Index

Ackerman, B. 337
administrative counterterrorism measures 249–67, 333–4
asset freezing 254–5, 257
authority relocation 256
blacklisting 257
constitutional and criminal law repercussions 254–7
control order proceedings 250
early timing of 252
evidence assessment and standard of proof 252–3
Finnish Security Intelligence Service and immigration law 259–66
illegally obtained evidence 259
intelligence reliance 257–9
intelligence services’ involvement 256
judicial review, limited scope of 253, 258, 333–4
judicial review of intelligence and closed oral hearings (Finland) 261–4, 265, 266
manifestation and rationales 250–53
non-disclosure of intelligence 258, 260, 261–6
popularity of 251
preventive and proactive nature 251–2
reason-giving requirement and immigration law (Finland) 263
smart (targeted) sanctions 250, 251–2
terrorism prevention 251
two-party procedure, absence of 253
Aftergood, S. 189
Anderson, D. 211, 219
Anderson, K. 135
Andersson, T. 288
anonymous testimony, normalization of 195–208, 327, 333
anonymity measures, differing effects of 198
anonymity type, different meanings of 197–8
bodily and vocal cues, absence of 206
challenging of witness, problems with 206
confrontation and anonymity 196–9
and constitutional norms 206–7
cross-examination of accusers, history of 196–7
defendant’s perspective, risks involved 205–6
identity withheld from specific persons 198
increased acceptance of 199–205
jury response 207–8
limiting anonymity to exceptional cases, benefits of 206–7
prosecution, increasing ease of 206
reliability assessment 208
risks and benefits 204–8
safety protection issues 198–9, 203, 204
technique development for dealing with 207–8
willingness to testify, increased possibility of 206
witness intimidation 200
witness protection programs, Australia 203
Anzon, A. 95, 97, 99, 109–10
Arconzo, G. 96
Arkin, W. 117
Aronson, Ori 229–46
asset freezing see freezing orders
Attanasio, A. 222
Australia
anonymouse testimony, increased acceptance of 202–4
certificate opposing release of information 164–5
constitutional values see constitutional values in UK and Australia, role and vulnerability of
control orders 155, 163, 164
Criminal Code Act 162, 164
Evidence Act (Qld) 202, 203
Haneef Commission 124
individual’s right to fair and open judicial hearing 165–8, 170
interim control orders 163–4
judicial control orders and secret evidence 162–8, 172
judicial integrity 165–6
National Security Information Act (NSIA) 163, 164–7
non-disclosed evidence and confidential intelligence 156, 167
Parliamentary Scrutiny (Human Rights) Act 155
secret evidence and control order proceedings 156, 167
Serious and Organised Crime (Control) Act 168
Witness Protection Act (Qld) 202
witness protection programs 203
Australia, cases
Fardon v. Attorney-General 166
Grollo v. Palmer 166
Gypsy Jokers Motorcycle Club Inc v. Commissioner of Police 168
Jabour v. Thomas 163, 166
K-Generation Pty Limited v. Liquor Licensing Court 168
R v. Lodhi 165–6, 168
South Australia v. Totani 168
Thomas v. Mowbray 164, 166–7, 169
Wainohu v. New South Wales 168
Avital, R. 143
Bajwa, A. 215
Barak, A. 66, 138, 140
Barak-Erez, D. 121, 135, 136, 137, 138, 140, 141, 181, 292, 332
Barile, P. 97
Bausback, W. 51
Bellia, P. 117
Benjamin, J. 30
blacklisting powers 257, 286–7, 288–9, 295–6, 328, 334
see also freezing orders; sanctions
Blum, S. 140
Bobbio, N. 96
Bonner, D. 170
Bonzano, C. 99
Boon, A. 274
Bröhmer, J. 44
Bronskill, J. 92
Burgess, J. 283
Cameron, I. 255, 288
Canada
Air India commission 124–5, 126–7
Anti-Terrorism Act 87
Arar Enquiry 91, 92, 93, 126–7, 128–9
Charter of Rights and Freedoms 121–2, 173–4
Commission for Public Complaints Against the RCMP (CPC) 92–3
Commissioner Review of CSE 91–2
Communications Security Establishment (CSE) 86–7, 91–2
fair hearing rights 182, 186, 187
Immigration and Refugee Protection Act 173, 178
intelligence information access see intelligence information, direct and indirect legislative access to, US and Canada
judicial authority on disclosure issues 179, 187–8
judicial review 178, 186–7, 188
National Security Advisor (NSA), disclosure of information to 125
Royal Canadian Mounted Police (RCMP), and intelligence information 86–7, 92–3
Index

secret evidence and cleared counsel see secret evidence and cleared counsel, comparative advantage (US, UK, and Canada) 

security certificate proceedings and fair trial rights 121

Security Intelligence Service (CSIS) 86–7, 90–91

special advocates 121–2, 136–7, 178–9, 187–8

Standing Committee on Public Safety and National Security 87–8

third party rule of control over shared intelligence 127

undisclosed evidence and detention and deportation 178

Canada, cases

AboysfianAbdelrazik v. The Minister of Foreign Affairs 124

Charkaoui v. Canada 121, 127, 173–4, 178–9, 184

Harkat v. Canada 122

Henrie v. Canada 120

R. v. Khawaja 127

Cannizzaro, E. 286

Caretti, P. 96

Chamberlain, M. 216

Chandra, A. 67–8, 70

Clark, Kathleen 75–94

cleared counsel 30, 176–9, 185–6, 187, 189–91

Cleveland, S. 135

closed doors system, EU secrecy regulation 305–7

closed judgments and special advocates, EU security law 276

closed material, terrorism and security 16–17, 20–21

closed pre-trial hearings, US 29

Cohen, E. 139

Cole, David 1–9, 140, 173–92, 297

Conn, T. 140

Conner, W. 80

constitutional court and counterterrorism see German Federal Constitutional Court and counterterrorism

