liberties dilemma underlying the case.

10. *See generally* Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 125–26 (2003) (discussing the obligation of the Israeli judiciary to remain vigilant against incursions on the rule of law); Aileen Kavanagh, *Constitutionalism, Counterterrorism and the Courts: Changes in the British Constitutional Landscape*, 9 INT'L J. CONST. L. 172, 173–74 (2011) (discussing the extent to which U.K. courts have engaged in constitutionalism as part of their decision-making after the passage of the Human Rights Act of 1998); Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, 21 NAT'L L. SCH. INDIA REV. 51, 59–67 (2009) (arguing that the Indian Supreme Court has been inconsistent in its approach to terrorism-related cases and other cases involving fundamental rights).

11. The type of national security judicial formalism I describe is evident in a number of recent cases. *E.g.*, Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (dismissing suit seeking damages for extraordinary rendition and torture upon a finding that constitutional and international law obligations did not apply); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing suit seeking injunctive relief for the listing of plaintiff's son on the U.S. targeted killings list based on standing and political question grounds); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007) (dismissing suit seeking damages for extraordinary rendition and torture upon upholding the government's invocation of the state secrets privilege).

with a separate lawsuit brought by Mohamed there. In this type of case, the United States appears to be moving away from the flexible, rule-of-law-oriented approach that courts in the United Kingdom and Israel take. Instead, U.S. courts are echoing the formalistic rigidity that the Indian Supreme Court uses in cases involving state invocations of secrecy.

Given the Obama Administration's continuing aggressive invocation of the state secrets privilege and the judiciary's seeming unwillingness to step into its countermajoritarian role to defend the ability of individuals to litigate their basic human and civil rights, I conclude that Congress should re-introduce state secrets reform legislation that could infuse the litigation process with some level of procedural and substantive fairness. At the same time, I urge courts to step away from the type of judicial formalism that they have rejected to some extent in other national security contexts, such as habeas corpus rights for detainees.[12] U.S. courts would do well to heed the lessons of countries like India, the United Kingdom, and Israel in terms of understanding the ramifications of a judiciary unwilling to engage in decision-making on these issues.

## II. THE OBAMA ADMINISTRATION'S INVOCATION OF THE STATE SECRETS PRIVILEGE

In his prefatory language to the Obama Administration's 2009 state secrets policy, Attorney General Holder emphasizes that the policy's goals include

> provid[ing] greater accountability and reliability in the invocation of the state secrets privilege in litigation . . . [and] strengthen[ing] public confidence that the U.S. government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests.[13]

The policy further includes important limitations on the Department of Justice's use of the privilege, including a

12. Decisions like *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008) reflect the Supreme Court's willingness to engage in a level of rights-protective reasoning that preserves the rule of law in the context of habeas corpus rights.

13. Holder Memorandum, *supra* note 5, at 1.

prohibition against using the privilege to:

> (i) [C]onceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.[14]

The rest of the policy establishes the layers of review within the Department of Justice with regard to satisfying the procedural requirements for invoking and defending the privilege.[15]

To many observers, this policy signaled the possibility of an important change from the perceived overuse and abuse of the privilege under the Bush Administration.[16] However, the Obama Administration's invocation of the privilege has been as aggressive as that of President Bush, as the case of Binyam Mohamed exemplifies.

In *Mohamed*, the Northern District of California dismissed a suit brought by five detainees against a Boeing subsidiary allegedly involved in the transportation of the detainees for government-directed rendition and torture.[17] The allegations of Binyam Mohamed, a British resident, are similar to those of others subjected to extraordinary rendition. Mohamed traveled to Afghanistan in 2001 to, according to his account, escape a lifestyle that led to drug addiction in England.[18] According to U.S. authorities, Mohamed trained with the Taliban in Afghanistan to prepare for an attack within the United States. Mohamed was

14. Holder Memorandum, *supra* note 5, at 2.

15. These procedural requirements are laid out in the first U.S. case to deal specifically with the state secrets privilege. United States v. Reynolds, 345 U.S. 1, 6–8, 10–11 (1953). For an in-depth account of the *Reynolds* case, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE (2006).

16. Some commentators expressed skepticism of the 2009 policy even at the time it was issued. *See* Charlie Savage, *Justice Dept. to Limit Use of State Secrets Privilege*, N.Y. TIMES, Sept. 23, 2009, at A16 ("Congress must still enact legislation that provides consistent standards and procedures for courts to use when considering state secrets claims. Our constitutional system requires meaningful, independent judicial review of governmental secrecy claims." (quoting Rep. Jerrold Nadler) (internal quotation marks omitted)).

17. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008).

18. *Profile: Binyam Mohamed*, BBC NEWS (Feb. 23, 2009, 16:00 GMT), http://news.bbc.co.uk/2/hi/7870387.stm.

arrested in Pakistan in 2002 as he attempted to return to the United Kingdom; he claims that he was detained and tortured in Pakistan, then transported to Morocco where he was held incommunicado and tortured for the next eighteen months.[19] Mohamed alleges that he was then moved to Afghanistan and was ultimately transferred to the U.S. detention center at Guantanamo Bay, Cuba, where he was held from September 2004 until February 2009.[20] Mohamed and others alleging they were subjected to extraordinary rendition by the United States filed suit in 2007 against Jeppesen Dataplan, the Boeing subsidiary that operated the airplanes that transported the detainees to various detention centers around the world.[21]

In granting the government's motion to dismiss, the district court cited much of the same reasoning that other U.S. courts dealing with the privilege had relied upon,[22] including the need to dismiss the suit because the subject matter at issue—the government's extraordinary rendition program—was itself a state secret that, if revealed, could jeopardize national security interests.[23] The plaintiffs appealed this decision while the Bush Administration was still in power. Oral argument on the appeal was scheduled for shortly after the Obama Administration took over, and many expected that the new administration would not contest the appeal or would do so on limited grounds. Instead, the Obama Administration followed with the litigation strategy begun by the Bush Administration—one that sought affirmation of the dismissal of Mohamed's case.[24] A Ninth Circuit panel reversed, adhering closely to the narrow standard first articulated by the U.S. Supreme Court in *United States v. Reynolds* in 1953 and rejecting the government's claims that the suit needed to be dismissed outright

19. *Id.* Mohamed alleges that he was beaten, scalded, and suffered cuts on his genitals with a scalpel by his captors. *Id.*

20. *Id.*

21. Amended Complaint at 1–6, Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009) (No. 07–2798).

22. *E.g.*, El-Masri v. Tenet, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007) (dismissing based on the state secrets privilege a suit in which plaintiff alleged extraordinary rendition and torture).

23. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1134–36 (N.D. Cal. 2008).

24. At that point, representatives of the Obama Administration reiterated the Bush Administration argument that the suit was properly dismissed based on the invocation of the state secrets privilege. *See* John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12.

based on its subject matter.[25]

Although this decision offered an opportunity for President Obama to align his administration's position with his campaign promises to reform the use of the state secrets privilege,[26] the administration appealed to the Ninth Circuit to hear the case en banc, where it prevailed in having Mohamed's suit dismissed.

## III. UNPACKING THE FORMALISM IN *MOHAMED*

In September 2010, the Ninth Circuit dismissed en banc the plaintiffs' suit in a formalistic opinion that failed to acknowledge the reality of the gross human rights abuses that the plaintiffs suffered at the hands of the U.S. government. The court dismissed the plaintiffs' suit while expressing concern about the lack of remedy available to the plaintiffs;[27] the majority opinion went so far as to suggest the remote possibility of compensation from the Obama Administration or a congressionally fashioned remedy to compensate for the grievous harm suffered by the plaintiffs.[28] The dissent, on the other hand, used a rule of law analysis to critique the majority, emphasizing the role of the court in providing a venue for those subjected to government abuse to seek redress and emphasizing the judiciary's responsibility to facilitate government accountability.[29]

The majority's reasoning begins with an obligatory recitation of the standard set forth for evaluating an invocation of the state secrets privilege: ascertaining whether the procedural requirements of invocation have been met; determining whether the information is privileged; and, assuming the privilege claim is successful, determining how to resolve the matter.[30] The court dispenses

25. Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 997, 1009 (9th Cir. 2009). The Ninth Circuit further clarified that documents considered "classified" for Freedom of Information Act purposes are not necessarily "secret" for purposes of the state secrets privilege and that the government had the burden of establishing the need for genuine secrecy. *Id.* at 1006–08.

26. Editorial, *Too Many 'State Secrets Privilege' Cases*, L.A. TIMES, Dec. 14, 2009, http://articles.latimes.com/2009/dec/14/opinion/la-ed-secrets14-2009dec14 (noting that Obama's defense of the Bush Administration position in *Mohamed* was in contrast to his campaign promises regarding the state secrets privilege).

27. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1092–93 (9th Cir. 2010) (en banc).

28. *Id.* at 1091–92.

29. *Id.* at 1101 (Hawkins, J., dissenting).

30. *Id.* at 1080 (majority opinion) (relying on the test articulated in *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953)).

relatively quickly with the first two questions, finding that the procedural requirements have been met and holding that the information is privileged based on government affidavits and the court's examination of some of the classified evidence.[31]

The majority then dwells on the question of how to resolve the matter. The court begins with its understanding of its obligation to dismiss a suit if it appears that privileged information will be necessary to litigate the case.[32] The majority finds that even if plaintiffs are able to prove their case relying solely on publicly available evidence, dismissal of the suit is still necessary because of the difficulty that Jeppesen Dataplan would have in defending itself against the suit without implicating privileged material.[33] It is particularly ironic that the majority opinion, while claiming to have struggled with the tension between human rights and security concerns, ultimately retreats to rigid and formalist reasoning that turns on its concern that a company that was allegedly complicit in the torture of innocent civilians is able to adequately defend itself in a civil matter.[34]

Instead of asserting the role of the courts as a venue in which those alleging human rights violations have the opportunity of access to justice, the majority opinion abdicates its responsibility as a standard bearer for the rule of law and a bulwark against government abuses. Instead, it offers several platitudes as to its own actions and the possibility of government accountability and redress stemming from the other branches of government: first, that the administration has complied with its own 2009 policy with regard to intra-executive review of claims of the state secrets privilege;[35] second, that the executive branch may decide someday to compensate the victims of the extraordinary rendition program, as was done decades after the rendition and internment of individuals of Japanese descent during World War II;[36] third, that

31. *Id.* at 1085–86.

32. *Id.* at 1083.

33. *Id.* at 1089–90.

34. The veracity of the plaintiffs' claims about Jeppesen Dataplan's complicity in the torture is not factored into the majority opinion, a point raised by the dissent. *See id.* at 1095 n.5 (Hawkins, J., dissenting) (noting that former Jeppesen Dataplan employees understood that their extraordinary rendition flights resulted in the torture of detainees, but that the company continued to run the flights because they "paid very well").

35. *Id.* at 1090.

36. *Id.* at 1091. It is remarkable that the majority stretched its reasoning to consider the reparations awarded to Japanese internees during World War II as a

Congress could initiate an investigation into government abuses; fourth, that Congress could enact private bills to compensate the plaintiffs; and fifth, that Congress could take up state secrets reform.[37] These potential avenues for compensation seem unlikely at best, and noting the executive branch's adherence to its own procedures or the possibility of future state secrets reform offers only cold comfort to plaintiffs.

