Procedural Innovations to Address the Secrecy Problem in National Security Litigation

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Shirin Sinnar, Procedural Experimentation and National Security in the Courts, 106 **Cal. L. Rev.** 991 (2018).

Public litigation implicating national security issues faces a particularly thorny problem: the need for secrecy. On one hand, this kind of litigation—whether challenging the military's use of Agent Orange in Vietnam, or the practice of putting individuals' names on a No Fly list, or the Trump Administration's "Muslim Ban"—raises important public issues and represents a paradigm case for judicial transparency. On the other hand, government defenses rely on state secrets with potentially vast consequences for national security, a situation where transparency can be dangerous.

Traditionally, courts have confronted the secrecy problem in national security litigation in one of two ways. Courts may abstain from hearing national security cases "because adjudication will lead to the dangerous exposure of sensitive national security information or to intractable challenges in reviewing and managing such information." Alternatively, courts may defer to the executive branch's judgment on a particular factual or judgment question. Both solutions often stop litigation in its tracks, preventing the court from evaluating cases on their merits.

Shirin Sinnar's new article identifies a set of cases where courts have moved beyond these initial hurdles and resolved the constitutional merits. To do so, the judges have experimented with several different procedural tools to address the secrecy problem. Sinnar's rich account of these experiments provides food for thought for procedure scholars. In her narrative, the secrecy problem is Goliath and procedural experimentation is David. While Sinnar is careful not to overstate the prevalence of these experiments, the lesson is that the power of procedure can prevail.

After describing the secrecy problems that can stymie litigation, Sinnar identifies six procedural experiments in national security cases that have not fallen prey to various abstention doctrines. Two are specifically designed for protecting secrets: "conducting ex parte and in camera review of protected information" and "using cleared counsel to access protected information." The other four are less secrecy-specific: consolidating and transferring cases via MDL; appointing special masters and experts; facilitating interlocutory review; and using judicial management to determine rights and remedies in an incremental and dynamic fashion. Sinnar explores these practices and their ability to "supplement the traditional adversarial process, spur the growth of an institutional architecture to protect secrets, encourage the executive to disclose information voluntarily, reduce cognitive biases, and enable judicial learning over the course of litigation."

Two of the examples I found most interesting were the use of special masters and of judicial management. As to the first, Sinnar cites two recent cases where judges considered, and rejected, appointing an FRE 706 expert "to assist the judge in determining whether disclosures in discovery would create a reasonable danger of harm to national security." But she highlights that special masters have succeeded in the past. In a 1987 FOIA case, Judge Oberdorfer appointed a former DOJ intelligence lawyer with top secret security clearance to review documents relating to hostage release efforts that the Department of Defense sought to withhold from the *Washington Post*. In the Agent Orange litigation, Judge Weinstein appointed a special master to review state secrets assertions. To alleviate the government's burden of asserting state secret privilege over all the documents, which would require approval by a department head for each document, the special master first ruled on relevance. Sinnar recounts that "the government granted extraordinary access to the special master, who spent weeks in a 'special guarded room in the Pentagon' examining tens of thousands of documents *prior* to the government deciding whether they qualified for state secrets protection."

This use of special masters is reminiscent of—or perhaps foreshadowed—the prevalence of special masters in modern MDL and other complex litigation, such as the 9/11 Victim Compensation Fund run by Ken Feinberg, or the appointment of then-less-well-known Robert Mueller as the special settlement master in the VW clean diesel litigation. In the secrecy cases and in these more modern examples, special masters devise specialized procedures—sometimes with input from or review by the judge and parties—to enable the litigation to function.

Judicial management, another familiar tool for adapting procedures to suit the needs of particular cases, can use specially designed procedures in a similar way. Sinnar singles out *Latif v. Sessions*, a constitutional challenge to the terrorist No-Fly watch list, as exemplifying the judicial-management approach. Judge Brown of the District of Oregon originally dismissed the plaintiffs' complaint. After the Ninth Circuit reinstated the case, she used what Sinnar calls "incremental and dynamic judicial management" to avoid or minimize the secrecy issues. For example, Judge Brown front-loaded certain questions of law that could be decided on a set of stipulated facts, such as whether the process for contesting one's placement on the list violated procedural due process. She thereby delayed consideration of the substantive due process questions that would require discovery of "potentially sensitive information about individual plaintiffs." This sequencing allowed the judge to conclude that the process for contesting inclusion on the list was constitutionally insufficient, marking "not only a rare victory for plaintiffs challenging watch lists, but also one of the first watch list challenges to even proceed to a determination on the merits."

