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'To the Serious Detriment of the Public': Secret Evidence and Closed Material Procedures

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I. INTRODUCTION

IN THE SUMMER of 1861, William Lloyd visited President Abraham Lincoln at the White House. It was two months since hostilities had begun in the American Civil War, and Lloyd was eager to travel through Confederate lines in order to continue his work as 'a publisher of railroad and steamer guides for railroads and steamers in the South'.[2] He needed Lincoln to approve his application for a pass, and the President knew an opportunity when he saw one. Lincoln offered Lloyd a salary of US$200 a month plus expenses if he would become Lincoln's personal spy in the South.[3] Lloyd's mission would be 'to proceed south and ascertain the number of troops stationed at different points in the insurrectionary states, procure plans of forts and fortifications, and gain such other information as might be beneficial'.[4] Lloyd and Lincoln signed a contract, and Lloyd headed south. From time to time, he sent information back to Lincoln. At the end of the War, however, Lloyd claimed that he had only been reimbursed expenses. Lloyd died in 1868, and his estate subsequently sued the United States Government before the Court of Claims.[5] Thus the question on appeal to the Supreme Court of the United States in *Totten v United States* was whether public policy interests forbade

> the maintenance of any suit in a court of justice the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated.[6]

[1] Many thanks to Liora Lazarus for her thoughts on this chapter and role in co-editing this Part.
[2] Central Intelligence Agency, *Intelligence in the Civil War* (CIA Public Affairs, 2012) 17.
[3] ibid, 17.
[4] *Totten v United States*, 92 US 105 (1876) (United States).
[5] Central Intelligence Agency (n 2 above), 48.
[6] *Totten v United States*, 92 US 105, 107 (1876) (United States).

Field J, delivering the opinion of the Court, held that allowing actions to be maintained on contracts such as Lloyd's might expose 'the details of dealings with individuals and officers . . . to the serious detriment of the public'.[7] Moreover:

> A secret service, with liability to publicity in this way, would be impossible, and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement.[8]

More than a century and a half after the American Civil War, there remains considerable public debate over the appropriate level of transparency that may be expected from governments and courts where competing public interests are at stake.[9] And, more specifically, courts around the world continue to grapple with the same central questions that Field J answered in *Totten*: how best to reconcile the principles of open justice on one hand with broader public interests on the other? How are those two elements best described and articulated? What analytical approach provides the most satisfactory reconciliation of the two? What is the appropriate division of labour between the courts and the other branches of government in cases such as these?

In this Part of *Reasoning Rights*, we approach these central questions from a variety of viewpoints, and formulate their answers with reference to a diverse body of case law. The case list for this Part draws on case law from the United Kingdom, the United States, Canada, Israel, the European Court of Justice, and the European Court of Human Rights. The cases under consideration range from Cold War era cases before the Supreme Court of the United States through to contemporary analysis from the Supreme Court of the United Kingdom.

In addition to this introduction, there are three further chapters in this Part. David Cole and Stephen Vladeck use a comparative analysis of special advocates and cleared counsel as a way into drawing out some of the broader questions involved in secret evidence. Their argument uses comparative analysis as the basis for a normative argument in favour of greater safeguards in all the relevant jurisdictions in question. In their chapter, Tom Hickman and Adam Tomkins begin with the British common law concept of '*Norwich Pharmacal* jurisdiction' and expand their analysis to encompass a range of comparative case law. In doing so, they raise fascinating questions about deference and the separation of powers. Shiri Krebs draws on interviews with a range of actors in the

[7] ibid, 106–7.

[8] ibid, 106–7. As recently as 2011, the United States Supreme Court has had regard to Field J's reasoning in *Totten*: *General Dynamics Corp v United States* 563 US ___ (2011) at p 7 of Slip Opinion (United States).

[9] See, for example, Alan Rusbridger, 'David Miranda, schedule 7 and the danger that all reporters now face', *The Guardian* (19 August 2013): www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters; Charlie Savage, 'Manning Is Acquitted of Aiding the Enemy', *The New York Times* (30 July 2013): www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html?hp&_r=0; Spencer Ackerman and Dominic Rushe, 'NSA director: Edward Snowden has caused irreversible damage to US', *The Guardian* (24 June 2013): www.theguardian.com/world/2013/jun/23/nsa-director-snowden-hong-kong; Owen Bowcott, 'What are secret courts and what do they mean for UK justice?', *The Guardian* (14 June 2013): www.theguardian.com/law/2013/jun/14/what-are-secret-courts; Canadian Press, 'Mulcair vows to fight for transparency in face of government secrecy', *The Globe and Mail* (29 April 2012): www.theglobeandmail.com/news/politics/mulcair-vows-to-fight-for-transparency-in-face-of-government-secrecy/article2417277/; Peter Wonacott, 'South Africa Parliament Adopts Secrecy Bill', *The Wall Street Journal* (22 November 2011): online.wsj.com/article/SB10001424052970204443404577054042196590350.html; and Jane Croft, 'Judge criticises superinjunction', *The Financial Times* (17 March 2011): www.ft.com/cms/s/0/8dd1cf1c-50d2-11e0-9227-00144feab49a.html#axzz1uNsbGAG6.

secret evidence process, as well as case law analysis, in her chapter critiquing Israel's 'judicial management' approach to secret evidence and comparing it with the special advocate model adopted in other jurisdictions.

In this introductory chapter, the goal is to highlight and elaborate on some of the principal points of controversy in the case law, to identify similarities and differences in the cases' approaches, and to set the scene for the contributors' analysis that follows. In doing so, this chapter will reinforce this book's focus on judicial human rights reasoning, and the potential utility of comparative analysis in that reasoning, by drawing extensively on extracts from the case law. This chapter begins where many of the judgments on our case list begin: the importance of open justice.

