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Ambiguity in National Security Powers under the UK's National Security and Investment Act 2021: Implications for Executive Accountability and Judicial Review

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ABSTRACT

Academic literature often asserts that, in recent years, governments have expanded the concept of 'national security' to include considerations that reach beyond traditional military and defence concerns. This process has coincided with a global proliferation in legislative regimes for the national security review of investment, particularly mergers and acquisitions. Given that these regimes leave the concept of 'national security' undefined, concerns have been raised that a potentially wide range of policy objectives may fall within the scope of national security review, narrowing the range of decisions for which governments can be held accountable and, as a result, undermining the liberal democratic principle that government power should be constrained by checks and balances. Focusing on the UK's investment review regime under the National Security and Investment Act 2021 ('NSIA'), this article assesses ambiguity in national security powers from a public law perspective. It argues that the ambiguity of national security under the NSIA, coupled with the courts' tendency to grant the executive broad powers over national security matters, permits non-defence-related concerns to be included within the ambit of national security. The result of this is that national security could mean anything at any time, creating the risk that ambiguous national security legislation, both in the investment context and beyond, will confer extensive powers to the executive, undermining the legal accountability of government. This article is divided into three sections. The first examines the executive's interpretation of national security under the NSIA, the second assesses the courts' approaches to traditional national security matters, and the third explores the practical implications of this article's findings for national security adjudication and executive accountability. Finally, this article concludes by offering suggestions for future research and reform.

Keywords: public law, national security, investment law, investment screening

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I. INTRODUCTION

It has often been asserted that national security is a source of executive power[1] and that '[n]o social science concept has been more abused and misused'.[2] Indeed, scholarly literature has emphasised that, although a *traditional* narrower view of national security has centred around military and defence concerns,[3] governments have increasingly used the concept to incorporate a far broader range of objectives.[4] A prominent example of this in recent years has been the incorporation of economic security within the scope of national security.[5] Although definitions abound, economic security has been used to encapsulate concerns ranging from economic prosperity,[6] the resilience of supply chains and critical infrastructure, to protection against 'nonmarket policies and practices', as well as the maintenance of technological prowess.[7] Broadly speaking, economic security refers to the upholding or furthering of economic power as a means of fulfilling state objectives, such as maintaining or improving standards of living to prevent societal unrest and disintegration and creating wealth to maximise tax revenues.[8] Today, shifts in the meaning of national security are especially relevant given the changing geopolitical context that has ensured that national security currently sits high on the agendas of governments across the globe.

The intersection between traditional national security and novel security concerns can be seen through legislation for the review of both domestic and foreign investment, in particular mergers and acquisitions, on national security grounds. These regimes grant governments across the world far-reaching powers to call-in, block, and amend transactions involving entities deemed sensitive to national security. They are said to have economic concerns at their

[1] David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate 2007) 187; Laurence Lustgarten and Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (OUP 1994) ch 1; Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 Harvard Law Review 2673; Andrew P Napolitano, 'A Legal History of National Security Law and Individual Rights in the United States: The Unconstitutional Expansion of Executive Power' (2014) 8 New York University Journal of Law & Liberty 396.

[2] David A Baldwin, 'The Concept of Security' (1997) 23 Review of International Studies 5, 26.

[3] Helga Haftendorn, 'The Security Puzzle: Theory-Building and Discipline-Building in International Security' (1991) 35 International Studies Quarterly 3, 4; Baldwin (n 2) 5; Marc A Levy, 'Is the Environment a National Security Issue?' (1995) 20 International Security 35, 39.

[4] Laura K Donohue, 'The Limits of National Security' (2011) 48 American Criminal Law Review 1573; Vivienne Bath, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China' (2012) 34 Sydney Law Review 5, 22; Baban Hasnat, 'US National Security and Foreign Direct Investment' (2015) 57 Thunderbird International Business Review 185; Sarah Bauerle Danzman and Sophie Meunier, 'Naïve No More: Foreign Direct Investment Screening in the European Union' (2023) 14 Global Policy 40, 41.

