

# California Law Review

---

VOL. 106

AUGUST 2018

No. 4

---

Copyright © 2018 by California Law Review, Inc., a California Nonprofit Corporation

## Procedural Experimentation and National Security in the Courts

Shirin Sinnar\*

*In the last fifteen years, individuals have brought hundreds of cases challenging government national security practices for violating human rights or civil liberties. Courts have reviewed relatively few of these cases on the merits, often deferring broadly to the executive branch on the grounds that they lack expertise, political accountability, or the ability to protect national security secrets. Yet in cases where courts have permitted civil suits to proceed far enough to decide legal questions, influence policy, or afford litigants relief, they have often experimented with new methods for managing the secret information implicated in many national security cases. These procedures include centralizing cases through Multidistrict Litigation, conducting in camera review of sensitive documents, pressing the government to provide opposing counsel access to secret evidence, appointing special experts of their own, facilitating*

---

DOI: <https://doi.org/10.15779/Z382B8VC0B>.

Copyright © 2018 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

\* John A. Wilson Distinguished Faculty Scholar & Associate Professor of Law, Stanford Law School. Many thanks to Janet Alexander, Carmen Cheung, Jen Daskal, David Dyzenhaus, David Engstrom, Mohammad Fadel, Deborah Hensler, Ramzi Kassem, Alexi Lahav, Amalia Kessler, Dave Marcus, Jenny Martinez, Imran Maskatia, Tim Meyer, Jim Pfander, David Pozen, Kent Roach, Joanna Schwartz, Sudha Setty, Hina Shamsi, Ganesh Sitaraman, David Sklansky, Norman Spaulding, Steve Vladeck, Bob Weisberg, Ingrid Wuerth, and workshop participants at the Seattle Civil Procedure Workshop, the Bay Area Procedure Forum, the Junior Federal Courts Workshop, the Vanderbilt New Voices in Civil Justice Workshop, and faculty workshops at Stanford Law School and the University of Toronto Faculty of Law. I am grateful for research assistance from Margot Adams, Hannah Kieschnick, Mollie Miller, Adrienne Pon, Anna Porto, Colin Scott, Brandon Teachout, Reece Trevor, and the extraordinary librarians at Stanford Law School.

*interlocutory review, and deciding cases in an incremental and dynamic fashion. Illuminating this procedural experimentation, this Article contends that courts can address secrecy in national security adjudication in a tailored, pragmatic fashion, rather than deferring to the executive at the threshold. But this account also shows the limits of such strategies: where misapplied, some procedures may fall short of due process, undermine norms of public access and transparency in the courts, reduce pluralism in the adjudication of disputes, or import bias into judicial decision-making. Together, this suggests that courts should adopt these procedures cautiously and with case-specific assessment of their costs and benefits. Panning out from national security litigation, the Article also offers a set of secondary insights for civil procedure more generally: it highlights the role of the executive branch in making procedural law, the costs of certain trans-substantive procedures, and distorted perceptions across the civil–criminal procedure divide.*

Introduction .....	993
I. The Judicial Role in “National Security” .....	997
A. The Deference Debate .....	999
B. The Secrecy Rationale for Deference .....	1001
II. Procedural Experimentation Over National Security Secrecy .....	1006
A. Centralization through Multidistrict Litigation .....	1008
B. In Camera Review .....	1012
C. Cleared Counsel .....	1015
D. Court-Appointed Experts and Masters .....	1018
E. Facilitating Interlocutory Appellate Review .....	1021
F. Incremental and Dynamic Judicial Management .....	1023
III. The Benefits of Procedural Experimentation .....	1026
A. Supplementing Adversarialism .....	1027
B. Spurring the Development of Architecture to Protect Secrets 1030	
C. Prompting Executive Reconsideration of Secrecy .....	1032
D. Countering Cognitive Biases .....	1033
E. Enabling Judicial Learning .....	1036
IV. Secrecy Experimentation and Rule of Law Values .....	1037
A. The Due Process Question .....	1038
B. Transparency and Public Access to the Courts .....	1040
C. Threats to Pluralism in Judicial Decision-Making .....	1043
D. Concerns Over Bias .....	1045
E. Too Little, Too Late? .....	1047
V. Implications for Civil Procedure .....	1049
A. Bottom-Up Procedural Innovation .....	1050
B. Trans-Substantive Diffusion Across Civil Procedure .....	1054
C. Diffusion Across the Civil-Criminal Procedure Divide ....	1055

Conclusion.....	1060
-----------------	------

## INTRODUCTION

In June 2018, the Supreme Court upheld President Trump’s order banning citizens of multiple, largely Muslim, countries from entering the United States.<sup>1</sup> Although the Court’s decision dismayed many for its willingness to overlook the president’s repeated expressions of religious animus, it represented only the latest example of judicial deference to the executive in national security cases.

In the last fifteen years, individuals have brought hundreds of cases challenging government counterterrorism policies or national security practices. But courts have resolved few of these cases on the merits, blocking many at the outset on account of the state secrets privilege, standing and immunity doctrines, jurisdictional restrictions, pleading standards, restrictions on the judicial creation of implied constitutional remedies, and other doctrines.<sup>2</sup> Although courts cite a range of doctrines as the basis for dismissing these cases, they often profess the same underlying concerns: the sense that courts lack the expertise or political accountability to decide complex, high-stakes questions; the fear that adjudication could reveal national security secrets; or the apprehension that managing highly sensitive information could present intractable administrability challenges. The government pushes hard to convince courts to defer to the executive branch’s positions or to decline review altogether, arguing that a failure to do so will expose the nation to grave threats for which the judges will bear responsibility. Faced with that specter, many courts choose not to intervene. As a result, allegations of human rights violations in a range of contexts—from immigrant detentions to torture to secret surveillance—go unheard.<sup>3</sup> Victims of abuse rarely win compensation or even acknowledgment of rights violations, while executive policies remain largely unchecked by judicial review, and important questions of constitutional rights remain unanswered.<sup>4</sup>

---

1. See *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337 (2018).

2. See Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 *DRAKE L. REV.* 1035, 1037–38 (2016); Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 *FORDHAM L. REV.* 827, 829 (2013); JAMES E. PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* xiv–xv (2017).

3. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (refusing to authorize a *Bivens* claim for damages in a constitutional challenge to post-9/11 immigrant detentions); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (refusing to authorize a *Bivens* claim for damages arising out of extraordinary rendition); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (dismissing a challenge to extraordinary rendition and torture based on the state secrets privilege); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (holding that plaintiffs failed to establish standing to challenge secret surveillance under the Foreign Intelligence Surveillance Act Amendments Act of 2008).

4. For more on the harm presented by this limited judicial review, see generally Vladeck, *The Demise of Merits-Based Adjudication*, *supra* note 2; PFANDER, *supra* note 2.

Despite this pattern, even before the lower courts invalidated several versions of the travel ban,<sup>5</sup> some courts faced with national security questions *did* permit civil suits to proceed far enough to decide legal questions on the merits, afford litigants some relief, or influence state policy. So far, such cases remain unusual.<sup>6</sup> Yet examining them reveals something interesting about the manner in which courts are working through national security cases: in permitting cases to move forward, some courts are experimenting with new approaches to review and manage government claims that information is too sensitive to be exposed in court. Thus, these courts are finding procedural mechanisms to sustain adjudication where the government claims that national security secrecy requires judicial deference. These procedures include: (1) centralizing and transferring cases through Multidistrict Litigation (MDL); (2) probing government secrecy assertions *in camera*; (3) supporting private counsel to obtain security clearances to access secret information; (4) appointing masters and independent experts; (5) enabling the government to seek immediate appellate review of orders requiring the disclosure of information; and (6) deciding cases in a deliberately incremental and dynamic fashion. These practices have elicited little notice or analysis in the largely substantive legal scholarship on national security.<sup>7</sup>

This Article illuminates this procedural experimentation in national security civil litigation. It focuses less on the bottom-line rulings of courts and more on the procedural steps along the way. It also turns our attention from

---

5. See *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd sub nom*, *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337 (2018); *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018), *as amended* (Feb. 28, 2018); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *cert. granted sub nom*. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017).

6. See *infra* Part II.

7. Notable exceptions exist. A recent article argues that courts treat national security secrecy assertions differently from ordinary privilege claims and proposes innovations such as the use of “special advocates.” Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 160–63 (2017). Other work highlights the procedural challenges of litigating against government state secrets claims. See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010); Lee Tien, *Litigating the State Secrets Privilege*, 42 CASE W. RES. J. INT'L L. 675, 689 (2010). An insightful student note discusses the spread of certain procedures from criminal to civil litigation. Ian MacDougall, Note, *CIPA Creep: The Classified Information Procedures Act and Its Drift into Civil National Security Litigation*, 45 COLUM. HUM. RTS. L. REV. 668 (2014). Other articles discuss the use of one or two specific practices for managing secrets. See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 174–75 (2006) (discussing the use of special masters in national security Freedom of Information Act (FOIA) litigation); David Cole & Stephen I. Vladeck, *Comparative Advantages: Secret Evidence and ‘Cleared Counsel’ in the United States, the United Kingdom and Canada*, in *SECURITY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW* 176–77 (David Cole, Federico Fabbrini & Arianna Vedaschi eds., 2013) (discussing the use of security-cleared counsel in Guantanamo habeas proceedings and in foreign jurisdictions). The present Article goes further in presenting a synthetic assessment of procedural experimentation with respect to national security secrecy in civil litigation and in situating such experimentation within procedural law more generally.

appellate courts to trial courts: not only do district court judges grapple with the tensions between enabling individuals to challenge potential rights violations and accommodating legitimate security interests, but they also confront complex questions of discovery and case management that appellate panels may never hear. Managing these challenges, trial judges innovate, often borrowing practices from other areas of civil litigation or criminal procedure to handle the difficulties they encounter.<sup>8</sup>

In the Trump era, the President's open animus towards racial and religious minority groups and erratic decision-making will lead some judges, especially in the lower courts, to question executive national security claims more readily than in the past. Yet in cases where judges do not feel able to resolve disputes on the public record, concerns over the disclosure or management of national security information will persist. The account of procedural experimentation in this Article suggests that, even in such contexts, courts can reject calls to limit their review of national security cases without the sky falling. Among other reasons, judges have procedural options that enable them to hear such cases without exposing secrets whose release could harm national security. For instance, procedures such as conducting *in camera* review, facilitating security clearances for private counsel, and using court-appointed experts provide a means for courts to assess government secrecy assertions even where a fully adversarial process is not possible. Consolidating similar cases through MDL and assigning them to judges experienced with classified information can reduce the risk of inadvertently exposing secrets. In addition, courts' willingness to probe secrecy claims through these kinds of procedures spurs the development of institutions to safeguard sensitive information in litigation. The use of these procedures also prompts the executive to narrow its privilege assertions, reducing secrecy as well as the volume of information over which courts must render difficult decisions. Moreover, these procedures may mitigate the cognitive biases associated with judges' evaluation of secret information, allowing for a more rational assessment of the costs and benefits of ordering disclosure. Finally, a managerial approach to adjudicating both rights and remedies can allow courts to resolve certain legal questions without engaging in privilege battles, and to gain more information over time before confronting such challenges.

To be clear, the procedural experimentation described here does not address every objection to judicial review over national security matters, such as the claim that the democratically elected branches alone should decide questions implicating national security. Such arguments must be met largely on substantive

---

8. Signaling the extent of *judicial* interest in such practices, the Federal Judicial Center has published several studies in recent years on the handling of secrets and national security concerns in criminal and civil litigation. See ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., KEEPING GOVERNMENT SECRETS: A POCKET GUIDE ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND CLASSIFIED INFORMATION SECURITY OFFICERS (2013); ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES (2013).

rather than procedural terms. The procedures assessed in this Article respond more specifically to the secrecy rationale for judicial deference—that is, the idea that courts should refrain from reviewing cases affecting national security, or sharply limit their review, because adjudication will lead to the dangerous exposure of sensitive national security information or to intractable challenges in reviewing and managing such information.

While undercutting the secrecy rationale for deference, the evolving procedures for managing secrets raise a different set of concerns: they often exist in tension with rule of law values. The most significant question is whether accommodations for secrecy actually satisfy procedural due process in a given context. Where litigants challenge state deprivations of liberty or other protected interests, courts must ensure that procedures limiting litigants' access to information still enable fair contestation of the basis for that deprivation. Apart from that threshold question, courts should consider the impact of procedural adaptations on other rule of law values. For example, certain practices might unsettle norms of open and public court proceedings. In addition, certain procedures that protect sensitive information—like the centralization and transfer of related cases through MDL—reduce pluralism in the resolution of public law disputes and threaten to introduce bias (or the appearance of bias) into judicial decision-making. Given these risks, courts should approach these procedures in a cautious, case-specific fashion, not as a set of “off the rack” solutions to national security secrecy. To this end, this Article identifies the most significant rule of law concerns and sets out principles for how courts might navigate them.

Beyond contributing to scholarship on the role of courts in national security, this account of procedural experimentation generates secondary insights and questions for procedural law at large. First, it provides further evidence that procedural reform often arises from the case-specific efforts of trial courts rather than from the top-down, systematic efforts of Congress or the Rules Committee. It also raises the question of whether the executive branch plays a larger role in shaping procedure than past scholarship has recognized. Second, procedural choices in national security cases provide an opportunity to reexamine certain features of trans-substantive procedure. For example, using procedures in national security cases commonly associated with private complex litigation, such as MDL, puts into sharp relief the costs of centralizing cases and assigning them to particular courts in a highly discretionary fashion. Third, this Article also posits that the divide between civil and criminal procedure is not as formidable as some scholarship has suggested. Judges regularly look to criminal procedure to determine whether the protections for individuals in civil litigation are adequate. The more intriguing question is whether the tendency to view criminal procedure as comparatively robust and rights-protective actually undercuts reform in civil litigation by limiting the protections imaginable. From

the starting point of national security litigation, this Article thus points to new questions for trans-substantive procedure.

The Article proceeds as follows. Part I recaps the longstanding theoretical debate on the role of courts in national security cases, elaborating primarily on the secrecy rationale for deference and the way in which it has influenced courts to limit their review. Part II examines six particular practices with which courts have experimented in national security cases: (1) consolidating and transferring cases via MDL; (2) conducting *ex parte* and *in camera* review of protected information; (3) using cleared counsel to access protected information; (4) appointing special masters and experts; (5) facilitating interlocutory review; and (6) determining rights and remedies in an incremental and dynamic fashion. Part III contends that these practices can help courts navigate secrecy without deferring so broadly to the executive in national security cases. It elaborates on how these practices supplement the traditional adversarial process, spur the growth of an institutional architecture to protect secrets, encourage the executive to disclose information voluntarily, reduce cognitive biases, and enable judicial learning over the course of litigation. Part IV sets out reasons to nonetheless exercise caution in adopting such procedures: procedural experimentation may risk falling short of due process, impinging on public access and transparency norms in the courts, reducing pluralism in judicial decision-making, and introducing new biases into dispute resolution. It also acknowledges the tentative and halting nature of the experimentation evident so far. Finally, moving beyond national security, Part V assesses the broader implications of this discussion for civil procedure as a whole, suggesting insights that corroborate, challenge, or present new questions for procedural scholarship at large.

## I.

### THE JUDICIAL ROLE IN “NATIONAL SECURITY”

The attacks of September 11, 2001, reinvigorated a recurrent debate in legal scholarship on how courts should respond to wartime policies, emergencies, or matters of national security. The role of courts in adjudicating public law disputes has long been contested, in any number of substantive areas.<sup>9</sup> But many judges and scholars have asserted that wartime, emergencies, or national security matters present *different* concerns that demand an additional degree of deference to the executive branch, whatever the proper baseline is for judicial involvement in more ordinary circumstances.<sup>10</sup>

Because the September 11 attacks involved a massive loss of life and led to armed conflict, post-9/11 proponents for judicial deference initially found it

---

9. Classics in this longstanding debate include ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).

10. See *infra* note 12 (discussing scholarship).

unnecessary to define the temporal or substantive boundaries of the conditions triggering such deference: most agreed that an emergency had occurred and that the United States was at war. As the years passed, however, the calls for deference became predicated less often on “wartime” or “emergencies,” and more often on a category of cases deemed to relate to “national security.”<sup>11</sup> Proponents of judicial deference continue to invoke that category, by and large, without endeavoring to define it, instead relying on the general assumption that we know what national security means. But a growing number of scholars have argued that the national security category is ill-defined and elastic.<sup>12</sup> Even the Supreme Court has cautioned that the national security label can be used to “cover a multitude of sins.”<sup>13</sup> Indeed, critics of the national security construct have begun to challenge not just the boundaries of the category or its effect in insulating executive policies from scrutiny, but also the extent to which race and identity influence conceptions of the “nation” to be protected.<sup>14</sup>

However undefined the concept may be, the executive regularly argues that cases touching on national security justify a more deferential judicial approach.<sup>15</sup> The Supreme Court, even while acknowledging the label’s risk of abuse, identifies national security policy as a category triggering a distinct set of considerations for judicial review.<sup>16</sup> This Article accordingly refers to cases “related to national security” as shorthand for the set of cases that the *executive* claims relate to national security—while flagging that the category is itself ripe for further critique and deconstruction. Part I.A recounts the broad contours of the deference debate in national security law. Part I.B then hones in on the deference rationale to which procedural experimentation in courts most responds—the secrecy rationale.

---

11. See, e.g., MARY L. DUDZIAK, WAR-TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 124–27 (2012) (describing transition from deference arguments based on “wartime” to less temporary concepts of national security and foreign relations). Dudziak argued that the idea of “wartime” was constructed to serve as “shorthand” for the “notion that the times are both exceptional and temporary.” *Id.* at 107.

12. For scholarship questioning the self-evident nature of the term, see Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1706–09 (2011) (arguing that, after the Cold War, the concept of national security expanded to include new threats such as climate change and drug trafficking, leading to an expansion of executive national security authority); Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1422–24 (2012) (arguing that, since World War II, and in contrast to the prior Anglo-American tradition, American thinkers increasingly conceived of security as beyond the comprehension of ordinary citizens); MARIANO-FLORENTINO CUÉLLAR, GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES 12–14 (2013) (arguing that competition between political actors for control of public agencies often redefines the concept of national security).

13. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)); see also *Meshal v. Higgenbotham*, 804 F.3d 417, 443–44 (2015) (Pillard, J., dissenting) (criticizing malleability of the national security concept).

14. See, e.g., Darryl Li, *The Unbearable Whiteness of National Security* (June 21, 2017) (unpublished draft) (on file with author).

15. See Deeks, *supra* note 2, at 881.

16. See *Abbasi*, 137 S. Ct. at 1861.

### A. *The Deference Debate*

Calls for judicial deference to the executive in national security matters come in a narrower and a broader form. The narrower version calls for deference to the executive's judgment on a factual or policy question—for instance, whether the disclosure of a particular secret or the removal of a person from a watch list would harm national security. Some commentators refer to this form of deference as “factual deference.”<sup>17</sup> The broader version calls for courts to refrain from review altogether—by, for example, dismissing a case because it involves a “political question” or because litigation would risk the exposure of state secrets. In keeping with other accounts of national security deference, this Article uses the term “deference” to signify both these narrower and broader forms.<sup>18</sup> Despite the differences between the two forms of deference, the arguments for and against each largely overlap, and in practice, their implications sometimes converge. For example, the executive frequently argues that the court's deference to the government on a narrower question (such as whether revealing certain evidence will harm national security) necessitates the dismissal of a case, or that courts should refrain from judicial review altogether to avoid second-guessing more specific executive judgments. In both scenarios, the government seeks effectively the same outcome.

Among legal scholars writing in the post-9/11 period, Eric Posner and Adrian Vermeule most forcefully advocated judicial deference. Citing a line of argument tracing back to Alexander Hamilton, Posner and Vermeule argued that emergencies enhanced the relative importance of the executive's institutional advantages in “secrecy, speed, and flexibility.”<sup>19</sup> Posner and Vermeule celebrated judicial deference to the executive during emergencies as a historically established, normatively desirable, and mostly inevitable practice.<sup>20</sup> Other scholars also called for judicial deference to executive national security claims, advancing formal and functional arguments rooted in the separation of powers.<sup>21</sup>

---

17. See, e.g., Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 446 (2005) (defining “factual deference”); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362–63 (2009) (discussing “fact deference”).

18. See Deeks, *supra* note 2, at 874–75 (disaggregating various forms of deference, but using the term to refer to both narrower and broader conceptions).

19. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 5 (2007). Although Posner and Vermeule link their arguments regarding deference to “emergencies” rather than to any policies bearing on national security, they define a threat to national security as an “essential feature” of emergencies. *Id.* at 4. Further, they imply that their claims may apply to a lesser extent to scenarios outside of full-scale emergencies where “government policy is unusually consequential for foreign policy or for national security.” *Id.* at 42.

20. *Id.* at 6.

21. See, e.g., John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 428 (2003) (arguing that the Constitution envisions no role for the judiciary in the review of war powers); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1551 n.2 (2009) (collecting sources arguing for the superiority of executive decision-making on national security).

The arguments for deference are well-trodden in legal scholarship and judicial opinions, and require little exposition. In sum, one set of arguments contends that the electorally accountable branches of government should largely control national security decisions, in light of the difficulty of making such decisions and the stakes involved.<sup>22</sup> Another line of argument maintains that courts are ill-equipped to decide national security questions because they lack speed and flexibility,<sup>23</sup> access to the intelligence necessary to make accurate decisions,<sup>24</sup> the ability to protect highly secret information if given access, and the expertise to assess national security information accurately. Other arguments highlight concerns that judicial review will divert executive officials from their core security responsibilities<sup>25</sup> or trigger executive or public resistance that could imperil the legitimacy of courts.<sup>26</sup>

In response to such claims, a wave of legal scholarship challenged the high level of generality with which deference advocates characterized the relative competencies of government branches and the distinctiveness of national security cases. For instance, scholars including Deborah Pearlstein, Robert Chesney, and Aziz Huq drew on organizational theory, cognitive bias literature, and social psychology to critique the supposition that the executive branch has singular expertise on security.<sup>27</sup> Others contested the notion that national security or foreign relations cases necessarily involve a distinct set of considerations from other kinds of cases, contending that the justifications for exceptional treatment neither apply to all national security cases nor differentiate them from non-

---

22. See Chesney, *National Security Fact Deference*, *supra* note 17, at 1429–31 (summarizing democratic accountability concern); *Rahman v. Chertoff*, 530 F.3d 622, 628 (7th Cir. 2008) (“Presidents, Cabinet officers, and Members of Congress can be dismissed by the people if they strike an unwise balance between false positives and false negatives . . . judges are immune from that supervision and must permit those who bear the blame for errors (in either direction) to assume the responsibility for management.”).

23. See POSNER & VERMEULE, *supra* note 19, at 5; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–81 (2002) (Thomas, J., dissenting) (extolling the “structural advantages of a unitary Executive” in national security and foreign policy domains).

24. See POSNER & VERMEULE, *supra* note 19, at 31, 49, 75.

25. See *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860, 1863 (2017).

26. See Chesney, *National Security Fact Deference*, *supra* note 17, at 1397–98, 1428–29 (describing institutional preservation concern for courts faced with national security cases).

