



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

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Abstract:	<p>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.</p>

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On the 25<sup>th</sup> 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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7 significant moments and supported indirectly through references to national security.  
8 Thirdly, the competing notion of a *collective self-identity* that demanded maintenance of legal  
9 principles - but only when rights of those not perceived as enemies were threatened - served  
10 to present the resulting Act as negotiated and balanced. This provided the Act with legitimacy  
11 despite the Othering and opaque verification of reasoning on which claims in argumentation  
12 were based.  
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16 This research will contribute to scholarship on the intersection between law and security.  
17 Basaran (2008) has argued that ‘spaces of exclusion’ are intrinsic to the mundane and banal  
18 practices of the liberal state, noting the multiplication of legal borders that are created not  
19 simply by territorial factors but also by practices of governance. Here I assess how secrecy  
20 can impact on argumentation surrounding the creation of law on justice and security issues.  
21 Indeed, scholars have lamented the scant attention that the relationship between the  
22 intelligence services and public political discourse receives in academic literature (Herfroy-  
23 Mischler, 2015; Hillebrand, 2012); including literature on securitisation.  
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29 In their seminal work on securitisation, scholars Barry Buzan, Ole Wæver and Jaap de Wilde  
30 (1998: 30) proposed that the way that threats are presented discursively, rather than the threat  
31 itself, should be central to any assessment of security. They make clear that securitization  
32 impacts on politics, suggesting that it ‘takes politics beyond the established rules of the game  
33 and frames the issue either as a special kind of politics or as above politics’ (Buzan et al.  
34 1998: 144). By securitizing an issue debate can be restricted and in the case analysed here,  
35 the Justice and Security Act is likely to see discussion surrounding human rights abuses  
36 related to counterterrorism restricted. By employing a methodology that selectively draws on  
37 more recent literature on securitisation and combines Martin Reisigl and Ruth Wodaks’  
38 (2009) and Norman and Isabella Faircloughs’ (2012) work on critical discourse analysis and  
39 argumentation, it provides new insight into development of argumentation surrounding  
40 securitising acts; and it is to the methodology that I now turn.  
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#### 46 47 **Methodology and outline of article**

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49 My methodology combines analysis of texts, context and intertextuality with argumentation  
50 and I suggest this facilitates a contribution to recent scholarship on securitisation. Originally,  
51 Barry Buzan, Ole Wæver and Jaap de Wilde (1998: 32) proposed that assessment of  
52 securitization involves particular questions: ‘who securitizes (Securitizing actor), on what  
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7 issues (threats), for whom (referent object), why, with what results, and not least, under what  
8 conditions?' Although Buzan *et al.* do recognize the need for the audience to accept a  
9 securitizing move, other scholars have called for more consideration of the role of the  
10 heterogeneous audience and the sociological context (Salter, 2008; Balsacq, 2011: 7; Hansen,  
11 2000).

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15 My analysis of texts is in line with recent explicit recognition of this need for securitisation to  
16 consider more the context and audience, I investigate discourse practice by looking at the  
17 relations between texts and how these texts are produced and interpreted - what Fairclough  
18 (1992: 84) and Lene Hansen (2006:55-73) call 'intertextuality'. Identifying sometimes latent  
19 evidence of influence from sources and texts on each other can be difficult and the solution  
20 adopted here is to engage in deeper contextual analysis, thereby systematically looking for  
21 patterns and noting dissimilarities and omissions. This is particularly important in this case  
22 because secrecy makes interpretation of the cause and effect of practice, including discursive  
23 practice, even more difficult to discern.