The dissent by Judge Hawkins focuses largely on procedural matters, but also offers a critique of the narrowness of the majority opinion. In a section dealing with the appropriate standard of review of a Rule 12 dismissal, Judge Hawkins notes the veracity of Mohamed's claims of Jeppesen Dataplan's role in rendition and torture and remarks that the majority's failure to give weight to these claims undermines an appropriate Rule 12 analysis.[38] The dissent's conclusion offers a direct rule-of-law-oriented critique: first, Judge Hawkins observes that the majority has "disregard[ed] the concept of checks and balances" and abdicated its responsibility by suggesting that the executive or Congress should act to provide compensation; second, the dissent characterizes the majority's suggestion regarding reparations as "elevat[ing] the impractical to the point of absurdity"; and finally, the dissent notes the horror of what was suffered by the plaintiffs and the need to preserve an avenue for them to seek redress in the courts if possible.[39]

The en banc decision in *Mohamed*, with its abdication of the court's traditional rule of law responsibilities, makes clear that Congress should step in and clarify the state secrets privilege.[40] The

potentially appropriate model of compensation for extraordinary rendition and torture. First, those reparations came decades after the harm to the internees and only after a national soul-searching was undertaken as to how such poor national security policy was validated by all branches of government and the public. Second, hearkening back to the World War II internment can only evoke comparisons to the deferential formalism of *Korematsu v. United States*, 323 U.S. 214 (1944), which most modern commentators view as a profound failure of the judiciary to apply a rule of law analysis to a case balancing security interests with human rights.

37. *Mohamed*, 614 F.3d at 1091–92.

38. *Id.* at 1095–96.

39. *Id.* at 1101.

40. It is clearly not in the interest of the executive branch to initiate any tinkering with the state secrets privilege, since the current application tends to grant most government requests for dismissal or non-discovery. *See* Editorial, *Secrets and Rights*, N.Y. TIMES, Feb. 2, 2008, http://www.nytimes.com/2008/02/02/opinion/02sat1.html?ref=editorials (noting that the proposed congressional measures were necessary given the courts' reflexive dismissal of cases involving

current application of the state secrets privilege raises numerous questions that require clarification: when the government can invoke the privilege and what can be protected from disclosure; whether it is appropriate to grant a motion to dismiss based on a state secrets claim at the initial pleadings stage; what the appropriate relief for a valid claim of the privilege is; and how deeply the court must examine the government's claim. Congress's refusal to enact reform thus far, in combination with the judiciary's inaction, has led to a de facto ceding of almost all decision-making control on this issue to the executive branch.[41]

## IV. FORMALISM IN THE COMPARATIVE CONTEXT

The *Reynolds* Court, in establishing the standard for evaluating a claim of privilege, drew from English precedent from the World War II era. The English version of the state secrets privilege, known as public interest immunity, has evolved in a different direction than that of the United States since that time; this dynamic is illustrated most dramatically in the English judiciary's contemporaneous treatment of Binyam Mohamed's lawsuit in the English courts.

To further contextualize the analysis of judicial formalism in the application of the privilege, I also look at how Israel and India—countries facing significant national security challenges that rely heavily on U.K. precedent—deal with questions of state secrets and the role of the courts during litigation.[42]

### *A. England*

English courts generally afford high levels of deference to government officials claiming public interest immunity,[43] although the 2009 and 2010 decisions in the case of Binyam Mohamed

national security issues).

41. *See* Aziz Rana, *Who Decides on Security?* 4, 35 (Cornell Law Sch., Faculty Working Paper No. 87, 2011), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1090&context=clsops_papers.

42. India and Israel are useful comparators as functioning democracies with constitutionally mandated separation of powers and serious ongoing national security threats, and, like the United States in the context of the state secrets privilege, both countries derive some legal processes from the United Kingdom.

43. *See* Air Canada v. Sec'y of State for Trade, [1983] 2 A.C. 394 at 395 (Eng.) (stating that when a government official has proffered a good faith affidavit as to the need for the public interest immunity to apply, the court should give absolute deference).

illustrate a potential shift in this trend. The Divisional Court in that case forewent its previously typical deference and engaged in the complexities of the case in a way that took into account the larger objectives and role of the judiciary and the need to maintain an avenue for government accountability for alleged human rights abuses.

The backdrop of the English litigation in *Mohamed* ties back to proceedings in the United States. In May 2008, the United States charged Mohamed under the Military Commissions Act[44] with conspiracy to commit terrorism,[45] relying on confessions that Mohamed alleged were elicited under the threat of torture.[46] Mohamed began proceedings in English courts, seeking release of evidence in the possession of the British government that the United States had compiled against Mohamed. In August 2008, a court ruled in Mohamed's favor, concluding that Mohamed's allegations of torture were substantiated and that he had a right to evidence that supported his claim.[47] As part of its ruling, the court summarized evidence gleaned from U.S. intelligence sources, but redacted that summary after the Foreign Secretary issued a public interest immunity certificate claiming that state secrets were at issue in Mohamed's suit.[48]

The Divisional Court of the Queen's Bench Division reconsidered in early 2009 whether the public interest immunity certificate issued by the Foreign Secretary was compelling such that the previously redacted summary with evidence of Mohamed's treatment could not be given to Mohamed's attorneys.[49] The public interest immunity certificate asserted that the summary report must remain undisclosed because the U.S government had

44. 10 U.S.C. §§ 948–50 (2006).

45. This proceeding was later dropped, as the convening judge determined the prosecution could not proceed without the use of evidence obtained through torture. *See* William Glaberson, *U.S. Drops Charges for 5 Guantánamo Detainees*, N.Y. TIMES, Oct. 21, 2008, http://www.nytimes.com/2008/10/22/washington/22gitmo.html?adxnnl=1&adxnnlx=1328130327-WTFkFvw3ue0Rn9QlvAuLHQ.

46. Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs, [2008] EWHC (Admin) 2048, [38]–[47] (Eng.).

47. *Id.* at [105].

48. *Id.* at [150]–[160].