II. THE IMPORTANCE OF OPEN JUSTICE

The case law is replete with references to the importance of open justice as a component of natural justice. The judgments' analysis commonly begins with a statement of the importance of open justice, and it is often set up as being on the opposing side of the scales to other interests (whether they be national security, defence interests, or simply the public interest). But what do the courts mean when they refer to the importance of open justice? This section will show how the case law generally tends to focus on open justice as a right held by the applicant or accused person, but also that it discloses other ways in which open justice can manifest itself in the courts' reasoning.

In discussing open justice, the main emphasis in our cases is on the importance of affording an applicant or an accused person certain process rights. In some instances, the concern is very much an instrumentalist concern aimed at delivering the best possible decision; in others, the concern is more dignitarian. In *A v B*, Lord Brown described 'the basic principles of open justice' as including 'that there should be a public hearing at which the parties have a proper opportunity to challenge the opposing case and after which they will learn the reasons for an adverse determination'.[10] These basic principles were also reflected in *American-Arab Anti-Discrimination Committee v Reno*, where the US Court of Appeals held that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.[11]

An analogous approach was adopted some years later in *Charkaoui (No 1)*, where the Canadian Supreme Court described the 'overarching principle of fundamental justice' as being that 'before the state can detain people for significant periods of time, it must accord them a fair judicial process'. The principle had 'a number of facets':

> It comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case.[12]

[10] *A v B* [2009] UKSC 12, at [25] (United Kingdom).

[11] *American-Arab Anti-Discrimination Committee v Reno*, 70 F 3d 1045 at §109 (9th Cir 1995) (United States).

[12] *Charkaoui v Canada (Citizenship and Immigration)(No 1)* 2007 SCC 9, at [28]–[31]. See also [53] (Canada).

Subsequently, in *Al Rawi*, Lord Dyson similarly identified the principle of natural justice as one of the 'features of a common law trial which are fundamental to our system of justice'.[13] Using language close to that of *Charkaoui*, Lord Dyson explained that the principle of natural justice has 'a number of strands':

> A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance . . . Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses.[14]

Similarly, Lord Kerr in *Al Rawi* described 'the right to know and effectively challenge the opposing case' as 'a fundamental feature of the judicial process' and as 'an elementary and essential prerequisite of fairness'.[15] Indeed, Lord Kerr warned, without that right, 'a trial between opposing parties cannot lay claim to the marque of judicial proceedings'.[16] In this sense, open justice becomes virtually synonymous with the right to a fair trial.

This understanding of the importance of open justice goes beyond statements of principle. As we shall see later in this chapter, acknowledgments of the open justice principle also feature in the course of the courts' application of the law to the facts. In *Jabarin*, for example, the court acknowledged that an ex parte hearing made 'it difficult for petitioner's counsel to confront the claims' made by the security services; such a hearing 'clearly' hampered the petitioner's counsel.[17] Perhaps slightly more memorably, in *Rafeedie v Immigration and Naturalization Service*, the US Court of Appeals invoked Franz Kafka's *The Trial* in the course of its analysis, thereby emphasising what it saw as the vital practical importance of the open justice principle:

> Rafeedie – like Joseph K. in *The Trial* – can prevail before the Regional Commissioner only if he can rebut the undisclosed evidence against him, *ie*, prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.[18] If the courts' analysis of the open justice principle here focuses on the rights of the applicant or accused person, we also see examples of links between open justice and the interests of actors other than the applicant.

We turn, then, to the ways in which the courts conceptualise the open justice principle as being of importance to actors other than the accused or litigating person. In a number of our cases, the courts have stressed the importance of the open justice principle to their own operations. As the court in *American-Arab Anti-Discrimination Committee v Reno* stated, 'As judges, we are necessarily wary of one-sided process'.[19] Or in the slightly more confessional expression of Hugessen J, a Canadian Federal Court judge quoted in

[13] *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [10]–[14] (United Kingdom).
[14] ibid, at [10]–[14].
[15] ibid, at [89].
[16] ibid, at [89],quoting Upjohn LJ in *In re K (Infants)* [1963] Ch 381.
[17] HCJ 5022/08, *Shawan Rateb Abdullah Jabarin v Commander of IDF Forces in the West Bank*, at [5] (Israel).
[18] *Rafeedie v Immigration & Naturalization Service*, 880 F 2d 506, 516 (DC Cir 1989) (United States).
[19] *American-Arab Anti-Discrimination Committee v Reno*, 70 F 3d 1045, at §110 (9th Cir 1995) (United States).

Charkaoui (No 1), 'We do not like this process of having to sit alone hearing only one party, and looking at the materials produced by only one party'.[20]

Indeed, as Krebs discusses in her chapter (nine) in this volume, the Supreme Court in *Charkaoui (No 1)* noted the importance of open justice principles to ensuring that judges and courts remain truly independent and impartial.[21] As the *Jabarin* court put it, when a procedure veers away from open justice and becomes an ex parte hearing, that hearing

> hampers the court, which wants to conduct an open and effective dialogue with the representatives of both sides, and it turns the court, in the natural course of things, into the 'representative' of the petitioner in the ex parte hearing. Conducting a hearing in this way hampers everyone.[22]

More generally, as we shall see below, the courts also reserve for themselves a place as guardians responsible for 'preserving an open court system'.[23] That having been said, we shall also see acknowledgement of negative consequences of open justice principles: notably Laws LJ in *Carnduff* referring to the danger of a transfer of 'the difficult and delicate business of tracking and catching serious professional criminals . . . [into] the glare of the public arena of a court of justice'.[24]

But if we move beyond the actors directly involved in judicial proceedings, we can also identify ways in which the courts see open justice as being of more general importance. The two principal themes here are the need for the general public and the media to be able to observe court proceedings, and the related but broader argument for transparency and accountability in a democratic society. The first theme here was expressed in *Binyam Mohamed*

> The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.[25]

Later in the same decision, Lord Neuberger described 'a very strong presumption' that a court's judgment 'should be fully available *for all to see*', and that, absent 'good reason to the contrary, it is axiomatic that a litigant should be able to see all the reasoning of the court in his case'.[26] These aspects of open justice were, in turn, linked to broader notions of free speech, transparency, and accountability of executive government.

> Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights . . . Although expressed in wide and general terms – and perhaps inevitably so expressed – in my judgment the principles of freedom of expression, democratic

[20] *Charkaoui v Canada (Citizenship and Immigration)(No 1)* 2007 SCC 9, at [36] (Canada).
[21] ibid, at [37]–[42].
[22] HCJ 5022/08, *Shawan Rateb Abdullah Jabarin v Commander of IDF Forces in the West Bank*, at [5] (Israel).
[23] *Mohamed v Jeppesen Dataplan, Inc (en banc rehearing)* 614 F 3d 1070, 1081 (9th Cir 2010);, quoting *Al-Haramain Islamic Foundation, Inc v Bush*, 507 F 3d 1190, 1203 (9th Cir 2007) (United States).
[24] *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [33]–[34] (United Kingdom).
[25] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, at [38]–[42] (United Kingdom).
[26] ibid, at [134] (emphasis added).

accountability and the rule of law are integral to the principle of open justice and they are beyond question.[27]

Similarly, in *Charkoui (No 1)* the Canadian Supreme Court said that 'in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees'.[28]

III. BALANCING OPEN JUSTICE WITH OTHER PUBLIC INTERESTS

The cases considered in this section conceptualise open justice as a multi-faceted principle, the implications of which range from the mechanical elements of a fair trial right up to the broadest of democratic concerns. If open justice is on one side of the scales, how do the courts articulate and describe the public interests that lay on the opposite side of the scales? What are the interests that could be considered as potentially outweighing, in whole or in part, the principles of open justice?

In many of the cases on our list, the opposing interest is framed in terms of the responsibility of the state to protect its citizens from existential threats to national security.[29] Thus in *MB*, for example, Lord Hoffman intoned that 'there can in time of peace be no public interest which is more weighty than protecting the state against terrorism'.[30] Using similar language, Lord Hope in *AF (No 3)* stated that:

> The country must be entitled to defend itself against those who would destroy its freedoms. The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. It is the duty of the court to do all that it can to respect and uphold that principle.[31]

Sometimes, as in the European Court of Human Rights' decision in *A v United Kingdom*, the courts go so far as to make a positive finding that the nation is, indeed, imperilled:

> The Court takes as its starting point that, as the national courts found and it has accepted . . . the activities and aims of the al'Qaeda network had given rise to a 'public emergency threatening the life of the nation'. It must therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and . . . a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information.[32]

For many judges, the force of findings such as these is only enhanced by events taking place outside the courtroom: in *Binyam Mohamed*, Lord Judge CJ in the Court of Appeal noted that:

> Terrorism is a constant threat both here and abroad. An incident in an aeroplane flying to the USA over this Christmas period demonstrates its ever present nature. In this country some terrorist plots have succeeded, with catastrophic results. They have succeeded abroad, with similar catastrophic results. Other plots have failed. And thanks to reliable intelligence and meticulous investigation, yet other plots have been identified and foiled before they could come to fruition. It is difficult to exaggerate the value of good intelligence and its contribution to the safety and wellbeing of the nation.[33]

Lord Judge went on to recognise that 'in the modern world national safety is almost inevitably linked with the defeat of terrorism and international crime whenever and wherever they may arise'.[34]

In terms of taking these statements about national security and the threats posed by terrorism and linking them to notions of secrecy, Scalia J in *General Dynamics* explained that:

> Many of the Government's efforts to protect our national security are well known . . . But protecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret . . . [The Supreme Court has] recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets.[35]

And at the risk of drawing Scalia J into a comparative law analysis, one may also consider the approach of the European Court of Justice in *Kadi*:

> [W]ith regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.[36]

And, perhaps confronting the link more directly, Lord Mance in *Tariq* described the earlier case of *AF (No 3)* as one 'in which it could be said that national security would be directly imperilled if secret evidence could not be used to justify imposing a control order'.[37]

Of course, framing the debate in terms of existential threats also raises the stakes. Thus, when Lord Hoffman in *AF (No 3)* viewed the European Court of Human Rights' decision in *A v United Kingdom* as 'wrong', the terms of the debate meant that the 'wrong' judgment by a court was capable of 'destroy[ing] the system of control orders which is a significant part of this country's defences against terrorism'.[38] Similarly, in the much earlier US Supreme Court *Greene v McElroy* decision, a dissent by Clark J warned that 'the present temporary debacle [that is, the effect of the majority's decision] will turn into a rout of our internal security'.[39]

But the public interest identified by our cases is not always framed as being quite as weighty as an existential threat. In a number of cases, the public interest identified is one ancillary to the safety of the state, such as a concern that diplomats and ministers be able

[27] ibid, at [38]–[42].
[28] *Charkaoui v Canada (Citizenship and Immigration)(No 1)* 2007 SCC 9, at [1] (Canada).
[29] See also the definition of 'sensitive information' in the UK's Justice and Security Act 2013: 'material the disclosure of which would be damaging to the interests of national security'.
[30] *Secretary of State for the Home Department v MB* [2007] UKHL 46, at [54] (United Kingdom).
[31] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, at [76] (United Kingdom).
[32] *A v United Kingdom* (App no 3455/05) [2009] ECHR 301, at [216] (ECtHR).

