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Formalism and State Secrets

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5. Formalism and state secrets

Sudha Setty

INTRODUCTION*

The state secrets privilege has received a tremendous amount of scholarly attention in the US in the last decade, initially prompted by the administration of President George W. Bush seeking early dismissals of lawsuits that dealt with allegations of serious constitutional and human rights violations.¹ The administration's litigation posture was troubling – but the judicial acceptance of these claims, largely based on the judiciary's own formalistic view of its own role in engaging the executive branch on national security secrecy² – allowed the executive branch to make virtually unilateral secrecy determinations that shielded it from civil suits.

In September 2009 the Obama administration created a new policy that mandated a more rigorous internal administrative review prior to invoking the state secrets privilege.³ In the years since the new policy took effect, it appears as though this internal review process has resulted in little difference with regard to the invocation of the privilege at the

* This chapter is drawn from a previous work: Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1629 (2012).

¹ Press Release, Office of Sen. Edward M. Kennedy, *Kennedy Introduces State Secrets Protection Act* (Jan. 22, 2008) (internal quotation marks omitted), available at 2008 WLNR 1256008; e.g., William G. Weaver and 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').

² E.g., *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).

³ See Memorandum from Eric Holder, Attorney Gen., on *Policies and Procedures Governing Invoking of the State Secrets Privilege to Heads of Exec.*

pleadings stage in cases that allege torture and other human rights abuses.⁴

One high-profile case, that of Binyam Mohamed and other plaintiffs claiming that they had been subject to extraordinary rendition, torture, and prolonged detention, offers evidence of a disturbing trend of US courts retreating to formalistic reasoning⁵ to extend unwarranted deference to the executive branch in security-related⁶ contexts.⁷ In this chapter, I consider the state secrets privilege and place the formalist decision-making of the *Mohamed* court in juxtaposition with other nations' jurisprudence – including the English courts that dealt with a separate

Dep'ts & Agencies (Sept. 23, 2009) [hereinafter Holder Memorandum], (establishing layers of internal review regarding invocations of the state secrets privilege).

⁴ See Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 *BROOK. L. REV.* 201, 257–8 (2009) (identifying the continuity between the Bush and Obama administrations in their approach to the state secrets privilege).

⁵ I use judicial formalism to refer to a 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'). Justice Antonin Scalia has supported 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).

⁶ Cass Sunstein has offered three categories of judicial decision-making in wartime: national security maximalism, in which courts defer broadly to executive branch claims of Article II authority; liberty maximalism, in which courts maintain a peacetime approach to constitutional liberty questions; and minimalism, in which courts use 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). 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 claims and avoiding meaningful engagement in underlying civil liberties concerns.

⁷ 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 US targeted killings list based on standing and political question grounds).

lawsuit brought by Mohamed there. This case exemplifies the US shift away from the flexible, rule of law-oriented approach that courts in the United Kingdom and Israel take, and toward the formalistic rigidity that the Indian Supreme Court often employs in government secrecy cases.⁸

Given the Obama administration's aggressive invocation of the state secrets privilege and the judiciary's unwillingness to defend the ability of individuals to litigate their basic human and civil rights, I conclude that for meaningful change to occur, the United States Congress must re-introduce state secrets reform legislation that infuses the litigation process with procedural and substantive fairness,⁹ and that courts must step away from judicial formalism and instead take on the complex and difficult task of providing a venue for government accountability.

1. THE OBAMA ADMINISTRATION AND THE STATE SECRETS PRIVILEGE

In his prefatory language to the Obama administration's 2009 state secrets policy, Attorney General Eric 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'.¹⁰ The policy also includes important limitations such as a prohibition against using the privilege to conceal violations of the law or prevent embarrassment to the government.¹¹ Unfortunately, the promise

⁸ These four nations – the United States, England, Israel and India – are useful comparators because of their shared common law traditions and the shared roots of evidentiary privileges such as the state secrets privilege in English law and policy.

⁹ Congress's reform attempts, albeit unsuccessful, have attempted to improve procedural and substantive justice for plaintiffs. See, e.g., 154 CONG. REC. S198–201 (daily ed. Jan. 23, 2008) (statement of Sen. Kennedy on the State Secrets Protection Act).

¹⁰ Holder Memorandum, *supra* note 3, at 1.

