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The UK Justice and Security Bill 2012-2013: using secrecy to legitimize the securitization of the law

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Abstract:	The Justice and Security Act of 2013 provides for closed hearings in civil cases involving security sensitive information. I argue that the UK Government successfully created and reinforced the authority of secretive sources to ensure the Bill was passed. Such authoritative sources promoted imaginaries of a future attack but also the need to respect legal principles that protected members of 'our' community. The dynamics between these imaginaries and principles led to the passing of the Bill in its final form - approving closed procedures in court, but removing inquests and issues of the 'public interest' from the Bill. Moreover, deliberation of the Bill was represented as negotiated and rational, thereby providing the final Act with legitimacy in elite fields. This research outlines how secrecy may not only be an end-goal of securitization moves, but reference to secret intelligence can be integral to the justification of these moves too.

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On the 25th April 2013, the Justice and Security Bill became law. The Act provided for the use of Closed Material Proceedings in civil cases concerning issues of national security. In the Closed Material Proceedings, or CMPs, access to evidence and reasoning would be limited to the judge and security cleared 'special advocates'. Furthermore, following the Act, judges' ability to order disclosure of information held by the intelligence services related to human rights abuses would also be limited. The UK Government stated that it was the large number of civil claims being made against the intelligence agencies and the increasing recourse to judicial review of their actions that necessitated the Bill (HM Government 2011: para. 1.17). Indeed, the public hearing of these claims had given credibility to allegations of UK complicity in torture by foreign governments and of the need for more accountability. However, the Justice and Security Bill appeared to resolve the incompatibility between open justice and the use of classified intelligence as evidence, with provisions for more government control of information. These proposals were opposed by human rights activists, politicians, jurists and the news media, including some more surprising publications, such as *The Daily Mail*. The Bill therefore provided significant controversy and discussion of pertinent issues of secrecy, security and law across key fields to facilitate the research below.

This paper asks how argumentation developed in public discourse to justify or challenge the securitisation of justice and it focuses on the role of secrecy in ensuring the Bill was approved by parliament. Principally, I argue that secrecy was successfully used as a leverage in order to win argumentation surrounding the Bill. The UK Government employed discourse strategies that reinforced the authority of secretive sources to ensure the Bill was passed. Discursive construction of authoritative sources and imaginaries of future attacks were key to argumentation schema. The dynamics between them and the need to respect legal principles that protected members of 'our' community, led to the passing of the Bill in its final form - approving CMPs, but removing inquests and issues of the 'public interest' from the Bill.

More specifically, *authoritative sources* within argumentation were discursively constructed in three related ways: (i) through reference to exclusive, classified or secret information; (ii) by enhancing the credibility of claims through official procedures or institutions; and (iii), by reducing suspicion of partiality and encouraging trust. Secondly, the repetition of discourses related to *imaginaries* of future attacks on the UK in the context of secrecy were repeated at

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significant moments and supported indirectly through references to national security. Thirdly, the competing notion of a *collective self-identity* that demanded maintenance of legal principles - but only when rights of those not perceived as enemies were threatened - served to present the resulting Act as negotiated and balanced. This provided the Act with legitimacy despite the Othering and opaque verification of reasoning on which claims in argumentation were based.

This research will contribute to scholarship on the intersection between law and security. Basaran (2008) has argued that 'spaces of exclusion' are intrinsic to the mundane and banal practices of the liberal state, noting the multiplication of legal borders that are created not simply by territorial factors but also by practices of governance. Here I assess how secrecy can impact on argumentation surrounding the creation of law on justice and security issues. Indeed, scholars have lamented the scant attention that the relationship between the intelligence services and public political discourse receives in academic literature (Herfroy-Mischler, 2015; Hillebrand, 2012); including literature on securitisation.

In their seminal work on securitisation, scholars Barry Buzan, Ole Wæver and Jaap de Wilde (1998: 30) proposed that the way that threats are presented discursively, rather than the threat itself, should be central to any assessment of security. They make clear that securitization impacts on politics, suggesting that it 'takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics' (Buzan et al. 1998: 144). By securitizing an issue debate can be restricted and in the case analysed here, the Justice and Security Act is likely to see discussion surrounding human rights abuses related to counterterrorism restricted. By employing a methodology that selectively draws on more recent literature on securitisation and combines Martin Reisigl and Ruth Wodaks' (2009) and Norman and Isabella Faircloughs' (2012) work on critical discourse analysis and argumentation, it provides new insight into development of argumentation surrounding securitising acts; and it is to the methodology that I now turn.

Methodology and outline of article

My methodology combines analysis of texts, context and intertextuality with argumentation and I suggest this facilitates a contribution to recent scholarship on securitisation. Originally, Barry Buzan, Ole Wæver and Jaap de Wilde (1998: 32) proposed that assessment of securitization involves particular questions: 'who securitizes (Securitizing actor), on what

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issues (threats), for whom (referent object), why, with what results, and not least, under what conditions?' Although Buzan *et al.* do recognize the need for the audience to accept a securitizing move, other scholars have called for more consideration of the role of the heterogeneous audience and the sociological context (Salter, 2008; Balsacq, 2011: 7; Hansen, 2000).

My analysis of texts is in line with recent explicit recognition of this need for securitisation to consider more the context and audience, I investigate discourse practice by looking at the relations between texts and how these texts are produced and interpreted - what Fairclough (1992: 84) and Lene Hansen (2006:55-73) call 'intertextuality'. Identifying sometimes latent evidence of influence from sources and texts on each other can be difficult and the solution adopted here is to engage in deeper contextual analysis, thereby systematically looking for patterns and noting dissimilarities and omissions. This is particularly important in this case because secrecy makes interpretation of the cause and effect of practice, including discursive practice, even more difficult to discern.

I therefore undertook an analysis of a large number of texts related to political discourse surrounding the passage of the Bill. I collected texts from news media, legal, activist and governmental fields that I judged to impact significantly on the discourse surrounding the Bill and ultimately the voting in the Houses of Parliament. I traced the intertextual repetitions of the discourses in debates and output from the House of Lords and Commons, including their scrutinizing committees. In the news media I examined a corpus of 222 news texts (see Appendix). The news media texts published by six news outlets were chosen because of their diverse editorial lines and higher numbers of readers both in their printed format and on the Internet (OFCOM 2012; Ponsford 2013). The publications included: *The Guardian* and *The Observer, The Daily Mail* and *The Mail on Sunday, The Daily Telegraph* and *The Sunday Telegraph, The Times* and *The Sunday Times* and *The Sun* and *The News of The World* and the *BBC News* website. I retrieved newspaper media texts from lexisnexis.com, whilst using the BBC website for its output. I also looked at output from the activist field, again assessing their intertextual impact on other actors and texts. In terms of the legal field I referred to key legal judgements and comments from significant legal commentators, including human rights activists Reprieve. In order to gain further insight into the practice of significant actors, I supplemented this textual analysis with background interviews with actors from news media

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(Ian Cobain from *The Guardian* and an undisclosed interviewee from a BBC journalist), governmental (Sir Malcolm Rifkind) and activist fields (three employees from Reprieve).

I also consider argumentation. The potential for issues to become desecuritised and openly discussed in public has been widely recognised (for example, Salter and Mutlu, 2013) and my focus on argumentation is partly chosen to interrogate the success of the myriad of securitizing and desecuritising moves that took place to justify or challenge the bill. Furthermore, Thierry Balsacq (2015: 1-10) has written on the importance of legitimacy in the complex relations between securitizing actor and referent object. Accordingly, the analysis of argumentation below also facilitates consideration of legitimacy – specifically the legitimacy provided for the provisions in the Justice and Security Act that treats evidence related to intelligence as being beyond public scrutiny. In this case, viewing legitimacy on a continuum (Balsacq, 2015: 5), the securitisation of the issue required sufficient legitimacy for parliament to approve it.

Critical discourse analysts Martin Reisigl and Ruth Wodak (2009) and Norman Fairclough and Isabella Fairclough (2012) provide practical insight into how argumentation can be analysed. Reisigl and Wodak break down the construction of arguments by assessing 'topoi'. Topoi are the topics or issues that form premises on which claims within argumentation are made (Reisigl & Wodak, 2009: 110). The repetition of topoi across texts can be traced and accordingly my analysis is not limited to arguments that are enunciated in whole in individual texts, but also encompasses arguments formed in the discourse over time, for example through campaigns or through argumentation structures that develop as the supporting topoi are repeated across texts, intertextually. Yet, while I emulated Reisigl and Wodaks' recording of topoi and premises found in the empirical data, this alone does not allow a sufficient reconstruction of the framework of arguments, thereby making explanatory or normative critique more difficult. Therefore, I added Fairclough and Faircloughs' analytical breakdown of argumentation to intertextual analysis of topoi.

Fairclough and Fairclough (2012: 51 & 124) break down the structure of arguments more systematically. Fairclough and Fairclough's consideration of argument and counter-argument investigates the following aspects: goals, values, circumstances, means, negative consequences, claims and counter claims and arguments from authority. This schema for the construction of argumentation includes a consideration of values and their effect on

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arguments. In this article I search for evidence of values related to justice, identity or universal human rights.

The analysis that follows is divided into three sections. Firstly, I assess argumentation surrounding the Bill's provisions to introduce Closed Material Procedures (CMPs) in civil proceedings, highlighting the Government's creation of the key authoritative source. Secondly, I consider how the need to control information by Government was promoted with reference to discourses articulated through imaginaries, and how counterclaims emanated mostly from long-standing legal principles. Finally, I discuss how the Executive structured the legislative process to present it as rigorously negotiated and legitimate; and how compromise of legal principles was only possible when it was 'the Other' whose rights were threatened.

1. Argumentation surrounding the Bill

The UK Government (HM Government 2011: 12) claimed that the goal of the Justice and Security legislation was to 'better equip our courts to pass judgement in cases involving sensitive information' – ostensibly an aim to improve justice. The Government based claims on sources with access to classified or secret information and intelligence. The following paragraphs will assess the importance and construction of an authoritative style in the related claims and counterclaims, before ultimately questioning the Government's stated commitment to justice.

The Justice and Security Bill (HM Government, 2012) proposed that Closed Material Procedures (CMPs) replace the current system of Public Interest Immunity (PII). The Government and security services argued for the extension of CMPs on the basis that the exclusion of evidence under the PII system restricts the ability of the court to reach a fair judgment. Under the PII system, PII certificates are issued by a judge to exclude individual pieces of evidence from the trial. In making this decision the judge considers the various public interest issues at play in disclosing, or alternatively withholding, pieces of evidence from the trial. In contrast, under the proposed CMPs, where evidence is deemed sensitive to 'national security' it is heard in closed session. During closed sessions in CMPs one party and their lawyers do not see the closed material - the closed material is seen by the judge and Special Advocates. The Special Advocates represent the interests of the excluded party, but do not have a duty to the 'client', instead only to the court. Special Advocates usually take

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instructions from the 'client' before they have seen the closed material but not after (House of Commons Research Paper, 2012).

