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JUDICIAL OVERSIGHT *of* COVERT ACTION *in the* UNITED STATES *and* UNITED KINGDOM

A Report from the 2015 United States-United Kingdom Legal Exchange

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INTRODUCTION

This paper was originally presented at the United Kingdom-United States Legal Exchange in London, England, in September 2015. The Exchange, sponsored by the American College of Trial Lawyers, originated in 1971, when Chief Justice Warren Burger suggested that the College provide a forum for discussion about matters of common interest to jurists of the United Kingdom and the United States. Since then there have been ten Exchanges, involving members of the highest courts of the United Kingdom and the United States, as well as leading appellate and trial judges. A small number of practitioners from both countries are invited to present the views of the Bar.

As a result of the Exchanges, participants have implemented improvements in their respective legal systems. For example, past participants have credited the Exchanges with a significant role in the establishment of the Inns of Court movement in the United States and the first use of written briefs in the appellate courts of Great Britain. Lord Harry Woolf, the former Chief Justice of England and Wales, publicly acknowledged the influence of the Exchanges in a 1998 report, Access to Justice, which formed the basis for sweeping procedural changes in the British legal system.

THE global war on terrorism has increased the attention paid to the "secret" courts responsible for overseeing and approving covert action. The United States Foreign Intelligence Surveillance ("FISA") Court is a U.S. federal court established in 1978 to oversee requests by federal law enforcement agencies for surveillance warrants against suspected foreign intelligence agents. The FISA Court's work has expanded and evolved with the times. The United Kingdom's counterpart to the FISA Court, the Investigatory Powers Tribunal ("IPT"), established by the Regulation of Investigatory Powers Act, has the power to hear complaints arising from the government's surveillance activities, including the activities of the U.K.'s secret and security services, MI5 and MI6. Both nations have also developed procedures to govern the use in ordinary courts of evidence, including evidence obtained through or pertaining to covert surveillance activities, the disclosure of which might impair national security.

Perhaps by necessity, much judicial consideration of secret and covert acts occurs in secret and is insulated from the adversarial process that is the hallmark of our common-law tradition. This paper explores the workings of the U.S. and U.K. secret courts, focusing especially on the varying levels of secrecy under each judicial regime, as well as the rules and procedures each nation has adopted to facilitate review of secret evidence in ordinary courts. Ultimately, the paper compares and contrasts the approaches the United States and the United Kingdom have taken to provide for judicial review of secret and covert acts, including considering potential policy questions raised by these differing approaches to secrecy and confidentiality.

UNITED KINGDOM

LAW GOVERNING OPENNESS OF JUDICIAL PROCEEDINGS AND RELATED RIGHTS

The European Convention on Human Rights ("Convention") provides that signatory nations, including the United Kingdom, must secure to everyone within their respective jurisdictions the right, in matters both civil and criminal, to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[2] The Convention requires that judgments "shall be pronounced publicly,"[3] but it allows for nonpublic proceedings "in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[4] The Convention also guarantees the right of a criminal defendant "to be informed promptly . . . and in detail, of the nature and cause of the accusation against him."[5]

The Convention further proclaims that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[6] The Convention permits no "interference by a public authority" with the right of privacy except "such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country,

for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[7]

The United Kingdom adopted these and other Convention provisions through passage of the Human Rights Act 1998.[8] The Act provides that a public authority cannot act in a way that "is incompatible with a Convention right" unless the act is compelled by "one or more provisions of primary legislation," including acts of Parliament.[9] Public authorities subject to that provision include "court[s]" and "tribunals" as well as any persons performing "functions of a public nature," but do not include "either House of Parliament or a person exercising functions in connection with proceedings in Parliament."[10] Anyone who claims that a public authority has acted or proposed to act in such an unlawful way, and that he "is (or would be) a victim of the unlawful act," can "bring proceedings against the authority . . . in the appropriate court or tribunal" or can otherwise "rely on the Convention right or rights concerned in any legal proceedings."[11]

The Human Rights Act thus codified at least part of the common-law tradition of openness of criminal and civil proceedings.[12] In addition to that codification, the common law continues to provide additional protection for the right to public proceedings.[13] Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state.[14]

THE INVESTIGATORY POWERS TRIBUNAL

In the United Kingdom, the Investigatory Powers Tribunal ("IPT") is the "appropriate tribunal" for adjudication of claims that government surveillance or interception of communications has violated any right guaranteed by the Convention and the Human Rights Act. Parliament established the IPT through passage of the Regulation of Investigatory Powers Act 2000 ("RIPA") as the successor to several previous tribunals that considered similar claims.[15] The IPT currently consists of ten members appointed by the Queen, including a president and vice president.[16] All are required to be "senior members of the legal profession," and the president and vice president must hold or have held "high judicial office."[17] The IPT has jurisdiction to hear challenges to government surveillance conducted by either national security intelligence agencies or domestic law enforcement, and it is the exclusive forum in which to challenge such surveillance under the Convention and the Human Rights Act.[18]

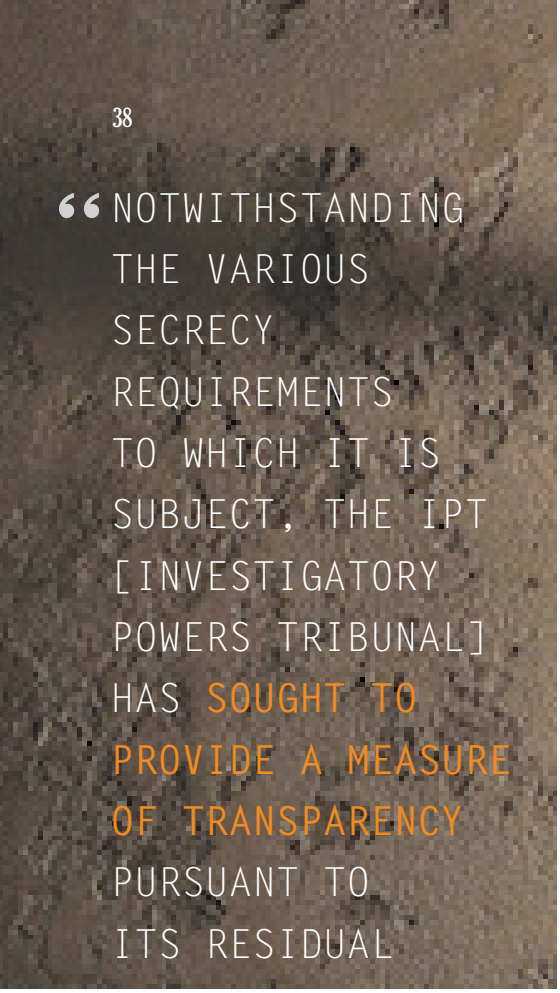
Any person may bring a complaint before the IPT, without cost, by submitting a form describing the nature of the complaint and "a summary of the information on which [it] is based."[19] RIPA provides that a complaint may be brought by any "person who is aggrieved by any conduct" subject to the IPT's jurisdiction that "he believes . . . to have taken place."[20] The IPT itself emphasizes that a complainant is "only required to *believe* that covert activity has taken place" and does not need to provide evidence because the IPT "is uniquely placed to facilitate the making and defending [of] a complaint [and] is able to investigate, obtain and protect evidence on behalf of all parties to the complaint."[21] The IPT adds, however, that "it will help your case if you provide as much information as you can about the circumstances which lead you to believe that covert action has been taken against you."[22]