[33] *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [10] (United Kingdom).
[34] ibid, at [43].
[35] *General Dynamics Corp v United States*, 563 US ___ (2011) at p 5 of Slip Opinion (United States).
[36] Case C-402/05 *Kadi v Council and Commission of European Communities* [2008] ECR I-6365, at [342]–[344] (ECJ).
[37] *Home Office v Tariq* [2011] UKSC 35, at [38] (United Kingdom). This description could be seen as either a description of counsel's argument or as Lord Mance's view; in any event this analysis of *AF (No 3)* is worthy of consideration.
[38] *Home Secretary v AF (No 3)* [2009] UKHL 28, at [70] (United Kingdom).
[39] *Greene v McElroy*, 360 US 474, 524 (1959) (United States).

to engage in free and frank correspondence,[40] a concern that intelligence sharing between allies not be compromised,[41] concerns over intelligence gathering,[42] the need to ensure that sensitive police investigations remain confidential,[43] the very nature of the justice system,[44] concerns over effective security vetting,[45] simply the 'general interest of the community',[46] or matters of 'state secret'.[47] As will be seen, Tom Hickman and Adam Tomkins' chapter seven in this book makes a compelling case that we should think more carefully and more critically about some frequently-invoked public and state interests.

Very often, the grand rhetorical statements about the role of the state are made in the course of articulating the balancing act between the public interest and the open justice interests of the individual concerned. In *Charkaoui (No 1)*'s analysis of section 1 of the Canadian Charter of Rights and Freedoms, the Supreme Court held that 'protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective' before going on to consider the other aspects of the section 1 test.[48] Approaching the same question from a different angle, in *Al-Ghabra* Lord Hope warned that, 'Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty'.[49]

It is to these balancing efforts that we turn next.

IV. EXPLORING WAYS TO BALANCE OPEN JUSTICE AND BROADER PUBLIC INTERESTS

Having established the different ways in which courts and judges deal with the open justice principle, and the ways in which they articulate the competing public interests in each case, we come to the question of how to reconcile these two sets of interests. As it was put by the European Court of Human Rights' decision in *Chahal*, the task is to identify 'techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.[50] Or, as the US Court of Appeals framed the question in *Jeppesen Dataplan*, 'whether it is feasible for the litigation to proceed without the protected evidence and, if so, how'.[51] Frequently, such techniques are discussed using analysis that seeks to identify and assess any 'counterbalancing' measures put into place to minimise the disadvantage at which an individual is put.[52]

[40] *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, at [93] (United Kingdom).
[41] *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [10]–[13] (United Kingdom).
[42] *A v B* [2009] UKSC 12, at [26] (United Kingdom); *A v United Kingdom* [2009] ECHR 301, at [216]–[218] (ECtHR).
[43] *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [50]–[51] (United Kingdom).
[44] *Home Secretary v AF (No 3)* [2009] UKHL 28, at [74] (United Kingdom).
[45] *Home Office v Tariq* [2011] UKSC 35, at [72] (United Kingdom).
[46] *RB (Algeria) v Home Secretary* [2009] UKHL 10, at [227] (United Kingdom). Compare the judgment of the High Court of Australia in *Assistant Commissioner Condon(Queensland Police) v Pompano Pty Ltd* [2013] HCA 7 (Australia).
[47] *Mohamed v Jeppesen Dataplan, Inc (en banc rehearing)*, 614 F 3d 1070, 1078 (9th Cir 2010) (United States).
[48] *Charkaoui v Canada (Citizenship and Immigration)(No 1)* 2007 SCC 9, at [68] (Canada).
[49] *Al-Ghabra v HM Treasury* [2010] UKSC 2, at [6] (United Kingdom).
[50] *Chahal v United Kingdom* (App no 22414/93) [1996] ECHR 54, at [131] (ECtHR).
[51] *Mohamed v Jeppesen Dataplan Inc (en banc rehearing)* 614 F 3d 1070, 1081 (9th Cir 2010 (United States).
[52] See, as but one example, *A v B* [2009] UKSC 12, at [14] (United Kingdom).

There are a number of approaches to assessing the adequacy of a counterbalancing measure. For the Canadian Supreme Court in *Charkaoui (No 1)*, the person concerned 'must be given the *necessary* information, or a *substantial substitute* for that information must be found' (emphasis added).[53] Relevant to such analysis would be whether the judge was 'in a position to *compensate* for' the disadvantage at which the person had been put.[54] In *A v United Kingdom*, the European Court of Human Rights held that if 'full disclosure' was not possible, Article 5 of the European Convention 'required that the difficulties this caused were counterbalanced in such a way that each applicant *still had the possibility effectively to challenge* the allegations against him' (emphasis added).[55] This question, the European Court of Human Rights said, 'must be decided on a case-by-case basis', but 'where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge' the decision concerned.[56] For Laws LJ in *Carnduff*, the counterbalancing analysis would include consideration of whether, after any counterbalancing measures are put in place, the case can 'be *justly* tried' (emphasis added).[57] In *A v B*, the obligation was described as being 'to provide as much information to the complainant as possible consistently with national security interests'.[58] In a situation where the accused or applicant does not have 'the whole evidential basis for the basic allegation' Baroness Hale in *MB* demanded that this be counterbalanced by 'a *sufficient* measure of procedural protection' (emphasis added).[59] For Lord Hope in *Tariq*, the question was whether the disadvantages had been '*sufficiently* counterbalanced' (emphasis added)[60] And for some of the judges, like Lord Kerr in *Tariq*, one of the functions 'of the counterbalancing measures is to ensure that *the very essence of the right is not impaired*' (emphasis added).[61] In this context, Lord Kerr held, 'the essence of the right must surely include the requirement that *sufficient information* about the case which is to be made against him be given to a party so that he can give meaningful instructions to answer that case' (emphasis added).[62]

Perhaps necessarily, these formulations are somewhat imprecise. And of course, as *A v United Kingdom* noted, their application will depend on the facts of the case under consideration. Yet their imprecision also poses difficulty for officials and legislators trying to devise frameworks within which open justice can be reconciled with broader public interests, and for judges in later cases trying to determine whether those frameworks make provision for 'sufficient' counterbalancing measures. We turn next to examine several of the common methods by which governments and courts attempt to reconcile open justice rights with broader public interests, and the extent to which those methods comply with standards of sufficiency and respecting the very essence of the right.