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29 I therefore undertook an analysis of a large number of texts related to political discourse  
30 surrounding the passage of the Bill. I collected texts from news media, legal, activist and  
31 governmental fields that I judged to impact significantly on the discourse surrounding the Bill  
32 and ultimately the voting in the Houses of Parliament. I traced the intertextual repetitions of  
33 the discourses in debates and output from the House of Lords and Commons, including their  
34 scrutinizing committees. In the news media I examined a corpus of 222 news texts (see  
35 Appendix). The news media texts published by six news outlets were chosen because of their  
36 diverse editorial lines and higher numbers of readers both in their printed format and on the  
37 Internet (OFCOM 2012; Ponsford 2013). The publications included: *The Guardian* and *The*  
38 *Observer*, *The Daily Mail* and *The Mail on Sunday*, *The Daily Telegraph* and *The Sunday*  
39 *Telegraph*, *The Times* and *The Sunday Times* and *The Sun* and *The News of The World* and  
40 the *BBC News* website. I retrieved newspaper media texts from lexisnexis.com, whilst using  
41 the BBC website for its output. I also looked at output from the activist field, again assessing  
42 their intertextual impact on other actors and texts. In terms of the legal field I referred to key  
43 legal judgements and comments from significant legal commentators, including human rights  
44 activists Reprieve. In order to gain further insight into the practice of significant actors, I  
45 supplemented this textual analysis with background interviews with actors from news media  
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7 (Ian Cobain from *The Guardian* and an undisclosed interviewee from a BBC journalist),  
8 governmental (Sir Malcolm Rifkind) and activist fields (three employees from Reprieve).  
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10 I also consider argumentation. The potential for issues to become desecuritized and openly  
11 discussed in public has been widely recognised (for example, Salter and Mutlu, 2013) and my  
12 focus on argumentation is partly chosen to interrogate the success of the myriad of  
13 securitizing and desecuritising moves that took place to justify or challenge the bill.  
14 Furthermore, Thierry Balsacq (2015: 1-10) has written on the importance of legitimacy in the  
15 complex relations between securitizing actor and referent object. Accordingly, the analysis  
16 of argumentation below also facilitates consideration of legitimacy – specifically the  
17 legitimacy provided for the provisions in the Justice and Security Act that treats evidence  
18 related to intelligence as being beyond public scrutiny. In this case, viewing legitimacy on a  
19 continuum (Balsacq, 2015: 5), the securitisation of the issue required sufficient legitimacy for  
20 parliament to approve it.  
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27 Critical discourse analysts Martin Reisigl and Ruth Wodak (2009) and Norman Fairclough  
28 and Isabella Fairclough (2012) provide practical insight into how argumentation can be  
29 analysed. Reisigl and Wodak break down the construction of arguments by assessing ‘topoi’.  
30 Topoi are the topics or issues that form premises on which claims within argumentation are  
31 made (Reisigl & Wodak, 2009: 110). The repetition of topoi across texts can be traced and  
32 accordingly my analysis is not limited to arguments that are enunciated in whole in individual  
33 texts, but also encompasses arguments formed in the discourse over time, for example  
34 through campaigns or through argumentation structures that develop as the supporting topoi  
35 are repeated across texts, intertextually. Yet, while I emulated Reisigl and Wodak’s  
36 recording of topoi and premises found in the empirical data, this alone does not allow a  
37 sufficient reconstruction of the framework of arguments, thereby making explanatory or  
38 normative critique more difficult. Therefore, I added Fairclough and Faircloughs’ analytical  
39 breakdown of argumentation to intertextual analysis of topoi.  
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47 Fairclough and Fairclough (2012: 51 & 124) break down the structure of arguments more  
48 systematically. Fairclough and Fairclough’s consideration of argument and counter-argument  
49 investigates the following aspects: goals, values, circumstances, means, negative  
50 consequences, claims and counter claims and arguments from authority. This schema for the  
51 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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7 instructions from the ‘client’ before they have seen the closed material but not after (House of  
8 Commons Research Paper, 2012).  
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10 On the Bill’s reading in the House of Commons, Kenneth Clarke MP suggested that without  
11 CMPs there would be ‘no justice at all’ (2013). As did the former head of MI5, Eliza  
12 Manningham-Buller (2012) and her argument was published in an op-ed in *The Times* on 14<sup>th</sup>  
13 November 2012. On 4<sup>th</sup> March 2013, the former Chief Justice Lord Wolf was quoted in the  
14 *Daily Mail* (Gibb, 2013) concurring that CMPs would be ‘better than the existing system  
15 where sensitive material is either heard at trial or excluded altogether’; and a similar claim  
16 was made by members of the Intelligence and Security Committee (ISC) in the debate in the  
17 House of Commons on 4<sup>th</sup> March 2013, including Hazel Blears MP (2013), Sir Malcom  
18 Rifkind MP (2013) and George Howarth MP (2013).  
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20 However, in the Supreme Court, Lord Kerr in *Al Rawi & Ors v The Security Service & Ors*  
21 (2011) critiqued the assumption implicit in the argument that CMPs facilitate justice:  
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28 The central fallacy of the argument, however, lies in the unspoken assumption that,  
29 because the judge sees everything, he is bound to be in a better position to reach a fair  
30 result. That assumption is misplaced. To be truly valuable, evidence must be capable  
31 of withstanding challenge. I go further. Evidence which has been insulated from  
32 challenge may positively mislead.  
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34 Lord Kerr was cited repeatedly in the House of Lords (see Pannick, 2012; Beecham, 2012)  
35 and in the House of Lords debate, the former Director of Public Prosecutions, Lord  
36 MacDonald (2012) suggested that simply by having access to more information does not  
37 necessarily ensure that people become better informed, stating:  
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41 I have spent many years in criminal courts watching evidence that at first sight  
42 seemed persuasive, truthful and accurate disintegrating under cross-examination  
43 conducted upon the instructions of one of the parties.  
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45 In the argumentation for CMPs or PII procedures the ostensible agreed ‘goal’ is the  
46 maximisation of justice through a trial in ‘circumstances’ where some evidence is national  
47 security sensitive. Kenneth Clarke and Eliza Manningham-Buller argue that the ‘means’ to  
48 achieve this are CMPs because they facilitate the consideration of a greater quantity of  
49 information, whereas Lord MacDonald argues against this on the basis that CMPs produce  
50 ‘negative consequences’ through their unreliable information or evidence. In this  
51 argumentation surrounding quality or quantity of information and evidence, it is differing  
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7 *authoritative* sources that contest whether CMPs are beneficial or detrimental to justice.  
8 Fairclough and Fairclough (2012:123-4) highlight the effectiveness of arguments originating  
9 from authority. But what constitutes authority and qualifies a position as more authoritative –  
10 or, a source as being in a more acceptable or justifiable position to comment - is disputable.  
11 As long ago as 1956 Hannah Arendt suggested that the modern world was bereft of any  
12 ‘authentic and indisputable’ authority. Nonetheless, despite being contested, some positions  
13 are clearly more authoritative than others.  
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18 For instance, the Special Advocates make a claim to a privileged or authoritative opinion  
19 based on their experience in operating closed material procedures - many of which were  
20 related to immigration and security issues in the Special Immigration Appeals Commission.  
21 The Special Advocates’ criticisms of CMPs were put forward in their response to the  
22 Government consultation and was signed by 59 of 67 Special Advocates. They concluded  
23 that it ‘would be most undesirable to extend CMPs any further’ (Special Advocates, 2012:  
24 para. 26). Moreover, the Special Advocates’ authority was sufficient to ensure their claims  
25 had intertextual repercussions. Summaries of their criticisms were repeated by the Joint  
26 Committee on Human Rights (2012a: para 12); the then Justice Secretary, Kenneth Clarke  
27 MP, told the Joint Committee on Human Rights on 6th March 2012 that ‘[o]f all the  
28 responses, the evidence of the special advocates most unsettled me’ (JCHR, 2012d); and,  
29 David Davis (2012) was one of many to cite their position in the Houses of Parliament.  
30 However, the Special Advocates were still vulnerable to accusations of partiality and  
31 Kenneth Clarke (2012a) attempted to trump David Davis’ authoritative source by referring to  
32 his undisclosed discussions with judges who were in favour of CMPs. As such, the question  
33 as to whether CMPs would improve justice remained unresolved.  
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42 However, security discourse develops in a particular context of secrecy and distrust and this  
43 can and did impact on the construction of authority. The classified nature of intelligence and  
44 the *sub judice* rules limiting discussion of evidence currently being considered by the courts  
45 can make claims harder to support or, conversely, challenge. Therefore, while Fairclough  
46 and Faircloughs’ examples of ‘authoritative argument’ are from established public bodies  
47 with recognized (albeit fallible) expertise such as the IMF or Confederation of British  
48 Industry; in the context of secrecy and uncertainty in security and rights discourse, claims to  
49 authoritative opinions are often based on exclusive access to information and knowledge – as  
50 a current member of the Government such as Kenneth Clarke or a former Head of the  
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7 Security Services such as Eliza Manningham-Buller, as a Special Advocate, or as a member  
8 of the Intelligence and Security Committee. Nonetheless, conspicuously, although former  
9 detainees and terrorism suspects may have an exclusive perspective, their comments were  
10 rarely voiced in the parliamentary, news media or legal texts assessed; unless their comments  
11 were channeled through a more authoritative intermediary, such as the activist group  
12 Reprieve, thereby providing them with more credibility and weight. For instance, institutions  
13 of the UK parliament were more likely to hold authority here. Authority could be created by  
14 a institutions deontological legitimacy derived from the systems, rules and processes it  
15 followed. The UK parliament's Joint Committee on Human Rights heard evidence from a  
16 number of leading legal practitioners (including Special Advocates), journalists and Ministers  
17 of Governments and concluded that there is no evidence that circumstances suggest a change  
18 to CMPs is needed because no cases to date have been dismissed as untriable because of  
19 evidence being excluded under PII (JCHR, 2012a). Criticisms from activists gained authority  
20 as their testimony was repeated in deontologically legitimate institutions. The JCHR report,  
21 for example, (2012a) featured in 32 articles in the news outlets examined (see Appendix,  
22 Row 7).  
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31 The Government's argument centred on its proposition that the 'circumstances' of on-going  
32 cases did require change but that classified evidence and *sub judice* rules prevented them  
33 from producing the evidence. In order to substantiate their claim, the Government created an  
34 authoritative source with yet more insight into selected exclusive information. They provided  
35 evidence to David Anderson QC, the Independent Reviewer of Terrorism Legislation, of on-  
36 going cases that might be put forward for CMPs. Of the 27 cases cited in the Green Paper,  
37 David Anderson was given special clearance to access information concerning seven cases  
38 (four were immigration cases) currently before the courts. As an 'independent' authority  
39 Anderson concluded that:  
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45 The cases to which I have been introduced persuade me that there is a small but  
46 indeterminate category of national security-related claims, both for judicial review of  
47 executive decisions and for civil damages, in respect of which it is preferable that the  
48 option of a CMP – for all its inadequacies – should exist (cited in Secretary of State  
49 for Justice, 2012: 4).

50 On 4<sup>th</sup> March 2013, in the final reading in the House of Commons, the Shadow Justice  
51 Secretary, Labour MP Sadiq Khan quoted this statement from David Anderson verbatim and  
52 prefaced it by saying:  
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7 Let me begin by making it absolutely clear to the House where the Opposition stand  
8 on the issue of closed material procedures in civil proceedings. We accept that there  
9 may be rare examples where it is preferable for a CMP to be used because there is no  
10 other way a particular case can be heard. Our position has been influenced to a large  
11 extent by the views of the independent reviewer of terrorism legislation, Mr David  
12 Anderson QC.

13 In both Houses of Parliament the Independent Reviewer of Terrorism Legislation, David  
14 Anderson QC appeared to be particularly influential on members of all major parties. In the  
15 House of Commons, Conservative backbencher (and Joint Secretary of the 1922 Committee)  
16 Robert Buckland MP (2012) said: ‘much has been made of the views of Mr David Anderson  
17 QC ... he, like me, is very much a reluctant convert to the limited use of closed material  
18 proceedings’; and, in the House of Lords on 21st November 2012, Liberal Democrat Lord  
19 Wallace (2012) suggested that David Anderson QC ‘probably gets the prize for the most  
20 quoted person in these debates’. Anderson’s insider knowledge and apparent ‘independent’  
21 status ensure a degree of trust from the parliamentarians that, however contrived, allows him  
22 to speak with authority. His style is judged by parliamentarians to be measured and one of  
23 objectivity, to which they are happy to relate to – describing him to be ‘like me’ and ‘a  
24 reluctant convert’. However, on closer examination the governmental systems and processes  
25 involved in vesting him with that authority held questionable objectivity.  
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29 In a submission to the Joint Committee on Human Rights (2012b: para 34) the ‘Special  
30 Advocates’ – who have had direct experience working with CMPs - disagreed with  
31 Anderson’s conclusion. Special Advocate Angus McCullough (JCHR, 2012c: page 16)  
32 challenged Anderson’s position suggesting that the cases seen by the Independent Reviewer  
33 were ‘a selection of three that had been, presumably, handpicked by the Government to prove  
34 their point’. The Special Advocates also cast further doubt on the judicial fairness of CMPs  
35 as currently practised in the immigration courts noting the ‘lack of any formal rules of  
36 evidence, so allowing second or third hand hearsay to be admitted, or even more remote  
37 evidence’. The Special Advocates (2012: para. 7) also describe:  
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41 [the] increasing practice of serving redacted closed documents on the Special  
42 Advocates, and resisting requests by the Special Advocates for production of  
43 documents to them on the basis of the Government’s unilateral view of relevance.  
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47 The Special Advocates’ testimony suggests that through CMPs, standards of proof and  
48 disclosure in the intelligence services are migrating into the legal field, and they are altering  
49 judicial process in favour of secrecy and security, thereby reducing the possibility of  
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7 accountability for violations of human rights. However, they did not match the authority of  
8 David Anderson as an 'independent', informed source.  
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11 In summary, much of the Government's argumentation was focused on the disputed  
12 'circumstances' concerning the operation of trials in the context of sensitive information and  
13 the disputed 'means' to move from those circumstances to the 'end goal' of natural justice.  
14 The government claimed that more evidence (albeit unchallenged by opposing parties in the  
15 case) would assist this process and significantly a source with constructed authority, David  
16 Anderson QC, supported them. Yet given the Special Advocates' submissions concerning  
17 dubious evidence and additional secrecy maintained by the security services operating in  
18 CMPs and that previous use of PII principles led to disclosure that the UK Government was  
19 concerned with in the Binyam Mohamed case (see next section) there is a strong possibility  
20 that the Government's primary end goal was not 'justice', but was more concerned with  
21 ensuring secrecy and control of information. This exchange of claims and counter-claims on  
22 the impact of CMPs on justice, that was foregrounded by the argumentation, diverted  
23 attention from issues surrounding the control of intelligence. Certainly the additional  
24 provisions within the Bill to preclude courts from ordering disclosure of information held by  
25 the intelligence services related to international human rights abuses (also referred to as  
26 Norwich Pharmacal orders) were clearly included for this purpose. If this was one of the  
27 motivations for including CMPs too, it was obscured through the argumentation structure that  
28 ostensibly focused on justice but also repeatedly privileged and reinforced the authority  
29 behested to secretive sources. I therefore now further investigate how the Government and  
30 then parliament supported the control of intelligence/evidence and the promotion of secrecy.  
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## 40 **2. Government control of intelligence/evidence and the promotion of secrecy**