In short, these procedural fixes work—they help litigation perform its functions and allow the parties and judges to get to the merits of national security cases. Sinnar points to five additional benefits. They supplement adversarialism, insofar as methods such as in camera review enable judges to see documents when opposing parties are not allowed access. They "spur the development of architecture to protect secrets." In other words, the more experience courts and the Justice Department have with providing secret information to courts in secure ways, the better they can develop infrastructure for providing and securing that information. Relatedly, more experience can prompt the Executive to be more receptive to requests to disclose information through secure processes. More experience can counter judges' natural biases in favor of deferring to the government. And bringing several of these themes together, Sinnar identifies a fifth benefit in promoting judicial learning.

Sinnar also highlights important concerns. Secrecy is an ideal issue to address through bespoke procedures because these national security cases create risks to core rule of law values such as due process, transparency, pluralism, and the avoidance of bias. Sinnar applauds the use of experimental procedures to address secrecy issues, but cautions against using them as "'off the rack' solutions for national security cases." She urges courts to consider whether the procedures satisfy due process and ensure "that their value outweighs their risks" before using them.

As a verdict on these experiments, Sinnar rejects the criticism that they are "too little, too late," concluding instead that they are "necessary, but insufficient." It remains true, as Margaret Kwoka documents, that this procedural experimentation is the exception to the general rule of judicial deference in national security cases. Sinnar poses "the real question" as "whether *ad hoc* judicial experimentation on secrecy can succeed in the absence of more systemic legislative change." She doubts that such change is likely, a common place at which both scholars and judges land when facing difficult procedural obstacles. It thus seems natural for Sinnar to conclude by offering insights for procedure more generally. In addition to insights about the potential for diffusion of innovative procedures across subject matter and across the civil-criminal divide, these experiments provide evidence of the pervasiveness of "bottom-up" ad hoc procedure "in response to functional needs" of particular litigations. In the national-security context, the executive branch plays an outsized role, triggering different institutional dynamics. But particularly in the absence of systemic procedural change, Sinnar predicts judges will continue to experiment with ad hoc procedure in the national security context.

Interestingly, Sinnar argues that the scope and capacity of judicial discretion to address these issues are unclear. The Supreme Court has reached conflicting results when reviewing judicial capacity to devise procedural solutions in this space. In Boumediene v. Bush, a Guantanamo detainee habeas case in 2008, "the Court expressed confidence that the district court had the 'expertise and competence' to resolve evidentiary challenges, including the protection of

classified intelligence." But one year later in Ashcroft v. Iqbal, "the Court was equally sure that, without an across-the-board change to pleading standards, district courts could not be relied upon to regulate discovery in a manner that sufficiently respected the needs of high-level national security officials."

This framing shows the important contribution of Sinnar's work. National security expert Rebecca Ingber argues that "it's important to pull away the veil of mystery draped over national security law" that courts often hide behind in these cases. Sinnar is uniquely positioned to help judges overcome their biases against delving into national security issues and to help national security experts understand procedural tools that can lift the veil. She can address both perspectives because she speaks both languages—national security and procedure—so fluently. Her work therefore facilitates both further conversations across these disciplines and a richer understanding of both fields.

This article is an excellent example of the important genre of procedural scholarship that focuses on the procedure of particular substantive areas, supporting the thesis that even trans-substantive procedure is not trans-substantive and simultaneously providing interesting insights for procedure more broadly (dare I say, trans-substantively). Other recent complements include Jessica Erickson's Heightened Procedure and Maria Glover's The Supreme Court's 'Non?Transsubstantive' Class Action. Anyone interested in procedure, procedural innovation, or trans-substantivity—not to mention procedural issues in national security litigation—should read Sinnar's article in full.

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