On the Bill's reading in the House of Commons, Kenneth Clarke MP suggested that without CMPs there would be 'no justice at all' (2013). As did the former head of MI5, Eliza Manningham-Buller (2012) and her argument was published in an op-ed in *The Times* on 14th November 2012. On 4th March 2013, the former Chief Justice Lord Wolf was quoted in the *Daily Mail* (Gibb, 2013) concurring that CMPs would be 'better than the existing system where sensitive material is either heard at trial or excluded altogether'; and a similar claim was made by members of the Intelligence and Security Committee (ISC) in the debate in the House of Commons on 4th March 2013, including Hazel Blears MP (2013), Sir Malcom Rifkind MP (2013) and George Howarth MP (2013).

However, in the Supreme Court, Lord Kerr in *Al Rawi & Ors v The Security Service & Ors* (2011) critiqued the assumption implicit in the argument that CMPs facilitate justice:

> The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.

Lord Kerr was cited repeatedly in the House of Lords (see Pannick, 2012; Beecham, 2012) and in the House of Lords debate, the former Director of Public Prosecutions, Lord MacDonald (2012) suggested that simply by having access to more information does not necessarily ensure that people become better informed, stating:

> I have spent many years in criminal courts watching evidence that at first sight seemed persuasive, truthful and accurate disintegrating under cross-examination conducted upon the instructions of one of the parties.

In the argumentation for CMPs or PII procedures the ostensible agreed 'goal' is the maximisation of justice through a trial in 'circumstances' where some evidence is national security sensitive. Kenneth Clarke and Eliza Manningham-Buller argue that the 'means' to achieve this are CMPs because they facilitate the consideration of a greater quantity of information, whereas Lord MacDonald argues against this on the basis that CMPs produce 'negative consequences' through their unreliable information or evidence. In this argumentation surrounding quality or quantity of information and evidence, it is differing

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authoritative sources that contest whether CMPs are beneficial or detrimental to justice. Fairclough and Fairclough (2012:123-4) highlight the effectiveness of arguments originating from authority. But what constitutes authority and qualifies a position as more authoritative – or, a source as being in a more acceptable or justifiable position to comment - is disputable. As long ago as 1956 Hannah Arendt suggested that the modern world was bereft of any 'authentic and indisputable' authority. Nonetheless, despite being contested, some positions are clearly more authoritative that others.

For instance, the Special Advocates make a claim to a privileged or authoritative opinion based on their experience in operating closed material procedures - many of which were related to immigration and security issues in the Special Immigration Appeals Commission. The Special Advocates' criticisms of CMPs were put forward in their response to the Government consultation and was signed by 59 of 67 Special Advocates. They concluded that it 'would be most undesirable to extend CMPs any further' (Special Advocates, 2012: para. 26). Moreover, the Special Advocates' authority was sufficient to ensure their claims had intertextual repercussions. Summaries of their criticisms were repeated by the Joint Committee on Human Rights (2012a: para 12); the then Justice Secretary, Kenneth Clarke MP, told the Joint Committee on Human Rights on 6th March 2012 that '[o]f all the responses, the evidence of the special advocates most unsettled me' (JCHR, 2012d); and, David Davis (2012) was one of many to cite their position in the Houses of Parliament. However, the Special Advocates were still vulnerable to accusations of partiality and Kenneth Clarke (2012a) attempted to trump David Davis' authoritative source by referring to his undisclosed discussions with judges who were in favour of CMPs. As such, the question as to whether CMPs would improve justice remained unresolved.

However, security discourse develops in a particular context of secrecy and distrust and this can and did impact on the construction of authority. The classified nature of intelligence and the *sub judice* rules limiting discussion of evidence currently being considered by the courts can make claims harder to support or, conversely, challenge. Therefore, while Fairclough and Faircloughs' examples of 'authoritative argument' are from established public bodies with recognized (albeit fallible) expertise such as the IMF or Confederation of British Industry; in the context of secrecy and uncertainty in security and rights discourse, claims to authoritative opinions are often based on exclusive access to information and knowledge – as a current member of the Government such as Kenneth Clarke or a former Head of the

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Security Services such as Eliza Manningham-Buller, as a Special Advocate, or as a member of the Intelligence and Security Committee. Nonetheless, conspicuously, although former detainees and terrorism suspects may have an exclusive perspective, their comments were rarely voiced in the parliamentary, news media or legal texts assessed; unless their comments were channeled through a more authoritative intermediary, such as the activist group Reprieve, thereby providing them with more credibility and weight. For instance, institutions of the UK parliament were more likely to hold authority here. Authority could be created by a institutions deontological legitimacy derived from the systems, rules and processes it followed. The UK parliament's Joint Committee on Human Rights heard evidence from a number of leading legal practitioners (including Special Advocates), journalists and Ministers of Governments and concluded that there is no evidence that circumstances suggest a change to CMPs is needed because no cases to date have been dismissed as untriable because of evidence being excluded under PII (JCHR, 2012a). Criticisms from activists gained authority as their testimony was repeated in deontologically legitimate institutions. The JCHR report, for example, (2012a) featured in 32 articles in the news outlets examined (see Appendix, Row 7).

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The Government's argument centred on its proposition that the 'circumstances' of on-going cases did require change but that classified evidence and *sub judice* rules prevented them from producing the evidence. In order to substantiate their claim, the Government created an authoritative source with yet more insight into selected exclusive information. They provided evidence to David Anderson QC, the Independent Reviewer of Terrorism Legislation, of on-going cases that might be put forward for CMPs. Of the 27 cases cited in the Green Paper, David Anderson was given special clearance to access information concerning seven cases (four were immigration cases) currently before the courts. As an 'independent' authority Anderson concluded that:

> The cases to which I have been introduced persuade me that there is a small but indeterminate category of national security-related claims, both for judicial review of executive decisions and for civil damages, in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist (cited in Secretary of State for Justice, 2012: 4).

On 4th March 2013, in the final reading in the House of Commons, the Shadow Justice Secretary, Labour MP Sadiq Khan quoted this statement from David Anderson verbatim and prefaced it by saying:

> Let me begin by making it absolutely clear to the House where the Opposition stand on the issue of closed material procedures in civil proceedings. We accept that there may be rare examples where it is preferable for a CMP to be used because there is no other way a particular case can be heard. Our position has been influenced to a large extent by the views of the independent reviewer of terrorism legislation, Mr David Anderson QC.

In both Houses of Parliament the Independent Reviewer of Terrorism Legislation, David Anderson QC appeared to be particularly influential on members of all major parties. In the House of Commons, Conservative backbencher (and Joint Secretary of the 1922 Committee) Robert Buckland MP (2012) said: 'much has been made of the views of Mr David Anderson QC ... he, like me, is very much a reluctant convert to the limited use of closed material proceedings'; and, in the House of Lords on 21st November 2012, Liberal Democrat Lord Wallace (2012) suggested that David Anderson QC 'probably gets the prize for the most quoted person in these debates'. Anderson's insider knowledge and apparent 'independent' status ensure a degree of trust from the parliamentarians that, however contrived, allows him to speak with authority. His style is judged by parliamentarians to be measured and one of objectivity, to which they are happy to relate to – describing him to be 'like me' and 'a reluctant convert'. However, on closer examination the governmental systems and processes involved in vesting him with that authority held questionable objectivity.

In a submission to the Joint Committee on Human Rights (2012b: para 34) the 'Special Advocates' – who have had direct experience working with CMPs - disagreed with Anderson's conclusion. Special Advocate Angus McCullough (JCHR, 2012c: page 16) challenged Anderson's position suggesting that the cases seen by the Independent Reviewer were 'a selection of three that had been, presumably, handpicked by the Government to prove their point'. The Special Advocates also cast further doubt on the judicial fairness of CMPs as currently practised in the immigration courts noting the 'lack of any formal rules of evidence, so allowing second or third hand hearsay to be admitted, or even more remote evidence'. The Special Advocates (2012: para. 7) also describe:

> [the] increasing practice of serving redacted closed documents on the Special Advocates, and resisting requests by the Special Advocates for production of documents to them on the basis of the Government's unilateral view of relevance.

The Special Advocates' testimony suggests that through CMPs, standards of proof and disclosure in the intelligence services are migrating into the legal field, and they are altering judicial process in favour of secrecy and security, thereby reducing the possibility of

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accountability for violations of human rights. However, they did not match the authority of David Anderson as an 'independent', informed source.

In summary, much of the Government's argumentation was focused on the disputed 'circumstances' concerning the operation of trials in the context of sensitive information and the disputed 'means' to move from those circumstances to the 'end goal' of natural justice. The government claimed that more evidence (albeit unchallenged by opposing parties in the case) would assist this process and significantly a source with constructed authority, David Anderson QC, supported them. Yet given the Special Advocates' submissions concerning dubious evidence and additional secrecy maintained by the security services operating in CMPs and that previous use of PII principles led to disclosure that the UK Government was concerned with in the Binyam Mohamed case (see next section) there is a strong possibility that the Government's primary end goal was not 'justice', but was more concerned with ensuring secrecy and control of information. This exchange of claims and counter-claims on the impact of CMPs on justice, that was foregrounded by the argumentation, diverted attention from issues surrounding the control of intelligence. Certainly the additional provisions within the Bill to preclude courts from ordering disclosure of information held by the intelligence services related to international human rights abuses (also referred to as Norwich Pharmacal orders) were clearly included for this purpose. If this was one of the motivations for including CMPs too, it was obscured through the argumentation structure that ostensibly focused on justice but also repeatedly privileged and reinforced the authority behested to secretive sources. I therefore now further investigate how the Government and then parliament supported the control of intelligence/evidence and the promotion of secrecy.

2. Government control of intelligence/evidence and the promotion of secrecy

On February 10th 2010, in *Binyam Mohamed Court vs. Foreign Secretary of Appeal (Civil Division) [2010] EWCA Civ 65* it was ruled that the summary of the information that the UK had been given by the US regarding the treatment of Binyam Mohamed in US custody should be published in the public interest. In defying the UK Government, the courts applied PII principles and therefore the interests of secrecy were balanced with the public interest for open accountability (Hickman, 2013). The case received substantial news media coverage (see Appendix, Row 2). However, in calling for disclosure, the Court of Appeal (para. 13) made clear that Mohamed's treatment in the US had already been disclosed by a US court and that there was no 'breach of security' and no 'intelligence material' was revealed.

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Members of the Security Services have since publicly called for more secrecy surrounding intelligence, and a prioritisation of the control principle over the disclosure of information related to human rights abuses. The head of MI6 John Sawers explained (in *The Times,* 29th October 2010):

> …we have a rule called the 'control principle': the service that first obtains the intelligence has the right to control how it is used. It is rule number one of intelligence sharing. If the control principle is not respected, the intelligence sharing dries up.

Adherence to the control principle ensures that when intelligence becomes evidence in the legal field it remains secret. Under the control principle intelligence is not discussed publicly. In the discourse surrounding the Justice and Security Bill, it is the Government and the security services that promote the notion that there is a need to maintain secrecy amongst parliamentarians and the broader public, so that legislation promoting secrecy is passed due to the terrorist threat faced and this was demonstrated at key moments. For example, following publication of parliament's Joint Committee on Human Rights Report on the Justice and Security Green Paper (2012a) *The Daily Telegraph* cited a 'senior British security source' and led an article on 4th April 2012 (Winnett, 2012) with the following:

> AMERICAN spy agencies refused to give Britain's intelligence services full details of a "Mumbai-style" terrorist plot in this country because they feared that top-secret sources would be exposed. The Daily Telegraph can disclose.