¹¹ Holder Memorandum, *supra* note 3, at 2. The rest of the policy establishes the layers of review with the Department of Justice with regard to satisfying the procedural requirements for invoking and defending the privilege. These procedural requirements are first laid out in the seminal US state secrets case of *United States v. Reynolds*, 345 U.S. 1, 6–8, 10–11 (1953). For an in-depth account of

of these reforms has not yet been fulfilled, 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.¹² Binyam Mohamed, a British resident, claimed that he traveled to Afghanistan in 2001 to escape a lifestyle that led to drug addiction in England.¹³ US authorities alleged that Mohamed trained with the Taliban in Afghanistan to prepare for an attack within the US. Mohamed was arrested in Pakistan in 2002 and claims he was detained and tortured in various locations under US control until February 2009, when he was released without charge.¹⁴ Mohamed and similarly situated plaintiffs filed suit in 2007 against Jeppesen Dataplan, the Boeing subsidiary that operated detainee transport airplanes to and from detention centers.¹⁵

In granting the government's motion to dismiss, the district court used the same reasoning that other US courts dealing with the privilege have relied upon,¹⁶ primarily the need to dismiss the suit because the subject matter at issue – the government's extraordinary rendition program – was itself a state secret that could jeopardize national security interests if revealed.¹⁷ A Ninth Circuit panel reversed, rejecting the government's claims that the suit needed to be dismissed outright based on its subject matter.¹⁸ The administration appealed to the Ninth Circuit to hear the case *en banc*, where it prevailed in having Mohamed's suit dismissed.

the *Reynolds* case, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE (2006).

¹² *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008).

¹³ Profile: Binyam Mohamed, BBC NEWS (Feb. 23, 2009), <http://news.bbc.co.uk/2/hi/7870387.stm>.

¹⁴ *Id.* Mohamed alleges that he was beaten, scalded, and suffered cuts on his genitals with a scalpel by his captors.

¹⁵ Amended Complaint at 1–6, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. 07-2798).

¹⁶ 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).

¹⁷ *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1134–36 (N.D. Cal. 2008).

¹⁸ *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 997, 1009 (9th Cir. 2009).

2. FORMALISM IN JEPPESEN

The Ninth Circuit *en banc* dismissed the plaintiffs' suit in a formalistic opinion that failed to acknowledge the reality of the gross human rights abuses that plaintiffs suffered. The majority began its evaluation of the government's invocation of the privilege by finding that the procedural requirements were met and that the information is privileged.¹⁹ The court then reasoned that it is obligated to dismiss a suit if it appeared that privileged information would be necessary to litigate the case.²⁰ The majority found that even if plaintiffs were able to prove their case relying solely on publicly available evidence, dismissal of the suit was still warranted because Jeppesen Dataplan would have found it difficult to mount a defense without implicating privileged material.²¹ It is particularly ironic that the majority, while claiming to have struggled with the tension between human rights and security concerns, ultimately retreated to rigid and formalist reasoning that turned on its concern that a company allegedly complicit in the torture of innocent civilians is able to adequately defend itself in a civil matter.²²

The majority opinion abdicated its structural responsibility to uphold the rule of law and check government abuse, instead offering only hollow platitudes and unlikely avenues for redress: at one point the court conjectures that the executive branch may decide someday to compensate the victims of the extraordinary rendition program, akin to the compensation for the rendition and internment of individuals of Japanese descent during World War II.²³ At other points, the court bizarrely shifted responsibility to Congress to provide redress to plaintiffs, noting that

¹⁹ Id. at 1080, 1085–6 (relying on the test articulated in *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953)).

²⁰ Id. at 1083.

²¹ Id. at 1089–90.

²² 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 employees understood that their extraordinary rendition flights resulted in the torture of detainees).

²³ Id. at 1091. It is remarkable that the majority considered the reparations awarded to Japanese internees during World War II as a potentially appropriate model of compensation. Those reparations came decades after the harm to the internees, and only after a national soul-searching as to how such poor national security policy was validated by all branches of government and the public. Further, hearkening back to the internment evokes comparisons to the deferential formalism of *Korematsu v. United States*, 323 U.S. 214 (1944), which most

Congress has the power to investigate government abuses, could enact private bills to compensate the plaintiffs or take up state secrets reform.²⁴

The dissent by Judge Hawkins included a critique of the narrowness of the majority opinion, noting the veracity of Mohamed's claims of Jeppesen Dataplan's role in rendition and torture, and that the majority's failure to give weight to these claims undermines an appropriate analysis.²⁵ Judge Hawkins observed that the majority 'disregard[ed] the concept of checks and balances' and abdicated its responsibility by suggesting that the executive or Congress should act to provide compensation, characterizing the majority's suggestion regarding reparations as 'elevat[ing] the impractical to the point of absurdity' and noting the need to preserve an avenue for the tortured plaintiffs to seek redress in the courts if possible.²⁶

3. FORMALISM IN THE COMPARATIVE CONTEXT

The Supreme Court established the standard for evaluating a claim of the state secrets privilege in the 1950s, drawing from English precedent during World War II. English public interest immunity, used akin to the state secrets privilege, evolved in a different direction than that of the U.S. since that time; this dynamic is illustrated clearly in the 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 briefly consider how Israel and India deal with questions of state secrecy during litigation.²⁷

3.1 England

English courts generally afford high levels of deference to government officials claiming public interest immunity,²⁸ although the 2009 and 2010

modern commentators view as a profound failure of the judiciary to uphold the rule of law and curb abuses by the national security state.