[53] *Charkaoui v Canada (Citizenship and Immigration)(No 1)* 2007 SCC 9, at [61]–[64] (Canada).
[54] ibid, at [61]–[64].
[55] *A v United Kingdom* [2009] ECHR 301, at [218] (ECtHR).
[56] ibid, at [220].
[57] *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [36] (United Kingdom)..
[58] *A v B* [2009] UKSC 12, at [30]–[31] (United Kingdom).
[59] *Home Secretary v MB* [2007] UKHL 46, at [74]. (Note that in *AF No 3* this was described at [17] as very ambiguous).
[60] *Home Office v Tariq* [2011] UKSC 35, at [76] (United Kingdom).
[61] ibid, at [118]–[119].
[62] ibid, at [118]–[119].

As was seen in the American Civil War case of *Totten*, in a number of instances, courts reconcile the two competing sets of interests by forcing the litigation to be discontinued. Typically employed in instances where a non-government actor is bringing an action against a government actor, this method is the result of a court reasoning that no counterbalancing measure is capable of 'saving' the litigation: if it were to continue, damage would necessarily be done to the broader public interest. For example, in *General Dynamics*, Scalia J for the US Supreme Court discounted possible counterbalancing measures as unacceptably risky:

> Every document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government's covert programs or capabilities . . . For instance, the fact that the Government had to continue asserting the privilege after granting petitioners access to B–2 and F–117A program information suggests it had other, possibly covert stealth programs in the 1980's and early 1990's.[63]

Ultimately, the *General Dynamics* Court adopted the 'traditional course' under US common law, which was to 'leave the parties where they stood when they knocked on the courthouse door'.[64] A similar process of reasoning through the practicality of the litigation in prospect was undertaken by the US Court of Appeals in *Binyam Mohamed v Jeppesen Dataplan*.[65] The chapter by Hickman and Tomkins explores this jurisprudence and describes an 'eye-watering' approach to striking out cases involving claims of gross human rights violations without independent judicial assessment of the public interest. In the United Kingdom, Laws LJ in *Carnduff* warned that 'a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all'.[66] Laws LJ identified practical concerns that may be added to those of Scalia J:

> In my judgment the very bringing of such a claim as this makes injustice, at least if the claim is disputed in good faith (and we are surely entitled to assume that that is the position here). If it is allowed to proceed at all, an expectation is generated that somehow or other a means may be found to try it consistently with the public interest; the parties are bound to attempt to configure their competing cases so as to get in evidence in the face of the obvious public interest difficulties; at once the very process of litigation, supposed to be even-handed, is gravely distorted. The basis on which either party's case is pleaded . . . is subject to pressures which should be irrelevant, and there will be pressures to compromise of a kind which ought not to be brought to bear. All this, in my judgment, tends to compromise the business of doing justice.[67]

Considering *Carnduff* a decade later, Lord Dyson in *Al Rawi* noted that 'cases such as *Carnduff* are a rarity' and that such cases 'do not pose a problem on a scale which provides any justification . . . for making a fundamental change to the way in which litigation is conducted in our jurisdiction'.[68]

In many of the cases we consider, however, forced discontinuation of the litigation was simply not an option. In litigation brought by a government actor against a non-

[63] *General Dynamics Corp v United States*, 563 US ___ (2011) at p 8 of Slip Opinion (United States).
[64] ibid, at p 9 of Slip Opinion.
[65] *Mohamed v Jeppesen Dataplan, Inc (en banc rehearing)* 614 F3d 1070, 1082-1083 (9th Cir 2010) (United States).
[66] *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [36].
[67] ibid, at [37].
[68] *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [50] (United Kingdom).

government actor, particularly in the context of quasi-criminal proceedings or proceedings motivated by the sorts of public interest concerns we considered above, discontinuing the proceedings could pose grave problems for the government. And so, governments and courts have sought to devise mechanisms that will allow the proceedings to continue while respecting both the broader public interests at stake and the individual's open justice rights. Most often, these mechanisms have involved some form of closed material procedure and some form of cleared counsel or special advocate: a security-cleared lawyer independent from the individual's legal team but tasked with acting on the individual's behalf during security-sensitive stages of the proceedings from which the individual is excluded. Or, as it was described in *MB*,

> Provision is made for the appointment of a special advocate whose function is to represent the interests of a relevant party . . . but who may only communicate with the relevant party before closed material is served upon him, save with permission of the court.[69]

Of the judgments considered in our case list, one of the first references to closed material procedures of this sort came in *Chahal*. In that case the European Court of Human Rights drew on comparative law in considering the options open to governments and legislatures when grappling with how to craft a policy that correctly balanced open justice with broader public interest concerns:

> The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that . . . in Canada a more effective form of judicial control has been developed in cases of this type . . .
>
> Under the Canadian Immigration Act 1976 . . . a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.[70]

The Court held that the Canadian system 'illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.[71] Special advocate closed material procedures of this sort have proliferated in the United Kingdom after *Chahal*, and have continued to operate in Canada.[72] Interestingly, as David Cole and Stephen Vladeck note in their chapter (seven) in this Part, the development of the case law in this area has been characterised by considerable comparative law analysis; Cole and Vladeck take that comparative analysis

[69] *Home Secretary v MB* [2007] UKHL 46, at [27] (United Kingdom).
[70] *Chahal v United Kingdom* (App no 22414/93) [1996] ECHR 54, at [131], [144] (ECtHR).
[71] ibid, at [131].
[72] Indeed, proposed United Kingdom legislation would expand the availability of closed material procedures dramatically and also broaden the range of information capable of triggering such procedures: see Justice and Security Bill 2012–13 (passed through the final stage of the House of Lords' consideration on 28 March 2013 and awaiting Royal Assent at the time of writing) and the *Justice and Security Green Paper* (October 2011).

further and call for greater safeguards by noting the ways in which safeguards adopted in one jurisdiction could be borrowed and implemented by other jurisdictions.[73]

