

# 1. Introduction

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No issue more profoundly challenges the commitments of constitutional democracy than secrecy in government. Representative democracy and the rule of law both require transparency and accountability, and secrecy strikes at the heart of both values. When government officials engage in secret actions on behalf of the state, they generally cannot be held accountable to the people for whom they purportedly act. What does it mean to have a government under law if it can act in ways that are effectively immune from legal regulation? Moreover, when the government's actions affect the life, liberty, or property interests of individuals, secret actions – or public actions justified on the basis of secret evidence – threaten to undermine basic protections of procedural fairness. How can one defend oneself against a case that is not disclosed?

At the same time, secrecy is essential to effective governance, nowhere more so than in the arena of national security. Even where national security is not at issue, much of the work government does occurs behind closed doors – including, for example, the deliberations of courts. If governance had to be conducted entirely in the open, it would be impossible to get candid advice, and thus most legal systems recognize the validity of privileges that keep confidential many of the internal discussions that inform government actions. Where the police are investigating crime, secrecy is also often essential, so as not to tip off those who may be under suspicion. When the crimes being investigated are not just any crimes, but crimes that seek to spread terror through the civilian population so as to undermine the government itself, the need for secrecy is still higher. When matters rise to the level of an armed conflict, as they did in Afghanistan and the border regions of Pakistan after the terrorist attacks of September 11, 2001, the demands of secrecy reach their highest intensity.

In short, constitutional democracies cannot live with secrecy, but cannot live without it either. Secrecy is a necessary part of governance,

and in particular of the state's efforts to keep its citizens secure from threats posed by others. At the same time, secrecy directly undermines the representative validity of the government to the extent that it impedes citizens' ability to know what their government is doing and thereby to assess whether it is consistent with their own goals and ideals.

Every democracy faces these issues, and as many of the contributions to this volume underscore, most democracies are confronting them more frequently and in a wider range of settings in the twenty-first century than ever before. What was unthinkable before Al Qaeda's terrorist attack on United States (US) civilians on September 11, 2001, is now thinkable. The transnational nature of the threat posed by Al Qaeda, a loosely organized movement that spans many countries, means that inter-state coordination and intelligence sharing is essential to identifying and neutralizing the threat. The condition of cooperation is often a promise of confidentiality, thus multiplying the potential grounds for secrecy claims. Thus, the United Kingdom (UK) may refuse to disclose information not because it considers it a secret, but because the US considers it a secret and shared it with the UK only on condition that the UK also treat it as secret.

The challenges posed by secrecy are not unique or *sui generis*. They are largely the same across democracies world-wide. Thus, we all have a lot to learn from each other, and from how different democracies have sought to strike a balance between transparency and confidentiality, between due process and secret evidence, between executive discretion and accountable, checked government. The contributions to this volume explore these questions from a multiplicity of perspectives, drawing on experiences from many jurisdictions, including Australia, Canada, the European Union (EU), Finland, Germany, India, Israel, Italy, the UK and the US. Comparative constitutionalism across so many jurisdictions is often made difficult by the substantial differences in legal culture, governmental structure, and the like. But on the issues of secrecy, what emerges is a common set of problems, and common attempts to address those problems. There are many differences, to be sure. But this is an area where cross-national learning and borrowing may be especially fruitful, precisely because the problems are so common.

This book, which developed from a conference held at the Bocconi University in Milan in December 2011, sponsored by the International Association of Constitutional Law Research Group on 'Constitutional Responses to Terrorism', is divided into five parts. Parts 1 and 2 address the issue of secrecy from an institutional point of view, examining the capacity of courts and legislatures to control the use and prevent the abuse of secrecy claims by the executive branch in national security

contexts. After this broad perspective, focused on questions of structural relations, Parts 3, 4 and 5 focus on three substantive areas of anti-terrorism law – detention, criminal trials and administrative measures – and explore how in each of these cases assertions of secrecy and national security distort the functioning of the legal system and can undermine fundamental principles of procedural justice and fairness.