49. The court noted that the information in question was "seven very short paragraphs amounting to about 25 lines" of text which summarized reports by the U.S. government to British intelligence services on the treatment of Mohamed during his detention in Pakistan. *See* Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs, [2009] EWHC (Admin) 152, [14] (Eng.).

threatened to "re-evaluate its intelligence sharing relationship with the United Kingdom" and possibly withhold vital national security information from the United Kingdom should the summary be disclosed to Mohamed's attorneys.[50]

The English court laid out the test for balancing the public interest in national security and the public interest in "open justice, the rule of law and democratic accountability."[51] The test involved balancing the public interest in disclosure of the information and the possibility of serious harm to a public interest, such as national security, if disclosure is made, and determining whether national security interests can be protected by means other than nondisclosure.[52] In theory, its analysis is not unlike that of the Ninth Circuit en banc majority in *Mohamed*. The application of this analysis, however, and the recognition of the importance of the detrimental effects of upholding the privilege differ significantly.

The English court took pains to detail all of the reasons that disclosure was desirable, including upholding the rule of law,[53] comporting with international and supranational standards,[54] ensuring that allegations of serious criminality are not dismissed inappropriately,[55] maintaining accountability over the executive branch of government,[56] and protecting the public and media interest in disclosure of government activities.[57] The court also appeared surprised that the U.S. government was apparently interfering in a matter of government accountability in another country, taking pains to note:

> [I]n light of the long history of the common law and democracy which we share with the United States, it was, in our view difficult to conceive that a democratically

50. *Id.* at [62]; *see* Glenn Greenwald, *Obama Administration Threatens Britain to Keep Torture Evidence Concealed*, SALON.COM (May 12, 2009, 9:36 AM), http://www.salon.com/2009/05/12/obama_101.

51. *Mohamed*, [2009] EWHC (Admin) 152, [18] (Eng.) (noting that this case revolved around a question of the rule of law, not around the rights of an individual litigant).

52. *Id.* at [34] (citing Regina v. H, [2004] 2 A.C. 134 (H.L.) [36(3)] (Eng.)).

53. *Mohamed*, [2009] EWHC (Admin) 152, [18]–[19] (Eng.).

54. *See id.* at [20]–[21], [26], [30], [101]–[105].

55. *Id.* at [26(iv)], [26(ix)].

56. *Id.* at [32].

57. *Id.* at [37] ("Where there is no publicity there is no justice. . . . There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves." (quoting Scott v. Scott, [1913] A.C. 417 (H.L.) 477 (Lord Shaw of Dunfermline) (appeal taken from EWCA (Civ)) (U.K.)).

> elected and accountable government could possibly have any rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters. Indeed we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence . . . where the evidence was relevant to allegations of torture and cruel, inhuman or degrading treatment, politically embarrassing though it might be.[58]

Despite the strong language regarding the rule of law and government transparency, when the court applied the test, it relied heavily on its long-standing precedent of offering deference to the executive branch in matters of national security,[59] found that the Foreign Secretary acted in good faith in issuing the public interest immunity certificate,[60] opined that an opportunity for government accountability may still exist with ongoing investigations within the United Kingdom into Mohamed's allegations,[61] and decided that there was no basis on which it could question the Foreign Secretary's issuance of the public interest immunity certificate.[62]

At this point, the analysis of the Ninth Circuit en banc decision and the Divisional Court of the Queen's Bench appear at least superficially consistent. Although the Divisional Court undertakes a more rigorous balancing test, both courts act with extreme deference and ultimately dismiss plaintiffs' claims despite concerns regarding the rule of law, human rights, and accountability.

However, the English court reconsidered its own decision

58. *Id.* at [69].

59. *See id.* at [63]–[67]. However, the court noted that such deference needed to be limited to instances of genuine national security, and not cases in which "it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest . . . ." *Id.* at [66] (quoting R. v. Shayler, [2003] A.C. 247 (H.L.) 272 (Lord Bingham of Cornhill) (appeal taken from EWCA (Crim)) (U.K.)).

60. *Id.* at [62]–[63], [76]–[79] (noting that the Foreign Secretary perceived the U.S. threat to be real, and that if the threat were carried out, U.K. national security interests would be seriously prejudiced); s*ee Ministers Face Torture Pressure*, BBC NEWS (Feb. 4, 2009, 20:53 GMT), http://news.bbc.co.uk/2/hi/uk_news /politics/7870049.stm (noting that Foreign Secretary David Miliband denied that the United States made a threat; Miliband instead stated that the U.S.-U.K. security relationship was based on trust and that trust depended on intelligence remaining confidential).

61. *Mohamed*, [2009] EWHC (Admin) 152, [102], [104]–[105] (Eng.).

62. *Id.* at [79].

based on its conclusion that it would have been a grave injustice to let the matter die because of U.S. executive branch pressures. The court reopened its ruling on public interest immunity and, in October 2009, reversed its previous decision to withhold the information regarding Mohamed's treatment by the U.S. government.[63] The court reasoned that there was an extremely low likelihood that the Obama Administration would actually withhold important intelligence from the U.K. government under these circumstances[64] and noted that "a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating to the involvement of the British security services in wrongdoing be placed in the public domain in the United Kingdom."[65]

The October 2009 decision in the *Mohamed* case reflects both the strength of English precedent that mandates a high level of deference to the government in matters related to public interest immunity and the hard questions that courts must face in applying that deferential standard when doing so implicates the rule of law, individual rights, and government accountability in matters of serious allegations of human rights abuses.[66] The opinion ultimately rejected formalistic reasoning about the process in place that would necessarily lead to deference to the executive in favor of maintaining the rule of law, "open justice," and the possibility of public accountability for whatever role the U.K. government had in maltreating Mohamed.[67]

In February 2010, the English Court of Appeal considered the Foreign Secretary's argument that government information that involved intelligence from the United States ought not to be

63. Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs, [2009] EWHC (Admin) 2653, [7] (Eng.) (noting that reopening of a case should be done in "exceptional circumstances" if necessary in the "interests of justice").

64. *Id.* at [39], [49], [69vi], [104]. The court noted that the objections made by the Obama Administration to disclosing the information in question were not as strong as the threats made by the Bush Administration. *Id.*

65. *Id.* at [105].