Constitutional Court role, Italy 102–7, 108–11

criminal law repercussions, administrative counterterrorism measures 254–7

due process rights for Guantánamo detainees, US 183–4, 190

Italy, state secrets privilege 96–8, 104, 106

jurisdiction and anti-terrorist measures 324, 325

constitutional values in UK and Australia, role and vulnerability of 154–72

certificate opposing release of information, Australia 164–5

control orders 154–9, 160–68, 172

derogating and non-derogating control orders, UK 158, 169

executive orders, UK 157–62

fair trial right and use of secret evidence, UK 160–61, 170

individual’s right to fair and open judicial hearing, Australia 165–8, 170

judicial integrity, Australia 165–6

non-disclosed evidence and confidential intelligence 156, 167

secret evidence and closed material procedures (CMPs), UK 162

secret evidence and control order proceedings 156–7, 160–61, 167

special advocates, UK 159–60, 161, 162

see also Australia; UK control orders

administrative counterterrorism measures 250

advice on, European Court of Human Rights 120, 154–5, 158, 159, 160–61, 180–81, 225
Index

EU CI (EU Classified Information) 309–13
Euratom Classified Information (ECI) classification 305–6
European Parliament’s treatment of confidential information 311–12, 318–19
formal regulation 305–13
information disclosure disadvantageous to the interests of the Union, understanding of 317–18
international agreements 316–19
international organisations and third states, dealing with 312–13
national measures, adoption obligation 309, 310–11
NATO, interim security agreement 312–13
originator control (ORCON creep) 313–14, 318
overclassification problems 315
secrecy and transparency as mirror images 302–5
security gradings 305–6, 307, 310, 313, 314–15, 317–18
security-of-information agreements 313
sensitive but unclassified information, treatment of 311–12, 318–19
sensitive documents ring-fenced and expanded 307–9
and US classified documents 318
EU security law and secret evidence 268–83, 333
best practice and future considerations 282–3
closed judgments and special advocates 276
due process rights 270, 271–2, 274
evidence disclosure risks by Member States 272
French Republic v. OMPI, Advocate General Sharpston’s Opinion 271–3, 281
intelligence data and criminal evidence, dealing with 278–9
judicial review 272–3, 278, 281, 282
Kadi case see Kadi case
legal experience problems 279
non-confidential summary of evidence, irreducible minimum requirement 272–3
Rules of Procedure, proposed changes to 271–2, 279–80
sanctions litigation 280–81
EU security law and secret evidence, special advocates accountability problems 274–5
communication restrictions 275–7, 333
crossing of information 276–7, 278
consideration of use of 272, 273
evidence challenge restrictions 277
problems with 273–8, 279–80
European Convention on Human Rights 15, 120
asset freezing as criminal charge 254–5
European Court of Human Rights (ECtHR) 335
fair and public hearings, right to, and witness anonymity 201, 202
legitimacy and implementation problems 335–6
non-disclosure of evidence 261, 262–3
political support considerations 336
reverse burdens in special precursor offences 220
secret evidence and control orders, advice on 120, 154–5, 158, 159, 160–61, 180–81, 225
special advocates 16, 161, 180–81
terrorism case law 336–7
European Court of Human Rights (ECtHR), cases
A v. United Kingdom 17–18, 19, 272–3, 292, 331
Al-Nashif v. Bulgaria 262
Banković et al. v. Belgium 336
Behrami et al. v. France 336
Brandstetter 253
Brinks v. the Netherlands 262
Brogan et al. v. United Kingdom 336
Chahal v. the United Kingdom 262

David Cole, Federico Fabbrini and Arianna Vedaschi - 9781781953860
Downloaded from Elgar Online at 04/11/2019 02:52:13AM via free access

Columns Design XML Ltd / Job: Cole-Secrecy_National_Security / Division: Index /Pg. Position: 5 / Date: 15/4
Secrecy, national security and the vindication of constitutional law

Edwards and Lewis v. the United Kingdom 258
Hirst v. United Kingdom 336
Jasper v. the United Kingdom 262
Kadi v. UK 18–19, 123
Kaya v. Romania 262
Lawless v. Ireland 335, 336
Lupsa v. Romania 262
Nada v. Switzerland 255
Q v. Finland 260–61
Saramati v. France et al. 336
Segerstedt-Wiberg and Others v. Sweden 262

European Court of Justice (ECJ)
Ayadi v. Council 293–4
Bank Melli Iran 280
El Morabit v. Council 255
Fahas v. Council 255
French Republic v. OMPI 271–3, 281, 291
Germany v. Commission 255
Käserei Champignon Hofmeister 255
Maizena and Others 255
People’s Mojahedin Organization of Iran v. Council 256
Sweden and Turco v. Council 319

