

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).

provisions relating to closed material procedure. Moreover, it is a fascinating example both of transatlantic influence in law- and policy-making and of the delicate interplay between courts, governments and parliamentarians in the matter of national security, international relations and keeping secrets.

II. THE NORWICH PHARMACAL JURISDICTION IN ENGLISH LAW

The *Norwich Pharmacal* jurisdiction is a means whereby a party may request the court to order the disclosure of documents or information where there has been wrongdoing by a third party and where the information is required in order to seek justice. The seminal judgment was a case about breach of intellectual property rights, but it had a public law dimension, as the defendants were the Customs and Excise Commissioners who held information about importers of allegedly counterfeit goods, and unwittingly became involved in their importation by virtue of their statutory responsibilities. The House of Lords held that the Commissioners could be made to disclose the documents. In a famous passage, Lord Reid stated:⁴

[I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did . . . [J]ustice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

Section 17(2) of the Justice and Security Act 2013 prevents the court from exercising its *Norwich Pharmacal* jurisdiction in any case concerning the disclosure of 'sensitive information'. The Act gives a very wide definition to sensitive information, covering any information held by an intelligence service, obtained from or held on behalf of an intelligence service or derived from such information, or even information relating to an intelligence service. This clearly encompasses information beyond that which it is necessary to keep secret. In addition, the Secretary of State may certify other information as non-disclosable if it would cause damage to the interests of national security or international relations.⁵ The bar on disclosure in such 'sensitive' cases is absolute: it is not subject to any balancing test that would take into account the interests in favour of disclosure. Even in a case alleging gross human rights violations, such as torture or unlawful killing, the jurisdiction of the court to order disclosure is removed. It was the use of the jurisdiction precisely in such a context, and the court's preparedness to balance harm to national security and international relations against the compelling interests in disclosure, which ignited international political controversy and provoked the legislative reform.

⁴ *Norwich Pharmacal*, *ibid* 175.

⁵ Justice and Security Act 2013 s 17(3)(e), (4), (5). Section 18 provides for a limited review of a certificate, as to whether the statutory conditions for certification are met, applying 'the principles which would be applied in judicial review proceedings'.

III. THE BINYAM MOHAMED CASE

The case which sparked the political firestorm was *Binyam Mohamed*.⁶ In 2008 Mr Mohamed, invoking the *Norwich Pharmacal* jurisdiction, sought the private disclosure to his security-cleared US counsel of such material as the UK Government had in its possession relating to his detention and torture by or on behalf of the United States. Mr Mohamed was an Ethiopian national who had been resident in the United Kingdom since 1994. As the Divisional Court held, he was unlawfully detained in Pakistan in April 2002. After suffering serious mistreatment there, he was flown incommunicado to Morocco by the CIA to a 'black site' where he was subjected to appalling torture. From there he was taken to Afghanistan and held for over three months in the notorious 'dark prison' in Kabul, being subjected to some of the worst imaginable conditions, before being taken to Bagram airbase and then to Guantanamo Bay.⁷ Whilst the British Government strongly contested the degree to which they had had knowledge of the detention and the mistreatment of Mr Mohamed, his general account was not challenged and substantial parts were corroborated by evidence served by the Government. In a separate case, which plays a part later in this tale, the US District Court for the District of Columbia found Mr Mohamed's account proven. It stated:⁸

Binyam Mohamed's trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans.

In May 2008, Mr Mohamed was charged under the Military Commissions Act of 2006 on the basis of confessions made whilst he was detained in Bagram and at Guantanamo Bay. His criminal defence was that those statements had been made under duress, whilst being subjected to cruel, inhuman or degrading treatment or torture, and were untrue. However, the evidence for this was principally his own, and the US authorities denied engaging in torture. Since it was clear that the UK intelligence services had been involved to some degree in his interrogations – in particular, he was interrogated by the British in Pakistan and questions were put to him subsequently which originated from UK intelligence – he sought corroborating documents under the *Norwich Pharmacal* jurisdiction.

The Divisional Court recognised that the case sought to apply the *Norwich Pharmacal* jurisdiction in novel circumstances. The court analysed *Norwich Pharmacal* as comprising five elements: (1) was there wrongdoing?, (2) were the UK Government, however innocently, involved in the wrongdoing?, (3) was the information necessary in order for the claimant to seek redress?, (4) was the information sought within the scope of the

⁶ In total six judgments were delivered by the Divisional Court and two judgments in the Court of Appeal. The first, and most important, of the Divisional Court's judgments is *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579. The Court of Appeal judgments are *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65 and [2010] EWCA Civ 158, reported together in the official law reports at [2011] QB 218.

⁷ [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, at [10]–[41] (United Kingdom).

⁸ *Farhi Saeed Bin Mohammed v Obama*, 704 F Supp 2d 1, 26–27 (2009) (G Kessler District Judge) (United States).

available relief?, and (5) should the court exercise its discretion in favour of granting relief? Only if all these elements were satisfied would disclosure be ordered.

The Divisional Court handed down judgment in August 2008. As to the first issue, it was accepted by the Government that the claimant had established an arguable case that ‘after being subject[ed] to torture and cruel, inhuman or degrading treatment in Pakistan, he was unlawfully rendered from Pakistan to Morocco by the US authorities’ and that ‘whilst in Morocco he was subject to . . . torture during his interrogation there by or on behalf of the US authorities’. In its judgment the court ruled that in the light of this concession it was not necessary for it to ‘determine whether there was in fact any arguable wrongdoing by or on behalf of the United States Government’.⁹

The Divisional Court then ruled that the second, third and fourth elements were satisfied on the facts of the particular case. It held that the Security Service had interviewed Mr Mohamed and facilitated US interrogations despite knowing that he was detained incommunicado and that he had been mistreated. It was therefore ‘mixed up’ in the matter: ‘the relationship of the United Kingdom Government to the United States authorities in connection with [Mr Mohamed] was far beyond that of a bystander or witness to the alleged wrongdoing’.¹⁰ The court held that the Foreign Secretary possessed 42 documents that constituted ‘information essential to a fair consideration of [the claimant’s] case and a fair trial’ in the Military Commission proceedings.¹¹ Furthermore, the Divisional Court held that the US authorities would be unlikely to make the documentation available to Mr Mohamed within ‘proper time’ to enable them to be used in his defence and that there was evidence to suggest that the US authorities would ‘seek to delay as long as possible the disclosure’. It was therefore necessary for the documents to be disclosed.¹²

Yet, despite these findings, the court did not rule that the documents should be disclosed at that stage. Rather, the court gave the Secretary of State the opportunity to consider whether he should make a public interest immunity (PII) certificate in respect of the documents.¹³ He did so, relying on the ‘control principle’. A number of the documents sought by Mr Mohamed were of US origin: they had been passed by the US intelligence services to their counterparts in the United Kingdom. Intelligence-sharing, the Secretary of State explained in his PII certificate, is essential between allies such as the United States and the United Kingdom: it is ‘vital to the national security of the United Kingdom’ such that ‘it saves lives’. To this end, the Secretary of State certified that ‘it is essential that the ability of the United States to communicate in confidence with the United Kingdom is protected; without this confidence they simply will not share information in the open manner that is currently the case’. It followed, in the Secretary of State’s view, that

disclosure of [the] documents by order of our courts or otherwise by United Kingdom authorities would seriously harm the existing intelligence-sharing arrangements between the United Kingdom and the United States and cause considerable damage to the national security of the United Kingdom.¹⁴

⁹ [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, at [67]–[68] (United Kingdom).

¹⁰ *ibid.*, [88].

¹¹ *ibid.*, [106].

¹² *ibid.*, [126].

¹³ PII is a doctrine of the law of evidence which enables a Secretary of State to certify that it would be contrary to the public interest for material evidence in a trial to be disclosed. See further below.

¹⁴ PII Certificate dated 26 August 2008. Ultimately there were five PII certificates made in the case: two by the Home Secretary and three by the Foreign Secretary.

It should be emphasised, however, that there was no question of disclosure of the 42 documents to the world at large, or even to Mr Mohamed's UK lawyers. What was sought was disclosure to the claimant's US lawyers who had been given security clearance in accordance with the regime established for providing legal representation to Guantanamo detainees.¹⁵

Following the Divisional Court's judgment the US authorities made a number of concessions, the most important of which was that the 42 documents would be disclosed if charges were referred for trial before a Military Commission. However the US Government still refused to disclose them before the Military Commission Convening Authority (who is responsible for deciding whether charges should be formally referred to the Military Commission) or for use in habeas corpus proceedings. What then occurred was a period of quite extraordinary inter-play between the UK proceedings and proceedings in the United States. The US Government abandoned an allegation that the claimant had been involved in a dirty bomb plot, and an order was made in habeas corpus proceedings that seven of the 42 documents should be disclosed to Mr Mohamed's security-cleared lawyers in redacted form. Then, in October 2008 the Military Commission Convening Authority dismissed the charges against Mr Mohamed (although new charges could still have been referred and there was an indication that they would be).