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43 On February 10<sup>th</sup> 2010, in *Binyam Mohamed Court vs. Foreign Secretary of Appeal (Civil*  
44 *Division) [2010] EWCA Civ 65* it was ruled that the summary of the information that the UK  
45 had been given by the US regarding the treatment of Binyam Mohamed in US custody should  
46 be published in the public interest. In defying the UK Government, the courts applied PII  
47 principles and therefore the interests of secrecy were balanced with the public interest for  
48 open accountability (Hickman, 2013). The case received substantial news media coverage  
49 (see Appendix, Row 2). However, in calling for disclosure, the Court of Appeal (para. 13)  
50 made clear that Mohamed's treatment in the US had already been disclosed by a US court  
51 and that there was no 'breach of security' and no 'intelligence material' was revealed.  
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7 Members of the Security Services have since publicly called for more secrecy surrounding  
8 intelligence, and a prioritisation of the control principle over the disclosure of information  
9 related to human rights abuses. The head of MI6 John Sawers explained (in *The Times*, 29<sup>th</sup>  
10 October 2010):  
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13 ...we have a rule called the ‘control principle’: the service that first obtains the  
14 intelligence has the right to control how it is used. It is rule number one of intelligence  
15 sharing. If the control principle is not respected, the intelligence sharing dries up.  
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17 Adherence to the control principle ensures that when intelligence becomes evidence in the  
18 legal field it remains secret. Under the control principle intelligence is not discussed  
19 publicly. In the discourse surrounding the Justice and Security Bill, it is the Government and  
20 the security services that promote the notion that there is a need to maintain secrecy amongst  
21 parliamentarians and the broader public, so that legislation promoting secrecy is passed due  
22 to the terrorist threat faced and this was demonstrated at key moments. For example,  
23 following publication of parliament’s Joint Committee on Human Rights Report on the  
24 Justice and Security Green Paper (2012a) *The Daily Telegraph* cited a ‘senior British security  
25 source’ and led an article on 4<sup>th</sup> April 2012 (Winnett, 2012) with the following:  
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31 AMERICAN spy agencies refused to give Britain's intelligence services full details of  
32 a "Mumbai-style" terrorist plot in this country because they feared that top-secret  
33 sources would be exposed. The Daily Telegraph can disclose.  
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35 This is an example of how argumentation in favour of secrecy is promoted through  
36 imaginaries of future risk by Government and the security services. Fairclough and  
37 Fairclough (2012: 103-8) explain how discourses about the future – or imaginaries - can  
38 describe possible worlds, including risks or potential circumstances caused by our (in)action  
39 now. Furthermore, in the above extract *The Daily Telegraph* compounds the representation  
40 of an imaginary of a “Mumbai-style” terrorist plot, with an emphasis on the exclusive nature  
41 of its source. This provides this imaginary with additional authority because it is framed as  
42 emanating from a source with access to exclusive information. Occasional authoritative  
43 reference to imaginaries of risk in the discourse maintains the latent imaginary of a potential  
44 attack and corresponds with Richard Grusin’s thesis that the news media repeats (or  
45 remediates) stories concerning the potential of attack in an attempt to premeditate and mitigate  
46 the shock from any future imagined attack (Grusin, 2010).  
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53 As noted in the previous section, members of the UK Intelligence and Security Committee  
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7 (ISC), with their exclusive discussions access to the UK Governments Security Services and  
8 Secret Intelligence Services were more prominent in the discourse surrounding the  
9 legislation. Furthermore, evidence was found of their promotion of risk based imaginaries.  
10 Speaking on 'national security', ISC member, Hazel Blears MP (2012) suggested there would  
11 be a heightened risk of an attack if the control principle was not adhered to:  
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15 I think of the information that the US has provided us with to protect our security. I  
16 think of the bomb plot in April—the second underpants bomb plot—where the liaison  
17 between the US and this country was essential to preventing an incident that could  
18 have cost many lives.  
19

20 These imaginaries can therefore justify claims that secrecy is justified. However, they are not  
21 always referred to so explicitly. They may be implicitly referred to through references to  
22 intelligence sharing relationships or the associated concept of national security (that protects  
23 against such threats). This, however, is explicitly referred to at crucial junctures. For  
24 example, the first line of the Forward, Executive Summary and First Section of the Green  
25 Paper reaffirm that the first duty of government is to provide national security. Similar  
26 references are common in the media. For example in the face of strong criticism from the  
27 widely reported Joint Committee on Human Rights on 4<sup>th</sup> April 2012, *The Telegraph's*  
28 editorial of 4<sup>th</sup> April, explicitly supports the proposals for more secrecy in hearings with a  
29 piece entitled 'Secrecy in the interests of national security'. On 5<sup>th</sup> April, in an article entitled  
30 'Cam vow to tighten security', *The Sun* presented Prime Minister Cameron as strong on  
31 security as he 'vowed to plug 'significant gaps' in UK security', whereas Deputy Prime  
32 Minister Clegg, who opposed it, is reported to have 'wobbled' – a particularly unsecure  
33 adjective.  
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40 Claims based on imaginaries of insecurity and potential violent threat to 'us' as a nation are  
41 commonplace. However, the most prominent counter-claim to discourses pertaining to  
42 security and imaginaries of future insecurity and risk was not concerned with potential human  
43 rights abuses, nor were they enunciated explicitly or prominently by former detainees or  
44 those directly affected by security practice. Instead, counter-claims centred upon the  
45 indirectly related issue of the departure from the traditions of the UK justice system.  
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50 The Justice and Security Bill's provisions for CMPs threatened the principles of open justice  
51 and natural justice. Open justice involves three factors: (i) that judges give reasons for their  
52 decisions; (ii) that court hearings are held in public; and, (iii) that the media are free to report  
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7 on court proceedings (HM Government, 2011: 5). Natural justice is sometimes dubbed  
8 'fairness' and concerns the right of parties to a case to be heard and to hear the opposing  
9 party's case (*audi alterem partem*) and also for parties to cross-examine opposing witnesses.  
10 Ostensibly, support for both principles was conspicuous across all fields. In the UK Supreme  
11 Court Lord Dyson (*Al Rawi & Ors vs Security Service & Ors* [2011] UKSC 35: para. 11)  
12 stated: 'The open justice principle is not a mere procedural rule. It is a fundamental common  
13 law principle'. On natural justice, the continental Other is viewed disparagingly. In *R v*  
14 *Davis* [2008] UKHL 36, Lord Bingham, then the most senior Law Lord, described how as  
15 long ago as in the 19<sup>th</sup> century Jeremy Bentham had 'criticised inquisitorial procedures  
16 practised on the continent of Europe, where evidence was received under a 'veil of secrecy'  
17 and the door was left 'wide open to mendacity, falsehood, and partiality.'" Historically and  
18 contemporaneously, comments noting the superiority of the British system of common law  
19 and the associated principles of open and natural justice are conspicuous amongst senior  
20 jurists.  
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28 Recognition of the long-standing indigenous national character of the norms of open and  
29 natural justice was also evident in the news media. Richard Norton-Taylor reporting on initial  
30 proposals for closed hearings in the *Guardian* (19<sup>th</sup> November 2009) emphasised the break  
31 from tradition in an article headlined: 'MI5, MI6 and the police will be able to withhold  
32 evidence from defendants and their lawyers in civil cases for the first time'; and, James Slack  
33 in the *Daily Mail* (19<sup>th</sup> November 2009) suggested an uncharacteristic move by the nation:  
34 'despite these Kafkaesque restrictions never being permitted in a civil court  
35 before...BRITAIN took another lurch towards 'secret' justice yesterday'. In turn, the activist  
36 group Reprieve (2012b) argued 'plans for secret courts will ride roughshod over centuries-old  
37 British rights to justice'. The language used stresses the break from civil and rational  
38 traditions threatened by the Bill. Reprieve's use of the metaphor 'riding roughshod' implies  
39 an inappropriate beastlike style and the *Mail's* use of the verb 'lurch' suggests a sudden move  
40 away from tradition. Most prominently, the abrogation of natural and open justice through  
41 Closed Material Procedures (CMPs) was communicated through the sound bites 'secret  
42 justice' and 'secret courts'. These epithets have been widely used in the news media (as in  
43 the *Daily Mail's* 'No to Secret Courts Campaign' for example, on 29<sup>th</sup> February 2012) and in  
44 the activist fields (see Reprieve, 2012a). Indeed, the next section demonstrates how such  
45 promotion of a national legal identity was instrumental in the intertextual construction of  
46 discourse across fields; and, crucially, in the amendments made to the Bill. Despite forcing  
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7 concessions the negotiation process ultimately did not stop the legislation and the final  
8 section considers this in more detail.