The IPT's investigation of a complaint is "conducted in private."[23] The IPT is empowered to receive evidence "in any form," regardless of whether the evidence would be admissible in a court of law, and to hold separate oral hearings at which the complainant and representatives of the government can present evidence and testimony.[24] All of these proceedings are subject to the IPT's "general duty" to ensure "that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."[25] In particular, the IPT may not "disclose to the complainant or to any other person" any information or documents provided to the IPT by the government — nor even the existence of such information or documents — without the consent of the responsible officials.[26]

The IPT's decisions are also largely private, but its remedial power is fairly broad. If the IPT rules in the complainant's favor, it can award the complainant damages or issue other remedies as it sees fit, including an order quashing "any warrant" or surveillance authorization or requiring the destruction of any records obtained under a warrant or authorization or held by any public authority.[27] In that circumstance, the IPT can notify the complainant of the determination in his favor and provide a "summary of that determination including any findings of fact."[28] A losing complainant can be told only that the IPT made no determination in his favor, that the IPT determined that he did not have the right to bring the complaint, or that the complaint was frivolous or untimely.[29]

The IPT's disclosures remain subject to the IPT's aforementioned "general duty" to ensure that they are not prejudicial to national security or the public interest.[30] From its inception in 2000 until 2014, however, the IPT upheld no complaints relating to any of the United Kingdom's intelligence agencies.[31] The IPT has upheld a handful of complaints against local authorities based on relatively trivial but nevertheless unlawful surveillance, including, for example, the use of closed-circuit television "to detect persistent dog fouling."[32]

Notwithstanding the various secrecy requirements to which it is subject,[33] the IPT has sought to provide a measure of transparency pursuant to its residual authority to regulate its own proceedings. For example, "[e]ven though [RIPA] stipulates that all hearings will be in private," the IPT has developed procedures to enable some cases to be heard in public "by anonymising identities, proceeding on the basis of assumed facts or examining the legal points behind the allegation."[34] In particular, the IPT "strives to hold oral hearings where there is to be argument about points of law which can be addressed without the need to review the facts of a case in detail."[35] The IPT has also committed to publishing its decisions "where at all possible."[36] Although court statistics indicate that the IPT hears approximately 150 to 200 cases per year, its website provides access to only 28 cases with published decisions.[37]



CLOSED MATERIAL PROCEDURES

Outside the IPT, the United Kingdom has expanded the ability of its ordinary courts to conduct private proceedings using “Closed Material Procedures.”[38] In general, Closed Material Procedures allow a court to determine a case by reference to evidence that the government presents outside the presence not only of the nonparty public and press, but also of the other nongovernmental parties to the litigation.

Common Law Background. Closed Material Procedures deviate from the common-law rule that parties are entitled to see the evidence against them and that proceedings should be public.[39] Before Parliament expanded the applicability of Closed Material Procedures to all civil claims, the presumption was that when sensitive government information was involved in a case, the government had to either disclose the information sought as evidence or concede the issues pertaining to that information. When a nongovernmental party sought disclosure of information in the government’s possession, courts sometimes invoked a “public interest immunity doctrine” under which the government could seek to withhold the information if there was a “real risk that [disclosure] would harm the national interest.”[40] On the government’s application, the court weighed the public interest in secrecy asserted by the government against the competing public interest in facilitating the “administration of justice” by ensuring the court’s access to “all relevant material.”[41] In appropriate cases, the court inspected the material the government sought to keep secret, and it sometimes appointed “special advocates” to help it decide whether the immunity doctrine should apply.[42] If the court ruled that the public interest favored disclosure, the government had to either disclose the information or concede the issues to which it pertained.[43] If, on the other hand, the court agreed that secrecy was warranted, the evidence could not be used by *either* party during the litigation.[44]

Basis for Closed Material Procedures. The public-interest-immunity doctrine presented the government with a difficult decision: either release information that might harm the public interest if disclosed, or lose a case that the government (and arguably, thus, its citizens) should win based on that information. Parliament addressed this tension in a series of acts.

First, the Special Immigration Appeals Commission Act 1997 provided that the Immigration Appeals Commission may exclude an immigrant appellant and his attorney from any portion of its proceedings.[45] While the law also allows the commission to appoint a special advocate to represent the appellant’s interests before the Commission during closed proceedings, it provides that such an advocate “shall not be responsible to the person whose interests he is appointed to represent.”[46]

Next, the Prevention of Terrorism Act 2005 provided that courts may exclude the affected party and his attorney from proceedings regarding “control orders” (which are used to restrict an individual’s liberty for the purpose of “protecting members of the public from a risk of terrorism”), while authorizing the appointment of a special advocate to represent the interests of, but not be responsible to, the party during closed proceedings.[47]

In 2007, Parliament’s Joint Committee on Human Rights criticized the use of such special advocates as being “‘Kafkaesque’ or like the Star Chamber” and “a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but . . . very much against basic notions of fair play as the lay public would understand them.”[48] The Committee proposed various reforms, but the government, through the Secretary of State for the Home Department, responded that adopting the Committee’s proposals “could potentially be damaging to the public interest, including to the extent of endangering the lives of members of the public.”[49]

A year later, Parliament passed the Counter-Terrorism Act 2008, which extended Closed Material Procedures (including the use of special advocates) to appeals of government orders imposing “financial restrictions” on those the government determines have engaged in activities such as terrorist financing and money laundering.[50]

Al Rawi v. The Security Service.