This is an example of how argumentation in favour of secrecy is promoted through imaginaries of future risk by Government and the security services. Fairclough and Fairclough (2012: 103-8) explain how discourses about the future – or imaginaries - can describe possible worlds, including risks or potential circumstances caused by our (in)action now. Furthermore, in the above extract *The Daily Telegraph* compounds the representation of an imaginary of a "Mumbai-style" terrorist plot, with an emphasis on the exclusive nature of its source. This provides this imaginary with additional authority because it is framed as emanating from a source with access to exclusive information. Occasional authoritative reference to imaginaries of risk in the discourse maintains the latent imaginary of a potential attack and corresponds with Richard Grusin's thesis that the news media repeats (or remediates) stories concerning the potential of attack in an attempt to premediate and mitigate the shock from any future imagined attack (Grusin, 2010).

As noted in the previous section, members of the UK Intelligence and Security Committee

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(ISC), with their exclusive discussions access to the UK Governments Security Services and Secret Intelligence Services were more prominent in the discourse surrounding the legislation. Furthermore, evidence was found of their promotion of risk based imaginaries. Speaking on 'national security', ISC member, Hazel Blears MP (2012) suggested there would be a heightened risk of an attack if the control principle was not adhered to:

> I think of the information that the US has provided us with to protect our security. I think of the bomb plot in April—the second underpants bomb plot—where the liaison between the US and this country was essential to preventing an incident that could have cost many lives.

These imaginaries can therefore justify claims that secrecy is justified. However, they are not always referred to so explicitly. They may be implicitly referred to through references to intelligence sharing relationships or the associated concept of national security (that protects against such threats). This, however, is explicitly referred to at crucial junctures. For example, the first line of the Forward, Executive Summary and First Section of the Green Paper reaffirm that the first duty of government is to provide national security. Similar references are common in the media. For example in the face of strong criticism from the widely reported Joint Committee on Human Rights on 4th April 2012, *The Telegraph's* editorial of 4th April, explicitly supports the proposals for more secrecy in hearings with a piece entitled 'Secrecy in the interests of national security'. On 5th April, in an article entitled 'Cam vow to tighten security', *The Sun* presented Prime Minister Cameron as strong on security as he 'vowed to plug 'significant gaps' in UK security', whereas Deputy Prime Minister Clegg, who opposed it, is reported to have 'wobbled' – a particularly unsecure adjective.

Claims based on imaginaries of insecurity and potential violent threat to 'us' as a nation are commonplace. However, the most prominent counter-claim to discourses pertaining to security and imaginaries of future insecurity and risk was not concerned with potential human rights abuses, nor were they enunciated explicitly or prominently by former detainees or those directly affected by security practice. Instead, counter-claims centred upon the indirectly related issue of the departure from the traditions of the UK justice system.

The Justice and Security Bill's provisions for CMPs threatened the principles of open justice and natural justice. Open justice involves three factors: (i) that judges give reasons for their decisions; (ii) that court hearings are held in public; and, (iii) that the media are free to report

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on court proceedings (HM Government, 2011: 5). Natural justice is sometimes dubbed 'fairness' and concerns the right of parties to a case to be heard and to hear the opposing party's case (*audi alterem partem*) and also for parties to cross-examine opposing witnesses. Ostensibly, support for both principles was conspicuous across all fields. In the UK Supreme Court Lord Dyson (*Al Rawi & Ors vs Security Service & Ors* [2011] UKSC 35: para. 11) stated: 'The open justice principle is not a mere procedural rule. It is a fundamental common law principle'. On natural justice, the continental Other is viewed disparagingly. In *R v Davis* [2008] UKHL 36, Lord Bingham, then the most senior Law Lord, described how as long ago as in the 19th century Jeremy Bentham had 'criticised inquisitorial procedures practised on the continent of Europe, where evidence was received under a 'veil of secrecy' and the door was left 'wide open to mendacity, falsehood, and partiality.'' Historically and contemporaneously, comments noting the superiority of the British system of common law and the associated principles of open and natural justice are conspicuous amongst senior jurists.

Recognition of the long-standing indigenous national character of the norms of open and natural justice was also evident in the news media. Richard Norton-Taylor reporting on initial proposals for closed hearings in the *Guardian* (19th November 2009) emphasised the break from tradition in an article headlined: 'MI5, MI6 and the police will be able to withhold evidence from defendants and their lawyers in civil cases for the first time'; and, James Slack in the *Daily Mail* (19th November 2009) suggested an uncharacteristic move by the nation: 'despite these Kafkaesque restrictions never being permitted in a civil court before...BRITAIN took another lurch towards 'secret' justice yesterday'. In turn, the activist group Reprieve (2012b) argued 'plans for secret courts will ride roughshod over centuries-old British rights to justice'. The language used stresses the break from civil and rational traditions threatened by the Bill. Reprieve's use of the metaphor 'riding roughshod' implies an inappropriate beastlike style and the *Mail*'s use of the verb 'lurch' suggests a sudden move away from tradition. Most prominently, the abrogation of natural and open justice through Closed Material Procedures (CMPs) was communicated through the sound bites 'secret justice' and 'secret courts'. These epithets have been widely used in the news media (as in the *Daily Mail's* 'No to Secret Courts Campaign' for example, on 29th February 2012) and in the activist fields (see Reprieve, 2012a). Indeed, the next section demonstrates how such promotion of a national legal identity was instrumental in the intertextual construction of discourse across fields; and, crucially, in the amendments made to the Bill. Despite forcing

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concessions the negotiation process ultimately did not stop the legislation and the final section considers this in more detail.

3. Breaking of norms whilst appearing reasonable

This final section of analysis demonstrates how the legislation was modified to protect the rights of those not perceived as enemies. It suggests that modifications ensured that the Bill could be represented as the result of reasoned negotiations, thereby limiting the potential for reflexive criticism of the manner in which legislation was created. Despite the Government issuing a three-line whip (Watt, 2013), a degree of reasonableness helped to ensure parliamentarians, particularly those in the opposition, did not vote against the Bill.

Norman Fairclough (2010: 386) has highlighted the directed nature of government pre-legislative consultation and the Director of Liberty, Shami Chakrabati (Whitehead, 2012) suggested that the strategy of the Government was: 'to start with such an outrageous proposal that even a minor tweak seems more reasonable'. Furthermore, Jonathan Bright (2012), who researched security discourse in respect of control orders in the UK, suggests that where rules, such as human rights norms, are strongly supported they are disaggregated and only the weaker elements are broken. In the case of the introduction of control orders in the UK the notion of liberty was disaggregated, thereby allowing a partial restriction of liberty (through curfews, tagging and surveillance) while rules against the broader infringement of liberty, such as detention without charge, were maintained. Bright termed this focus on weak rules 'channeling'. My assessment of the discourse here suggested that the channelling of norm breaking concerning open justice and natural justice regarding security allow the Government to appear reasonable.

The Justice and Security Green Paper (HM Government, 2011) and Government consultation questions were very significant in structuring the argumentation surrounding the Bill. As the Appendix shows (see Row 7), on 4th April 2012 the Joint Committee on Human Rights Report (JCHR, 2012a) specifically addressed the Green Paper and received substantial coverage in the media. The JCHR concluded that CMPs were not necessary for inquests and that CMPs should only be used in cases related to national security – not to those where it was in the 'public interest' to hold a CMP. On 4th April 2012, *The Sun* headlined a page 2 article 'Let justice be 'public'' and repeated the JCHR's comments that the Green Paper's proposals are 'inherently unfair'. The following day, on 5th April 2012, with momentum

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building against the Bill *The Daily Mail* asked: 'How can ministers justify holding inquests into police killings and military deaths behind closed doors?' and highlighted calls for the criteria for preventing disclosure used in the Green Paper to be 'tightened' from 'public interest' to national security. The claimants in such cases would have been less likely to be terrorist suspects and these cases would be more likely to involve British claimants. Here open justice was defended where it could affect members of 'our' community. *The Daily Mail* was concerned with how the Justice and Security Bill might affect cases involving British citizens who were not terrorist suspects.

The Head of Communications at Reprieve, Donald Campbell (2012) stressed how campaigning on the exclusion of inquests from the Bill 'does give it a much broader appeal'. Campbell suggested it might: '…put it in a sense that people can more easily understand: which is that this potentially affects anything that the government can claim [as] national security - so it's not just your classic 'War on Terror' cases.' However, concern for the rights of Others, in Other suspect communities (Hillyard, 1993), such as Muslims deemed to be potential jihadi terrorists threatening 'our' community, was less readily adopted by the news media or those in the governmental field, demonstrating how such cosmopolitan approaches gained less traction beyond the activist field. In this case, justice, and particularly open justice and democratic accountability through the law, were more robustly defended when it was the rights of the members of the majority community that were threatened.

Campbell (2012) gave insight into how persuasive argument could be constructed in security discourse though. He stressed the value of what he termed 'your unexpected allies or your kind of 'establishment figures'' to activist campaigns. He pointed to the strength of criticism that comes from those with experience operating the system themselves, such as guards at Guantanamo Bay Naval Base, or the former UK Director of Public Prosecutions (above): 'Those are your ideal figures for presenting because they've got the expertise and there's not an obvious self interest, or an 'oh, they would say that wouldn't they' aspect to it.' When an 'unexpected ally speaks', it fulfils the newsworthy criteria of 'newness' and of 'unexpectedness' (Galtung and Ruge 1965). Significantly, 'unexpected allies' allow issues concerning authenticity and trust to be put to one side. Therefore, support from a newspaper such as *The Daily Mail*, or even *The Sun* not widely referred to as liberal-progressive, could be particularly effective for a civil liberties campaign.

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Following criticism of the Bill's threat to 'our' rights, it became apparent that unlike open justice in civil proceedings, open justice in coroners' inquests was not a rule that could be broken. Lobbying from within parliament, the news media – including the *Daily Mail* - and activists including Reprieve and Liberty ensured inquests were excluded from the Bill first published on 29th May 2012 (HM Government 2012) and the wording was changed from 'public interest' to 'interests of national security'. In an article in the *Daily Mail* (29th May 2012) the Justice Secretary directly attributed his change of policy to the newspaper – his article was headlined 'My plans were too broad and the *Mail* has done a service to the public interest' and he suggests campaigners highlighted 'the threat to the UK's tradition of open justice'.