The matter came back before the Divisional Court that same month. The Court indicated that it was both shocked and mystified that the US Government had still not provided all of the documents to Binyam Mohamed's US defence team. In a strongly worded judgment it stated that it could 'see no rational basis for the refusal by the US Government to provide the documents';¹⁶ and it warned that 'if disclosure was not given', it would rule on the disclosure application including the submission that 'the Government of the United States is deliberately seeking to avoid disclosure of the 42 documents'.¹⁷ Just in case anyone was in doubt as to which way the wind was blowing, the court concluded by stating:

We must record that we have found the events set out in this judgment deeply disturbing. This matter must be brought to a just conclusion as soon as possible, given the delays and unexplained changes of course which have taken place on the part of the United States Government.¹⁸

Nonetheless the Court stayed the matter, giving the US authorities further time to make the disclosures.¹⁹ At this point the 42 documents were disclosed in the habeas corpus proceedings before the US District Court, albeit in redacted format. They were also permitted to be used before the Military Commission Convening Authority.

Whilst we cannot determine the contribution that the UK proceedings made to the disclosure of the 42 documents, their identification in the UK proceedings as being highly relevant to Mr Mohamed's defence, the robust and strongly-worded judgments of the Divisional Court, as well as the ever-present risk of disclosure and further, possibly even stronger, criticism of the US Government by the UK court, seem to have played a part, either in terms of placing indirect pressure on the US authorities via the UK Government or, at least, as a form of inter-state judicial dialogue. The chronology of events and

¹⁵ See the account of this regime given by Cole and Vladeck, chapter eight of this volume.

¹⁶ [2008] EWHC 2519 (Admin) at [4] (United Kingdom).

¹⁷ *ibid*, [55].

¹⁸ *ibid*, [55].

¹⁹ The order to stay was requested by the UK Government and, at the time, was resisted by Mr Mohamed's UK legal team.

reported circumstances suggest that it was the combined effect of pressure from proceedings on both sides of the Atlantic that resulted in the eventual disclosures to Mr Mohamed's US security-cleared legal team.²⁰

The disclosure of the 42 documents meant that there was no further remedy sought in the UK claim but there was one *issue* remaining in the case and this turned out to be an intractable one. In a PII certificate issued in September 2008, the Foreign Secretary had objected not only to the disclosure of the 42 documents but also to the publication of seven paragraphs in the Divisional Court's first judgment. These paragraphs provided a summary of reports by the CIA on the circumstances of Mr Mohamed's detention in Pakistan and of the interrogation techniques employed here by US authorities. At the same time, the paragraphs were important to the court's reasoning, in particular to understanding the degree to which UK authorities had become mixed-up in the arguable wrongdoing of US authorities. The CIA reports had been received by the United Kingdom before Mr Mohamed was interviewed in Pakistan by a British intelligence officer and therefore demonstrated the degree of knowledge of the conditions of detention (in particular the use of sleep deprivation techniques foresworn by the United Kingdom in 1972) prior to the intelligence officer seeking to extract information from Mr Mohamed.

The question was whether or not these paragraphs should be restored to the judgment and made public. At first, the Divisional Court held that the paragraphs should remain redacted. The Court reasoned that it would not be in the public interest 'to expose the United Kingdom to what the Foreign Secretary still considers to be the real risk of the loss of intelligence so vital to the safety of our day to day life'.²¹ However, it transpired that no inquiry had been made of the new Obama administration about its view of the disclosure of the seven paragraphs. There followed further hearings, and further evidence and further PII certificates, after which the Court held that its earlier judgment refusing to disclose the seven paragraphs had been based on a mistake and, amazingly, it reversed it. Although the Court went out of its way to acquit the UK Government of any bad faith,²² it is easy to see why by this stage many on-lookers considered that the Court's trust and confidence in the Government and its evidence had been very badly shaken.²³

²⁰ Two other things were going on in parallel to the legal proceedings which contributed to the high-octane nature of the litigation. First, the UK Government was making concerted efforts to obtain the release and repatriation of Mr Mohamed and other UK residents held in Guantanamo Bay. Secondly, there was a US Presidential election campaign in 2008. And on 4 November 2008 Barack Obama won the Presidency, promising the closure of Guantanamo Bay and a new approach to Government secrecy and international relations. On 22 January 2009, two days after taking office, President Obama issued an executive order prohibiting new charges being brought against Guantanamo detainees. Then, on 23 February 2009, the UK Government's efforts to release Mr Mohamed came to fruition and he was put on an airplane to the UK where he was released. The extent to which the legal proceedings might have played a part in Mr Mohamed's return is impossible to judge. But if the UK Government thought that the return of Mr Mohamed would bring the legal proceedings to end, events proved otherwise.

²¹ [2009] EWHC 152 (Admin), [2009] 1 WLR 2653, at [107] (United Kingdom).

²² [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, at [96]–[100] (United Kingdom).

²³ It is also an important part of the story, and relevant to the potential loss of confidence in the Government's evidence, that after the Court had initially upheld PII over the seven paragraphs and was considering whether to reverse this finding, further documents, described by the court as 'highly significant', were found and disclosed by the UK intelligence services which showed that they had more knowledge of the mistreatment and extraordinary rendition of Mr Mohamed than had been thought. At this very late stage, the Divisional Court felt the need to take the 'quite exceptional step' of correcting parts of its first judgment in which it had made findings of fact relating to the degree to which the UK had been mixed-up in the actions of the CIA; the Court also stated that it had made 'extensive revisions' to its closed judgment. The Court said that had these documents been available it would inevitably have made further open findings on that issue: [2009] EWHC 2549 (Admin) at [61]–[63] (United Kingdom). The published version of the Divisional Court's first judgment was subsequently revised.

The court also appears to have been simply unable to believe that the Obama administration would put up any serious objection to the reinstatement of the seven paragraphs, given the compelling case for openness as to the mistreatment of Mr Mohamed. Obama's Presidential election campaign had been very closely followed by the British media and like much of the rest of the world Britain had been swept up in the euphoric mood that followed his election. Indeed, it is worth recalling that on 9 October 2009, just a few days before the court's judgment, it was announced that President Obama had been awarded the Nobel Peace Prize.²⁴

The court referred to President Obama's commitment to transparency when running for office and the fact that on 16 April 2009 he had approved the release of a number of US Government memoranda that detailed the treatment inflicted on detainees by the CIA.²⁵ The court held that the seven paragraphs contained information about interrogation techniques that was no different from that which President Obama had himself put in the public domain and which he had emphasised was information necessary to uphold the rule of law. More strikingly, it held that an objection to publication raised by US Secretary of State Hilary Clinton, after the Obama administration had been approached about the issue, must have been made 'without a proper analysis or understanding' of the limited nature of the disclosure proposed.²⁶ It concluded that although there was 'some small risk' that intelligence sharing would be reviewed or affected if the court were to disclose the redacted paragraphs, 'the evidence simply does not sustain the Foreign Secretary's opinion that there is a serious risk'.²⁷

The Government appealed to the Court of Appeal, instructing Jonathan Sumption QC, whose eminence at the Bar at the time was afterwards reflected in his appointment directly to the UK Supreme Court: this was an appeal the UK Government appeared determined to win. For its part, the Court of Appeal convened the strongest appeal court possible: Lord Judge, the Lord Chief Justice, Lord Neuberger,²⁸ the Master of the Rolls and Sir Anthony May, President of the Queen's Bench Division.

The Court of Appeal dismissed the Government's appeal, albeit only by a whisker and only after changing its own collective judicial mind. Following the Court of Appeal hearing the Government discovered, and drew the court's attention to, a decision of the US District Court for the District of Columbia in habeas corpus proceedings brought by another Guantanamo detainee who was detained in part on the basis of evidence provided by Mr Mohamed. District Judge Kessler held that the evidence from Mr Mohamed could not be relied upon, finding his account of his treatment to be proven and that his mistreatment amounted to torture.²⁹ The mistreatment of Mr Mohamed had thus been judicially found to be a matter of fact by the courts of the United States. As such, on one view, there was no longer any confidentiality in the information contained in the

²⁴ Given the procedure for judgments in such a case to be sent first to the Government for security checking, the judgment had probably been written by 9 October 2009, but it is a reminder of the historical context and prevailing mood.

²⁵ [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, at [38]. For the memos see KJ Greenberg and JL Dratel (eds), *The Torture Papers: the Road to Abu Ghraib* (Cambridge, CUP, 2005).

²⁶ [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, at [93] (United Kingdom).

²⁷ *ibid.*, [95].

²⁸ In 2012 Lord Neuberger became the President of the UK Supreme Court.