²⁴ *Id.* at 1091–92.

²⁵ *Id.* at 1095–96.

²⁶ *Id.* at 1101.

²⁷ India and Israel are useful comparators as functioning democracies with constitutionally mandated separation of powers and serious ongoing national security threats, and, like the US in the context of the state secrets privilege, derive some legal processes from the United Kingdom.

²⁸ See *Air Canada v. Sec'y of State for Trade* [1983] 2 AC 394 at 395 (Eng.) (stating that when a government official has proffered a good faith affidavit as to

decisions in the case of Binyam Mohamed illustrate a potential shift. The backdrop of the English litigation in *Mohamed* relates to proceedings in the US. In May 2008, the US charged Mohamed under the Military Commissions Act²⁹ with conspiracy to commit terrorism,³⁰ relying on confessions which Mohamed alleged were elicited under the threat of torture.³¹ Mohamed began proceedings in English courts seeking release of evidence in the possession of the British government that the US had compiled against Mohamed. In August 2008, a court ruled in Mohamed's favor,³² but redacted a summary of intelligence gleaned from US intelligence sources after the Foreign Secretary issued a public interest immunity certificate claiming that state secrets were at issue.³³

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.³⁴ The public interest immunity certificate asserted that the summary report must remain undisclosed because the US 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 to Mohamed's attorneys.³⁵

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

the need for the public interest immunity to apply, the court should give absolute deference).

²⁹ 10 U.S.C. §§ 948–50 (2006).

³⁰ 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, www.nytimes.com/2008/10/22/washington/22gitmo.html?adxnml=1&adxnmlx=1328130327-WTFkFvw3ue0Rn9QlvAuLHQ.

³¹ *Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs*, [2008] EWHC (Admin) 2048, [38]–[47] (Eng.).

³² *Id.* at [105].

³³ *Id.* at [150]–[160].

³⁴ The court noted that the information in question was '7 very short paragraphs amounting to about 25 lines' of text which summarized reports by the US 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.).

³⁵ *Id.* at [62]. See Glenn Greenwald, Obama Administration Threatens Britain to Keep Torture Evidence Concealed, SALON.COM (May 12, 2009), www.salon.com/2009/05/12/obama_101.

and democratic accountability'.³⁶ 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.³⁷

Considering factors in support of disclosing the information, the court noted the need to uphold the rule of law,³⁸ comport with international and supranational standards,³⁹ ensure that allegations of serious criminality are not inappropriately dismissed,⁴⁰ maintain accountability over the government,⁴¹ and protect the public and media interest in disclosure of government activities.⁴² The court also appeared surprised that the U.S. government was apparently interfering in a matter of the rule of law and government accountability in another country.⁴³ Nonetheless, the court relied on its long-standing precedent of deference to the executive branch in matters of national security⁴⁴ and upheld the Foreign Secretary's issuance of the public interest immunity certificate.⁴⁵

However, in October 2009 the court reversed its previous decision to withhold the information regarding Mohamed's treatment.⁴⁶ The court

³⁶ *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).

³⁷ *Id.* at [34] (citing *Regina v. H*, [2004] 2 AC 134 (HL) [36(3)] (Eng.)).

³⁸ *Mohamed*, [2009] EWHC (Admin) 152, [18]–[19] (Eng.).

³⁹ See *Mohamed*, [2009] EWHC (Admin) 152, [20]–[21], [26], [30], [101]–[105].

⁴⁰ *Id.* at [26(iv)], [26(ix)].

⁴¹ *Id.* at [32].

⁴² *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] AC 417 (HL) 477 (Lord Shaw of Dunfermline) (appeal taken from EWCA (Civ) (UK))).

⁴³ *Id.* at [69].

⁴⁴ 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] AC 247 (HL) 272 (Lord Bingham of Cornhill) (appeal taken from EWCA (Crim) (UK))).

⁴⁵ *Id.* at [79].