27. See, e.g., Pearlstein, *supra* note 21, at 1598–1618 (using organizational decision-making literature to point out costs of executive flexibility, unity, and insularity, and benefits of independent review); Chesney, *National Security Fact Deference*, *supra* note 17, at 1404–26 (challenging, as frequently overstated, arguments related to courts’ comparative institutional weaknesses in access to information, expertise, and other prudential concerns); Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904–05 (2012) (arguing that political science and empirical research undermine assumptions from dated political theory regarding the relative institutional competence of the branches); see also David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1357 (2008) (arguing that, even if the executive branch has greater information or expertise related to security, courts are better positioned to balance competing liberty and security interests).

security cases.<sup>28</sup> Several scholars offered more tailored approaches to judicial deference grounded in administrative law<sup>29</sup> or other generally applicable approaches to resolving legal or factual questions in public law.<sup>30</sup>

Still other scholars and judges suggested that procedural mechanisms might provide courts an alternative to broad deference, but without fully elaborating on what these mechanisms are or how they might help.<sup>31</sup> This Article now turns to the secrecy rationale for judicial deference, to which procedural experimentation is most relevant.

### B. *The Secrecy Rationale for Deference*

Proponents of judicial deference in national security cases contend that judicial review will risk the exposure of sensitive information and thereby endanger US security. They advance this secrecy rationale both as a reason to withhold review altogether and to accept the executive's factual judgments without probing the evidence behind them. More specifically, they highlight concerns that: (1) sensitive information revealed through a court proceeding will reach US adversaries who will use it to evade surveillance and advance their interests; (2) if litigation can force the government to reveal sensitive information, individuals will mount cases precisely to put the government to the Hobson's choice of settling cases or revealing the information (the "graymail" concern); and (3) an inability to guarantee the privacy of information shared with US intelligence agencies will deter foreign intelligence services or confidential sources from cooperating with the US government.

The secrecy rationale frequently intersects with the "expertise rationale" for deference: the claim that "generalist" judges lack experience in national security and should defer to the executive branch's comparative institutional

---

28. See, e.g., Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 501–15 (2005) (critiquing five rationales for distinguishing military cases from non-military cases, including the stakes involved, exigent circumstances, expertise, legal doctrines of deference, and the executive's role as commander-in-chief); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935–49 (2015) (critiquing eight rationales for "foreign relations exceptionalism," including expertise, speed, secrecy, flexibility, error costs, uniformity, the nature of the subject matter, and the statutory foundations for foreign relations).

29. See, e.g., Masur, *supra* note 28, at 520–21.

30. See, e.g., Huq, *Structural Constitutionalism as Counterterrorism*, *supra* note 27, at 944 (arguing that courts should use "ordinary tools of legal reasoning and fact finding" to evaluate national security policies in light of applicable legal standards); Sitaraman & Wuerth, *supra* note 28, at 1905 (calling for application of standard administrative law doctrines and "normal interpretive principles" in assessing executive factual claims and treaty interpretation).

31. See, e.g., Meshal, 804 F.3d at 446–47 (arguing that courts have developed procedures to manage sensitive issues in national security litigation without declining adjudication altogether); Vladeck, *The Demise of Merits-Based Adjudication*, *supra* note 2, at 1076 (observing that national security cases heard on the merits often have employed judge-made procedures to protect secrecy); Fuchs, *supra* note 7, at 171–75 (describing procedural tools for judicial review of secrecy claims); Kwoka, *Procedural Exceptionalism*, *supra* note 7, at 160–63 (proposing use of special advocates in national security litigation).

advantage. One argument holds that judges do not have the expertise to discern whether the disclosure of particular information will harm national interests—in other words, that judges lack the expertise to judge the secrecy claim itself. A second claim is that judges lack the experience to safeguard classified information shared with courts, so that even if they do not order broader disclosure, they cannot assure the protection of information lodged with the court. A third argument linking the secrecy and expertise objections is that, because the need for secrecy will prevent the government from fully sharing sensitive information with courts, judges will lack complete information with which to review national security determinations. In other words, as a result of secrecy requirements, the judiciary will be at a perpetual epistemic disadvantage compared to the executive branch.

As with other rationales for deference, scholars have objected to the level of generality used to apply the secrecy rationale to national security or foreign relations cases.<sup>32</sup> Numerous critics have charged that state secrecy is excessive, observing that national security officials and bipartisan commissions routinely acknowledge that executive agencies overclassify government documents.<sup>33</sup> A body of scholarship argues that this excessive state secrecy undermines democratic accountability, good governance, and other rule of law values.<sup>34</sup> Despite these critiques, courts regularly invoke concerns over disclosure in limiting or rejecting the review of national security cases.

The secrecy rationale inhibits judicial review most directly through application of the state secrets privilege. One version of the privilege, first recognized in *Totten v. United States*, precludes the maintenance of suits altogether where litigating the claims would “inevitably lead to the disclosure of matters which the law itself regards as confidential.”<sup>35</sup> The *Totten* bar applies to cases “where the very subject matter of the action” is a “matter of state secret”—such as the espionage contract at issue in that case—and may thus call for dismissal on the pleadings “without ever reaching the question of evidence.”<sup>36</sup> The more commonly invoked version of the privilege, recognized in *United States v. Reynolds*, permits the exclusion of particular evidence whose disclosure would present a “reasonable danger” of harming national security interests.<sup>37</sup> Despite the theoretically more tailored form of the *Reynolds* privilege, in

---

32. See, e.g., Sitaraman & Wuerth, *supra* note 28, at 1941–42 (critiquing secrecy rationale for foreign relations exceptionalism).

33. See, e.g., MARK FENSTER, *THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION* 6 (2017) (noting that “blue ribbon commissions and congressional committees have regularly and uniformly decried overclassification”); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL’Y REV.* 399, 400–01 (2009).

34. For a notable recent contribution to this voluminous literature, see SUDHA SETTY, *NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW* 1–15 (2017).

35. *Totten v. United States*, 92 U.S. 105, 107 (1875).

36. *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953).

37. *Id.* at 10.

practice, it often leads courts to the same result—the early dismissal of cases—either because courts determine that the exclusion of evidence would prevent plaintiffs from establishing their claims or defendants from mounting a full defense, or because courts conclude that the litigation would create an “unjustifiable risk of divulging state secrets.”<sup>38</sup> Thus, this interpretation of the privilege leads courts to dismiss cases in anticipation of disclosure harms, rather than after a concrete discovery demand for sensitive information. Applying this broad interpretation of the privilege, courts have often barred legal challenges to extraordinary rendition and National Security Agency surveillance.<sup>39</sup> A recent empirical analysis concluded that the government invoked the privilege much more often between 2002 and 2013 than in the preceding decades, and that courts upheld the privilege two-thirds of the time.<sup>40</sup>

While the state secrets privilege remains one of the most common—and most controversial—bases for dismissing national security cases, a host of other secrecy doctrines block disclosure of government documents and often prevent courts from reaching the merits of plaintiffs’ challenges. Secondary privileges, such as the law enforcement privilege or the statutory protection for “Sensitive Security Information,” impede discovery even where the executive does not invoke state secrets.<sup>41</sup> These privileges may be less categorical than the state secrets privilege in that they permit judicial balancing of the need for secrecy against litigants’ informational needs. In practice, however, expansive interpretation of security needs may achieve the same effect as the state secrets privilege without eliciting the same level of public scrutiny. The secrecy rationale also hinders suits seeking transparency over national security policy. For instance, many legal scholars have shown that courts have largely stymied disclosure of national security information in Freedom of Information Act cases, despite the fact that Congress strengthened the law over several decades expressly to curb excessive national security secrecy.<sup>42</sup>

---

38. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 (9th Cir. 2010) (dismissing extraordinary rendition and torture claims against defense contractor under *Reynolds*).

39. See Kwoka, *Procedural Exceptionalism*, *supra* note 7, at 118.

40. Daniel R. Cassman, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 STAN. L. REV. 1173, 1189–90 (2015). Cassman found 159 assertions of the privilege between 1937 and 2001, and 137 assertions between 2002 and 2013. *Id.* at 1188. Across most categories of cases, he found that courts upheld the privilege in full more often than they either denied it or partially upheld it. *Id.* at 1199.

41. See Fuchs, *supra* note 7, at 134–35; see also Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA’s Secret Docket*, 6 HARV. L. & POL’Y REV. 313, 315 (2012).

42. See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1118–20, 1119 n.123 (2017) (collecting sources on the high rate of government success in cases seeking national security records under various FOIA exemptions); Kwoka, *Procedural Exceptionalism*, *supra* note 7, at 139–43, 154 (describing “procedurally exceptional” treatment of secrecy questions in national security FOIA cases, including courts’ allowance of a “Glomar” response to records requests refusing to confirm or deny the existence of records on the basis that even such disclosure would harm national security); see also Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013) (describing routine judicial deference to the government in FOIA cases).

Beyond doctrines explicitly designed to address secrecy, a concern for protecting national security secrets has also influenced courts' decisions to bar litigation on other grounds. For instance, courts have blocked constitutional damages claims, known as *Bivens* actions, against federal officials in military, intelligence, and counterterrorism contexts partly due to fear of information disclosure.<sup>43</sup> The Supreme Court has cited the military context of disputes as a "special factor[]" weighing against the judicial recognition of an implied damages remedy in the absence of explicit congressional authorization.<sup>44</sup> Most recently, in *Ziglar v. Abbasi*, the Court rejected *Bivens* claims against high-level federal officials for due process and equal protection violations arising out of immigrants' post-9/11 detentions.<sup>45</sup> The Court ruled that "special factors" weighed against permitting plaintiffs' detention policy claims, including the fact that the claims contested elements of national security policy.<sup>46</sup> While *Abbasi* cited general separation of powers reasons for judicial deference to Congress and the President in national security matters,<sup>47</sup> lower courts had specifically identified secrecy and expertise concerns as reasons to preclude *Bivens* challenges to rendition or detentions.<sup>48</sup> Therefore, even before *Abbasi*, appellate courts had largely rejected *Bivens* claims arising out of the war on terror.<sup>49</sup>

Other courts have dismissed challenges to national security policy on the basis of standing, often relying on *Clapper v. Amnesty International USA* to find that plaintiffs failed to show a sufficiently concrete injury. In *Clapper*, the Supreme Court ruled that legal, human rights, and media organizations could not challenge a surveillance program on constitutional grounds because they could not show that the interception of their own communications was "certainly impending."<sup>50</sup> The secret nature of government surveillance prevented plaintiffs from knowing whether or not the government had obtained, or would obtain, their communications. Although the Court explained its decision largely on trans-substantive grounds, the decision invoked national security considerations; the Court observed that it had often declined to find standing in cases involving

---

43. Suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the case that first recognized an implied right of action to sue for damages based on Fourth Amendment search-and-seizure violations, are often the only form of relief available against federal actors where the conduct alleged to have violated constitutional rights has ended.

44. See *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *United States v. Stanley*, 483 U.S. 669, 683 (1987).

45. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017). In the interest of full disclosure, I was co-counsel for amici Asian Americans Advancing Justice and other civil rights organizations on behalf of the respondents in the case.

46. *Id.* at 1860–61.

47. *Id.* at 1861.

48. See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 576–79 (2d Cir. 2009) (en banc) (describing concerns around reliance on classified information from foreign intelligence services, a preference for "open rather than clandestine court proceedings," and the risk of graymail as reasons not to create a *Bivens* remedy for extraordinary rendition cases); Vladeck, *The Demise of Merits-Based Litigation*, *supra* note 2, at 1055–56 (detailing lower courts' treatment of *Bivens* claims in national security cases).

49. See PFANDER, *supra* note 2, at xvi, 45–56.

50. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013).

government decisions “in the fields of intelligence gathering and foreign affairs”<sup>51</sup> and noted that discovery of the information required to demonstrate standing would risk disclosing to terrorists whether they were subject to surveillance.<sup>52</sup>

Even where judges do not dismiss cases based on doctrines derived from secrecy or expertise rationales, those concerns may influence their dismissal decisions formally based on other grounds.<sup>53</sup> A judge asked to dismiss a challenge to national security policies for jurisdictional or procedural reasons—such as a failure to state a plausible claim or the inability to join a required party to the litigation—may be influenced to do so because of concerns over the national security content of the case. Judges have acknowledged these pressures to defer. Judge Robertson, who oversaw terrorism trials as a federal district court judge, stated during a public convening on intelligence oversight:

[T]he truth is that most federal judges defer almost automatically to the Justice Department. They bring in a guy called a security officer. They tell you what you have to do. They bring you a safe, and they put it in your office, but you don’t know how to open the damn thing most of the time. Your law clerks may or may not be cleared. No matter what kind of classified information you’re handling, . . . [i]t’s difficult to handle it, it’s difficult to deal with it, but more than that, there is this deference that judges pay to the executive branch of the government in all matters that have to do with national security. And, frankly, I think they should defer. Not only because it’s a separation of powers question, but because, what do we know about intelligence? What do we know about the merits? We’re not trained intelligence officers.<sup>54</sup>

Judge Robertson’s candid remarks suggest that reasoned arguments for deference intersect with psychological pressures to defer as well as mundane concerns about judicial management: the elaborate procedures used to protect information may signal that the information involved is exceptionally sensitive, that judges are unqualified to assess it, and that they will face serious difficulties in managing any cases that they allow to move forward. Thus, the secrecy

---

51. *Id.* at 1147.

52. *Id.* at 1149 n.4. Sitaraman and Wuerth noted that briefing in the case cited secrecy and expertise concerns as a reason for the Court to rule against the plaintiffs on standing, though they argued that the Court did not rely significantly on that reasoning. Sitaraman & Wuerth, *supra* note 28, at 1950. Steve Vladeck has described the decision as both more restrictive than earlier standing decisions and as having a particular effect on challenges to surveillance in the lower courts. Vladeck, *The Demise of Merits-Based Adjudication*, *supra* note 2, at 1044–45.

53. *See, e.g.*, Sitaraman & Wuerth, *supra* note 28, at 1910 (noting that courts sometimes engage in “covert” “foreign relations exceptionalism”); Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1017, 1031–32 (2008) (describing the resolution of cases on procedural grounds as a form of “process as avoidance”).

54. Judge James Robertson, Former Dist. Court Judge for D.C., Panel at the Brennan Ctr. for Justice Symposium on Strengthening Intelligence Oversight (May 28, 2015), in CONFERENCE REPORT, 2015, at 43–44.

rationale influences courts to dodge or defer in national security cases, whether or not courts actually justify such decisions in formal secrecy doctrines.

## II.

### PROCEDURAL EXPERIMENTATION OVER NATIONAL SECURITY SECRECY

As a result of the doctrinal obstacles and deference rationales described above, courts in the post-9/11 period have often failed to reach the merits of challenges to national security policies. While some accounts of the Supreme Court's Guantanamo decisions through 2008 highlight the Court's willingness to reject executive national security assertions,<sup>55</sup> broader accounts of national security civil litigation as a whole depict courts as largely deferential to the government, at least before the travel ban litigation.<sup>56</sup> The precise extent of that deference is difficult to measure. Nonetheless, the limited quantitative evidence available shows that courts have largely accepted the government's state secrets assertions,<sup>57</sup> upheld the government's refusal to disclose information in FOIA cases on national security grounds,<sup>58</sup> and rejected damages claims in "war-on-terror" litigation.<sup>59</sup>

---

55. See Sitaraman & Wuerth, *supra* note 28. Sitaraman and Wuerth argued that over the past twenty-five years, "foreign relations law is being normalized" with respect to doctrine on justiciability, federalism, and executive power. *Id.* at 1901. They defined "foreign relations law" to include national security law, *see id.* at 1907 n.28, and presented the Supreme Court's 2004–2008 war on terror decisions as a "second wave" of normalization. *Id.* at 1902–03. Sitaraman and Wuerth's examination of the broader category of foreign relations law may have caused them to understate the extent to which courts continue to treat national security policy as distinctive. For one thing, they focused solely on merits decisions of the Supreme Court, likely causing them to miss broader patterns in national security cases—including trends in the lower courts as well as the Court's decisions to grant certiorari only in national security cases in which the government lost below. See Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. FORUM 322 (2015). Moreover, even with respect to the Supreme Court, decisions outside the 2004–2008 Guantanamo context, such as *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), suggest a much more deferential posture towards executive national security policy. Sitaraman and Wuerth considered some of these decisions "outliers" or examples of an incomplete process of normalization. Sitaraman & Wuerth, *supra* note 28, at 1950, 1965–68. Considered together, however, it is difficult to view the Court's national security decisions as more reflective of "normalization" than of "exceptionalism."

56. See Deeks, *supra* note 2, at 829; Vladeck, *The Demise of Merits-Based Adjudication*, *supra* note 2, at 1037; Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1296 (2012) (describing the lack of damages awards); PFANDER, *supra* note 2, at xvi.

57. See *supra* note 40 (discussing Cassman study).

58. Susan Nevelow Mart & Tom Ginsburg, *(Dis-)informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 728, 764–65 (2014) (concluding that only 5 percent of cases involving the national security exemption of the FOIA result in an "outright" win for plaintiffs and only one in five result in "partial disclosure," based on authors' empirical analysis of 270 reported FOIA cases in the DC district court and appellate cases nationwide from 1974–2012 that considered the national security statutory exemption); *see also* Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 42, at 1118–20.

59. Pfander, *supra* note 2, at xvi, 167–80 (concluding that, of forty-one *Bivens* cases arising from the war on terror, eight cases resulted in compensation from settlement agreements, while appellate courts hearing these cases "almost uniformly rejected *Bivens* claims"). One limitation of several post-9/11 quantitative studies on national security litigation is that they rarely compare results in national

Even in the pre-travel ban period, however, courts did not universally or absolutely defer to the government. In certain cases, judges rejected broad appeals to dismiss cases or to defer to government national security claims, sometimes leading to changes in government policy or at least partial victories for plaintiffs. While some scholars have attempted to identify the substantive similarities across these cases,<sup>60</sup> no one has synthesized or assessed the *procedural* strategies evident in many such cases. Notably, courts that did not defer at the threshold frequently tried novel or little-used procedures to minimize concerns over secrecy and related claims of inadequate judicial expertise.

For example, a long-running Freedom of Information Act case in the Southern District of New York prompted the extraordinary release of government records shedding light on the abuse and torture of detainees.<sup>61</sup> In evaluating the plaintiffs' disclosure requests, the district court devised innovative procedures to inspect the documents *in camera* while preserving a public record of its decisions. The court further deployed a variety of sampling and case management techniques to move forward the highly sensitive litigation.<sup>62</sup>

Meanwhile, two district courts within the Ninth Circuit found constitutional violations in government terrorist watch-listing processes, forcing the government to provide greater rights to individuals contesting their inclusion on the "No Fly List."<sup>63</sup> In adjudicating those cases, the courts experimented with multiple strategies to manage secrecy concerns. These strategies included reviewing documents *in camera*, facilitating clearances for private counsel to view sensitive information, ordering the publication of opinions in stages to accommodate secrecy objections, facilitating interlocutory appellate review, and fashioning remedies in an incremental and dynamic fashion.<sup>64</sup>

---

security cases with analogous cases in other contexts, making it difficult to conclude how these cases diverge from broader trends in public law. See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 273 (arguing that the remedies ordered or denied in post-9/11 criminal detention cases reflect broader trends in public law).

60. For instance, Vladeck pointed to FOIA cases, challenges to terrorist watch lists, and the Guantanamo habeas cases as several areas where national security litigation has atypically moved forward. Vladeck, *The Demise of Merits-Based Adjudication*, *supra* note 2, at 1073–76.

61. See *ACLU v. Dep't of Defense*, 229 F. Supp. 3d 193, 197–204 (S.D.N.Y. 2017) (recounting lengthy case history beginning with ACLU's 2003 FOIA requests). Jack Goldsmith, who served in the Bush Administration Office of Legal Counsel, described the lawsuit as generating an unprecedented and highly consequential release of information, including the disclosure of 150,000 pages of previously secret documents. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 116 (2012). David Cole, now national legal director of the ACLU, characterized the lawsuit as the "centerpiece of civil society's transparency campaign on torture" and noted that the disclosures triggered investigations, generated widespread media attention, and helped establish that detainee abuse was not limited to lower-level officials. DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 202–03 (2016).

62. See *infra* Part II.B.

63. *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 927–28, 931 (N.D. Cal. 2014); *Latif v. Holder (Latif I)*, 28 F. Supp. 3d 1134 (D. Or. 2014). In the interest of full disclosure, I served as an expert witness for the plaintiff at trial in *Ibrahim*. The "No Fly List" bars listed individuals from boarding flights passing through or over the United States. *Latif I*, 28 F. Supp. 3d at 1140.

64. See *infra* Parts II.B, II.C, II.E, II.F.

Another district court judge refused to dismiss, on state secrets grounds, a challenge to phone companies that cooperated with National Security Agency (NSA) surveillance.<sup>65</sup> Before congressional legislation retroactively immunized the phone companies and compelled the dismissal of NSA surveillance cases,<sup>66</sup> judges centralized the cases in MDL and proposed appointing an independent expert to assess state secrets claims.<sup>67</sup>

Neither the extent nor impact of such procedural experimentation should be overstated. First, to the extent that these cases resulted in some determination of the merits, they represent exceptions to the broader pattern of dismissal of national security cases. Second, as further discussed below, courts experimented only tentatively and sometimes encountered significant executive resistance. And third, even where partly successful, these cases certainly fell short of providing the relief that the challengers sought.

Nonetheless, the procedural experimentation suggests that courts have mechanisms to address secrecy in litigation that provide a partial alternative to categorical forms of deference. To that end, this Section describes six of the procedural strategies that federal courts have used or proposed to mitigate secrecy in national security civil litigation.<sup>68</sup> Following this descriptive account, subsequent Sections of the Article will analyze how these procedures may benefit the adjudication of national security disputes (Part III), but also how they exist in tension with rule of law values (Part IV).

#### A. Centralization through Multidistrict Litigation

On several occasions, federal judges used the MDL process to consolidate similar cases challenging national security practices. In these cases, conventional justifications also existed for the use of MDL, such as the efficiency gains from aggregating factually overlapping cases. But special concerns associated with national security litigation also played a role: litigants advocated MDL treatment by appealing to the need to protect sensitive information, and judges cited such concerns in their decisions to grant MDL treatment. The use of MDL addressed

---

65. See *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

66. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 671 F.3d 881 (9th Cir. 2011) (upholding dismissal of cases based on immunity provision).

67. See *infra* Parts II.A, II.D.

68. I focus below primarily on civil cases *outside* the habeas cases brought by Guantanamo detainees in the DC district court, although I discuss parallels to the habeas litigation where they arise. The Guantanamo habeas cases are in many respects *sui generis*, since they arose out of an exceptional system of military confinement and had characteristics of both traditional military detentions and traditional criminal trials. See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008). After the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the lower courts faced the task of determining both the substantive standards and procedural rules that would govern in this unique set of cases. I consider the habeas litigation a distinct category of cases, in some respects closer to criminal trials than to civil adjudication. Thus, I focus here on ordinary civil national security cases to show how procedural experimentation represents a wider phenomenon in which courts across the United States engage in a variety of national security contexts.

secrecy concerns both by consolidating cases—thereby limiting the number of courts potentially exposed to sensitive information—and by transferring them to courts thought to be experienced with classified information.