European General Court
El Morabit v. Council 253
Fahas v. Council 253
Fulmen 280
Kadi II 19, 123, 254, 268, 269–70, 284–5, 299
OMPI v. Council 291, 293
and presumption of innocence 252–3
presumption of innocence and precautionary measures 252–3
Sophie in ‘t Veld v. Council 319
evidence
anonymous testimony see anonymous testimony,
normalization of
assessment and standard of proof 252–3
challenge restrictions, EU security law 277
disclosure see disclosure of evidence
gist of see gist of evidence
non-disclosed 156, 167, 258, 260, 261–6
obtained from torture, UK 217
secret see secret evidence and cleared counsel, comparative advantage (US, UK, and Canada)
Ewing, K. 170
executive branch
checks on, US 26–34
courts cooperation 330
decline in powers of 324
dominance problems 329
information disclosure discretion, US and Canada 81–2
Italy, state secrets privilege 97–8, 101
lack of objectivity, US 40
oversight within, US 25–6, 323
reform implementation, US 41–3
executive orders
benefits of, terrorists on trial, UK 213, 224–5
constitutional values in UK and Australia, role and vulnerability of 157–62
lack of effectiveness of, terrorists on trial, UK 211, 223
Fabbrini, Federico 1–9, 98, 103, 284–301
fair trial
indefinite detention 331
judicial independence, importance of 332
right and use of secret evidence, UK 160–61, 170
secret evidence and cleared counsel 182, 186, 187, 326
and state secrets in domestic courts 331–4
see also human rights
Falkoff, M. 134
Fanchiotti, V. 95
Fassbender, B. 288
Feinaugle, C. 286
Fenwick, H. 160, 161
Feroni, G. 110
Finland
  administrative procedure law 252
  Aliens Act 259
  human rights protection, alleged
    shortcomings 260–61, 264–5
  judicial review of intelligence and
    closed oral hearings 261–4, 265, 266
  non-disclosure of evidence 260, 261, 262–6
  Q v. Finland 260–61
  reason-giving requirement and
    immigration law 263
  Security Intelligence Service and
    immigration law 259–66
Fischer, Tobias 195–208
Fisher, L. 59
Fiss, O. 233, 242
Fitzgerald, P. 286, 295
Foglesong, T. 135
Forcese, C. 87, 88, 89, 91
Foucault, M. 237
freezing orders
  administrative counterterrorism
    measures 254–5, 257
  global sanctions and supranational
    review 287–8, 295–6, 299, 328
  terrorism and security 18–19
  US 295–6, 299
see also blacklisting powers;
  sanctions
Friedman, L. 117
Frosini, J. 101, 103
Frowein, J. 287
Galanter, M. 236
Garlicki, Lech 322–37
Garrett, B. 184
Geltzer, J. 184
German Federal Constitutional Court
  and counterterrorism 44–56, 330
Code of Criminal Procedure
  amendments 53–4
core executive competences and
  public weal as grounds for
    withholding information 47–8
  data retention legislation, and right to
    privacy of communication 53–5
  dragnet investigation 50–51
  Federal Intelligence Service, CIA
    cooperation and intelligence
    sharing 46–9
  free development of personality, right
    to 50–51
  government’s grounds for
    withholding information 47–8
  grid search 50
  informational self-determination,
    right to 49–51
  inter-state intelligence co-operation
    46–9
  investigative committee
    appointments 45–7
  North Rhine-Westphalia Constitution
    Protection Act 52
  North Rhine-Westphalia (NRW)
    Police Act 50
  parliamentary investigation,
    reinforcing rights of 46–9
  personal computer systems,
    protecting integrity and
    confidentiality of 52–3
  personality rights and government
    control and surveillance,
    tensions between 49–55
  proportionality principle and data
    retention legislation 54
  Telecommunications Act
    amendments 53–4
  transparency through democratic
    accountability 45–9
see also judicial review
Ginsborg, L. ix, 270, 293–4
gist of evidence
  and disclosure levels, global
    sanctions and supranational
    review 292–3, 299–300
  electronic interception of evidence,
    terrorism and security 20
  summary requirement, UK, secret
    evidence and cleared counsel
    180–81, 186, 187, 189
see also evidence
Giupponi, T. 98
Glaberson, W. 63, 196
Glazier, D. 232
Global sanctions and supranational review 284–301, 328
blacklisting 286, 295–6, 328, 334
disclosure levels and 'gist' of evidence 292–3, 299–300
due process rights 288, 289–90, 292–3, 294–5, 296–8, 299
EC regulation for freezing assets 287–8
EU Common Foreign and Security Policy 287
freezing of suspect's assets 287–8, 295–6, 299, 328
judicial review in EU courts 288–91
judicial review of domestic sanctions in US courts, difficulties of 296–300
Kadi case see Kadi case
and lack of transparency 327
sanctions delisting 300
secret evidence problems 291–4
and supranational jurisdictions 334–7
and technical infrastructure 324
terrorism, global administrative framework against 286–8
and terrorism threat 323–4
UN Security Council sanctions 250, 286–7, 288–9, 293–4, 295–6
and US Office of Foreign Assets Control (OFAC) 295–6, 297–9
see also supranational arrangements
Greenwald, G. 63
Guantánamo Bay
classified information, shared 177, 185–6
detentions, US, oversight of national security secrecy 29
due process rights for detainees, US 183–4, 190
military tribunals see military tribunals, Guantánamo Bay
targeted killings 117–19

Hansen, V. 117
Heller-Roazen, D. 13
Hersh, S. 77
Heymann, P. 140
Hillyard, P. 214
Hocking, J. 135
Hoffman, F. 288
Holder, E. 119
Holt, P. 76, 82
Horne, A. 210
Hudson, A. 294
Hugessen, J. 121
Huisman, W. 250
human rights
due process rights see due process rights
Europe see European Court of Human Rights
fair trial see fair trial
free development of personality, right to, German Federal Constitutional Court 50–51
individual rights protection 330–31
institutions, and anti-terrorist measures 324, 325
personality rights and government control and surveillance, tensions between, German Federal Constitutional Court 49–55
principles of natural justice 182–4
protection shortcomings, administrative counterterrorism measures 256–7, 258, 260–61, 264–5
records, countries with poor 128
and secret jails 328
terrorism and security 14–15, 326