It was against this backdrop that the government sought a further expansion of Closed Material Procedures in a civil case, even though there was no clear statutory framework for doing so. In *Al Rawi v. The Security Service*, a group of former Guantanamo Bay detainees sued the U.K. government for its role in their detention and treatment at the U.S. facility.[51] The government acknowledged its role but sought to present a defense based on evidence that it claimed had to be withheld in light of the public interest favoring nondisclosure.[52] The former detainees argued that the government should follow the common-law public-interest-immunity procedures, and thus either lose the ability to defend based on the evidence or disclose it publicly.[53] The government responded that the court had "the power to substitute, at least in exceptional cases, a closed material procedure for a conventional [public interest immunity] exercise."[54]

Both the Court of Appeal and the U.K. Supreme Court agreed with the former detainees, holding that only Parliament could authorize the use of Closed Material Procedures.[55] Lord Dyson reasoned that those procedures involve "an invasion of . . . fundamental common law principles" and that "if a closed material procedure is to be available in ordinary civil claims, the decision as to when it might be 'necessary' for such a procedure to be used should be left to Parliament."[56]

Justice and Security Act 2013.

Parliament provided a statutory underpinning for applying Closed Material Procedures in civil cases generally in the form of the Justice and Security Act 2013. Under this law, in conjunction with Part 82 of the Civil Procedure Rules, a court can declare certain civil proceedings and evidence immune from public disclosure and nonetheless allow the nondisclosed evidence to affect the case.[57]

The Justice and Security Act created a two-step process to trigger closed proceedings. First, to establish that the case is one in which closed proceedings or secret evidence might be appropriate, the government must show that the case will require a party to disclose "sensitive material" and that allowing the government to seek closure is "in the interests of the fair and effective administration of justice."[58] Second, if the court declares that closed proceedings may be appropriate, the government can formally move to close proceedings or withhold evidence from anyone other than the court, a special advocate appearing on behalf of an excluded party, or the Secretary of State.[59] The court must consider that request "in the absence of every other party to the proceedings (and every other party's legal representative)," and it must allow the government to withhold the material if it finds that disclosure "would be damaging to the interests of national security."[60] The court can order the government to provide a summary of the withheld material to the other parties, but only to the extent that the disclosures in the summary would not harm national security.[61] A special advocate may be appointed to "represent the interests of" an excluded party during closed proceedings, but the advocate is "not responsible to," and is prohibited from sharing nondisclosed material with, the excluded party.[62]

In the first year after passage of the Justice and Security Act, the U.K. government sought a declaration that Closed Material Procedures might be appropriate on five occasions.[63] As of June 2014, two of those five requests had been granted and three remained outstanding.[64]

UNITED STATES

LAW GOVERNING OPENNESS OF JUDICIAL PROCEEDINGS AND RELATED RIGHTS

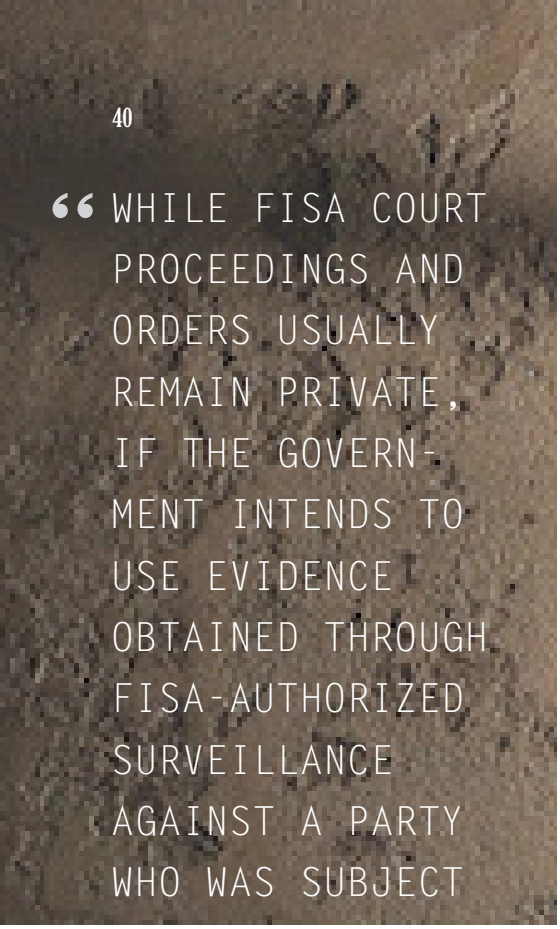
Under both common law and the U.S. Constitution, U.S. court proceedings are presumptively open to the public. The First and Sixth Amendments to the U.S. Constitution guarantee the historic right of a public criminal trial and other criminal proceedings.[65] The Sixth Amendment also protects the right of a criminal defendant to confront and cross-examine the witnesses against him.[66] Likewise, the U.S. Constitution's guarantee of due process of law provides at least some protection against *ex parte* presentation of evidence and argument in civil and administrative proceedings.[67] Many federal courts have also held that the First Amendment safeguards the common-law right of access to civil proceedings.[68]

The U.S. Constitution does not expressly protect a general right to privacy. The Fourth Amendment, however, guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[69] The U.S. Supreme Court has held that the Fourth Amendment generally requires a judicial warrant for law-enforcement searches aimed at discovering evidence of criminal wrongdoing and for electronic surveillance related to "domestic security."[70]

THE FISA COURT

In passing the Foreign Intelligence Surveillance Act of 1978 ("FISA"), Congress created a special court system that operates outside the open framework that normally governs U.S. courts.[71] The Foreign Intelligence Surveillance Court ("FISA Court") has exclusive jurisdiction to hear government applications for approval of foreign intelligence collection activities, including electronic surveillance, physical searches, and orders to compel production.[72] It currently consists of eleven district court judges, designated publicly by the chief justice of the United States, who serve staggered, nonrenewable seven-year terms.[73] One of these judges is designated by the chief justice as presiding judge.[74]

The Foreign Intelligence Surveillance Court of Review, consisting of three district court or court of appeals judges designated by the chief justice, is available to review decisions of the FISA Court at the government's request.[75] That court, however, had no occasion to meet until 2002 because of the government's "almost perfect record . . . in obtaining the surveillance warrants and other powers it requested from" the FISA Court.[76] Of the more than 36,000 electronic surveillance applications the government presented to the FISA Court from 1979 through 2014, the court modified the proposed orders in about 1.5 percent of the applications and rejected 12 — a government success rate of about 99.97 percent.[77] The FISA Court has no independent investigatory authority, and thus no ability to police the government's compliance with its orders unless the government itself ▸



