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## The Rise of National Security Secrets

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## Article

### The Rise of National Security Secrets

SUDHA SETTY

*Professor Aziz Rana urges a broad and populist reconsideration of the idea that the administration and military are best positioned to make decisions about national security issues. This Article calls for a rethinking of national security secrecy as well. The centralization of security decision-making power in the early Cold War era fostered a culture of government secrecy, with Congress and the judiciary enabling the rise of national security secrecy out of fear that they were ill-equipped to make security-related decisions, and public fear of internal and international security threats trumping concerns about legitimacy or democratic accountability. This culture of secrecy has reinforced and legitimated governmental secrecy in current times. The ongoing harms include a long-term distortion to the rule of law, prevention of redress for individual litigants harmed by the national security state, a detriment to perceptions of governmental legitimacy, and a severe reduction in transparency and accountability.*

*Other democratic nations facing severe security threats have found a more just and humane balance between the legitimate need for secrecy and the democratic demand for information concerning actions taken in the name of our national security, which demonstrates that the current U.S. information-sharing paradigm is not necessarily the default. Such evidence provides a strong basis for reconsidering the current security structures in the United States and re-engaging the public in gaining greater access to information that the government relies upon in making security policy. Professor Rana's call for a re-thinking of the security roles of government actors and of the public provides an important starting point for discourse around remediating imbalances in information and decision-making power to better balance and strengthen our democracy.*

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# The Rise of National Security Secrets

SUDHA SETTY\*

## I. INTRODUCTION

Professor Aziz Rana, in his thought-provoking article, *Who Decides on Security?*, traces the history of Congress and the judiciary abdicating their proper role in deciding security matters back to the New Deal and World War II eras—which saw the rise of security expertise and security-related information being inculcated solely in the executive branch and administrative departments.<sup>1</sup> Rana argues that this new structural arrangement constituted a significant shift in the public understanding of what “security” meant and how the different branches of government ought to be involved in understanding, maintaining, and protecting it.<sup>2</sup>

Part II of this Article argues that the professionalization of security during World War II and the early Cold War era enabled not only the exclusivity of military decision-making in the executive branch and administration, but also subverted the fundamental democratic principle that the public, the courts, and Congress have the right to information about security decision-making. This shift in the information paradigm was cemented during the early Cold War years and has reinforced governmental secrecy in current times. Courts now rely on their own precedent over several decades to defer extensively to executive branch determinations that secrecy must surround national security initiatives, such as extraordinary rendition and targeted killing, even when the end result undermines the judiciary’s role in protecting fundamental rights.<sup>3</sup> In

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<sup>1</sup> See Aziz Rana, *Who Decides on Security?*, 44 CONN L. REV. 1417, 1455–58 (2012) (discussing the professionalization of the military in the 1930s and 1940s).

<sup>2</sup> See *id.* at 53 (focusing on a limited judicial review of executive war-making decisions that enabled and empowered serious governmental abuse of liberties (citing *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding the military’s decision to intern Japanese Americans and U.S. residents of Japanese origin during World War II and emphasizing the need to defer to military decision-making in wartime); *Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (upholding the military authority to impose a wartime curfew on Japanese Americans and U.S. residents of Japanese origin)).

<sup>3</sup> This dynamic has been well-documented elsewhere. *E.g.*, Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 168 (2006)

such cases, courts often express misgivings about their (in)ability to take on their traditional counter-majoritarian role, but profess a lack of understanding to question executive branch assertions and override claims of national security, even where executive branch overreaching is remediable only through judicial action.<sup>4</sup> Likewise, Congress continues its decades-old pattern of actively ceding authority to the executive branch even when it has the constitutional authority to demand more information or, as Professor Rana encourages, play a greater role in security-related decision-making.<sup>5</sup>

Part III posits that this state of affairs is not necessarily the default. Examples from other democratic nations in which security has been a challenge illustrate that it is feasible and structurally desirable for the judiciary to be fully engaged on security-related issues and for legislatures to provide meaningful checks on executive overreaching.

This Article concludes that such evidence provides a strong basis for reconsidering the current security structures in the United States and re-engaging the public in gaining greater access to information that the government relies upon in making security policy. In the end, Professor Rana's call for a re-thinking of the security roles of government actors and of the public provides a starting point for discourse around creating genuine structural change to remediate the imbalances in information and decision-making power among the branches of government and with regard to the public as well.

## II. THE RISE OF SECRECY

As the professionalization of military decision-making took hold by the mid-twentieth century and Congress, the judiciary, and the public were largely seen as observers to security-related policy-making, it was a logical next step and beneficial to the administration to exclude the public and other branches of government from having access to the information underlying the decision-making. Thus, it is unsurprising that security-related secrecy intensified in the late 1940s and onward as the Cold War developed and then anchored security discourse.

### A. *Cold War Secrecy*

The early Cold War period represented a crucial turning point in public, judicial, and congressional access to national security-related

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(arguing that the judiciary is constitutionally and structurally obligated to assess executive branch claims of national security secrecy less deferentially).

<sup>4</sup> *Id.* at 168–69.

<sup>5</sup> See Rana, *supra* note 1, at 1421 (explaining that even when Congress does intervene the effect of the legislation increases executive power).

information.<sup>6</sup> Several interrelated dynamics led to the lack of information-sharing: first, the Cold War represented a shift in the U.S. security model where reliance on professional intelligence-gathering and access to information became central to perceptions of U.S. military success.<sup>7</sup> Second, the Cold War represented a challenge to the United States in terms of foreign affairs and the government's ability to extend the U.S. geopolitical sphere of influence.<sup>8</sup> As such, the role of the executive as the natural decision-maker in matters involving foreign policy and foreign affairs enabled the consolidation of decision-making power in the executive branch and the military.<sup>9</sup> Third, much of the domestic rhetoric surrounding the Cold War included a deep unease that Soviet interests had permeated American society such that the loyalty of citizens was questionable.<sup>10</sup> Once this concern took root, the argument that information

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<sup>6</sup> See Wallace Parks, *Secrecy and the Public Interest in Military Affairs*, 26 GEO. WASH. L. REV. 23, 23 (1957) (noting the shift in access to national security-related information following World War II).

<sup>7</sup> See *id.* (noting the importance of not disclosing information unnecessarily given that “the U.S.S.R. maintains an extensive and efficient world-wide intelligence apparatus”). Despite the need for some secrecy for intelligence-gathering operations, the potential negative implications of long-term military secrecy were also clear to contemporary scholars. See *id.* at 23–24. Parks argued that the lack of information forthcoming from the military establishment in the post-World War II era eroded the fundamental democratic principle of open government and ultimately would prove detrimental to national security interests. *Id.* at 26.