[5] James K Jackson, 'Foreign Investment and National Security: Economic Considerations' (Congressional Research Service RL34561, 2013); Kana Inagaki and Leo Lewis, 'Japan's Economic Security Minister Warns on Chip Industry Survival' *Financial Times* (Tokyo, 19 October 2021) <https://www.ft.com/content/f59173b6-211c-4446-aa57-5c9b78d602c2> accessed 10 May 2024.

[6] Lucia Retter and others, 'Relationships between the Economy and National Security: Analysis and Considerations for Economic Security Policy in the Netherlands' (RAND Corporation 2020) <https://www.rand.org/pubs/research_reports/RR4287.html> accessed 10 May 2024.

[7] Matthew P Goodman, 'G7 Gives First Definition to "Economic Security"' (*Center for Strategic and International Studies*, 31 May 2023) <https://www.csis.org/analysis/g7-gives-first-definition-economic-security> accessed 10 May 2024.

[8] Sheila R Ronis (ed), *Economic Security: Neglected Dimension of National Security?* (National Defense University Press 2011) viii; Simon Dalby, 'Security, Intelligence, the National Interest and the Global Environment' (1995) 10 Intelligence and National Security 175, 176.

heart, typifying the way in which national security has come to mean far more than merely military defence.[9]

National security has long been described as an 'ambiguous symbol'.[10] Although each country's review regime differs subtly from one another, a common feature of each is that national security is left undefined.[11] The extent of the powers granted by these regimes hinges upon the precise meaning of national security, raising concerns that the ambiguity inherent in a minimal or non-existent definition permits a wide range of policy objectives to fall within the ambit of national security.[12] This potentially narrows the range of decisions for which governments could be held legally accountable. Although the competition, trade, and investment law aspects of these legislative regimes have been well-trodden,[13] there has been comparatively little attention given to their public law dimension.[14]

Accordingly, this article will assess, from a public law perspective, national security ambiguity (or the ability of 'national security' to carry a broad range of meanings) and its relationship to executive power. In so doing, it will focus on the UK's review regime under the National Security and Investment Act 2021 ('NSIA'). It will be argued that national security under the NSIA is indeed an 'ambiguous symbol' and that this ambiguity permits governments to incorporate potentially far-reaching concerns within the confines of national security, thereby creating the risk of vast, unchecked executive power. Although it is the executive that seeks to expand the bounds of national security in pursuit of its policy objectives, ambiguity can only lead to executive power through an interaction between the executive and judicial branches. The courts have typically given the executive a free hand over matters of national security, placing few constraints on executive action where national security is concerned. This potential expansion of executive national security power under the NSIA is problematic given that it stands at odds with the liberal democratic view that government power should be constrained by a set of legal and political checks and balances.[15] The normative analysis in this article therefore proceeds upon the basis that any such expansion of unchecked executive power in the UK would undermine core constitutional values, such as the rule of law, government accountability, and the separation of powers, and should therefore be avoided.

By analysing government policy papers and related source material, Section I of this article will discuss how the executive has interpreted national security under the NSIA, how far economic security concerns fall within its scope, and what this can tell us about the potential breadth of national security. It will conclude that the executive, through the NSIA, has blurred the lines between economic and national security, stretching the concept of national security in pursuit of non-defence-related security objectives. In Section II, the discussion will

[9] Hasnat (n 4); Jackson (n 5); Bauerle Danzman and Meunier (n 4).

[10] Arnold Wolfers, '"National Security" as an Ambiguous Symbol' (1952) 67 Political Science Quarterly 481.

[11] Kiran S Desai, 'The National Security and Investment Act 2021' (2021) 5 European Competition and Regulatory Law Review 416.

[12] Ibid. See also Keyan Lai, 'National Security and FDI Policy Ambiguity: A Commentary' (2021) 4 Journal of International Business Policy 496.

[13] Hasnat (n 4); Bath (n 4); Jason Jacobs, 'Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union' (2019) 47 International Journal of Legal Information 105; Cheng Bian, 'Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity' (2021) 22 Journal of World Investment & Trade 561.

[14] For a rare example in the US context, see Kristen E Eichensehr and Cathy Hwang, 'National Security Creep in Corporate Transactions' (2023) 123 Columbia Law Review 549.