“WHILE FISA COURT PROCEEDINGS AND ORDERS USUALLY REMAIN PRIVATE, IF THE GOVERNMENT INTENDS TO USE EVIDENCE OBTAINED THROUGH FISA-AUTHORIZED SURVEILLANCE AGAINST A PARTY WHO WAS SUBJECT

THE GOVERNMENT MUST NOTIFY THE PARTY THAT IT INTENDS TO USE OR DISCLOSE SUCH EVIDENCE.

brings problems to the court's attention.[78]

The FISA Court considers the government's applications in *ex parte* proceedings in which only the government can participate.[79] The government's applications, as well as "the overwhelming majority" of the Court's orders, are classified and "kept behind closed doors in a secure facility."[80] The FISA Court judge who authored an opinion or order, however, can request that it be published, and the presiding judge may so direct.[81] Before publication, the Court may (but need not) direct the government to review and redact the document as necessary to protect classified information.[82] In short, although "[o]ther courts operate primarily in public, with secrecy the exception," the FISA Court "operates primarily in secret, with public access the exception."[83]

Recent legislative reform efforts, however, may reduce that secrecy somewhat. The USA FREEDOM Act, signed into law on June 2, 2015, mandates the disclosure, to the greatest extent possible consistent with national security, of any FISA Court decision "that includes a significant construction or interpretation of any provision of" FISA.[84]

USE OF EVIDENCE OBTAINED UNDER FISA IN OTHER PROCEEDINGS

While FISA Court proceedings and orders usually remain private, if the government intends to use evidence obtained through FISA-authorized surveillance against a party who was subject to that surveillance in any legal proceeding, including a criminal prosecution, the government must notify the party that it intends to use or disclose such evidence.[85] The party can have the evidence suppressed if he can establish that the surveillance was authorized or conducted unlawfully.[86] Challenges to FISA-related evidence, however, are generally resolved by the court *ex parte* and without adversary procedures. When a party moves to suppress FISA-related evidence, if the attorney general files an affidavit stating that "disclosure or an adversary hearing would harm the national security," the court reviews "*in camera* and *ex parte*" the application, order, and any other materials necessary to determine whether the surveillance was lawful.[87] The court can disclose these materials to the movant "under appropriate security procedures," but only if it determines that such disclosure is "necessary to make an accurate determination of the legality of the surveillance."[88] No court has ever allowed a party seeking to suppress FISA-related evidence, or his attorney, to review FISA materials.[89]

In January 2014, a U.S. district court ordered the government to disclose FISA application materials to a criminal defense attorney challenging the legality of a FISA warrant.[90] The court reasoned that the "adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment" and would help the court to make "an accurate determination of the legality of the surveillance."[91] It also pointed out that the defense attorney's security clearance would have allowed him to review the materials, had he worked for the court or the prosecution.[92] The court of appeals reversed, holding that FISA forbids disclosure except where *necessary* to enable the court to determine the legality of the surveillance.[93] The court observed that "federal judicial procedure" is neither "always adversarial" nor "always fully public," and it reasoned that the national security interests underlying FISA required that "[c]onventional adversary procedure . . . be compromised in recognition of valid social interests that compete with the social interest in openness."[94] The court of appeals reached its decision in part based on an *ex parte, in camera* examination of government counsel from which defense counsel was excluded.[95]

It is also "widely assumed" that the U.S. Supreme Court's decision in *Franks v. Delaware*, allowing a criminal defendant to challenge the truthfulness of a warrant affidavit, applies to FISA applications.[96] In practice, however, *Franks* adds little to the framework set forth in FISA for challenging the lawfulness of FISA-approved surveillance. To obtain an evidentiary hearing on the veracity of the government's FISA application, the defendant must make a "substantial preliminary showing" that the application was deliberately or recklessly false or misleading.[97] That required showing is a "virtually insurmountable obstacle" to defendants who are denied access to the application.[98] As one district

court has observed, the "quest to satisfy the *Franks* requirements" without access to the FISA application and related materials is apt to resemble a "wild-goose chase."[99]

SURVEILLANCE-RELATED LITIGATION IN ORDINARY COURTS

Federal courts in the United States are courts of limited jurisdiction. Under the U.S. Constitution, the federal judicial power is limited to resolving "cases" and "controversies."[100] Based on that limitation and underlying separation-of-powers principles, the U.S. Supreme Court has held that for a plaintiff to have standing to sue in federal court, the plaintiff must "have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision."[101]

Standing presents a significant obstacle to plaintiffs seeking to challenge allegedly unlawful governmental surveillance, as the secrecy surrounding such surveillance makes it difficult for a plaintiff to establish that he is an injured party. The U.S. Supreme Court's 2013 decision in *Clapper v. Amnesty International USA* exemplifies that difficulty.[102] In that case a diverse group of plaintiffs, including attorneys and human rights, labor, legal, and media organizations, brought suit challenging the constitutionality of FISA's authorization of surveillance targeting the communications of non-U.S. persons located abroad.[103] The plaintiffs alleged that their work required them to engage in sensitive or privileged communications with individuals located abroad, that some of their foreign contacts were likely to become targets of FISA surveillance, and that they had taken costly and burdensome measures to avoid surveillance of their communications with those foreign contacts.[104] The Supreme Court held that plaintiffs lacked standing to sue because they had "no actual knowledge of the Government's [surveillance] practices" and therefore could not establish that their communications had been or imminently would be targeted for interception by the government.[105]

Another obstacle to surveillance-related litigation in U.S. courts is the common-law "state secrets privilege." U.S. courts generally operate openly and allow for expansive methods of discovery (akin to disclosure in the United Kingdom) by which the parties in civil cases can obtain information relevant to their claims or defenses. Information sought in discovery "need not be admissible in evidence in order to be discoverable."[106] The state secrets privilege departs from this norm and allows the government to withhold information from discovery "when disclosure would be inimical to national security."[107] When the government invokes the state secrets privilege, the court must decide whether there is a "reasonable danger" that disclosure "will jeopardize national security," while affording the "utmost deference" to the executive's determination on that score, and without disclosing the assertedly privileged material to the party seeking its production.[108]

Application of the state secrets privilege can involve more than withholding information from a nongovernment party in litigation: It also can require dismissal of a case altogether.[109] Courts will dismiss a case based on the state secrets privilege not only when withholding of the privileged information prevents a plaintiff from obtaining evidence needed to state a prima facie claim (as can occur with other evidentiary privileges), but also where the privilege makes it so difficult for the defendant to assert a defense that the fact-finder "is likely to reach an erroneous conclusion" absent the evidence, and where the privileged information is so intertwined with the nonprivileged information needed to litigate the case that allowing the case to move forward "would present an unacceptable risk of disclosing state secrets."[110]