<sup>8</sup> In this respect, some contemporary commentators worried that too much secrecy could undermine public support for necessary foreign policy measures because of a false public sense of security or because misleading information could take root in the public mind in the absence of reliable information forthcoming from the military establishment. See Parks, *supra* note 6, at 31. Other commentators expressed concern that too much secrecy would undermine the democratic freedoms that differentiated the United States from communist nations. See Leo Albert Huard, *The Status of National Internal Security During 1955*, 44 GEO. L.J. 179, 179–80 (1956) (“The excrescence of international communism and the constant presence of total war, hot or cold, has made the keeping of national secrets an absolute necessity. We must show the world that democracy can be secure without silencing its citizens or suppressing the free expression of their political thought.”).

<sup>9</sup> Early Cold War era commentators opined that the professionalization of the military establishment in the World War I era largely undermined the constitutional structure of civilian control over the military, and that this restructuring of constitutional power was being cemented by the lack of information being made available outside of the executive branch in the post-World War II era. See, e.g., Parks, *supra* note 6, at 27–29. New Deal era cases made clear that the shift in perception of information access preceded World War II. For example, the Court's perception of comparative congressional-executive information access regarding military and foreign affairs matters in *Curtiss-Wright* validates Congress's decision to cede some of its own legislative power to enable greater latitude for executive decision-making with regard to foreign affairs. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–21 (1936) (noting that the President has access to “confidential sources of information” and the ability to act on sensitive and confidential matters in a way that Congress cannot).

<sup>10</sup> Certainly the activities of the House Un-American Activities Committee, the Senate Permanent Subcommittee on Investigations, and other congressional bodies reflect this concern in the early Cold War era. ELEANOR BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* 171 (1957); see also COMMISSION ON GOVERNMENT SECURITY, *REPORT OF THE COMMISSION ON GOVERNMENT SECURITY* 102 (1953) (noting that significant evidence was given that various congressional committees had been

access over security-related information must be curtailed to prevent injury to national security became compelling to courts and to Congress despite concerns that the military could use secrecy as a tool to avoid congressional oversight and public or judicial accountability.<sup>11</sup>

Congress was quite willing to cede to the executive and military both the authority to make national security decisions and to control access to national security-related information. In a series of statutes passed in the early Cold War period, Congress enabled administrative control of the collection and classification process for secret information.<sup>12</sup> When public resistance to this enabling occurred, Congress made some attempts to regain public trust. For example, Congress established the Commission on Government Security (“the Wright Commission”) in 1955,<sup>13</sup> with the purpose of conducting active oversight of security matters. In addition to structuring the Wright Commission to include bipartisan representatives and private citizens selected by both houses of Congress and the President,<sup>14</sup> the Wright Commission had a broad mandate to “study and investigate the entire Government security program, including . . . national defense secrets.”<sup>15</sup>

Such attempts at oversight would appear to alleviate contemporary concerns about a security state in which relevant information is kept secret within the executive and military. Yet the Wright Commission’s only

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infiltrated, and recognizing the “vast powers which hidden Communists could exercise from such a vantage point”). The executive branch also reacted strongly to fears of Communist infiltration. *See* Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (supplanting E.O. 9835 and mandating federal agencies to investigate whether employees posed a security risk to the nation); Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947) (setting forth a broad mandate for the Federal Employee Loyalty Program); *see also* Huard, *supra* note 8, at 180 (“We must take steps to remove disloyal persons from positions where national secrets are available to them. . . . [S]ome allege, that the balance between preservation of our form of government and protection of individual rights has been upset . . . . Some of this criticism can be dismissed as communist-inspired.”).

<sup>11</sup> *See* Parks, *supra* note 6, at 30 (noting a serious concern with “the implications of the withholding of information on the American institutions of civil-military relations with primary emphasis on the informational needs of the non-governmental community and the Congress”).

<sup>12</sup> *E.g.*, Internal Security Act of 1950, 64 Stat. 987, §§ 1006–13 (codified as amended at 50 U.S.C. §§ 831–35 (2006)) (providing limitations and guidelines on who has access to classified information at the National Security Agency); Central Intelligence Agency Act of 1949, *id.* § 403g (holding the Director of National Intelligence accountable for safeguarding intelligence information from disclosure); National Security Act of 1947, 50 U.S.C. § 435 (governing the process of classifying information and accessing classified information); *id.* § 403-5d (limiting the dissemination of privileged information); *id.* § 404g (disallowing intelligence from being shared with the United Nations); *id.* § 421 (punishing individuals who reveal the identity of undercover agents and classified information); *id.* § 432 (allowing operational files of the National Geospatial-Intelligence Agency to not be disclosed or viewed by the public).

<sup>13</sup> Pub. L. 304, 69 Stat. 595, 595 (1955); *see also* Daniel Patrick Moynihan, *Foreword* to REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY XXXIII (1997).

<sup>14</sup> *See* Huard, *supra* note 8, at 205.

<sup>15</sup> Pub. L. 304, § 6, 69 Stat. at 596.

legislative proposals were to amend criminal statutes to enable prosecution of those who made classified information public and to allow for evidence of subversion obtained through wiretaps authorized by the Attorney General to be admissible.<sup>16</sup> Thus, the legacy of the Wright Commission in terms of its impact on congressional oversight of military decision-making was to encourage making legislative allowances for increasing and protecting secrecy against the constitutional interests of free expression and privacy.<sup>17</sup>

Likewise, the judiciary evinced little interest in taking an active oversight role regarding security-related secrecy. A seminal case illustrating the judicial-political dynamic in the early Cold War era is *United States v. Reynolds*,<sup>18</sup> which established the U.S. standard for evaluating executive branch and military claims of the state secrets privilege and helped cement the idea that national security information is often too sensitive to be disclosed to even the courts.<sup>19</sup> In *Reynolds*, the widows of three civilians killed in the 1948 crash of a military plane during a test flight sought compensation in a wrongful death suit against the government.<sup>20</sup> The government asserted the state secrets privilege<sup>21</sup> in

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<sup>16</sup> COMMISSION ON GOVERNMENT SECURITY, *supra* note 10, at 629; *see also* Rana, *supra* note 1, at 1421 (observing the same congressional enabling of executive power at different times in U.S. history).