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The amended Justice and Security Bill published on 29th May 2012 was framed by the Government and some of the news media as a compromise. On 29th May, *The Sun* headline read 'Ken does U-turn on secrecy' and when the Bill was passed in the House of Lords on 21st November again most of the news media coverage, particularly the headlines, highlighted the defeats for the Government, with the passing of the Bill as a whole given secondary prominence. On 22nd November 2012, for example, *The Guardian* headline read 'Secret courts bill savaged by the House of Lords'. The news media gave the impression that the Bill was in jeopardy. However, the key clauses introducing CMPs remained. The idea of a Government compromise was not only prominent and intertextually repeated, but it implicitly supported the notion that the legislative process facilitated contributions from a range of actors. This allowed further presentation of the UK Government's position as concessionary and reasonable. This diverted attention from the closed position adopted towards voices from those deemed to be an Other or even a potential enemy, both in the deliberation of the Bill now and in future civil court cases.

Conclusion

The discourse surrounding the Bill involved legal complexities, tied up with sentiments towards tradition, values and national identity. While some amendments to the Bill were made, these were limited and the argument that the principles of open and natural justice could be broken prevailed when it was perceived to concern national security but not threaten 'our' civil liberties. Furthermore, the discourse was set in the context of international intelligence sharing and secrecy. Therefore, concerns that intelligence relationships were under threat were linked to imaginaries that repeatedly reappeared in the discourse. These

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ultimately supported arguments in favour of CMPs and less public disclosure of information in the courts. Indeed, as an early indicator of how the genre of discourse surrounding civil claims related to security will develop, in 2014 McNamara and Lock (2014) reported that in the first year of the Act, five applications had been made for CMPs however the Government had not released information detailing which cases they were.

With the passing of the Bill, secrecy, controlled by the Government, therefore appears set to increase. However, by presenting the deliberating process surrounding legislation as reasoned, measured and negotiated, legitimacy was provided for the Act in the elite fields assessed here. The use of well-placed authoritative sources with access to exclusive information, such as the Independent Reviewer of Terrorism Legislation, David Anderson, were key to this. However, the relative lack of criticism levelled at the 'Independent Reviewer' despite his opaque methods indicates the importance of control of secret information in the justification of a securitisation move. It is this control that facilitates the creation of credible and authoritative sources; and these sources hold a deontological legitimacy because they have been created through a recognised official process. This supports Balsacq's (2015: 5-8) suggestion that deontic features can be important factors in the provision of justification and consent for securitsation. Moreover, it also highlights the leverage in argumentation that control of secret information can provide and therefore suggests that secrecy may not only be an end-goal of securitisation moves, but that reference to secret intelligence can legitimise these moves too.

Initial indications in the discourse surrounding other counterterrorism legislation suggest that these findings can be generalised. The importance of secrecy in (i) the construction of authority and (ii) imaginaries, followed by the appearance of acting cautiously and rationally despite these threats continues to be key. For example, the legislative passage of changes to the law related to surveillance and bulk collection of communications data have demonstrated similar features. In this case privacy rights have been challenged but, as with the Justice and Security Bill, the original proposals have also been watered down. Original plans in 2009 for a large government database have been changed to requirements for private internet service providers to retain data; and, further concessions concerning judicial authorisation look likely as the most recent Draft Investigatory Powers Bill is deliberated (*The Guardian*, 2015). In debate surrounding this legislation, the Intelligence and Security Committee (2015) again promoted imaginaries of attacks – through reference to the lack of interception of the

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communications of the killers of Fusilier Lee Rigby - and once more the Independent Reviewer of Terrorism Legislation has been widely referred to and is informing 'public and political debate' with his 'unrestricted access, at the highest level of security clearance, to the responsible Government Departments' (Anderson, 2015). The potential for control of secrecy to be crucial to argumentation surrounding security is again clear.

More broadly, the findings in this paper support Basaran's (2008) thesis that identity and borders are constituted in law by liberal governance. The research in this paper highlight how compromise of legal principles are challenged and do need to be justified, but it suggests that information – even evidence related to grave human rights abuse – may be successfully argued to be beyond legal borders where it is intelligence that concerns a threat from a perceived potential enemy. The potential for these restrictions on rights to contribute to further animosity and distrust is clear and is also worth noting for studies on radicalisation.

Nonetheless, this research has demonstrated how key phenomena in argumentation - authoritative sources, imaginaries of attacks, collective self-identity and Othering - are inter-related and dynamic. Accordingly, there was evidence of argumentation advocating desecuritisation and this suggests that securitisation has not been comprehensive and that there is possibility for change. Here constitutional and democratic principles such as open and natural justice were more likely to be defended when those whose rights are threatened were not deemed to be a potential enemy. By noting Othering in the discourse, this paper also provided insight into how discourse developed following changes to amend legal principles and civil liberties' norms. This can add to the explanations that Jonathan Bright (2012) has already provided on the impact of securitisation moves. Therefore, I call for an even greater awareness of Othering and collective identity amongst security and securitisation scholars and, most importantly, the further investigation of the significance of the control of secret information in constructing authority and imaginaries in this highly contested and secretive area that is security discourse.

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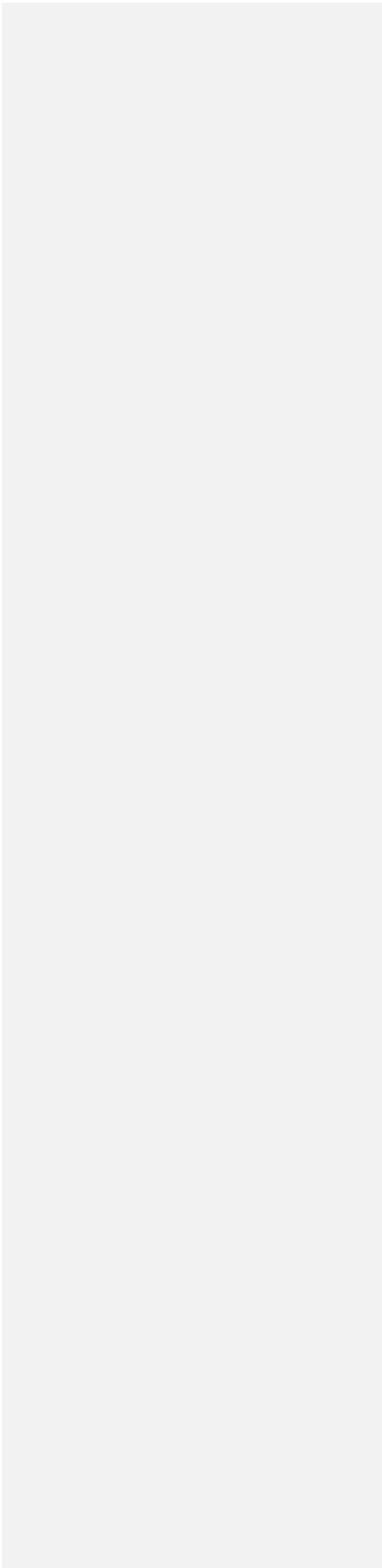

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Manuscript

On the 25th April 2013, the Justice and Security Bill became law. The Act provided for the use of Closed Material Proceedings in civil cases concerning issues of national security. In the Closed Material Proceedings, or CMPs, access to evidence and reasoning would be limited to the judge and security cleared 'special advocates'. Furthermore, following the Act, judges' ability to order disclosure of information held by the intelligence services related to human rights abuses would also be limited. The UK Government stated that it was the large number of civil claims being made against the intelligence agencies and the increasing recourse to judicial review of their actions that necessitated the Bill (HM Government 2011: para. 1.17). Indeed, the public hearing of these claims had given credibility to allegations of UK complicity in torture by foreign governments and of the need for more accountability. However, the Justice and Security Bill appeared to resolve the incompatibility between open justice and the use of classified intelligence as evidence, with provisions for more government control of information. These proposals were opposed by human rights activists, politicians, jurists and the news media, including some more surprising publications, such as *The Daily Mail*. The Bill therefore provided significant controversy and discussion of pertinent issues of secrecy, security and law across key fields to facilitate the research below.

~~In their initial proposals, the UK Government had stated that it was the large number of civil claims being made against the UK intelligence agencies and the increasing recourse to judicial review of agencies' actions that necessitated the change (HM Government 2011: para. 1.17). Since 2001, there had been 14 such hearings in the House of Lords and Supreme Court alone and, notably, in the case of *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] the Court of Appeal had also ruled that a court could, in theory, order the disclosure of information that the UK Government had been passed by a foreign state. Furthermore, in the case of *Al Rawi & Ors v Security Service & Ors*, former Guantanamo Bay detainees had issued a claim against the UK Security Services for complicity in their torture and the UK Government argued that the volume of sensitive information necessitated a Closed Material Proceeding (or CMP), where evidence was not heard in public. Yet, when the case reached the Supreme Court in 2011 (in *Al Rawi & Ors v Security Service & Ors* [2011] UKSC 35) the court then found that a CMP could not be used without further legislation. These cases challenged the Government's capacity to control information and they had implications for how security discourse is conducted, not only in~~

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~~the courts themselves, but in the news media, activist and government fields. What could be submitted for public deliberation and *how* would be decided by the Bill - to use Norman Fairclough's (2003: 89) terms, in the deliberation of this Bill, the 'genre' of security discourse was at stake.~~

~~While the Bill was progressing through parliament, David Anderson QC (2012), the UK Parliament's Independent Reviewer of Terrorism Legislation, effused:~~

~~Every provision of every one of our laws is routinely tested to destruction - and that says a lot to me about the very vigorous legal culture we have in this country as well as the journalistic culture and the NGOs.~~

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~~In fact, the Act that was finally passed contained provisions that sections of the UK press, the activist sector, and legal commentators had been critical of since the publication of the Government Green Paper and consultation began in October 2011. Most contentious were the provisions for the use of Closed Material Proceedings in civil cases concerning issues of national security. Previously in cases involving sensitive information, judges determined whether individual pieces of evidence should be removed from the trial. In the proposed Closed Material Proceedings, or CMPs, access to the evidence and reasoning would be limited to the judge and security cleared 'special advocates'. Furthermore, following the Act, judges' ability to order disclosure of information held by the intelligence services related to human rights abuses would be limited.~~ This paper asks how ~~these~~ argumentation developed in public discourse to justify or challenge the securitisation of justice and it focuses on the role of secrecy in~~changes to civil proceedings were deliberated and,~~ ~~ultimately, how this~~ ~~ensur~~ensuring the Bill ~~ed that they were~~was approved by parliament.

Principally, I argue that secrecy was successfully used as a leverage in order to win argumentation surrounding the Bill. T~~t~~he UK Government ~~successfully~~ employed discourse strategies that reinforced the authority of secretive sources to ensure the Bill was passed. Discursive construction of authoritative sources and imaginaries of future attacks were key to argumentation schema. The dynamics between them and the need to respect legal principles that protected members of 'our' community, led to the passing of the Bill in its final form - approving CMPs, but removing inquests and issues of the 'public interest' from the Bill.