Part 1 begins with a chapter by Lord Justice Stephen Sedley, on the role of the judiciary in the oversight of secrecy in the UK. Lord Sedley, a retired judge of the Court of Appeal of England and Wales, examines a number of key decisions by British courts, including several cases in which he was directly involved as a judge, and explains how, over the last decade, the British judiciary has attempted to improve its standards of procedural justice, constraining the recourse by the government to secret evidence in a variety of settings. His contribution emphasizes the fundamental roles that the jurisprudence of the European Court of Human Rights (ECtHR) and of the European Court of Justice (ECJ) have had on the position of British courts, often forcing the UK Supreme Court to overrule the deferential decisions of lower courts. Nevertheless, Lord Sedley concludes his essay with a sober note on the UK government's 2011 proposal, initially contained in a 'Green Paper' entitled *Justice and Security*, to expand the use of classified evidence and cleared counsel – a development he regards as fundamentally incompatible with the principles of the British Constitution.

The role of the judiciary in checking abuse of secrecy is also at the core of the chapters by Stephen Schulhofer and Mindia Vashakmadze, focusing respectively on the US and Germany. Stephen Schulhofer's contribution examines the three main legal regimes for judicial oversight of secrecy in the US: the Classified Information Procedure Act (CIPA), applicable in criminal cases; the 'state secrets' privilege, which operates primarily in civil damages suits; and the Freedom of Information Act (FOIA), a statute that grants citizens the right to obtain official documents from their government, but contains many exemptions that preserve secrecy. While Schulhofer regards the CIPA and FOIA regimes as granting more adequate instruments of review to US courts, he concludes that executive branch demands for deference generally inhibit the willingness of the judiciary to use their existing capacities effectively to oversee executive recourse to secrecy. He advances a plea for a reconsideration of the role of courts in the field of national security, based on a more informed understanding of the characteristics of judicial expertise and of the comparative advantage of courts vis-à-vis the other branches of government in balancing security needs with public interest values.

A more optimistic assessment of the willingness of courts to rein in executive abuse of secrecy emerges from Mindia Vashakmadze's analysis of the jurisprudence of the German Constitutional Court (GCC). As Vashakmadze accounts, the GCC has, albeit with some limits, reinforced the right of the German Parliament to obtain classified information from the executive and at the same time annulled legislation which unduly restricted privacy rights in the interests of surveillance and public safety. Part 1 concludes with a chapter by Sudha Setty, which offers a worrying comparative summary of the institutional weakness of the judiciary as a counter-weight to governmental claims of secrecy in the field of counter-terrorism. Surveying the practice of courts in the US, the UK, Israel and India, Setty reveals substantial limitations in the capacity of courts to provide relief, even to individuals subject to the most disgraceful human rights abuses, when governments invoke the state secrets privilege. While formalistic reasoning discarding review of secrecy claims appears to be at its height in the US and India, Setty suggests that structural reforms would be needed in most legal systems to invert the trend of judicial deference vis-à-vis the executive when reasons of secrecy are asserted to thwart litigation.

In light of the difficulties encountered by the judiciary in overseeing recourse by the executive branch to secrecy, Part 2 explores the potential role played by legislatures. Kathleen Clark and Nino Lomjaria compare legislative access to intelligence information in the US and Canada. The US and Canada have different institutional regimes: while the latter is a parliamentary system, the former is characterized by separated institutions sharing power. As Clark and Lomjaria's chapter emphasizes, legislatures tend to be more effective in controlling the executive branch in separation-of-powers systems than in parliamentary systems. Nevertheless, the US Congress faces significant practical difficulties in accessing and managing intelligence information that may significantly limit its capacity to operate as an effective check on executive agencies.

Analyzing the state secrets privilege in Italy, Arianna Vedaschi identifies a potential expansion of its use through Prime Ministerial decrees, which are exempt from parliamentary review. Vedaschi maintains that this expansive trend is neither lawful nor consistent with the fact that secrecy is a constitutional exception and should therefore not permit expansive interpretations and applications. In addition, Vedaschi criticizes both the weakness of parliamentary scrutiny and the excessively cautious approach adopted by the Italian Constitutional Court in overseeing the state secrets privilege. The political dynamics at play in Italy's parliamentary system have substantially reduced the incentive for the Parliamentary Committee to scrutinize the use of the state secrets privilege,

while at the same time the Constitutional Court has so far failed to exercise judicial review. Vedaschi concludes her contribution with a plea for more robust oversight – a recommendation, however, that in its most recent rulings the Italian Constitutional Court has failed to follow.