### 10 **3. Breaking of norms whilst appearing reasonable**

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

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

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

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7 building against the Bill *The Daily Mail* asked: ‘How can ministers justify holding inquests  
8 into police killings and military deaths behind closed doors?’ and highlighted calls for the  
9 criteria for preventing disclosure used in the Green Paper to be ‘tightened’ from ‘public  
10 interest’ to national security. The claimants in such cases would have been less likely to be  
11 terrorist suspects and these cases would be more likely to involve British claimants. Here  
12 open justice was defended where it could affect members of ‘our’ community. *The Daily*  
13 *Mail* was concerned with how the Justice and Security Bill might affect cases involving  
14 British citizens who were not terrorist suspects.  
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19 The Head of Communications at Reprieve, Donald Campbell (2012) stressed how  
20 campaigning on the exclusion of inquests from the Bill ‘does give it a much broader appeal’.  
21 Campbell suggested it might: ‘...put it in a sense that people can more easily understand:  
22 which is that this potentially affects anything that the government can claim [as] national  
23 security - so it’s not just your classic ‘War on Terror’ cases.’ However, concern for the rights  
24 of Others, in Other suspect communities (Hillyard, 1993), such as Muslims deemed to be  
25 potential jihadi terrorists threatening ‘our’ community, was less readily adopted by the news  
26 media or those in the governmental field, demonstrating how such cosmopolitan approaches  
27 gained less traction beyond the activist field. In this case, justice, and particularly open justice  
28 and democratic accountability through the law, were more robustly defended when it was the  
29 rights of the members of the majority community that were threatened.  
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36 Campbell (2012) gave insight into how persuasive argument could be constructed in security  
37 discourse though. He stressed the value of what he termed ‘your unexpected allies or your  
38 kind of ‘establishment figures’’ to activist campaigns. He pointed to the strength of criticism  
39 that comes from those with experience operating the system themselves, such as guards at  
40 Guantanamo Bay Naval Base, or the former UK Director of Public Prosecutions (above):  
41 ‘Those are your ideal figures for presenting because they’ve got the expertise and there’s not  
42 an obvious self interest, or an ‘oh, they would say that wouldn’t they’ aspect to it.’ When an  
43 ‘unexpected ally speaks’, it fulfils the newsworthy criteria of ‘newness’ and of  
44 ‘unexpectedness’ (Galtung and Ruge 1965). Significantly, ‘unexpected allies’ allow issues  
45 concerning authenticity and trust to be put to one side. Therefore, support from a newspaper  
46 such as *The Daily Mail*, or even *The Sun* not widely referred to as liberal-progressive, could  
47 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 29<sup>th</sup> 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* (29<sup>th</sup> 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 29<sup>th</sup> May 2012 was framed by the Government and some of the news media as a compromise. On 29<sup>th</sup> 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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7 ultimately supported arguments in favour of CMPs and less public disclosure of information  
8 in the courts. Indeed, as an early indicator of how the genre of discourse surrounding civil  
9 claims related to security will develop, in 2014 McNamara and Lock (2014) reported that in  
10 the first year of the Act, five applications had been made for CMPs however the Government  
11 had not released information detailing which cases they were.  
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15 With the passing of the Bill, secrecy, controlled by the Government, therefore appears set to  
16 increase. However, by presenting the deliberating process surrounding legislation as  
17 reasoned, measured and negotiated, legitimacy was provided for the Act in the elite fields  
18 assessed here. The use of well-placed authoritative sources with access to exclusive  
19 information, such as the Independent Reviewer of Terrorism Legislation, David Anderson,  
20 were key to this. However, the relative lack of criticism levelled at the 'Independent  
21 Reviewer' despite his opaque methods indicates the importance of control of secret  
22 information in the justification of a securitisation move. It is this control that facilitates the  
23 creation of credible and authoritative sources; and these sources hold a deontological  
24 legitimacy because they have been created through a recognised official process. This  
25 supports Balsacq's (2015: 5-8) suggestion that deontic features can be important factors in  
26 the provision of justification and consent for securitisation. Moreover, it also highlights the  
27 leverage in argumentation that control of secret information can provide and therefore  
28 suggests that secrecy may not only be an end-goal of securitisation moves, but that reference  
29 to secret intelligence can legitimise these moves too.  
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38 Initial indications in the discourse surrounding other counterterrorism legislation suggest that  
39 these findings can be generalised. The importance of secrecy in (i) the construction of  
40 authority and (ii) imaginaries, followed by the appearance of acting cautiously and rationally  
41 despite these threats continues to be key. For example, the legislative passage of changes to  
42 the law related to surveillance and bulk collection of communications data have demonstrated  
43 similar features. In this case privacy rights have been challenged but, as with the Justice and  
44 Security Bill, the original proposals have also been watered down. Original plans in 2009 for  
45 a large government database have been changed to requirements for private internet service  
46 providers to retain data; and, further concessions concerning judicial authorisation look likely  
47 as the most recent Draft Investigatory Powers Bill is deliberated (*The Guardian*, 2015). In  
48 debate surrounding this legislation, the Intelligence and Security Committee (2015) again  
49 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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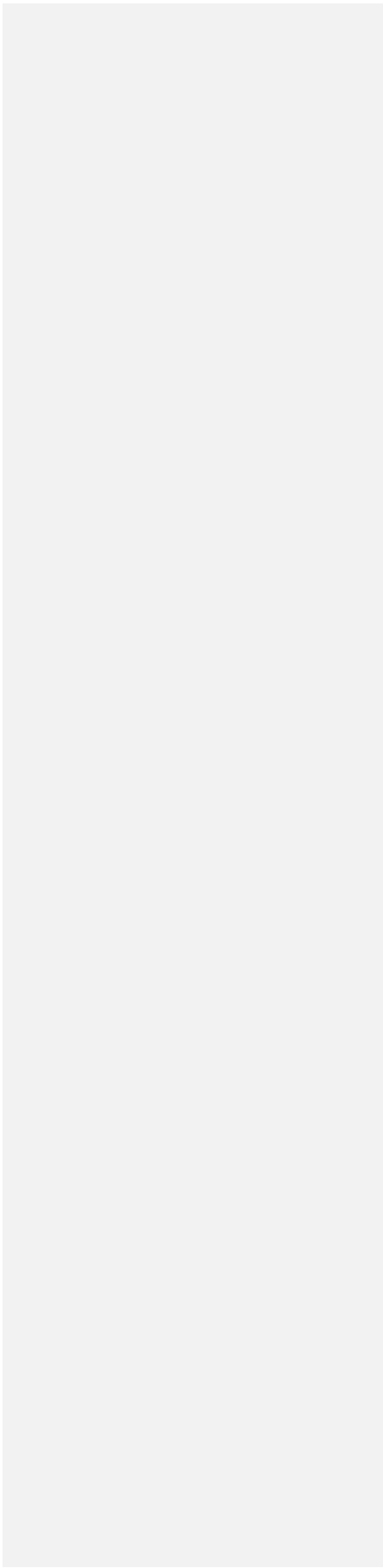
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<< Appendix to be inserted here >>