The privilege usually arises in cases where the government is a party. But courts have allowed the government to intervene in litigation between nongovernmental parties, assert that the litigation threatens state secrets, present detailed arguments to that effect in private, and then move to dismiss the case on those grounds.[111] Thus, a civil case between private parties can be dismissed with prejudice after the government makes a secret presentation, and the party whose case is dismissed can be told little more than that "[t]he nature of the information here requires that counsel not be granted access."[112] In short, in such cases, the court must resort to a "harsh sanction" and thus leave plaintiffs in a situation where they "not only do not get their day in court, but cannot be told why."[113]

The government has invoked the state secrets privilege in suits challenging electronic surveillance measures, although some courts have held that the privilege is preempted by FISA's secrecy provisions where they are applicable.[114] Standing and the state secrets privilege can also work together to bar plaintiffs' claims. For example, one U.S. Court of Appeals held that an organization seeking to challenge allegedly unlawful governmental surveillance could not establish injury in fact, and therefore lacked standing to sue, because the document on which it relied to establish "that its members were unlawfully surveilled" was "protected by the state secrets privilege."[115]

These obstacles are not insuperable. A U.S. Court of Appeals recently held that several civil liberties organizations had standing to challenge the government's telephone metadata collection program, because secret FISA Court orders leaked to the public by former government contractor Edward Snowden, and additional orders disclosed by the government in the wake of the Snowden leaks, established that the government had collected or might in the future collect the plaintiffs' call records.[116] The court rejected the government's argument that standing required the plaintiffs to show not only that their data was being collected, but also that it was likely to be *reviewed* by government agents.[117] The government is not, however, precluded from raising that argument in future cases.

COMPARATIVE ISSUES

The foregoing discussion only scratches the surface of the complex challenges faced by the United States and the United Kingdom when it comes to balancing our shared tradition of open, adversarial judicial proceedings against the need for secrecy in an age of global terrorism. Even this much, however, makes it evident that both nations have been struggling with similar issues and that each can learn much from the

"THE UNITED KINGDOM HAS GAINED SIGNIFICANT EXPERIENCE WITH THE USE OF SPECIAL ADVOCATES. THESE ADVOCATES ARE APPOINTED TO INTRODUCE AN ELEMENT OF ADVERSARIAL PROCEDURE

THE UNITED STATES IS SET TO BEGIN A SIMILAR EXPERIMENT.

other's efforts. The following topics, among others, may be fertile areas for discussion and exchange of ideas.

EX ANTE JUDICIAL REVIEW OF SURVEILLANCE ACTIVITIES

Our two nations have taken different approaches to *ex ante* judicial review of proposed governmental surveillance. The United Kingdom appears not to require prior judicial authorization for intelligence-related surveillance activities, whereas the United States has established the FISA Court to rule prospectively on applications to engage in such activities. The FISA Court has been subject to criticism on a variety of grounds, including its secrecy, its nonadversarial procedures, and the high rate at which it historically has granted the government's applications. But even secret proceedings may provide a meaningful check on abuses of power, and it is at least theoretically possible that the government's high success rate before the FISA Court reflects not (or not only) that court's pliancy, but also governmental self-policing motivated in part by the need to preserve the government's credibility with the court. The United States' experience with the FISA Court thus provides a jumping-off point for considering the efficacy of *ex ante* mechanisms of judicial review.

EX POST CHALLENGES TO SURVEILLANCE ACTIVITIES

Our nations have also taken differing approaches to litigation challenging the lawfulness of completed or ongoing governmental surveillance. The United Kingdom channels citizen complaints about surveillance to the IPT, a tribunal specially designed by Parliament to deal with the secrecy issues that such litigation necessarily entails. The United States, by contrast, allows those claims to be brought in regular courts, where secrecy concerns are addressed largely pursuant to judicially crafted rules like the state secrets privilege. Thus, consideration of both countries' experiences may shed light on whether this type of litigation is better handled by specialized tribunals or ordinary courts.

Our nations also appear to use different standards for determining who can sue over governmental surveillance activities. As noted above, the IPT advertises that an individual who "believes" he has been subjected to covert action may bring a complaint before the tribunal without having to support that belief with evidence, and it promises to use its investigatory powers to obtain evidence from the government to determine whether there is any basis for the complaint. No institution in the United States can make a similar offer to individuals who are concerned about governmental surveillance but lack evidence that they personally have been, or are likely imminently to be, surveilled. Moreover, the IPT recently held that affirmative disclosure of the privacy-protecting safeguards built into a governmental surveillance program was *required* in order to make the program lawful under the European Convention.[118] U.S. standing rules, which are based in the Constitution's requirement of a concrete "case or controversy," would probably not permit a plaintiff who could not show that he had been or was likely to be subject to surveillance to assert injury based solely on the government's failure to disclose extant privacy protections.

Although the U.S. Constitution might not permit the creation of a judicial tribunal with powers like the IPT's within the U.S. federal judiciary, the precise contours of constitutional standing rules are a subject of continuing debate. (Whether some kind of administrative tribunal or legislative "Article I" court might be possible is another matter and may be worth exploration.) The United Kingdom's experience with the IPT may offer valuable insight regarding the pros and cons of relaxing standing requirements in certain types of surveillance cases.

SECRECY OF SPECIALIZED COURTS

Although the FISA Court and the IPT are involved at different stages of the surveillance process, with the former considering prospective warrant applications by the government and the latter considering retrospective complaints by citizens, they face much the same challenges when it comes to secrecy. Both tribunals were created to decide matters that are of great interest to the public but require consid-

eration of evidence and information that, if disclosed, could harm national security. The IPT has adopted a variety of measures that attempt to balance those competing interests and to enhance the transparency of its proceedings. For example, the IPT has committed to holding open hearings and publishing its decisions whenever possible; and it has developed techniques for doing so, such as addressing questions of law based on assumed facts. It is possible that some of those techniques could be adapted to facilitate greater transparency of proceedings in the FISA Court (and perhaps also in ordinary U.S. courts considering challenges to the legality of FISA warrants), so any lessons the United Kingdom has learned from its experimentation in this area may be of interest to the United States.