Cole and Vladeck's call for greater safeguards reflects the fact that the operation of the special advocate system has been subject to significant criticisms, particularly in some of the British cases. In *Al-Rawi*, Lord Dyson reflected on its weaknesses:

> The closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it.
>
> Can all of these flaws be cured by a special advocate system? No doubt, special advocates can mitigate these weaknesses to some extent and in some cases the litigant may be able to add little or nothing to what the special advocate can do. For example, this will be the case where the litigant has no knowledge of the matters to which the closed material relates and can give no instructions which will enable the special advocate to perform his function more effectively. But in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material. A further problem is that it may not always be possible for the judge (even with the benefit of assistance from the special advocate) to decide whether the special advocate will be hampered in this way.[74]

Or, in the words of a 2007 report of the British Parliament's Joint Committee on Human Rights, excerpted in Lord Dyson's judgment:

> After listening to the evidence of the Special Advocates [given to the Joint Committee's inquiry], we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening . . . has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.[75]

Such robust criticism raises real doubts over the extent to which closed material procedures successfully reconcile the principles of open justice with broader public interest concerns. In her chapter, Shiri Krebs draws links between these concerns of the United Kingdom's special advocates and those of lawyers involved in proceedings under the Israeli judicial management model. In doing so, Krebs raises questions about both the judicial management model and the special advocate model.

Several years before *Al Rawi*, in a judgment dissenting on the relevant point in *A v Home Secretary (No 2)*, Lord Bingham had noted the disadvantageous position of the special advocate when compared with government counsel, for whom the government's resources are available: 'special advocates have no means or resources to investigate'.[76] In the majority in the same case, however, Lord Rodger did not regard the closed material procedure in quite such a negative light. He noted that special advocates would be able to 'present information provided by international organisations or derived from

[73] This comparativism is also evident in other jurisdictions. See, eg, *Condon v Pompano Pty Ltd* [2013] HCA 7, at [55]–[65] French CJ (Australia).

[74] *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [35]–[36] (United Kingdom).

[75] ibid, at [37]. See also *Home Office v Tariq* [2011] UKSC 35.

[76] *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, at [55]–[59] (United Kingdom).

books and articles to paint the picture of conditions in the country concerned', before stating:

> Of course, the suspects themselves will not be able to assist the special advocate in finding more information during the closed hearing. But that is not so great a disadvantage as may appear at first sight, since it is in any event unlikely that they would be able to cast light on the specific circumstances in which a particular statement had been taken by the overseas authorities. So, usually at least, any investigation will have to be done by others. On behalf of the Home Secretary, Mr Burnett QC explained how those in the relevant departments who were preparing a case for a SIAC hearing would sift through the material, on the lookout for anything that might suggest that torture had been used. The Home Secretary accepted that he was under a duty to put any such material before the Commission. With the aid of the relevant intelligence services, doubtless as much as possible will be done. And SIAC itself will wish to take an active role in suggesting possible lines of investigation.[77]

One may well wonder about the extent to which such reliance on the security services is consistent with some of the loftier statements about open justice considered earlier in this chapter.

But while the special advocate system has been subject to significant criticism, there remains a sense that the system provides a counterbalancing mechanism that is, to put it in the vernacular, better than nothing.[78] As the Canadian Supreme Court said in *Charkaoui (No 1)* when considering legislation lacking a special advocate procedure:

> Why the drafters of the legislation did not provide for special counsel to objectively review the material with a view to protecting the named person's interest, as was formerly done for the review of security certificates by SIRC and is presently done in the United Kingdom, has not been explained. The special counsel system may not be perfect from the named person's perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person's [Charter] interests.[79]

Even accepting the special advocate closed material procedure on its merits, there remains uncertainty in some of the case law over how best to operate such a procedure. In seeking to ameliorate some of the disadvantages inherent in a closed material procedure, some of the cases on our list have imposed qualifications on how closed material is used. Here, we consider two related categories of qualification over which there is uncertainty: the so-called 'gisting' requirement, and the extent to which material must be disclosed even if it 'makes no difference' to the applicant or accused person's case.

The first area of uncertainty relates to gisting. This is the notion that even if the closed material cannot be provided to the individual concerned in full, or in unadulterated form, it should be summarised or provided in redacted form. Cole and Vladeck's chapter provides thoughtful analysis of different ways that the different jurisdictions seek to accomplish this goal. Thus, for example, in explaining the role of the judge in closed proceedings in the national security context, the Canadian Supreme Court in *Charkaoui (No 2)* stated:

> The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence – which he

[77] ibid, at [142]–[143].

[78] The perceived advantages of this sort of counterbalancing mechanism are considered in the Israeli context by Krebs in chapter nine of this volume.

[79] *Charkaoui v Canada (Citizenship and Immigration)(No 1)*, 2007 SCC 9, at [86] (Canada).

or she will have been able to check for accuracy and reliability – for the named person . . . In short, the judge must filter the evidence he or she has verified and determine the limits of the access to which the named person will be entitled at each step of the process, both during the review of the validity of the certificate and at the detention review stage . . . The designated judge then provides non-privileged information to the named person, as completely as the circumstances allow.[80]

A similar discussion took place in *Al-Odah v United States*, where the Court of Appeals left open the possibility that 'alternatives to disclosure' might 'effectively substitute for unredacted access'; this was a matter for the District Court to address on remand. In general terms, such alternatives might include 'a statement admitting relevant facts that the specific classified information would tend to prove' or 'a summary of the specific classified information'.[81]

The gisting requirement has generated considerable recent debate in the United Kingdom, as is reflected in a number of our selected judgments, and in debate over what became section 8 of the Justice and Security Act 2013. In considering the special advocate procedure in *A v United Kingdom*, the European Court of Human Rights stated that:

the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with *sufficient information* about the allegations against him to enable him to give effective instructions to the special advocate (emphasis added).[82]