More specifically, *authoritative sources* within argumentation were discursively constructed

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in three related ways: (i) through reference to exclusive, classified or secret information; (ii) by enhancing the credibility of claims through official procedures or institutions; and (iii), by reducing suspicion of partiality and encouraging trust. Secondly, the repetition of discourses related to *imaginaries* of future attacks on the UK in the context of secrecy were repeated at significant moments and supported indirectly through references to national security. Thirdly, the competing notion of a *collective self-identity* that demanded maintenance of legal principles - but only when rights of those not perceived as enemies were threatened - served to present the resulting Act as negotiated and balanced. This provided the Act with legitimacy despite the Othering and opaque verification of reasoning on which claims in argumentation were based. ~~As such the lack of cosmopolitanism evident in the discourse studied here was largely not criticised in practice but was, nonetheless, significant in explaining its dynamics.~~

This research ~~is likely to be of interest to scholars of security or rights discourse and legislation and to practitioners working in these areas in activist, media, judicial or governmental fields. It~~ will ~~add~~ contribute to scholarship on the intersection between law and security. Basaran (2008) has argued that 'spaces of exclusion' are intrinsic to the mundane and banal practices of the liberal state, noting the multiplication of legal borders that are created not simply by territorial factors but also by practices of governance. Here I assess how secrecy can impact on argumentation surrounding the creation of law on justice and security issues. ~~what~~ Indeed, scholars have lamented ~~to be~~ the scant attention that the relationship between the intelligence services and public political discourse receives in academic literature (Herfroy-Mischler, 2015; Hillebrand, 2012); including literature on securitisation.

In their seminal work on securitisation, scholars Barry Buzan, Ole Wæver and Jaap de Wilde (1998: 30) proposed that the way that threats are presented discursively, rather than the threat itself, should be central to any assessment of security. They make clear that securitization impacts on politics, suggesting that it 'takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics' (Buzan et al. 1998: 144). By securitizing an issue debate can be restricted and in the case analysed here, the Justice and Security Act is likely to see discussion surrounding human rights abuses related to counterterrorism restricted. By employing a methodology that selectively draws on more recent literature on securitisation and combines Martin Reisigl and Ruth Wodaks' (2009) and Norman and Isabella Faircloughs' (2012) work on critical discourse analysis and

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argumentation, it provides new insight into development of argumentation surrounding securitising acts; and it is to the methodology that I now turn.

Methodology and outline of article

My methodology combines analysis of texts, context and intertextuality with argumentation and I suggest this facilitates a contribution to recent scholarship on securitisation. Originally, Barry Buzan, Ole Wæver and Jaap de Wilde (1998: 32) proposed that assessment of securitization involves particular questions: 'who securitizes (Securitizing actor), on what issues (threats), for whom (referent object), why, with what results, and not least, under what conditions?' Although Buzan *et al.* do recognize the need for the audience to accept a securitizing move, other scholars have called for more consideration of the role of the heterogeneous audience and the sociological context (Salter, 2008; Balsacq, 2011: 7; Hansen, 2000).

My analysis of texts is in line with recent explicit recognition of this need for securitisation to consider more the context and audienceI follow a dialectical relational approach to critical discourse analysis, as advocated by Lilie Chouliaraki and Norman Fairclough (1999). In other words, relations are considered to involve elements that are different but not discrete and where each internalises aspects of the other. It sees semiotic events as maintaining dialectical relations with non-semiotic ones and views discourse, like any other social practice, as involving interplay between social structures, practices and events. Following Fairclough I view discourse practice as the link between the sociocultural background and texts. This approach is particularly appropriate for this research because it facilitates assessment of socio-cultural factors such as collective identity, national norms and cosmopolitanism, all of which are potentially integral to discourse surrounding communication of justice and security issues.

In order to assess the varied relationship between the sociocultural context and text, I investigate discourse practice by looking at the relations between texts and how these texts are produced and interpreted - what -Fairclough (1992: 84) and Lene Hansen (2006:55-73) calls 'intertextuality'. Identifying sometimes latent evidence of influence from sources and texts on each other can be difficult and For Fairclough (1992: 84) intertextuality describes:

the properties texts have of being full of snatches of other texts, which may be explicitly

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~~demarcated or merged in and which the text may assimilate, contradict, ironically echo and so forth.~~

~~In other words, intertextuality concerns the phenomenon where texts draw on other texts and voices. While it is sometimes possible to ascertain which texts have been drawn on with precision – for instance, when reported speech is used in a news report – it is often not. I am therefore interested in more than just these manifest and explicit forms of intertextuality and I am also concerned with what Meinhof and Smith (2000) have termed 'diffuse intertextuality'. Diffuse intertextuality looks beyond straightforward deterministic relationships between texts and specific sources. Fairclough (1992: 85) called this form of intertextuality 'interdiscursivity' and he later broke this down analytically in three ways: (i) it is concerned with the repetition of discourses (representations of aspects of the world); (ii) with genres (the ways discourses are communicated); and (iii) styles (identities and ways of being of those creating the discourse or of those represented) (Fairclough, 2003). In any individual text these three features may not be attributable to specific sources in a linear deterministic manner and when certain texts or voices that might have been included are actually excluded, this is often even more difficult to identify (Fairclough, 2003: 39-61). t~~The solution ~~to these problems~~ adopted here is to engage in deeper contextual analysis, thereby systematically looking for patterns and noting dissimilarities and omissions. This is particularly important in this case because secrecy makes interpretation of the cause and effect of practice, including discursive practice, even more difficult to discern.

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I therefore undertook an analysis of a large number of texts related to political discourse surrounding the passage of the Bill. I collected texts from news media, legal, activist and governmental fields that I judged to impact significantly on the discourse surrounding the Bill and ultimately the voting in the Houses of Parliament. I traced the intertextual repetitions of the discourses in debates and output from the House of Lords and Commons, including their scrutinizing committees. In the news media I examined a corpus of 222 news texts (see Appendix). The news media texts published by six news outlets were chosen because of their diverse editorial lines and higher numbers of readers both in their printed format and on the Internet (OFCOM 2012; Ponsford 2013). The publications included: *The Guardian* and *The Observer, The Daily Mail* and *The Mail on Sunday, The Daily Telegraph* and *The Sunday Telegraph, The Times* and *The Sunday Times* and *The Sun* and *The News of The World* and the *BBC News* website. I retrieved newspaper media texts from lexisnexis.com, whilst using

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the BBC website for its output. I also looked at output from the activist field, again assessing their intertextual impact on other actors and texts. In terms of the legal field I referred to key legal judgements and comments from significant legal commentators, including human rights activists Reprieve. In order to gain further insight into the practice of significant actors, I supplemented this textual analysis with background interviews with actors from news media (Ian Cobain from *The Guardian* and an undisclosed interviewee from a BBC journalist), governmental (Sir Malcolm Rifkind) and activist fields (three employees from Reprieve).

I also consider argumentation. The potential for issues to become desecuritised and openly discussed in public has been widely recognised (for example, Salter and Mutlu, 2013) and my focus on argumentation is partly chosen to interrogate the success of the myriad of securitizing and desecuritising moves that took place to justify or challenge the bill. Furthermore, Thierry Balsacq (2015: 1-10) has written on the importance of legitimacy in the complex relations between securitizing actor and referent object. Accordingly, the analysis of argumentation below also facilitates consideration of legitimacy – specifically the legitimacy provided for the provisions in the Justice and Security Act that treats evidence related to intelligence as being beyond public scrutiny. In this case, viewing legitimacy on a continuum (Balsacq, 2015: 5), the securitisation of the issue required sufficient legitimacy for parliament to approve it.

Critical discourse analysts Martin Reisigl and Ruth Wodak (2009) and Norman Fairclough and Isabella Fairclough (2012) ~~also maintain that argumentation is integral to political discourse analysis~~provide practical insight into how argumentation can be analysed. Reisigl and Wodak break down the construction of arguments by assessing 'topoi'. Topoi are the topics or issues that form premises on which claims within argumentation are made (Reisigl & Wodak, 2009: 110). The repetition of topoi across texts can be traced and accordingly my analysis is not limited to arguments that are enunciated in whole in individual texts, but also encompasses arguments formed in the discourse over time, for example through campaigns or through argumentation structures that develop as the supporting topoi are repeated across texts, intertextually. Yet, while I emulated Reisigl and Wodaks' recording of topoi and premises found in the empirical data, this alone does not allow a sufficient reconstruction of the framework of arguments, thereby making explanatory or normative critique more difficult. Therefore, I added Fairclough and Fairclough' analytical breakdown of argumentation to intertextual analysis of topoi.

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Fairclough and Fairclough (2012: 51 & 124) break down the structure of arguments more systematically. Fairclough and Fairclough's consideration of argument and counter-argument investigates the following aspects: goals, values, circumstances, means, negative consequences, claims and counter claims and arguments from authority. This schema for the construction of argumentation includes a consideration of values and their effect on arguments. ~~Indeed, critical discourse analysts encourage the incorporation of concepts developed in other disciplines of social science to improve analysis (Wodak and Meyer, 2009: 2).~~ In this article I search for ~~the concept of cosmopolitanism as a value, as the value that is broadly concerned with the collective or individual Self being open and positive towards engagement and recognition of the Other (Hannerz, 1990). I chose cosmopolitanism because, as Gerald Delanty (2009) outlines, cosmopolitanism can be further broken down to include a consideration of self-other relations, reflexivity, deliberation and a notion of universal moral norms. It has also been associated with rationality since the stoical philosophers (see Douzinas, 2007: 157-9)) up to and including 21st century scholars (Delanty, 2009; Beck, 2006). These factors are all clearly relevant to a study on the arguments surrounding issues of justice and security; and, where CDA demands that the researcher adopts a normative stance, my position is that security discourse would benefit from more cosmopolitanism.~~ evidence of values related to justice, identity or universal human rights.

The analysis that follows is divided into three sections. Firstly, I assess argumentation surrounding the Bill's provisions to introduce Closed Material Procedures (CMPs) in civil proceedings, highlighting the Government's creation of the key authoritative source. Secondly, I consider how the need to control information by Government was promoted with reference to discourses articulated through imaginaries, and how counterclaims emanated mostly from long-standing legal principles. Finally, I discuss how the Executive structured the legislative process to present it as rigorously negotiated and legitimate; and how compromise of legal principles was only possible when it was 'the Other' whose rights were threatened.

4. Argumentation surrounding the Bill

The UK Government (HM Government 2011: 12) claimed that the goal of the Justice and Security legislation was to 'better equip our courts to pass judgement in cases involving sensitive information' – ostensibly an aim to improve justice. The Government based claims on sources with access to classified or secret information and intelligence. The following

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paragraphs will assess the importance and construction of an authoritative style in the related claims and counterclaims, before ultimately questioning the Government's stated commitment to justice.

The Justice and Security Bill (HM Government, 2012) proposed that Closed Material Procedures (CMPs) replace the current system of Public Interest Immunity (PII). The Government and security services argued for the extension of CMPs on the basis that the exclusion of evidence under the PII system restricts the ability of the court to reach a fair judgment. Under the PII system, PII certificates are issued by a judge to exclude individual pieces of evidence from the trial. In making this decision the judge considers the various public interest issues at play in disclosing, or alternatively withholding, pieces of evidence from the trial. In contrast, under the proposed CMPs, where evidence is deemed sensitive to 'national security' it is heard in closed session. During closed sessions in CMPs one party and their lawyers do not see the closed material - the closed material is seen by the judge and Special Advocates. The Special Advocates represent the interests of the excluded party, but do not have a duty to the 'client', instead only to the court. Special Advocates usually take instructions from the 'client' before they have seen the closed material but not after (House of Commons Research Paper, 2012).