<sup>17</sup> Although the legislative proposals of the Wright Commission were not immediately adopted, four decades later Senator Patrick Moynihan reflected on the work of the Wright Commission:

In retrospect, the importance of the Wright Commission was not what it proposed, but that its proposals were never seriously considered. It had become clear to the nation . . . that even in a time of Cold War, the United States Government must rest, in the words of the Declaration of Independence, on “the consent of the governed.” And there can be no meaningful consent where those who are governed do not know to what they are consenting.

Moynihan, *supra* note 13, at XXXIII–XXXIV (citing DAVID WISE & THOMAS B. ROSS, *THE INVISIBLE GOVERNMENT* 6 (1964)) (internal quotations omitted).

<sup>18</sup> 345 U.S. 1 (1953).

<sup>19</sup> *Id.* at 6–7, 10. For a fuller discussion of the state secrets privilege and the role of *Reynolds*, see William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 90 (2005) (arguing that the courts should clarify the privilege to enhance these protections against executive branch overreaching); *see also* Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 206–08 (2009) (discussing the deferential judicial approach to invocations of the state secrets privilege).

<sup>20</sup> *Reynolds*, 345 U.S. at 2–3.

<sup>21</sup> The state secrets privilege is a common law evidentiary privilege enabling the government to prevent disclosure of sensitive state information during litigation. A court upholding a claim of privilege has the power to shape the litigation according to the perceived degree of harm, with consequences ranging from the denial of a discovery request for a document to the dismissal of a suit. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073–74 (9th Cir. 2010) (dismissing suit seeking recovery for rendition and torture); El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007) (same).



response to a document request by plaintiffs for the flight accident report.<sup>22</sup>

The U.S. Supreme Court, in evaluating whether the flight accident report ought to remain secret and whether the case could go forward without the report, reasoned that although “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,”<sup>23</sup> the privilege required deference on the part of the judiciary and, in this case, required secrecy over the information in question.<sup>24</sup> Notably, although the standard established by the *Reynolds* Court specifically allowed for the reviewing court to examine the underlying documents in camera as a means of evaluating the sufficiency of the privilege claim, the Court decided that the trial court did not need to do so. This aspect of the Court’s holding turned on its perception that “this is a time of vigorous preparation for national defense,”<sup>25</sup> thereby making clear that it agreed with the executive assertion that secrecy is an integral part of effective national security. Under this framework of security decision-making, to encourage judicial access to information—even for in camera review—would unacceptably compromise security interests.<sup>26</sup> The loss suffered by the widows bringing the suit against the government, although acknowledged by the Court, was ultimately unpersuasive for the purpose of even having the trial court examine the underlying accident report.

Had the Court allowed the trial court to examine the flight accident report, the trial court would have been able to take into account the

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<sup>22</sup> *Reynolds*, 345 U.S. at 3–4. The government also cited to Air Force Regulation No. 62-7(5)(b), which precluded disclosure of such reports outside the authorized chain of command without the approval of the Secretary of the Air Force. *Id.* at 3–4 & n.4.

<sup>23</sup> *Id.* at 9–10.

<sup>24</sup> *Id.* at 6–7. The *Reynolds* Court created a deferential framework for evaluating claims of privilege that involves, among other requirements, that the reviewing court uphold the claim of privilege if a “reasonable danger” to national security is likely. *Id.* at 10.

<sup>25</sup> *Id.* at 10–11.

<sup>26</sup> Notably, Justice Frankfurter was among the dissenting justices in *Reynolds*. Although the dissenting justices chose not to write a separate opinion, they cited to the Third Circuit’s opinion in the litigation as reflective of the dissenting justices’ thinking on the subject. *Id.* at 12 (Black, J., dissenting). The Third Circuit held that the flight accident report should be examined and that the scope of the state secrets privilege ought to be construed narrowly so as to allow the litigation to proceed. *Reynolds v. United States*, 192 F.2d 987, 998 (3d Cir. 1951). Judge Maris offered his view of the philosophical dangers of secrecy in a democracy:

We need to recall in this connection the words of Edward Livingston: “No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured.” And it was Patrick Henry who said that “to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country.[”]

*Id.* at 995 (internal citations omitted).

information that had become public when the report was declassified in the 1990s:<sup>27</sup> the military secrets claimed by the government did not exist, but there was evidence that the plane's lack of standard safeguards may have contributed to its crash—evidence of the negligence alleged in the widows' lawsuit from the 1950s.<sup>28</sup>

Other secrecy-related cases from the early Cold War period offer a mix of perspectives from the judiciary on investigating government claims of national security secrecy. In the criminal context, courts expressed some deference to executive branch secrecy designations,<sup>29</sup> but maintained oversight by forcing the government to confront the constitutional problems arising from attempts to keep secret information that was relied upon to prosecute a suspect.<sup>30</sup> In the civil context, the judiciary was more deferential to claims of secrecy,<sup>31</sup> although courts were willing to check executive secrecy when Congress authorized the judiciary to take a more active role in dealing with secret information.<sup>32</sup>

The 1950s security-related congressional activity, along with *Reynolds* and other contemporary cases, illustrates the early Cold War reality that the public,<sup>33</sup> the judiciary, and Congress had diminished access to the information underlying security decision-making.<sup>34</sup> The end result of

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<sup>27</sup> LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 165–66 (2006).

<sup>28</sup> *Id.* at 181–82. For an in-depth account of the *Reynolds* case, see generally *id.* (analyzing the case and contextualizing it by assessing its effect on the United States); see also Patrick Radden Keefe, *State Secrets: A Government Misstep in a Wiretapping Case*, *NEW YORKER*, Apr. 28, 2008, at 28 (describing the frequency with which state secrets, as outlined in *Reynolds*, are invoked); cf. *Herring v. United States*, 424 F.3d 384, 392 (3d Cir. 2005) (holding that the United States did not commit a fraud on the court in its representations during the *Reynolds* litigation).

<sup>29</sup> See *United States v. Haugen*, 58 F. Supp. 436, 438 (E.D. Wa. 1944) (“The determination of what steps are necessary in time of war for the protection of national security lies exclusively with the military and is not subject to court review.”) (quoting *United States v. Hirabayashi*, 320 U.S. 81, 93 (1943)).

<sup>30</sup> See *Jencks v. United States*, 353 U.S. 657, 670–72 (1957) (opining that the limit of national security secrecy was reached when the ability to mount a criminal defense was significantly compromised by defendant's lack of access to sensitive but relevant information); *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (holding that the prosecution must decide whether to drop its case or reveal state secrets relevant to the defense).

<sup>31</sup> See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468–69 (1951) (upholding the authority of the Attorney General to promulgate regulations prohibiting disclosure of Justice Department information, even in response to subpoenas issued in habeas corpus proceedings).