⁴⁶ *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').

reasoned that there was an extremely low likelihood that the Obama administration would actually withhold intelligence from the United Kingdom,⁴⁷ 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’.⁴⁸

The October 2009 decision ultimately rejected formalistic reasoning in favor of maintaining the rule of law, open justice and the possibility of public accountability. In February 2010, the Court of Appeal upheld the divisional court’s decision, noting the veracity of Mohamed’s claims of torture.⁴⁹ Specifically, the appellate decision looked to dicta in the US habeas corpus matter of *Mohammed v. Obama*.⁵⁰ In that case, Judge Kessler weighed the habeas corpus petition of detainee Farhi Saeed bin Mohammed and considered evidence proffered by the government that Binyam Mohamed, while in detention at Guantánamo Bay, told the government that bin Mohammed had trained with him at an al-Qaeda base.⁵¹ Judge Kessler described the harrowing detention and torture of Binyam Mohamed while in US custody that rendered his testimony regarding bin Mohammed unreliable and inadmissible.⁵² She further noted that ‘[t]he Government does not challenge or deny the accuracy of Binyam Mohamed’s story of brutal treatment’.⁵³

The English Court of Appeal used this revelation as one basis for upholding the order for the UK government to disclose information

⁴⁷ 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.

⁴⁸ Id. at [105].

⁴⁹ *Mohamed v. Sec’y of State for Foreign & Commonwealth Affairs*, [2010] EWCA (Civ) 158, [2011] QB 218 (Eng.). See Adam Tomkins, National Security and the Due Process of Law, 64 *CURRENT LEGAL PROBLEMS* 215, 229 (2011) (noting that allegations of horrific torture weighed significantly in the court’s decision-making).

⁵⁰ *Mohammed v. Obama*, 704 F. Supp. 2d 1 (D.D.C. 2009). This citation refers to the de-classified 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).

⁵¹ *Mohamed*, 704 F. Supp. 2d. at 2, 18–19.

⁵² Id. at 20–23, 29.

⁵³ Id. at 24.

regarding Mohamed's mistreatment.⁵⁴ This willingness of the English Court of Appeal to 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 and instead limits itself to an overly formalistic interpretation of the state secrets privilege.⁵⁵

3.2 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. Courts, akin to the English reasoning in the *Mohamed* case, use a flexible, realist approach to analyzing these questions, giving significant weight to plaintiffs' allegations of human rights violations. In Israel almost any complaint against the executive branch is considered justiciable.⁵⁶ Although justiciability is no guarantee of ultimate success in litigation against the government, the institutionalization of hearing such cases reflects, at its best, a judicial willingness of the courts to engage in critical thinking about government claims regarding national security.

In *Public Committee Against Torture in Israel v. Israel*,⁵⁷ plaintiffs challenged the preventative strikes undertaken by the Israeli military in response to alleged terrorist attacks based on the ensuing loss of civilian life and Israel's international law obligations. As an initial matter, the court considered a challenge by the government that the suit was not justiciable based on national security concerns.⁵⁸ The Israeli Supreme

⁵⁴ *Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs*, [2010] EWCA (Civ) 65 [138], [2011] QB 218 (Eng.).

⁵⁵ 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).

⁵⁶ 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.').

⁵⁷ H CJ 769/02 Public 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.

⁵⁸ *Id.* at 5 ¶ 9 (arguing against justiciability, the government cites Israeli High Court of Justice precedent, H CJ 5872/01 Barakeh v. Prime Minister 56(3)

Court applied a four-pronged test to determine justiciability, reasoning that a case involving the impingement of human rights is always justiciable;⁵⁹ that a case in which the central issue is one of political or military policy and not a legal dispute is not justiciable;⁶⁰ 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.⁶¹

In this case, the Israeli Supreme Court found that the claims were clearly justiciable.⁶² Ultimately, the Israeli Supreme Court concluded that the targeted killings at issue were not per se illegal, but that they must be evaluated on an individual basis.⁶³ Although the holding in *Public Committee Against Torture* raises important and concerning questions as to the substantive justice of these decisions, a baseline structural benefit exists in having access to courts for grievances involving allegations of human rights violations.

3.3 India

Whereas England and Israel illustrate the ability of courts to utilize a rule of law analysis, India represents a hard line of formalism that the US is at risk of veering toward. Indian courts have historically granted the utmost deference to the executive branch as to when national security policy should be disclosed.⁶⁴ When cases raise issues of individual rights being

[2002], 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').

⁵⁹ HCJ 769/02 Public 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) *Isr SC* 113, 124 (Isr.)).