USE OF SECRET EVIDENCE IN ORDINARY COURTS

There appear to be several notable differences between the U.S. and U.K. frameworks for dealing with the use in ordinary litigation of secret evidence related to governmental surveillance or other intelligence activities. With the Justice and Security Act 2013, the United Kingdom has codified formal procedures for enabling the government to introduce, and the courts to consider, secret evidence in litigation without the need for that evidence to be disclosed to the adverse party. The United States has no such formalized procedures; the common-law state secrets privilege, however, may perform much the same function. Further comparative study may illuminate the benefits and drawbacks of codifying procedures for the use of secret evidence versus allowing those procedures to be developed by the judiciary in common-law fashion.[119]

Another difference that may be worth exploring is the law's treatment of offensive versus defensive use of secret evidence by the government. Where the government is a defendant (as in suits challenging allegedly unlawful surveillance), the U.S. state secrets doctrine has much the same effect as the U.K. Closed Material Procedures. If the government asserts that it has a valid defense that is based on state secrets, a court will ordinarily review the secret material *ex parte* and *in camera* and may decide that the evidence requires dismissal of the plaintiff's case, without the plaintiff or its lawyers ever being able to review the government's evidence. The same result is evidently possible under the Closed Material Procedures, although those procedures might include the appointment of a special advocate to provide a greater measure of adversarial testing of the government's case than is possible in the U.S. system.

On the other hand, the U.S. system does not provide ready means for the government to use secret information offensively. In a criminal prosecution where the government seeks to rely on information obtained through FISA-authorized surveillance, the defendant and his lawyer will typically not be able to access secret materials that might otherwise be used to seek suppression of the information, but they *will* have access to the information that the government seeks to use as evidence against them. By contrast, the Justice and Security Act 2013 seems to contemplate the use of Closed Material Procedures to enable the government to use secret evidence both defensively and offensively without having to disclose that evidence to the other party. This apparent difference may be worth exploring.

USE OF SPECIAL ADVOCATES

As described above, over the past two decades, the United Kingdom has gained significant experience with the use of special advocates. These advocates are appointed to introduce an element of adversarial procedure into matters where the government's need to rely on secret evidence would otherwise prevent the government's case from being tested in the traditional manner. The United States is set to begin a similar experiment. The recently passed USA FREEDOM Act authorizes the FISA Court to appoint an *amicus curiae* with expertise in "privacy and civil liberties, intelligence collection, telecommunications," or any other relevant area to present argument in any case before the Court, and requires it to appoint such an individual in any case that the court determines "presents a novel or significant interpretation of the law."[120] Moreover, such court-appointed *amici* could theoretically also be used to assist U.S. courts in considering governmental invocations of the state secrets privilege. The United Kingdom's experience with special advocates, and criticism of their use by members of Parliament and others, may provide helpful guidance on how such a quasi-adversarial system can be made to work in the United States and on the challenges that system is likely to face.

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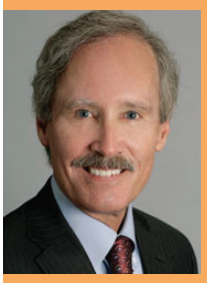

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2 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, § 1, 213 U.N.T.S. 221, http://www.echr.coe.int/Documents/Convention_ENG.pdf [hereinafter European Convention].

3 *Id.*

4 *Id.*

5 *Id.* art. 6, § 3.

[6] *Id.* art. 8, § 1.

[7] *Id.* art. 8, § 2.

[8] Human Rights Act, 1998, c. 42 (UK).

[9] *Id.* §§ 6(1)–(2), 21(1).

[10] *Id.* § 6(3).

[11] *Id.* § 7(1).

[12] *See* Edward Jenks, The Book of English Law 73–74 (6th ed. 1967) ("[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.").

[13] *See Guardian New & Media Ltd. v. Westminster Magistrates' Court* [2012] EWCA Civ 420 ¶¶ 69–70 ("The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.").

[14] *Id.*

[15] Regulation of Investigatory Powers Act, 2000, c. 23, §§ 65, 70 (UK) [hereinafter RIPA].

[16] *Id.* § 65(1); Membership—List of Current Members, Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=12.

[17] *Membership—Legislative Requirements for Members,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=13; *see* Constitutional Reform Act, 2005, c. 4, § 60(2)(a) (UK) (defining "high judicial office").

[18] RIPA § 65(2); *see generally Functions—Jurisdiction,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=3.

[19] Investigatory Powers Tribunal Rules, 2000, S.I. 2000 No. 2665, Rules 7–8 [hereinafter IPT Rules]; *see How To Complain—FAQs,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=20 ("The Tribunal's investigation of complaints and claims is free of charge.").

[20] RIPA § 65(4).

[21] *How To Complain—FAQs,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=20 (emphasis in original).

[22] *Id.*

[23] IPT Rule 9(6).

[24] IPT Rules 9(3)–(4), 11(1).

[25] IPT Rule 6(1)–(2).

[26] IPT Rule 6(2)–(3).

[27] RIPA § 67(7).

[28] RIPA § 68(4)(a); IPT Rule 13(2).

[29] RIPA § 68(4)(b); IPT Rule 13(3).

[30] IPT Rule 13(4); *see* IPT Rule 6(1).

[31] Owen Bowcott, *US-UK Surveillance Regime Was Unlawful 'For Seven Years',* The Guardian (Feb. 6, 2015), http://www.theguardian.com/uk-news/2015/feb/06/gchq-mass-internet-surveillance-unlawful-court-nsa.

[32] *See X v. Local Authority* [2008] (IPT/03/50/CH: 25.08.08), http://www.ipt-uk.com/section.aspx?pageid=9.

[33] Notably, the IPT's confidentiality rules do not appear to restrict the complainant's right to disclose information to third parties; those rules apply only to the IPT itself, not the parties appearing before it. *See generally* IPT Rule 6 (describing restrictions on disclosure of information). Independently, the complainant may be subject to the Official Secrets Act 1989, which prohibits a person who is "a member of the security and intelligence services" or "a person notified that he is subject to the provisions of [the Act]," including Crown servants and government contractors, from disclosing any information related to security or intelligence. See Official Secrets Act, 1989, c. 6 (UK), § 1(1). The Act also prohibits secondary disclosure by an individual who has come into possession of protected material when she has reasonable cause to believe the disclosed information was protected. *See id.* c. 6, § 5.

[34] *Operation—Overview by the President,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=6. There is reason to doubt whether the IPT's efforts to increase hearing transparency have been successful. A recent article noted that the IPT conducted a "rare" public hearing, noting that "almost all [of the IPT's] hearings are in secret." Ian Cobain, *GCHQ Spying Case Wins Rare Public Hearing in Secret Court,* The Guardian (Jan. 14, 2014), http://www.theguardian.com/world/2014/jan/14/gchq-spying-case-rare-public-hearing-secret-court.