<sup>32</sup> See *Halpern v. United States*, 258 F.2d 36, 43–44 (2d Cir. 1958) (holding that Congress had authorized courts to hold in camera sessions to try cases under the Invention Secrecy Act, even where state secrets were at issue).

<sup>33</sup> Congress acted to formalize secrecy protections to control private information as well. See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 93 (2010) (describing the government role in secrecy as extending into the private sector in the 1950s).

<sup>34</sup> See Arthur S. Miller, *The Constitutional Law of the “Security State,”* 10 *STAN. L. REV.* 620, 639 (1958) (noting that “[b]oth the judiciary and the legislature have waned in their positions of relative power”).

*Reynolds*, where overreaching and misstatements by the military were unchecked by a reluctant judiciary, illustrates early costs of the post-World War II rise of secrecy, which were largely cemented in the ensuing decades.<sup>35</sup>

### B. *Post-9/11 Secrecy*

In the post-9/11 era, the same objections to national security secrecy—relating to government accountability, transparency, and the rule of law—that were raised in the early Cold War era have been resurrected.<sup>36</sup> Yet in a variety of contexts, from the government’s numerous invocations of the state secrets privilege,<sup>37</sup> to a suit challenging the government’s targeted killing program,<sup>38</sup> to freedom of information requests regarding the implementation of post-9/11 security measures,<sup>39</sup> government secrecy claims have prevailed consistently over principles of accountability, transparency, and open government.

Although plaintiffs have achieved some degree of victory in habeas corpus cases claiming access to the judicial system to contest detentions,<sup>40</sup>

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<sup>35</sup> See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1292–93 (2007) (discussing several cases during the 1970s in which the state secrets privilege was invoked); Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?* 14–15 (N.Y.U. Sch. of L. Pub. L. & Legal Theory Res. Paper Series, Working Paper No. 10-53, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1661964](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661964) (discussing self-serving motivations for the administration to keep information secret).

<sup>36</sup> See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 1–2 (2003) (describing the parallels between post-9/11 security measures and the McCarthy era).

<sup>37</sup> See Weaver & Pallitto, *supra* note 19, at 89 (describing the Bush administration’s invocation of the state secrets privilege in the years immediately following the 9/11 attacks as unprecedentedly high).

<sup>38</sup> See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 54 (D.D.C. 2010) (dismissing, based on standing grounds and concerns about the government’s need for secrecy with regard to its targeted killing program, 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).

<sup>39</sup> See, e.g., *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 926–27 (D.C. Cir. 2003) (citing *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001), and *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988) with regard to the need for deference) (denying Freedom of Information Act requests for the names of immigrants detained in post-9/11 law enforcement sweeps and noting that it is “well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview”); *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20, 34–35 (D.D.C. 2003) (denying freedom of information requests regarding the implementation of surveillance mechanisms under the USA PATRIOT Act). In these cases, the government has often successfully invoked a mosaic theory to claim that seemingly innocuous information is still too sensitive to allow for disclosure to the public. See Jameel Jaffer, *The Mosaic Theory*, 77 SOC. RES. 873, 873 (2010).

<sup>40</sup> Decisions like *Boumediene v. Bush*, 553 U.S. 723, 796–98 (2008) (discussing the Court’s judicial authority to consider issues of restraint on personal liberty), *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (holding that military commissions set up by executive branch lacked power to proceed), *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding, against Congress’s actions, that those held as enemy combatants must be given a meaningful opportunity to challenge their categorization as

when it comes to pursuing civil cases for damages resulting from government overreaching, plaintiffs have met with far-reaching claims of secrecy that courts have consistently upheld. The cases reflect a judicial formalism that adheres to a very narrow view of the judicial role vis-à-vis security decision-making,<sup>41</sup> to the detriment of the protection of fundamental rights, the rule of law, and arguably of security interests as well.<sup>42</sup>

Post-9/11 state secrets privilege cases reflect a striking continuity with the deferential reasoning seen in *Reynolds* and other early Cold War secrecy-related cases. For example, in September 2010, the Ninth Circuit en banc dismissed plaintiffs' claims in *Mohamed v. Jeppesen Dataplan, Inc.*,<sup>43</sup> a civil suit seeking damages for extraordinary rendition and torture conducted at the direction of the U.S. government, based on the state secrets privilege.<sup>44</sup> Although the court in *Jeppesen Dataplan* expressed concern over plaintiffs' lack of judicial remedy and the lack of government accountability, ultimately the government's argument that the extraordinary rendition program—although publicly known—must be kept secret prevailed.<sup>45</sup> The majority found that dismissal of the suit was necessary despite the public knowledge of the program because of the challenges Jeppesen Dataplan would have faced in defending itself without access to the privileged material.<sup>46</sup> The dissent in *Jeppesen Dataplan*, by contrast, observed that the majority had “disregard[ed] the concept of checks and balances” abdicated its judicial responsibility, and ignored the structural need to preserve a realistic avenue for plaintiffs to seek redress against government overreaching.<sup>47</sup>

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such), and *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that federal courts have authority to decide whether foreign nationals held at Guantanamo Bay were wrongfully imprisoned) reflect the Supreme Court's willingness to engage in a more robust judicial role vis-à-vis security decision-making in the context of habeas corpus rights.

<sup>41</sup> See generally Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1629 (2012).

<sup>42</sup> Parks, *supra* note 6, at 26.

<sup>43</sup> 614 F.3d 1070 (9th Cir. 2010).

<sup>44</sup> See *id.* at 1073 (quoting *United States v. Reynolds*, 345 U.S. 1, 11 (1953)) (dismissing action after finding “that [state] secrets are at stake”). The decision in *Jeppesen Dataplan, Inc.* followed the reasoning, tenor, and validation of government secrecy evident in several other cases regarding rendition and torture. See *Arar v. Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (discussing the sensitivities surrounding “exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues”); *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007) (dismissing claims of detention and torture on grounds of state secrecy).

<sup>45</sup> See *Jeppesen Dataplan, Inc.*, 614 F.3d at 1073, 1089, 1091 (dismissing a claim for state secrecy, mentioning public documents tending to support claim, and discussing other possible remedies for plaintiff).

<sup>46</sup> *Id.* at 1090. It is ironic that the court's weighing of fairness ultimately resulted in dismissal based on concerns that a defendant that was allegedly complicit in the torture of innocent civilians would not be able to defend itself against a civil suit.

<sup>47</sup> *Id.* at 1101 (Hawkins, J., dissenting).