This warning from the European Court was taken to heart in the House of Lords' decision in *AF (No 3)*. Lord Bingham held that the European Court had

made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.[83]

Similarly, Lord Hope regarded the 'core principle' as being that a person subject to a control order must be 'given sufficient information to enable his special advocate effectively to challenge the case that is brought against him'.[84] In the more recent decision of the UK Supreme Court in *Tariq*, however, the gisting requirement was enforced less rigorously in a security-vetting case where the applicant's liberty was not at stake. As Lord Hope put it:

This is an entirely different case from . . . *AF (No 3)*. There the fundamental rights of the individual were being severely restricted by the actions of the executive. Where issues such as that are at stake, the rule of law requires that the individual be given sufficient material to enable him to answer the case that is made against him by the state. In this case the individual is not faced with criminal proceedings against him or with severe restrictions on personal liberty. This is a civil claim and the question is whether Mr Tariq is entitled to damages . . .

[80] *Charkaoui v Canada (Citizenship and Immigration)(No 2)* 2008 SCC 38, at [62]–[64] (Canada).
[81] *Al Odah v United States* 559 F 3d 539, 547 (DC Cir 2009) (United States). These examples are an analogy drawn from proceedings under the Classified Information Procedures Act – 18 USC App III §6(c)(1).
[82] *A v United Kingdom* [2009] ECHR 301, at [220] (United Kingdom).
[83] *Home Secretary v AF (No 3)* [2009] UKHL 28, at [65] (United Kingdom).
[84] ibid, at [85]. See also Lady Hale at [101].

There cannot, after all, be an absolute rule that gisting must always be resorted to whatever the circumstances. There are no hard edged rules in this area of the law. As I said at the beginning, the principles that lie at the heart of the case pull in different directions. It must be a question of degree, balancing the considerations on one side against those on the other, as to how much weight is to be given to each of them. I would hold that, given the nature of the case, the fact that the disadvantage to Mr Tariq that the closed procedure will give rise to can to some extent be minimised and the paramount need to protect the integrity of the security vetting process, the balance is in favour of the Home Office (emphasis added).[85]

Lord Kerr dissented strongly from this view, holding that 'there is no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that is made'.[86] The effect of the majority judgment in *Tariq*, however, is to create uncertainty over when, precisely, gisting will be required. While Lord Hope holds that this is an area of law without hard edges, his judgment offers little certainty or guidance or for those who come into contact with its soft edges.

The second, and related, area of uncertainty is whether closed material must be disclosed or gisted even if that material would 'make no difference' to the case of the individual concerned. In its decision in *Ahmad*, for example, the Canadian Supreme Court stated that:

Lack of disclosure in this context cannot necessarily be equated with the denial of the right to make full answer and defence resulting in an unfair trial. There will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised by the absence of full disclosure.[87]

The issue has also received considerable attention in the British courts. The possibility of a narrow 'makes no difference' exception to general disclosure and gisting requirements was envisaged by Lord Brown in his judgment in *MB*:

There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. *Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded* (a difficult but not, I think, impossible conclusion to arrive at . . .), he would have to conclude that the making . . . of an order would indeed involve significant injustice to the suspect.[88]

A broader exception was countenanced in *RB (Algeria)*, where the undisclosed material related to the applicant's past actions and their consequences in the applicant's home country, to which deportation was proposed:

It is true that, if that deportee will be at real risk of a violation of his human rights on return to his own country, this is likely to be because of facts that are personal to him. The difference is that he will normally be aware of those facts and indeed he will be relying on them to establish the risk that he faces on his return. His situation is not that of an individual who is unaware of the case that is made against him. Indeed, so far as safety on return is concerned, the State does not have to make out a case against the deportee.[89]

[85] *Home Office v Tariq* [2011] UKSC 35, at [81]–[83] (United Kingdom).
[86] ibid, at [134].
[87] *R v Ahmad* 2011 SCC 6, at [30] (Canada).
[88] *Home Secretary v MB* [2007] UKHL 46, at [90] (United Kingdom) (emphasis added).
[89] *RB (Algeria) v Home Secretary* [2009] UKHL 10, at [95].

Thus, it was said, 'ignorance on the part of the deportee of the closed material is unlikely to prejudice the conduct of his case'.[90] The matter was put similarly by Lord Brown, who noted that the applicant was 'making a case against the state to which it is proposed to expel him' and that withholding material used by the government in response to his case was 'less prospectively damaging to his cause than where (as in a control order case) he may be left entirely in the dark as to why he is alleged to constitute a terrorist threat'.[91]

In *AF (No 3)*, Lord Phillips gave some consideration to the 'makes no difference' principle. In doing so, he quoted the judgment of Sedley LJ in the Court of Appeal, thus:

> '[I]t is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know'.[92]

Lord Philips went on to acknowledge that there was some weight to the 'makes no difference' argument, but concluded that there were 'strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him':

> The first is that there will be many cases where it is impossible for the court to be confident that disclosure will make no difference. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge. Next there is the point made . . . in respect of the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result. The point goes further. Resentment will understandably be felt, not merely by the controlee but by his family and friends, if sanctions are imposed on him on grounds that lead to his being suspected of involvement in terrorism without any proper explanation of what those grounds are. Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.[93]

These policy arguments bear close resemblance to some of the broadest of the open justice principles discussed earlier in this chapter.

[90] ibid, at [100].
[91] ibid, at [256].
[92] *Home Secretary v AF (No 3)* [2009] UKHL 28, at [36], quoting *Home Secretary v AF (No 3)* [2008] EWCA Civ 1148, at [113].
[93] *Home Secretary v AF (No 3)* [2009] UKHL 28, at [63].