66. *See* KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM 223–24 (2011) (addressing the different attitudes of U.S. and U.K. courts in the *Mohamed* litigation).

67. *See* Steven D. Schwinn, *State Secrets, Open Justice, and the Criss-Crossing Evolution of Privilege in the United States and the United Kingdom*, 29 L'OBSERVATEUR DES NATIONS UNIES 171, 186 (2011) (discussing open justice principles).

disclosed.[68] It upheld the Divisional Court's decision, reiterating open justice principles that provide for both procedural and substantive justice. Bolstering the reasoning of the lower court with regard to these principles, the Court of Appeal took notice not just of the formal process of how to consider public interest immunity, but also the veracity of Mohamed's claims and the need for the court to hold in a way that maintained fairness in the proceedings.[69]

Specifically, the appellate decision looked to dicta in the U.S. habeas corpus matter of *Mohammed v. Obama*.[70] In that case, Judge Kessler of the D.C. District Court weighed the petition for a writ of habeas corpus from detainee Farhi Saeed bin Mohammed and considered evidence proffered by the government that Binyam Mohamed, while in detention at Guantanamo Bay, told the government that bin Mohammed had trained with him at an al Qaeda base.[71] Judge Kessler described at length and in much detail the harrowing detention and torture of Binyam Mohamed while in United States custody; based on the duration and severity of his mistreatment, she held that his testimony with regard to bin Mohammed was unreliable and, therefore, inadmissible.[72] She further noted that "[t]he Government does not challenge or deny the accuracy of Binyam Mohamed's story of brutal treatment."[73]

The English Court of Appeal took close notice of the acceptance by Judge Kessler of the veracity of Binyam Mohamed's claims regarding his treatment and used this revelation as one of the bases for reaffirming its open justice principles and upholding the order for the U.K. government to disclose information regarding Mohamed's mistreatment.[74] This willingness of the

68. Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs, [2010] EWCA (Civ) 158, [2011] Q.B. 218 (Eng.).

69. *See* Adam Tomkins, *National Security and the Due Process of Law*, 64 CURRENT LEGAL PROBLEMS 215, 229 (2011) (noting that the fact that Mohamed's case involved allegations of horrific torture weighed significantly in the court's decision-making regarding the public interest immunity question).

70. 704 F. Supp. 2d 1 (D.D.C. 2009). This citation refers to the declassified opinion that was made publicly available on December 16, 2009. The original version of the opinion, dated November 19, 2009, is cited at *Mohammed v. Obama*, 689 F. Supp. 2d 38 (D.D.C. 2009).

71. *Mohammed*, 704 F. Supp 2d. at 2, 18–19.

72. *Id.* at 20–23, 29.

73. *Id.* at 24.

74. Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs, [2010] EWCA (Civ) 65 [138], [2011] Q.B. 218 (Eng.).

English Court of Appeal to take notice of a U.S. federal court decision in which relevant facts were discussed and engage in a realist analysis serves as a sharp contrast to the Ninth Circuit en banc decision in *Mohamed*, where the majority does not appear to concern itself with evidence of the veracity of Mohamed's claims, does not take note of Judge Kessler's opinion—even though it had been brought to the court's attention—and instead limits itself to an overly formalistic interpretation of the state secrets privilege that fails to address human rights concerns in a meaningful way.[75]

### *B. Israel*

Israeli courts, like their English counterparts, offer an example of how the courts balance imperatives of security with the rule of law when they refuse to accept a narrow interpretation of their own role. In Israel, the analysis of a state secrets-type claim turns on two questions: whether the case is justiciable, and, if so, how to evaluate potentially sensitive evidence that relates to national security matters.[76] Analysis of both of these questions is undertaken using a flexible, realist approach to decision-making that accounts for the government's interest and, more importantly, gives significant weight to plaintiffs' allegations that human rights have been violated. This type of approach and the mindset of the Israeli courts reflect similar attitudes to the English reasoning in the *Mohamed* case.

In Israel, almost any complaint against the executive branch is considered justiciable.[77] The Israeli Supreme Court "dismantled various doctrinal barriers to judicial review in the 1990s, such as

75. In fact, the only reference to Judge Kessler's decision comes in a footnote referencing the *Mohammed* case, in which the court notes that Binyam Mohamed's allegations have been discussed elsewhere. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1074 n.1 (9th Cir. 2010).

76. Israel's Evidence Act includes provisions on how courts should consider government assertions of a privilege surrounding sensitive information that, in many respects, mirror the structure used in England and the United States. *See* Evidence Ordinance (New Version), 5731-1971, 2 LSI 198, §§ 44–46 (1968–1972) (Isr.). However, the Israeli Supreme Court's analysis with regard to the invocation of the privilege as a matter of justiciability depends on constitutional and common law sources that are separate from the Evidence Act.

77. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 153 (2002) ("Our Supreme Court—which in Israel serves as the court of first instance for complaints against the executive branch—opens its doors to anyone with a complaint about the activities of a public authority.").

standing and justiciability," in order to facilitate more private actions.[78] Even with an extremely broad grant of standing—particularly by U.S. standards—Israeli courts undertake a balancing analysis to determine whether national-security-related litigation ought to continue or be dismissed as non-justiciable. Although justiciability is no guarantee of ultimate success in litigation against the government, this layer of procedural protection reflects a willingness of the courts to step away from formulaic and formalistic decision-making and is particularly remarkable given the national security climate and political pressures in Israel.[79]

One illustrative case is *Public Committee Against Torture in Israel v. Israel*,[80] in which the central issue was whether preventative strikes undertaken by the Israeli military in response to alleged terrorist attacks were illegal. The plaintiffs challenged the practices of the military based on the loss of civilian life in the strikes and Israel's obligations under international treaties and international customary law. However, before reaching a conclusion as to the merits of the case, the court considered a challenge by the government that the suit was not justiciable based on national security concerns.[81]

The Israeli Supreme Court considered the broad Israeli justiciability doctrine[82] and applied a four-pronged test to

78. Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1923 (2004). Schulhofer also notes that Israeli government and military leaders seem to accept the judicial safeguards that have been put into place to modify the conduct of the administration. *Id.* at 1931.