²⁹ *Farhi Saeed Bin Mohammed v Obama*, 704 F Supp 2d 1 (2009) (United States). See n 10 above.

seven paragraphs as to the treatment of Mr Mohamed. For two members of the court – Sir Anthony May P and Lord Neuberger MR – this was decisive.³⁰

Sir Anthony May P reasoned that the judgment of Judge Kessler tipped the balance of public interests in favour of disclosure. Not only had an arguable case of torture become a case in which torture had been found to have occurred, but disclosure of information established as a fact in other proceedings could not ‘in any real sense’ be regarded as a breach of the control principle.³¹ Lord Neuberger MR reasoned, rather differently, that there was no longer any evidential basis for the contention that the control principle would be infringed by making the paragraphs public or that a constriction of intelligence-sharing would result, given that the paragraphs describe mistreatment that had been found as a fact by a US court.³² Lord Judge CJ, who alone would have dismissed the appeal irrespective of Judge Kessler’s judgment, took a more robust view and thought as a matter of principle that the paragraphs should be restored:

[U]nless the control principle is to be treated as if it were absolute, it is hard to conceive of a clearer case for its disapplication than a judgment in which its application would partially conceal the full reasons why the court concluded that those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture. Such a case engages concepts of democratic accountability and, ultimately, the rule of law itself.³³

In understanding the Court of Appeal’s judgment it is important to be clear about the nature of the material contained in the seven paragraphs. There is nothing in them that could identify any agent or any facility or any secret means of intelligence gathering. They do not themselves contain secret intelligence, or provide any information that could put anyone in harm’s way. Lord Judge CJ repeatedly stressed this point in his judgment: he stated, for example, that the redacted paragraphs do not identify methods of surveillance or reveal the methods employed by the security and intelligence service to penetrate terrorist groups. Indeed, he said, ‘it seems right to emphasise that the publication of the redacted paragraphs would not and could not of itself do the slightest damage to the public interest’.³⁴ The paragraphs do give limited information, on all fours with that made public by the Obama administration, about certain US interrogation techniques. The redacted paragraphs state that Mr Mohamed was subject to ‘sleep deprivation, threats and inducements’; that his fears of ‘disappearing’ were played upon; that he was shackled; that he was under ‘significant mental stress’; that this treatment, if it had been administered on behalf of the United Kingdom, would have been unlawful; and that it could ‘easily be contended to be at the very least cruel, inhuman and degrading treatment’.³⁵

³⁰ It is one of the many extraordinary parts of the transatlantic tale that had Judge Kessler’s judgment not been drawn to the Court’s attention by the Government, as it quite properly was, the Government’s appeal would have been allowed and the law in the UK may now have had a very different shape.

³¹ [2010] EWCA Civ 65, [2011] QB 218, at [295] (United Kingdom). Angels, he said, ‘are now dancing on a pinhead’.

³² *ibid*, [203].

³³ *ibid*, [57].

³⁴ *ibid*, [52]. See, to like effect, Lord Judge CJ, at [13] (and see further below).

³⁵ The full text of the paragraphs is printed in the official law report of the Court of Appeal’s judgment: see [2011] QB 218, 314.

IV. REACTIONS TO BINYAM MOHAMED

Despite its efforts to reverse the Divisional Court judgment, the Government was swift to portray the decision of the Court of Appeal as a victory. It did not seek to appeal to the Supreme Court and the seven paragraphs were therefore disclosed.³⁶ On the day the judgment was handed down, the then Foreign Secretary (David Miliband MP) made a statement to the House of Commons in which he welcomed the fact that ‘crucially, the court has today upheld the control principle’. The Secretary of State described the judgment as having ‘specifically vindicate[d] the careful assessment that releasing the seven paragraphs without the consent of the United States would have damaged the public interest’.³⁷ The basis for these comments is the fact that the court acknowledged the ‘centrality of the control principle or confidentiality to intelligence-sharing arrangements’, and the need in general terms to respect the same (albeit that the principle is not a rule of law and is not absolute).³⁸

The then Shadow Foreign Secretary (William Hague MP³⁹) agreed with the Government, welcoming the judgment of the Court of Appeal, ‘which upholds the principle of control’, as he put it.⁴⁰ Their shared view was subsequently endorsed by the Intelligence and Security Committee (ISC), which stated as follows in its *Annual Report* for 2009–10:⁴¹

The Committee is concerned that the publication of other countries’ intelligence material, whether sensitive or otherwise, threatens to undermine the key ‘control principle’ of confidentiality which underpins relations with foreign intelligence services, and that this may seriously damage future intelligence co-operation. We therefore welcome the Court of Appeal’s recognition of the importance of the ‘control principle’.

This positive view of the Court of Appeal’s judgment was given despite the fact that, as the Committee noted, the US Office of the Director of National Intelligence had released a statement following the Court of Appeal’s judgment stating that: ‘The decision by a United Kingdom court to release classified information provided by the United States is not helpful, and we deeply regret it’.⁴²

However, the views of both the Government and the ISC subsequently changed, as a direct result of representations made by US intelligence agencies. On 6 July 2010, the Prime Minister stated that the judgment had ‘strained’ its intelligence partnership with the United States because it had created ‘doubts about our ability to protect the secrets

³⁶ Even so, the proceedings were not yet quite over. Prior to handing down his judgment Lord Neuberger MR had, at the request of the Government in a letter from Jonathan Sumption QC, removed some pointed criticisms of the UK security service. Following objections from the claimant and intervening parties, as well as the dissemination of Jonathan Sumption’s letter, the Court of Appeal handed down a second judgment restoring, with further clarification, the criticisms to Lord Neuberger’s judgment and criticising the dissemination of the letter: [2010] EWCA Civ 158.

³⁷ HC Deb, 10 February 2010, cols 913–14.

³⁸ [2010] EWCA Civ 65, [2011] QB 218, at [49] (Lord Judge CJ); cf at [287] (May P).

³⁹ Following the general election of May 2010 Mr Hague replaced Mr Miliband as Foreign Secretary.

⁴⁰ Mr Hague said the following: ‘We . . . welcome today’s judgment, which upholds the principle of control and the need for openness in this particular case’ and added that ‘We have always believed that the principle of control could be upheld while seeking an exception in this case from the United States’ (HC Deb, 10 February 2010, col 916).

⁴¹ ISC, *Annual Report* 2009–10 (Cm 7844, 2010) para 57.

⁴² *Statement by the Office of the Director of National Intelligence*, 10 February 2010.

of our allies'.⁴³ He indicated that a proposal for legislative reform would be brought forward in a Green Paper.

In its *Annual Report* for 2010–11 the ISC also returned to the subject and reported that on a visit to the United States they had been 'struck by the force with which certain interlocutors within the US intelligence community voiced their worries'.⁴⁴ The reason appears to have been that the US intelligence community view all material or information generated by their intelligence agencies as their property.⁴⁵ In contradiction to its previous view that the Court of Appeal had upheld the control principle, the ISC went on state its concern that 'the inability of the Government to prevent disclosure represented a breach of the "control principle"'.⁴⁶ It also stated that the decision in the *Binyam Mohamed* case 'resulted in the release of US intelligence material'.⁴⁷ Since the material was not, as we have seen, intelligence as such, we must take the Committee to mean information supplied by a foreign intelligence agency. The ISC concluded with a recommendation that the law be urgently changed.⁴⁸

What is particularly unsatisfactory about all of this is not that the Government and the ISC changed their opinion (*sub silentio!*) of the Court of Appeal's judgment – even law professors must be allowed to change their view of a case from time to time – but that their views of the merits of the Court of Appeal's judgment, and of the approach of the UK courts more generally, were determined entirely by a one-sided concern driven by the US intelligence community. It was not offset by any consideration or concern for the fact that the information disclosed serious mistreatment of a British resident, the fact that this information was central to understanding the degree of complicity of British officials in conduct which is outlawed by the laws of this country, or that the disclosure of the information sought in the proceedings to security-cleared counsel was necessary to provide Mr Mohamed with a fair trial on a capital charge based on evidence obtained through torture. Nor, for that matter, was there any express consideration given to the fact that the material was not operationally sensitive and did not endanger anyone or anything. Insofar as we can tell from the public record, the preferences of the US foreign intelligence services were regarded as effectively decisive and dictated a change in the law in the United Kingdom.

The Green Paper on *Justice and Security* published in October 2011, which proposed curtailing the *Norwich Pharmacal* jurisdiction along with the introduction of closed material procedure in ordinary civil claims, was explicit as to the reasons for the proposal:

[T]he UK Government has received clear signals that if we are unable to safeguard material shared by foreign partners, then we can expect the depth and breadth of sensitive material shared with us to reduce significantly. There is no suggestion that key 'threat to life' information would not be shared, but there is already evidence that the flow of sensitive material has been affected. The risk is that such material withheld by a foreign partner might, when pieced together with other intelligence material in the possession of the Government, provide the critical 'piece of the jigsaw' that would allow a threat to be contained, or a terrorist to be brought

⁴³ HC Deb, 6 July 2010, col 175.

⁴⁴ ISC, *Annual Report* 2010–11 (Cm 8114, 2011) para 230.

⁴⁵ The relevant sentence in the report is redacted, and reads: 'we heard from a number of US agencies and departments that they viewed their material as ***'. If not US property, then presumably inviolable or secret or some other adjective with a similar meaning.

⁴⁶ *ibid*, para 226.

⁴⁷ *ibid*, para 16.