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On the Bill's reading in the House of Commons, Kenneth Clarke MP suggested that without CMPs there would be 'no justice at all' (2013). As did the former head of MI5, Eliza Manningham-Buller (2012) and her argument was published in an op-ed in *The Times* on 14th November 2012. On 4th March 2013, the former Chief Justice Lord Wolf was quoted in the *Daily Mail* (Gibb, 2013) concurring that CMPs would be 'better than the existing system where sensitive material is either heard at trial or excluded altogether'; and a similar claim was made by members of the Intelligence and Security Committee (ISC) in the debate in the House of Commons on 4th March 2013, including Hazel Blears MP (2013), Sir Malcom Rifkind MP (2013) and George Howarth MP (2013).

However, in the Supreme Court, Lord Kerr in *Al Rawi & Ors v The Security Service & Ors* (2011) critiqued the assumption implicit in the argument that CMPs facilitate justice:

> The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable

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> of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.

Lord Kerr was cited repeatedly in the House of Lords (see Pannick, 2012; Beecham, 2012) and in the House of Lords debate, the former Director of Public Prosecutions, Lord MacDonald (2012) suggested that simply by having access to more information does not necessarily ensure that people become better informed, stating:

> I have spent many years in criminal courts watching evidence that at first sight seemed persuasive, truthful and accurate disintegrating under cross-examination conducted upon the instructions of one of the parties.

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In the argumentation for CMPs or PII procedures the ostensible agreed 'goal' is the maximisation of justice through a trial in 'circumstances' where some evidence is national security sensitive. Kenneth Clarke and Eliza Manningham-Buller argue that the 'means' to achieve this are CMPs because they facilitate the consideration of a greater quantity of information, whereas Lord MacDonald argues against this on the basis that CMPs produce 'negative consequences' through their unreliable information or evidence. In this argumentation surrounding quality or quantity of information and evidence, it is differing *authoritative* sources that contest whether CMPs are beneficial or detrimental to justice. Fairclough and Fairclough (2012:123-4) highlight the effectiveness of arguments originating from authority. But what constitutes authority and qualifies a position as more authoritative – or, a source as being in a more acceptable or justifiable position to comment - is disputable. As long ago as 1956 Hannah Arendt suggested that the modern world was bereft of any 'authentic and indisputable' authority. Nonetheless, despite being contested, some positions are clearly more authoritative that others.

For instance, the Special Advocates make a claim to a privileged or authoritative opinion based on their experience in operating closed material procedures - many of which were related to immigration and security issues in the Special Immigration Appeals Commission. The Special Advocates' criticisms of CMPs were put forward in their response to the Government consultation and was signed by 59 of 67 Special Advocates. They concluded that it 'would be most undesirable to extend CMPs any further' (Special Advocates, 2012: para. 26). Moreover, the Special Advocates' authority was sufficient to ensure their claims had intertextual repercussions. Summaries of their criticisms were repeated by the Joint Committee on Human Rights (2012a: para 12); the then Justice Secretary, Kenneth Clarke MP, told the Joint Committee on Human Rights on 6th March 2012 that '[o]f all the

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responses, the evidence of the special advocates most unsettled me' (JCHR, 2012d); and, David Davis (2012) was one of many to cite their position in the Houses of Parliament. However, the Special Advocates were still vulnerable to accusations of partiality and Kenneth Clarke (2012a) attempted to trump David Davis' authoritative source by referring to his undisclosed discussions with judges who were in favour of CMPs. As such, the question as to whether CMPs would improve justice remained unresolved.

However, security discourse develops in a particular context of secrecy and distrust and this can and did impact on the construction of authority. The classified nature of intelligence and the *sub judice* rules limiting discussion of evidence currently being considered by the courts can make claims harder to support or, conversely, challenge. Therefore, while Fairclough and Faircloughs' examples of 'authoritative argument' are from established public bodies with recognized (albeit fallible) expertise such as the IMF or Confederation of British Industry; in the context of secrecy and uncertainty in security and rights discourse, claims to authoritative opinions are often based on exclusive access to information and knowledge – as a current member of the Government such as Kenneth Clarke or a former Head of the Security Services such as Eliza Manningham-Buller, as a Special Advocate, or as a member of the Intelligence and Security Committee. Nonetheless, conspicuously, although former detainees and terrorism suspects may have an exclusive perspective, their comments were rarely voiced in the parliamentary, news media or legal texts assessed; unless their comments were channeled through a more authoritative intermediary, such as the activist group Reprieve, thereby providing them with more credibility and weight. For instance, institutions of the UK parliament were more likely to hold authority here. Authority could be created by a institutions deontological legitimacy derived from the systems, rules and processes it followed. The UK parliament's Joint Committee on Human Rights heard evidence from a number of leading legal practitioners (including Special Advocates), journalists and Ministers of Governments and concluded that there is no evidence that circumstances suggest a change to CMPs is needed because no cases to date have been dismissed as untriable because of evidence being excluded under PII (JCHR, 2012a). Criticisms from activists gained authority as their testimony was repeated in deontologically legitimate institutions. The JCHR report, for example, (2012a) featured in 32 articles in the news outlets examined (see Appendix, Row 7).

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The Government's argument centred on its proposition that the 'circumstances' of on-going cases did require change but that classified evidence and *sub judice* rules prevented them from producing the evidence. In order to substantiate their claim, the Government created an authoritative source with yet more insight into selected exclusive information. They provided evidence to David Anderson QC, the Independent Reviewer of Terrorism Legislation, of on-going cases that might be put forward for CMPs. Of the 27 cases cited in the Green Paper, David Anderson was given special clearance to access information concerning seven cases (four were immigration cases) currently before the courts. As an 'independent' authority Anderson concluded that:

> The cases to which I have been introduced persuade me that there is a small but indeterminate category of national security-related claims, both for judicial review of executive decisions and for civil damages, in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist (cited in Secretary of State for Justice, 2012: 4).

On 4th March 2013, in the final reading in the House of Commons, the Shadow Justice Secretary, Labour MP Sadiq Khan quoted this statement from David Anderson verbatim and prefaced it by saying:

> Let me begin by making it absolutely clear to the House where the Opposition stand on the issue of closed material procedures in civil proceedings. We accept that there may be rare examples where it is preferable for a CMP to be used because there is no other way a particular case can be heard. Our position has been influenced to a large extent by the views of the independent reviewer of terrorism legislation, Mr David Anderson QC.

In both Houses of Parliament the Independent Reviewer of Terrorism Legislation, David Anderson QC appeared to be particularly influential on members of all major parties. In the House of Commons, Conservative backbencher (and Joint Secretary of the 1922 Committee) Robert Buckland MP (2012) said: 'much has been made of the views of Mr David Anderson QC ... he, like me, is very much a reluctant convert to the limited use of closed material proceedings'; and, in the House of Lords on 21st November 2012, Liberal Democrat Lord Wallace (2012) suggested that David Anderson QC 'probably gets the prize for the most quoted person in these debates'. Anderson's insider knowledge and apparent 'independent' status ensure a degree of trust from the parliamentarians that, however contrived, allows him to speak with authority. His style is judged by parliamentarians to be measured and one of objectivity, to which they are happy to relate to – describing him to be 'like me' and 'a

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reluctant convert'. However, on closer examination the governmental systems and processes involved in vesting him with that authority held questionable objectivity.

In a submission to the Joint Committee on Human Rights (2012b: para 34) the 'Special Advocates' – who have had direct experience working with CMPs - disagreed with Anderson's conclusion. Special Advocate Angus McCullough (JCHR, 2012c: page 16) challenged Anderson's position suggesting that the cases seen by the Independent Reviewer were 'a selection of three that had been, presumably, handpicked by the Government to prove their point'. The Special Advocates also cast further doubt on the judicial fairness of CMPs as currently practised in the immigration courts noting the 'lack of any formal rules of evidence, so allowing second or third hand hearsay to be admitted, or even more remote evidence'. The Special Advocates (2012: para. 7) also describe:

> [the] increasing practice of serving redacted closed documents on the Special Advocates, and resisting requests by the Special Advocates for production of documents to them on the basis of the Government's unilateral view of relevance.

The Special Advocates' testimony suggests that through CMPs, standards of proof and disclosure in the intelligence services are migrating into the legal field, and they are altering judicial process in favour of secrecy and security, thereby reducing the possibility of accountability for violations of human rights. However, they did not match the authority of David Anderson as an 'independent', informed source.

In summary, much of the Government's argumentation was focused on the disputed 'circumstances' concerning the operation of trials in the context of sensitive information and the disputed 'means' to move from those circumstances to the 'end goal' of natural justice. The government claimed that more evidence (albeit unchallenged by opposing parties in the case) would assist this process and significantly a source with constructed authority, David Anderson QC, supported them. Yet given the Special Advocates' submissions concerning dubious evidence and additional secrecy maintained by the security services operating in CMPs and that previous use of PII principles led to disclosure that the UK Government was concerned with in the Binyam Mohamed case (see next section) there is a strong possibility that the Government's primary end goal was not 'justice', but was more concerned with ensuring secrecy and control of information. This exchange of claims and counter-claims on the impact of CMPs on justice, that was foregrounded by the argumentation, diverted attention from issues surrounding the control of intelligence. Certainly the additional

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provisions within the Bill to preclude courts from ordering disclosure of information held by the intelligence services related to international human rights abuses (also referred to as Norwich Pharmacal orders) were clearly included for this purpose. If this was one of the motivations for including CMPs too, it was obscured through the argumentation structure that ostensibly focused on justice but also repeatedly privileged and reinforced the authority behested to secretive sources. I therefore now further investigate how the Government and then parliament supported the control of intelligence/evidence and the promotion of secrecy.

5. Government control of intelligence/evidence and the promotion of secrecy

On February 10th 2010, in *Binyam Mohamed Court vs. Foreign Secretary of Appeal (Civil Division) [2010] EWCA Civ 65* it was ruled that the summary of the information that the UK had been given by the US regarding the treatment of Binyam Mohamed in US custody should be published in the public interest. In defying the UK Government, the courts applied PII principles and therefore the interests of secrecy were balanced with the public interest for open accountability (Hickman, 2013). The case received substantial news media coverage (see Appendix, Row 2). However, in calling for disclosure, the Court of Appeal (para. 13) made clear that Mohamed's treatment in the US had already been disclosed by a US court and that there was no 'breach of security' and no 'intelligence material' was revealed.

Members of the Security Services have since publicly called for more secrecy surrounding intelligence, and a prioritisation of the control principle over the disclosure of information related to human rights abuses. The head of MI6 John Sawers explained (in *The Times,* 29th October 2010):

> …we have a rule called the 'control principle': the service that first obtains the intelligence has the right to control how it is used. It is rule number one of intelligence sharing. If the control principle is not respected, the intelligence sharing dries up.