79. *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel 5 ¶ 10, 9–10 ¶ 16, 33 ¶ 47 [2005] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf ("Between Israel and the various terrorist organizations . . . a continuous situation of armed conflict has existed since the first *intifada*."); HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel 4 ¶ 1 [1999] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf ("The State of Israel has been engaged in an unceasing struggle for both its security—indeed, its very existence."); Schulhofer, *supra* note 78, at 1918–19 (describing the security risks faced by Israel since its founding).

80. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel [2005] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

81. *Id.* at 5 ¶ 9 (arguing against justiciability, the government cites Israeli High Court of Justice precedent, HCJ 5872/01 Barakeh v. Prime Minister 56(3) [2002] (Isr.), for the proposition that "the choice of means of war employed by [the government] in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene").

82. The Court considered two strands of Israeli justiciability doctrine—normative and institutional. For a fuller discussion, see Setty, *supra* note 6, at 246.

determine whether this was an issue in which the court should involve itself. The Israeli Supreme Court reasoned that a case involving the impingement of human rights is always justiciable;[83] that a case in which the central issue is one of political or military policy and not a legal dispute is not justiciable;[84] that an issue that has already been decided by international courts and tribunals to which Israel is a signatory must be justiciable in Israel's domestic courts; and that judicial review is most appropriate in an ex post situation.[85]

When the first and second prongs of the justiciability analysis come into conflict in a particular situation, courts undertake a proportionality analysis, which, by its very nature, involves the court stepping away from a rigid approach and adopting a flexible view to determine whether a suit should continue.[86] Applying these criteria to the situation at hand, the Israeli Supreme Court found that the claims were clearly justiciable and that the plaintiffs' suit could go forward.[87] Ultimately, the Israeli Supreme Court concluded that the targeted killings at issue in the case were not per se illegal, but that they must be evaluated on an individual basis—again reflecting the court's priority in retaining a flexible analysis in evaluating the best course of action when balancing the imperatives of security, transparency, accountability, and the rule of law.[88]

Israeli courts have consistently been involved in weighing national security interests against human rights concerns and have

83. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel 34–35 ¶ 50 [2005] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf (citing HCJ 606/78 Oyeb v. Minister of Def. 33(2) IsrSC 113, 124 [1978] (Isr.)).

84. *Id.* at 35 ¶ 51 (citing HCJ 4481/91 Bargil v. Israel 37(4) IsrSC 210, 218 [1993] (Isr.)).

85. *Id.* at 36 ¶¶ 53–54.

86. *Id.* at 38 ¶ 58.

> Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. To the extent that it has a legal aspect, it approaches the one end of the spectrum. To the extent that it has a professional military aspect, it approaches the other end of the spectrum. *Id.*

87. *Id.* at 1–2 ¶¶ 1–3.

88. *Id.* at 41–42 ¶ 63. This decision is particularly notable given the recent U.S. decision dismissing a suit challenging the U.S. targeted killing program. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing, based on standing grounds, the suit of Nasser al-Aulaqi to enjoin the U.S. government from keeping his son, U.S. citizen Anwar al-Aulaqi, on its targeted killing list).

developed a sophisticated analysis to do so. Like their English counterparts, they appear to view the rule of law as demanding that the courts assert themselves in security matters despite hesitations based on security imperatives or historical deference. Justice Procaccia, in *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior*, explained the rule of law approach that underpins the thinking of Israeli courts:

> The "security need" argument made by the state has no magical power such that once raised it must be accepted without inquiry and investigation . . . . Admittedly, as a rule, the court is cautious in examining the security considerations of the authorities and it does not intervene in them lightly. Notwithstanding, where the implementation of a security policy involves a violation of human rights, the court should examine the reasonableness of the considerations of the authorities and the proportionality of the measures that they wish to implement.[89]

### *C. India*

If England and Israel illustrate the ability of courts to utilize a rule of law analysis regarding secret information and justiciability, India represents a hard line of formalism that the United States is at risk of veering toward.

Historically, Indian courts have granted the utmost deference to the executive branch as to when national security policy should be disclosed.[90] When cases raise issues of individual rights being compromised by government secrecy, courts undertake a balancing test to determine whether the public interest or individual rights at stake should override executive secrecy; however, government claims regarding the necessity of secrecy, as in the U.S. state secrets privilege cases in the post-9/11 context, consistently prevail.[91]

89. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Interior 260 ¶ 10 [2006] (Isr.) (citing Ajuri v. IDF Commander in the W. Bank [1], 375–76; HCJ 9070/00 Livnat v. Chairman of Constitution, Law & Justice Comm. 810), *available at* http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf.

90. *E.g.*, State of Uttar Pradesh v. Raj Narain, A.I.R. 1975 S.C. 865 (India) (carving out national security as the area in which the Prime Minister can unilaterally decide what information to disclose); *see* Satish & Chandra, *supra* note 10, at 65 (describing the history of Indian courts deferring to executive decisions regarding security matters).

91. *E.g.*, People's Union for Civil Liberties & Anr. v. Union of India & Ors.,

Deference to executive branch decision-making is deeply rooted in national-security-related cases[92] and is consistent with India's history of granting the executive branch sole power to determine whether to disclose information in any number of contexts, including enforcement of its Official Secrets Act, a legacy of British colonial rule in India.[93] Courts consistently discuss the need for government accountability and transparency, but ultimately revert to a formalist analysis that defers to an executive branch claim for nondisclosure in the name of public interest.