India
Dinesh Trivedi v. Union of India 68–9
formalism and state secrets 67–70
Freedom of Information Act 68
People’s Union for Civil Liberties v. Union of India 68, 69
Right to Information Act 69
Uttar Pradesh v. Raj Narain 67–8, 69
intelligence
co-operation, inter-state, German Federal Constitutional Court 46–9
data and criminal evidence, dealing with, EU security law 278–9 reliance, administrative counterterrorism measures 257–9
and secret evidence 327 services’ involvement, administrative counterterrorism measures 256 intelligence information, direct and indirect legislative access to, US and Canada 75–94, 330
Canadian Auditor General, role of 88, 89–90
Canadian Commission for Public Complaints Against the RCMP (CPC) 92–3
Canadian non-parliamentary offices, and review of intelligence activities 90–93
Canadian parliament 86–93
Canadian Special Committee on Anti-Terrorism 88
Church Committee, US 77, 82–3
Commissioner Review of CSE, Canada 91–2
Congress members’ staff, US 82–4, 330
congressional authorization for war 84 covert actions and notice requirements (US) 77, 79–81, 83 executive branch, information disclosure discretion 81–2 federal government programs, auditing of, Canada 88 Government Accountability Office (GAO), US 84–5 intelligence abuses, ad hoc enquiries, Canada 93 intelligence agency abuses, US 77–8 intelligence committees, US 76–82 Iran-Contra controversy 79–81 National Security Agency (NSA), information to staffers, US 83 National Security Letters (NSLs), FBI’s use of, US 86 Pike Committee, US 77, 82–3 Royal Canadian Mounted Police (RCMP) 86–7, 92–3 Senate Select Committee on Intelligence, US 77–8 US Congress’s access to intelligence information 76–86 see also Canada; US international arrangements see supranational arrangements
Israel
formalism and state secrets 66–7 judicial management model 121 military tribunals, Palestinian Territories see military tribunals, Palestinian Territories secret evidence and targeted killings 119
Israeli Supreme Court and national security 133–53, 324, 332 bargaining in shadow of the court 147–50 decision lengths 143 detention length 144 Emergency Powers (Detentions) Law (IDL) 137, 142, 143, 144
Incarceration of Unlawful Combatants Law (UCL) 139, 143, 144
incorrect decisions and judicial review 136
judicial management model 136, 145–7, 332
judicial review of preventive detentions 134–8
judicial review process 140–44, 149–50
judicial review process, case outcomes 142–3
judicial review process, court practice 141–3
military law 138–9, 142
nationality of detainees 144
preventive detentions 137–9, 146
Preventive Detentions Order No. 1591 (MDO) 138–9, 142, 143, 144, 148, 149
recommendations to parties 144
rhetoric and practice, gap between 150–51
secret evidence 141, 145–7
West Bank military law 138–9, 142
withdrawal rates 143, 148
Issacharoff, S. 27, 238
Italy, state secrets privilege 95–111
Abu Omar case 103, 106, 108
constitutional basis 96–8, 104, 106
Constitutional Court role 102–7, 108–11
control mechanism 101–3
criminal investigations 100–101
erga omnes effect 103
executive role 97–8, 101
government accountability 105–6
judicial independence 97, 234
judicial review exclusion 106, 109–10
Law 124/2007 98–9, 100, 102, 104
Law 133/2012 102, 108
legislation 98–103
national security definition 104–5
Parliamentary Committee for the Intelligence and Security Services (COPASIR) 102, 107–8
PM role 98, 99, 100–101, 102, 105, 107–8, 111
rules of procedure 99
salus rei publicae 104–5
seal of state secrecy 99, 104
subversive acts 101–2, 105, 108
supranational secrets 100
Jacobs, L. 84
Jenkins, D. 184
Jinks, D. 134, 135
Johnson, L. 83
judicial review
Canada 178, 186–7, 188
domestic sanctions in US courts, difficulties of 296–300
EU courts 288–91
EU security law and secret evidence 272–3, 278, 281, 282
exclusion, Italy 106, 109–10
German Federal Constitutional Court see German Federal Constitutional Court and counterterrorism
intelligence and closed oral hearings, Finland 261–4, 265, 266
Israeli Supreme Court see under Israeli Supreme Court and national security
limited scope of, administrative counterterrorism measures 253, 258, 333–4
secret evidence and cleared counsel, comparative advantage (US, UK, and Canada) 178, 179, 180, 186–8
UK 127–8, 180, 186–7, 188
US, oversight of national security secrecy 37–8, 332
judiciary
authority on disclosure issues, Canada 179, 187–8
capacity for detail, US 38–9, 41
checking powers, US 29–35
decision-making in wartime, US 58
independence concerns, US 37–40, 41
<table>
<thead>
<tr>
<th>Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>judicial management model, Israeli Supreme Court</td>
</tr>
<tr>
<td>136, 145–7, 332</td>
</tr>
<tr>
<td>listening ability, US</td>
</tr>
<tr>
<td>39</td>
</tr>
<tr>
<td>jury response, anonymous testimony, normalization of 207–8</td>
</tr>
<tr>
<td>jury trials, terrorist trials, UK</td>
</tr>
<tr>
<td>226</td>
</tr>
<tr>
<td>Kadi case</td>
</tr>
<tr>
<td>EU security law and secret evidence</td>
</tr>
<tr>
<td>269–71</td>
</tr>
<tr>
<td>global sanctions and supranational review</td>
</tr>
<tr>
<td>284–5, 289–94, 296, 297, 328</td>
</tr>
<tr>
<td>Kadi v. Council of the European Union</td>
</tr>
<tr>
<td>17, 254, 256, 267–71</td>
</tr>
<tr>
<td>280, 281, 289–94, 296, 297</td>
</tr>
<tr>
<td>Kadi v. Geithner, US, cases</td>
</tr>
<tr>
<td>297–8, 301</td>
</tr>
<tr>
<td>Kadi v. UK, European Court of Human Rights (ECtHR)</td>
</tr>
<tr>
<td>18–19, 123</td>
</tr>
<tr>
<td>and release of information by US</td>
</tr>
<tr>
<td>270–71</td>
</tr>
<tr>
<td>UN Security Council</td>
</tr>
<tr>
<td>270</td>
</tr>
<tr>
<td>Kaiser, A.-B.</td>
</tr>
<tr>
<td>53</td>
</tr>
<tr>
<td>Katyall, N.</td>
</tr>
<tr>
<td>232</td>
</tr>
<tr>
<td>Kavanagh, A.</td>
</tr>
<tr>
<td>159, 160, 161</td>
</tr>
<tr>
<td>Keller, B.</td>
</tr>
<tr>
<td>43</td>
</tr>
<tr>
<td>Kennedy, M.</td>
</tr>
<tr>
<td>89</td>
</tr>
<tr>
<td>Kitai-Sangero, R.</td>
</tr>
<tr>
<td>134, 136</td>
</tr>
<tr>
<td>Kitrosser, H.</td>
</tr>
<tr>
<td>83</td>
</tr>
<tr>
<td>Knezo, G.</td>
</tr>
<tr>
<td>312</td>
</tr>
<tr>
<td>Knott, S.</td>
</tr>
<tr>
<td>77</td>
</tr>
<tr>
<td>Koemans, M.</td>
</tr>
<tr>
<td>250</td>
</tr>
<tr>
<td>Koh, H.</td>
</tr>
<tr>
<td>35, 229</td>
</tr>
<tr>
<td>Kornhauser, L.</td>
</tr>
<tr>
<td>148</td>
</tr>
<tr>
<td>Krebs, Shiri</td>
</tr>
<tr>
<td>133–53</td>
</tr>
<tr>
<td>Kretzmer, D.</td>
</tr>
<tr>
<td>136</td>
</tr>
<tr>
<td>Krisch, N.</td>
</tr>
<tr>
<td>287</td>
</tr>
<tr>
<td>Labriola, S.</td>
</tr>
<tr>
<td>97</td>
</tr>
<tr>
<td>Langer, M.</td>
</tr>
<tr>
<td>156</td>
</tr>
<tr>
<td>Larkin, J.</td>
</tr>
<tr>
<td>293</td>
</tr>
<tr>
<td>Lepsius, O.</td>
</tr>
<tr>
<td>44</td>
</tr>
<tr>
<td>Levinson, D.</td>
</tr>
<tr>
<td>27</td>
</tr>
<tr>
<td>Light, P.</td>
</tr>
<tr>
<td>86</td>
</tr>
<tr>
<td>Linzer, D.</td>
</tr>
<tr>
<td>190</td>
</tr>
<tr>
<td>Lomjaria, Nino</td>
</tr>
<tr>
<td>75–94</td>
</tr>
<tr>
<td>Luban, D.</td>
</tr>
<tr>
<td>233, 235</td>
</tr>
<tr>
<td>Lusty, D.</td>
</tr>
<tr>
<td>202</td>
</tr>
<tr>
<td>Lynch, Andrew</td>
</tr>
<tr>
<td>154–72</td>
</tr>
<tr>
<td>McBain, G.</td>
</tr>
<tr>
<td>222</td>
</tr>
<tr>
<td>McColgan, M.</td>
</tr>
<tr>
<td>222</td>
</tr>
<tr>
<td>McCullough, A.</td>
</tr>
<tr>
<td>160, 162</td>
</tr>
<tr>
<td>McGhee, D.</td>
</tr>
<tr>
<td>137</td>
</tr>
<tr>
<td>McGoldrick, D.</td>
</tr>
<tr>
<td>135</td>
</tr>
<tr>
<td>McLoughlin, J.</td>
</tr>
<tr>
<td>134</td>
</tr>
<tr>
<td>Mäenpää, O.</td>
</tr>
<tr>
<td>252</td>
</tr>
<tr>
<td>Maini, F.</td>
</tr>
<tr>
<td>303</td>
</tr>
<tr>
<td>Malaysia</td>
</tr>
<tr>
<td>122–3</td>
</tr>
<tr>
<td>Mathews, J.</td>
</tr>
<tr>
<td>182</td>
</tr>
<tr>
<td>Mayer, J.</td>
</tr>
<tr>
<td>241, 245</td>
</tr>
<tr>
<td>Mayers, J.</td>
</tr>
<tr>
<td>295</td>
</tr>
<tr>
<td>Mazzonzo, Jason</td>
</tr>
<tr>
<td>195–208</td>
</tr>
<tr>
<td>Mégret, F.</td>
</tr>
<tr>
<td>288</td>
</tr>
<tr>
<td>Meijer, A.</td>
</tr>
<tr>
<td>302</td>
</tr>
<tr>
<td>Mersel, Y.</td>
</tr>
<tr>
<td>140</td>
</tr>
<tr>
<td>Metcalfe, E.</td>
</tr>
<tr>
<td>274</td>
</tr>
<tr>
<td>Meyerson, D.</td>
</tr>
<tr>
<td>164</td>
</tr>
<tr>
<td>military tribunals</td>
</tr>
<tr>
<td>229–46</td>
</tr>
<tr>
<td>and civilian court system</td>
</tr>
<tr>
<td>231, 240, 242, 243–6</td>
</tr>
<tr>
<td>criticism of 231</td>
</tr>
<tr>
<td>forum choice 231</td>
</tr>
<tr>
<td>as heterotopias 237–8</td>
</tr>
<tr>
<td>in/visible courts 235–40</td>
</tr>
<tr>
<td>openness and accessibility concerns</td>
</tr>
<tr>
<td>236–7</td>
</tr>
<tr>
<td>political context and hostility</td>
</tr>
<tr>
<td>awareness between state and defendant 240</td>
</tr>
<tr>
<td>prosecution process 231–5</td>
</tr>
<tr>
<td>secrecy effects 230, 238–40</td>
</tr>
<tr>
<td>semi-secret courts, challenge of 235–7</td>
</tr>
<tr>
<td>terrorist leaders, prosecution of 241–6</td>
</tr>
<tr>
<td>visibility of invisible courts 230, 238–40</td>
</tr>
<tr>
<td>visibility and publicity shortcomings</td>
</tr>
<tr>
<td>231</td>
</tr>
<tr>
<td>military tribunals, Guantánamo Bay</td>
</tr>
<tr>
<td>231, 232–3, 238</td>
</tr>
<tr>
<td>civilian attorney access</td>
</tr>
<tr>
<td>232–3</td>
</tr>
</tbody>
</table>
Mohammed, Khalid Sheikh, detention 241–2, 245
open court restrictions 233, 240
military tribunals, Palestinian Territories 231, 233–5, 238
Barghouthi, Marwan prosecution 243–6
judicial independence 234
normalization 234
open court restrictions 234–5, 240
Mnookin, R. 148
Möllers, C. 49
Morbidelli, G. 110
Morris, N. 218
Morrone, A. 110
mosaic theory, US, oversight of national security secrecy 33, 120
Murphy, Cian C. 268–83
Nash, S. 274
national security measures
adoption obligation, EU secrecy regulation 309, 310–11
executive implementation oversight, need for 329
and Israeli Supreme Court see Israeli Supreme Court and national security
secrecy management and migration in post-9/11 world 124–6
secrecy oversight see US, oversight of national security secrecy
NATO, interim security agreement, EU secrecy regulation 312–13
Nesbitt, K. 135
Nesson, C. 314
Nettesheim, M. 287
Neuman, G. 238
New Zealand 203, 204–5
Nice-Petersen, N. 295, 298
Nino, M. 103
normalization of anonymous testimony see anonymous testimony, normalization of
Ojanen, Tuomas 249–67
Omerod, D. 201
originator control (ORCON creep), EU secrecy regulation 313–14, 318
Otty, T. 225
overclassification concerns 24–5, 42, 189, 315
Pace, A. 97, 100, 108
Pallitto, R. 28, 38, 57
Paulus, A. 56
Paust, J. 229
Peers, S. 303
Pellizzzone, I. 96
Perez, E. 232
Phillipson, G. 160, 161
Pildes, R. 27, 58
Pisano, V. 98
Poole, T. 278
Posner, E. 35, 38, 125
Pozen, D. 120, 316
Priest, D. 84, 117
Provosti, R. 137
Qupty, M. 137
Raaflaub, T. 87, 91, 92, 93
Raj, A. 89
Ramacci, F. 95
Rana, A. 71
Raveraiva, M. 96