Adherence to the control principle ensures that when intelligence becomes evidence in the legal field it remains secret. Under the control principle intelligence is not discussed publicly. In the discourse surrounding the Justice and Security Bill, it is the Government and the security services that promote the notion that there is a need to maintain secrecy amongst parliamentarians and the broader public, so that legislation promoting secrecy is passed due to the terrorist threat faced and this was demonstrated at key moments. For example, following publication of parliament's Joint Committee on Human Rights Report on the

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Justice and Security Green Paper (2012a) *The Daily Telegraph* cited a 'senior British security source' and led an article on 4th April 2012 (Winnett, 2012) with the following:

> AMERICAN spy agencies refused to give Britain's intelligence services full details of a "Mumbai-style" terrorist plot in this country because they feared that top-secret sources would be exposed. The Daily Telegraph can disclose.

This is an example of how argumentation in favour of secrecy is promoted through imaginaries of future risk by Government and the security services. Fairclough and Fairclough (2012: 103-8) explain how discourses about the future – or imaginaries - can describe possible worlds, including risks or potential circumstances caused by our (in)action now. Furthermore, in the above extract *The Daily Telegraph* compounds the representation of an imaginary of a "Mumbai-style" terrorist plot, with an emphasis on the exclusive nature of its source. This provides this imaginary with additional authority because it is framed as emanating from a source with access to exclusive information. Occasional authoritative reference to imaginaries of risk in the discourse maintains the latent imaginary of a potential attack and corresponds with Richard Grusin's thesis that the news media repeats (or remediates) stories concerning the potential of attack in an attempt to premediate and mitigate the shock from any future imagined attack (Grusin, 2010).

As noted in the previous section, members of the UK Intelligence and Security Committee (ISC), with their exclusive discussions access to the UK Governments Security Services and Secret Intelligence Services were more prominent in the discourse surrounding the legislation. Furthermore, evidence was found of their promotion of risk based imaginaries. Speaking on 'national security', ISC member, Hazel Blears MP (2012) suggested there would be a heightened risk of an attack if the control principle was not adhered to:

> I think of the information that the US has provided us with to protect our security. I think of the bomb plot in April—the second underpants bomb plot—where the liaison between the US and this country was essential to preventing an incident that could have cost many lives.

These imaginaries can therefore justify claims that secrecy is justified. However, they are not always referred to so explicitly. They may be implicitly referred to through references to intelligence sharing relationships or the associated concept of national security (that protects against such threats). This, however, is explicitly referred to at crucial junctures. For example, the first line of the Forward, Executive Summary and First Section of the Green Paper reaffirm that the first duty of government is to provide national security. Similar

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references are common in the media. For example in the face of strong criticism from the widely reported Joint Committee on Human Rights on 4th April 2012, *The Telegraph's* editorial of 4th April, explicitly supports the proposals for more secrecy in hearings with a piece entitled 'Secrecy in the interests of national security'. On 5th April, in an article entitled 'Cam vow to tighten security', *The Sun* presented Prime Minister Cameron as strong on security as he 'vowed to plug 'significant gaps' in UK security', whereas Deputy Prime Minister Clegg, who opposed it, is reported to have 'wobbled' – a particularly unsecure adjective.

Claims based on imaginaries of insecurity and potential violent threat to 'us' as a nation are commonplace. However, the most prominent counter-claim to discourses pertaining to security and imaginaries of future insecurity and risk was not concerned with potential human rights abuses, nor were they enunciated explicitly or prominently by former detainees or those directly affected by security practice. Instead, counter-claims centred upon the indirectly related issue of the departure from the traditions of the UK justice system.

The Justice and Security Bill's provisions for CMPs threatened the principles of open justice and natural justice. Open justice involves three factors: (i) that judges give reasons for their decisions; (ii) that court hearings are held in public; and, (iii) that the media are free to report on court proceedings (HM Government, 2011: 5). Natural justice is sometimes dubbed 'fairness' and concerns the right of parties to a case to be heard and to hear the opposing party's case (*audi alterem partem*) and also for parties to cross-examine opposing witnesses. Ostensibly, support for both principles was conspicuous across all fields. In the UK Supreme Court Lord Dyson (*Al Rawi & Ors vs Security Service & Ors* [2011] UKSC 35: para. 11) stated: 'The open justice principle is not a mere procedural rule. It is a fundamental common law principle'. On natural justice, the continental Other is viewed disparagingly. In *R v Davis* [2008] UKHL 36, Lord Bingham, then the most senior Law Lord, described how as long ago as in the 19th century Jeremy Bentham had 'criticised inquisitorial procedures practised on the continent of Europe, where evidence was received under a 'veil of secrecy' and the door was left 'wide open to mendacity, falsehood, and partiality.'' Historically and contemporaneously, comments noting the superiority of the British system of common law and the associated principles of open and natural justice are conspicuous amongst senior jurists.

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Recognition of the long-standing indigenous national character of the norms of open and natural justice was also evident in the news media. Richard Norton-Taylor reporting on initial proposals for closed hearings in the *Guardian* (19th November 2009) emphasised the break from tradition in an article headlined: 'MI5, MI6 and the police will be able to withhold evidence from defendants and their lawyers in civil cases for the first time'; and, James Slack in the *Daily Mail* (19th November 2009) suggested an uncharacteristic move by the nation: 'despite these Kafkaesque restrictions never being permitted in a civil court before...BRITAIN took another lurch towards 'secret' justice yesterday'. In turn, the activist group Reprieve (2012b) argued 'plans for secret courts will ride roughshod over centuries-old British rights to justice'. The language used stresses the break from civil and rational traditions threatened by the Bill. Reprieve's use of the metaphor 'riding roughshod' implies an inappropriate beastlike style and the *Mail*'s use of the verb 'lurch' suggests a sudden move away from tradition. Most prominently, the abrogation of natural and open justice through Closed Material Procedures (CMPs) was communicated through the sound bites 'secret justice' and 'secret courts'. These epithets have been widely used in the news media (as in the *Daily Mail's* 'No to Secret Courts Campaign' for example, on 29th February 2012) and in the activist fields (see Reprieve, 2012a). Indeed, the next section demonstrates how such promotion of a national legal identity was instrumental in the intertextual construction of discourse across fields; and, crucially, in the amendments made to the Bill. Despite forcing concessions the negotiation process ultimately did not stop the legislation and the final section considers this in more detail.

6. Breaking of norms whilst appearing reasonable

This final section of analysis demonstrates how the legislation was modified to protect the rights of those not perceived as enemies. It suggests that modifications ensured that the Bill could be represented as the result of reasoned negotiations, thereby limiting the potential for reflexive criticism of the manner in which legislation was created. Despite the Government issuing a three-line whip (Watt, 2013), a degree of reasonableness helped to ensure parliamentarians, particularly those in the opposition, did not vote against the Bill.

Norman Fairclough (2010: 386) has highlighted the directed nature of government pre-legislative consultation and the Director of Liberty, Shami Chakrabati (Whitehead, 2012) suggested that the strategy of the Government was: 'to start with such an outrageous proposal that even a minor tweak seems more reasonable'. Furthermore, Jonathan Bright (2012), who

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researched security discourse in respect of control orders in the UK, suggests that where rules, such as human rights norms, are strongly supported they are disaggregated and only the weaker elements are broken. In the case of the introduction of control orders in the UK the notion of liberty was disaggregated, thereby allowing a partial restriction of liberty (through curfews, tagging and surveillance) while rules against the broader infringement of liberty, such as detention without charge, were maintained. Bright termed this focus on weak rules 'channeling'. My assessment of the discourse here suggested that the channelling of norm breaking concerning open justice and natural justice regarding security allow the Government to appear reasonable.

The Justice and Security Green Paper (HM Government, 2011) and Government consultation questions were very significant in structuring the argumentation surrounding the Bill. As the Appendix shows (see Row 7), on 4th April 2012 the Joint Committee on Human Rights Report (JCHR, 2012a) specifically addressed the Green Paper and received substantial coverage in the media. The JCHR concluded that CMPs were not necessary for inquests and that CMPs should only be used in cases related to national security – not to those where it was in the 'public interest' to hold a CMP. On 4th April 2012, *The Sun* headlined a page 2 article 'Let justice be 'public'' and repeated the JCHR's comments that the Green Paper's proposals are 'inherently unfair'. The following day, on 5th April 2012, with momentum building against the Bill *The Daily Mail* asked: 'How can ministers justify holding inquests into police killings and military deaths behind closed doors?' and highlighted calls for the criteria for preventing disclosure used in the Green Paper to be 'tightened' from 'public interest' to national security. The claimants in such cases would have been less likely to be terrorist suspects and these cases would be more likely to involve British claimants. Here open justice was defended where it could affect members of 'our' community. *The Daily Mail* was concerned with how the Justice and Security Bill might affect cases involving British citizens who were not terrorist suspects.

The Head of Communications at Reprieve, Donald Campbell (2012) stressed how campaigning on the exclusion of inquests from the Bill 'does give it a much broader appeal'. Campbell suggested it might: '…put it in a sense that people can more easily understand: which is that this potentially affects anything that the government can claim [as] national security - so it's not just your classic 'War on Terror' cases.' However, concern for the rights of Others, in Other suspect communities (Hillyard, 1993), such as Muslims deemed to be

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potential jihadi terrorists threatening ‘our’ community, was less readily adopted by the news media or those in the governmental field, demonstrating how ~~moral~~ such cosmopolitan approaches~~ism~~ gained less traction beyond the activist field. In this case, justice, and particularly open justice and democratic accountability through the law, were more robustly defended when it was the rights of the members of the majority community that were threatened.

Campbell (2012) gave insight into how persuasive argument could be constructed in security discourse though. He stressed the value of what he termed ‘your unexpected allies or your kind of ‘establishment figures’’ to activist campaigns. He pointed to the strength of criticism that comes from those with experience operating the system themselves, such as guards at Guantanamo Bay Naval Base, or the former UK Director of Public Prosecutions (above): ‘Those are your ideal figures for presenting because they’ve got the expertise and there’s not an obvious self interest, or an ‘oh, they would say that wouldn’t they’ aspect to it.’ When an ‘unexpected ally speaks’, it fulfils the newsworthy criteria of ‘newness’ and of ‘unexpectedness’ (Galtung and Ruge 1965). Significantly, ‘unexpected allies’ allow issues concerning authenticity and trust to be put to one side. Therefore, support from a newspaper such as *The Daily Mail*, or even *The Sun* not widely referred to as liberal-progressive, could be particularly effective for a civil liberties campaign.

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Following criticism of the Bill’s threat to ‘our’ rights, it became apparent that unlike open justice in civil proceedings, open justice in coroners’ inquests was not a rule that could be broken. Lobbying from within parliament, the news media – including the *Daily Mail* - and activists including Reprieve and Liberty ensured inquests were excluded from the Bill first published on 29th May 2012 (HM Government 2012) and the wording was changed from ‘public interest’ to ‘interests of national security’. In an article in the *Daily Mail* (29th May 2012) the Justice Secretary directly attributed his change of policy to the newspaper – his article was headlined ‘My plans were too broad and the *Mail* has done a service to the public interest’ and he suggests campaigners highlighted ‘the threat to the UK’s tradition of open justice’.