For Peer Review



## Manuscript

On the 25<sup>th</sup> 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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7 ~~the courts themselves, but in the news media, activist and government fields. What could be~~  
8 ~~submitted for public deliberation and how would be decided by the Bill — to use Norman~~  
9 ~~Fairelough's (2003: 89) terms, in the deliberation of this Bill, the 'genre' of security~~  
10 ~~discourse was at stake.~~

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

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

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

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42 ~~Principally, I argue that secrecy was successfully used as a leverage in order to win~~  
43 ~~argumentation surrounding the Bill. The UK Government ~~successfully~~ employed discourse~~  
44 ~~strategies that reinforced the authority of secretive sources to ensure the Bill was passed.~~  
45 ~~Discursive construction of authoritative sources and imaginaries of future attacks were key to~~  
46 ~~argumentation schema. The dynamics between them and the need to respect legal principles~~  
47 ~~that protected members of 'our' community, led to the passing of the Bill in its final form -~~  
48 ~~approving CMPs, but removing inquests and issues of the 'public interest' from the Bill.~~

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

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

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

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41 In their seminal work on securitisation, scholars Barry Buzan, Ole Wæver and Jaap de Wilde  
42 (1998: 30) proposed that the way that threats are presented discursively, rather than the threat  
43 itself, should be central to any assessment of security. They make clear that securitization  
44 impacts on politics, suggesting that it 'takes politics beyond the established rules of the game  
45 and frames the issue either as a special kind of politics or as above politics' (Buzan et al.  
46 1998: 144). By securitizing an issue debate can be restricted and in the case analysed here,  
47 the Justice and Security Act is likely to see discussion surrounding human rights abuses  
48 related to counterterrorism restricted. By employing a methodology that selectively draws on  
49 more recent literature on securitisation and combines Martin Reisigl and Ruth Wodaks'  
50 (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 audience. I 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 socio-cultural 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 socio-cultural 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). 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.~~

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 desecuritized 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 Wodak’s 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.

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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 21<sup>st</sup> century scholars (Delanty, 2009; Beek, 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.~~

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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.

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#### 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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7 paragraphs will assess the importance and construction of an authoritative style in the related  
8 claims and counterclaims, before ultimately questioning the Government's stated  
9 commitment to justice.  
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12 The Justice and Security Bill (HM Government, 2012) proposed that Closed Material  
13 Procedures (CMPs) replace the current system of Public Interest Immunity (PII). The  
14 Government and security services argued for the extension of CMPs on the basis that the  
15 exclusion of evidence under the PII system restricts the ability of the court to reach a fair  
16 judgment. Under the PII system, PII certificates are issued by a judge to exclude individual  
17 pieces of evidence from the trial. In making this decision the judge considers the various  
18 public interest issues at play in disclosing, or alternatively withholding, pieces of evidence  
19 from the trial. In contrast, under the proposed CMPs, where evidence is deemed sensitive to  
20 'national security' it is heard in closed session. During closed sessions in CMPs one party  
21 and their lawyers do not see the closed material - the closed material is seen by the judge and  
22 Special Advocates. The Special Advocates represent the interests of the excluded party, but  
23 do not have a duty to the 'client', instead only to the court. Special Advocates usually take  
24 instructions from the 'client' before they have seen the closed material but not after (House of  
25 Commons Research Paper, 2012).  
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33 On the Bill's reading in the House of Commons, Kenneth Clarke MP suggested that without  
34 CMPs there would be 'no justice at all' (2013). As did the former head of MI5, Eliza  
35 Manningham-Buller (2012) and her argument was published in an op-ed in *The Times* on 14<sup>th</sup>  
36 November 2012. On 4<sup>th</sup> March 2013, the former Chief Justice Lord Wolf was quoted in the  
37 *Daily Mail* (Gibb, 2013) concurring that CMPs would be 'better than the existing system  
38 where sensitive material is either heard at trial or excluded altogether'; and a similar claim  
39 was made by members of the Intelligence and Security Committee (ISC) in the debate in the  
40 House of Commons on 4<sup>th</sup> March 2013, including Hazel Blears MP (2013), Sir Malcom  
41 Rifkind MP (2013) and George Howarth MP (2013).  
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47 However, in the Supreme Court, Lord Kerr in *Al Rawi & Ors v The Security Service & Ors*  
48 (2011) critiqued the assumption implicit in the argument that CMPs facilitate justice:  
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51 The central fallacy of the argument, however, lies in the unspoken assumption that,  
52 because the judge sees everything, he is bound to be in a better position to reach a fair  
53 result. That assumption is misplaced. To be truly valuable, evidence must be capable  
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7 of withstanding challenge. I go further. Evidence which has been insulated from  
8 challenge may positively mislead.