Under the MDL statute, 28 U.S.C. § 1407, a panel of seven federal judges may transfer civil cases filed in multiple federal districts to a single district court for pre-trial proceedings, including the resolution of dispositive pre-trial motions.<sup>69</sup> The statute provides for remanding cases for trial,<sup>70</sup> although most cases never return to their original districts because the transferee court dismisses them or the parties settle before trial.<sup>71</sup> The statute provides minimal and vague standards for MDL consolidation: it only requires that the cases present “one or more common questions of fact” and that transfer will serve “the convenience of parties and witnesses” and the “just and efficient conduct of such actions.”<sup>72</sup> The MDL Panel can send cases to any federal district and any federal judge in the country, whether or not those courts or judges were hearing any of the cases in question and whether or not any, or all, parties approve the transfer choice.<sup>73</sup> As one indication of the MDL Panel’s significant power, its decision whether and where to transfer cases has apparently never been reversed.<sup>74</sup>

A series of challenges to NSA surveillance practices filed in 2006 represents perhaps the most significant set of national security-related cases subjected to MDL treatment. Following the *New York Times*’ revelation of a secret warrantless wiretapping program to intercept phone calls and emails between US parties and suspected foreign terrorists,<sup>75</sup> the Electronic Frontier Foundation sued AT&T for collaborating with the NSA in illegal surveillance.<sup>76</sup> The plaintiffs in *Hepting v. AT&T*, filed in the Northern District of California, sought to represent AT&T customers in a class action alleging violations of the First and Fourth Amendment, the Foreign Intelligence Surveillance Act, and other federal and state laws.<sup>77</sup> After the filing, a second news story alleged that the NSA was operating a separate secret program to collect *domestic* call records in cooperation with AT&T, Verizon, and Bell South.<sup>78</sup> Within two weeks,

---

69. 28 U.S.C. § 1407(a) (2012).

70. *Id.*

71. Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMP. LEGAL STUDIES 424, 426 (2013).

72. 28 U.S.C. § 1407(a).

73. In practice, the MDL Panel often sends cases to those courts that a defendant or other party has proposed. See Williams & George, *supra* note 71, at 457.

74. *Id.* at 427.

75. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?mtrref=www.google.com&gwh=66D337AB8FCA9E82CD185508E5C871A4&gwt=pay> [<https://perma.cc/FS8E-HSTD>].

76. See *Hepting v. AT&T*, 439 F. Supp. 2d 974, 978 (N.D. Cal. 2006).

77. *Id.* at 978–79.

78. See Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA TODAY, May 11, 2006.

plaintiffs nationwide filed nineteen other lawsuits against phone companies in fourteen federal districts.<sup>79</sup> Verizon moved the MDL Panel to transfer these cases, including *Hepting*, to a single district court for consolidated pretrial proceedings.<sup>80</sup>

In support of the motion, Verizon argued that unique national security reasons, not just efficiency and convenience, justified MDL treatment.<sup>81</sup> Unlike the “standard commercial, products liability, or securities actions” that typically went before the MDL Panel, Verizon maintained that the telecom cases involved “issues of vital national security.”<sup>82</sup> According to Verizon, centralization would reduce risks in two ways: (1) by avoiding the transport of secret material to multiple locations for review by multiple courts, and (2) by preventing inconsistent rulings on the threshold question of whether the cases should be dismissed based on the state secrets privilege.<sup>83</sup> The US government supported Verizon’s motion, confirming that it intended to assert the state secrets privilege in the telecom cases, and moved for the consolidation of additional cases brought solely against the government.<sup>84</sup>

Regarding the transfer decision, both Verizon and the government argued in favor of sending the litigation to the District of Columbia on the grounds that judges there had significant experience in handling national security cases.<sup>85</sup> The MDL Panel approved consolidation but assigned the cases instead to Judge Walker in the Northern District of California, noting that *Hepting* had advanced further than other cases and that Judge Walker had already established a procedure to review classified information.<sup>86</sup>

The MDL Panel also consolidated other cases where litigants argued that special national security considerations justified consolidation. The *plaintiffs* in a set of four cases challenging detainee abuse in Iraq and Afghanistan asked for MDL treatment, claiming that courts could avoid inconsistent rulings on national

---

79. Defendants Verizon Communications Inc., Verizon Global Networks Inc., & Verizon Northwest Inc.’s Motion for Transfer & Coordination Pursuant to 28 U.S.C. § 1407 at 1–2, *In re Nat’l Sec. Agency Litig.* (J.P.M.L. May 30, 2006) (No. MDL-1791).

80. *Id.* at 1.

81. Memorandum in Support of Defendants Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.’s Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 at 7–8, *In re Nat’l Sec. Agency Litig.* (J.P.M.L. May 30, 2006) (No. MDL-1791).

82. *Id.* at 7.

83. *Id.* at 8, 13.

84. The United States’ Combined Memorandum in Support of Verizon Communications Inc.’s, Verizon Global Networks Inc.’s, and Verizon Northwest Inc.’s Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 and Memorandum in Support of the United States’ Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 at 2–3, 9–10, *In re Nat’l Sec. Agency Litig.* (J.P.M.L. June 19, 2006) (No. MDL-1791) (stating that the United States intended to assert state secrets in all the actions filed).

85. *Id.* at 18–19; *see also* Defendants Verizon Communications Inc., Verizon Global Networks Inc., & Verizon Northwest Inc.’s Motion, *supra* note 79, at 3.

86. Transfer Order, 444 F. Supp. 2d 1332, 1335 (J.P.M.L. 2006) (No. MDL-1791). Following transfer, the Panel transferred numerous newly filed actions to the same multidistrict litigation. *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 956 (N.D. Cal. 2009).

security-based privilege assertions by consolidating the existing cases.<sup>87</sup> The plaintiffs openly stated that they had filed separate actions against Secretary of Defense Donald Rumsfeld and other high-ranking military officials only to satisfy personal jurisdiction requirements.<sup>88</sup> MDL consolidation provided a means to surmount this restriction, since the Panel has long maintained that a transferee court can hear cases even if it would have lacked jurisdiction over defendants if the cases had been filed there directly.<sup>89</sup>

Unsurprisingly, the parties strategically sought transfer to courts or judges they may have expected to be most favorable, while explaining those preferences on neutral grounds. The plaintiffs requested transfer to Judge Hellerstein in the Southern District of New York because he had already established “special logistical arrangements and security clearances” for a separate FOIA case seeking records on detainee abuse.<sup>90</sup> The government opposed MDL treatment but argued, in the alternative, to send the cases to the Eastern District of Virginia—a district within the Fourth Circuit, well known at the time for its expansive views of executive power on the battlefield.<sup>91</sup> The MDL Panel ultimately centralized the cases but sent them to the federal District of Columbia instead, deeming the nation’s capital a “particularly appropriate forum” for lawsuits against senior military leaders.<sup>92</sup>

These and other examples do not suggest a groundswell of support for MDL treatment of national security cases.<sup>93</sup> In numerous national security contexts where common factual questions existed across cases, no litigant moved for MDL consolidation, and the Panel did not reach out to consolidate such cases on its own initiative.<sup>94</sup> In addition, in 2017, the Panel rejected a government request

---

87. Memorandum in Support of Motion for Transfer Under 28 U.S.C. § 1407 at 11, *In re Iraqi/Afghan Detainee Human Rights Litig.* (J.P.M.L. Mar. 14, 2005) (No. MDL-1686).

88. *Id.* at 1.

89. *See In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163 (J.P.M.L. 1976).

90. *See* Memorandum in Support of Motion for Transfer, *supra* note 87, at 3.

91. For one striking depiction of the known ideological proclivities of the Fourth Circuit on such issues at that time, see Transcript of Motions Hearing at 24–26, *Al Shimari v. CACI Int'l*, No. 08-cv-827 (E.D. Va. Oct. 24, 2008) (quoting district judge as noting that “this circuit is really conservative and . . . very expansive in their view of what the government can do particularly in a wartime and a battlefield. District judges around here have been beaten down three or four times involving those issues.”).

92. *See In re Iraq & Afg. Detainees Litig.*, 374 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005).

93. At least two other sets of cases involving national security considerations have gone through the MDL process. This includes a set of thirteen cases against military contractors for burning waste in open air burn pits in Iraq and Afghanistan, *In re Battlefield Waste Disposal Litig.*, 655 F. Supp. 2d 1374 (J.P.M.L. 2009), and six cases filed against the Saudi Binladin Group and other defendants alleging a conspiracy to support al Qaeda, *In re Terrorist Attacks on Sept. 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003). In the latter litigation, movants pointed to the special risk of inconsistent rulings arising in “matters of U.S. foreign policy and national security” and requested transfer to Judge Robertson, a District of Columbia judge who had experience with terrorism cases. Memorandum in Support of Motion for Transfer and Consolidation Pursuant to 28 U.S.C. § 1407 by Defendant SBG at 13, 16, *In re Sept. 11, 2001 Terrorist Attacks Litig.* (J.P.M.L. Aug. 21, 2003) (MDL No. 1570).

94. Legal challenges to terrorist watch lists, NSA surveillance, and the travel ban—among other national security cases—have proceeded in parallel in multiple district courts. *See, e.g.*, Shirin Sinnar,

to consolidate a set of FOIA cases seeking records on the implementation of the travel ban.<sup>95</sup> While the Panel explained its decision on standard efficiency grounds, it may also have feared that transferring such politically salient cases to a single district court could raise legitimacy concerns.<sup>96</sup>

### B. *In Camera* Review

Courts review documents *in camera* in many contexts in civil and criminal litigation. But doing so in national security cases is more unusual. Overcoming that reluctance, some district courts have done so to independently determine whether the government has properly withheld national security information.

In the process, they have experimented with methods to determine when such review is truly necessary and to preserve the ability of litigants and the public to understand, as far as possible, what transpired in such proceedings.

Courts review national security-related secrecy assertions in at least four contexts: (1) to decide whether the government qualifies for a statutory exemption from disclosing records under FOIA; (2) to determine whether the government has properly withheld information sought in discovery pursuant to the state secrets privilege, law enforcement privilege, or other statutory or common law privileges; (3) to decide whether to dismiss a claim or case altogether on the basis of a state secrets assertion; and (4) to determine whether government deprivation of an individual's liberty or property on the basis of undisclosed information comports with due process.

In several of these scenarios, the existing law on the propriety of *in camera* review is ambiguous, leaving judges with substantial discretion to decide how closely to review government assertions. For instance, the leading US Supreme Court case on the state secrets privilege, *United States v. Reynolds*, provides that “[j]udicial control” of the evidence “cannot be abdicated to the caprice of executive officers,” suggesting a role for courts in reviewing the evidence over which the government asserts a privilege.<sup>97</sup> The decision advises courts to probe an assertion of state secrets to a greater degree where plaintiffs make a stronger

---

*Towards a Fairer Terrorist Watchlist*, 40 ADMIN. & REG. L. NEWS 4 (2015) (describing several recent watch list cases); Kara Brandeisky, *NSA Surveillance Lawsuit Tracker*, PROPUBLICA, <https://projects.propublica.org/graphics/surveillance-suits> [<https://perma.cc/LV2K-LEDE>] (last updated May 13, 2015) (listing cases challenging government surveillance); *Civil Rights Challenges to Trump Refugee/Visa Order*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/results.php?searchSpecialCollection=44> [<https://perma.cc/26WX-2AQ6>] (last visited July 11, 2018) (partially listing cases related to Trump immigration executive orders).

95. See Order Denying Transfer at 1, *In re* ACLU FOIA Requests Regarding E.O. 13769 (J.P.M.L. Aug. 2, 2017) (MDL No. 2786) (denying transfer of thirteen ACLU FOIA suits related to implementation of the first travel ban because the factual issues “appear relatively straightforward and unlikely to entail extensive pretrial proceedings”).

96. *Id.* (stating that common factual issues were unlikely to require “extensive pretrial proceedings”). For a discussion of potential concerns with MDL centralization related to legal pluralism, bias, and legitimacy, see *infra* Parts IV.C, IV.D.

97. *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953).

showing of need for the documents.<sup>98</sup> But the decision also warns courts against insisting on *in camera* review where they believe that the government has met the standard for invoking the privilege—that there exists a reasonable danger of exposing matters harmful to national security.<sup>99</sup> Given that warning, lower courts often shy away from examining documents *in camera* where the government has asserted state secrets protection.<sup>100</sup>

Similarly, FOIA law provides mixed signals on the propriety of independent review of documents that the government claims to be exempt from disclosure. The statute mandates that district courts conduct a *de novo* review of exemption claims and specifically authorizes them to review withheld records *in camera*.<sup>101</sup> But where the government cites national security reasons for non-disclosure, many courts have characterized *in camera* review as the exception rather than the rule, and accordingly have exempted documents from disclosure on the basis of agency affidavits alone.<sup>102</sup>

Despite this larger pattern, several district courts have recently inspected documents *in camera* to probe a FOIA exemption claim or to determine whether the government has validly asserted a privilege. For instance, in the detainee abuse FOIA case before the Southern District of New York, Judge Hellerstein reviewed a number of documents *in camera* before ordering the release of photos depicting abuse at Abu Ghraib.<sup>103</sup> While taking that relatively unusual step, Judge Hellerstein also sought to prevent unnecessary disclosure of classified information even to the court. For instance, he chose not to view documents directly where he found that the government had sufficiently justified its exemption claims.<sup>104</sup> Further, he used sampling procedures to limit the information shared with the court: he examined directly only a sample of documents that the government claimed were exempt, ruled whether each of the documents sampled could be released or meaningfully redacted, and then required the government to apply those rulings to the full set of documents.<sup>105</sup>

While undertaking *ex parte*, *in camera* review, several district courts took steps to preserve some measure of adversarial input into, and public knowledge of, the process. As an initial matter, courts engaged in gatekeeping to determine

---

98. *Id.* at 11.

99. *Id.* at 10.

100. *See, e.g., In re “Agent Orange” Prod. Liab. Litig.*, 97 F.R.D. 427, 431 (E.D.N.Y. 1983) (describing *in camera* review in state secrets context as “not routine,” and permitting, but not requiring, it in that case).

101. 5 U.S.C. § 552(a)(4)(B) (2012).

102. *See* *ACLU v. Dep’t of Defense*, 389 F. Supp. 2d 547, 564, 566–67 (S.D.N.Y. 2005) (stating that courts generally “fail to grapple with this tension” between the statutory requirement of *de novo* review and case law according substantial deference to agency affidavits, and citing decisions); *see also* Fuchs, *supra* note 7, at 163 (stating that in most cases where the government invokes a national security exemption to release of documents, courts defer to government affidavits without conducting *in camera* review).

103. *ACLU v. Dep’t of Defense*, 389 F. Supp. at 550, 568, 572, 579.

104. *Id.* at 567–68.

105. *Id.* at 555–56; *see also id.* at 568–69.

whether to allow the government to present material on an *ex parte* basis at all. For instance, in *Ibrahim v. DHS*, a constitutional challenge to terrorist watch lists in the Northern District of California, Judge Alsup rejected the government's proposal to show him confidential records *ex parte* in support of a motion to dismiss. At that point, the government had not invoked the state secrets privilege as a ground for dismissing the case, and it made the proposal in an unusual fashion: a government official called the court to say that "a federal agent was on his way from Washington to San Francisco to show the judge confidential records about this case" which would be removed by the agent as soon as the judge had reviewed them.<sup>106</sup> The judge refused to meet with the agent and asked both sides to brief whether the court should accept *ex parte* communications in support of a motion to dismiss.<sup>107</sup> After briefing, the court ruled that it would allow *ex parte* communications in support of dispositive motions only where the government filed a public brief explaining its argument, the supporting evidence, and its justification for not providing more detail to the other side.<sup>108</sup> While Judge Alsup declined to review the documents on that occasion,<sup>109</sup> he did review large numbers of privileged documents *in camera* to resolve discovery disputes<sup>110</sup> and accepted the state secrets assertion over many of them.<sup>111</sup>

Where courts decided they would permit *ex parte* review, they attempted to create as much of a public record as possible so that the excluded parties, the appellate courts, and the public at large could understand the courts' decisions. Judge Hellerstein, for instance, devised elaborate measures to examine documents in the detainee abuse FOIA case: first, the ACLU would identify the particular documents to be sampled from an index of withheld documents; second, the judge would review the selected documents in the presence of government representatives, a court reporter, and his law clerk; third, the judge would describe each document under review and rule regarding the availability of exemptions "without disclosing anything classifiable"; and finally, the court would make public a transcript of the session after review by the government.<sup>112</sup>

---

106. See Order Denying Motion to Dismiss & Motion to Stay Discovery, *Ibrahim v. DHS*, No. C 06-00545 WHA, 2012 WL 6652362, at \*2 (N.D. Cal. Dec. 20, 2012).

107. *Id.*

108. *Id.* at \*8.

109. *Id.*

110. See Omnibus Order on Pending Motions, *Ibrahim v. DHS*, No. C 06-00545 WHA, 2013 WL 4549941, at \*2 (N.D. Cal. Aug. 23, 2013) (explaining that the court had to individually review each and every document sought in one set of discovery disputes).

111. See Order Granting in Part & Denying in Part Plaintiff's Motion to Compel, *Ibrahim v. DHS*, No. C 06-00545 WHA, 2013 WL 1703367, at \*11 (N.D. Cal. Apr. 19, 2013).

112. Memorandum from Judge Alvin K. Hellerstein to the Parties in *ACLU v. Dep't of Defense Regarding Protocol for Examining CIA Documents Where Exemption 1 Is Claimed* (Feb. 6, 2008), attached to Order Granting Plaintiffs' Motion for Reconsideration, *ACLU v. Dep't of Defense*, No. 04 Civ. 4151 (AKH), 2008 WL 8985276 (S.D.N.Y. May 8, 2008).

Other judges similarly insisted on creating a parallel public record summarizing sealed filings or closed sessions.<sup>113</sup>

### C. Cleared Counsel

In a few cases, courts have suggested, facilitated, or even ordered the government to clear litigants' counsel to view secret evidence. In the case of sensitive but unclassified information, lawyers have obtained clearances pursuant to explicit statutory authority. Where parties have sought access to classified information, however, courts have operated in unclear legal terrain. In ordering the government to clear counsel, judges have sometimes analogized to criminal cases or habeas corpus proceedings for Guantanamo detainees. But the government has resisted the use of cleared counsel in civil litigation on separation of powers grounds, leaving its status uncertain and contested.

In *Ibrahim v. DHS*, the watch list case in the Northern District of California, the court assisted plaintiff's counsel in obtaining clearances to view Sensitive Security Information (SSI)—a category of nonclassified transportation security information that a statute protects from public disclosure.<sup>114</sup> A separate 2006 statute permits the disclosure of SSI to litigants who have a "substantial need" for it and who cannot obtain the "substantial equivalent" elsewhere without hardship, unless the Transportation Security Administration (TSA) or Department of Homeland Security (DHS) demonstrates that access to the information would "present[] a risk of harm to the nation."<sup>115</sup> Although Ibrahim's counsel passed the background check required to access SSI,<sup>116</sup> it took the court's repeated intervention to compel the government to provide the privileged documents. At one point, after numerous discovery disputes, the court rebuked the government for its "persistent and stubborn refusal to follow the [2006] statute."<sup>117</sup> Plaintiff's counsel eventually obtained access to some SSI, but not to classified information.<sup>118</sup>

---

113. See Transcript of Proceedings at 7, *Latif I*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-CV-750-BR).

114. 49 C.F.R. § 1520.5(a)(3) (2009).

115. Department of Homeland Security Appropriations Act of 2007 § 525(d), Pub. L. No. 109-295, 120 Stat. 1355 (2006).

116. Plaintiff's Brief Re: SSI Versus Secret Standards, *Ibrahim v. DHS*, No. C 06-0545 WHA (N.D. Cal. Dec. 13, 2013).

117. Order Denying Motion to Dismiss & Motion to Stay Discovery, *supra* note 106, at 8; see also Request Regarding SSI Clearances, *Ibrahim v. DHS*, No. C 06-00545 WHA (N.D. Cal. Apr. 22, 2013) (ordering the government to expedite review of clearance applications from members of the plaintiff's legal team).

118. Ibrahim's lawyers did not seek access to classified information until trial. Order Denying Plaintiff's Request for Order Re Access to Classified Documents at 1, *Ibrahim v. DHS*, No. C 06-00545 WHA (N.D. Cal. Dec. 30, 2013). They stated that they had not sought access earlier because the government had previously suggested that it would not use its discretion to grant clearances to plaintiff's counsel. Plaintiff's Response to the Court's Order Re Clearance (Docket No. 666) at 2, *Ibrahim v. DHS*, No. C 06-0545 WHA (N.D. Cal. Dec. 23, 2013). The judge denied the plaintiff's request as untimely because he found plaintiffs' conditions for access to the information, including permission to discuss the

In several other cases, courts proposed granting litigants' counsel access to classified information in order to remedy potential due process deficits or evaluate a state secrets assertion. In *Latif I*, a District of Oregon decision holding No Fly List processes constitutionally deficient, the court suggested that the government might satisfy due process by providing the classified reasons for a watch list designation to cleared counsel.<sup>119</sup> Federal courts similarly suggested clearing plaintiffs' counsel to access classified evidence in due process challenges to the designation of groups as terrorist organizations.<sup>120</sup> And in *Horn v. Huddle*, a District of Columbia suit against individual government officials for illegal surveillance of a former employee's conversations, the court ordered the government to grant certain lawyers access to classified information that their clients already knew.<sup>121</sup> In that case, the court concluded that involving counsel in determining the boundaries of, and need for, privileged information would protect against harmful disclosures and help the court determine how best to manage privileged information.<sup>122</sup>

The government, however, objected to these rulings on the grounds that courts could not constitutionally compel access to classified information. In *Latif*, the government argued that the decisions to grant a security clearance and to disclose specific information lay within the sole discretion of the executive branch, and that disclosures to cleared counsel could result in inadvertent leaks.<sup>123</sup> In other cases, the government contended that, even if counsel qualified for security clearances, they still would not have a "need to know" the information in question—a condition for access under an executive order governing classification decisions.<sup>124</sup>

Some courts have rejected the government's separation of powers argument. For instance, *Horn v. Huddle* noted that the DC Circuit had "continuously suggested, or at least reserved, that it may be appropriate in the

---

information with their client, to be unreasonable. Order Denying Plaintiff's Request for Order Re Access to Classified Documents, *supra* at 2.

119. *Latif I*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014). In 2016, Judge Brown again held that where the government withheld information regarding plaintiff's placement on the No Fly List, it should determine whether further disclosures could be provided to cleared counsel for plaintiffs. *Latif v. Lynch*, No. 3:10-CV-00750-BR, 2016 WL 1239925, at \*8 (D. Or. Mar. 28, 2016).

120. *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 982–84 (9th Cir. 2011).

121. *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009), *vacated on other grounds*, 699 F. Supp. 2d 236 (D.D.C. 2010).

122. *Id.* at 59.