The post-9/11 judicial enabling of executive secrecy is not limited to the context of extraordinary rendition and torture. The 2010 dismissal of *Al-Aulaqi v. Obama*,<sup>48</sup> in which the plaintiff sought injunctive relief for his U.S. citizen son who was a subject of the CIA's targeted killing program, similarly gives primacy to deferring to the executive branch and enabling secrecy over the substantial and troubling rule of law concerns that are concomitant with any targeted killing program, particularly of a country's own citizens.<sup>49</sup> Likewise, the early 2012 Fourth Circuit decision in *Lebron v. Rumsfeld*,<sup>50</sup> upholding the dismissal of a civil damages suit based on the alleged abuse of U.S. citizen Jose Padilla when he was in military custody, turned in part on the court's perception that it need not wait for privilege and secrecy issues to arise during the course of litigation, and that "the prospect of adverse collateral consequences" related to a breach in security-related secrecy counseled the court to dismiss the suit at the pleadings stage.<sup>51</sup>

Compounding the problem of information access, Congress has consistently enabled heightened secrecy in security decision-making in the last decade. Immediately following the terrorist attacks of 9/11, Congress passed the USA PATRIOT Act, which cemented the government's authority to determine whether information was too sensitive to disclose and then punish those who disclosed such information.<sup>52</sup> Most recently, Congress enacted the National Defense Authorization Act of 2012, which empowered the President to take extraordinary national security measures unilaterally, such as ordering the indefinite detention of U.S. citizens,<sup>53</sup> and, as an added measure, enabled further non-disclosure of information by the administration and military.<sup>54</sup>

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<sup>48</sup> 727 F. Supp. 2d 1 (D.D.C. 2010).

<sup>49</sup> *Id.* at 52–54 (discussing the state secrets privilege and dismissing the suit on justiciability and standing grounds).

<sup>50</sup> No. 11 6480, 2012 WL 213352 (4th Cir. Jan. 23, 2012).

<sup>51</sup> *Id.* at \*1, \*12–13 (noting that under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), special factors counseling hesitation in letting a suit go forward include the need for deference to the executive branch with regard to national security concerns).

<sup>52</sup> See USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 215, 115 Stat. 272 (codified in scattered sections of 50 U.S.C.) (disallowing the dissemination of information regarding any business records that are sought pursuant to terrorism investigations); *id.* § 223 (codified in scattered sections of 18 U.S.C.) (permitting civil liability and administrative disciplinary measures against individuals who make unauthorized disclosures of information); *id.* § 116 (prohibiting disclosure to individuals involved in suspicious activities that such activity was reported pursuant to the issuance of a National Security Letter).

<sup>53</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, §§ 1021, 1022, 125 Stat. 1298 (2011) (authorizing indefinite military detention of U.S. citizens).

<sup>54</sup> *Id.* § 1025 (limiting the types of information, forms of communication, and representation available to detainees).

### III. THE ABILITY TO AVOID UNNECESSARY SECRECY

Although U.S. courts and Congress, in the post-9/11 context, emphasize the need for government secrecy in national security,<sup>55</sup> consideration of other democratic nations with long-standing security issues reveals a variety of approaches to information-sharing among branches of government. Looking at England, Israel, and India as comparative examples is particularly germane. The English government's approach to security-related secrecy shifted significantly during World War II, as did that of the United States; Israel and India are both post-World War II democracies that have faced serious security threats since their founding.

As parliamentary nations, it is of little surprise that the information shared between the legislative and executive branches in these nations is significantly higher than the information shared between a presidential administration and Congress in the United States. Nonetheless, the willingness of the courts in England and Israel to meaningfully engage the question of executive secrecy—and the refusal of Indian courts to do the same—is particularly helpful in providing insight into U.S. structural balancing.

#### A. *England*

The World War II era marked a significant shift in the information-sharing structures among the branches of government in England. However, even during World War II, when the Prime Minister's foreign affairs responsibilities were at their highest,<sup>56</sup> the English government managed to both share security-related information with the Parliament and maintain a high level of secrecy within Parliament to minimize the leak of intelligence to enemy forces.<sup>57</sup> The decision to make the parliamentary sessions secret was itself open to the democratic process: the members of the House of Commons voted to have secret sessions in order to better understand the security-related decisions being made by the Prime Minister and Cabinet, and to keep the content of such sessions as secret as

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<sup>55</sup> Arguably this level of deference is supported by the public as well. See Schulhofer, *supra* note 35, at 29 (arguing that “the public sides with the President and regards oversight as interference”).

<sup>56</sup> See Clive Parry, *Legislatures and Secrecy*, 67 HARV. L. REV. 737, 739 (1954) (noting that foreign affairs, being squarely the responsibility of the Prime Minister, “have always been conducted upon somewhat less democratic principles than home affairs”).

<sup>57</sup> Records indicate that the Prime Minister held over sixty secret sessions with Parliament related to the war effort during World War II. *Id.* at 755. In addition to the holding of secret sessions, the government used the threat of prosecution under the Official Secrets Act on Members of Parliament who leaked information. See *id.* at 775; see also Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, § 2 (Eng.) (detailing the penalties for the inappropriate leaking of official and secret information).

possible.<sup>58</sup> In doing so, the English government struck a very different balance than the United States in terms of information-sharing; although the public ultimately would not have access to security-related information due to concerns over intelligence leaking to Germany,<sup>59</sup> some check existed in terms of Parliament having access to security-related information and the ability and obligation to question the government with regard to security policy.

At the same time that the Parliament and executive were sharing security-related information, however, the English courts made clear that they would defer to government claims of the need to keep information secret. The English case of *Duncan v. Cammell, Laird, & Co.*<sup>60</sup> established the largely deferential standard for evaluating claims of secrecy under the public interest immunity,<sup>61</sup> a standard that was maintained for decades after the end of World War II.<sup>62</sup> In evaluating the government claim of privilege at issue in *Duncan*, the House of Lords relied on its precedent<sup>63</sup> to hold that courts should defer to government claims of public interest immunity, noting that, “[t]hose who are responsible for the national security must be the sole judges of what the national security requires.”<sup>64</sup> This deferential view of executive secrecy over national security decision-making prevailed through the turn of the twenty-first century.

Nonetheless, in the post-9/11 context, both the English courts and Parliament have, to some extent, pushed back against government claims of the need for secrecy in national-security decision-making.<sup>65</sup> For

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<sup>58</sup> See Parry, *supra* note 56, at 755.