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10 Lord Kerr was cited repeatedly in the House of Lords (see Pannick, 2012; Beecham, 2012)  
11 and in the House of Lords debate, the former Director of Public Prosecutions, Lord  
12 MacDonald (2012) suggested that simply by having access to more information does not  
13 necessarily ensure that people become better informed, stating:  
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16 I have spent many years in criminal courts watching evidence that at first sight  
17 seemed persuasive, truthful and accurate disintegrating under cross-examination  
18 conducted upon the instructions of one of the parties.  
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20 In the argumentation for CMPs or PII procedures the ostensible agreed 'goal' is the  
21 maximisation of justice through a trial in 'circumstances' where some evidence is national  
22 security sensitive. Kenneth Clarke and Eliza Manningham-Buller argue that the 'means' to  
23 achieve this are CMPs because they facilitate the consideration of a greater quantity of  
24 information, whereas Lord MacDonald argues against this on the basis that CMPs produce  
25 'negative consequences' through their unreliable information or evidence. In this  
26 argumentation surrounding quality or quantity of information and evidence, it is differing  
27 *authoritative* sources that contest whether CMPs are beneficial or detrimental to justice.  
28 Fairclough and Fairclough (2012:123-4) highlight the effectiveness of arguments originating  
29 from authority. But what constitutes authority and qualifies a position as more authoritative –  
30 or, a source as being in a more acceptable or justifiable position to comment - is disputable.  
31 As long ago as 1956 Hannah Arendt suggested that the modern world was bereft of any  
32 'authentic and indisputable' authority. Nonetheless, despite being contested, some positions  
33 are clearly more authoritative than others.  
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36 For instance, the Special Advocates make a claim to a privileged or authoritative opinion  
37 based on their experience in operating closed material procedures - many of which were  
38 related to immigration and security issues in the Special Immigration Appeals Commission.  
39 The Special Advocates' criticisms of CMPs were put forward in their response to the  
40 Government consultation and was signed by 59 of 67 Special Advocates. They concluded  
41 that it 'would be most undesirable to extend CMPs any further' (Special Advocates, 2012:  
42 para. 26). Moreover, the Special Advocates' authority was sufficient to ensure their claims  
43 had intertextual repercussions. Summaries of their criticisms were repeated by the Joint  
44 Committee on Human Rights (2012a: para 12); the then Justice Secretary, Kenneth Clarke  
45 MP, told the Joint Committee on Human Rights on 6th March 2012 that '[o]f all the  
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7 responses, the evidence of the special advocates most unsettled me' (JCHR, 2012d); and,  
8 David Davis (2012) was one of many to cite their position in the Houses of Parliament.  
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10 However, the Special Advocates were still vulnerable to accusations of partiality and  
11 Kenneth Clarke (2012a) attempted to trump David Davis' authoritative source by referring to  
12 his undisclosed discussions with judges who were in favour of CMPs. As such, the question  
13 as to whether CMPs would improve justice remained unresolved.  
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17 However, security discourse develops in a particular context of secrecy and distrust and this  
18 can and did impact on the construction of authority. The classified nature of intelligence and  
19 the *sub judice* rules limiting discussion of evidence currently being considered by the courts  
20 can make claims harder to support or, conversely, challenge. Therefore, while Fairclough  
21 and Faircloughs' examples of 'authoritative argument' are from established public bodies  
22 with recognized (albeit fallible) expertise such as the IMF or Confederation of British  
23 Industry; in the context of secrecy and uncertainty in security and rights discourse, claims to  
24 authoritative opinions are often based on exclusive access to information and knowledge – as  
25 a current member of the Government such as Kenneth Clarke or a former Head of the  
26 Security Services such as Eliza Manningham-Buller, as a Special Advocate, or as a member  
27 of the Intelligence and Security Committee. Nonetheless, conspicuously, although former  
28 detainees and terrorism suspects may have an exclusive perspective, their comments were  
29 rarely voiced in the parliamentary, news media or legal texts assessed; unless their comments  
30 were channeled through a more authoritative intermediary, such as the activist group  
31 Reprieve, thereby providing them with more credibility and weight. For instance, institutions  
32 of the UK parliament were more likely to hold authority here. Authority could be created by  
33 a institutions deontological legitimacy derived from the systems, rules and processes it  
34 followed. The UK parliament's Joint Committee on Human Rights heard evidence from a  
35 number of leading legal practitioners (including Special Advocates), journalists and Ministers  
36 of Governments and concluded that there is no evidence that circumstances suggest a change  
37 to CMPs is needed because no cases to date have been dismissed as untriable because of  
38 evidence being excluded under PII (JCHR, 2012a). Criticisms from activists gained authority  
39 as their testimony was repeated in deontologically legitimate institutions. The JCHR report,  
40 for example, (2012a) featured in 32 articles in the news outlets examined (see Appendix,  
41 Row 7).  
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7 The Government's argument centred on its proposition that the 'circumstances' of on-going  
8 cases did require change but that classified evidence and *sub judice* rules prevented them  
9 from producing the evidence. In order to substantiate their claim, the Government created an  
10 authoritative source with yet more insight into selected exclusive information. They provided  
11 evidence to David Anderson QC, the Independent Reviewer of Terrorism Legislation, of on-  
12 going cases that might be put forward for CMPs. Of the 27 cases cited in the Green Paper,  
13 David Anderson was given special clearance to access information concerning seven cases  
14 (four were immigration cases) currently before the courts. As an 'independent' authority  
15 Anderson concluded that:  
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21 The cases to which I have been introduced persuade me that there is a small but  
22 indeterminate category of national security-related claims, both for judicial review of  
23 executive decisions and for civil damages, in respect of which it is preferable that the  
24 option of a CMP – for all its inadequacies – should exist (cited in Secretary of State  
25 for Justice, 2012: 4).  
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27 On 4<sup>th</sup> March 2013, in the final reading in the House of Commons, the Shadow Justice  
28 Secretary, Labour MP Sadiq Khan quoted this statement from David Anderson verbatim and  
29 prefaced it by saying:  
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32 Let me begin by making it absolutely clear to the House where the Opposition stand  
33 on the issue of closed material procedures in civil proceedings. We accept that there  
34 may be rare examples where it is preferable for a CMP to be used because there is no  
35 other way a particular case can be heard. Our position has been influenced to a large  
36 extent by the views of the independent reviewer of terrorism legislation, Mr David  
37 Anderson QC.  
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39 In both Houses of Parliament the Independent Reviewer of Terrorism Legislation, David  
40 Anderson QC appeared to be particularly influential on members of all major parties. In the  
41 House of Commons, Conservative backbencher (and Joint Secretary of the 1922 Committee)  
42 Robert Buckland MP (2012) said: 'much has been made of the views of Mr David Anderson  
43 QC ... he, like me, is very much a reluctant convert to the limited use of closed material  
44 proceedings'; and, in the House of Lords on 21st November 2012, Liberal Democrat Lord  
45 Wallace (2012) suggested that David Anderson QC 'probably gets the prize for the most  
46 quoted person in these debates'. Anderson's insider knowledge and apparent 'independent'  
47 status ensure a degree of trust from the parliamentarians that, however contrived, allows him  
48 to speak with authority. His style is judged by parliamentarians to be measured and one of  
49 objectivity, to which they are happy to relate to – describing him to be 'like me' and 'a  
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7 reluctant convert'. However, on closer examination the governmental systems and processes  
8 involved in vesting him with that authority held questionable objectivity.  
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10 In a submission to the Joint Committee on Human Rights (2012b: para 34) the 'Special  
11 Advocates' – who have had direct experience working with CMPs - disagreed with  
12 Anderson's conclusion. Special Advocate Angus McCullough (JCHR, 2012c: page 16)  
13 challenged Anderson's position suggesting that the cases seen by the Independent Reviewer  
14 were 'a selection of three that had been, presumably, handpicked by the Government to prove  
15 their point'. The Special Advocates also cast further doubt on the judicial fairness of CMPs  
16 as currently practised in the immigration courts noting the 'lack of any formal rules of  
17 evidence, so allowing second or third hand hearsay to be admitted, or even more remote  
18 evidence'. The Special Advocates (2012: para. 7) also describe:  
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24 [the] increasing practice of serving redacted closed documents on the Special  
25 Advocates, and resisting requests by the Special Advocates for production of  
26 documents to them on the basis of the Government's unilateral view of relevance.  
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28 The Special Advocates' testimony suggests that through CMPs, standards of proof and  
29 disclosure in the intelligence services are migrating into the legal field, and they are altering  
30 judicial process in favour of secrecy and security, thereby reducing the possibility of  
31 accountability for violations of human rights. However, they did not match the authority of  
32 David Anderson as an 'independent', informed source.  
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36 In summary, much of the Government's argumentation was focused on the disputed  
37 'circumstances' concerning the operation of trials in the context of sensitive information and  
38 the disputed 'means' to move from those circumstances to the 'end goal' of natural justice.  
39 The government claimed that more evidence (albeit unchallenged by opposing parties in the  
40 case) would assist this process and significantly a source with constructed authority, David  
41 Anderson QC, supported them. Yet given the Special Advocates' submissions concerning  
42 dubious evidence and additional secrecy maintained by the security services operating in  
43 CMPs and that previous use of PII principles led to disclosure that the UK Government was  
44 concerned with in the Binyam Mohamed case (see next section) there is a strong possibility  
45 that the Government's primary end goal was not 'justice', but was more concerned with  
46 ensuring secrecy and control of information. This exchange of claims and counter-claims on  
47 the impact of CMPs on justice, that was foregrounded by the argumentation, diverted  
48 attention from issues surrounding the control of intelligence. Certainly the additional  
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7 provisions within the Bill to preclude courts from ordering disclosure of information held by  
8 the intelligence services related to international human rights abuses (also referred to as  
9 Norwich Pharmacal orders) were clearly included for this purpose. If this was one of the  
10 motivations for including CMPs too, it was obscured through the argumentation structure that  
11 ostensibly focused on justice but also repeatedly privileged and reinforced the authority  
12 behested to secretive sources. I therefore now further investigate how the Government and  
13 then parliament supported the control of intelligence/evidence and the promotion of secrecy.  
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##### 17 18 **5. Government control of intelligence/evidence and the promotion of secrecy**

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20 On February 10<sup>th</sup> 2010, in *Binyam Mohamed Court vs. Foreign Secretary of Appeal (Civil*  
21 *Division) [2010] EWCA Civ 65* it was ruled that the summary of the information that the UK  
22 had been given by the US regarding the treatment of Binyam Mohamed in US custody should  
23 be published in the public interest. In defying the UK Government, the courts applied PII  
24 principles and therefore the interests of secrecy were balanced with the public interest for  
25 open accountability (Hickman, 2013). The case received substantial news media coverage  
26 (see Appendix, Row 2). However, in calling for disclosure, the Court of Appeal (para. 13)  
27 made clear that Mohamed's treatment in the US had already been disclosed by a US court  
28 and that there was no 'breach of security' and no 'intelligence material' was revealed.  
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34 Members of the Security Services have since publicly called for more secrecy surrounding  
35 intelligence, and a prioritisation of the control principle over the disclosure of information  
36 related to human rights abuses. The head of MI6 John Sawers explained (in *The Times*, 29<sup>th</sup>  
37 October 2010):  
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41 ...we have a rule called the 'control principle': the service that first obtains the  
42 intelligence has the right to control how it is used. It is rule number one of intelligence  
43 sharing. If the control principle is not respected, the intelligence sharing dries up.  
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45 Adherence to the control principle ensures that when intelligence becomes evidence in the  
46 legal field it remains secret. Under the control principle intelligence is not discussed  
47 publicly. In the discourse surrounding the Justice and Security Bill, it is the Government and  
48 the security services that promote the notion that there is a need to maintain secrecy amongst  
49 parliamentarians and the broader public, so that legislation promoting secrecy is passed due  
50 to the terrorist threat faced and this was demonstrated at key moments. For example,  
51 following publication of parliament's Joint Committee on Human Rights Report on the  
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7 Justice and Security Green Paper (2012a) *The Daily Telegraph* cited a ‘senior British security  
8 source’ and led an article on 4<sup>th</sup> April 2012 (Winnett, 2012) with the following:  
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11 AMERICAN spy agencies refused to give Britain's intelligence services full details of  
12 a "Mumbai-style" terrorist plot in this country because they feared that top-secret  
13 sources would be exposed. The Daily Telegraph can disclose.