[15] Gavin Drewry, 'The Executive: Towards Accountable Government and Effective Governance?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th ed, OUP 2011) 189.

turn to the courts' role in conferring national security power on the executive. Given that the courts have yet to decide a case under the NSIA, Section II will focus on traditional national security contexts, assessing how the courts have applied interpretations of national security and deference to the executive and how this process may inform the extent of executive power under the NSIA. Here, we will find that the courts place few constraints on the UK Government in relation to national security and that this is the result of national security secrecy involving secretive evidence and closed judgments. Section III will bring these two strands together, exploring the practical implications of this article's findings for the role of the courts in national security adjudication and for executive accountability, both under the NSIA and beyond. These implications include the risks that legal certainty is undermined, that there is an ever-expanding executive power, and that there is a potential chilling effect on the investment flows that the NSIA purports to protect.[16] This article will conclude that national security ambiguity, constructed by the executive and reinforced by the courts, allows national security to mean anything at any given time, rendering ambiguous national security legislation as a tool of executive power and thus undermining the core values that the UK constitution rests upon. These conclusions will, in turn, prompt areas for future research and reform.

II. The Executive: National Security, Public Interest, and Economic Security

A. Contextualising National Security

In order to determine the likelihood that the NSIA, as well as future national security legislation, could be used to incorporate non-defence-related objectives within their scope, we must first assess how the national security ground for the review of investment in the UK has been applied and, therefore, what national security has meant in relation to investment control. Therefore, this subsection will outline the background context to the national security review of investment into the UK and how the executive's power to intervene in transactions on national security grounds has evolved.

(i) Pre-NSIA

National security and public interest considerations have always overlapped to some extent. Prior to 2002, the 'public interest test' under the Fair Trading Act 1973 gave the relevant Secretary of State ('SoS') broad powers to review transactions on the ground of public interest. This applied not only to those considerations that are today regarded as distinct public interest grounds, but also to transactions that the SoS believed raised competition concerns.[17] Later, the Enterprise Act 2002 passed responsibility for competition review to the

[16] Cabinet Office, 'National Security and Investment Act 2021: Call for Evidence Response' (Cabinet Office, last updated 18 April 2024) <https://www.gov.uk/government/calls-for-evidence/call-for-evidence-national-security-and-investment-act/outcome/national-security-and-investment-act-2021-call-for-evidence-response> accessed 10 May 2024.

[17] David Reader, 'Extending "National Security" in Merger Control and Investment: A Good Deal for the UK?' (2018) 14 Competition Law International 35; Ioannis Kokkoris, 'National Security as a Public Interest Consideration in UK Merger Control' (2021) 14 Journal of Strategic Security 47, 49.

Competition and Markets Authority ('CMA'), while also providing for limited specified considerations where the executive could intervene on public interest grounds, including national security.[18]

In practice, this regime limited ministerial intervention to those transactions that passed high thresholds relating to share of supply or UK turnover.[19] As a competition body, the CMA's responsibility for flagging national security concerns inevitably raised competency questions, with the CMA admitting in the 'Hytera-Sepura' merger that it 'is not expert in national security matters'.[20] Given that the CMA was formed to transfer responsibility for executive decision-making to arm's length bodies[21]—in a process that also saw the creation of the Office for Standards in Education, Children's Services and Skills ('Ofsted') and the Environment Agency[22]—its role also engendered uncertainty over the exact locus of accountability for national security decisions.[23] These challenges, combined with a perception that the old regime was 'no longer sufficient' in the wake of 'significant national security, technological and economic changes',[24] prompted reform to the national security review of investment in the UK.

(ii) NSIA

By placing national security review onto its own statutory footing, the NSIA affords sole responsibility to the relevant minister, ending the CMA's role in national security review. The NSIA gives the executive the power to 'call-in' a transaction for review if the transaction relates to a particular qualifying entity or asset,[25] as well as providing for mandatory notifications to Government for those acquiring entities in 17 named sectors.[26] Once a transaction is reviewed and a national security risk identified, the Government can order remedies, including blocking the transaction or imposing other conditions.[27]

In line with this, the Government expected the number of interventions under the new regime to increase substantially. Although the previous screening regime was used just

[18] Enterprise Act 2002, s 58.