The case of *Dinesh Trivedi v. Union of India*[94] exemplifies the type of reasoning that the Indian Supreme Court often relies upon to uphold government secrecy claims. In *Trivedi*, the Indian Supreme Court considered whether to order the publication of background documents underlying a commissioned report on government corruption, which the government had withheld based on a claim of needed secrecy. Members of Parliament, including

(2004) 2 S.C.C. 476 (India) (upholding denial of request for disclosure of information).

92. This deference has been consistent, despite the adoption of right-to-information legislation in recent years and judicial statements about the importance of government transparency. Freedom of Information Act, No. 5 of 2003, INDIA CODE (2009), *available at* http://indiacode.nic.in; *e.g.*, S.P. Gupta v. President of India, A.I.R. 1982 S.C. 234, ¶ 66 (India) ("The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a) [of the Indian Constitution]. Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands."); *see also Country Passing Through Transparency Revolution: Antony*, UNITED NEWS OF INDIA, June 8, 2011 (quoting Defense Minister A.K. Antony as hailing the advent of a "transparency revolution" in which the "walls of secrecy were crumbling").

93. India operates under the edicts of the Official Secrets Act, No. 19 of 1923, INDIA CODE (2009), *available at* http://indiacode.nic.in, enforced in India by the British colonial government. Under the Official Secrets Act (OSA), any disclosure of information—intentional or inadvertent—likely to affect the sovereignty, integrity, or security of India is punishable by imprisonment for up to fourteen years. Although similar provisions of the Official Secrets Act were removed in England in 1989, the provisions of the 1923 Act remain in effect in India, despite criticism of its application. *See* Sarbari Sinha, *Official Secrets and a Frame-Up*, FRONTLINE, May 7, 2005, *available at* http://www.frontlineonnet.com/fl2210 /stories/20050520000607400.htm (addressing how revocation of the Official Secrets Act would curb potential abuses of police powers).

94. Dinesh Trivedi v. Union of India, (1997) 4 S.C.C. 306 (India). The Court in *Trivedi* relies heavily on the balancing test articulated in *S.P. Gupta*, A.I.R. 1982 S.C. 234, to find that government secrecy claims ought to be upheld despite rule of law concerns.

petitioner Dinesh Trivedi, alleged that the Home Minister refused disclosure to avoid government embarrassment.[95] In response, the Home Secretary submitted an affidavit affirming the accuracy of a publicly distributed summary report, but claiming that additional documents could not be disclosed as a matter of public interest.[96]

The Indian Supreme Court's response is emblematic of the reflexively deferential and overly formalistic reasoning in matters of national security and government secrecy. The Indian Supreme Court begins with familiar language about the necessity of transparency to curb government abuse and uphold the rule of law, noting that, "Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead."[97] The Indian Supreme Court accepts with little question the government's assertion that publication of the report may be injurious to the public interest and goes further to hypothesize that the public furor toward individuals named in the report—should it be published in full—could lead to harassment and violence. Based on its own speculative concerns that appear grounded in historical deference to executive decision-making, the court held that publication of the full report and its underlying documents was unwarranted.[98]

This pattern of acknowledging the policy and rights concerns underlying a case, but ultimately siding with the government's position with little investigation into the veracity of the government's claims, has played out in other secrecy-related cases.[99] In doing so, the Indian Supreme Court has opined that its deference to government secrecy claims is bolstered by its consistency with English cases on public interest immunity.[100] In

95. *Trivedi*, 4 S.C.C. 306, ¶¶ 6, 8.
96. *Id.* ¶¶ 9–10.
97. *Id.* ¶ 19.
98. *Id.* ¶¶ 16–20.
99. *E.g.*, People's Union for Civil Liberties & Anr. v. Union of India & Ors., (2004) 2 S.C.C. 476 (India). The Court in this case upheld the government's secrecy claim over a report on nuclear reactors, reasoning that that secrecy was sometimes necessary because "[i]f every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker." *See id.* (the Right of Information section).
100. *See id.* (the Criteria for Determining the Question of Privilege section, holding that "the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed

one case, this deference manifested itself in the Indian Supreme Court declining review of documents over which the government claimed secrecy even after the government had proffered submission for in camera review.[101] The level of deference offered by the Indian Supreme Court is higher than that of any of the other nations surveyed here, but is arguably more consistent with the recent state secrets cases in the United States than that of the English courts in the *Mohamed* litigation.[102]

The failure of the Indian Supreme Court to engage in a more meaningful analysis of rights claims in the secrecy and security contexts is unsurprising. In crafting counterterrorism legislation, Parliament has responded to public pressure and arguable constitutional priorities[103] in prioritizing robust security measures over protection of individual rights.[104] The Indian Supreme Court, consistent with its security-related jurisprudence, has little appetite for putting itself in a countermajoritarian role and instead has consistently reverted to a formalistic analysis that offers a rhetorical nod to the rule of law and individual rights, but no substantive relief to those who seek to chip away at government secrecy.[105]

## V. CONCLUSION

Current trends in U.S. state secrets jurisprudence offer two related insights. First, U.S. courts in the post-9/11 context are

would injure public and national interest") (citing Uttar Pradesh v. Raj Narain, A.I.R. 1975 S.C. 865 (India)).

101. *See id.* (the Conclusion section).

102. There is no indication that the adoption of a right to information statute in 2005 has substantially affected the reasoning of the courts with regard to security-related secrecy, particularly since the statute contains a carve-out for national security matters. *See* The Right to Information Act, No. 22 of 2005, INDIA CODE (2009), *available at* http://indiacode.nic.in.

103. *See* SHYLASHRI SHANKAR, SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS 61–71, 90–91 (2009) (arguing that whereas social rights is considered an area in which the judiciary is expected to take an active role, security and secrecy are areas in which the constitutional framers and Parliament have purposefully curtailed the judiciary's ability to curb executive power).

104. *See* Sudha Setty, *What's in a Name: How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 46–54 (2011) (detailing the history of Indian counterterrorism legislation and the court's validation of legislation that has been abused to violate civil rights and liberties).