Part 3 turns to an analysis of secrecy in a number of distinct substantive national security settings, and particularly to an evaluation of the consequences of procedures relying on secret evidence for the protection of due process. As Kent Roach explains, the need to protect secret information existed already during the Cold War. Nevertheless, the use of secrecy has widely expanded since 9/11, triggering a number of unprecedented problems. Secret information is used to justify military and immigration detention, to blacklist individuals suspected of financing terrorism and freeze their assets and, more recently, even to decide targeted killings with drones. At the same time, as Roach accounts, secrecy is not static: national governments and international institutions gather and share information in dynamic and polycentric ways. This raises entirely new challenges. As Roach says, information that originates in a dark torture cell in one part of the world can be transmitted and cause secrecy-based legal and political decisions in Washington and London. In this context, a particularly worrying development is the use of secret evidence to justify detention or other restrictive measures on the personal liberty of individuals – a theme at the heart of the chapters by Shiri Krebs and Andrew Lynch, Tamara Tulich and Rebecca Welsh.

Shiri Krebs's contribution focuses on the use of secret evidence in preventive detention in Israel. Her chapter defies conventional wisdom on the jurisprudence of the Israeli Supreme Court and reveals a worrying picture of widespread acceptance of secret evidence as a justification for administrative detention. On the basis of the analysis of hundreds of court cases between 2000 and 2010, Krebs lifts the veil of secrecy that surrounds judicial proceedings reviewing the lawfulness of security detentions and provides a useful glimpse into the dynamics that drive judicial oversight, casting some doubts about the capacity of courts to uphold core due process values when directly assessing secret evidence in an inquisitorial way. Andrew Lynch, Tamara Tulich and Rebecca Welsh's chapter compares the use of control orders based on secret evidence in the UK and Australia. As the authors explain, control orders cause a profound restriction on personal freedom, amounting to a form of quasi-detention. Yet, judicial review of control orders based on secret evidence has been at best uneven in both countries. As Lynch, Tulich and Welsh argue, UK courts have been more demanding in pushing for disclosure of secret evidence through special advocates, mostly because of the pressures of the ECtHR, while Australian courts lacked analogous

capacity, thus raising serious concerns about the vulnerability of constitutional values.

Wrapping up the themes addressed throughout Part 3 is the contribution by David Cole and Steve Vladeck, which offers a comprehensive analytical framework on the use of secret evidence and cleared counsel in detention proceedings. By comparing the US, the UK and Canada, Cole and Vladeck explain how all three countries have faced the challenge raised by the use of secret evidence to deprive individuals of their liberty and have addressed it through the use of cleared counsel (i.e. attorneys with special permission to access security files). Yet each country has adopted distinct practices with respect to the limits on, and powers of, these cleared counsel. The authors compare the cleared counsel models in place in the US for the Guantanamo proceeding, in the UK for the adoption of control orders and in Canada for immigration proceedings and underline the advantages and the disadvantages that each model has vis-à-vis the others. Moreover, after demonstrating that all three countries are governed by common constitutional principles of due process and fair justice, Cole and Vladeck argue that each country could – and indeed, as a constitutional matter, should – borrow from the experiences of the others to improve the fairness of the proceedings without undermining legitimate security concerns.

Part 4 focuses on the role of secrecy in criminal trials. Jason Mazzone and Tobias Fischer explore the use of anonymous testimony in criminal trials and the implications that a normalization of this practice may have. The authors compare the increasing use of anonymous testimony in recent years in three common law countries, the UK, Australia and New Zealand, and discuss the advantages and disadvantages that the institutionalization of a practice that remains exceptional elsewhere, such as in the US, may have. In their account, Mazzone and Fischer refrain from providing definitive answers to the question whether normalization of anonymous testimony should be encouraged or resisted but clearly illustrate the competing interests at stake in the debate, thus opening an important avenue of research on how to balance transparency and secrecy in criminal law. Clive Walker's contribution analyzes the role that secrecy has played in the criminal prosecution of suspected terrorists in the UK legal system, as well as the range of constitutional and international law questions that the UK's increasing reliance on secret evidence has raised.

Ori Aronson, instead, compares the use of military tribunals in the US and Israel and discusses what may be the hidden significance of a resort to adjudicatory bodies that operate outside the ordinary judicial system (founded on principles of transparency and open justice) and instead

follow a logic of secrecy and exceptionality. Drawing on Michel Foucault's notion of *heterotopia* (literally: a diverse place), Aronson argues that the establishment of military tribunals to try national security cases may paradoxically have the effect of making these (apparently invisible) institutions more visible to the public. To substantiate his claim, Aronson contrasts two recent examples – the US decision to try Khalid Sheikh Mohammed in military tribunals and Israel's decision to prosecute Marwan Barghouti in civilian courts – and suggest that the former may have had the effect of securing much more visibility to the trial than the latter. Aronson's philosophical and multidisciplinary perspective aims to enrich our understanding of the complex interplay of secrecy and constitutional values.