[19] 'UK Mergers Regime – The UK Is Moving Towards Reform of National Security and Infrastructure Investment Review in the UK' (*Court Uncourt (Blog)*, 30 May 2019) <https://www.stalawfirm.com/en/blogs/view/uk-mergers-regime.html> accessed 10 May 2024.

[20] 'Hytera-Sepura: A Report to the Secretary of State for Business, Energy and Industrial Strategy on the Anticipated Acquisition by Hytera Communications Corporation Limited of Sepura PLC' (Competition and Markets Authority, 4 May 2017) para 97 <https://assets.publishing.service.gov.uk/media/5a820650ed915d74e340152e/sepura-hytera-cma-report-redacted.pdf> accessed 10 May 2024.

[21] Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (CUP 2007) 35–37.

[22] Cabinet Office, 'The Arms Length Body (ALB) Landscape at a Glance' (Cabinet Office, 2020) <https://assets.publishing.service.gov.uk/media/60eddaaad3bf7f5688e5d966/Public_Bodies_2020.pdf> accessed 10 May 2024.

[23] Jill Rutter, 'The Strange Case of Non-Ministerial Departments' (Institute for Government, October 2013) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/NMDs%20-%20final.pdf> accessed 10 May 2024.

[24] Department for Business, Energy and Industrial Strategy, *National Security and Investment: A Consultation on Proposed Legislative Reforms* (White Paper, Cm 9637, 2018) ('White Paper') para 1.09.

[25] NSIA 2021, s 5(1).

[26] The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021, SI 2021/1264, reg 2.

[27] Kiran Desai, 'National Security and Investment Act 2021: Eight Months Review' (2022) 6 European Competition and Regulatory Law Review 271, 272–73.

seven times since 2002,[28] the Government estimated the imposition of remedies under the new regime in 10 cases per year.[29] In its latest 'Annual Report' on the NSIA, released in July 2023, a little over a year after the Act's commencement, the Government announced that it had called in 65 deals for closer review, intervening in 15 of them.[30] As of 18 April 2024, the Government had reviewed more than 1,700 notifications and, by 10 May 2024, it had issued 21 final orders under the NSIA.[31]

As we saw in this article's introduction, the absence of a statutory definition creates challenges when locating the precise meaning of national security.[32] What is important to assess, given that the NSIA removed national security from the ambit of the Enterprise Act's public interest considerations, is the extent to which national security under the NSIA is framed as distinct from the public interest. This should move us closer to understanding how broadly the concept of national security is capable of being cast and, thus, how far the executive can use national security in pursuit of its policy objectives. Only by understanding this can we explore the potential risks to executive accountability and the rule of law posed by both the NSIA and, by extension, the ambiguity surrounding the meaning of national security in UK law.

B. NATIONAL SECURITY AND PUBLIC INTEREST

In justifying the creation of a distinct national security review regime, the NSIA's White Paper stressed that '[n]ational security is not the same as the public interest or the national interest'.[33] This approach contrasts starkly with the preceding Green Paper, which acknowledged that, although national security is a form of public interest, it is merely one narrow and exceptional subset of the public interest.[34] This latter approach was reiterated in the Government's response to its White Paper consultation, which distinguished between review powers for national security and those for 'other areas of public interest'.[35]

Further areas of overlap between these two concepts can be found within the 2015 Strategic Defence and Security Review ('SDSR'), which forms the basis of national security policies, including the NSIA. The SDSR's repeated references to the UK's 'interests' ensure

[28] Department for Business, Energy and Industrial Strategy, *National Security and Infrastructure Investment Review: The Government's Review of the National Security Implications of Foreign Ownership or Control* (Green Paper, October 2017) ('Green Paper') para 21.

[29] Department for Business, Energy and Industrial Strategy, *NSI Impact Assessment* (RPC-4173(4)-BEIS, Impact Assessment (IA), 9 November 2020) paras 81, 83, 134.

[30] Cabinet Office, 'National Security and Investment Act 2021: Annual Report 2022–2023' (Cabinet Office, July 2023) 4 <https://assets.publishing.service.gov.uk/media/65c21672688c39000d334c12/National_Security_and_Investment_Act_2021_annual_report_2022-23__PDF_.pdf> accessed 10 May 2024.