⁶⁰ *Id.* at 35 §51 (citing HCJ 4481/91 *Bargil v. Israel* 37(4) *Isr SC* 210, 218 [1993] (Isr.)).

⁶¹ *Id.* at 36 §§ 53–4.

⁶² *Id.* at 1–2 §§1–3.

⁶³ *Id.* at 41–2 § 63. 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 US government from keeping his son, US citizen Anwar al-Aulaqi, on its targeted killing list).

⁶⁴ E.g., *State of Uttar Pradesh v. Raj Narain*, A.I.R. 1975 SC 865 (India) (carving out national security as the area in which the Prime Minister can unilaterally decide what information to disclose); see Mrinal Satish and Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme*

compromised by government secrecy, courts purport to 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 consistently prevail.⁶⁵ Deference to executive branch decision-making is deep-rooted in national security-related cases,⁶⁶ 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.⁶⁷

In *Dinesh Trivedi v. Union of India*,⁶⁸ the Indian Supreme Court considered whether to order the publication of background documents underlying a commissioned report on government corruption over which the government had claimed secrecy. Members of Parliament, including petitioner Dinesh Trivedi, alleged that the Home Minister refused disclosure to avoid government embarrassment.⁶⁹ The Indian Supreme Court began with the need for transparency, noting that 'Sunlight is the best

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).

⁶⁵ E.g., *People's Union for Civil Liberties & Anr. v. Union of India & Ors.*, (2004) 2 S.C.C. 476 (India) (upholding denial of request for disclosure of information).

⁶⁶ 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.').

⁶⁷ 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.

⁶⁸ *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*, *supra* note 65, to find that government secrecy claims ought to be upheld despite rule of law concerns.

⁶⁹ *Trivedi*, 4 S.C.C. 306, §§6, 8.

disinfectant. But it is equally important to be alive to the dangers that lie ahead.⁷⁰ The Indian Supreme Court accepted with little question the government's claim and hypothesized 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,⁷¹ the court upheld government secrecy claims.⁷² Similar reasoning has been used in other secrecy matters,⁷³ bolstered by claims of consistency with English public interest immunity jurisprudence.⁷⁴ The level of deference offered by the Indian Supreme Court is higher than that of any of the other nations considered here, but is seemingly more consistent with the recent state secrets cases in the US than that of the English courts in the *Mohamed* litigation.⁷⁵ The Indian Supreme Court, consistent with its security-related jurisprudence, has consistently reverted to a formalistic analysis that offers a rhetorical nod to the rule of

⁷⁰ Id. § 19.

⁷¹ 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).

⁷² Id. §§ 16–20.

⁷³ 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 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 the popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker'. See the Right of Information section of the *People's Union* opinion, id.

⁷⁴ See the Criteria for Determining the Question of Privilege section of the *People's Union* opinion, id. (citing *Uttar Pradesh v. Raj Narain*, A.I.R. 1975 S.C. 865, which held that 'the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law').

⁷⁵ 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>.

law and individual rights, but no avenue of relief for those who seek to chip away at government secrecy.⁷⁶

CONCLUSION

In the US, 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 counter-majoritarian role of protecting individual rights and justice. Certainly the approach taken by India and the US is not the only viable one – England and Israel are evidence of that. 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 US exerting pressure regarding the state secrets privilege serves as a warning that even though the US was not successful with regard to applying pressure on England,⁷⁷ US soft power may successfully pressure courts in nations where courts would otherwise apply a narrower privilege.

Such a dynamic makes it all the more important that structural reform occur. Passage of strong state secrets reform legislation should become a

⁷⁶ See Satish and Chandra, *supra* note 64, at 63 (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).

⁷⁷ The US government's displeasure at the English treatment of Binyam Mohamed's case 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 (UK), available at 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.* § 1.43; cf. United Kingdom House of Lords, Joint Committee on Human Rights, Twenty-Fourth Report, Justice and Security Green Paper, at §§ 99–103 (Mar. 27, 2012) (emphasizing the importance of courts in weighing government claims of the need for secrecy).

priority,⁷⁸ and courts should resist being cowed by assertions that judicial involvement in security matters is unwarranted or undermines the safety of the nation.⁷⁹ Although genuine access to the courts is no guarantee of substantive justice, substantive justice is unlikely to be achieved if the judiciary continues to retreat behind a wall of formalism.

⁷⁸ Arguments that high levels of deference are unwarranted continue to grow. E.g., See Aziz Rana, Who Decides on Security? 44 Conn. L. Rev. 1417, 1424, 1445–46 (2012); 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>.

⁷⁹ Such assertions 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').