⁴⁸ Recommendation AA on p 66 of the ISC's *Annual Report* for 2010–11.

to justice. The fullest possible exchange of sensitive intelligence material between the UK and its foreign partners is critical to the UK's national security.⁴⁹

One important piece of information disclosed in this passage relates to the limited nature of the contraction that was said to be a risk. Whilst no doubt the Government is entirely right to lament any contraction of intelligence flow, the recognition of the limited nature of the contraction calls for consideration of whether such contraction is tolerable if it means that courts in this country can, in an exceptional case, disclose wrongdoing of others in which British officials are mixed up. Moreover, we know that the exchange of information between intelligence agencies has never been entirely open, even between the United Kingdom and the United States. This is well illustrated by *Binyam Mohamed* itself. As the Divisional Court recorded, the Security Service was denied information from the United States as to Mr Mohamed's whereabouts after he was rendered from Pakistan: the United Kingdom could infer he was at a black site, but the United States would not confirm his location.⁵⁰ The true question therefore was whether a further limited contraction in openness justified a change in the law. At the least, the question clearly arises of what would be lost if the law were changed. Unfortunately, however, the debate was never conducted in this way.

The proposals to abolish *Norwich Pharmacal* jurisdiction provoked much controversy – given its effective use in the *Binyam Mohamed* case – from NGOs and others.⁵¹ But they were none the less brought forward in the Justice and Security Bill, introduced into Parliament in May 2012. The views of the US authorities were emphasised to Parliament both by the Government and by members of the ISC in support of the provisions.⁵² Kenneth Clarke MP, the minister responsible for the Bill in the House of Commons, informed Parliament that the American authorities were 'extremely alarmed' that a UK court should have disclosed information contained in a CIA document and they 'wish to be reassured'.⁵³ It was of course impossible for Parliament to go behind the statements as to the degree of US disquiet and no further information about the precise implications for national security was made public. All that skeptical Parliamentarians could do was to point to the absence of merit in the US position.⁵⁴ They suggested that American fears were based on a 'misapprehension'⁵⁵ or on a 'false perception'⁵⁶ of the law as articulated in the *Binyam Mohamed* case, or were 'simply unfounded'.⁵⁷ After all, a UK court had never disclosed intelligence or source material against the objections of the Government and had only disclosed the seven paragraphs because their content was no longer secret.

⁴⁹ HM Govt, *Green Paper, Justice and Security* (Cm 8194, 2011) para 1.22.

⁵⁰ [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, at [29]–[32] (United Kingdom).

⁵¹ The Cabinet Office has a valuable website which contains extensive materials on the Justice and Security reforms and includes responses to the Green Paper: consultation.cabinetoffice.gov.uk/justiceandsecurity/the-justice-and-security-bill. Among numerous examples, Amnesty International described the proposed reforms to *Norwich Pharmacal* as 'deeply problematic'; Justice described them as 'unacceptable and unnecessary'; and the Bingham Centre for the Rule of Law described them as 'based on several misconceptions and . . . unjustified'.

⁵² HC Deb, 18 December 2012, cols 726–27 and 4 March 2013, col 748 (Kenneth Clarke MP); HC Deb, 18 December 2012, col 727 (Sir Malcom Rifkind MP) and col 752 (Hazel Blears MP); HL Deb, 19 June 2012, col 1681 (Lord Butler) and col 1686 (Marquess of Lothian).

⁵³ HC Deb, 4 March 2013, col 748.

⁵⁴ HL Deb, 19 June 2012, col 1692 (Lord Lester of Herne Hill).

⁵⁵ *ibid*, col 1725 (Lord Macdonald of River Glaven).

⁵⁶ *ibid*, col 1748 (Baroness Manningham-Buller).

⁵⁷ HL Deb, 23 July 2012, col 543 (Lord Pannick).

But such objections could not prevail. Lord Butler, for example, explained frankly that: ‘the trust of the US has been weakened and we need to restore that trust. *It matters not that the grounds for the breaking of that trust may not be justified*’ (emphasis added). In somewhat different terms the minister responsible for the Bill in the House of Lords, Lord Wallace of Tankerness, explained that ‘the very existence’ of the courts’ *Norwich Pharmacal* jurisdiction in the national security field ‘can erode the confidence of our agents and our intelligence-sharing partners that we can protect the secrets they share with us’.⁵⁸

As the Bill progressed through its various parliamentary stages, opposition to the *Norwich Pharmacal* provisions withered. This was partly because the focus of the Bill’s many critics was elsewhere – namely, on its provisions concerned with closed material procedure and special advocates – and it was partly also because the Labour party were never entirely sure whether they should support or oppose the Government’s plans on *Norwich Pharmacal*: it had, after all, been a Labour Foreign Secretary (David Miliband) who had signed the critical PII certificates in *Binyam Mohamed*. But it was also because Parliament could not question the degree or precise nature of US concerns and was in no real position to challenge the alleged need to provide legislative reassurance. Parliament’s Joint Committee on Human Rights, for instance, recognised that it had to accept that in the light of the American view as expressed by the Government and the ISC, it was legitimate to seek to reassure intelligence partners by providing greater legal certainty. The Committee was able to question only whether the reforms were proportionate. It pointed out, for instance, that the legislation would go well beyond meeting the concerns of the American authorities. Not only would it render all information received from intelligence partners absolutely immune from disclosure in *Norwich Pharmacal* proceedings, even if no objection or breach of the control principle would result, it would also extend to all information held by the intelligence services, whether received from a foreign partner or not.⁵⁹ In other words, pressure from the United States was being used as an opportunity by the Government to shore-up and widen the secrecy of the United Kingdom’s intelligence services.

V. NATIONAL SECURITY LITIGATION IN THE US: THE BREADTH OF SECRECY

Let us now turn to consider the US perspective and the basis for the pressure for the reform of UK law. The United States takes a quite different approach to secrecy and judicially-developed doctrines have gone to considerable lengths to keep national security issues out of the courts. Various doctrines operate to this effect, in particular, the state secrets doctrine, the law of standing, the political question doctrine and the law of sovereign immunity. In this paper, it is sufficient for us to examine the first of these.

The state secrets doctrine in US law formally comprises two elements: a rule of evidence known as the state secrets privilege, and a jurisdictional bar named after the nineteenth-century US Supreme Court case of *Totten*.⁶⁰ On the state secrets privilege the seminal judgment is that of the US Supreme Court in *Reynolds v United States*. This established the

⁵⁸ HL Deb, 21 November 2013, col 1922.

⁵⁹ Joint Committee on Human Rights, *Fourth Report of 2012–13* (HL 59, HC 370, 6 November 2012) 24–29.

⁶⁰ *Totten v United States*, 92 US 105 (1875) (United States).

privilege 'in its modern form'⁶¹ as a rule of evidence which precludes courts from requiring the disclosure of evidence that would reveal military or state secrets.⁶² It is a common law rule, although it 'performs a function of constitutional significance'.⁶³ As a rule of evidence it does not necessarily bar civil claims, although a party deprived of evidence could thereby be so prejudiced in their case that it might prove determinative. Thus, in *Reynolds* itself, the wives of three men killed when a B-29 Superfortress crashed in 1948 whilst testing secret equipment, sought disclosure of an accident report into the crash in support of their tort claim. The Supreme Court held that the report was privileged but that the plaintiffs could and should seek to make out their case on the available evidence.

Reynolds also made clear that US courts are required to be satisfied that a claim of state secrets privilege is well-founded: there should be no unquestioning acceptance of official assertions of privilege: 'judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers'.⁶⁴ The court must be satisfied that 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged'.⁶⁵ There is formally a burden on the Government to make out the claim, but the court will show 'utmost deference' to the executive branch.⁶⁶ In practice, 'few courts order inspection of the documents in question', resulting in the *Reynolds* approach to state secrets privilege requiring 'little scrutiny of the Government claim'.⁶⁷ This is exacerbated in the context of national security, in which documents seem rarely if ever to be examined: 'even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake'.⁶⁸ Furthermore, in the US courts 'no attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure'.⁶⁹ The effect of a determination that a piece of evidence is a privileged state secret is its removal from the proceedings entirely.⁷⁰

The so-called *Totten* bar also operates in the context of cases that are pervaded by secrecy. In *Totten* the Supreme Court held unenforceable a claim brought by the estate of a Civil War spy on a contract allegedly made with President Lincoln himself for covert action behind enemy lines.⁷¹ The court held that the claim could not be litigated at all, as it centrally concerned a secret arrangement. This rule was recently revisited by the Supreme Court in *General Dynamics v United States*,⁷² which concerned a claim by the

⁶¹ *El-Masri v Tenet*, 479 F 3d 296, 302 (4th Cir 2007) (United States) (we consider this case in detail below). The Supreme Court did not create the state secrets privilege anew in *Reynolds*. It had earlier antecedents, but *Reynolds* established the modern law.

⁶² *United States v Reynolds*, 345 US 1, 6–7 (1953) (United States). In *General Dynamics Corp v United States*, 563 US (2011) (United States), Scalia J, delivering the Opinion of the Court, stated that '*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it' (at 6) [slip opinion].

⁶³ *El-Masri*, 479 F 3d 296, 303; *United States v Nixon*, 418 US 683, 710 (1974) (United States).

⁶⁴ *Reynolds*, 345 US 1, 9–10.

⁶⁵ *ibid*, 10.

⁶⁶ *United States v Nixon*, 418 US 683, 710 (1974) (United States).

⁶⁷ J Kalajdzic, 'Litigating State Secrets: A Comparative Study' (2009–10) 41 *Ottawa Law Review* 289, 295.