[31] Cabinet Office, 'Notices of Final Orders Under the National Security and Investment Act 2021' (Cabinet Office, 15 July 2022, last updated 9 May 2024) <https://www.gov.uk/government/collections/notice-of-final-orders-made-under-the-national-security-and-investment-act-2021> accessed 10 May 2024; Cabinet Office, 'National Security and Investment Act 2021: Call for Evidence Response' (n 16).

[32] Desai, 'The National Security and Investment Act 2021' (n 11).

[33] White Paper, Cm 9637 (n 24) para 1.10.

[34] Green Paper (n 28) paras 100, 138.

[35] Department for Business, Energy and Industrial Strategy, *National Security and Investment White Paper: Government Response to the Consultation* (White Paper Consultation Response, CP 323, 2020) para 195.

that the public or national interest is placed at the heart of its national security strategy.[36] This in turn suggests that, although not as conceptually broad as the public or national interest, national security can nevertheless be a means of furthering those interests. Therefore, the White Paper's suggestion that national security is entirely distinct from the public interest is inconsistent with the NSIA's other policy documents.

One SDSR objective is 'project[ing] our global influence'.[37] Gerhard Colm has argued that such aims demonstrate that national security is an intrinsic part of the public interest by going beyond individuals' self-interest to be concerned more with 'supranational groupings and with humanity as such'.[38] This is reflected by the SDSR's aim of projecting the UK's global influence, along with its emphasis on securing the interests of 'allies and partners' and 'fragile states and regions'.[39] This again suggests a closer relationship between national security and the public interest than that found in the White Paper.

As well as coming into tension with the Act's other policy documents, the White Paper's downplaying of the relationship between national security and the public interest ignores the extent to which meanings of national security hinge upon those national interests that are deemed worthy of securing. In this sense, national security and the public interest remain distinct, though closely intertwined, concepts—national security concerns the protection of public interests, rather than constituting the public interest per se. When viewed as a whole, the NSIA's policy documents have demonstrated that the White Paper is an outlier in rejecting any association between the two concepts.

Nevertheless, there remain problems with conflating national security with the public interest, as seen through cases of national security whistleblowing that are argued to be in the overriding public interest.[40] Therefore, it is helpful that the NSIA's policy documents, taken as a whole, do not entirely conflate national security with the public interest, but instead frame national security as one form of public interest. The policy documents' narrowing of what national security is intended to mean may in turn suggest that the meaning of national security under the NSIA is itself intended to take a narrow, more traditional form relating exclusively to military defence. However, the following subsection will demonstrate that, although the NSIA's policy documents present national security as a narrow form of public interest, the executive's incorporation of non-defence-related security objectives within the NSIA creates the risk that governments may use national security to bypass legal accountability mechanisms and the rule of law, thus undermining core constitutional values.

C. NATIONAL SECURITY AND ECONOMIC SECURITY

Scholars have often asserted that investment review regimes have economic security concerns at their heart[41] and that this is part of a wider expansion of national security.[42]

[36] Cabinet Office and others, *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom* (Policy Paper, Cm 9161, 2015).
[37] ibid ch 5.
[38] Gerhard Colm, 'In Defense of the Public Interest' (1960) 27 Social Research 295, 298.
[39] Policy Paper, Cm 9161 (n 36) ch 5.
[40] Jason Zenor, 'Damming the Leaks: Balancing National Security, Whistleblowing and the Public Interest' (2015) 3 Lincoln Memorial University Law Review 61.
[41] Donohue (n 4); Bath (n 4), 22; Hasnat (n 4).
[42] Jackson (n 5); Chad P Bown, 'Export Controls: America's Other National Security Threat' (2020) 30 Duke Journal of Comparative & International Law 283, 287; Rana Foroohar, 'The US-China Decoupling Story Is Not Over' *Financial Times* (London, 14 August 2023) <https://www.ft.com/content/f07921e7-c334-427f-bc50-bda9e0530eb4> accessed 10 May 2024; Inagaki and Lewis (n 5).

In the absence of a statutory definition, we can once again turn to the NSIA's policy documents to determine not only the extent to which the NSIA incorporates economic security within national security, but also how far the concept of national security is capable of being morphed by executive policy objectives. Such an assessment helps us to understand how ambiguous national security powers, such as those within the NSIA, are capable of undermining executive accountability and the rule of law.