Reagan, R. 175
Rees, W. 304
Reinish, A. 288
Resnik, J. 236, 242
Roach, Kent 93, 115–32, 156, 179, 271
Röben, V. 46
Roberts, A. 309, 312, 313
Robertson, G. 227
Rubinstein, E. 244
Rudman, M. 137
safety protection issues, anonymous testimony, normalization of 198–9, 203, 204
Said, W. 195–6
Sanama, A. 32, 33
sanctions global see global sanctions and supranational review
smart (targeted), administrative
counterterrorism measures 250,
251–2
see also blacklisting powers; freezing
orders
Satish, M. 67–8, 70
Savage, C. 241
Savage, J. 295
Savino, M. 288
S Scalia, A. 58
Scheinin, Martin ix–xi, 255, 256, 257,
270, 282, 293–4, 334
Scheppele, K. 294
Schoenfeld, G. 117
Schulhofer, Stephen 22–43, 71, 133,
140, 196
secrecy
dimensions 326–31
effects, military tribunals 230,
238–40
management, UN Security Council
123–4, 128, 129
and national security, history of
322–3
regulation, EU see EU secrecy
regulation
and secret regulations 327–8
and suppression of judgments,
terrorists on trial, UK 216
secrecy management and migration in
post-9/11 world 115–32
Canada 121–2, 124–7, 128–9
challenging nature of 116
controversial aspects, legal and
political 117–24
costs of 130–31
dangers in 131–2
future recommendations 130–31
human rights records, countries with
poor 128
international management 126–9
Malaysia 122–3
military commissions 118
national domestic management
124–6
public suspicion issues 118, 119
secret evidence, perceived unfairness
of 118–19
targeted killings and Guantanamo
(US) 117–19
third party rule of control over shared
intelligence 127
UK 119–20, 127–8
UN Security Council 123–4, 128, 129
secret evidence
and closed material procedures
(CMPs), UK 162
control order proceedings, UK and
Australia 156–7, 160–61, 167
control orders, advice on, European
Court of Human Rights 120,
154–5, 158, 159, 160–61,
180–81, 225
and intelligence 327
Israeli Supreme Court 141, 145–7
problems, global sanctions and
supranational review 291–4
sources, disclosure of, UK 213
secret evidence and cleared counsel,
comparative advantage (US, UK,
and Canada) 173–92, 326
applicable principles 182–4
best practices, identification of 184–8
Canadian process 178–9
Canadian system, advantages of
186–8
classified information, shared, in
Guantánamo hearings, US 177,
185–6
cleared counsel, Canada 178–9, 187,
189–91
cleared counsel model, US 176–7,
185–6, 187, 189–91
constitutional due process rights for
Guantánamo detainees, US
183–4, 190
control orders, UK 181
counsel access to classified
information, US 177, 185–6
detainee rights, US 175–7
detainee statements, secrecy of, US
177–8
disclosure of classified evidence, US
176–7, 185, 188–9
fair hearing rights 182, 186, 187, 326
individual fairness issues, UK 180–81
information disclosure, UK 180
judicial review 178, 179, 180, 186–8
as normative project 174–5
overclassification concerns, US 189
preventive detention hearings, UK 180–81
principles of natural justice 182–4
shared problems 188–91
special advocates 178–9, 180–82, 187–8, 190
summary (gist) requirement, UK 180–81, 186, 187, 189
UK process 180–82
UK system, advantages of 186–8
undisclosed evidence and detention and deportation, Canada 178
US process 175–8
US system, advantages of 185–6
see also Canada; UK; US
security
gradings, EU secrecy regulation 305–6, 307, 310, 313, 314–15, 317–18
law and secret evidence, EU see EU security law and secret evidence
and terrorism see terrorism and security
Sedley, Stephen 13–21
Setty, Sudha 57–71, 299
Shane, S. 182
Shankar, S. 69
Silverberg, M. 80
Smist, F. 77, 82
Snider, L. 76, 78, 79, 82, 83
Spataro, A. 99, 107
special advocates 333–4
Canada 121–2, 136–7, 178–9, 187–8
EU security law and secret evidence see EU security law and secret evidence, special advocates
secret evidence and cleared counsel, comparative advantage (US, UK, and Canada) 178–9, 180–82, 187–8, 190
terrorism and security 16–17
UK see under UK
Stack, J. 209
Starmer, K. 222
state secrets, and formalism see US, formalism and state secrets
state secrets privilege, Italy see Italy, state secrets privilege
Stellios, J. 155
Stewart, H. 135
Steyn, J. 135
Stone Sweet, A. 182
summary of evidence see gist of evidence
Sunstein, C. 27, 58
supranational arrangements
international agreements, EU secrecy regulation 316–19
international management in post-9/11 world 126–9
international organisations and third states, dealing with, EU secrecy regulation 312–13
international police cooperation 222
Italy, state secrets privilege 100
review see global sanctions and supranational review see also EU; UN
targeted killing program, US 67, 117–19
terrorism
constitutional court and counterterrorism see German Federal Constitutional Court and counterterrorism
counterterrorism measures see administrative counterterrorism measures
global administrative framework against 286–8
prosecutions and security clearance, US 30
terrorist leaders, prosecution of, military tribunals 241–6
terrorism and security 13–21, 325, 326, 329
closed material 16–17
closed material proceedings – CMPs 20–21
control orders and disclosure of evidence, UK 16–17
freezing orders 18–19
gisting and electronic interception of evidence 20
human rights issues 14–15, 326
piracy law 13–14
security services, information gathering disclosure 20
special advocates 16–17
traditional police methods 14
terrorists on trial, UK 209–28
abusive treatment abroad, alleged British complicity in 223–4
agents and informants, handling of 218
arrests, charges and convictions 212
Closed Material Procedures (CMPs) 224–6
collaboration and joint operations 217
close-up orders replaced by Terrorism Prevention and Investigation Measures (TPIMs) 211
cost considerations 213–14, 215
criminal offence challenges 218–21
criminal process challenges 214–18
criminal prosecution benefits 211–12
criminal prosecution challenges 213–21
criminal prosecution drawbacks 212–13
criminal prosecution trend 211
detention without trial 210
evidence obtained from torture 217 executive orders, benefits of 213, 224–5
executive orders, lack of effectiveness of 211, 223
future criminal offences 221–2
future criminal process and admission and disclosure of evidence 222–6
future manipulation 221–7
guilt by association 220
international police cooperation 222
jurisdictional coverage, extension of 221–2
jury trials 226
neighbour (home-grown) terrorism 210–11
net-widening problem 219
offences against the state, revival of 222
open justice principle 215–16
precursor offences, widening of 222
primacy of criminal prosecution 210–13
public accountability benefits 211
resource issues 215
reverse burdens in special precursor offences 220–21
rules of evidence 216–17
secrecy and suppression of judgments 216
secret sources, disclosure of 213
special advocates 215–16
suppression of evidence and public interest immunity 216–17
terrorism committed overseas, criminalisation of 219
Terrorism Prevention and Investigation Measures (TPIM notices) 210, 215, 223, 225
trial process, choice of 226–7
Tham, J.-C. 170
Thompson, D. 321
Tomkins, A. 65, 160
Tribe, L. 232
tribunals, military see military tribunals
Tulich, Tamara 154–72
Tung Yin 242
Turner, S. 30, 196
UK
Anti-Terrorism, Crime and Security Act 119–20, 210
closed material proceedings – CMPs 20–21
constitutional values see constitutional values in UK and Australia, role and vulnerability of
closed material proceedings 20–21
calculating values in UK and Australia, role and vulnerability of
closed material proceedings – CMPs 20–21
closed material proceedings
control orders 16–17, 120, 154–5, 157–9, 160–61, 163, 181, 273–4
Coroners and Justice Act 201, 226
coroners’ juries, light touch vetting of 21
Counter-Terrorism Act 211
Criminal Evidence (Witness Anonymity) Act (WAA) 200–202
Criminal Justice Act (CJA) 199–200, 226
cross-examination of accusers, history of 196–7
derogating and non-derogating control orders 158, 169
detention without trial 210
Diplock courts (juryless) 210, 214
disclosure of evidence and control orders 16–17
executive orders 157–62
fair hearing rights 182, 186
fair trial right and use of secret evidence 160–61, 170
formalism and state secrets, England 62–6
freezing orders 18–19
Holland Inquiry 226
Human Rights Act 15, 120, 171, 201, 224
immigration legislation and detention 15–16
increased acceptance of anonymous testimony 199–202
indeterminate detention without trial, provisions for 120
Joint Committee of Human Rights (JCHR) 155, 160, 181
judicial review 127–8, 180, 186–7, 188
Justice and Security Bill 277
Lockerbie trial processes 226, 227
London 7/7 attacks 14, 20
Macdonald Report 228
Operation Overt 218
Prevention of Terrorism Act (PTA) 157, 223
preventive detention hearings 180–81
primacy of criminal prosecution 210
Protocol on the Management of Terrorism Cases 214–15
public interest immunity certificates and state secrets 63–4
Regulation of Investigatory Powers Act 218
secrecy management and migration in post-9/11 world 119–20, 127–8
secret evidence and cleared counsel see secret evidence and cleared counsel, comparative advantage (US, UK, and Canada)
secret evidence and closed material procedures (CMPs) 162
secret information access 119
special advocates, accountability problems 274–5
special advocates, communication restrictions 275–7
special advocates, evidence challenge restrictions 277
special advocates, lack of accountability 274–5
Special Advocates Support Office 276–7
Special Immigration Appeals Commission 21, 119–20, 224–5, 275
Special Immigration Appeals Commission (SIAC) Act 274, 278, 332–3
Terrorism Act 211, 214, 216, 219, 220
Terrorism Prevention and Investigation Measures (TPIM notices) 157, 158–9, 169, 210, 215
terrorists on trial see terrorists on trial, UK
UK, cases
A v. Home Secretary 15–16
A v. Secretary for the Home Department 157, 217
A v. United Kingdom 120, 160, 181, 216, 279, 337
Ahmed and Others 254
Ahmed v. HM Treasury 18, 19
Air Canada v. Sec'y of State for Trade 62–3
Al Rawi v. Security Service 21, 160, 183, 216
Al-Jedda 337
Al-Saadood and Mufldi 337
Al-Skeini et al. 337
Gillan and Quinton 337
Her Majesty's Treasury v. Ahmed 181
John v. Rees 17
Megrahi v. HM Advocate 227
Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs 63, 64–6, 70, 170
Official Solicitor v. K 183
Othman (Abu Quatada) 337
R (Binyam Mohammed) v. Secretary of State for the Foreign & Commonwealth Office 223
R v. Ahmed 217
R v. AF 220
R v. Benbrika 215
R v. Davis 200, 216
R v. F 219
R v. G 220
R v. Gul 219
R v. Horncastle 202
R v. Khayam 217
R v. Mayers 201–2
R v. Omar Khayam 215, 216
Rehman 275
Scott v. Scott 21, 64, 215
Secretary of State for the Home Department v. AF (No. 3) 16, 161, 162, 181
Secretary of State for the Home Department v. MB 17, 158, 159, 160
ZZ v. Secretary of State for the Home Department 281
UN freezing orders 18–19