<sup>59</sup> In 1940, Prime Minister Winston Churchill noted: “‘The reason why I asked the House to go into Secret Session was not because I had anything particularly secret or momentous to say. It was only because there are some things which it is better for us to talk over among ourselves than when we are overheard by the Germans.’” *Id.* at 759 (quoting WINSTON CHURCHILL, *Parliament in the Air Raids* (Sept. 17, 1940), in SECRET SESSION SPEECHES 15, 15 (Charles Eade ed., 1946)).

<sup>60</sup> [1942] A.C. 624 (H.L.) (appeal taken from Eng.). The facts of *Duncan* are strikingly similar to the U.S. *Reynolds* case: a British submarine sank in 1939 during sea trials, which resulted in the death of ninety-nine people. The families of the sailors who had been killed claimed damages from the builders, Cammell, Laird & Co., and sought the plans of the submarine as part of their lawsuit. *Id.* at 625–26.

<sup>61</sup> Public interest immunity is akin to the U.S. state secrets privilege. See Setty, *supra* note 19, at 228–29 (discussing the history of the *Duncan* case and the court’s holding that “courts should take an affidavit claiming public interest immunity at face value”).

<sup>62</sup> See, e.g., *Air Can. v. Sec’y of State for Trade*, [1983] 2 A.C. 394 (H.L.) 395 (appeal taken from 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).

<sup>63</sup> *Beatson v. Skene*, [1860] 157 Eng. Rep. 1415, 1421 (holding that “if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice”).

<sup>64</sup> *Duncan*, [1942] A.C. 624 (H.L.) 641 (appeal taken from Eng.) (internal quotations omitted).

<sup>65</sup> Although parliamentary engagement in the question of national security-related secrecy is beyond the scope of this Article, it is worthwhile to note that the English parliament in the post-9/11 era has been deferential to the executive branch in some respects, has provided robust oversight in other

example, the 2008 and 2009 decisions in the case of Binyam Mohamed illustrate a shift in the historical deference of courts to the executive branch in matters of public interest immunity, potentially a sign that the English judiciary views access to national security information as a fundamental aspect of its role in checking abuses by the government.<sup>66</sup> Binyam Mohamed, a plaintiff in the *Jeppesen Dataplan* suit in the United States,<sup>67</sup> had been charged by the U.S. government under the Military Commissions Act<sup>68</sup> with conspiracy to commit terrorism,<sup>69</sup> based in part on confessions which Mohamed alleged were elicited under the threat of torture.<sup>70</sup> Mohamed's litigation in English courts sought release of evidence in the possession of the British government that the United States had compiled against Mohamed.<sup>71</sup> Initially, Mohamed's suit was successful, but for seven short paragraphs in a summary report that had been redacted after the Foreign Secretary issued a public interest immunity certificate claiming that state secrets were at issue.<sup>72</sup>

The public interest immunity certificate asserted that the summary report must remain secret because, among other reasons, the U.S. government had 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.<sup>73</sup> The court reiterated its commitment to "open

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contexts, and at times has used oversight to reaffirm seemingly problematic national security policies. See, e.g., HOME DEP'T, THE DEFINITION OF TERRORISM: A REPORT BY LORD CARLILE OF BERRIEW Q.C. INDEPENDENT REVIEWER OF TERRORISM LEGISLATION 40–41 (2007), available at <http://www.icj.org/IMG/UK-Carlile-DefTer.pdf> (examining the appropriateness of the legal definition of terrorism in the United Kingdom, upholding the inclusion of glorification of terrorist activity as "terrorism," but voicing some concern based on the application of this type of criminalization stretching back to Henry II's execution of Priest Becket in 1164).

<sup>66</sup> Mohamed v. Sec'y of State for Foreign and Commonwealth Aff., [2009] EWHC (Admin) 152 (Eng.); Mohamed v. Sec'y of State for Foreign and Commonwealth Aff., [2008] EWHC (Admin) 2048 (Eng.).

<sup>67</sup> Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1074 (9th Cir. 2010).

<sup>68</sup> Mohamed v. Sec'y of State for Foreign and Commonwealth Aff., [2009] EWHC (Admin) 152, [3] (Eng.) (referencing the Military Commissions Act, 10 U.S.C. §§ 948–950 (2006)).

<sup>69</sup> This proceeding was later dropped when the convening judge determined the prosecution could not proceed without the use of evidence obtained through torture. William Glaberson, *U.S. Drops War Crimes Charges for 5 Guantanamo Detainees*, N.Y. TIMES, Oct. 22, 2008, at A1.

<sup>70</sup> Mohamed v. Sec'y of State for Foreign and Commonwealth Aff., [2008] EWHC (Admin) 2048, [38]–[40] (Eng.).

<sup>71</sup> *Id.* at [2]–[3].

<sup>72</sup> *Id.* at [150]–[157], [160]. 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 United States Government to British intelligence services on the treatment of Mohamed during his detention in Pakistan. Mohamed v. Sec'y of State for Foreign and Commonwealth Aff., [2009] EWHC (Admin) 152, [14] (Eng.).

<sup>73</sup> Mohamed v. Sec'y of State for Foreign and Commonwealth Aff., [2009] EWHC (Admin) 152, [62] (Eng.); see also Eli Lake, *Obama Threatens to Limit U.S. Intel with Brits*, WASH. TIMES, May 12, 2009, [www.washingtontimes.com/news/2009/may/12/obama-threatens-to-limit-us-intel-with-brits/](http://www.washingtontimes.com/news/2009/may/12/obama-threatens-to-limit-us-intel-with-brits/)



justice, the rule of law and democratic accountability,<sup>74</sup> and offered several reasons that disclosure was desirable: upholding the rule of law,<sup>75</sup> comporting with international and supranational standards,<sup>76</sup> ensuring that allegations of serious criminality are not dismissed inappropriately,<sup>77</sup> maintaining accountability over the executive branch of government,<sup>78</sup> and protecting the public and media interest in disclosure of government activities.<sup>79</sup> Yet ultimately the court relied heavily on its long-standing precedent of deference to the executive branch in matters of national security<sup>80</sup> to uphold the Foreign Secretary's issuance of the public interest immunity certificate.<sup>81</sup>

However, the English court re-opened 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,<sup>82</sup> noting 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 . . . British security services in wrongdoing be placed in the public domain in the United Kingdom."<sup>83</sup>

The October 2009 decision in the *Mohamed* case<sup>84</sup> reflects a willingness by the English courts to engage in substantial questioning of the need for secrecy in at least some national security matters, but it also has created significant judicial-political tensions. In late 2011, the British government proposed that Parliament, which has exercised a significant

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(discussing May 6, 2009 letter from the Obama administration reiterating its position that disclosure of information in question—even if made unilaterally by English courts over the objection of Her Majesty's Government—would likely lead to the withholding of valuable counterterrorism information from the United Kingdom).