V. CONCLUSION

In concluding this chapter, we note one final way in which the cases on our list may be compared and contrasted: the ways in which they deal with separation of powers and allocation of responsibilities between different branches of government. In some of the cases, such as *Binyam Mohamed*, courts demonstrate some deference to the view of the executive government:

> While there are strong reasons for scepticism, I accept that the Foreign Secretary genuinely believes, and has some grounds for believing, what he has stated in the three certificates, namely that the flow of information from foreign Government intelligence services to the [Security Services] could be curtailed if the redacted paragraphs are published, because that publication would be regarded by those Governments as an unjustifiable breach of the control principle . . .
>
> We are here concerned with a possible risk to the flow of information that may affect national security, which is an issue . . . on which the Foreign Secretary's opinion is both far more informed and experienced than that of any judge, and is supported by material, not merely from the US Government, but from the White House and the Secretary of State.[94]

In others, however, such as *Arab-American Anti-Discrimination Committee v Reno*, the courts refuse to so defer:

> We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.[95]

And in another group of cases – including *Jabarin*, *Greene v McElroy*, and *Al-Rawi* – the courts refuse to take steps in their judgments that they believe may properly be taken only by the executive or legislature.[96] The Hickman and Tomkins chapter now explores these questions in considerable depth.

In thinking about secret evidence procedures, the chapters in this Part also raise interesting, and sometimes troubling, methodological questions. Building on the open justice considerations outlined above, these chapters reveal something of the difficulty faced by citizens, lawyers, and academics seeking to scrutinise the operation of secret evidence proceedings. Lord Judge CJ in *Binyam Mohamed* said that 'every judge sitting in judgment is on trial', but noted that in 'reality very few citizens can scrutinise the judicial process'.[97] The task of scrutiny is made significantly harder when dealing with closed material proceedings. As Sedley LJ put it in the Court of Appeal,

> '[i]t may be . . . that the answer to [the] question – what difference might disclosure have made? – is that you can never know.[98]

[94] *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [170], [174] (United Kingdom).
[95] *American-Arab Anti-Discrimination Committee v Reno*, 70 F 3d 1045, at §115 (9th Cir 1995) (United States).
[96] *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [74]; *Greene v McElroy* 360 US 474, 508 (1959); HCJ 5022/08, *Shawan Rateb Abdullah Jabarin v Commander of IDF Forces in the West Bank* at [5].
[97] *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [38]–[42] (United Kingdom).
[98] *Home Secretary v AF (No 3)* at [36], citing *Secretary of State for the Home Department v AF (No 3) (CA)* [2008] EWCA Civ 1148, at [113].

For academics and lawyers working in this area, therefore, it is important to reflect on how best to assess the work being done behind closed doors. To what extent can academics and lawyers, as members of a critical legal community, adequately scrutinise proceedings that are closed to the public and whose secrecy is ensured by national security laws? If critics are unable to see the information supporting the state's national security arguments, can their criticism truly engage with what is at stake in any closed material proceedings? To what extent must any analysis of closed material procedures necessarily be caveated, and to what extent might the difficulty of scrutiny provide an argument against the closed material procedures themselves? These questions, whether implicitly or expressly, run through the chapters in this Part and through many of the cases considered in it.

Whether by telling us something about the courts' sense of the separation of powers, or by demonstrating the breadth of meanings encompassed in the open justice principle, or by exploring how infringements of rights may be counterbalanced, this introductory chapter has begun to demonstrate the wealth of debates raised by the secret evidence case law. More than a century and a half after Lincoln and Lloyd concluded their contract in the White House, courts continue to grapple with how best to resolve the competing demands of open justice and national security interests. In the remainder of this Part, our contributors develop challenging and thought-provoking arguments that put these very old questions in a new light as they consider how a variety of diverse jurisdictions adjudicate these human rights controversies in the modern context.

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National Security Law and the Creep of Secrecy: A Transatlantic Tale

TOM HICKMAN AND ADAM TOMKINS

I. INTRODUCTION

THE JUSTICE AND Security Act 2013 was passed by the United Kingdom Parliament in April 2013.[1] It is a highly controversial measure, mainly because of the way in which it extends the use of 'closed material procedure' and special advocates across a range of civil proceedings. It heralds a new era in national security law in the United Kingdom.[2]

Our discussion will bring us to the issue of closed material procedure (CMP), and we hope to shed light on it, but we approach it via a different aspect of the legislation, which will be our focus: namely, the Act's provisions to curb the courts' *Norwich Pharmacal* jurisdiction in the context of national security and international relations.[3] The *Norwich Pharmacal* jurisdiction enables the courts in England and Wales to order persons who are 'mixed up' in the wrongdoing of others to disclose documents necessary for other legal proceedings. Section 17 of the Justice and Security Act abolishes this jurisdiction in relation to material held by or derived from intelligence agencies and prohibits its exercise in relation to other national security or international relations material, upon the issue of a certificate by the Secretary of State.

This reform was highly controversial when the Justice and Security Bill was introduced into Parliament in 2012 because of the role played by *Norwich Pharmacal* in one of the most politically-heated cases of recent times, relating to the extraordinary rendition of a UK resident, Binyam Mohamed. During the passage of the Bill, however, the matter lost its sting due to a volte-face by the English Court of Appeal, but the tale is critical to understanding the Justice and Security Act more generally, including the

[1] Adam Tomkins advised the House of Lords Constitution Committee on the Justice and Security Bill in 2012–13. Tom Hickman acted as junior counsel in several of the cases mentioned in this paper, including before the Court of Appeal in the *Binyam Mohamed* case. As Fellows of the Bingham Centre for the Rule of Law, they were also both involved in the Bingham Centre's work on the Justice and Security reforms in 2011–13. They write here in a personal capacity by reference to the public record.

[2] For an account, see A Tomkins, 'Justice and Security in the United Kingdom' (2014) 47 *Israel Law Review* (forthcoming). In 2011 the UK Supreme Court ruled that the courts could not extend the use of closed material procedure in this way: to make such an inroad into the principles of open and natural justice would require legislation: *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 (United Kingdom).

[3] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (United Kingdom).