Global Counter-Terrorism Strategy 251
see also supranational arrangements
UN Human Rights Committee, Nabil Sayadi and Patricia Vinck v. Belgium 255
UN Security Council blacklisting powers 286–7, 288–9
Kadi case 270
Ombudsperson and security delisting recommendations 124, 128, 129
Resolution 1267 123–4, 128, 129, 250, 286–9, 293–4, 295–6
sanctions 250, 286–7, 288–9, 293–4, 295–6
secrecy management 123–4, 128, 129
US
9/11 Commission 124–6
Administrative Procedure Act 298
Church Committee 77, 82–3
CIA cooperation and intelligence sharing, German Federal Constitutional Court and counterterrorism 46–9
classified documents, and EU secrecy regulation 318
Classified Information Proceedings Act (CIPA) 118
classified information, shared, in Guantánamo hearings 177, 185–6
constitutional due process rights for Guantánamo detainees 183–4, 190
cross-examination of accusers, history of 197
detainee rights 175–7
detainee statements, secrecy of 177–8
Director of National Intelligence (DNI), right to intelligence 78–9, 85
disclosure levels and ‘gist’ of evidence 299–300
freezing of suspect’s assets 295–6, 299
Government Accountability Office (GAO) 84–5
356  Secrecy, national security and the vindication of constitutional law