123. *Latif v. Lynch*, 2016 WL 1239925, at \*18.

124. See Tien, *supra* note 7, at 689 (describing developments in *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007)); see also *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077 (N.D. Cal. 2009). The current version of that executive order permits access to classified information on three conditions: (1) an agency has determined that the person is eligible for access, (2) the prospective recipient has signed a nondisclosure agreement, and (3) the person has a "need to know" the information, defined as a "determination within the executive branch" that the person requires access to "perform or assist in a lawful and authorized governmental function." Exec. Order No. 13526, 75 Fed. Reg. 707 (2009) at § 4.1(a), 6.1(dd).

right circumstance” for a court to order access to classified information over the government’s objections.<sup>125</sup> But courts proposing the use of cleared counsel ultimately dodged the separation of powers dispute by resolving the cases on other grounds, or because the cases settled before the dispute could be resolved.<sup>126</sup> Thus, the courts’ authority to order the executive to provide access to classified evidence remains unsettled.<sup>127</sup>

The practice of clearing counsel to view classified information is more established outside traditional civil litigation. In criminal cases, for instance, the Classified Information Procedures Act (CIPA) allows courts to prohibit the disclosure of classified information to defendants, while providing for alternative procedures to enable defendants to use or contest that evidence.<sup>128</sup> The Second Circuit has ruled that access to classified information under CIPA may be limited to individuals who can obtain security clearances, provided that this limitation “does not deprive the defense of evidence that would be ‘useful to counter the government’s case or to bolster a defense.’”<sup>129</sup> In some cases, this means that a defendant’s lawyer can see classified information otherwise barred from the defendant.

The Guantanamo habeas litigation also operates with cleared counsel: detainees’ lawyers who obtain the necessary security clearances may access classified information,<sup>130</sup> but may not disclose that information to the detainees without specific permission from the government.<sup>131</sup> Pursuant to a broad protective order applicable to Guantanamo detainee habeas suits, detainees’ counsel may ask questions to their clients that are informed by the classified evidence so long as they do not reveal the content of the classified information.<sup>132</sup> In the general civil context, however, with neither a foundational statute like CIPA, nor an accepted, class-wide protective order as in the Guantanamo habeas cases, the potential for counsel to obtain classified information in civil cases remains unclear.

---

125. *Horn*, 647 F. Supp. 2d at 63.

126. *Id.* at 56; *see also* Tien, *supra* note 7, at 692 (describing how the court “dodged the looming constitutional issue” after a protracted struggle with the government over its order providing for plaintiffs’ counsel to access top secret evidence).

127. Other district courts continue to assert their authority to decide the “need to know” question while acknowledging the legal uncertainty. *See, e.g.*, *Pollard v. U.S. Parole Comm’n*, 2016 WL 3167229 (S.D.N.Y. June 6, 2016) (concluding that the court could review the executive’s *ex parte* declaration that counsel did not have a “need to know” the information relied upon to set special parole release conditions).

128. 18 U.S.C. app. 3 § 3 (2012).

129. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 122 (2d Cir. 2008).

130. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 148 (D.D.C. 2008), *protective order amended by In re Guantanamo Bay Detainee Litig.*, 2009 WL 2143732 (D.D.C. July 10, 2009).

131. *Id.* at 150.

132. *Cole & Vladeck, supra* note 7, at 177.

*D. Court-Appointed Experts and Masters*

In civil national security litigation, federal district courts have experimented with two kinds of judicial assistants to help review secret material: court-appointed independent experts authorized by the Federal Rule of Evidence (F.R.E.) 706(a) and special masters pursuant to the Federal Rule of Civil Procedure (F.R.C.P.) 53(b). This experimentation has been tentative. In recent years, two courts considered appointing independent experts to help evaluate an assertion of the state secrets privilege, although for various reasons, they did not follow through. Additionally, in the pre-9/11 period, at least two courts used special masters to help review government secrecy assertions, including in a state secrets context. Ultimately, the use of special judicial assistants for reviewing classified information faces the same constraint as cleared counsel: the uncertain legal authority of courts to overturn executive “need to know” determinations.

The two federal courts that proposed appointing experts did so pursuant to F.R.E. 706(a), which allows a court to appoint experts on its own initiative, regardless of whether or not the parties approve of the choice.<sup>133</sup> That suggestion went furthest in *Hepting*, the NSA surveillance challenge against AT&T described above.<sup>134</sup> After the US government asserted the state secrets privilege, Judge Walker rejected as premature the government’s request to dismiss the case outright.<sup>135</sup> To determine whether more limited invocations of the privilege were justified, Judge Walker proposed appointing his own expert under F.R.E. 706 to help assess whether the disclosure of certain evidence would present “a ‘reasonable danger’ of harming national security.”<sup>136</sup> Judge Walker envisioned appointing someone with a high-level security clearance who had “extensive experience in intelligence matters,” and believed that such a “procedural innovation” was “appropriate given the complex and weighty issues the court w[ould] confront in navigating any future privilege assertions.”<sup>137</sup>

The plaintiffs supported the proposal because they believed a court-appointed expert could partially offset the lack of an adversarial process for challenging the government’s state secrets claims.<sup>138</sup> They urged the judge to select someone without professional ties to the government and to disclose as much as possible about that person’s actual participation in the case.<sup>139</sup> By contrast, AT&T and the government argued that the appointment would be neither necessary nor helpful. AT&T asserted that only current executive officials with a full understanding of the “entire national security and intelligence

---

133. FED. R. EVID. 706(a).

134. *See supra* Part II.A.

135. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006).

136. *Id.* at 1010.

137. *Id.* at 1010–11.

138. Plaintiffs’ Brief on Order to Show Cause Issued in the Court’s July 20, 2006 Order at 8, *Hepting*, 439 F. Supp. 2d 974 (N.D. Cal. July 31, 2006) (No. C-06-00672-VRW).

139. *Id.* at 9–10.

picture” could judge the harm from disclosing information.<sup>140</sup> “Not to be glib, we are happy to be your experts,” the Justice Department lawyer told the court, asserting that, if necessary, the judge could ask further questions to government lawyers or to an intelligence official *in camera*.<sup>141</sup> Furthermore, AT&T argued that an expert could not confidentially advise the court because his or her analysis would be subject to discovery and testimony at trial.<sup>142</sup> Moreover, as in the cleared counsel cases, the government charged that a court order requiring the executive branch to provide an independent expert with access to classified information would raise “significant separation of powers concerns.”<sup>143</sup>

Judge Walker ultimately decided not to appoint an expert at that stage, finding it premature in light of “a whole variety of reasons,” presumably including the procedural posture of the case.<sup>144</sup> But the court’s approach influenced at least one other court to consider a F.R.E. 706 appointment: in *Al-Haramain Islamic Foundation v. Bush*, a suit challenging the NSA’s interception of phone conversations between a charity and its attorneys, the district court also proposed selecting an expert to assist the judge in determining whether disclosures in discovery would create a reasonable danger of harm to national security.<sup>145</sup> As in *Hepting*, the judge refused to dismiss the case at the outset on the basis of the state secrets claim, but stated that he might have to do so later if it turned out that the parties could not prove their claims or assert defenses without exposing state secrets.<sup>146</sup> The court did not ultimately appoint an expert, as the Ninth Circuit held that the government had properly invoked the privilege over certain evidence, and remanded for further determination of whether foreign intelligence law preempted the privilege.<sup>147</sup>

---

140. AT&T Corp.’s Response to July 20, 2006 Order to Show Cause Regarding Appointment of Expert at 4, *Hepting*, 439 F. Supp. 2d 974 (N.D. Cal. July 31, 2006) (No. C-06-00672-VRW).

141. Transcript of Proceedings at 19, *Hepting*, 439 F. Supp. 2d 974 (N.D. Cal.) (No. C06-0672 VRW). Apparently unaware of the Agent Orange case, AT&T incorrectly stated that no court had ever used an expert or advisor to review state secrets assertions before. *Id.* at 18–19.

142. AT&T Corp.’s Response to July 20, 2006 Order to Show Cause Regarding Appointment of Expert, *supra* note 140, at 5.

143. *Id.* at 17.

144. Transcript of Proceedings, *supra* note 141, at 33. Specifically, the reasons likely included the possibility that the case could be dismissed after the Ninth Circuit reviewed the district court’s state secrets decision or that the case might be reassigned to another judge by the MDL Panel. In addition, Judge Walker might also have concluded that he did not lack the knowledge to judge the claim without assistance or that the appointment of a technical advisor, rather than an independent expert, would be more suitable. *See id.* at 9–10.

145. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1233 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007). The opinion noted that other courts had encouraged “procedural innovations” to assist judges in allowing cases to proceed while protecting privileged information, and that *Hepting* had proposed a “special master to consider classified evidence.” *Id.* at 1220–21.

146. *Id.* at 1226–27.

147. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1204, 1206 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007). The Ninth Circuit reviewed the evidence in question *in camera* and found that the government had properly invoked the privilege, agreed with the district court’s determination that the subject matter of the case did not constitute a state secret, but disapproved of the court’s order allowing the plaintiffs to testify about the content of the privileged evidence *in camera*. *Id.*

Although neither *Hepting* nor *Al-Haramain* resulted in the appointment of an independent expert, earlier courts have used special masters to determine whether the government could properly withhold national security-related information. In 1987, Judge Oberdorfer in the District of Columbia appointed a special master in a FOIA case brought by the Washington Post to obtain Defense Department documents relating to US hostage rescue efforts.<sup>148</sup> The Defense Department had invoked FOIA's national security exemption to withhold 2,000 documents, amounting to 14,000 pages.<sup>149</sup> The court selected as a special master a former Justice Department intelligence lawyer who had held a top secret security clearance, and tasked him with reviewing a representative sample of the withheld documents in order to provide arguments for and against exemption.<sup>150</sup> The DC Circuit rejected the government's application for a writ of mandamus to overturn the order, holding that the appointment met the F.R.C.P. 53(b) standard for demonstrating an "exceptional condition."<sup>151</sup> The court approved Judge Oberdorfer's findings that the only alternatives to using a special master, such as relying on the government to randomly select documents or waiting for law clerks to obtain security clearances, were undesirable.<sup>152</sup>

In an even earlier case, a district court authorized a special master to rule on whether the government had properly invoked the state secrets privilege. In the Agent Orange litigation in the Eastern District of New York, veterans and their family members sued manufacturers of herbicides used by the US government in the Vietnam War.<sup>153</sup> The court appointed a special master to supervise all pretrial discovery for the first phase of the trial, which centered on whether the defendant companies could maintain a government contract defense to liability.<sup>154</sup>

The authority and access granted to that special master are striking in light of current executive resistance to the involvement of third parties in state secrets cases. The court empowered the security-cleared special master<sup>155</sup> to decide both whether government documents were relevant to the litigation and whether the state secrets privilege justified their non-disclosure.<sup>156</sup> Because the government claimed it would be burdensome to assert the privilege over thousands of documents—assertion of the privilege requires a department head to review each

---

at 1204. The plaintiffs in the case had received the evidence in question inadvertently as a result of a government mistake. *Id.* at 1194–95. The Ninth Circuit held that once the state secrets privilege properly protected information, the information could not be relied upon in any fashion to prove standing or the elements of the plaintiff's case. *Id.* at 1204.

148. *In re U.S. Dep't of Defense*, 848 F.2d 232, 234 (D.C. Cir. 1988). See Fuchs, *supra* note 7, at 174–75 for a longer description of the use of the special master in that case.

149. *In re U.S. Dep't of Defense*, 848 F.2d at 233.

150. *Id.* at 234.

151. *Id.* at 235.

152. *Id.* at 237–38.

153. *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427, 429 (E.D.N.Y. 1983).

154. *Id.*

155. *Id.* at 438 n.4.

156. *Id.* at 439. The master's decisions could be "appealed" to the district court.

document in question—the special master decided that he would rule first on relevance.<sup>157</sup> To facilitate that review, the government granted extraordinary access to the special master, who spent weeks in a “special guarded room in the Pentagon” examining tens of thousands of documents *prior* to the government deciding whether they qualified for state secrets protection.<sup>158</sup>

Only some of these cases are remembered. Judges and lawyers continue to cite the use of a special master in the DC hostage rescue FOIA litigation.<sup>159</sup> But the use of a special master to review state secrets assertions in the Agent Orange case seems largely to have been forgotten: the government in *Hepting*, for instance, appeared unaware that courts had ever deployed third parties to help review state secrets.<sup>160</sup>

Now, however, the government appears to resist clearing third parties to a greater degree than in the past. Had courts appointed independent experts or special masters in recent cases, the government would likely have pressed its position that only the executive branch can determine whether a person meets the “need to know” requirement for accessing classified information.<sup>161</sup> Thus, to be effective, the appointment of judicial adjuncts would require either executive acquiescence or a judicial decision overruling the separation of powers objection.

#### *E. Facilitating Interlocutory Appellate Review*

In general, parties cannot appeal decisions in a case unless a judge has issued a final judgment.<sup>162</sup> A decision is not final unless it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>163</sup>

---

157. *Id.* at 437, 439.

158. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 93 (1986). The master designated 154 documents that he considered relevant and gave the government an opportunity to assert the privilege with respect to just those documents. *Id.* The government ultimately claimed the privilege with respect to just one document. *Id.* It remains unclear, from Schuck’s account, whether the special master ruled on the privilege assertion over that document.

159. For instance, Judge Hellerstein cited that precedent in noting that special masters could be used in FOIA disputes, before deciding to review documents himself in his detainee abuse FOIA case. *ACLU v. Dep’t of Defense*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004). In addition, the plaintiffs in *Hepting* suggested the special master from the hostage rescue FOIA case as a possible candidate for appointment as an independent expert. Plaintiffs’ Brief on Order to Show Cause Issued in the Court’s July 20, 2006 Order, *supra* note 138, at 14.

160. Transcript of Proceedings, *supra* note 141, at 18–19 (quoting government lawyer as stating, “I’m not aware of a single state secrets case in which an expert has been appointed. In every case that I am aware of . . . the exchange is between the Executive Branch and the Article 3 court.”). Although the government may have been correct with respect to F.R.E. 706 experts, it seemed to be calling unprecedented the involvement of any third party in reviewing a state secrets claim. Brief references to the state secrets review in the Agent Orange case do appear in some academic sources. *See* SCHUCK, AGENT ORANGE ON TRIAL, *supra* note 158, at 93; Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2148–49 (1989).

161. *See supra* Part II.C.

162. *See* 28 U.S.C. § 1291 (2012) (conferring jurisdiction to courts of appeal for “appeals from all final decisions of the district courts of the United States”).

163. *Catlin v. United States*, 324 U.S. 229, 233 (1945). The question of finality is more complicated than this formulation may suggest, as subsequent cases recognize. *See, e.g.*, *Gillespie v.*

Federal law allows for interlocutory appeals, however, under certain circumstances where a delayed appeal may lead to significant or irreversible harm. For instance, under 28 U.S.C. § 1292(b), trial courts can certify cases for interlocutory appeal where an order “involves a controlling question of law as to which there is substantial ground for difference of opinion,” and where “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” In several cases where courts ruled in favor of disclosure or refused to terminate a case, judges certified their decisions for interlocutory appeal or otherwise facilitated immediate appellate review.

District judges permitted interlocutory appeals when they refused to dismiss cases based on a state secrets claim. Ordinarily, a trial court’s grant of a motion to dismiss all claims is a final judgment, because it ends the case, but a court’s *refusal* to grant such a motion is not a final judgment, since the case will proceed. Thus, plaintiffs challenging national security policies can generally appeal court orders dismissing their cases at once, while the government will not be able to immediately appeal orders denying dismissal. However, where the government sought dismissal of a state secrets case on the grounds that litigating the case would endanger national security, district courts that ruled against the government often permitted the government to file interlocutory appeals. Judge Walker did so in *Hepting*, indicating that his state secrets decision involved a controlling legal question.<sup>164</sup> The federal judge in *Al-Haramain*, the contemporaneous state secrets case in the District of Oregon, took the same step.<sup>165</sup>

In these cases, the district judges recognized that, given the government’s claim that the mere maintenance of the lawsuit would harm national security interests, the costs of an erroneous decision were potentially high. In the criminal context, the CIPA statute has taken a similar approach, making immediately appealable any court orders authorizing the disclosure of classified information, penalizing the government for nondisclosure, or rejecting the government’s proposed conditions for releasing such information.<sup>166</sup> The common principle across the civil and criminal cases is that decisions that create a conceivable risk of irreparable harm are entitled to secondary review (even if the district judge herself does not find such a risk to be plausible).

The terrorist watch list cases also demonstrate trial court facilitation of appellate review. In the *Ibrahim* case before the Northern District of California, the court addressed potential disclosure risks by releasing its opinion in stages: after initially issuing a three-page summary of his decision siding with the plaintiffs, Judge Alsup abstained from releasing the full opinion until the

---

U.S. Steel Corp., 379 U.S. 148, 152 (1964) (stating that a final decision need not be “the last order possible to be made in a case”).

164. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006).

165. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1233 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007).

166. 18 U.S.C. app. 3 § 7(a) (2012).

defendants had a chance to seek review of the *disclosure decision* from the Ninth Circuit.<sup>167</sup> Likewise, Judge Brown in the *Latif* watch list case indicated she was willing to entertain an interlocutory appeal of her decisions ordering the government to disclose the reasons for plaintiffs' placement on the No Fly List.<sup>168</sup> Thus, courts complemented their atypical rulings in favor of individual rights and transparency with atypical opportunities for appellate judges to vet those decisions.

#### F. Incremental and Dynamic Judicial Management

The experimentation discussed above involved specific procedural mechanisms to reduce the risk of exposing secrets while scrutinizing secrecy claims. In addition to these particular procedures, courts have used broader processes of managing cases and determining remedies that address secrecy in a tailored, fine-grained way. In the tradition of managerial judging<sup>169</sup> and experimentalist intervention,<sup>170</sup> this approach is deliberately cautious, incremental, and dynamic—it continually responds to new information or changed circumstances.

Judge Brown's management of a constitutional challenge to terrorist watch listing in *Latif v. Sessions* exemplifies this approach. In *Latif*, a group of US citizens and legal permanent residents who had been prohibited from boarding flights to, or from, the United States, sued the government for procedural and substantive due process violations.<sup>171</sup> They argued that the procedures for challenging their apparent inclusion on the "No Fly List" fell short of

---

167. Findings of Fact, Conclusions of Law & Order for Relief, *Ibrahim v. DHS*, 62 F. Supp. 3d 909, 934, 936 (N.D. Cal. Jan. 14, 2014) (No. 3:06-cv-00545 WHA); *see also* *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 934 (N.D. Cal. 2014) (stating that "[f]or the time being, all of the order shall remain secret (save and except for a brief public summary) until the court of appeals can rule on this Court's view that the entire order be opened to public view").

168. Supplemental Joint Status Report, *Latif v. Sessions*, No. 3:10-cv-00750-BR, at 3 (D. Or. Sept. 3, 2015) (asking whether defendants intended to pursue an interlocutory appeal).

169. In the classic account of "managerial judging," Judith Resnik argued that judges were departing from their traditional role as dispassionate, passive adjudicators by meeting with parties throughout a lawsuit to shape case preparation, resolve discovery disputes, and encourage settlement. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). While Resnik criticized managerial judging for eroding the traditional due process safeguards of the adversarial system, *id.* at 426–31, the term came to be associated with a wide variety of pretrial practices related to an active judicial role, with conflicting normative appraisals. *See, e.g.*, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 328–29 (1986) (defending managerial judging as a response to transaction costs); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 30 (2003) (advocating a return to a "traditional" judicial rule); Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012) (describing and defending the role of a managerial judge in complex torts litigation); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1030 (2013) (arguing that managerial judging should be evaluated in light of substantive legal ends rather than "endogenous values in the practice of judging").

170. *See infra* Part III.E (discussing Sabel and Simon's work on "experimentalist intervention" in the remedial phases of structural reform litigation).

171. *Latif v. Holder (Latif II)*, 969 F. Supp. 2d 1293, 1296 (D. Or. 2013).

constitutional due process requirements and that their inclusion was unwarranted.<sup>172</sup> The district court initially dismissed the case on jurisdictional and joinder grounds, but the Ninth Circuit reinstated it on appeal.<sup>173</sup> Following the reinstatement, Judge Brown structured and closely managed the litigation to attempt to answer the legal questions it presented while avoiding secrecy disputes where possible, or treating them cautiously where not.

To begin, Judge Brown sequenced the litigation to address questions of law that could be resolved in advance of complex secrecy disputes. After the Ninth Circuit reinstated the case, the district court agreed to review the parties' claims in two stages. First, the parties would brief whether the existing process for contesting one's placement on the list satisfied procedural due process,<sup>174</sup> a question of law that would trigger neither fact-specific and contentious privilege disputes, nor the potential assertion of the state secrets privilege. Only after the court resolved that question would it turn to the substantive due process claims, which would require the discovery of potentially sensitive information about individual plaintiffs.<sup>175</sup> In the first stage, Judge Brown therefore considered the parties' cross-motions for summary judgment on the basis of facts to which both sides had agreed to stipulate.<sup>176</sup>

Judge Brown then adjudicated the procedural due process question in multiple steps. In 2013, she ruled that the plaintiffs' interest in international travel and their reputations implicated liberty interests protected under the Due Process Clause.<sup>177</sup> One year later, after requesting additional briefing, she held that the available "redress" procedures for contesting inclusion on the list violated due process because they failed to provide notice of the reasons for one's inclusion or a meaningful opportunity to contest it.<sup>178</sup> This decision marked not only a rare victory for plaintiffs challenging watch lists, but also one of the first watch list challenges to even proceed to a determination on the merits.<sup>179</sup>

Furthermore, after finding a due process violation, the court did not mandate precise remedies, but ordered the government to fashion a new procedure for challenging one's watch list placement that corrected the constitutional deficiencies her opinion identified.<sup>180</sup> Her opinion made clear that the court had deliberately charged the government with that task rather than

---

172. *Id.* at 1295–96.

173. *Id.* at 1296.

174. *See id.* at 1295; Parties' Joint Case Management Plan, *Latif v. Holder*, No. 3:10-cv-00750-BR at 4 (D. Or. Dec. 10, 2012).

175. Parties' Joint Case Management Plan, *supra* note 174, at 4–5.

176. *Latif II*, 969 F. Supp. 2d at 1298 (noting that the court heard motions on the basis of undisputed facts); *see also* Joint Statement of Stipulated Facts, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Jan. 31, 2013).

177. *Latif II*, 969 F. Supp. 2d at 1305.

178. *Latif I*, 28 F. Supp. 3d 1134, 1160–61 (D. Or. 2014).

179. *See Shirin Sinnar, Towards a Fairer Terrorist Watchlist*, *supra* note 94.