⁶⁸ *ibid*.

⁶⁹ *El-Masri*, 479 F 3d 296, 306. See, to the same effect, *Mohamed v Jeppesen Dataplan Inc*, 614 F 3d 1070, 1081 (9th Cir 2010) (United States): 'If [the *Reynolds*] standard is met, the evidence is absolutely privileged, irrespective of the plaintiff's countervailing need for it'.

⁷⁰ *Reynolds*, 345 US 1, 11.

⁷¹ *Totten v United States*, 92 US 105, 106 (1875) (United States).

⁷² *General Dynamics Corp v United States* 563 US (2011) (United States).

Government for repayment of money advanced under a contract for development of stealth aircraft. In its defence General Dynamics argued that the Government was withholding crucial know-how, a recognised contractual defence in US law. The Supreme Court held that establishing the know-how defence would risk inadvertent disclosure of national security material and it therefore could not be litigated.

Two recent cases arising out of the US practice of extraordinary rendition⁷³ demonstrate the contemporary application of the state secrets privilege and the *Totten* bar in tort claims. The first case, *El-Masri v Tenet and Others*,⁷⁴ was a claim brought by Khaled El-Masri against the Director of the CIA, 10 unnamed (and presumably unknown) employees of the CIA and three corporate defendants. El-Masri, a German citizen, claimed that in December 2003 he had been detained in Macedonia and handed over to the CIA who flew him to a detention facility near Kabul, where he was held until May 2004. He was then flown to Albania and released in a remote area. He claimed that he had been drugged, beaten, detained in a tiny and unsanitary cell, subjected to torture and inhuman and degrading treatment, prevented from communicating with the outside world, including his family or the German Government (let alone a lawyer or the Red Cross). The second case was brought by Binyam Mohamed, Bisher Al-Rawi and three other victims of extraordinary rendition.⁷⁵ They sued Jeppesen Dataplan Inc, a US corporation that, in the words of the court, was alleged to have ‘provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among various locations where they were detained and allegedly subjected to torture’.⁷⁶

El-Masri’s claim was brought as a claim alleging violation by the specified CIA employees of the Fifth Amendment right to due process (a *Bivens* claim for unconstitutional conduct⁷⁷) and, secondly, as a claim under the Alien Tort Statute for breaching *ius cogens* norms of international law.⁷⁸ In *Mohamed and Others v Jeppesen Dataplan Inc*, the claim was brought against the aircraft company, which a painstaking analysis of flight records showed had been used by the CIA in transporting the plaintiffs between various countries. The circuitous ways that the claims were framed is a reflection of the various substantive immunities and other bars to direct claims against the US

⁷³ In *Arar v Ashcroft*, 585 F 3d 559, 564 (2nd Cir 2009), the US Court of Appeals for the Second Circuit, sitting *en banc*, explained as follows: *rendition* refers to ‘the transfer of a fugitive from one state to another’; *extradition* is a ‘distinct form of rendition’; and *extraordinary rendition* refers to ‘the extra-judicial transfer of a person from one country to another’, or, more particularly, to ‘the transfer, without formal charges, trial or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation’. On 6 September 2006, President Bush publicly admitted that which had been widely known for some time (not least through the testimonies of those subject to it), namely, that the US Government had been holding unnamed alleged terrorist ‘enemy combatants’ in secret detention centres around the world: see L. Sadat, ‘Extraordinary Rendition, Torture, and other Nightmares from the War on Terror’ (2007) 75 *George Washington Law Review* 1200.

⁷⁴ *El-Masri v Tenet and Others*, 479 F 3d 296 (4th Cir 2007) (United States).

⁷⁵ *Mohamed and Others v Jeppesen Dataplan Inc*, 614 F 3d 1070 (9th Cir 2010) (United States).

⁷⁶ *ibid*, 1075.

⁷⁷ *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971) (United States). A *Bivens* claim is an implied private action for damages against federal officers alleged to have violated constitutional rights. A *Bivens* claim is brought against individuals, and any damages are payable by the offending officers.

⁷⁸ The Alien Tort Statute is best known for conferring on US courts jurisdiction to hear extra-territorial civil claims against foreign corporations for violations of fundamental principles of international law: see 28 USC § 1350.

Government and, had the cases been permitted to proceed further, there was no guarantee that these claims could have been sustained as a matter of law.⁷⁹

In both *El-Masri* and *Mohamed and Others v Jeppesen Dataplan Inc*, the United States intervened and submitted both open and classified declarations from the then Directors of the CIA⁸⁰ stating that the cases could not proceed without disclosing state secrets.

In *El-Masri*, the District Court granted the motion to dismiss before the defendants had even submitted pleadings in defence of the claim. The Court of Appeals for the Fourth Circuit upheld the dismissal and the Supreme Court declined to hear an appeal.⁸¹ There were two strands to the reasoning of the Court of Appeals in *El-Masri*. The first was that *El-Masri* could not make out even a prima facie case. This may seem somewhat surprising, given his ability to rely on his own testimony of his treatment, given his undoubted disappearance, given the US Government's public acknowledgement that it operated a rendition programme at the time, and given the powerful corroborative testimony of a strikingly similar modus operandi from other individuals who had been subject to extraordinary rendition, many of whom came to be openly held in US custody at Guantanamo Bay. The court reasoned that these public facts formed only the general background to the case and that to litigate it would require access to more particular facts, which were neither in the public domain nor accessible to El-Masri. As the court put it, 'advancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law'.⁸² This was because, in order to establish a prima facie case, El-Masri would be 'obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him'.⁸³

The court's reasoning on this point is comprehensible only in the context of the absence of direct or even vicarious liability of the US Government for conduct of individuals within its employ. If there were such liability, establishing the precise nature of the knowledge and involvement of particular individual officers could potentially be avoided, if the apprehension, detention and mistreatment could be shown to be illegal and attributable to US officials acting within the scope of their employment. However, the need in a *Bivens* claim to establish liability on the part of particular individuals meant that the facts central to making out El-Masri's legal case were not his forced disappearance and mistreatment but the roles, if any, that the defendants played in the events he alleged. The court considered that proving this would require evidence of how the CIA is organised and operates:⁸⁴

Such a showing could be made only with evidence that exposes how the CIA organises, staffs, and supervises its most sensitive intelligence operations. With regard to Director Tenet, for example, El-Masri would be obliged to show in detail how the head of the CIA participates in such operations, and how information concerning their progress is relayed to him.

⁷⁹ For example, the ability of non-US citizens to rely on constitutional arguments is a moot point: see Kalajdzic, 'Litigating State Secrets: A Comparative Study'.

⁸⁰ Porter Goss in *El-Masri*, Michael Tenet in *Binyam Mohamed and Others*.

⁸¹ 552 US 947 (2007) (cert den).

⁸² *El-Masri*, 479 F 3d 296, 308–9.

⁸³ *ibid.*, 309.

⁸⁴ *ibid.*

The second basis for the decision in *El-Masri* was that even if the plaintiff could establish a prima facie case, ‘the defendants could not properly defend themselves without using privileged evidence’.⁸⁵ Again, a prominent aspect of this reasoning was based on the need to establish individual liability of particular officers, who would not be able to show, if such was their defence, that their involvement in the particular operation involving El-Masri was limited. Furthermore, the court was concerned not only about the need to prove matters relating to the organisation and operation of the CIA, but that even showing that the mistreatment of El-Masri did *not* occur ‘would require testimony by the personnel involved’ in his detention and interrogation.⁸⁶ Thus, ‘virtually any conceivable response to El-Masri’s allegations would disclose privileged information’.⁸⁷ Neither strand of reasoning in *El-Masri* distinguished cleanly between the *Reynolds* privilege and the *Totten* bar.

Mohamed and Others v Jeppesen Dataplan Inc was ultimately resolved in the same way, although the Court of Appeals for the Ninth Circuit decided it with notably more reluctance than was exhibited by the Fourth Circuit in *El-Masri*. The plaintiffs’ claims were structured quite differently from those in *El-Masri*. Whereas El-Masri sued the Director and other members of the CIA, in *Mohamed and Others v Jeppesen Dataplan Inc* the plaintiffs sued a private corporation.⁸⁸ The claim was based on the Alien Tort Statute and focused on two alleged harms: forced disappearance, and torture and other cruel, inhuman or degrading treatment.⁸⁹ In *Mohamed and Others v Jeppesen Dataplan Inc* the plaintiffs alleged that the defendants were liable directly (for active participation), through their ‘conspiracy with agents of the United States’, and through aiding and abetting US agents.⁹⁰ The plaintiffs’ argument was that the defendants ‘knew or reasonably should have known that the flights involved the transportation of terror suspects pursuant to the extraordinary rendition program’ and that this knowledge could be inferred from the fact that they had allegedly ‘falsified flight plans submitted to European air traffic control authorities to avoid public scrutiny of CIA flights’.⁹¹

The United States intervened in the proceedings and, as in *El-Masri*, two declarations (one classified and one open) were filed by the then Director of the CIA seeking the dismissal of the claim. The District Court granted the motion to dismiss and entered judgment for the defendants. In a judgment filed on 28 April 2009, a three-judge panel of the Court of Appeals reversed and remanded, holding that the Government had failed to establish a basis for dismissal under the state secrets doctrine but permitting the Government to reassert the doctrine at subsequent stages of the litigation.⁹² The Court of Appeals then decided to take the case *en banc* in order to resolve the ‘questions of exceptional importance regarding the scope of the state secrets doctrine’ which the case raised.⁹³ By the time the case was re-argued before the *en banc* Ninth Circuit, President Obama had been elected to the White House. In September 2009 the Obama administration announced

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*, 310.