[35] *Development—Open Hearings,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=23.

[36] *Operation—Overview by the President,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=6.

[37] *See Functions—Annual Case Statistics,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=5; *Operation—List of Judgments,* Investigatory Powers Tribunal, http://www.ipt-uk.com/section.aspx?pageid=8.

[38] *See, e.g.,* John Sullivan, *Closed Material Procedures and the Right to a Fair Trial*, 29 Md. J. Int'l L. 269, 269–70 (2014).

[39] *See Al Rawi v. The Security Service*, [2011] UKSC 34 ¶¶ 11–12 ("The open justice principle is not a mere procedural rule. It is a fundamental common law principle. . . . A party has a right to know the case against him and the evidence on which it is based.").

[40] *See Al Rawi v. The Security Service*, [2010] EWCA Civ 482 ¶ 24.

[41] *Id.* ¶ 25.

[42] *Id.* ¶ 26.

[43] *Id.* ¶ 25.

[44] *Id.*

[45] Special Immigration Appeals Commission Act, 1997, c. 68, § 5(3)(b) (UK).

[46] *Id. § 6(1), (4).*

[47] Prevention of Terrorism Act, 2005, c. 2, § 1(1), Schedule, ¶¶ 4(2), 7(1), (5).

[48] Joint Comm. on Human Rights, Counter-Terrorism Policy & Human Rights: 28 Days, Intercept & Post-Charge Questioning, 2006–07, HL 157, H.C. 394 (U.K.), ¶ 210, http://www.statewatch.org/news/2007/jul/1uk-jhrc-rep-terr-detention.pdf.

[49] The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights, Session 2006–07, ¶ 49, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243174/7215.pdf.

[50] Counter-Terrorism Act, 2008, c. 28, §§ 62–68 (UK).

[51] [2011] UKSC 34 ¶ 3.

[52] *Id.* ¶ 4.

[53] *Id.* ¶ 5.

[54] *Id.* ¶ 8.

[55] *Id.* ¶ 69 ("[T]he issues of principle raised by the closed material procedure are so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so."); *see Al Rawi,* [2010] EWCA Civ 482 ¶ 30 ("[T]he principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise.").

[56] *Al Rawi*, [2011] UKSC 34 ¶¶ 46–47. In a later decision, *Bank Mellat v. HM Treasury*, [2013] 3 W.L.R. 179 (2013), the U.K. Supreme Court issued careful guidance on the circumstances in which it would use closed material procedures on appeal. *See id.* ¶¶ 68–74. The Court stated that it would only conduct a closed hearing from an appeal of an open and closed judgment if it was "strictly necessary for fairly determining the appeal." *Id.* ¶ 70.

[57] Justice and Security Act, 2013, c. 18, §§ 6–8

[hereinafter Justice and Security Act]; *see Justice and Security Green Paper*, at ¶ 1.30, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228860/8194.pdf ("A [Closed Material Procedure] enables the court to take into account relevant material that might otherwise be excluded from consideration altogether by the operation of" the public interest immunity doctrine.).

[58] Justice and Security Act § 6(1), (4)–(5).

[59] *Id.* § 8(1)(a).

[60] *Id.* § 8(1)(b)–(c); *see also id.* § 11(2)(e) (court may "conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party"); Civil Procedure Rule 82.6.

[61] Justice and Security Act § 8(1)(d)–(e).

[62] *Id.* § 9(1), (4); Civil Procedure Rule 82.11(2).

[63] *See* Ministry of Justice, Report on Use of Closed Material Procedure (From 25 June 2013 to 24 June 2014), at 3, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342224/moj-report-closed-material-procedure.pdf [hereinafter Ministry of Justice Report]. The Ministry of Justice later released the names of the five cases in which the government sought a Closed Material Procedure declaration. *See* Owen Bowcott, *Secret Court Hearing Applications Should Be Made Public, Says Thinktank,* The Guardian (Sept. 5, 2014), http://www.theguardian.com/law/2014/sep/05/secret-court-hearing-applications-public-closed-material-procedures.

[64] Ministry of Justice Report at 4.

[65] *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (First Amendment requires open criminal trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (constitutional guarantees of open criminal proceedings apply to jury selection in criminal case).

[66] *See, e.g., Crawford v. Washington,* 541 U.S. 36 (2004).

[67] *See, e.g., Greene v. McElroy*, 360 U.S. 474, 496–97 (1959); *Swank v. Smart,* 898 F.2d 1247, 1253–54 (7th Cir. 1990); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 927 (6th Cir. 1988).

[68] *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (preliminary injunction hearing); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984) (documents filed with motion to dismiss); *In re Iowa Freedom of Info. Council,* 724 F.2d 658 (8th Cir. 1984) (contempt hearing); *Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983) (pre- and post-trial hearings); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n,* 710 F.2d 1165 (6th Cir. 1983) (vacating the district court's sealing of documents filed in a civil action based on common law and First Amendment right of access to judicial proceedings). While the U.S. Supreme Court has not expressly held that the First Amendment protects public access to civil proceedings, it has recognized the common-law tradition "that historically both civil and criminal trials have been presumptively open." *Richmond Newspapers,* 448 U.S. at 580 n.17.

[69] U.S. Const. amend. IV.

[70] *Riley v. California,* 134 S. Ct. 2473, 2482 (2014); *United States v. U.S. Dist. Ct. for the E. Dist. of Mich.,* 407 U.S. 297, 316–17 (1972).

[71] *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended primarily at 50 U.S.C. §§ 1801–1885c) [hereinafter FISA].

[72] 50 U.S.C. §§ 1803(a), 1822(c), 1842(a)(1), 1861(b)(1).

[73] *Id.* § 1803(a)(1), (d).

[74] FISA Ct. Rule 4(b).

[75] *Id.* § 1803(b), 1822(d).

[76] *History of the Federal Judiciary—Foreign Intelligence Surveillance Court,* Fed. Judicial Ctr., http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html.

[77] *See Foreign Intelligence Surveillance Act Court Orders 1979–2014,* Elec. Privacy Info. Ctr., https://www.epic.org/privacy/wiretap/stats/fisa_stats.html; Letter from Peter J. Kadzik, Asst. Atty. Gen., to Hon. Charles E. Grassley, et al. (April 20, 2015), http://fas.org:8080/irp/agency/doj/fisa/2014rept.pdf.