180. *Latif I*, 28 F. Supp. 3d at 1161–62.

specifying the appropriate procedures itself.<sup>181</sup> Judge Brown articulated the parameters of what she determined to be constitutionally necessary—notice of the reasons for placement on the list sufficient to allow plaintiffs to submit a rebuttal—but also suggested mechanisms for accommodating government concerns regarding the disclosure of classified information.<sup>182</sup> The decision held open the possibility that, in some cases, information on the reasons for watch list placement might need to be withheld altogether.<sup>183</sup>

While allowing the government the first run at fashioning new procedures, Judge Brown made clear that she would not surrender her own authority or grant the government unlimited time. Following her order, defendants asked for a six-month “voluntary remand” of plaintiffs’ claims, arguing that the government was in the “best position” to consider the costs and benefits of various procedures and insisting that courts “lack the expertise to make sensitive judgments about handling of classified information and prediction of future threats.”<sup>184</sup> After hearing from both sides, including the plaintiffs’ concerns over prolonging an already drawn-out process, the court rejected the remand request and ordered the defendants to apply a revised set of procedures within three months.<sup>185</sup>

In response to the court’s decision, the government revised its procedures so that US persons who remained on the No Fly List following an administrative complaint and internal review could learn the reasons for their inclusion.<sup>186</sup> Notably, the government announced that it would apply the new procedures to not only the *Latif* plaintiffs but also to other similarly situated “U.S. persons.”<sup>187</sup> This policy marked an important departure from the government’s long-standing refusal to notify individuals whether they were on the No Fly List at all, let alone why. The government accordingly supplied statements of reasons, of varying length and detail, to the *Latif* plaintiffs remaining on the No Fly List, claiming that more information could not be disclosed without threatening national security.<sup>188</sup>

The court addressed the sufficiency of the disclosure to plaintiffs and of the new redress procedures in a series of rulings. Rejecting the plaintiffs’ contention that the new procedures ought to include a live hearing and a clear and convincing evidentiary standard, the court concluded that the revised procedures

---

181. *See id.* (concluding that “Defendants (and not the Court)” were responsible for designing new procedures).

182. *Id.* at 1162.

183. *Id.*

184. Parties’ Joint Status Report at 3, 4, 6, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Aug. 4, 2014).

185. Case-Management Order at 2–4, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Oct. 3, 2014).

186. Notice Regarding Revisions to DHS TRIP Procedures at 2–3, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Apr. 13, 2015).

187. *Id.* at 2.

188. *Latif v. Lynch*, No. 3:10-CV-00750-BR, 2016 WL 1239925, at \*5 (D. Or. Mar. 28, 2016).

“satisf[ied] in principle” most requirements that the court had outlined.<sup>189</sup> But Judge Brown ruled that she could not fully resolve the claims because the record did not identify what information the defendants had actually withheld from particular plaintiffs.<sup>190</sup> She accordingly ordered the defendants to provide to the court a summary of material information withheld and an explanation for why additional disclosures, or special procedures such as the use of cleared counsel, were not possible.<sup>191</sup> After the government supplied this additional information (some of it *ex parte*), the court concluded that the government had adequately justified its withholdings and had met due process requirements.<sup>192</sup>

The plaintiffs have appealed these decisions as well as the court’s decision to dismiss the remaining substantive due process claims for jurisdictional reasons.<sup>193</sup> They argued that the government’s failure to explain its withholding of material information, its generalized references to potential privileges, and the limitations on adversarial contestation fell short of due process.<sup>194</sup> Notably, the district court did not explain in its final opinion why it did not push the government to clear plaintiffs’ counsel to access classified information, a possibility it had earlier proposed.<sup>195</sup>

Whether or not the court went far enough in allowing individuals to meaningfully contest their inclusion on the watch list, its decision-making process is notable. Its case management reflected a distinctly incremental and dynamic approach: the court sequenced the litigation to resolve questions that could be addressed without triggering privilege battles, decided questions in a step-by-step manner, and provided the government an initial opportunity to propose remedies while supervising the sufficiency of the reforms adopted.

### III.

#### THE BENEFITS OF PROCEDURAL EXPERIMENTATION

Moving from the descriptive to the normative, this Section argues that procedural strategies like those described can help courts while protecting information that is legitimately secret. Through such strategies, courts can reject absolutist executive assertions of secrecy while providing for more tailored protection of secrets whose release might harm US security. These procedures

---

189. *Id.* at \*2.

190. *Id.*

191. *Id.* at \*20.

192. *Latif v. Sessions*, No. 3:10-CV-00750-BR, 2017 WL 1434648, at \*4 (D. Or. Apr. 21, 2017) (describing order of Oct. 6, 2016).

193. In April 2017, the district court dismissed the plaintiffs’ remaining claims for lack of jurisdiction because a statute conferred exclusive jurisdiction over orders of the Transportation Security Administration in the federal courts of appeal and, pursuant to the government’s revised procedures, the TSA administrator was charged with issuing a final order removing or retaining a person from the No Fly List. *Id.* at \*9–10.

194. Plaintiffs’ Response to Defendants’ Second Supplemental Memorandum in Support of Their Motion for Summary Judgment, *Latif v. Lynch* (D. Or. May 26, 2016) (No. 3:10-cv-00750-BR).

195. *See Latif v. Sessions*, 2017 WL 1434648, at \*4 (dismissing all remaining claims).

do not spare courts the task of making difficult judgments about the harm that might result from particular disclosures, nor rule out the possibility of dismissals in cases where courts judge those harms to be too great. But they suggest that there often exists an alternative to broad judicial deference that might allow for greater adjudication of rights claims, accountability for legal violations, and the development of law relevant to national security activities.

Thus, Part III identifies the benefits of the procedures courts are exploring, focusing on how they enable courts to assess secret information more rigorously while protecting against harmful disclosure. Following that discussion, Part IV will explain why enthusiasm for these procedures should nonetheless be tempered with an appreciation for their costs.

#### A. *Supplementing Adversarialism*

In cases where information cannot be fully disclosed to litigants, several procedures enhance courts' capacities to evaluate information in the absence of a completely adversarial process. The US legal system typically operates on the premise that truth emerges from adversarial competition, which enables judges to determine factual and legal disputes based on the best arguments from both sides. When the government argues that certain evidence cannot be shared directly with opposing parties, the use of *in camera* review, independent experts and special masters, and cleared counsel mitigates—to varying degrees—the shortfalls in adversarial review. These procedures span the range from less to more adversarial. At one end, *ex parte* and *in camera* review involves a judge reviewing material directly rather than relying on the government's representations about them—an improvement from total deference but without input from anyone who has seen the evidence and can critique the government's position. Going a step further, court-appointed experts who have accessed the secret material can offer arguments in opposition to the government, but still without input from opposing counsel. The use of cleared counsel goes furthest in providing access to sensitive documents to opposing counsel, while still shielding documents from certain parties (and the public). Despite their differences, all of these mechanisms assist courts in deciding whether information must be kept secret in the first place, and in resolving certain factual disputes where the court has determined that some information must remain secret.

Although these procedures are often novel in civil national security cases, courts have experience with them from other contexts, reducing the administrative burdens and the security risks of applying them. For example, courts commonly review documents *in camera* in resolving privilege disputes in ordinary civil discovery and in FOIA litigation outside the national security context. In fact, in the FOIA context, the operative statute explicitly authorizes *in camera* review. *In camera* review is therefore “experimental” only in that judges use it relatively rarely in national security litigation, and because judges

who have used it have sometimes devised new methods for preserving transparency in the process.<sup>196</sup>

In civil national security contexts, courts have drawn on practices that have developed under the CIPA statute governing the use of classified information in criminal trials.<sup>197</sup> For instance, while plaintiffs' counsel in civil cases rarely procures security clearances to access classified information, criminal defense lawyers have long done so pursuant to CIPA. In the latter context, courts often enter fairly standard protective orders to set out the conditions for defense counsel's access and use of classified evidence.<sup>198</sup> Similarly, hundreds of US lawyers have now obtained security clearances and accessed classified evidence to represent Guantanamo detainees in habeas proceedings.<sup>199</sup> Thus, courts have a body of precedent and practice to draw on when they choose to apply similar procedures to civil litigation.

In addition, although judges' proposals to use third-party experts have made little headway to date in ordinary Article III courts, Congress approved a somewhat analogous model in recent reform of the Foreign Intelligence Surveillance Court (FISA court).<sup>200</sup> The FISA court originated as a specialized court with the relatively narrow function of reviewing individual surveillance warrants, but assumed an expanded role after Congress authorized it to oversee broad surveillance programs without approving the individual targets of that surveillance.<sup>201</sup> In 2015, responding to concerns over the FISA court's growing role in overseeing "bulk surveillance" in a nonadversarial fashion, Congress required the court to appoint a standing pool of amici curiae who could supply the judges with legal arguments or technical expertise related to "intelligence collection or communications technology."<sup>202</sup> Like the F.R.E. 706 experts district court judges considered appointing in *Hepting* and *Al-Haramain*, the amicus provision envisioned experts selected by the court, based on their legal or subject matter expertise, who would be eligible for security clearances to access classified information.<sup>203</sup> Unlike the proposed F.R.E. 706 experts, Congress charged the FISA court amici with presenting "legal arguments that

---

196. See *supra* Part II.B (describing Judge Hellerstein's novel procedures to review documents *in camera* while preserving a detailed record of that review for opposing counsel and appellate review).

197. See MacDougall, *supra* note 7, at 691–705.

198. See Arjun Chandran, Note, *The Classified Information Procedures Act in the Age of Terrorism: Remodeling CIPA in an Offense-Specific Manner*, 64 DUKE L.J. 1411, 1418 n.41 (2015).

199. Cole & Vladeck, *supra* note 7, at 173, 175–78.

200. See USA Freedom Act of 2015 § 401, Pub. L. No. 114-23, 129 Stat. 268 (2015).

201. See PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 174–76 (2014) (describing the beginnings of the FISA court and its expanded role after 9/11).

202. USA Freedom Act of 2015 § 401(i)(1)–(4).

203. *Id.* §§ 401(i), 401(i)(2)(A), 401(i)(3)(B). The amici curiae might suffer from similar informational access problems as the independent experts, however, in that the amici are subject to ambiguous and potentially problematic executive restrictions on their ability to access classified information. See *id.* §§ 401(i)(6)(C)–(D).

advance the protection of individual privacy and civil liberties,”<sup>204</sup> an explicitly adversarial function responding to the near-complete absence of opposing views in the FISA court, where adjudication proceeds in secret and generally without any representation from adverse parties.<sup>205</sup>

The Foreign Intelligence Surveillance Act (FISA) amicus provision Congress adopted created a less robust amicus position than many civil liberties advocates had sought, and in its current form, the FISA amici may not sufficiently redress the FISA court’s adversarialism deficit.<sup>206</sup> Nonetheless, its adoption reflects a baseline recognition that judges may lack the incentives or information to question the executive branch’s position on their own, and that some form of independent advocate can assist in interjecting contrary views. The establishment of a formal amici mechanism in the FISA context makes such a strategy less unusual than when first proposed in *Hepting* and *Al-Haramain*.

Of course, that some judges may be familiar with some of these practices does not make it easy to determine whether and how to use them, nor does it mean that all judges are familiar with the procedures. As judges experiment with such strategies, however, the process becomes easier. For instance, after some judges appoint masters or experts to review secrecy claims, later courts benefit from those courts’ published orders governing their scope of work or protecting against unauthorized disclosure, and may even choose to appoint the same experts in later cases. Existing channels for sharing information among judges make this easier, especially the Federal Judicial Center’s publications compiling methods judges have adopted in criminal and civil national security cases.<sup>207</sup> Were US judges to look abroad, they would find even greater legal precedent for, and practical experience with, procedures to evaluate cases involving sensitive information, such as the use of security-cleared counsel and “special advocates.”<sup>208</sup> Thus, judges wishing to experiment have analogues to examine within and beyond the US legal system.

204. *Id.* §§ 401(i)(3)(A), 401(i)(4), 401(i)(4)(A).

205. See Emily Berman, *The Two Faces of the Foreign Intelligence Surveillance Court*, 91 IND. L.J. 1191, 1202 (2016) (describing frequency of adversarial proceedings in the FISA court as “vanishingly small”).

206. In contrast to proposals for a public advocate that some members of Congress had proposed, Congress ultimately gave the FISA judges the power to decide whether or not to invite input from *amici* in particular cases, rather than allowing an independent public advocate to make that determination herself, and did not confer on such an advocate the right to appeal decisions of the FISA court. Berman, *supra* note 205, at 1241–46. Berman argues that, in its present form, the FISA amicus will therefore have a “negligible effect” in improving adversarial review in the FISA court. *Id.* at 1242.

207. See REAGAN, KEEPING GOVERNMENT SECRETS, *supra* note 8; REAGAN, CASE-MANAGEMENT CHALLENGES, *supra* note 8. The Federal Judicial Center has also issued a publication compiling protective orders judges have issued in criminal national security prosecutions. FED. JUDICIAL CTR., NATIONAL SECURITY PROSECUTIONS: PROTECTIVE ORDERS (2014).

208. On the use of security-cleared counsel abroad, see, e.g., Cole & Vladeck, *supra* note 7, at 173–92 (evaluating the use of cleared counsel in the United Kingdom, Canada, and United States). On foreign jurisdictions’ use of cleared “special advocates” in various contexts, see, e.g., Graham Hudson, *As Good as It Gets? Security, Asylum, and the Rule of Law After the Certificate Trilogy*, 52 OSGOOD HALL L.J. 905 (2015) (discussing use of special advocates in Canadian immigration proceedings that

*B. Spurring the Development of Architecture to Protect Secrets*

While providing sensitive information to courts or litigants generates some risk of secrets spilling out, courts' interest in reviewing secrets also spurs the growth of institutional mechanisms to reduce that risk. In other words, systemic adjustment in response to judicial procedural experimentation goes some distance towards offsetting the security risks of expanded judicial review.

The centerpiece of the institutional architecture for protecting classified information is the Litigation Security Group (LSG), a unit of the Justice Department structurally divided from the department's litigators.<sup>209</sup> The LSG assists courts both with protecting the physical security of classified information and with facilitating security clearances for court personnel or parties other than the government.<sup>210</sup> For instance, in some cases, the group's specialists may install a special safe in a judge's chambers to store classified information, while in other cases it may require the court and parties to access especially sensitive information in a "Sensitive Compartmented Information Facility," or SCIF, located in the courtroom or in a nearby FBI office, US Attorney's Office, or other federal facility.<sup>211</sup>

The rules and structures for handling classified information in court first arose in the criminal context. There, CIPA required the Chief Justice to issue rules for the protection of classified information in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense.<sup>212</sup> Under these rules, courts must appoint information security officers from the LSG to criminal cases involving classified information.<sup>213</sup> Although the CIPA rules govern only criminal cases, LSG specialists are now also assigned to civil cases involving classified information.<sup>214</sup> In 2008, the unit handled 50 civil

---

subject immigrants to detention as threats to Canadian security); CRAIG FORCESE & LORNE WALDMAN, SEEKING JUSTICE IN AN UNFAIR PROCESS: LESSONS FROM CANADA, THE UNITED KINGDOM, AND NEW ZEALAND ON THE USE OF "SPECIAL ADVOCATES" IN NATIONAL SECURITY PROCEEDINGS (2007) (setting out requisites for an acceptable system of special advocates in Canadian noncriminal proceedings involving security information).

209. See REAGAN, KEEPING GOVERNMENT SECRETS, *supra* note 8. The Deputy Assistant Attorney General for Human Resources/Administration oversees the LSG. *Id.*

210. Revised Security Procedures Established Pursuant to Pub. L. No. 96-456, § 4, 94 Stat. 2025 (1980), by the Chief Justice of the United States for the Protection of Classified Information.

211. See, e.g., REAGAN, KEEPING GOVERNMENT SECRETS, *supra* note 8, at 22; REAGAN, CASE-MANAGEMENT CHALLENGES, *supra* note 8, at 92-94, 162-63.

212. Classified Information Procedures Act, § 9, Pub. L. 96-456, § 9, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3 (2012)).

213. Revised Security Procedures Established Pursuant to Pub. L. No. 96-456, § 2, 94 Stat. 2025 (1980), by the Chief Justice of the United States for the Protection of Classified Information.

214. Information security officers were assigned in watch listing cases, see Transcript of Proceedings, *supra* note 113, at 5-7; immigration cases, see *Kaur v. Holder*, 561 F.3d 957, 960 n.2 (9th Cir. 2009); surveillance cases, see *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); and disputes involving government contractors, see *Afghan Am. Army Servs. Corp. v. United States*, 106 Fed. Cl. 751, 753 (2012).

cases, in addition to 140 criminal cases and about 500 habeas cases involving Guantanamo detainees.<sup>215</sup>

Together with the efforts of judges and parties, the LSG's precautions appear to largely succeed in preventing the inadvertent exposure of sensitive information. There are reportedly no public instances of judges failing to secure evidence<sup>216</sup> or of cleared counsel disclosing sensitive information.<sup>217</sup> Where lapses have occurred as a result of government error, the systemic response appears to be swift and even drastic, while extensive review processes guard against such incidents occurring in the first place.<sup>218</sup>

To be clear, the LSG's security procedures can present challenges for judges and litigants. They can create serious logistical burdens, especially where judges' chambers or counsel's offices are far from secure facilities or where law clerks lack clearances to assist courts.<sup>219</sup> Moreover, the physical trappings of secrecy can signal to judges that cases involving national security secrets are exceptional and better left untouched, while the dependence of judges on executive branch security officers to handle evidence can reinforce a sense of judicial subservience or incompetence.<sup>220</sup>

---

215. Panel Discussion, *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 FORDHAM L. REV. 1, 25 (2008) (statement of court information security officer).

216. JUSTIN FLORENCE & MATTHEW GERKE, NATIONAL SECURITY ISSUES IN CIVIL LITIGATION: A BLUEPRINT FOR REFORM 15 (2008) (reporting that "there is no known instance of a federal judge improperly disclosing or failing to secure secret evidence"). There exists at least one public report of inadvertent disclosure arising from civil litigation, though not through any apparent judicial failure. See *General Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1904 (2011) (describing exposure of classified information through depositions in a civil case). It is not clear, however, whether court security information officers were involved in those depositions or how developed security measures were at that time, since the incident dates from the early 1990s.

217. Stephen I. Vladeck, *The Case for a FISA "Special Advocate"* 19 (unpublished manuscript) (on file with authors). The lack of such security breaches stands in sharp contrast to pervasive leaks of classified information from the executive branch itself. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013) (arguing that the pervasiveness of leaks results in large part from executive interests in permitting them).

218. See Dafna Linzer, *In Gitmo Opinion, Two Versions of Reality*, PROPUBLICA (Apr. 25, 2011), <https://www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality> [<https://perma.cc/VZ9J-AWX9>] (describing withdrawal of a published judicial opinion one day after its filing after security officer notified court that Justice Department had accidentally cleared it for release without redacting all classified information).

219. See, e.g., Robert Timothy Reagan, *Classified Information in Federal Court*, 53 VILL. L. REV. 889, 916–17 (2008) (noting that the federal judge in one case decided not to take notes on materials in light of onerous procedures for storing them); REAGAN, CASE-MANAGEMENT CHALLENGES, *supra* note 8207, at 94 (describing difficulties presented by delay in clearing judges' law clerks); Transcript at 4–5, *United States v. Al-Timimi* (E.D. Va. Feb. 19, 2009) (No. 1:04-CR-385) (reporting judge's frustration in a criminal case with a delay in clearing law clerks); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 63 & n.5 (D.D.C. 2007) (illustrating a judge's bafflement that the government resisted sharing classified information with a law clerk even after the clerk received clearance). Also note that federal district court and appellate judges do not need to obtain security clearances but law clerks must. REAGAN, KEEPING GOVERNMENT SECRETS, *supra* note 8, at 2.

220. For more on this psychological dimension to national security secrecy, see *infra* Part III.D.

Some measures are in place, however, to protect the LSG's neutrality so that security officers do not simply advance executive interests. The Chief Justice's rules charge the LSG with serving as a neutral interlocutor for the judiciary rather than as a tool of the executive branch.<sup>221</sup> In addition, courts attempt to protect the LSG's neutrality. For instance, routine protective orders in criminal cases prohibit information security officers from discussing defense lawyers' written work or conversations with others and provide that the officers' presence in a secure facility does not rupture defendants' attorney-client privilege.<sup>222</sup> Only rarely have parties questioned the LSG officers' independence from department litigators.<sup>223</sup>

While more can be done to improve the efficiency and independence of LSG processes, the courts' interest in testing secrets more rigorously promotes both the use and the professionalization of the LSG. That, in turn, improves the safety and fairness of the court's adjudication of sensitive information. The LSG infrastructure principally aims to prevent the *inadvertent* exposure of sensitive information; it cannot prevent a court from incorrectly deciding to order the release of information that harms national security. But by facilitating the use of classified information by courts and litigants, this infrastructure assists judges in making those decisions in a more fine-grained fashion.

### C. Prompting Executive Reconsideration of Secrecy

Judicial plans to scrutinize privilege claims often prompt executive officials to disclose more material voluntarily before courts rule on those claims, increasing transparency while narrowing the range of material on which the court must render a decision. By prompting internal reconsideration of secrecy within

---

221. Revised Security Procedures Established Pursuant to Pub. L. No. 96-456, § 2, 94 Stat. 2025 (1980), by the Chief Justice of the United States for the Protection of Classified Information; *see also* Panel Discussion, *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, *supra* note 215, at 24–25 (statement of Mike Macisso, court information security officer).

222. *See* CIPA Protective Order ¶ 15, *United States v. Kim*, No. CRIM. 10-255 CKK, 2013 WL 3866545 (D.D.C. July 24, 2013); CIPA Protective Order ¶ 15, *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2006 WL 3542685 (N.D. Tex. Dec. 8, 2006); Protective Order ¶ 14, *United States v. Moussaoui*, No. 01-455-A (E.D. Va. Jan. 22, 2002).

223. For a notable example of such questioning, *see* Jesselyn Radack, *FindLaw: The Justice Department's Litigation Security Group and Its Ethics Violations in the Al-Haramain Case*, GOV'T ACCOUNTABILITY PROJECT (May 8, 2008), <http://whistleblower.org/multimedia/findlaw-justice-departments-litigation-security-group-and-its-ethics-violations-al> [https://perma.cc/8ASV-5DRV] (alleging violation of ethical standards and LSG collusion with government attorneys in *Al-Haramain* surveillance case); *see also* Patrick Radden Keefe, *State Secrets*, *NEW YORKER* (Apr. 28, 2008), <http://www.newyorker.com/magazine/2008/04/28/state-secrets-2> [https://perma.cc/V3UU-RHPK] (“The Litigation Security Station is ostensibly neutral and independent, but . . . a Justice Department employee . . . had a conflict of interest, and . . . allowing his opponents to determine who could contribute to a court filing undermines the fairness of the adversarial process”). While charges of collusion appear to be rare, the bigger concern is that security agencies themselves have wide authority over the process of determining what information in a court opinion is classified and must be redacted. *See* Linzer, *supra* note 218 (describing agencies’ “free hand in removing information supplied for the government’s case”).

the executive branch, courts' actions may diminish unjustified secrecy assertions and reduce the executive's propensity to shield material instinctively.