⁸⁸ Jeppesen Dataplan Inc was said to have provided flight planning and logistical support services in respect of the aircraft and crew employed in task of extraordinary rendition.

⁸⁹ *Mohamed and Others v Jeppesen Dataplan Inc*, 614 F 3d 1070, 1075 (9th Cir 2010) (United States).

⁹⁰ *ibid.*, 1075–76.

⁹¹ *ibid.*, 1076.

⁹² *Mohamed and Others v Jeppesen Dataplan Inc*, 579 F 3d 943 (9th Cir 2009) (United States).

⁹³ *Mohamed and Others v Jeppesen Dataplan Inc*, 614 F 3d 1070, 1077 (9th Cir 2010) (United States).

new policies for invoking the state secrets privilege and it was speculated that reliance on the state secrets doctrine would be withdrawn in *Mohamed's* case. But it was not to be: the new administration, after having reviewed the case, determined that it was appropriate to continue to assert the state secrets privilege in the proceedings.⁹⁴

The *en banc* Ninth Circuit was split six-to-five. In a judgment filed on 8 September 2010 the majority held that the District Court had been correct to dismiss the case by reason of state secrets. Unlike the Fourth Circuit in *El-Masri*, the majority in *Mohamed* was clear that this ruling was based on the *Reynolds* evidentiary privilege and not on the *Totten* bar.⁹⁵ The majority in *Mohamed* stated that *Totten* might bar some of the plaintiffs' claims (in particular, their allegations that Jeppesen had conspired with agents of the United States in the plaintiffs' forced disappearance and torture) but held that it did not need to rule on the matter, given its finding that the *Reynolds* privilege in any event meant that the case could not proceed.⁹⁶ Thus, the majority accepted (as had the Fourth Circuit in *El-Masri*) that the *Totten* bar applies to every case in which 'the very subject-matter of the action is a matter of state secret'.⁹⁷

Again like the Fourth Circuit in *El-Masri*, the majority in *Mohamed* accepted that the *Reynolds* evidentiary privilege may be asserted 'prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial'.⁹⁸ The majority in *Mohamed and Others v Jeppesen Dataplan Inc* accepted that the showing that the Government must make to prevail prospectively may be 'especially difficult', but 'foreclosing the Government from even trying to make that showing would be inconsistent with the need to protect state secrets'.⁹⁹ The majority accepted that, ordinarily, a successful invocation of the *Reynolds* privilege means that the particular evidence in respect of which it is invoked is excluded, and the litigation continues without that piece of evidence. But the majority ruled that, in some instances, the application of the privilege may require the dismissal of the action altogether: 'when this point is reached, the *Reynolds* privilege converges with the *Totten* bar'.¹⁰⁰ The majority was prepared to assume (without deciding) that the plaintiffs' prima facie case and Jeppesen's defence would not inevitably depend on privileged evidence, but held that dismissal was nonetheless 'required under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets'.¹⁰¹

Judge Hawkins filed a powerfully written dissenting opinion, which was joined by four others. The dissent's starting point was starkly expressed:

[T]he state secrets doctrine . . . is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets.¹⁰²

⁹⁴ *ibid.*

⁹⁵ *ibid.*, 1085.

⁹⁶ *ibid.*

⁹⁷ *ibid.*, 1078 (citing *Reynolds*, 345 US 1, at 11). The majority was nonetheless anxious to underscore that the 'categorical', 'absolute' protection of the *Totten* bar 'is appropriate only in narrow circumstances' (*ibid.*, 1084).

⁹⁸ *ibid.*, 1081.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*, 1083.

¹⁰¹ *ibid.*, 1087 emphasis added.

¹⁰² *ibid.*, 1094.

In their contribution to this volume at chapter eight, 'Navigating the Shoals of Secrecy', David Cole and Stephen Vladeck provide an account of a second system that has been developed in the US in habeas petitions from Guantanamo Bay. According to procedures that have been fashioned in that context, intelligence material can be given to security-cleared lawyers acting for individuals who are detained. It was precisely such security-cleared lawyers that Binyam Mohamed claimed should be provided with the 42 documents and who, ultimately, were provided with them. However such individuals are prohibited from disclosing such information, even to their own clients, and secrecy prevails even if the individual needs to be told the information against him in order to meet minimum conditions of fairness. Furthermore, as Cole and Vladeck point out, under this system, in common with claims to state secrecy in civil damages claims, judges are not prepared to second-guess executive determinations, which are regarded as effectively determinative.¹⁰³

VI. A CLASH OF LEGAL CULTURES

For cases involving claims of gross human rights violations to be struck out at a preliminary stage based on general assertions of secrecy, as occurred in *El-Masri* and *Mohamed and Others v Jeppesen Dataplan Inc*, and for judges to provide no meaningful scrutiny of secrecy claims, is quite alien to lawyers schooled in Dicey's principle of equality before the law and the correlative absence of any special immunities for state officials.¹⁰⁴

Traditionally, such issues in the United Kingdom would be addressed through the PII process. If a minister considers that relevant evidence cannot be disclosed for reasons of national security, he signs a PII certificate to that effect. The Government will not claim PII based on a 'class' of documents, but only where the disclosure of the content of particular documents, or parts thereof, would cause identified harm to the public interest. The PII certificate is subject to review by a court and an assessment must be made by the court as to whether disclosure would cause 'substantial harm' or 'real damage' to the public interest. If so, this harm or risk of harm must be weighed against the interests in the administration of justice in having the documents disclosed to the other party – this is now referred to as the 'Wiley balance'.¹⁰⁵ Thus, a court in the United Kingdom may uphold a PII certificate only if it is satisfied that the public interest in maintaining confidentiality outweighs the public interest in disclosure. This was the process that was gone through in the *Binyam Mohamed* case.

The idea of 'balance' is central to the way in which the common law has fashioned the tools with which judges are to weigh the imperatives of security in any particular litigation in the United Kingdom.¹⁰⁶ It is a constitutional fundamental in our legal system that the view of the Government of the day does not exhaust the public interest: and national

¹⁰³ Cole and Vladeck chapter eight of this volume.

¹⁰⁴ AV Dicey, *Introduction to the Law of the Constitution* (London, MacMillan & Co, 1885), eg as he famously described the principle of legal equality in England, p 193: 'With us every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen'.

¹⁰⁵ See *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274 (United Kingdom). In fact, the Wiley balance dates back to *Conway v Rimmer* [1968] AC 910 (United Kingdom).

¹⁰⁶ For an overview of the authorities, see P Craig, *Administrative Law*, 7th edn (London, Sweet & Maxwell, 2012) para 13-009.

security is designed to safeguard the public interest, not merely the Government of the day. This was authoritatively recognised by the House of Lords as long ago as 1956¹⁰⁷ and since then has been many times repeated and emphasised.¹⁰⁸ The contrary position had been taken by the House of Lords in the famous Second World War case of *Duncan v Cammell Laird*,¹⁰⁹ but this was overruled by the law lords first (for Scots law) in 1956¹¹⁰ and then (for English law) in the celebrated decision of *Conway v Rimmer* in 1968.¹¹¹ In 1995 the House of Lords described *Duncan v Cammell Laird* as having had ‘dangerous consequences’.¹¹² Moreover, the principle that national security claims must be capable of judicial determination is also a requirement of European human rights law. Ministerial certificates that have the effect of conclusively determining proceedings on national security grounds have been held to be incompatible with both EU law and the European Convention on Human Rights.¹¹³

We can now see the problem starkly, and it arises from a clash of legal cultures. The United States has become accustomed to a legal regime which, as exemplified in *El-Masri* and *Mohamed and Others v Jeppesen Dataplan Inc*, effectively operates as an absolute bar to the disclosure or examination of material which relates to the operation of the intelligence services, since their actions are regarded as classified. In contrast, the judgments of the Divisional Court and the Court of Appeal in *Binyam Mohamed* are firmly located within the context of the common law and European rule of law culture. The matter was perhaps put most clearly by Lord Judge CJ, who indicated in *Binyam Mohamed* that he had been ‘unable to eradicate the impression’ that the Court was being invited by the Government to accept that once the Secretary of State has made his judgement that matters must be kept secret, ‘as a matter of practical reality, that should be that’. Lord Judge reminded the Secretary of State that, although his views were entitled to great respect, ‘they cannot command the unquestioning acquiescence of the court’. The consequence, he explained, was that¹¹⁴

in our country, which is governed by the rule of law, upheld by an independent judiciary, the confidentiality principle is indeed subject to the clear limitation that the government and the intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so.