105. *See* Satish & Chandra, *supra* note 10, at 73 (critiquing the Indian Supreme Court's terrorism jurisprudence for focusing on procedural and technical questions and abdicating its role as a protector of fundamental rights).

shifting toward a formalized approach to the privilege that is, in some respects, reminiscent of Indian jurisprudence—formal acknowledgement of rule of law imperatives, but ultimately deciding that the judiciary's role is not to stake a position contrary to the executive branch, resulting in a consistent lack of relief for individual litigants. In India, this dynamic has been reflected in national-security-related cases for some time; the context of challenging secrecy designations may be relatively new, but the reasoning of the courts and the ultimate result is the same. In the United States, the state secrets cases illustrate what may be becoming the new normal in security-related jurisprudence: formalistic reasoning that allows the court to bow out of its countermajoritarian role of protecting individual rights and justice. Certainly the approach taken by India and the United States is not the only viable one—England and Israel are evidence of that.

Second, the *Mohamed* case illustrates that England's current application of the state secrets privilege—however historically deferential—reflects at least in some cases the prioritization of various rule of law principles by the English courts, including the need for open justice, government accountability, and the opportunity for redress by individual litigants. The flexible approach used by the English court to determine that secrecy ought not prevail in the *Mohamed* case is reassuring to those concerned with rights protection. Yet the larger specter of the United States exerting pressure regarding the state secrets privilege serves as a warning that even though the United States was not successful with regard to applying pressure on England,[106] given U.S. soft power around the world, it may be successful in other

106. The U.S. government's displeasure with the English treatment of Binyam Mohamed's case has, however, motivated the British government to propose the stripping of judicial review over similar cases in which sensitive information may be disclosed. *See* SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, Cm. 8194, ¶ 2.91 (U.K.), *available at* http://www.statewatch.org/news/2011/oct/uk-justice-and-security-green-paper.pdf. The Green Paper notes that such measures are necessary because "[s]ince *Binyam Mohamed*, the Government and its foreign government partners have less confidence than before that the courts will accept the view of Ministers on the harm to national security that would result from disclosure." *Id.* at ¶ 1.43; *cf.* ADAM TOMKINS & TOM HICKMAN, BINGHAM CENTRE FOR THE RULE OF LAW, RESPONSE TO THE JUSTICE AND SECURITY GREEN PAPER ¶¶ 66–70 (Jan. 6, 2012), *available at* www.biicl.org/files/5829_bingham_centre_response_to_green_paper.pdf (arguing that the Green Paper's proposal to strip judicial review of such cases is based on misconceptions, is unjustified, and would undermine the rule of law).

nations where courts would otherwise apply a narrower privilege.

As it stands, there is no incentive for any administration—Democratic or Republican—to curtail its own power with regard to the state secrets privilege. The 2009 Holder Memorandum adds layers of intra-executive oversight that have yielded little in terms of increasing government transparency or furthering rule of law principles.[107] That leaves Congress and the courts to act. Congressional apathy on this issue has been clear; although useful and thoughtful legislation[108] on this issue has been proposed twice, it has not been passed, and there is no apparent political motivation or will for Congress to take up state secrets reform now.

When Mohamed filed his U.S. suit seeking redress for human rights violations allegedly suffered from rendition and torture, it was understood that the executive branch would invoke the state secrets privilege and that Congress had not offered guidance on applying the privilege. Instead of acknowledging this reality and embracing the unique ability and obligation of the courts to balance security interests with the grave human rights concerns at issue, the Ninth Circuit sitting en banc employed formalistic, deferential, and altogether unsatisfactory reasoning to suggest that the judiciary must defer to the executive. The abdication of the judiciary's responsibility in the name of executive branch secrecy concerns is all the more striking when contrasted with the reasoning of courts in England and Israel. Modern state secrets jurisprudence in these two nations ought to counsel the courts toward a rule-of-law-oriented approach to future litigation in this area.

Passage of strong state secrets reform legislation should remain a priority to ensure an external, long-term check on executive branch overreaching.[109] In the meantime, courts should

107. *See* Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 643–46 (2010) (discussing the limits of intra-executive review of secrecy decisions). Wells further observes that if "nothing in the Obama [state secrets] policy or subsequent actions suggests that the Administration will hold itself accountable, courts' inconsistency in applying the [state secrets] privilege presents further problems." *Id.* at 648.

108. *See* Setty, *supra* note 6, at 255–59 (discussing potential benefits of the proposed state secrets reforms and suggesting additional reform measures).

109. Legislative inertia and a high level of deference to executive branch decision-making have hobbled many avenues for genuine legislative oversight or any kind of substantial reform efforts with regard to national security and the rule of law. *See, e.g.*, Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 464–66 (2005) (discussing inaccuracies in the

heed the lessons of nations like England and Israel in not being cowed by assertions that judicial involvement in security matters is unwarranted or undermines the safety of the nation.[110] Instead, courts must take on the responsibility of offering a realistic opportunity for redress for those alleging grave violations of civil rights and civil liberties, even—and perhaps especially—during times of war.

Office of Legal Counsel Torture Memorandum and the ethical implications); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 2–3 (2005) (critiquing torture memos from the Office of Legal Counsel and suggesting comprehensive regime change). Arguments that this deference is unwarranted continue to grow. *E.g.*, Rana, *supra* note 41; Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?* (NYU Sch. of Law, Pub. Law Research Paper No. 10–53), *available at* http://ssrn.com/abstract=1661964.

110. Such assertions are commonly levied by the executive branch, but are sometimes offered by the judiciary itself. *E.g.*, Boumediene v. Bush, 553 U.S. 723, 802 (2008) (Roberts, C.J., dissenting) (critiquing the level of judicial involvement in detention decisions endorsed by the Court and noting that, "[a]ll that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary"); *id.* at 827–28 (Scalia, J., dissenting) (arguing that "no basis for judicial intervention" existed here, and that such intervention "will almost certainly cause more Americans to be killed").