The NSIA's Green Paper provides that the regulation of investment into the UK is underpinned by the need to mitigate the risk of 'severe economic or social consequences'.[43] The idea that non-defence-related concerns can be caught within the ambit of national security was reiterated in the NSIA's Draft Statement of Policy Intent, which provides that national security 'goes beyond "defence of the realm"', encompassing 'all genuine and serious threats to a fundamental interest in society'.[44] In assessing the extent to which the NSIA distinguishes economic security from national security, this reference to a 'fundamental interest' warrants further exploration.

A clue as to the nature of a 'fundamental interest' can be found in the SDSR's three national security objectives: 'protecting our people'; 'projecting our global influence'; and 'promoting our prosperity'.[45] That the NSIA was designed to complement the SDSR's wider strategy suggests that these objectives are crucial to understanding the NSIA's economic underpinnings.[46] Although the first objective, 'protecting our people', appears to promote a narrower view of national security centred around defence, the SDSR also provides that protecting the UK's 'economic security' and 'way of life' are integral components of this objective. The second objective, 'projecting our global influence', gives a more tacit indication that economic concerns are interwoven with national security. Specifically, this objective's references to 'the rules-based international order' and 'building stability overseas' demonstrate a commitment to associating economic security with national security.[47] Although the 'rules-based international order' comprises non-economic components, it equally relates to the 'Global Economic Architecture', including the World Trade Organisation, the International Monetary Fund, and the World Bank.[48] Similarly, references to 'stability overseas' emphasise the potential for development programmes to 'drive economic development and prosperity' and to help create 'markets for future British business'.[49] The third objective, 'promoting our prosperity', most explicitly incorporates economic security into the sphere of national security. The SDSR specifies that 'economic and national security go hand-in-hand',[50] although also tacitly acknowledging that all of its objectives are possible only through the protection of economic security, given that a 'strong economy provides the foundation to invest in our security and enables us to project our influence across the world'.[51] This suggests that economic

[43] Green Paper (n 28) para 45.
[44] Department for Business, Energy and Industrial Strategy, *National Security and Investment: Draft Statutory Statement of Policy Intent* (Policy Paper, July 2018) para 1.03 ('*Draft Statutory Statement of Policy Intent*').
[45] Policy Paper, Cm 9161 (n 36) paras 1.10–1.21.
[46] Green Paper (n 28) para 43.
[47] Policy Paper, Cm 9161 (n 36) para 5.2.
[48] ibid paras 5.87–5.94.
[49] ibid para 5.10.
[50] ibid para 6.1.
[51] ibid para 6.7.

security concerns and traditional, defence-related security concerns are tightly interwoven both within the SDSR and the NSIA.

An association between economic and national security concerns is certainly nothing new. Theodore H Moran has explored three ways in which neglecting economic policy threatens national security: by contributing to national decline relative to geopolitical rivals; by causing losses of vital domestic capabilities; and by prompting increased dependence on other states.[52] However, by associating the perceived negative consequences of particular policy outcomes with threats to national security, Moran's argument that economic policy and national security are inherently interconnected could be applied to any policy objective. In turn, this argument tacitly suggests that anything can be national security, further confirming that the concept of national security is ambiguous and could be used by governments to pursue a wide range of objectives unrelated to military defence. Although it is one thing for defence-related security to depend on economic policy, the NSIA's policy documents go further still, by directly incorporating economic prosperity within national security. The SDSR's emphasis on economic prosperity reinforces Baban Hasnat's view that national security is increasingly used to encapsulate economic concerns. However, Hasnat, writing in the US context, argued that these concerns are intertwined because of the US Government's protection of critical infrastructure and technologies deemed essential to national defence.[53] In so doing, Hasnat only brings limited economic elements within the purview of national security, elements that are already associated with the traditional or narrow view of national security relating to military defence. Although the NSIA policy documents also refer to 'Critical National Infrastructure' that permits the basic functioning of government,[54] 'promoting our prosperity' goes one step further. It explicitly broadens national security by including economic prosperity, rather than simply entailing those economic elements, such as 'Critical National Infrastructure', that align with a traditional, defence-related view of national security. This suggests that the NSIA rejects the narrower view of national security that relates exclusively to military defence, providing support for the scholarly view that national security is increasingly used to incorporate a wider range of policy goals.[55]