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15 This is an example of how argumentation in favour of secrecy is promoted through  
16 imaginaries of future risk by Government and the security services. Fairclough and  
17 Fairclough (2012: 103-8) explain how discourses about the future – or imaginaries - can  
18 describe possible worlds, including risks or potential circumstances caused by our (in)action  
19 now. Furthermore, in the above extract *The Daily Telegraph* compounds the representation  
20 of an imaginary of a “Mumbai-style” terrorist plot, with an emphasis on the exclusive nature  
21 of its source. This provides this imaginary with additional authority because it is framed as  
22 emanating from a source with access to exclusive information. Occasional authoritative  
23 reference to imaginaries of risk in the discourse maintains the latent imaginary of a potential  
24 attack and corresponds with Richard Grusin’s thesis that the news media repeats (or  
25 remediates) stories concerning the potential of attack in an attempt to premeditate and mitigate  
26 the shock from any future imagined attack (Grusin, 2010).  
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33 As noted in the previous section, members of the UK Intelligence and Security Committee  
34 (ISC), with their exclusive discussions access to the UK Governments Security Services and  
35 Secret Intelligence Services were more prominent in the discourse surrounding the  
36 legislation. Furthermore, evidence was found of their promotion of risk based imaginaries.  
37 Speaking on ‘national security’, ISC member, Hazel Blears MP (2012) suggested there would  
38 be a heightened risk of an attack if the control principle was not adhered to:  
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43 I think of the information that the US has provided us with to protect our security. I  
44 think of the bomb plot in April—the second underpants bomb plot—where the liaison  
45 between the US and this country was essential to preventing an incident that could  
46 have cost many lives.

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48 These imaginaries can therefore justify claims that secrecy is justified. However, they are not  
49 always referred to so explicitly. They may be implicitly referred to through references to  
50 intelligence sharing relationships or the associated concept of national security (that protects  
51 against such threats). This, however, is explicitly referred to at crucial junctures. For  
52 example, the first line of the Forward, Executive Summary and First Section of the Green  
53 Paper reaffirm that the first duty of government is to provide national security. Similar  
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7 references are common in the media. For example in the face of strong criticism from the  
8 widely reported Joint Committee on Human Rights on 4<sup>th</sup> April 2012, *The Telegraph's*  
9 editorial of 4<sup>th</sup> April, explicitly supports the proposals for more secrecy in hearings with a  
10 piece entitled 'Secrecy in the interests of national security'. On 5<sup>th</sup> April, in an article entitled  
11 'Cam vow to tighten security', *The Sun* presented Prime Minister Cameron as strong on  
12 security as he 'vowed to plug 'significant gaps' in UK security', whereas Deputy Prime  
13 Minister Clegg, who opposed it, is reported to have 'wobbled' – a particularly insecure  
14 adjective.  
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19 Claims based on imaginaries of insecurity and potential violent threat to 'us' as a nation are  
20 commonplace. However, the most prominent counter-claim to discourses pertaining to  
21 security and imaginaries of future insecurity and risk was not concerned with potential human  
22 rights abuses, nor were they enunciated explicitly or prominently by former detainees or  
23 those directly affected by security practice. Instead, counter-claims centred upon the  
24 indirectly related issue of the departure from the traditions of the UK justice system.  
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29 The Justice and Security Bill's provisions for CMPs threatened the principles of open justice  
30 and natural justice. Open justice involves three factors: (i) that judges give reasons for their  
31 decisions; (ii) that court hearings are held in public; and, (iii) that the media are free to report  
32 on court proceedings (HM Government, 2011: 5). Natural justice is sometimes dubbed  
33 'fairness' and concerns the right of parties to a case to be heard and to hear the opposing  
34 party's case (*audi alterem partem*) and also for parties to cross-examine opposing witnesses.  
35 Ostensibly, support for both principles was conspicuous across all fields. In the UK Supreme  
36 Court Lord Dyson (*Al Rawi & Ors vs Security Service & Ors* [2011] UKSC 35: para. 11)  
37 stated: 'The open justice principle is not a mere procedural rule. It is a fundamental common  
38 law principle'. On natural justice, the continental Other is viewed disparagingly. In *R v*  
39 *Davis* [2008] UKHL 36, Lord Bingham, then the most senior Law Lord, described how as  
40 long ago as in the 19<sup>th</sup> century Jeremy Bentham had 'criticised inquisitorial procedures  
41 practised on the continent of Europe, where evidence was received under a 'veil of secrecy'  
42 and the door was left 'wide open to mendacity, falsehood, and partiality.'" Historically and  
43 contemporaneously, comments noting the superiority of the British system of common law  
44 and the associated principles of open and natural justice are conspicuous amongst senior  
45 jurists.  
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7 Recognition of the long-standing indigenous national character of the norms of open and  
8 natural justice was also evident in the news media. Richard Norton-Taylor reporting on initial  
9 proposals for closed hearings in the *Guardian* (19<sup>th</sup> November 2009) emphasised the break  
10 from tradition in an article headlined: ‘MI5, MI6 and the police will be able to withhold  
11 evidence from defendants and their lawyers in civil cases for the first time’; and, James Slack  
12 in the *Daily Mail* (19<sup>th</sup> November 2009) suggested an uncharacteristic move by the nation:  
13 ‘despite these Kafkaesque restrictions never being permitted in a civil court  
14 before...BRITAIN took another lurch towards ‘secret’ justice yesterday’. In turn, the activist  
15 group Reprieve (2012b) argued ‘plans for secret courts will ride roughshod over centuries-old  
16 British rights to justice’. The language used stresses the break from civil and rational  
17 traditions threatened by the Bill. Reprieve’s use of the metaphor ‘riding roughshod’ implies  
18 an inappropriate beastlike style and the *Mail*’s use of the verb ‘lurch’ suggests a sudden move  
19 away from tradition. Most prominently, the abrogation of natural and open justice through  
20 Closed Material Procedures (CMPs) was communicated through the sound bites ‘secret  
21 justice’ and ‘secret courts’. These epithets have been widely used in the news media (as in  
22 the *Daily Mail*’s ‘No to Secret Courts Campaign’ for example, on 29<sup>th</sup> February 2012) and in  
23 the activist fields (see Reprieve, 2012a). Indeed, the next section demonstrates how such  
24 promotion of a national legal identity was instrumental in the intertextual construction of  
25 discourse across fields; and, crucially, in the amendments made to the Bill. Despite forcing  
26 concessions the negotiation process ultimately did not stop the legislation and the final  
27 section considers this in more detail.