Guantánamo Bay see Guantánamo Bay
Inspector General (IG) offices 85–6
intelligence information access see intelligence information, direct and indirect legislative access to, US and Canada
Iran-Contra controversy 79–81
judicial review of domestic sanctions in US courts, difficulties of 296–300
Military Commissions 227
Military Commissions Act 118
military tribunals, Guantánamo Bay see military tribunals, Guantánamo Bay
National Counterterrorism Centre 125–6
National Security Agency (NSA), information to staffers 83
National Security Letters (NSLs), FBI’s use of 86
Office of Foreign Assets Control (OFAC) 295–6, 297–9
overclassification concerns 189
PATRIOT Act 295
Pike Committee 77, 82–3
principle of natural justice 183–4
secret evidence and cleared counsel see secret evidence and cleared counsel, comparative advantage (US, UK, and Canada)
Senate Select Committee on Intelligence 77–8
substantial connections test 297
targeted killings and Guantánamo (US) 117–19
Wikileaks 43, 270, 315
US, cases
A. v. Secretary of State 120
ACLU v. Dept. of Defense 33, 187
Al Haramain Islamic Foundation v. Dept. of the Treasury 299
Al Haramain Islamic Foundation v. Obama 81
Al-Aulaqi v. Obama 58, 67, 119
Awad v. Obama 190
Bismullah v. Gates 176, 177
Boumediene v. Bush 71, 176, 183, 232, 238
Crawford v. Washington 195
El-Masri v. Tenet 57, 60
EPA v. Mink 32, 38
Fazaga v. Federal Bureau of Investigation 81
Hamdan v. Bush 117–18
Holy Land Foundations for Relief and Development v. Ashcroft 298, 299
Islamic Am. Relief Agency v. Gonzales 298
Kadi v. Geithner 297–8, 301
KindHearts v. Geithner 298, 299, 301
Mathews v. Eldridge 183
Mohamed v. Jeppesen Dataplan 58, 60, 61–2, 63, 65–6
Mohammed v. Obama 65
Mousovi v. Obama 176–7
National Council of Resistance of Iran v. Department of State 297
Ohio v. Roberts 198
Padilla v. Yoo 81
Rasul v. Bush 175
Secretary of State v. AF 120
United States v. Ramos-Cruz 195
United States v. Reynolds 32, 38, 59, 61
Youngstown Sheet & Tube Co. v. Sawyer 80
US, formalism and state secrets 57–71, 333
comparative context 62–70
compensation considerations for rendition and internment 61
England comparison 62–6
extraordinary rendition program 60
Holder Memorandum 57, 59–60
India comparison 67–70
internal review process 57–8
Israel comparison 66–7
judicial decision-making in wartime 58
Index