Whilst the Government purported to accept that the control principle could not be absolute, it appears that it regarded the possibility of disclosure over a claim for PII on national security grounds as theoretical rather than real. It certainly appears that the US administration understood this to be the case and it was, in effect, the position urged upon the Court of Appeal by the Government, as Lord Judge CJ observed.

¹⁰⁷ *Glasgow Corporation v Central Land Board*, 1956 SC (HL) 1, at 18–19 (Lord Radcliffe): ‘the interests of government, for which the minister should speak with full authority, do not exhaust the public interest’.

¹⁰⁸ See, eg, *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, at 1127 (Lord Edmund-Davies), 1131 and 1134 (Lord Keith) and 1143 (Lord Scarman). At 1143 Lord Scarman described judicial balancing as the very ‘essence of the matter’.

¹⁰⁹ *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624.

¹¹⁰ *Glasgow Corporation v Central Land Board*, 1956 SC (HL) 1.

¹¹¹ *Conway v Rimmer*, [1968] AC 910.

¹¹² *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274, at 289 (Lord Woolf).

¹¹³ See, respectively, Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, [1987] 1 QB 129 and *Tinnelly & Sons Ltd v United Kingdom* (1999) 27 EHRR 249.

¹¹⁴ [2010] EWCA Civ 65, [2011] QB 218, at [46].

Seen in this context, what the seven paragraphs disclosed, and *even the origin* of the information they contained, was only part of a larger issue. The larger issue was that the UK courts demonstrated that they mean what they have long said: that they are the ultimate guardians of the public interest and the rule of law requires that they have the final say on whether material should be disclosed. This is a position that stands in marked contrast to the approach taken by US courts in the national security context.

This analysis is supported by a further aspect of the *Binyam Mohamed* case which is revealing. The UK authorities did actually disclose a substantial amount of information that had been provided by the CIA, and the Divisional Court referred to such information without objection in its first judgment. Thus, the Divisional Court had referred without objection to information provided by the US authorities relating to Mr Mohamed's detention in Pakistan, confession, transfer, questioning, co-operation, request for a lawyer, and subsequent detention by US officials. The point was raised before the Court of Appeal as demonstrative of the qualified nature of the control principle. The response of the intelligence services was that they were able to judge that these disclosures would not have been found objectionable by the United States, and, they said, were expressed in general terms and disclosed nothing of substance. Lord Neuberger MR stated that he did not find this particularly convincing given that the objection to disclosure of the seven paragraphs was not based on their substance either but that they referred to the content of CIA reports.¹¹⁵ This serves to emphasise that the heart of the issue was the division of powers: whether courts or the executive should have the authority to disclose sensitive material. This appears to have been more significant even than the origin of the information. Even if the court's assessment of the sensitivity of the material was sound, and might, on another day, have been shared by the intelligence services, it was objectionable to the United States simply in virtue of being an assessment of a court.

This point is illustrated by a further aspect of the litigation which is possibly its most puzzling aspect of all. Not only had communications from the CIA been voluntarily disclosed in the *Norwich Pharmacal* proceedings but information had also been disclosed which, at the same time, was being said to be highly secret by the US Government on the other side of the Atlantic. The statement filed by CIA Director Michael Hayden, dated 18 October 2007, asserting state secret privilege in *Mohamed and Others v Jeppesen Dataplan Inc* claimed that 'any details' of the extraordinary rendition program were secret other than the limited information made public by President Bush. For instance, it stated that the United States had not 'publicly acknowledged whether any of these plaintiffs were ever in CIA custody'. Therefore the fact that Mr Mohamed had been the subject of extraordinary rendition, and had been held in custody in Pakistan, Morocco, and Afghanistan, was itself said to be a US state secret. The declaration also referred to other matters that were secret such as any information which could have tended to confirm whether any particular allied governments had assisted the CIA.¹¹⁶ The US Government continued to rely on the declarations throughout the proceedings, certifying that they had been affirmed by officials at the highest level.

It is an intriguing feature of this transatlantic tale that, as we have seen, such matters

¹¹⁵ *ibid*, [165].

¹¹⁶ 'Formal Claim of State Secrets and Statutory Privilege by General Michael V Hayden, USAF, Director, Central Intelligence Agency', filed in the US District Court for the Northern District of California, 18 October 2007, especially paras [15], [18]–[20].

had been disclosed in the *Norwich Pharmacal* proceedings by the UK Government. They were addressed in witness evidence, documentary disclosure and had even been the subject of open cross-examination of a Security Service witness. Mr Mohamed's detention in Pakistan, transfer to Morocco, the Dark Prison, Bagram and Guantanamo Bay, and the involvement of the UK intelligence services, which were all said by the CIA to be a state secret, incapable of judicial examination, were examined at great length in the UK proceedings and extensively addressed in the Divisional Court's first judgment dated 21 August 2008. This occurred without objection from the UK authorities, indeed, with their cooperation.

Leaving aside the puzzle of how such divergent approaches were taken on different sides of the Atlantic, which on the face of it appears to expose another example of executive over-claiming of secrecy, it serves to emphasise that the nerve struck by the *Binyam Mohamed* case related to the division of powers and not to the content or origin of the information disclosed. From the US perspective, it is one thing for information to be released by the *executive* – in this case the UK intelligence services – but it is considered to be quite another thing for classified information to be released into the public domain by a *court*. For the US authorities, national security and associated secrecy is a matter that lies within the province of the executive. By contrast, the UK courts have long asserted a jurisdiction to oversee claims of secrecy and, moreover, to balance them against competing rule of law imperatives. That this division of powers issue was at the heart of the US backlash against the *Binyam Mohamed* claim draws support from comments made by Kenneth Clarke MP during debates on the Justice and Security Bill: 'the Americans', he said, 'are extremely alarmed about the fact that *we are giving those powers to our judges*' (emphasis added).¹¹⁷ At the behest of the Americans, the Justice and Security Act 2013 took those powers away from judges and gave them back to the Government.

VII. THE WIDER IMPACT OF THE NORWICH PHARMACAL ISSUE

Late in June 2012, not long after the Justice and Security Bill commenced its passage through Parliament, the High Court handed down its judgment in *R (Omar and others) v Secretary of State for Foreign and Commonwealth Affairs*.¹¹⁸ Omar and the other claimants had been charged with murder and other offences in connection with their alleged involvement in a terrorist bombing in Kampala, Uganda, in 2010, in which 76 people were killed. Omar alleged that he was arrested in Kenya and illegally rendered to Uganda and that he was tortured and subjected to ill-treatment in Uganda. The Kenyan and Ugandan authorities denied that he had been detained in Kenya or that he had been mistreated. Omar made an application to the Constitutional Court of Uganda to have the criminal charges stayed as an abuse of process. Because there were indications that UK intelligence services had provided intelligence or other assistance to the Kenyan and

¹¹⁷ HC Deb, 4 March 2013, col 748. See also the view of Sir Daniel Bethlehem, Foreign Office Legal Adviser at the time of the *Binyam Mohamed* case, who has stated that the fallout from the case was only in part due to the disclosure of the seven paragraphs: 'More serious, in my view, was the decision of the Divisional Court to reject the PII certificate and substitute its own view of the balance of public interest'. *Statement of Sir Daniel Bethlehem QC, on the Justice and Security Bill*, Written Evidence to the JCHR, 15 October 2012, [24].

¹¹⁸ [2012] EWHC 1737 (Admin) (United Kingdom).

Ugandan authorities, Omar commenced a *Norwich Pharmacal* claim in the High Court in London seeking disclosure of evidence in the possession of the UK Government which would provide the crucial corroboration of his claims.

At a preliminary hearing, Thomas LJ, one of the two judges who had decided the *Binyam Mohamed* case in the Divisional Court, raised a question as to whether it was appropriate for the court to exercise *Norwich Pharmacal* jurisdiction given that there exists a statutory regime for mutual assistance between states in judicial proceedings.¹¹⁹ This was manna from heaven for the Government, who adopted the argument that the statutory regime did indeed preclude the exercise of *Norwich Pharmacal* jurisdiction in aid of foreign proceedings that are underway, and that where evidence was sought to assist foreign proceedings, a mutual assistance request would have to be made. In a criminal case, the statutory process may be triggered only at the request of a foreign court, prosecuting authority or law enforcement agency (and not at the instigation of an individual). The legislation also offers protection against disclosure certified by the Secretary of State to be prejudicial to the security of the United Kingdom and no balancing of interests is permitted.

In *Omar* the Divisional Court gave judgment rejecting the claim on the merits and also accepting that the existence of the statutory regimes for mutual assistance precluded the exercise of *Norwich Pharmacal* jurisdiction. In February 2013 the Court of Appeal dismissed an appeal and, notably, held that the Court lacked jurisdiction in the light of the statutory regimes.¹²⁰ It was therefore found that Parliament had already excluded the *Norwich Pharmacal* jurisdiction and the provisions in the Justice and Security Bill were unnecessary. Maurice Kay LJ stated that:

On the legal analysis I have just expounded, *Binyam Mohamed* was a manifestation of *communis error*. The [Justice and Security] Bill assumes that there is a problem which requires resolution. If the problem does not exist, the parliamentary assumption that it does is equally erroneous.¹²¹

Whilst the court's analysis of the issue of jurisdiction was not influenced expressly by the fall-out from the *Binyam Mohamed* case, the court placed considerable emphasis on the fact that the statutory regimes precluded judicial balancing of secrecy against competing considerations.¹²² The importance of the two different approaches to disclosure had been starkly demonstrated by the *Binyam Mohamed* case.