The detainee abuse FOIA case illustrates this dynamic. In that case, Judge Hellerstein's insistence that the government justify FOIA exemptions on an item-by-item basis, as well as his plan to review the actual documents *in camera*, prompted multiple rounds of disclosure. This disclosure in advance of court rulings is not unique: according to Meredith Fuchs, the procedures used in the hostage rescue FOIA litigation, such as the use of a special master, spurred the agency to narrow its exemption claims and disclose 85 percent of the records.<sup>224</sup> Others have demonstrated that security agencies regularly respond to credible threats of adjudication by reforming policy or narrowing secrecy claims without actual court directives.<sup>225</sup> Thus, using some of these procedures triggers greater transparency without requiring courts to make difficult judgments on the harm emerging from disclosure.

Skeptics might argue that the threat of judicial involvement could prompt executive officials to release information that they should not, in an attempt to ward off decisions requiring even greater disclosure. But the strong incentive of executive officials to err in favor of classification, and the widely acknowledged overclassification of information that results,<sup>226</sup> suggests that the disclosures often represent a correction for existing dynamics rather than an unreasonable assumption of risk. This is especially likely in contexts where internal executive procedures for objecting to disclosure lack rigor; in the FOIA context, for example, the statute does not require that a high-level government official personally review documents and approve exemption claims. By contrast, high-level officials must personally consider a state secrets assertion.<sup>227</sup> The less rigorous the initial process for asserting a privilege, the more likely that the viable threat of judicial scrutiny will lead the executive to disclose additional information before a court mandates it.

#### D. Countering Cognitive Biases

Experimental procedures of the kind described here can also counter the cognitive biases and psychological pressures affecting judges in cases involving national security and secrecy. A body of research in social and political psychology shows that cognitive biases may affect decision-making with respect to security threats. For instance, biases can lead judges to overestimate the imminence or threat of terrorism, leading courts to defer to government claims

---

224. Fuchs, *supra* note 7, at 174–75.

225. See Deeks, *supra* note 2, at 830–31 (calling this responsiveness the “observer effect”).

226. See *supra* note 33 and sources cited therein.

227. See *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953) (requiring that the head of a department with control over information formally make a state secrets claim after personal consideration of the issue).

rather than evaluate facts or costs and benefits in a rational fashion.<sup>228</sup> Some distortions result specifically from the presence of secret information in a case. For instance, experimental research points to the existence of a “secrecy heuristic” that leads people to perceive secret information as more valuable and accurate, regardless of actual differences in the quality of that information.<sup>229</sup>

The kinds of arguments advanced by the executive in security cases and the procedures for guarding secret information can also instill fear-based judicial responses rather than rational assessment. The government sometimes gestures at grave consequences from the disclosure of information with little support. For instance, as David Pozen observes, the executive has invoked the “mosaic theory” to argue that judges cannot evaluate the danger that flows from disclosing information, because adversaries might combine individually harmless pieces of information to gain insight into US counterterrorism efforts.<sup>230</sup> This theory leads some courts to accept “low-support, low-specificity, low-plausibility mosaic claims” on the basis of threats of “unknown vulnerabilities, unknown evils.”<sup>231</sup> Moreover, the special safes, secured rooms, and security officers used to protect information may create an inflated sense of danger beyond what the facts support.<sup>232</sup>

The experimental procedures described above might counter these cognitive biases and psychological tendencies. For example, assigning cases to judges experienced with classified information (through MDL) or appointing experienced experts can offset tendencies to overestimate the reliability of, or harm from disclosing, secret information. Although largely anecdotal, there is some evidence that judges experienced in dealing with classified information are more willing to probe secrecy claims because they have encountered

---

228. See CASS R. SUNSTEIN, WORST-CASE SCENARIOS 26 (2009) (arguing that cognitive availability, probability neglect, and outrage influence perceptions of terrorism risk); Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415, 1442–52 (2014) (noting that “in high risk-contexts, we see a judicial propensity to weight the harm heavily in disregard of evidence supporting the probability or imminence of that harm”); SETTY, *supra* note 34, at 124–27 (citing political science and media studies on terrorism threat inflation). For a striking example, see *United States v. Mehanna*, 735 F.3d 32, 40 (1st Cir. 2013) (“Terrorism is the modern-day equivalent of the bubonic plague: it is an existential threat.”). The bubonic plague killed an estimated 25 million people in Europe in the fourteenth century, wiping out perhaps one-third of the population. *Black Death*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/Black-Death> [<https://perma.cc/733Y-QMDB>] (last visited July 11, 2018).

229. See Mark Travers et al., *The Secrecy Heuristic: Inferring Quality from Secrecy in Foreign Policy Contexts*, 35 POL. PSYCHOL. 97, 97–98 (2014).

230. See generally David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005) (documenting the “evolution of the ‘mosaic theory’” in national security law post-9/11 and arguing that the theory is susceptible to abuse).

231. *Id.* at 653; see also *id.* at 677–78 (suggesting the appointment of special masters or other “extrajudicial assistants” to help judges evaluate “difficult” mosaic claims).

232. See, e.g., Remarks of Judge Gerald E. Rosen, *The War on Terrorism in the Courts*, 21 T.M. COOLEY L. REV. 159, 164 (2004) (stating that “entering the SCIF and reviewing materials in it is something of a twilight-zone experience”); see also *supra* note 54 (quoting Judge Robertson’s remarks on how the presence of security officers, safes, and non-cleared clerks may encourage deferential judicial review of cases involving classified information).

overclassification in the past.<sup>233</sup> Similarly, consultation with outside experts might diminish the mystification that surrounds national security secrecy, because individuals previously exposed to the variable strength of intelligence claims may be less prone to overestimate their value.

Of course, mechanisms to introduce “expertise” do not always counter such biases. As researchers have noted, security professionals might place even *greater* weight on secret information than lay people if they worked for agencies with bureaucratic interests in exaggerating their intelligence-gathering capabilities.<sup>234</sup> For experts to mitigate secrecy-related biases, judges must be able to identify candidates who are both experienced with classified information *and* sufficiently independent from intelligence agencies. Judges might screen for independence by emphasizing qualifications such as an absence of current government employment, a lack of intent to rejoin security agencies, and professional experience that includes reviewing executive secrecy or national security claims. Individuals who have previously served in an oversight rather than operational role might be especially suitable, such as former Inspectors General within security agencies,<sup>235</sup> former members of the Privacy and Civil Liberties Oversight Board,<sup>236</sup> or past members of special commissions charged with reviewing agencies’ classification decisions.<sup>237</sup>

The procedures described in this Article may also enable more rational risk assessment by alleviating judges’ psychological sense that they will bear full, personal responsibility for a security lapse.<sup>238</sup> Consultation with a court-

---

233. According to Judge Trenga, who interviewed thirty-one federal judges on the application of the state secrets privilege, some judges with experience adjudicating executive privilege claims and national security issues were “among those inclined to be the least deferential and most probing concerning an invocation of the state secrets privilege,” because they had witnessed agencies’ overclassification of information and the government’s tendency to overstate potential harm to national security. Anthony J. Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 HARV. NAT. SEC. L. J. 1, 54 (2018).

234. See Travers et. al, *supra* note 229, at 108.

235. See generally Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013) (highlighting the significant role of inspectors general in monitoring national security activities affecting rights); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 309–15 (2015) (describing Justice Department Inspector General).

236. See Sinnar, *Institutionalizing Rights*, *supra* note 235, at 316–24 (discussing the Privacy and Civil Liberties Oversight Board).

237. See Aftergood, *Reducing Government Secrecy*, *supra* note 33, at 407 (praising the Interagency Security Classification Appeals Panel as an effective executive branch effort to combat overclassification).

238. As one example of the psychological pressure on judges, during oral arguments for a case challenging the closure of post-9/11 immigration hearings for terror detainees, Third Circuit Judge Morton I. Greenberg asked ACLU counsel: “People may die, lots of people, if we’re wrong. You want us to run that risk. How can we do that?” Howard Bashman, *Coverage of Today’s Third Circuit Oral Argument in Case Challenging the INS’s Blanket Closure of Terror-Related Deportation Proceedings*, ABOVE THE LAW: HOW APPEALING (Sept. 17, 2002), [http://howappealing.abovethelaw.com/2002\\_09\\_01\\_appellateblog\\_archive.html](http://howappealing.abovethelaw.com/2002_09_01_appellateblog_archive.html) [<https://perma.cc/W3LE-AD47>]. This exchange was noted in COLE, *ENGINES OF LIBERTY*, *supra* note 61, at 192–93.

appointed advisor, the facilitation of interlocutory review, and incremental decision-making all provide a means for judges to obtain a “second opinion” before making a decision or before their decision takes full effect.<sup>239</sup>

While some of these strategies give the government additional opportunities to persuade courts not to order disclosure, the availability of second opinions may also make the judiciary more comfortable questioning government claims. If judges hesitate to intervene in national security cases out of a sense that they will be personally blamed for security failures, then structured opportunities to share decision-making authority may increase the courts’ willingness to rule against the government. In other words, knowing that an appellate court will review a decision before it takes effect, or that the government will take the first step of proposing changes to policies found to violate the law, may reduce the psychological pressures on courts to defer unconditionally to the executive.

#### *E. Enabling Judicial Learning*

Almost all the procedural strategies addressed here focus, in some fashion, on increasing the information available to courts as they judge government secrecy claims. Some procedures do this by enabling the judge, judicial adjuncts, or private counsel to access secret information and thus reach more informed decisions about the need for secrecy or the merits of a case. In that sense, all of these strategies enable judicial learning. But this Section focuses more particularly on how courts’ approach to managing cases and determining remedies—described above as “incremental and dynamic”—allows judges to increase their understanding of national security legal disputes over time, rather than making broad judgments prematurely.

The *Latif* court’s approach to sequencing litigation, both before and after it ruled that the watch listing process violated plaintiffs’ due process rights, illustrates the point well.<sup>240</sup> Case management decisions enabled the court to resolve certain claims without delving into privileged information. Further, the court permitted the government to propose remedies addressing the court’s due process decision following an interagency review process, rather than mandating a detailed set of remedies. As described above, the sequential and incremental nature of the decision-making process enabled the court to gain familiarity with the claims over time, to decide how much sensitive information needed to be disclosed when it had more information, and to make course corrections as needed.

While this approach to decision-making may be prompted by an interest in protecting national security secrets, legal scholars have observed a more general

---

239. See generally Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435 (2011) (analyzing how second opinion mechanisms can be integral to the design of legal and lawmaking institutions).

240. See *supra* Part II.F.

move towards structuring the remedial phase of judicial intervention in a manner that facilitates learning. For instance, Charles Sabel and Bill Simon have argued that structural remedies in public law litigation have changed considerably.<sup>241</sup> In earlier decades, courts relied on “command-and-control injunctive regulation,”<sup>242</sup> which expressed key directives in a “single, comprehensive, and hard-to-change decree,” measured the defendant’s compliance against specific “prescriptions of conduct,” and depended heavily on the court or a court-appointed master to implement remedies.<sup>243</sup> More recently, Sabel and Simon argued, courts have turned to “experimentalist intervention” characterized by establishing “more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability.”<sup>244</sup> The newer form of structural remedies “institutionalizes a process of ongoing learning and reconstruction” by allowing parties and stakeholders to revise goals and continually reassess an institution’s performance.<sup>245</sup>

Sabel and Simon’s model of experimentalist intervention only loosely applies to national security civil litigation. For instance, Sabel and Simon envision reforms emerging out of stakeholder participation in a “dialogic” process<sup>246</sup> that involves substantial public transparency.<sup>247</sup> It is difficult to imagine executive agencies agreeing to a remedial process with that level of transparency, even when identifiable communities of affected individuals have expressed interest in such a process. Nonetheless, the remedial phase of the *Latif* litigation reflects an objective broadly similar to the Sabel-Simon model of experimentalist intervention: to institute a structured process of information-gathering used to reform a violation, rather than resolving the issues all at once through a comprehensive judicial decree. As much as specific experimental procedures, courts’ overall case-management and remedial decisions can allow them to learn over time and reach more informed decisions.

#### IV.

##### SECRECY EXPERIMENTATION AND RULE OF LAW VALUES

As Part III argued, courts’ procedural experimentation in national security cases suggests an alternative to broad judicial deference to the executive, enabling litigation while accommodating secrecy interests that courts find to be justified. Yet in some cases, the procedures adopted create tension with core rule of law values: due process, transparency, pluralism, and the avoidance of bias. Moreover, some might object that these procedures are simply too little, too late

---

241. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

242. *See id.* at 1019.

243. *See id.* at 1021–22.

244. *Id.* at 1019.

245. *Id.*

246. *Id.* at 1025.

247. *Id.* at 1070–71.

to counter the explosive growth of executive secrecy and the insulation of most national security policies from judicial review.

This Section identifies, and acknowledges the significance of, these concerns. Although using such procedures improves upon a status quo in which court challenges to national security policies rarely advance, the procedures do not offer a set of “off the rack” solutions for national security cases. Courts should turn to these procedures only after determining that the procedures satisfy due process requirements and that their value outweighs their risks. This Section elaborates the most significant concerns and suggests some principles to guide their use.

#### A. *The Due Process Question*

Courts experimenting with procedures to review national security information must determine that they are fair to the individuals at the center of the legal dispute. But a procedure that is fair in one context may be insufficient in another. For any of the procedures discussed in this Article, procedural fairness depends on a range of factors including the substantive right at stake in a proceeding, the government’s countervailing interests, the particular function for which the court is seeking to use it, and the court-imposed conditions for its use.

To take a straightforward example, a court’s *in camera* review of national security information might suffice to evaluate a FOIA exemption claim, while it might fail completely to protect a person contesting her inclusion on a watch list. In the FOIA context, a person requesting the disclosure of government records need not show any particular need for the information, let alone its material impact on her life.<sup>248</sup> While FOIA requests play an important role in generating transparency over the conduct of government, the plaintiff’s stake in the litigation is far different from that of a person barred from air travel. Indeed, in the latter context, *Latif* held that the government must ordinarily provide some information regarding the reasons for watch listing directly to the affected individual, not just to a reviewing court or her counsel.<sup>249</sup> Other relevant differences exist between the application of secrecy management procedures across the two contexts: notably, in FOIA cases, the litigation itself is over access to information, so a court order to provide information to opposing parties represents a government loss on the merits, not a mechanism to advance the case.<sup>250</sup>

---

248. See *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) (noting that FOIA gives “any person” a right to request federal records without needing to state reasons for the request).

249. See *Latif I*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014).

250. In watch listing cases, court orders requiring the provision of information to the plaintiffs might represent a loss to the government on a procedural due process claim as well as a step towards resolution of the plaintiffs’ other constitutional challenges, such as substantive due process or equal protection claims.

Where the government uses undisclosed evidence to deprive individuals of protected interests in life, liberty, or property, the Due Process Clause governs the analysis of procedural fairness. In such contexts, the familiar constitutional analysis weighs the private interests of the affected individual, the risk of error from the procedures used and the value of additional safeguards, and the government's interests in question.<sup>251</sup> The more serious the deprivation, the less that measures short of full access to information will pass constitutional muster. Procedures that satisfy due process in watch listing cases, for instance, might insufficiently protect individuals in detention or deportation proceedings.

Thus, depending on the right at stake, even procedural innovations that go relatively far in conferring access to national security information, like clearing counsel to view classified information about their clients, may not satisfy due process. Cleared counsel cannot ask their clients directly about classified, derogatory information the government has against them, so they can only indirectly seek their clients' perspective on those allegations. As a result, their rebuttals of such evidence will be incomplete. In addition, where lawyers have access to information they cannot share with their clients, that asymmetry in knowledge can damage trust within the lawyer-client relationship.<sup>252</sup> Thus, while resort to such procedures might improve upon the status quo, no court should employ them without a candid accounting of their limitations.

The spread of judicial experimentation creates a risk that some judges might embrace procedural compromises even where the circumstances do not justify it. Courts' experience with classified information in criminal cases suggests this risk of normalization. Congress passed the CIPA statute in 1980 because of concerns that defendants in espionage cases—usually former government officials—could “graymail” the government into dropping prosecutions by threatening to divulge their knowledge of classified information during trial.<sup>253</sup> When Congress passed the statute, legislators and courts emphasized that the procedures established for using classified evidence should not erode defendants' right to a fair trial.<sup>254</sup> Yet over time, courts arguably transformed CIPA's permission to use *ex parte* proceedings into a mandatory procedure, accepting what was originally an exceptional practice with little justification for its need.<sup>255</sup> A similar dynamic could occur in the civil context. While the first courts to use a procedure may carefully approach that decision,

---

251. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

252. For a critique of the effect of security-cleared counsel on the lawyer-client relationship in criminal cases, see Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1371–78 (2012). In addition to the detrimental effect on the client, the information asymmetry can pose ethical challenges for lawyers.

253. See Joshua L. Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041, 1043 (2007).

254. See *id.* at 1043–45.

255. See *id.* at 1046–49. Section 4 of the statute merely reads: “[t]he court *may* permit the United States to make a request for authorization in the form of a written statement to be inspected by the court alone.” *Id.* at 1046.

subsequent courts might consider it appropriate because other courts have used it, without independently determining that the procedure is fair.

To avoid misapplying procedural adjustments to inappropriate contexts, courts should only use them under certain basic conditions. First, courts should affirmatively decide whether a procedure comports with procedural due process in any given context before using it. That determination should be made after adversarial briefing, in light of the interests at stake and the legal standard in question, and with thorough consideration of any available alternatives. Second, courts should carefully regulate use of the procedure in question. In a case involving cleared counsel, for example, the terms of access should clearly specify the scope of information to which counsel will have access and ensure that counsel may meaningfully communicate with clients about the sensitive information.<sup>256</sup> Both US courts dealing with CIPA cases and foreign courts have recognized that the specific terms of access to information matter significantly to the fairness of secrecy management procedures.<sup>257</sup> Third, courts should preserve the ability of the parties to contest a procedure on appeal. For instance, courts should maintain as much of a public record as possible of any *ex parte* hearings and consider certifying the use of any particularly innovative approach for interlocutory appeal. Courts must ultimately decide the fairness of experimental procedures in a contextual, case-specific fashion, rather than by fetishizing certain procedures as the answer to secrecy dilemmas.

### B. *Transparency and Public Access to the Courts*

Turning from party interests to those of the public at large, a second concern is that the increasing use of secrecy management procedures will hasten the decline of transparency and public access norms surrounding the courts. Judith Resnik and others argue that these norms are in peril across substantive areas of law because of the growth of alternative dispute resolution, the rise of mandatory arbitration, the lack of trials, and the increasing sealing of documents and cases.<sup>258</sup> Legal scholars observe that the rise in sealed settlement agreements, unpublished dispositions, and other limits on public access can allow misconduct to persist and obscure public understanding of the rules by which disputes are actually decided.<sup>259</sup> Specifically in national security cases, the use of *in camera* review, cleared counsel, and other accommodations for secrecy appear to further challenge expectations of “public justice.”

---

256. See, e.g., Cole & Vladeck, *supra* note 7, at 185–88 (comparing terms of access to classified evidence of special advocates in Canadian and UK courts and cleared counsel in US habeas proceedings).

257. *Id.*; see also FORCESE & WALDMAN, *supra* note 208, at v–viii (setting out principles for fair use of special advocates in Canadian security certificate proceedings).

258. See generally Judith Resnik, *Courts: In and Out of Sight, Site, and Cite: The Norman Shachoy Lecture*, 53 VILL. L. REV. 771 (2008); Smith, *supra* note 41.

259. See Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 335–36 (2012).

These concerns are heightened with respect to the concealment of trials and court opinions from public view. While protective orders limiting public access to discovery materials represent a relatively routine practice, closing portions of trial obscures the one part of adjudication that is canonically public. Given general media interest in trials and the symbolic value of trial for public audiences, trial closures especially affect the perceived legitimacy of the proceedings. The redaction of classified information in court opinions also raises special concern because it obscures not only the resolution of particular past disputes, but also the law that will govern the resolution of future cases. By concealing certain information from the public record, procedures regulating national security secrecy can threaten public legitimacy, public understanding of the law and the judicial process, the ability to hold government accountable for misconduct, and other rule of law values.

Moreover, even where warranted in particular cases, accommodations for secrecy can erode the norms that now protect against unjustified secrecy. In some of the cases described in this Article, judges recoiled from executive demands for concealment, finding such demands to be out of step with their expectations of a normal judicial process. For instance, in the *Ibrahim* watch list case, the government's repeated insistence that portions of the trial be closed to the public noticeably vexed Judge Alsup, and he strove to resist such pressures as a result.<sup>260</sup> But as such practices become more accepted, judges who now insist on protecting public access may agree to restrict it because the restrictions no longer generate normative dissonance.

As with the due process concerns discussed above, these risks caution against treating secrecy management procedures as a default set of procedures in national security cases. Courts should only use such procedures after a case-specific analysis of their necessity, with adversarial briefing, and a threshold showing that the benefits outweigh the risks.

At the same time, procedures that do not provide full public access to information do not necessarily threaten rule of law values when compared to the status quo. For instance, a judge's decision to examine documents *in camera*, rather than rely on government assertions that the state secrets privilege or a FOIA exemption protects them from disclosure, *increases* the likelihood that such documents will come to public light. In that context, the procedure clearly serves transparency rather than limiting it. Second, even our "classic" adversarial model allows for limitations on public access in service of truth seeking or other important objectives. The attorney-client privilege, the exclusion of evidence that might mislead a jury, lawyers' sidebars with the judge during trial, and the secret nature of jury deliberations all represent examples of permitted non-

---

260. See *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 935–36 (N.D. Cal. 2014) (deploring the threat to public access to courts, but noting that the court temporarily closed trial at the government's behest on ten separate occasions).

disclosure to protect the accuracy of judicial proceedings, lawyers' ability to serve as zealous advocates, and other values.<sup>261</sup>

Notably, even the plaintiffs in national security cases sometimes seek to limit public access in the service of such values. For instance, in *Latif*, the ACLU asked to partially close hearings related to the factual basis for watch listing their clients to protect against reputational damage from unproven allegations.<sup>262</sup> Thus, procedures to prevent the disclosure of information that would harm security do not invariably contravene traditional norms. Accordingly, while measures that conceal misconduct or obscure the legal basis for decisions should be opposed, objections cannot simply rest on an imagined norm of complete transparency.

Finally, the risks of adaptive procedures to manage secrecy must be considered against the cost of perpetuating a status quo in which courts dismiss national security cases altogether. In national security cases, adaptive procedures cannot be compared to a non-existent model of full transparency, but to the reality of very little national security adjudication. Ironically, some courts today cite the prospect of limiting public access to court proceedings as a reason to dismiss cases altogether, even in cases alleging torture and other extreme human rights violations.<sup>263</sup> But rule of law values—such as the legitimacy of court proceedings or accountability for misconduct—are clearly better served by limiting access to sensitive information in a tailored fashion rather than by immunizing allegations of torture from judicial review. Cases where judges categorically reject the need for secrecy, without agreeing to procedural accommodations, will likely remain exceptions.<sup>264</sup> Therefore, concerns that

---

261. I thank Norman Spaulding for raising this point.

262. Plaintiffs' Motion for Partial Closure of Oral Argument Hearing, *Latif v. Holder* (D. Or. Dec. 2, 2015) (No. 3:10-cv-00750-BR). Judge Brown eventually denied the request as moot.