<sup>74</sup> *Id.* at [18] (noting that this case revolved around a question of the rule of law, not around the rights of an individual litigant).

<sup>75</sup> *Id.* at [18]–[19].

<sup>76</sup> *Id.* at [20], [21], [26], [101]–[105].

<sup>77</sup> *Id.* at [26(iv)], [26(ix)].

<sup>78</sup> *Id.* at [32].

<sup>79</sup> *See 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.").

<sup>80</sup> *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].

<sup>81</sup> *Id.* at [79].

<sup>82</sup> *See id.* at [7] (noting that reopening of a case should be done in "exceptional circumstances" if necessary in the "interests of justice").

<sup>83</sup> *Id.* at [105].

<sup>84</sup> In February 2010, the Court of Appeal upheld the divisional court's decision. *Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs*, [2010] EWCA (Civ) 65, [2011] Q.B. 218 (Eng.).

amount of oversight authority in various security matters,<sup>85</sup> strip judicial review over cases similar to *Mohamed*, in which sensitive information may be disclosed.<sup>86</sup> In doing so, the British government is demonstrating its clear distaste for the type of oversight that the judiciary exercised in *Mohamed*. As of this writing, it remains unclear whether the parliament or the courts will acquiesce to the government's request that it be granted even greater rights to keep information away from other branches of government and the public, despite rule of law and open justice concerns.<sup>87</sup> Given that the question of access to information is directly related to the outcomes of individual trials and implicates sensitive foreign relations questions, the government has been applying significant pressure on the judiciary and parliament to acquiesce in this matter.<sup>88</sup>

### B. *Israel*

Two Israeli cases are particularly useful in addressing secrecy-related decision-making in the comparative context. In *Public Committee Against Torture v. Israel*,<sup>89</sup> the central issue was the legality under domestic and international law of preventative strikes undertaken by the Israeli military in response to the fear of terrorist attacks. The court first dealt with the

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<sup>85</sup> 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, 41–45 (2011) (taking note of parliamentary oversight with regard to some security-related decisions, such as establishing the legal definition of terrorism).

<sup>86</sup> See SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER 36 ¶ 2.91 (2011). 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 14 ¶ 1.43.

<sup>87</sup> See ADAM TOMKINS & TOM HICKMAN, BINGHAM CENTRE FOR THE RULE OF LAW, RESPONSE TO THE JUSTICE AND SECURITY GREEN PAPER 22–24 (2012), available at [http://www.bicl.org/files/5829\\_bingham\\_centre\\_response\\_to\\_green\\_paper.pdf](http://www.bicl.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); UNITED KINGDOM HOUSE OF LORDS, JOINT COMMITTEE ON HUMAN RIGHTS, TWENTY-FOURTH REPORT, JUSTICE AND SECURITY GREEN PAPER 32–33 (2012), available at <http://www.statewatch.org/news/2012/apr/uk-jhrc-green-paper-security.pdf> (emphasizing the importance of the judicial role in determining access to information and weighing government claims of the need for secrecy).

<sup>88</sup> See Patrick Wintour & Ian Cobain, *David Cameron Defends Secret Court Hearings and Surveillance Proposals*, THE GUARDIAN (U.K.), Apr. 4, 2012, <http://www.guardian.co.uk/law/2012/apr/04/david-cameron-secret-courts-surveillance> (quoting Prime Minister David Cameron and Justice Minister Ken Clarke as defending the green paper's proposals. Clarke claimed that the United States had already curtailed the information shared with the United Kingdom, noting “I can't force the Americans to give our intelligence people full cooperation—if they fear our courts, they won't give us the material. Sometimes national security demands that you have to give a guarantee of complete confidentiality to third party countries—and not just the Americans.”).

<sup>89</sup> HCJ 769/02 Public Comm. Against Torture v. Israel 2 ISR. L. REP. 459, 470–471, 475–77, 509–10 [2006] (Isr.).

threshold question of justiciability based on national security concerns,<sup>90</sup> much like the U.S. district court in the *al-Aulaqi* case.

The Israeli Supreme Court considered the broad Israeli justiciability doctrine that encouraged the justiciability of claims involving human rights,<sup>91</sup> and undertook a proportionality analysis to find that the plaintiff's suit could go forward.<sup>92</sup> Ultimately, the court concluded that the targeted killings at issue in the case were not per se illegal, but that they should be evaluated by courts on a case-by-case basis, with the court reviewing evidence in camera as necessary to deal with security concerns.<sup>93</sup>

In another case, *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior*,<sup>94</sup> the court explained the imperative of open government that enables the judiciary to access information to make informed decisions as to the appropriate level of deference with regard to security decision-making:

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.<sup>95</sup>

The Israeli Supreme Court uses an approach focused on reasonableness and proportionality to determine the appropriate level of deference in

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<sup>90</sup> *Id.* at 470 (discussing how the government, in arguing against justiciability, cited Israeli High Court of Justice precedent, HCJ 5872/01 *Barakeh v. Prime Minister* 1 [2002], for the proposition that “the choice of the method of combat that [the government] employ[ed] in order to prevent murderous terrorist attacks before they are committed is not one of the subjects in which this court will see fit to intervene”).

<sup>91</sup> The Court considered two strands of Israeli justiciability doctrine—normative and institutional. For a fuller discussion, see Setty, *supra* note 19, at 246.

<sup>92</sup> HCJ 769/02 Public Comm. Against Torture v. Israel 2 ISR. L. REP. 459, 464–65 [2006] (Isr.).

<sup>93</sup> *Id.* at 521–23. This decision is particularly notable given the recent 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).

<sup>94</sup> HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* 1 ISR. L. REP. 443, 445 [2006] (Isr.) (holding that the Citizenship and Entry into Israel law, barring reunification of some Palestinian families, did not violate the Human Dignity and Liberty Clause of the Basic Law, based on the perceived security interests of Israel).

<sup>95</sup> *Id.* at 692–93 (internal citations omitted).

security-related cases. In order to undertake such an approach, it has created a legal culture that disallows blanket claims of secrecy and enables the courts to engage fully in the judicial review process.<sup>96</sup> Although the extent to which this procedural fairness inures to the substantive benefit of individual plaintiffs appears to be limited, since the courts largely affirm the actions of the military and the government,<sup>97</sup> the access to information afforded by the Israeli courts has significant structural value in allowing suits to proceed and attempting to establish a baseline of process for those affected by the national security state.