The amended Justice and Security Bill published on 29th May 2012 was framed by the Government and some of the news media as a compromise. On 29th May, *The Sun* headline read ‘Ken does U-turn on secrecy’ and when the Bill was passed in the House of Lords on 21st November again most of the news media coverage, particularly the headlines,

highlighted the defeats for the Government, with the passing of the Bill as a whole given secondary prominence. On 22nd November 2012, for example, *The Guardian* headline read ‘Secret courts bill savaged by the House of Lords’. The news media gave the impression that the Bill was in jeopardy. However, the key clauses introducing CMPs remained. The idea of a Government compromise was not only prominent and intertextually repeated, but it implicitly supported the notion that the legislative process facilitated contributions from a range of actors. This allowed further presentation of the UK Government’s position as concessionary and reasonable. This diverted attention from the closed position adopted towards voices from those deemed to be an Other or even a potential enemy, both in the deliberation of the Bill now and in future civil court cases.

Conclusion

The discourse surrounding the Bill involved legal complexities, tied up with sentiments towards tradition, values and national identity~~ – but, revealingly, these showed little evidence of cosmopolitanism, as defined by Delanty above~~. While some amendments to the Bill were made, these were limited and the argument that the principles of open and natural justice could be broken prevailed when it was perceived to concern national security but not threaten ‘our’ civil liberties. Furthermore, the discourse was set in the context of international intelligence sharing and secrecy. Therefore, concerns that intelligence relationships were under threat were linked to imaginaries that repeatedly reappeared in the discourse. These ultimately supported arguments in favour of CMPs and less public disclosure of information in the courts.

~~Former detainees and those who made civil claims against the Government contributed little to the deliberation and the use of CMPs under the Act will likely provide more possibilities for Government to control which information is disclosed.~~ Indeed, as an early indicator of how the genre of discourse surrounding civil claims related to security will develop, in 2014 McNamara and Lock (2014) reported that in the first year of the Act, five applications had been made for CMPs however the Government had not released information detailing which cases they were.

With the passing of the Bill, secrecy, controlled by the Government, therefore appears set to increase. However, by presenting the deliberating process surrounding legislation as reasoned, measured and negotiated, legitimacy was provided for the Act in the elite fields

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assessed here.—_The use of well-placed authoritative sources with access to exclusive information, such as the Independent Reviewer of Terrorism Legislation, David Anderson, were key to this. However, the relative lack of criticism levelled at the 'Independent Reviewer' despite his opaque methods indicates the importance of control of secret information in the justification of a securitisation move. It is this control that facilitates the creation of credible and authoritative sources; and these sources hold a deontological legitimacy because they have been created through a recognised official process. This supports Balsacq's (2015: 5-8) suggestion that deontic features can be important factors in the provision of justification and consent for securitsation. Moreover, it also highlights the leverage in argumentation that control of secret information can provide and therefore suggests that secrecy may not only be an end-goal of securitisation moves, but that reference to secret intelligence can legitimise these moves too.

Initial indications in the discourse surrounding other counterterrorism legislation suggest that these findings can be generalised. The importance of secrecy in (i) the construction of authority and (ii) imaginaries, followed by the appearance of acting cautiously and rationally despite these threats continues to be key. For example, the legislative passage of changes to the law related to surveillance and bulk collection of communications data have demonstrated similar features. In this case privacy rights have been challenged but, as with the Justice and Security Bill, the original proposals have also been watered down. Original plans in 2009 for a large government database have been changed to requirements for private internet service providers to retain data; and, further concessions concerning judicial authorisation look likely as the most recent Draft Investigatory Powers Bill is deliberated (*The Guardian*, 2015). In debate surrounding this legislation, the Intelligence and Security Committee (2015) again promoted imaginaries of attacks – through reference to the lack of interception of the communications of the killers of Fusilier Lee Rigby - and once more the Independent Reviewer of Terrorism Legislation has been widely referred to and is informing 'public and political debate' with his 'unrestricted access, at the highest level of security clearance, to the responsible Government Departments' (Anderson, 2015). The potential for control of secrecy to be crucial to argumentation surrounding security is again clear.

More broadly, the findings in this paper support Basaran's (2008) thesis that identity and borders are constituted in law by liberal governance. The research in this paper highlight how compromise of legal principles are challenged and do need to be justified, but it suggests

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that information – even evidence related to grave human rights abuse – may be successfully argued to be beyond legal borders where it is intelligence that concerns a threat from a perceived potential enemy. ~~–~~The potential for these ~~developments~~ restrictions on rights to contribute to further animosity and distrust is clear and is also worth noting for studies on radicalisation.

Nonetheless, this research has demonstrated how key phenomena in argumentation - authoritative sources, imaginaries of attacks, collective self-identity and Othering - are inter-related and dynamic.~~–~~ Accordingly, there was evidence of argumentation advocating desecuritisation and t~~T~~his suggests that securitisation has not been comprehensive and that there is possibility for change. Here constitutional and democratic principles such as open and natural justice were more likely to be defended when those whose rights are threatened were not deemed to be a potential enemy. By ~~searching for cosmopolitanism, or a lack of cosmopolitanism and the uncosmopolitan nature of~~noting Othering in the discourse, this paper also provided insight into how discourse developed following changes to amend legal principles and civil liberties' norms. This can add to the explanations that Jonathan Bright (2012) has already provided on the impact of securitisation moves. Therefore, I call for an even ~~A~~ greater awareness of Othering and collective identity amongst security and securitisation scholars and, most importantly, the further investigation of the significance of the control of secret information in construct~~ed nature of~~ing authority and ~~the lack of cosmopolitanism~~imaginaries ~~could be important first steps towards creating more open discourse, even~~ in this highly contested and secretive area that is ~~justice and~~ security discourse.

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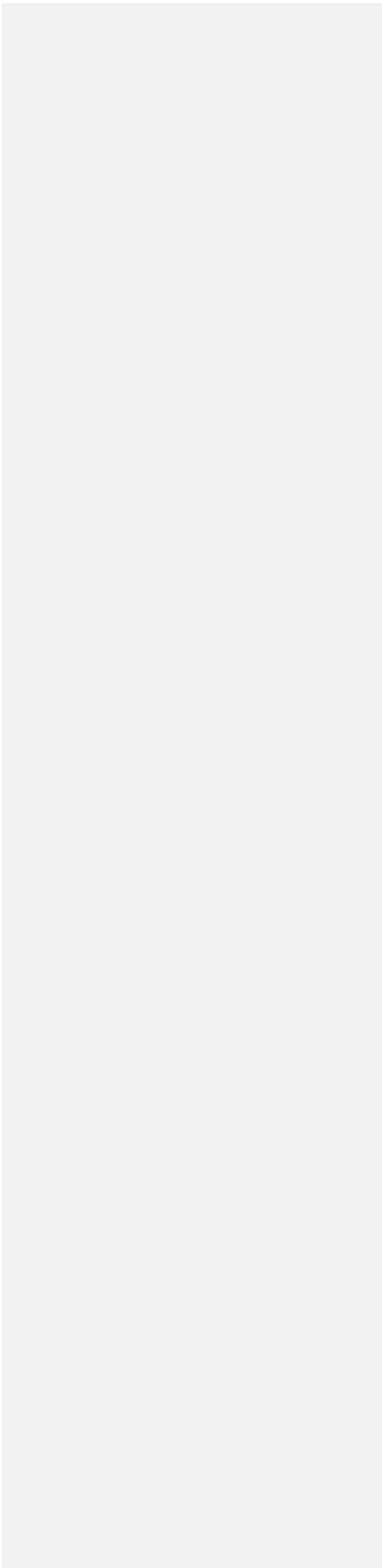

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Appendix - Number of articles published for 28 significant events related to the passage of the Justice and Security Bill*

	Date	Event	Guardian & Obser.	Telegraph & Sunday Telegraph	Times & S. Times	The Sun	Daily M & Mail o Sun.	BBC Website	TOTAL
1	18/11/2009	The High Court allows in principle, introduction of secret evidence in civil trials	1	0	1	0	1	0	3
2	10/02/2010	Binyam Mohamed Court of Appeal ruling	9	4	6	3	4	13	39
3	04/05/2010	The Court of Appeal overturns the High Court ruling “firmly and unambiguously”	2	1	1	0	1	1	6
4	16/11/2010	Ken Clarke announces mediated out-of-court settlement	6	3	8	5	5	12	39
5	13/07/2011	The Supreme Court unanimously dismisses the government’s further appeal	1	0	1	0	0	0	2
6	19/10/2011	Government publishes a Green Paper	2	1	1	0	1	1	6
7	04/04/2012	Joint Committee on Human Rights publishes report on Green Paper	9	4	1	4	9	5	32
8	29/05/2012	Justice and Security Bill published	7	4	1	2	5	4	23
9	15/06/2012	Lords Constitution Committee Report on Bill published	0	3	1	0	0	0	4
10	19/06/2012	Second Reading House of Lords (i.e. first debate)	2	0	0	0	0	2	4
11	06/07/2012	Lords Constitution Committee Report on Norwich Pharmacal implications of Bill	0	0	0	0	0	0	0
12	09/07/2012	1st Committee Sitting House of Lords	0	1	0	0	0	0	1
13	11/07/2012	2nd Committee Sitting House of Lords	0	0	0	0	0	0	0
14	17/07/2012	3rd Committee Sitting House of Lords	0	0	0	0	0	0	0
15	23/07/2012	4th Committee Sitting House of Lords	0	0	0	0	0	0	0
16	12/09/2012	UN Special Rapporteur on Torture expresses concerns on Bill at Chatham House	1	0	0	0	0	0	1
17	26/09/2012	Secret courts plan voted against at Lib Dem conference	5	1	1	1	1	2	11
18	15/10/2012	UK accused of helping to supply arms for Northern Ireland loyalist killings	1	0	0	0	0	0	1
19	15/10/2012	Secret courts plan criticised as 'Kafkaesque' by Amnesty International	1	1	0	0	1	1	4
20	16/10/2012	Guardian website story on colonial case lawyers fear of secret courts	0	0	0	0	0	0	0
21	13/11/2012	Joint Committee on Human Rights publishes 2nd report on Bill	1	1	0	0	1	1	4
22	20/11/2012	Master of the Rolls, Lord Neuberger Speech on Open Justice	0	0	0	0	0	0	0
23	21/11/2012	2nd report stage in House of Lords including division votes on amendments	2	1	1	1	2	2	9
24	18/12/2012	Second Reading in House of Commons (i.e. first debate)	0	1	1	0	1	1	4
25	28/01/2013	Publication of House of Commons Committee Stage Amendments	1	1	0	0	2	1	5
26	04/03/2013	House of Commons Report Stage	3	4	4	1	6	3	21
27	07/03/2013	Third Reading in the House of Commons	0	0	0	0	0	0	0
28	26/03/2013	Final vote on Commons Amendments in the House of Lords	1	0	0	0	2	0	3
		TOTAL	55	31	28	17	42	49	222

*LexisNexis.com database and the BBC news website were searched for articles on the date of event and the following day. Articles were retrieved from results from searches with six or seven key terms selected for each event i.e. “Lords” or “lord” or “justice and security” or “secret courts” or “secret justice” or “closed material”.

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