263. See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 577 (2d Cir. 2009) (en banc) (citing the "strong preference in the Anglo-American legal tradition for open court proceedings" as a reason for not authorizing a *Bivens* claim).

264. In an exceptional recent case, the ACLU achieved a successful settlement against two psychologists who designed the CIA's torture program—reportedly the first case related to the CIA torture program not to be dismissed at early stages. Press Release, ACLU, CIA Torture Psychologists Settle Lawsuit (Aug. 17, 2017), <https://www.aclu.org/news/cia-torture-psychologists-settle-lawsuit> [<https://perma.cc/HK69-4B75>]. Judge Quackenbush in the District of Washington refused to dismiss the case on political question and other grounds and allowed the case to proceed to trial. Memorandum Opinion & Order Denying Motion to Dismiss, *Salim v. Mitchell*, No. CV-15-0286-JLQ, at 13 ¶¶ 1–2 (E.D. Wash. Apr. 28, 2016). He also required former top CIA officials to testify in depositions, rejecting government requests that the depositions be conducted in writing. Order Re: Motion for Protective Order, *Mitchell v. Salim*, No. CV-15-0286-JLQ, at 4 (E.D. Wash. Oct. 4, 2016). Although this case stands out for the judge's willingness to reject secrecy claims outright, rather than agreeing to procedural modifications, the case was exceptional in several respects. Most significantly, much of the information required to prove the case was already available on the public record as a result of the Senate Torture Report and prior FOIA litigation by public interest groups. Dror Ladin, *The Government Breaks Its Streak of Cutting Off CIA Torture Lawsuits*, ACLU: SPEAK FREELY (Apr. 21, 2016), <https://www.aclu.org/blog/national-security/torture/government-breaks-its-streak-cutting-cia-torture-lawsuits> [<https://perma.cc/8Q6F-GZN3>]. In addition, advocacy groups had persuaded the Obama Administration not to seek total dismissal of the case based on state secrets, in light of the developed

adaptive procedures impose intolerable costs to public access and transparency must be considered with a realistic appraisal of alternatives.

*C. Threats to Pluralism in Judicial Decision-Making*

A third concern, presented specifically by the use of MDL in national security cases, is that the centralization of cases will undercut the benefits of pluralism in judicial resolution of significant public law disputes. Good reasons exist for MDL treatment of certain national security disputes: consolidation can minimize the risk of leaking sensitive material by limiting disclosure to a single court; transfer to a judge who already has cleared law clerks and secure facilities can simplify judicial review of classified material; a judge experienced in national security cases may be less prone to overvalue government security claims; and adjudication of overlapping cases with substantial discovery can be more efficient in a single forum. But centralization also truncates judicial review with respect to controversial public law questions that could benefit from parallel consideration by multiple courts.<sup>265</sup>

Alexandra Lahav argues that the drive to consolidate litigation in recent decades has obscured the social value of jurisdictional redundancy.<sup>266</sup> She contends that “[m]ulticentered litigation” can generate multiple outcomes on divisive social issues, encourage innovation in the law, and mitigate the risk of erroneous decisions.<sup>267</sup> In light of these benefits, Lahav argues that the MDL Panel, in deciding whether to consolidate cases, should consider the extent of disagreement about the substance of the law, the costs of inconsistent adjudication, and the level of concern that ideology will influence court decisions.<sup>268</sup>

In national security cases involving secrets, centralization interferes with several benefits of plural decision-making. Many rights-based challenges to

---

public record. *Id.* Relatively few national security cases, however, involve such broad public disclosure prior to the litigation.

265. The question of the optimal level of centralization in dispute resolution systems occurs across many areas of substantive law, from patent law to public health, and often raises similar questions. *See, e.g.,* Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1627–37 (2007) (arguing that decentralization in court systems can spur competition, improve information gathering, foster innovation, and enable diversity, while centralization can increase expertise and economies of scale). An extensive and related literature on court specialization evaluates the trade-offs between specialized and generalist mechanisms for dispute resolution. *See* Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1639–40 n.33 (2015) (compiling sources and noting that proponents of specialized courts claim “efficiency, quality, and uniformity” as benefits while detractors cite “insularity or tunnel vision” and vulnerability to “politicization, political capture, or outside influence” as drawbacks).

266. Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2370 (2008).

267. *Id.* at 2414.

268. *Id.* at 2414–15. Specifically addressing the NSA telecom surveillance cases, Lahav argued that centralization was appropriate because of the risks of revealing privileged information, but noted that the cases did involve substantial disagreement and presented the possibility of an ideological divide. *Id.* at 2418–20.

national security policies involve highly contested questions reflecting significant ideological disagreement. Centralizing such cases reduces the opportunity for lower courts to model different approaches to difficult legal questions for the benefit of policy-makers, affected individuals, and the public. Further, the US Supreme Court benefits from diversity in lower court decisions when it decides to review disputes. The federal government has made this point in other procedural contexts, for example, when it argued successfully for the non-availability of non-mutual collateral estoppel against the government.<sup>269</sup> In addition, consolidation may undercut innovation. If most courts defer excessively in national security cases, then consolidation before a single judge reduces the potential for more experimental judges to formulate new methods for handling secrecy.

The experience of the federal courts on Guantanamo habeas litigation also demonstrates the potential pitfalls of centralization. Following the Supreme Court's signal to consolidate habeas challenges by Guantanamo detainees in the DC district court,<sup>270</sup> district judges ruled in favor of the detainees on a number of occasions.<sup>271</sup> The DC Circuit, however, regularly overturned such decisions, leading some to charge that the appellate court (or particular judges within that court) had subverted Supreme Court decisions requiring meaningful review of detention decisions.<sup>272</sup> The Court denied certiorari on a number of these cases, leaving that single appellate court's decisions as the final word on hotly contested and consequential issues.<sup>273</sup> Had litigation not been confined to the DC courts, a circuit split may have developed. This could have compelled the Court to confront the questions at stake, with the benefit of appellate decisions illuminating opposing perspectives. While channeling these cases to the DC federal courts made it easier to coordinate litigation, issue system-wide procedural orders, and learn from earlier decisions, it also truncated rule development in this area.

Outside the unique context of the Guantanamo litigation, even stronger reasons weigh in favor of plural and geographically distributed resolution of national security issues. For instance, where nationwide watch listing, surveillance, or immigration security policies affect US residents throughout the country, there is value in litigants' ability to seek relief from their own federal districts. At the same time, outside the context of an extraterritorial military

---

269. See *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (holding that a rule permitting nonmutual collateral estoppel would “substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue” and “deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari”).

270. See *Boumediene v. Bush*, 553 U.S. 723, 795–96 (2008).

271. See Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1453 (2011).

272. See *id.* (citing sources—including “scholars, civil liberties groups, and detainee lawyers (not to mention the editorial pages of various major newspapers)” —so arguing).

273. See *id.* at 1454.

prison, there are fewer administrative and security reasons to restrict adjudication to a single federal forum. While MDL and other consolidation mechanisms may protect secrets, they simultaneously discourage innovation, limit diversity in judicial approaches, and potentially affect the quality of the resulting law.

#### *D. Concerns Over Bias*

Several of the procedures described in this Article, if implemented poorly, could import new sources of bias into judicial decision-making. The challenge is that courts insufficiently sensitive to this risk will end up adopting procedures that exacerbate some of the very deference that they are seeking to offset.

For instance, the incremental and dynamic approach to case management depicted above<sup>274</sup>—which may include inviting government participation in the design of remedies—runs the risk of ceding too much authority to the executive. After determining that the government violated the law, it may be sound policy for a court to allow the government an opportunity to engage in interagency deliberations and propose reforms. But a court that does not retain the authority and will to reject inadequate government proposals risks approving cosmetic changes that do not actually remediate the underlying harm.

Similarly, the appointment of masters and experts might exacerbate the lopsided adjudication of secrecy claims if courts select individuals predisposed to identify with the government. Judges may prefer individuals with experience in national security agencies, both because of their presumed expertise and because they more likely have, or can qualify for, appropriate security clearances. That experience may make these individuals less likely to view secrecy claims as inscrutable—a point discussed above.<sup>275</sup> On the other hand, this past experience might lead such experts to share the perspective of the national security establishment. Courts that select experts without fully vetting their capacity for independent judgment might replicate security biases, not overcome them.<sup>276</sup>

The use of MDL also raises concerns over bias—or the appearance of bias—in the selection of a transferee court. The Panel has tremendous discretion over where to send cases that it chooses to consolidate. Ordinarily, when plaintiffs file cases outside the MDL process, personal jurisdiction doctrine and rules for the random assignment of judges within jurisdictions constrain plaintiffs' choice of forum.<sup>277</sup> Through MDL, both limits collapse. The MDL Panel can send a case to any court in the country, whether or not it would have had personal jurisdiction over the defendant if the case were filed there directly. The Panel also designates the particular judge who will hear the case. Moreover, the brief orders issued by

---

274. *See supra* Part II.F.

275. *See supra* Part III.D.

276. *See supra* notes 235–36 (noting some means by which judges might identify experts more likely to demonstrate desired independence).

277. *See supra* Part II.A.

the MDL Panel provide limited justifications for these transfer decisions. Despite the broad discretion over forum choice, and the limited transparency of Panel decisions, that choice can be consequential. For instance, the majority rule is that the transferee court applies its circuit's law on federal law questions rather than the law of the transferor court.<sup>278</sup> Therefore, the transfer decision determines which Circuit's interpretation of federal law will be applied. Where patterns of ideological division exist across the circuits, as sometimes happens on national security questions, the choice of forum can significantly affect the outcome.

Thus, even where no actual bias leads the Panel to choose one court over another, the transfer decision can predetermine—or appear to predetermine—the result. For instance, the MDL Panel might send national security cases to the Eastern District of Virginia, citing that court's familiarity with federal terrorism prosecutions or its proximity to the federal government.<sup>279</sup> While this appears to be a neutral—or even desirable—basis for preferring that court, other factors might cast doubt on the legitimacy of that decision. For instance, presidents might have appointed specific judges to that court, with its disproportionate share of terrorism prosecutions, precisely because of the judges' past government experience defending terrorism policies.<sup>280</sup> In addition, the fact that that district lies within the Fourth Circuit might also have raised concerns in the past, since that circuit at one point notoriously held expansive views of executive power on the battlefield.<sup>281</sup>

The question is whether judges can alleviate these concerns by making decisions cognizant of these risks. In the context of appointing special masters

---

278. See, e.g., *In re Korean Air Lines Disaster* of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (holding that the law of an MDL transferor forum does not have precedential effect on a federal district court in another circuit); see also Mark A. Hill, Note, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 342 (2009) (“[A] court receiving an MDL docket should apply its own circuit's law to decide federal questions.”).

279. See Sari Horwitz, *In Va.'s Eastern District, U.S. Attorney's Reach Transcends Geographic Bounds*, WASH. POST (Dec. 15, 2012), [https://www.washingtonpost.com/world/national-security/invas-eastern-district-us-attorneys-reach-transcends-geographic-bounds/2012/12/15/a3f8f992-4625-11e2-9648-a2c323a991d6\\_story.html?utm\\_term=.e06e963a3b75](https://www.washingtonpost.com/world/national-security/invas-eastern-district-us-attorneys-reach-transcends-geographic-bounds/2012/12/15/a3f8f992-4625-11e2-9648-a2c323a991d6_story.html?utm_term=.e06e963a3b75) [https://perma.cc/5QBL-BKME]; Adam Goldman & Carol D. Leonnig, *Benghazi Case a Big Test for D.C. Lawyers Who Lack Experience Prosecuting Terror Suspects*, WASH. POST (June 21, 2014), [https://www.washingtonpost.com/world/national-security/benghazi-case-a-big-test-for-dc-prosecutors-who-lack-experience-in-terrorism/2014/06/21/a4e3c8a6-f6fe-11e3-a606-946fd632f9f1\\_story.html?utm\\_term=.3bf116b5c8d9](https://www.washingtonpost.com/world/national-security/benghazi-case-a-big-test-for-dc-prosecutors-who-lack-experience-in-terrorism/2014/06/21/a4e3c8a6-f6fe-11e3-a606-946fd632f9f1_story.html?utm_term=.3bf116b5c8d9) [https://perma.cc/MFU4-ZJSQ] (noting that most federal terrorism cases are heard in the Eastern District of Virginia or New York and that “[f]or the highest-profile cases, including terrorism cases, senior Justice Department officials frequently become involved in choosing the venue, considering factors such as the experience of the prosecutors, the reputation of the judges and the potential juries in each district”).

280. For an example of a similar dynamic with respect to the Southern District of New York, another favored district for terrorism prosecutions, see Spencer Ackerman, *Ex-FBI Lawyer Linked to Surveillance Abuses Poised for Federal Judge Post*, GUARDIAN (Sept. 6, 2013), <https://www.theguardian.com/world/2013/sep/06/fbi-lawyer-surveillance-judge-valerie-caproni> [https://perma.cc/9SQN-R5WE] (noting the nomination of former FBI lawyer Valerie Caproni to federal judgeship in the Southern District of New York).

281. See Transcript of Motions Hearing, *supra* note 91, at 24–26.

or experts, most judges will take seriously the parties' objections to proposed experts, lessening the bias concern. Because the judicial appointment of masters or experts represents a relatively unusual practice, judges will likely select adjuncts who do not generate strong opposition from either party. In the MDL process, by contrast, it might be harder to raise such concerns. Panel judges will likely resist the notion that a colleague could not judge fairly, at least in the absence of a direct conflict of interest. Moreover, given prevailing norms that require parties in MDL to cite "convenience" and "efficiency" as the reasons for preferring certain courts, it might be difficult to claim differences in federal law as the real basis for their preferences. Thus, the MDL process of handpicking transferee judges and courts, with little explanation or oversight, cautions against overusing it in contentious national security cases.

#### *E. Too Little, Too Late?*

A final concern is that the procedural moves courts have made towards managing secrecy are essentially "too little, too late." The procedures are arguably too little because instances of experimentation represent exceptions to an overall pattern of judicial deference, and such experiments are not likely to spread without broader legislative reform. They are arguably too late because they do not address the incentives that lead to excessive secrecy at the front end. These concerns are valid: the procedural experimentation evident so far is limited in scope and impact. Yet it points the way to broader solutions. To reframe the point, procedural adaptation in national security cases is not "too little, too late," so much as it is "necessary but insufficient."

As an initial matter, this Article does not contest the view that a judicial refusal to probe secrets, rather than a willingness to experiment, remains the dominant trend. Thus, this Article does not take issue with, for instance, Margaret Kwoka's recent depiction of the overall judicial treatment of national security secrecy.<sup>282</sup> Kwoka argues that "all litigation doors are often shut" when the government asserts a national security secrecy claim.<sup>283</sup> She contends that courts' responses demonstrate "procedural exceptionalism" because they depart from both the ordinary, adversarial rules used to resolve informational disputes in non-security contexts and from "inquisitorial fallback procedures" like *in camera* review.<sup>284</sup>

The experimentation described in this Article *is* a departure from prevailing patterns of judicial deference. The real question is whether *ad hoc* judicial experimentation on secrecy can succeed in the absence of more systemic legislative change. Clearly, legislative reform of the state secrets privilege, constitutional damages claims, and other doctrines could address some of the most pressing obstacles to judicial review in cases involving national security

---

282. Kwoka, *Procedural Exceptionalism*, *supra* note 7.

283. *Id.* at 117.

284. *Id.* at 107–08, 141–42.

secrets.<sup>285</sup> For example, legislation could change the substantive standard for state secrets claims by allowing judges to balance the national security harms from disclosure against the litigants' need for information, or by constraining the dismissal of cases on the basis of the privilege. Even without such significant changes, Congress could specifically authorize some of the procedures that courts have considered, such as the use of judicial adjuncts or cleared counsel to review state secrets claims. Indeed, the failed State Secrets Reform Act aimed to achieve some of these changes.<sup>286</sup> Explicit statutory authorization would give more judges the confidence to deploy adaptive procedures, especially where legal uncertainty exists as to the scope of the courts' authority.

In the absence of legislative authorization or approval from higher courts, legal uncertainty will remain an obstacle to some of the more promising methods to review classified information. For example, without the blessing of Congress or appellate courts, many judges will hesitate to order the executive to clear special masters, independent experts, or opposing counsel to access classified information. As long as the executive objects that it alone can determine whether individuals have a "need to know" classified information, many courts will prefer to duck the confrontation rather than decide the separation of powers question.

The prospect of legislative reform, however, is uncertain at best. Congress is unlikely to enact improved procedures for reviewing national security secrets unless a major human rights or civil liberties scandal changes political incentives. Members of Congress frequently lack the incentive to legislate on national security, especially in the direction of protecting individual rights.<sup>287</sup> Congress declined to enact the State Secrets Protection Act, the bill that would have ratified several procedures for reviewing state secrets claims, despite considering it at a time when public concern over the Bush administration's counterterrorism policies had intensified.<sup>288</sup> As others have noted, lawmakers have more incentive to weigh in on procedural matters related to national security litigation if the executive branch asks them to do so to *curtail* judicial review.<sup>289</sup>

---

285. For an account of some of these doctrines, see *supra* Part I.B.

286. For a discussion of that legislation, see Kwoka, *Procedural Exceptionalism*, *supra* note 7, at 159; Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS UNIV. L. REV. 443, 450–67 (2008).

287. See, e.g., Huq, *Structural Constitutionalism as Counterterrorism*, *supra* note 27, at 921.

288. State Secrets Protection Act, S. 417, 111th Cong. (2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009); see also MacDougall, *supra* note 7, at 706–07.

289. MacDougall, *supra* note 7, at 727 (arguing that legislation such as the State Secrets Protection Act will more likely move forward if courts refuse to dismiss cases on the basis of state secrets, leading the executive to support the bill as a necessary compromise). To be clear, in certain contexts, Congress has specified procedures for review of certain government security decisions. As noted above, FOIA authorizes *ex parte* review of records for which the government claims exemptions, and a statute provides for the furnishing of sensitive information related to transportation security to parties in litigation. See *supra* note 115. See also, e.g., 50 U.S.C. § 1702(c) (2012) (authorizing the *ex*

On the other hand, another high-profile revelation of abuses akin to the Abu Ghraib or Snowden revelations might make security reform more viable. Indeed, modest procedural improvements might be politically easier to enact than more far-reaching substantive reform. If an opportunity arises for legislation, courts' existing experimentation can highlight the costs and benefits of particular procedures. And until congressional action becomes viable, ad hoc efforts can help courts adjudicate rather than dismiss national security cases.

Of course, procedural innovations to examine secrets will not undo judicial deference in national security litigation as a whole. Judicial deference on national security matters stems from concerns beyond the secrecy rationale for deference, and other rationales must be addressed on their own terms.<sup>290</sup> Moreover, experimentation in litigation will not reverse the growth of executive secrecy at the front end. The vast authority and incentives of executive officials to shield information in the first place necessarily limits back-end judicial intervention. As others have written, curtailing state secrecy will depend on challenging the front-end risk perceptions, biases, and incentives that drive excessive secrecy in the first instance.<sup>291</sup>

While procedural measures cannot undo the curtailment of judicial review or state secrecy writ large, they can provide courts mechanisms to adjudicate the cases that come before them when the government advances national security secrecy as a reason for dismissal or deference. An appreciation of the ways in which trial courts are already doing so can encourage further experimentation and allow legislators and appellate courts to weigh the outcomes based on that experience. Necessarily limited, the procedural experimentation of courts remains nonetheless significant to guiding future reform.

## V.

### IMPLICATIONS FOR CIVIL PROCEDURE

Procedural experimentation to address secrecy claims responds to concerns over the proper role of courts in the specific domain of national security. But an examination of these developments also sheds light on questions that procedural scholars have addressed in other substantive contexts. Part V turns from this Article's primary objective to offer three secondary insights for civil procedure. First, procedural experimentation in national security litigation provides further

---

*parte, in camera* review of classified information used to add persons or entities to the Specially Designated Global Terrorists list).

290. Indeed, as noted above, numerous legal scholars have challenged these rationales typically offered for deference on substantive grounds. *See, e.g.*, Pearlstein, *supra* note 21 (using organizational decision-making literature to point out costs of executive flexibility, unity, and insularity, and benefits of independent review); Chesney, *National Security Fact Deference*, *supra* note 17, (arguing that arguments related to comparative institutional weaknesses of the courts in access to information, expertise, and other prudential concerns are frequently overstated).

291. For recent attempts to grapple with these root causes and remedial measures, *see, e.g.*, FENSTER, *supra* note 33; SETTY, *supra* note 34, at 125–26; Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 42, at 1121.

support for the pervasiveness of “bottom-up” procedural reform in response to new substantive challenges. Second, the diffusion of innovative procedures across subject matter is both promising and potentially concerning, and may sometimes require a revisiting of the rules governing such procedures. Finally, procedural spillover across the civil-criminal divide challenges a view of these procedural systems as entirely separate realms. These observations invite further investigation of questions, including the role of the executive branch in the development of procedure, the risks of MDL in public law cases, and the limits of criminal procedure as a model for improving protections in civil proceedings.

#### A. Bottom-Up Procedural Innovation

Procedural experimentation in national security cases provides a little noticed illustration of a broader dynamic within US civil procedure, in which judges and parties innovate in individual cases in response to new substantive challenges, and such procedural experimentation then spreads horizontally across courts or vertically through codification and formalization by other institutions. The experimentation in national security cases can thus be seen as another case study in the pervasiveness of what some have called “ad hoc procedure.”<sup>292</sup> Despite the standard view of procedure as emanating from congressional legislation or the rulemaking process of the Rules Enabling Act, court-led procedural reform abounds. At the same time, the experimentation in the national security context may have different institutional dynamics than in other substantive areas, with the executive branch playing a more prominent role and the Advisory Committee on Rules of Civil Procedure Committee virtually absent.