The NSIA's White Paper makes no direct reference to economic security. Nevertheless, remarks by the then Business Secretary during the White Paper's House of Commons debate emphasised a desire to protect businesses 'at the very forefront of technological breakthroughs'.[56] Although protecting technology companies might reasonably serve defence-related objectives, the Government's willingness to use the NSIA to exert control over successful British technology companies as a means of attracting investment demonstrates that the NSIA can also be used to achieve non-defence-related objectives.[57] Technological discoveries have long been linked to national security. The internet and GPS, both of which have widespread

[52] Theodore H Moran, *American Economic Policy and National Security* (Council on Foreign Relations Press 1993) 2.
[53] Hasnat (n 4).
[54] Department for Business, Energy and Industrial Strategy, *National Security and Investment: Sectors in Scope of the Mandatory Regime* (Government Response, March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965784/nsi-scope-of-mandatory-regime-gov-response.pdf> accessed 10 May 2024; 'Case Study: Securing the UK's Critical National Infrastructure' (*National Cyber Security Centre*, 14 November 2023) <https://www.ncsc.gov.uk/collection/annual-review-2023/resilience/case-study-securing-cni> accessed 10 May 2024.
[55] Hasnat (n 4); Donohue (n 4); Bath (n 4).
[56] HC Deb 11 November 2020, vol 683, col 35WS.
[57] Antoni Slodkowski and others, 'UK Officials Weigh National Security Grounds to Force London IPO for Arm' *Financial Times* (Tokyo, 22 June 2022) <https://www.ft.com/content/074940e5-b435-45b2-9144-d246354602f3> accessed 10 May 2024.

civilian applications, emerged from the race to develop the next generation of military technology.[58] However, there is a distinction between breakthroughs that result from defence-related security policy and using such breakthroughs to promote an economic agenda. The former is more closely linked to military defence, whereas the latter relates to matters that have not traditionally been included within the scope of national security. Therefore, the executive's willingness to use the NSIA to promote technology investment suggests that economic concerns, as well as defence-related ones, underpin the Act.

Moreover, during the Bill's House of Lords debate, another minister went further still, arguing that 'national prosperity is inextricably and rightly linked with our national security',[59] supporting the scholarly view that economic and national security concerns have grown increasingly interlinked. Such rhetoric also follows a common pattern seen around the globe, most notably in the US, where successive administrations have stressed that 'economic security is national security' and that the distinctions between different forms of security are 'less meaningful than ever before'.[60] Although the UK Government noted that 'foreign policy rests on strong domestic foundations', in particular a strong economy,[61] conflation of the economy's ability to deliver for defence interests with its overall industrial capacity demonstrates how far national security has spilled over into the economic domain. Far from occurring spontaneously, the association of economic security with national security is the product of conscious political desires to widen the scope of national security.[62] Indeed, security policies are being used by governments to cover 'an increasingly wide array of risks and vulnerabilities'.[63]

Attempts to incorporate economic concerns within the scope of national security under the NSIA demonstrate the willingness of executive branches to use national security to cover far-reaching objectives, beyond simply the defence context. Consequently, although the NSIA's policy documents appear to cast national security narrowly as simply one aspect of the public interest, national security is capable of far broader application, extending to public health, culture, the environment, and, as we have seen in this section, the economy.[64]

D. Conclusion

Each subsection explored in this section has served a distinct purpose. Section II.A contextualised the national security review of investment, exploring how the powers now contained within the NSIA have evolved over time. Section II.B examined the distinctions between national security and the public interest under the NSIA, while Section II.C explored

[58] Michael A Peters, '"Global Britain": The China Challenge and Post-Brexit Britain as a "Science Superpower"' (2023) 55 Educational Philosophy and Theory 871, 871.

[59] HL Deb 4 February 2021, vol 809, col 2374.