The Court of Appeal's volte-face in *Omar* might be thought to have consigned the story of the *Binyam Mohamed* case and its repercussions to a cul-de-sac of legal history. However, the repercussions of the case reverberated far further than the law on *Norwich Pharmacal* relief. They fed directly into the provisions of the Justice and Security Act introducing closed material procedure into ordinary civil proceedings.

Closed material procedure was first invented in the context of immigration appeals. A special tribunal called the Special Immigration Appeals Commission was established with powers to hear secret evidence in immigration cases.¹²³ In order to make such pro-

¹¹⁹ The Evidence (Proceedings in Other Jurisdictions) Act 1975 (for civil cases) and the Crime (International Co-operation) Act 2003 (for criminal cases).

¹²⁰ *R (Omar and others) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118 (United Kingdom).

¹²¹ *ibid*, [26].

¹²² *ibid*, [25].

¹²³ Special Immigration Appeals Commission Act 1997.

ceedings less unfair, special counsel known as special advocates are instructed to act in the interests of the individual in 'closed' hearings but they are not permitted to communicate with the person whose interests they represent unless permission is obtained.¹²⁴ This procedure had been extended by statute into other areas, most notably Control Orders and Terrorism Prevention and Investigation Measures (TPIMs).¹²⁵ The Justice and Security Act confers on courts a jurisdiction to use closed material procedure in any civil proceedings involving national security sensitive information.¹²⁶

One of the significant features of the statutory schemes which have introduced closed material procedure in particular contexts is that they preclude any balancing of interests in considering whether material should be made 'open' and disclosed to the affected individual. If it would be contrary to the interests of national security to disclose the material it cannot be disclosed.¹²⁷ This precludes disclosure of information even where the harm to national security concern is clearly outweighed by the interests of justice: perhaps, for example, where it is necessary to make a finding of gross wrongdoing. In the context of immigration powers and TPIMs the wrongdoing of public officials is rarely in issue, but in the context of ordinary civil proceedings the issue is obviously of more relevance, as the *Binyam Mohamed* case well illustrates.

During the passage of the Justice and Security Bill through Parliament the Government made a number of concessions to critics of the Bill and introduced some safeguards. However, one proposal that they steadfastly refused to accept was the introduction of a balancing of interests approach in determining what material should be disclosed once a court has opted to use a closed material procedure. The Act requires that rules of court be made to ensure that 'material not be disclosed' if the disclosure of the 'would be damaging to the interests of national security'.¹²⁸ This effectively reverses *Conway v Rimmer* for litigation in the national security context, once the court has declared the case appropriate for closed material procedure. The consequences of this could be very grave indeed.

The recent case of *Secretary of State for the Home Department v CC and CF* demonstrates this clearly. This was a control order/TPIM case and therefore one of the limited types of case where CMP is currently applied under statutory authority. Exceptionally, the case was not solely about whether the two defendants had been involved in terrorism-related activity. The defendants argued that the imposition of control orders on them had been an abuse of process because of the involvement of British officials in what they claim to have been unlawful detention and mistreatment in Somaliland and in their unlawful return to the United Kingdom (where control orders were imposed). Lloyd

¹²⁴ For an account of this system see Cole and Vladeck in chapter eight of this volume. For reasons they explain, special advocates rarely seek permission to communicate with the individual whose interests they represent.

¹²⁵ Prevention of Terrorism Act 2005; Terrorism Prevention and Investigation Measures Act 2011.

¹²⁶ Section 6.

¹²⁷ Special Immigration Appeals Commission Rules (SI 2003/1034), r 4(1). The courts have held that in some contexts prohibition on disclosure has to be read subject to an individual's rights under Article 6 of the European Convention on Human Rights to know the case against them. This is not the introduction of a balance but a trump, because if the information is necessary to enable a person to answer the case against them it must be disclosed: see especially *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28, [2010] 2 AC 269. However, this principle does not always apply. It has for example been held not to apply to immigration or employment matters: *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110; *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452. In *CC and CF* the principle was held not to apply to allegations of abuse of process: [2012] EWHC 1732 (Admin) (United Kingdom).

¹²⁸ Section 8(1)(c).

Jones J held that the abuse of process case was not established. He recorded that the position of the Secretary of State was that she neither confirmed nor denied that the UK authorities had been involved in the arrest, detention and return of the defendants. His judgment simply records that, with ‘considerable reluctance I have come to the conclusion that these matters cannot be addressed in my open judgment’.¹²⁹ There is no more than that. The defendants lost but they do not know why. The court’s findings of fact on the abuse of process allegations are all ‘closed’. The claimants thus do not know to what extent, if at all, the British authorities were involved in their arrest, detention and deportation. They do not even know what the Government’s case is. The case is under appeal, but it demonstrates at least the extent of secrecy that could result from the Justice and Security Act and stands in marked contrast to the Divisional Court’s judgment in *Binyam Mohamed*.

It should now be clear why this approach was taken in the Act. It was taken to close the lid on the disclosure of sensitive national security information in a variety of cases, not just in *Norwich Pharmacal* claims. For the same reason, the Government resisted proposed amendments that would have permitted the use of closed material procedure only after the PII process had been exhausted. The Government was rarely explicit that the same concerns that had led to the curtailment of the *Norwich Pharmacal* jurisdiction were also influencing the degree of disclosure permitted under closed material procedure. But Kenneth Clarke MP made the connection in response to an amendment that would have introduced a balancing of interests approach. He said it could not be accepted, as it ‘would give rise to the sort of power that promoted our allies’ concerns following the *Binyam Mohamed* case’.¹³⁰

The effect of precluding the courts from undertaking a balance of interests will undoubtedly be to increase secrecy. This is not so much because the courts regularly order disclosure when applying a balancing approach but because the test does not just fall to be applied by the courts but must be applied by the Government when deciding what material it should apply to withhold from disclosure.¹³¹ Although over-claiming of secrecy still occurs, in the main the Government diligently applies the balancing of interests test and the result is more disclosure than would otherwise be made. This is demonstrated by *Binyam Mohamed* because, as explained above, most of the information about the extraordinary rendition of Mr Mohamed was voluntarily disclosed by the Government and was not ordered to be disclosed by the court. In cases where such an approach is not applicable, such as *CC and CF*, the results can be starkly different.¹³²

A great deal will therefore turn on how the courts interpret their power to adopt

¹²⁹ *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin) (United Kingdom).

¹³⁰ HC Deb, 4 March 2013, col 707. There is a significant difference between *Norwich Pharmacal* cases and ordinary civil proceedings. In the latter, the Government will often, although not invariably, be able to avoid disclosure by conceding an issue or withdrawing a case. However, one of the main purposes of the Act was to remove this prospect by enabling the Government to litigate more claims under closed material procedure. Kenneth Clarke MP made the point that the introduction of a balancing test would mean that the prospect would be reintroduced in cases in which the Government did not agree with the decision of a court to order disclosure. While the courts are still able to order disclosure over Government objections under the Justice and Security Act 2013, this is only on the much more unlikely basis that they disagree with the Government’s assessment that it would give rise to a danger to national security.

¹³¹ See *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] 1 WLR 274 (United Kingdom).

¹³² Of course, the result in terms of disclosure provided can also be precisely the same.

closed material procedure under the Justice and Security Act and how ready they are to accede to Government requests that closed material procedure be employed: because once a court orders a closed material procedure, the curtain of secrecy will descend on the proceedings. The *Binyam Mohamed* case was a significant contributory factor in the adoption of this new model for litigating national security cases in the United Kingdom. Understanding the story of the case is central to understanding the Justice and Security Act and the new shape of national security law in the United Kingdom.

VIII. CONCLUSION

The transatlantic tale that we have told in this paper has charted the advance and the retreat of the rule of law. In unprecedented litigation, *Binyam Mohamed* prised open an aspect of the post-9/11 relationship between the UK intelligence services and their US counterparts. The light of transparency and accountability was momentarily, but importantly, shone on that relationship. Since then the law has retreated behind statutory bars on disclosure which provide special exemptions and privileges in the context of national security. The most immediate cause has been pressure from the US intelligence community. The most obvious result is a levelling-down of openness and transparency, to a position closer to that found under US law. It has also resulted in the abrogation of an important constitutional principle in the United Kingdom: that it is for independent judges ultimately to decide in legal proceedings whether the public interest demands disclosure.

It is an important part of this story, and one that we should in conclusion make more explicit, that this increase in secrecy in the United Kingdom has occurred not only in relation to the dealings between the UK and foreign government agencies, but also in relation to the conduct of the intelligence services that does not bring the control principle into play. The provisions of the Justice and Security Act apply to national security in general and are not limited to information-sharing or joint operations with intelligence partners. The UK intelligence agencies saw an opportunity to keep their secrets secret, and seized it. The 9/11 terrorist attacks on the United States drew the US and UK intelligence services out of the shadows, but before the law they now retreat, hand-in-hand, into the darkness.