Pamela Bookman and David Noll describe “ad hoc procedure” as pervasive: reform by courts or legislatures “motivated by a problem (or problems) that is specific to a case or set of cases” and that “addresses that problem in the midst of a faltering pending litigation, through an intervention that changes the ‘rules of the road’ for the case or litigation as it proceeds.”<sup>293</sup> They contrast such forms of procedural change to the “traditional model of procedural design” in which neutral experts, focused on process values such as fairness and efficiency rather than substantive regulatory considerations, determine procedural rules prior to specific cases.<sup>294</sup>

Thus far, legal scholars have focused on judicial procedural entrepreneurship in two contemporary contexts: public institutional reform cases and mass torts litigation. For instance, Owen Fiss and others analyzed how the motivation to desegregate public schools in the wake of *Brown v. Board of Education* led lower courts to adopt new procedural forms to transform resistant

---

292. See Silberman, *supra* note 160; Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017).

293. Bookman & Noll, *supra* note 292, at 784.

294. *Id.* at 781.

state bureaucracies.<sup>295</sup> The challenge of desegregation “required a revision of familiar conceptions about party structure, new norms governing judicial behavior, and new ways of looking at the relationship between rights and remedies.”<sup>296</sup> That perceived need led judges to embrace procedural innovations, such as the use of special masters to design and enforce reforms on an ongoing basis against state institutions.<sup>297</sup> Moreover, in time, these “procedural innovations . . . transcended the substantive claim,” spreading beyond the school desegregation context to the reform of other public institutions, such as prisons, mental hospitals, and the welfare system.<sup>298</sup>

Others have described how evolving mass tort suits led to several phases of procedural experimentation. Peter Schuck argued that mass tort litigation prompted new forms of judicial management leading to “some of the most far-reaching innovations in judicial history,” such as “novel claims aggregation techniques, statistically-derived outcomes, administration of discovery, damages assessments, advanced courtroom technologies, more systematic alternative dispute resolution efforts, and coordinated federal-state court proceedings.”<sup>299</sup> Howard Erichson contended that the new use of court-appointed experts and settlement class actions in mass tort litigation was moving courts away from the traditional adversarial model and closer to civil law “inquisitorial” decision-making systems.<sup>300</sup>

Recent work by Amalia Kessler also reveals that the bottom-up development of procedural reform is not new. Kessler argues that, contrary to the traditional view of the 1848 New York Field Code of Procedure as a “revolutionary” code that merged the law and equity traditions, the adoption of the code was actually a *fait accompli*.<sup>301</sup> According to Kessler, since the early nineteenth century, lawyers litigating in the New York Chancery Court successfully pushed for greater control over the taking of evidence, both to promote their clients’ interests and to increase their social standing.<sup>302</sup> Through a “bottom-up, case-by-case basis,” lawyers imported changes into equity procedure that transformed it from a “quasi-inquisitorial” model to one closer to the oral and adversarial culture of the common law.<sup>303</sup>

---

295. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 4 (1979); see also David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 711 (2011) (discussing the impact of school desegregation litigation on broader class action doctrine).

296. Fiss, *supra* note 295, at 3.

297. *Id.* at 56–57.

298. *Id.* at 4.

299. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 956–57 (1995).

300. Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999).

301. AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877*, at 136 (2017).

302. See *id.* at 67, 95, 151–56.

303. *Id.* at 13.

National security civil litigation provides more evidence of the significance of decentralized, bottom-up procedural change in response to functional needs. More so than in other contexts, however, there is little immediate prospect for ratification by other rulemaking institutions, such as Congress or the Advisory Committee on Rules of Civil Procedure. An earlier Section explains why the potential for congressional intervention is limited.<sup>304</sup> Meanwhile, the Advisory Committee charged with the development of civil rules is likely to stay out of rule development related to classified information or national security. This abstention would accord with the committee's tendency to reject substance-specific rule changes out of an unstated commitment to trans-substantivity.<sup>305</sup> But the Advisory Committee is even less likely to play a role here, given the high-profile nature of the political questions involved, the close connection between procedure and contested substantive views on the role of the courts, and the relatively small number of cases at issue.<sup>306</sup>

For its part, the Supreme Court has reached contrasting decisions on not just the appropriate scope of judicial deference in national security matters, but also on the district courts' abilities to devise procedural solutions. In allowing Guantanamo detainees to challenge their detention through habeas proceedings, for example, the Court expressed confidence that the district court had the "expertise and competence" to resolve evidentiary challenges, including the protection of classified intelligence.<sup>307</sup> One year later, the Court was equally sure that, without an across-the-board change to pleading standards, district courts could not be relied upon to regulate discovery in a manner that sufficiently respected the needs of high-level national security officials.<sup>308</sup> While Congress or the Supreme Court may choose to intervene at some point, it appears that the procedures developed by judges will primarily diffuse horizontally rather than vertically: judges will learn about other courts' strategies through published opinions, the Federal Judicial Center's publications on case-management in national security cases,<sup>309</sup> and the briefs of repeat player parties who urge the adoption of techniques piloted elsewhere.<sup>310</sup>

---

304. See *supra* Part IV.E.

305. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 413–15 (2010).

306. This does not mean that members of the Advisory Committee are not invested in such questions. Indeed, Judge Bates, the current chair, served as the presiding judge of the Foreign Intelligence Surveillance Court for four years and has a strong interest in national security litigation. See, e.g., *Senior Judge John D. Bates*, United States District Court for the District of Columbia, <http://www.dcd.uscourts.gov/content/senior-judge-john-d-bates> [<https://perma.cc/FZU2-43KR>] (last visited July 8, 2018).

307. *Boumediene v. Bush*, 553 U.S. 723, 796 (2008).

308. See *Ashcroft v. Iqbal*, 556 U.S. 662, 685–86 (2009).

309. See *supra* note 207 (listing Federal Judicial Center publications).

310. See David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1062–70 (2004) (describing the role of repeat-player parties in transmitting institutional reform ideas across trial courts).

The prominent role of the executive branch represents the most notable difference between procedural experimentation in the national security context and elsewhere. Judges seeking to use some of the innovations described here—such as providing access to classified information to cleared counsel or experts—cannot do so without surmounting executive resistance. Even where courts have ordered the government to grant access to secret information, the government has sometimes actively resisted in terms that some judges have characterized as outright disobedience.<sup>311</sup> The executive's extraordinary power to classify information in the first place, to assert the state secrets privilege, and to resist litigation challenging its authority—directly or through lobbying Congress—means that courts lack the power over procedure that they enjoy in other contexts.

It is unsurprising that the executive branch has a dominant role over procedure in national security litigation, given the executive's unrivalled power over security, its constitutional role, and its repeat player status in litigation. Nonetheless, the executive's extensive role in shaping procedural law in this context raises questions for civil procedure more generally. Institutional accounts of procedural change almost always center on the courts, Congress, the Advisory Committee, or interest groups. Procedural scholarship largely ignores the executive branch, or considers it mostly for its role in pressing Congress to adopt legislation.<sup>312</sup> But even outside the national security context, the executive branch exerts considerable influence over civil litigation—whether through promulgating rules limiting class action bans in arbitration agreements,<sup>313</sup> advocating positions on procedural issues before the courts as either a party or amicus participant,<sup>314</sup> imposing rules on government lawyers for the conduct of litigation,<sup>315</sup> or advocating for its interests through standing representation on the

---

311. See Tien, *supra* note 7, at 689–92 (describing government's resistance to court order in *Al Haramain* litigation requiring government to provide plaintiffs' counsel access to top secret information); see also *id.* at 691 (describing district court's order to show cause why defendants should not be sanctioned for "failing to obey the court's orders").

312. See Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521, 1540 (1993) (describing Civil Justice Reform Act as originating in the administration); STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 27–34 (2017) (describing Reagan administration's legislative efforts to inhibit private enforcement of federal rights).

313. Jessica Silver-Greenberg & Michael Corkery, *U.S. Just Made It a Lot Less Difficult to Sue Nursing Homes*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/business/dealbook/arbitration-nursing-homes-elder-abuse-harassment-claims.html> [<https://perma.cc/E57F-BSYR>].

314. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (adopting US government position that tighter pleading rules applied across substantive areas of law); *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017) (agreeing with Solicitor General's amicus position that an intervening party must have independent constitutional standing whenever it seeks different or additional relief from plaintiffs with standing).

315. See generally Tobias, *supra* note 312, at 1530–37 (describing George H.W. Bush administration executive order requiring government lawyers to minimize cost and delay in litigation to which the government is a party).

Advisory Committee.<sup>316</sup> Such disparate examples suggest that the executive branch has a greater role in procedure-making than typically recognized, even outside the national security context. An examination of such influence in the national security arena, including the forms of such influence and the justifications for it, invites a comparative exploration of executive procedure-making in other areas.

*B. Trans-Substantive Diffusion Across Civil Procedure*

The national security cases described in this Article illuminate the extent to which courts are transmitting procedures *across* substantive law contexts. Judges in national security cases are drawing, in particular, on case management techniques devised for mass torts or other private complex litigation. For instance, in the FOIA litigation seeking records of detainee abuse, Judge Hellerstein used case management strategies most associated with private complex litigation. He required the plaintiffs to prioritize their FOIA requests to narrow the scope of the litigation, set strict timelines for moving forward the case, and adopted sampling procedures to apply his rulings on information disclosure to large categories of similar documents. It is unsurprising that it was Judge Hellerstein who chose to do so because he has used such hands-on techniques in other private law contexts and has championed the role of “managerial judging” to resolve complex cases.<sup>317</sup> His innovations in the FOIA case extend the techniques of managerial judging pioneered in mass torts cases to a new context.

Other procedures also reflect trans-substantive migration. For instance, the use of special masters and court-appointed experts is most associated with the remedial stages of institutional reform cases,<sup>318</sup> the discovery stages of aggregate litigation,<sup>319</sup> and the pre-trial resolution of torts cases involving conflicting scientific expert testimony.<sup>320</sup> In addition, the application of MDL to surveillance and detainee abuse suits applies a procedural mechanism typically employed to centralize product liability, antitrust, securities, intellectual property, or consumer disputes.

The value of such diffusion, of course, depends on the extent to which the courts can effectively assess differences across substantive contexts and determine whether borrowed procedures fit the new context. If judges do not exhibit sufficient sensitivity to substantive differences, then the transplantation

---

316. See *Membership of the Committees on Rules of Practice and Procedure: Chairs and Reporters*, U.S. COURTS (Oct. 1, 2017), <http://www.uscourts.gov/sites/default/files/committee-roster.pdf> [<https://perma.cc/MK2E-6ADZ>]. I thank Dave Marcus for pointing out this example.

317. Hellerstein, *Managerial Judging*, *supra* note 169, at 142–55.

318. See Fiss, *supra* note 295, at 28; see also Silberman, *supra* note 160, at 2161 (comparing modern “remedial” special masters to their historical predecessors).

319. See, e.g., Hellerstein, *supra* note 169, at 141–42 (describing use of special masters in 9/11 tort suits).

320. See Erichson, *supra* note 300, at 2012–13.

may be counterproductive. For instance, this Article raises particular concerns regarding the application of MDL to public policy contexts involving significant ideological disagreement.<sup>321</sup> As discussed above, the use of MDL in policy contexts like national security magnifies concerns about the Panel's preference for consolidating cases and its process for assigning cases.<sup>322</sup> While MDL treatment can facilitate the review of national security secrets, it also prevents courts from generating multiple answers to hard questions. As Lahav has noted, the value of jurisdictional pluralism may be greater with respect to legal disputes on controversial issues that elicit strong disagreements.

Similarly, concerns around the MDL Panel's selection of a transferee court may be greater where significant political or ideological divisions exist, as in many national security contexts. Procedural scholars have previously examined other sources of potential bias in transfer decisions—suggesting that the Panel tends to assign cases to judges who favor global settlements<sup>323</sup> or judges who come from the same courts as the panel members.<sup>324</sup> Concerns around bias, or the appearance of bias, in assignment decisions can have an even greater impact on the perceived legitimacy of judicial decisions where transfers appear to predetermine the outcomes of high-profile and contentious cases.<sup>325</sup> These concerns should affect not only the binary decision of whether or not to subject cases to MDL treatment, but should also lead proceduralists to consider reforms to the MDL process. If judges use MDL at all in divisive public policy contexts, policy-makers should consider reforming the process for assigning cases to make it more random, more transparent, or more subject to appellate review. As the MDL example suggests, the migration of procedural mechanisms to new substantive areas offers benefits but also requires courts to revisit existing rules.

### C. Diffusion Across the Civil-Criminal Procedure Divide

One notable feature of procedural adaptation in national security litigation is that procedures have spread not only across substantive contexts within civil procedure, but also across the civil-criminal procedural divide. As discussed above, courts in a number of civil cases analogized to procedures used under the CIPA statute for managing classified information in criminal cases.<sup>326</sup> The *ex parte, in camera* review of ostensibly privileged material, the attempt to clear counsel to view classified information, the facilitation of interlocutory review where district courts reject the government's state secrets assertion, as well as

---

321. See *supra* Parts IV.C, IV.D.

322. For a discussion of some of these concerns, though not in the national security or public policy contexts, see generally Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245 (2008).

323. See *id.* at 2287–89.

324. Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation?* 10 J. EMP. L. STUD. 424, 457 (2013).

325. See *supra* Part IV.D.

326. An excellent student note identified and described this phenomenon as “CIPA Creep.” See MacDougall, *supra* note 7.

other procedures now deployed in the civil context, mirror practices that are conventional under CIPA.<sup>327</sup> This procedural diffusion has several implications beyond national security cases.

As an initial matter, it provides a counterexample to some scholars' characterization of the civil-criminal procedure divide as nearly absolute. Professors Sklansky and Yeazell described that divide in the following terms:

Civil litigation and criminal litigation in the contemporary United States occupy separate worlds. They employ different procedural rules, often before different judges in different courthouses, and with almost entirely unconnected bars, each of which views the other with an attitude verging on contempt. In law schools, civil and criminal process are taught in separate courses by scholars whose ranks rarely overlap . . . . Many judges, of course, still hear a mixture of civil and criminal cases . . . . Aside from this point of contact, though, there is little else to suggest that the two dockets are part of the same legal system.<sup>328</sup>

Sklansky and Yeazell contend that the gap between the procedural systems has widened since the nineteenth century as criminal procedure increasingly became a state monopoly and civil procedure grew increasingly privatized.<sup>329</sup> As examples of that divide, they observe that civil and criminal procedure take different approaches to the role of the judge in the settlement process, the preclusive treatment of former adjudication, the discovery process, and remedies for lawyering failures.<sup>330</sup>

The migration of practices for managing national security secrecy, however, suggests that the divide is far less wide. To be sure, the particular subject matter of national security litigation makes procedural migration especially natural, since government officials address security threats like terrorism through a combination of criminal and regulatory responses. In addition, procedural spillover more likely occurs in this context because national security cases are typically heard in federal court, where the same judges preside over both civil and criminal matters, and therefore gain exposure to both regimes.

But courts draw on criminal procedure in civil national security litigation not simply because these are national security cases, but because these cases often originate from exercises of state power imposing substantial restrictions on individuals. The judicial inclination to import procedural protections from the criminal realm stems from an inherent blurring of state criminal and civil power, through which formally civil exercises of power impose restrictions on liberty

---

327. *See id.* at 706–07.

328. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 684 (2006).

329. *Id.* at 684.

330. *See id.* at 696–727. To be clear, Sklansky and Yeazell do note that borrowing is routine in certain areas, as in the law of evidence, *see id.* at 728–33, but their account on the whole emphasizes differences.

resembling criminal penalties. This blurring of criminal and civil enforcement power is not unique to the national security context, however, even if it is particularly pronounced in that realm.

For instance, courts considered CIPA-like proposals for divulging classified information in cases arising out of the placement of individuals on terrorist watch lists or the designation of groups as terrorist organizations.<sup>331</sup> While classified as civil, these kinds of measures impose serious constraints on their targets. Jennifer Daskal notes, for example, that the designation of US individuals as “specially designated global terrorists,” while rare, effectively bars those individuals from buying food, accessing health care, or engaging in any kind of financial transaction without a license.<sup>332</sup> Daskal argues that the use of these and related “noncustodial pre-crime restraints” has “exploded” in the past decade, “mostly in the national security arena but also on the margins of the criminal justice system.”<sup>333</sup> Other examples include residential and employment restrictions on sex offenders, orders issued in response to domestic violence allegations, supervised release conditions in immigration proceedings, and security clearance revocations.<sup>334</sup> In cases where these practices “dramatically restrict the ability to lead a meaningful life,” despite their non-custodial nature, Daskal argues that they ought to require the same procedural protections applicable to incarceration.<sup>335</sup>

In fact, even before concerns over terrorism led to new preventive measures against those deemed a security threat, state actions in other contexts were already challenging the conceptual division between civil and criminal law and procedure. Legal scholars in the 1990s argued that, while Anglo-American jurisprudence had long distinguished between civil and criminal cases, the government was increasingly relying on civil remedies to address undesirable social behavior.<sup>336</sup> These civil sanctions included civil forfeiture, injunctions against organized crime, the involuntary civil confinement of mentally ill individuals, deportation and denaturalization, the imposition of civil contempt, and the levying of other financial sanctions.<sup>337</sup> These developments, as well as the post-New Deal enforcement of regulatory actions by federal agencies in various substantive realms, led to an explosion of litigation seeking to extend the

---

331. See, e.g., Transcript of Proceedings, *supra* note 113, at 5–6 (quoting district court judge in watch list case as stating she planned to rely heavily on CIPA statute in addressing disclosure of classified evidence).

332. Jennifer C. Daskal, *Pre-crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 329 (2014).

333. *Id.* at 335.

334. *Id.*

335. *Id.* at 334.

336. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325–28 (1991); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777–80 (1997).

337. Cheh, *supra* note 336, at 1334–44; Steiker, *supra* note 336, at 778–80.

procedural rights recognized in criminal proceedings to various civil contexts.<sup>338</sup> The Supreme Court has extended some protections and refused to extend others.<sup>339</sup> Either way, the attempt to analogize to the criminal context to increase procedural protections for those subject to civil sanctions is not new.

Moreover, procedural diffusion is not even limited to cases involving the government as a party. In some instances, civil litigation has imported protections first recognized in criminal cases even where no traditional state actor is involved. For example, procedures applicable to the selection and instruction of juries have crossed the divide, including constitutional protections against the discriminatory exclusion of jurors<sup>340</sup> and rules regarding the consideration of jury instruction errors not preserved at trial.<sup>341</sup> Thus, the division between civil and criminal procedure is best characterized as uneven, rather than either cavernous or collapsed.

Once accurately characterized, the civil-criminal divide raises at least two important questions. The more conventional question is whether civil proceedings of various kinds require the same level of procedural protections as criminal prosecutions. In the national security context, for instance, the Supreme Court has distinguished between the criminal and civil contexts in which classified information is at issue. In *Reynolds*, the civil case that established the modern state secrets privilege, the Supreme Court cautioned against requiring in civil state secrets cases the same protections as in criminal proceedings, where prior to the passage of CIPA, the government could “invoke its evidentiary privileges only at the price of letting the defendant go free.”<sup>342</sup> The Court explained:

The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.<sup>343</sup>

The Court’s distinction between the two contexts is overstated for some of the reasons alluded to above. The difference between affirmative and defensive uses of privileged information breaks down in civil cases where the government

---

338. Steiker, *supra* note 336, at 779.

339. See, e.g., Cheh, *supra* note 336, at 1371–89.

340. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (extending to civil cases the constitutional protection against race-based dismissal of a juror first recognized in *Batson v. Kentucky*, 476 U.S. 79 (1986)).

341. See FED. R. CIV. P. 51 advisory committee’s note to 2003 amendments (explaining that the rule allowing courts to consider jury instruction errors not preserved at trial, in exceptional circumstances, is “borrowed from Criminal Rule 52” and noting the cross-referencing of civil and criminal cases in Supreme Court jurisprudence on the issue).

342. *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

343. *Id.*

is the defendant, but the case arose out of the government's use of classified information to deprive the plaintiff of a protected interest (such as the right to travel or engage in financial transactions). In such cases, due process may not require the full panoply of rights attending a criminal trial, but it will require a set of procedural rights proportional to the deprivation that allows individuals to contest the basis for the government action.

While courts and commentators have asked how far civil cases should embody criminal procedure protections, they have less often asked a second question: could analogizing to the criminal context in some scenarios actually *constrain* rather than expand the procedural protections imaginable for civil litigants? The traditional assumption is that criminal procedure is more protective of defendants than civil procedure. In some areas, of course, that assumption is valid. Criminal defendants have constitutionally derived rights—such as the right to state-funded counsel—that individuals generally do not enjoy in civil proceedings.<sup>344</sup> But the assumption is not universally correct. In some respects, civil procedure actually offers greater protections to litigants than criminal procedure. For instance, civil litigants generally enjoy broader rights of discovery than criminal defendants.<sup>345</sup> In addition, personal jurisdiction doctrine is more favorable to civil defendants than to criminal defendants.<sup>346</sup> Therefore, drawing an analogy to criminal procedure does not necessarily weigh in favor of greater protections for civil litigants.

Moreover, even where procedural protections afforded criminal defendants exceed those available to civil litigants, it does not necessarily follow that those protections are sufficient or ideal. Beginning with the national security context, the discussion in various courts about extending CIPA-like procedures to civil litigation implicitly suggests that the protections available to criminal defendants are robust. While defendants' rights to access classified information are stronger than in civil cases, that does not necessarily mean those rights sufficiently safeguard the interests at stake. But if courts or lawyers envision criminal procedure as the outer bounds of what is possible, overlooking criticisms of whether CIPA itself affords a fair trial, that starting premise will limit the scope of procedural protections imaginable.<sup>347</sup>

Outside the national security context, the tendency to view criminal procedure as the protective side of a standard divide also leads legal actors to advocate for the transfer of criminal procedure guarantees. For instance,

---

344. See *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (holding that due process does not require states to provide counsel to indigent defendants in civil contempt proceedings to enforce child support obligations).

345. See Sklansky & Yeazell, *supra* note 328, at 713–15.

346. See Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 460–61 (2018) (observing that courts have found criminal prosecutions to be unconstrained by minimum contacts requirements).

347. See MacDougall, *supra* note 7, at 729–30 (arguing that “many alternatives to CIPA-like procedures . . . are far more litigant-friendly and civil liberties-protective,” such as the “British model” for awarding damages in cases where the government does not want to reveal state secrets).

immigration scholars seeking more robust protection for individuals in deportation proceedings have frequently analogized to criminal protections, such as the right to counsel or the exclusionary rule.<sup>348</sup> But proposals to import criminal procedure protections such as the exclusionary rule into immigration cases may neglect the considerable debate on whether such protections even function effectively in their original context.<sup>349</sup> Observing that the outcomes of procedural rights in criminal cases have not lived up to expectations, some immigration scholars have begun to question the prevailing “hope . . . for a revolution in constitutional immigration procedure analogous to the Warren Court revolution in constitutional criminal procedure.”<sup>350</sup> Within and beyond the national security context, scholars and advocates should ask whether analogizing to criminal procedure in civil contexts possibly limits—rather than expands—the potential for protecting rights.

#### CONCLUSION

While many courts faced with national security cases have largely deferred to the executive branch, often leading to the dismissal of cases altogether, courts that have rejected categorical deference have sometimes demonstrated a willingness to experiment with procedure to resolve the challenges these cases present. This experimentation—intensely pragmatic and often creative—has enabled courts to adjudicate claims despite government assertions that national security interests preclude the exposure of certain information. While procedural strategies cannot address the full set of rationales offered for judicial deference, they suggest an alternative to deference where concerns over secrecy are prominent. At the same time, these procedures should be used only where judges are satisfied that they comport with due process and do not undercut other core rule of law values.

More broadly, procedural experimentation in this context offers insights for procedural scholarship at large. It suggests that the horizontal diffusion of procedure across trial courts is common and that it scales the traditional civil-criminal divide. This account also provokes new questions on the role of the executive branch in shaping procedure, the legitimacy of MDL in contentious public law cases, and the risk of viewing criminal procedure as the outer limit of procedural protection.

---

348. For a leading account, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010).

349. See, e.g., Christopher Slobogin, *The Exclusionary Rule: Is it on Its Way Out? Should It Be?* 10 OHIO ST. J. CRIM. L. 341, 349 (2013) (arguing that exclusionary rule is ineffective at curtailing police misconduct and calling instead for damages against police officers for bad faith misconduct and department liability for negligent misconduct).

350. Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556, 564 (2016).