Part 5 addresses the use of secrecy in administrative counter-terrorism measures. As Tuomas Ojanen explains in his contribution, an increasing resort to administrative measures has taken place in the last few years to tackle the threat of national and international terrorism. Administrative measures have a number of advantages: they are preventive in character; they can generally be adopted by the executive with lighter standards of proof; and they do not require prior judicial involvement or adversarial proceedings. For these reasons, they can be a flexible, proactive instrument to fight terrorism. Yet administrative measures have profound repercussions on the constitutional rights of targeted individuals and entities. Human rights concerns are heightened when administrative measures are based on secret information. In these situations, according to Ojanen, courts should abandon the traditional deference that is adopted in administrative law cases and demand greater disclosure of evidence. Ojanen takes Finland as a case study. Despite its solid tradition of respect for human rights, since 9/11 the Finnish government has increasingly resorted to secrecy in immigration proceedings to justify expulsion of foreign nationals based on national security reasons. Nevertheless, in its most recent case law the Supreme Administrative Court has resisted executive claims of secrecy developing a positive judicial practice against government abuses.

While Ojanen's chapter focuses on the use of secrecy in administrative measures at the *national* level, Cian Murphy considers the issue from a *supranational* perspective. In his chapter, Murphy analyzes the most recent case law of the ECJ on the use of secrecy in counter-terrorism cases and discusses the option of introducing special advocates in EU law – a proposal he regards as unconvincing, given the unsatisfactory experience of special advocates in the UK. Federico Fabbrini takes the topic one step further, by analyzing the interplay between secrecy and administrative measures on a *global* scale. In his chapter, Fabbrini

describes the emergence at the level of the United Nations (UN) of an administrative regime to freeze the assets of individuals and entities suspected of financing terrorism and the challenges that judicial review of these measures raises. As Fabbrini explains, courts in the EU have increasingly demanded disclosure of the evidence that is said to justify terrorist listings. Yet, judicially mandated access to classified information has thus far been impossible because the UN itself does not possess the evidence, which is held as secret by individual states, most often the US. Given the central role played by the US in the global fight against terrorism and the similarities between the US and UN sanctions regimes, Fabbrini's chapter explores the possibilities for listed persons to seek due process in US courts, as well as the obstacles that emerge along this road.

The use of secrecy in the administrative arena is also at the core of the last contribution of Part 5: Deirdre Curtin's chapter on secrecy regulation in the EU. Rather than focusing on EU administrative sanctions based on secret evidence and judicial review by the ECJ, Curtin's work adopts an original stand and examines from an institutional point of view the emergence of a web of secret administrative practices within the action of the EU bodies. Building on her previous work on the institutionalization of an executive power in the EU, Curtin examines the expansion of regulatory instruments that provide for the classification of documents and the sharing of confidential information among EU agencies and between the EU institutions and the member states. EU integration in the economic, political and security realm has inevitably increased the need for EU institutions to adopt internal administrative measures to manage and classify information. But Curtin maintains that a risk of overclassification arises from the practice of the EU political branches in the last decades. To counter this development, Curtin argues in favor of stronger oversight by the EU Parliament, whose role ought to be precisely to check the executive branch in the EU separation-of-powers system.

The book concludes with a chapter by Justice Lech Garlicki, whose essay can rightly be considered as a sort of *rapport de synthèse*. Garlicki, until November 2012 a judge and President of Chamber at the ECtHR, offers a historical account of the use of secrecy in political societies and at the same time illuminates the gradual but substantive improvements that constitutional law has made over time to address the challenges that executive assertions of secrecy raise. In particular, according to Garlicki, the emergence of layers of constitutional norms beyond the state has significantly enhanced the protection of core values of constitutionalism, such as transparency, fairness and procedural justice. This is supported by the jurisprudence of the ECtHR, and by its positive influence in many domestic jurisdictions. Garlicki's conclusion thus nicely echoes the

opening chapter by Lord Sedley, who expressly acknowledged the lead of the ECtHR in changing the practice of the UK judiciary. As the dialogue between the two judges reminds us, secrecy, national security, and the challenge of assuring fundamentally fair procedures will remain a certain feature of our uncertain era. The chapters in this volume suggest that the vindication of constitutional law will turn on both the comparative study of, and the joint interaction between, national and supranational legal regimes.