### C. India

In many respects, India provides a counterexample to England and Israel in terms of the willingness of courts to question executive secrecy claims. Historically, Indian courts have granted the utmost deference to the executive branch as to when government information,<sup>98</sup> particularly in the area of national security, need be disclosed.<sup>99</sup> The Supreme Court of India made clear almost forty years ago, in *Uttar Pradesh v. Raj Narain*,<sup>100</sup> that national security is the primary area in which the Prime Minister can unilaterally decide what information to disclose and that the role of the courts in questioning those decisions was extremely limited.<sup>101</sup> The judiciary's rhetoric highlights the need for government accountability and transparency,<sup>102</sup> but courts consistently defer to executive branch claims of

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<sup>96</sup> The Israeli government and military appear to accept the robust judicial review that forces disclosure of policy and sometimes results in significant changes in the conduct of the administration. See Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1931 (2004) ("Israeli courts have put in place a strong, increasingly robust system of judicial checks.").

<sup>97</sup> See, e.g., HCJ 3239/02 Marab v. The Commander of IDF Forces in the West Bank, 57(2) PD 349 [2002] (Isr.).

<sup>98</sup> Weaver & Pallitto offer an early colonial-era counterexample in which the court insisted that justice and humanity required that the books of the Council to the East India Company be produced as part of a criminal prosecution, despite government claims of state secrets being at issue. Weaver & Pallitto, *supra* note 19, at 97.

<sup>99</sup> See 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, 65 (2009) (describing the history of Indian courts deferring to executive decisions regarding security matters).

<sup>100</sup> *State of Uttar Pradesh v. Raj Narain*, (1975) 3 S.C.R. 333 (India).

<sup>101</sup> *Id.* (upholding government decisions to keep national security information secret).

<sup>102</sup> This deference has been consistent despite the adoption of the right to information legislation in recent years and judicial statements about the importance of government transparency. The Freedom of Information Act, No. 5 of 2003, INDIA CODE (2009); see also, e.g., S.P. Gupta v. President of India, (1982) 2 S.C.R. 365 (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."); *Country Passing Through Transparency Revolution:*

secrecy in the name of public interest.<sup>103</sup> Further, the courts allow for active enforcement of the Official Secrets Act, a legacy of British colonial rule in India,<sup>104</sup> to investigate and punish disclosure of sensitive information.

This pattern of acknowledging the policy and rule of law concerns surrounding secrecy, but ultimately siding with the government's position with little investigation into the need for secrecy or the veracity of the government's claims, has played out in a variety of secrecy-related cases. For example, in the 2004 case of *People's Union for Civil Liberties v. Union of India*,<sup>105</sup> the court upheld the government's secrecy claim over a report on nuclear reactors, reasoning 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."<sup>106</sup> The court couched its long-standing deference and the need for secrecy in terms of maintaining consistency with the English public interest immunity doctrine.<sup>107</sup>

The court's enabling of government secrecy in the national security context is largely a response to public pressure on the Indian government to take whatever steps are necessary and available to safeguard national security,<sup>108</sup> a dynamic that has led to the hasty passage of counterterrorism laws that further enable government secrecy.<sup>109</sup> The reticence of the courts

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").

<sup>103</sup> See, e.g., *Shri Dinesh Trivedi, M.P. v. Union of India*, (1997) 4 S.C.C. 306 (India). The court in *Trivedi* relied heavily on the balancing test articulated in *S.P. Gupta v. President of India*, (1982) 2 S.C.R. 365 (India), to find that government secrecy claims ought to be upheld despite rule of law concerns. The court noted that, "[s]unlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead." *Shri Dinesh Trivedi*, 4 S.C.C. 306 (India).

<sup>104</sup> India operates under the edicts of the Official Secrets Act of 1923 (OSA), enforced in India by the British colonial government. Under the 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, e.g., Sarbari Sinha, *Official Secrets and a Frame-Up*, FRONTLINE, May 7, 2005, <http://www.frontlineonnet.com/fl2210/stories/20050520000607400.htm> (addressing how revocation of the Official Secrets Act would curb potential abuses of police powers).

<sup>105</sup> (2004) 2 S.C.C. 476 (India).

<sup>106</sup> *Id.*

<sup>107</sup> See *id.* (citing *State of Uttar Pradesh v. Raj Narain*, (1975) 3 S.C.R. 333 (India), which held 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 would injure public and national interest").

<sup>108</sup> See Somini Sengupta & Keith Bradsher, *India Faces Reckoning as Terror Toll Eclipses 170*, N.Y. TIMES, Nov. 30, 2008, at A1 (describing India's ill-preparedness to deal with terrorist attacks in light of the 2008 attack on Mumbai).

<sup>109</sup> See, e.g., The National Investigation Agency Bill, No. 34 of 2008, INDIA CODE (2010) (authorizing nondisclosure of evidence, witness information, and other pertinent information if the

to demand security-related information from the government may also be a product of the judiciary's conceptual understanding of its constitutional role as one which exercises a robust judicial review with regard to most social justice and individual rights cases, but not with regard to security-related issues.<sup>110</sup>

Whether judicial deference is constitutionally based, responsive to public pressure, or otherwise, the end result is the conscious and consistent practice of allowing government invocations of secrecy to go unchecked, regardless of the effect on curbing government abuse or preserving an avenue of redress for individual litigants or upholding the rule of law more generally. In some respects, the Indian example serves to illustrate the significance of the ability to gain access to the courts in Israel: even if the plaintiff is unlikely to prevail there, the plaintiff is still able to access the courts for a public airing of the grievances being alleged.

#### IV. CONCLUSION

Professor Rana has urged a reconsideration of the position that the executive and military are best positioned to make decisions about national security issues. This Article argues that this centralization of security decision-making power, particularly in the early Cold War era, has fostered a culture of secrecy that has been enabled by Congress and the judiciary despite their structural obligations to provide oversight. The ongoing harms to the rule of law and to individual litigants are reason enough to rethink the current extraordinary deference afforded the executive branch, and it is worthwhile to recall that Congress has previously observed that, "secrecy comes at a price. That price includes undermining the legitimacy of government actions, reducing accountability, hindering critical technological and scientific progress, interfering with the efficiency of the marketplace, and breeding paranoia."<sup>111</sup> Other democratic nations facing severe security threats have found a more just and humane balance between the legitimate need for secrecy and the fundamental imperative to access information concerning actions taken in the name of our national security; our own democratic principles demand that we do the same.

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government claims that national security would be otherwise jeopardized).

<sup>110</sup> 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 are 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); see also Satish & Chandra, *supra* note 99, 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).

<sup>111</sup> DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 8 (1997).