Obama administration and state secrets privilege 59–60
privileged information, implication of 61, 333
State Secrets Protection Act 57, 59
targeted killing program 67
US, oversight of national security secrecy 22–43, 332
assessment of system 34–5
automatic declassification procedure 25–6
civil litigation 31–2
Classified Information Procedures Act (CIPA) 22, 23, 29–31, 34, 37, 38
cleared counsel 30
closed pre-trial hearings 29
Congress, ability to see big picture 40–41
Congress, access to classified information 27–8, 34
Congress, intelligence committee staff 36, 42
Congress, mediation skills 41
Congress motivation incentives 36–7, 41
Congress security breaches 35–6
Congress shortcomings and reform proposals 35–7
Congress, strengthening, and two-way information flow 41–2
courts, lack of expertise and vulnerability to leaks 38–40
courts, strengthening 42–3
denovo review mandate 32–3, 39, 42–3
declassification procedures 42
‘embassy bombings’ trial 30
executive branch, checks on 26–34
executive branch, lack of objectivity 40
executive branch, oversight within 25–6, 323
executive branch, reform implementation 41–3
executive control over sensitive information 23
executive secrecy apparatus 24–6, 40
Freedom of Information Act (FOIA) 22, 26, 32–5, 38–9
Freedom of Information Act (FOIA), national security exemptions 34–5, 37, 38, 42–3
initial classification 24–5
institutional assets and liabilities 35–41
intelligence community budget 27–8
inter-branch comparative advantage 40–41
Interagency Security Classification Appeals Panel (ISCAP) 26
judicial capacity for detail 38–9, 41
judicial checking powers 29–35
judicial independence concerns 37–40, 41
judicial listening ability 39
judicial review 37–8, 332
mandatory declassification review (MDR) 26
mosaic theory 33, 120
over-classification 24–5, 42
press leaks 27, 34
protective orders 29–30
public disclosure decisions 28
public-interest balance 25, 42
reform proposals 35–43
secrecy, judgment whether to impose 28
security-cleared counsel representation 22–3
state secrets privilege (SSP) 22
terrorism prosecutions and security clearance 30
Van den Broek, M. 255
Van Harten, G. 136, 216
Vashakmadze, Mindia 44–56
Vedaschi, Arianna 1–9, 95–111
Vermeule, A. 35, 38
Vermeulen, M. 257, 305
Vladeck, Stephen I. 173–92, 238, 241
Volcansek, M. 209
Wald, P. 32
Waldron, J. 236
Walker, Clive 157, 209–28, 274
Secrecy, national security and the vindication of constitutional law

Waxman, M. 121, 135, 136, 137, 138, 140, 141, 181, 292
Weaver, W. 28, 38, 57
Weber, M. 319
Welsh, Rebecca 154–72
Wikileaks 43, 270, 315
Will, A. 305
witnesses, anonymous testimony see anonymous testimony, normalization of
Yavne, L. 234
Zabel, R. 30
Zamir, I. 135, 137, 140