[78] *See, e.g., In re Production of Tangible Things from Redacted,* No. BR 08-13, 2009 WL 9150913 (FISA Ct. Mar. 2, 2009).

[79] 50 U.S.C. §§ 1805(a), 1824(a), 1842(d), 1861(c).

[80] *In re Motion for Release of Court Records,* 526 F. Supp. 2d 484, 487–88 (FISA Ct. 2007).

[81] FISA Ct. Rule 62(a).

[82] *Id.*

[83] *In re Motion,* 526 F. Supp. 2d at 488.

[84] USA FREEDOM Act, H.R. 3361, § 402 (2015).

[85] 50 U.S.C. § 1806(c); *cf. id.* §§ 1825(d), 1845(c).

[86] *Id.* § 1806(e), (g).

[87] *Id.* § 1806(f).

[88] *Id.*

[89] *United States v. Kashmiri*, No. 09 CR 830-4, 2010 WL 4705159, at *3 (N.D. Ill. Nov. 10, 2010).

[90] *United States v. Daoud*, No. 12-0723, 2014 WL 321384 (N.D. Ill. Jan. 29, 2014).

[91] *Id.* at *3.

[92] *Id.* at *2.

[93] *United States v. Daoud,* 755 F.3d 479, 481–83 (7th Cir. 2014).

[94] *Id. at 482–83.*

[95] *Id. at 485.*

[96] *Id.* at 489 (Rovner, J., concurring) (collecting cases); *see Franks v. Delaware,* 438 U.S. 154 (1978).

[97] *Daoud,* 755 F.3d at 490 (Rovner, J., concurring).

[98] *Id.; see also id.* at 493–94.

[99] *Kashmiri,* 2010 WL 4705159, at *6.

[100] U.S. Const. art. III, § 2.

[101] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[102] 133 S. Ct. 1138 (2013).

[103] *Id.* at 1142–45.

[104] *Id.* at 1145–46.

[105] *Id.* at 1148.

[106] Fed. R. Civ. P. 26(b). At the end of 2015, the U.S. Congress amended this rule. Until then, the Rule provided that information sought in discovery need not be admissible at trial, so long as it "appears reasonably calculated to lead to the discovery of admissible evidence." *See* Proposed Amendments to the Federal Rules of Civil Procedure 12 (Apr. 29, 2015), http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf. That language had led some courts to apply an unduly expansive test for discoverable information; the amendment to the Rule was designed to restore its original meaning.

[107] *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *see United States v. Reynolds*, 345 U.S. 1, 7–11 (1953); *Restis v. Am. Coalition Against Nuclear Iran, Inc.,* No. 13-5032, 2015 WL 1344479, at *2 (S.D.N.Y. Mar. 23, 2015).

[108] *Id.* at 546–47 (internal quotation marks omitted); *see Reynolds*, 345 U.S. at 8 (courts must examine the claim of privilege "without forcing a disclosure of the very thing the privilege is designed to protect"). This is not dramatically different from the procedures used when a court considers other evidentiary privileges. For example, in a discovery dispute about whether the attorney-client privilege protects a given communication or document from disclosure, courts sometimes review the information *ex parte* and *in camera* to make a determination. In these situations, however, the party seeking the potentially privileged material often has at least some notion of its subject matter, the parties or individuals involved in the communication, and when it occurred, because the party asserting the privilege is often required to include that information in a "privilege log." *See* Fed. R. Civ. P. 26(b)(5).

[109] *Zuckerbraun*, 935 F.2d at 546–47; *see also, e.g., Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092 (9th Cir. 2010).

[110] *Restis,* 2015 WL 1344479, at *5 (citing *Zuckerbraun,* 935 F.2d at 547; *El-Masri v. United States,* 479 F.3d 296, 309 (4th Cir. 2007); *Mohamed*, 614 F.3d at 1088).

[111] *See, e.g., id.* at *2 ("The Government has asserted the state secrets privilege and contends that application of the privilege requires the dismissal of the instant action. The Government has submitted classified declarations and documents in support of its assertion of the privilege *ex parte* for the Court's *in camera* review."). The court did not identify which U.S. government agency asserted the privilege, because the government "asserted that disclosing even the identity of the agency involved creates an unwarranted risk of exposing the information it seeks to protect." *Id.* at *3 n.9.

[112] *Id.* at *4.

[113] *Id.* at *8; *see also, e.g., Doe v. Cent. Intelligence Agency*, 576 F.3d 95 (2d Cir. 2009) (affirming dismissal based on *in camera* review of government's submissions where plaintiff's counsel was not permitted to access an unredacted copy of the complaint).

[114] *See, e.g., Jewel v. Nat'l Sec. Agency,* 673 F.3d 902, 906 (9th Cir. 2011); *In re Nat'l Sec. Agency Telecom. Records Litig.*, 671 F.3d 881, 901 (9th Cir. 2011); *Jewel v. Nat'l Sec. Agency,* 965 F. Supp. 2d 1090 (N.D. Cal. 2013); *Fazaga v. Fed. Bureau of Investigation,* 884 F. Supp. 2d 1022 (C.D. Cal. 2012).

[115] *Al-Haramain Islamic Found. v. Bush,* 507 F.3d 1190, 1205 (9th Cir. 2007).

[116] *Am. Civil Liberties Union v. Clapper,* 785 F.3d 787 (2d Cir. 2015).

[117] *Id.*

[118] *Liberty v. Sec'y of State for Foreign & Commonwealth Affairs*, [2015] UKIPTrib 13 77-H, http://www.ipt-uk.com/docs/Liberty_Ors_Judgment_6Feb15.pdf.

[119] State secrets privilege cases in the U.S. are not particularly numerous. In the last three years, for example, the federal appellate courts have issued only eight decisions that even used the term "state secrets privilege." Of those, only two dealt with the privilege at any length. *See United States v. Sedaghaty,* 728 F.3d 885 (9th Cir. 2013); *Al-Haramain Islamic Found., Inc. v. Obama,* 690 F.3d 1089 (9th Cir. 2012), superseded and amended by 705 F.3d 845 (9th Cir. 2012).

[120] USA FREEDOM Act, *supra* note 84, § 401 (to be codified as 50 U.S.C. § 1803(i)). *See also* Don Wallace Jr., *Special Advocate at FISA Court Would Pass Constitutional Muster,* The Hill (Sept. 17, 2014), http://thehill.com/blogs/congress-blog/homeland-security/217900-special-advocate-at-fisa-court-would-pass (describing this reform as creating a "special advocate").