## 38 **6. Breaking of norms whilst appearing reasonable**

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

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

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7 researched security discourse in respect of control orders in the UK, suggests that where  
8 rules, such as human rights norms, are strongly supported they are disaggregated and only the  
9 weaker elements are broken. In the case of the introduction of control orders in the UK the  
10 notion of liberty was disaggregated, thereby allowing a partial restriction of liberty (through  
11 curfews, tagging and surveillance) while rules against the broader infringement of liberty,  
12 such as detention without charge, were maintained. Bright termed this focus on weak rules  
13 'channeling'. My assessment of the discourse here suggested that the channelling of norm  
14 breaking concerning open justice and natural justice regarding security allow the Government  
15 to appear reasonable.  
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21 The Justice and Security Green Paper (HM Government, 2011) and Government consultation  
22 questions were very significant in structuring the argumentation surrounding the Bill. As the  
23 Appendix shows (see Row 7), on 4<sup>th</sup> April 2012 the Joint Committee on Human Rights  
24 Report (JCHR, 2012a) specifically addressed the Green Paper and received substantial  
25 coverage in the media. The JCHR concluded that CMPs were not necessary for inquests and  
26 that CMPs should only be used in cases related to national security – not to those where it  
27 was in the 'public interest' to hold a CMP. On 4<sup>th</sup> April 2012, *The Sun* headlined a page 2  
28 article 'Let justice be 'public'' and repeated the JCHR's comments that the Green Paper's  
29 proposals are 'inherently unfair'. The following day, on 5<sup>th</sup> April 2012, with momentum  
30 building against the Bill *The Daily Mail* asked: 'How can ministers justify holding inquests  
31 into police killings and military deaths behind closed doors?' and highlighted calls for the  
32 criteria for preventing disclosure used in the Green Paper to be 'tightened' from 'public  
33 interest' to national security. The claimants in such cases would have been less likely to be  
34 terrorist suspects and these cases would be more likely to involve British claimants. Here  
35 open justice was defended where it could affect members of 'our' community. *The Daily*  
36 *Mail* was concerned with how the Justice and Security Bill might affect cases involving  
37 British citizens who were not terrorist suspects.  
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46 The Head of Communications at Reprieve, Donald Campbell (2012) stressed how  
47 campaigning on the exclusion of inquests from the Bill 'does give it a much broader appeal'.  
48 Campbell suggested it might: '...put it in a sense that people can more easily understand:  
49 which is that this potentially affects anything that the government can claim [as] national  
50 security - so it's not just your classic 'War on Terror' cases.' However, concern for the rights  
51 of Others, in Other suspect communities (Hillyard, 1993), such as Muslims deemed to be  
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7 potential jihadi terrorists threatening ‘our’ community, was less readily adopted by the news  
8 media or those in the governmental field, demonstrating how ~~moral-such~~ cosmopolitan  
9 ~~approachesism~~ gained less traction beyond the activist field. In this case, justice, and  
10 particularly open justice and democratic accountability through the law, were more robustly  
11 defended when it was the rights of the members of the majority community that were  
12 threatened.  
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16 Campbell (2012) gave insight into how persuasive argument could be constructed in security  
17 discourse though. He stressed the value of what he termed ‘your unexpected allies or your  
18 kind of ‘establishment figures’ to activist campaigns. He pointed to the strength of criticism  
19 that comes from those with experience operating the system themselves, such as guards at  
20 Guantanamo Bay Naval Base, or the former UK Director of Public Prosecutions (above):  
21 ‘Those are your ideal figures for presenting because they’ve got the expertise and there’s not  
22 an obvious self interest, or an ‘oh, they would say that wouldn’t they’ aspect to it.’ When an  
23 ‘unexpected ally speaks’, it fulfils the newsworthy criteria of ‘newness’ and of  
24 ‘unexpectedness’ (Galtung and Ruge 1965). Significantly, ‘unexpected allies’ allow issues  
25 concerning authenticity and trust to be put to one side. Therefore, support from a newspaper  
26 such as *The Daily Mail*, or even *The Sun* not widely referred to as liberal-progressive, could  
27 be particularly effective for a civil liberties campaign.  
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35 Following criticism of the Bill’s threat to ‘our’ rights, it became apparent that unlike open  
36 justice in civil proceedings, open justice in coroners’ inquests was not a rule that could be  
37 broken. Lobbying from within parliament, the news media – including the *Daily Mail* - and  
38 activists including Reprieve and Liberty ensured inquests were excluded from the Bill first  
39 published on 29<sup>th</sup> May 2012 (HM Government 2012) and the wording was changed from  
40 ‘public interest’ to ‘interests of national security’. In an article in the *Daily Mail* (29<sup>th</sup> May  
41 2012) the Justice Secretary directly attributed his change of policy to the newspaper – his  
42 article was headlined ‘My plans were too broad and the *Mail* has done a service to the public  
43 interest’ and he suggests campaigners highlighted ‘the threat to the UK’s tradition of open  
44 justice’.  
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50 The amended Justice and Security Bill published on 29<sup>th</sup> May 2012 was framed by the  
51 Government and some of the news media as a compromise. On 29<sup>th</sup> May, *The Sun* headline  
52 read ‘Ken does U-turn on secrecy’ and when the Bill was passed in the House of Lords on  
53 21st November again most of the news media coverage, particularly the headlines,  
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7 highlighted the defeats for the Government, with the passing of the Bill as a whole given  
8 secondary prominence. On 22nd November 2012, for example, *The Guardian* headline read  
9 'Secret courts bill savaged by the House of Lords'. The news media gave the impression that  
10 the Bill was in jeopardy. However, the key clauses introducing CMPs remained. The idea of  
11 a Government compromise was not only prominent and intertextually repeated, but it  
12 implicitly supported the notion that the legislative process facilitated contributions from a  
13 range of actors. This allowed further presentation of the UK Government's position as  
14 concessionary and reasonable. This diverted attention from the closed position adopted  
15 towards voices from those deemed to be an Other or even a potential enemy, both in the  
16 deliberation of the Bill now and in future civil court cases.

### 21 22 **Conclusion**

23  
24 The discourse surrounding the Bill involved legal complexities, tied up with sentiments  
25 towards tradition, values and national identity ~~—but, revealingly, these showed little evidence~~  
26 ~~of cosmopolitanism, as defined by Delanty above.~~ While some amendments to the Bill were  
27 made, these were limited and the argument that the principles of open and natural justice  
28 could be broken prevailed when it was perceived to concern national security but not threaten  
29 'our' civil liberties. Furthermore, the discourse was set in the context of international  
30 intelligence sharing and secrecy. Therefore, concerns that intelligence relationships were  
31 under threat were linked to imaginaries that repeatedly reappeared in the discourse. These  
32 ultimately supported arguments in favour of CMPs and less public disclosure of information  
33 in the courts.

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

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

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

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51 More broadly, the findings in this paper support Basaran’s (2008) thesis that identity and  
52 borders are constituted in law by liberal governance. The research in this paper highlight  
53 how compromise of legal principles are challenged and do need to be justified, but it suggests  
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7 that information – even evidence related to grave human rights abuse – may be successfully  
8 argued to be beyond legal borders where it is intelligence that concerns a threat from a  
9 perceived potential enemy. –The potential for these ~~developments~~ restrictions on rights to  
10 contribute to further animosity and distrust is clear and is also worth noting for studies on  
11 radicalisation.  
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15 Nonetheless, this research has demonstrated how key phenomena in argumentation -  
16 authoritative sources, imaginaries of attacks, collective self-identity and Othering - are inter-  
17 related and dynamic. – Accordingly, there was evidence of argumentation advocating  
18 deseuritisation and ~~this suggests~~ that securitisation has not been comprehensive and that  
19 there is possibility for change. Here constitutional and democratic principles such as open  
20 and natural justice were more likely to be defended when those whose rights are threatened  
21 were not deemed to be a potential enemy. By ~~searching for cosmopolitanism, or a lack of~~  
22 ~~cosmopolitanism and the unc cosmopolitan nature of~~ noting Othering in the discourse, this  
23 paper also provided insight into how discourse developed following changes to amend legal  
24 principles and civil liberties' norms. This can add to the explanations that Jonathan Bright  
25 (2012) has already provided on the impact of securitisation moves. Therefore, I call for an  
26 even ~~A~~ greater awareness of Othering and collective identity amongst security and  
27 securitisation scholars and, most importantly, the further investigation of the significance of  
28 the control of secret information in ~~constructed nature of~~ ing authority and ~~the lack of~~  
29 ~~cosmopolitanism~~ imaginaries ~~could be important first steps towards creating more open~~  
30 ~~discourse, even~~ in this highly contested and secretive area that is ~~justice and~~ security  
31 discourse.  
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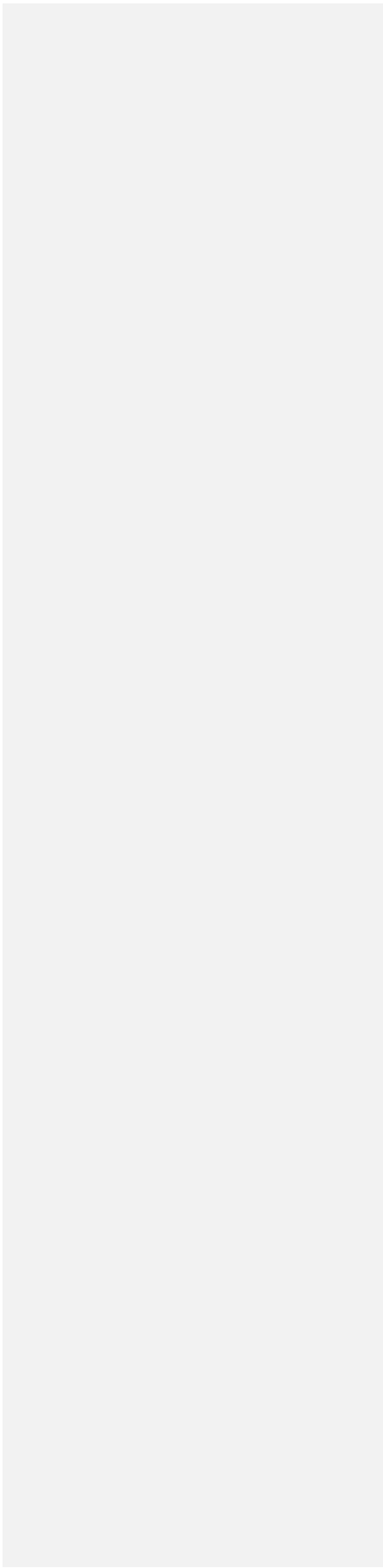
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<< Appendix to be inserted here >>

For Peer Review



## 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 Mail & Mail on 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".