[60] Ana Swanson and Paul Mozur, 'Trump Mixes Economic and National Security, Plunging the U.S. Into Multiple Fights' *The New York Times* (Washington DC, 8 June 2019) <https://www.nytimes.com/2019/06/08/business/trump-economy-national-security.html> accessed 10 May 2024; The White House, 'Interim National Security Strategic Guidance' (*The White House*, 3 March 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/03/interim-national-security-strategic-guidance/> accessed 10 May 2024.

[61] Cabinet Office, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy* (Policy Paper, CP 403, 2021) 12.

[62] Jackson (n 5) 18.

[63] J Benton Heath, 'The New National Security Challenge to the Economic Order' (2020) 129 Yale Law Journal 1020, 1020.

[64] Donohue (n 4) 1575.

economic security in relation to the NSIA. From these subsections, and from the NSIA policy papers explored within them, we can glean that the executive simultaneously casts national security as one narrow subset of the public interest while interpreting the concept sufficiently broadly to encompass non-traditional conceptions of security. This in turn highlights the executive's ability to apply the ambiguity inherent in national security in pursuit of potentially far-reaching objectives.

However, although the executive may seek to benefit from the ambiguous nature of national security, the task of applying the legal meaning of national security in cases brought under the NSIA will fall to the courts. This, as well as the normal questions of statutory interpretation and grounds for judicial review, means that the extent of executive national security power under the Act will depend in large part on the judiciary.[65] This in turn will have significant ramifications for the executive's ability to shape the meaning of national security in the future. Given that there has yet to be a judicial review challenge decided under the NSIA, we must turn to traditional national security contexts to understand both how the concept stands to be interpreted and the relationship between executive national security power and the judicial process. A discussion of the courts' role in national security adjudication will therefore be the focus of the next section of this article.

III. The Courts: Interpretations, Deference, and Secrecy

In *Secretary of State for the Home Department v Rehman*, Lord Hoffmann remarked that 'there is no difficulty about what "national security" means'.[66] This section will demonstrate that such a statement is misplaced and that, far from being clear, judicial interpretations of national security are entirely ambiguous. Although national security constitutes a source of executive power,[67] this power stems not from national security per se, but from the courts' ambiguous interpretations of national security, along with a wide degree of judicial deference.[68] Despite courts justifying executive national security power in both competence and democratic legitimacy terms, these justifications obfuscate the significant extent to which executive power results from the secrecy inherent in national security adjudication as a result of classified evidence and closed hearings. Once again, the unchecked executive power that emerges from questions of national security is problematic through its undermining of fundamental norms of Western systems of government.

This section will first discuss how the courts have interpreted national security and how this interacts with the degree of deference shown to the executive over decisions purported to be 'in the interests of' national security. Given that there has yet to be a judicial review challenge decided under the NSIA, this section will rely on traditional, defence-related national security case law. Next, the discussion will turn to the relationship between national security secrecy and executive power. By better understanding these issues, we can gain a deeper comprehension of the executive-judiciary dynamic and how these matters may operate under the NSIA. We will see that judicial interpretations of national security and deference to the executive are inextricably linked and that the courts' tendency to place few meaningful demands on the executive poses challenges for national security adjudication and executive

[65] Bonner (n 1) 14.
[66] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 ('*Rehman* (HL)') [50].
[67] Bonner (n 1) 187.
[68] Stephen Cody, 'Dark Law: Legalistic Autocrats, Judicial Deference, and the Global Transformation of National Security' (2021) 6 University of Pennsylvania Journal of Law & Public Affairs 643.

accountability, both under the NSIA and beyond. In matters of national security, the courts are therefore complicit, however unwittingly, in undermining the constitutional norms that permit them to exist independently of the executive.

Although recent national security case law has been coloured by the post-9/11 security context and the 'war on terror',[69] the sources discussed in this section nevertheless represent, within this geopolitical backdrop, a variety of factual contexts, ranging from deportation and citizenship to detention and control orders. What will emerge is the remarkable consistency of the courts' deferent approach to executive power whenever national security is invoked. This consistency suggests that national security is a powerful tool for the executive, capable of being invoked to free governments of the ordinary checks, balances, and constraints that are central to liberal democratic systems of public law.

A. Interpretations of National Security and Deference

Although the academic literature often emphasises the significant degree of national security deference that is shown to the executive and its subsequent effect on executive power,[70] an often-neglected aspect of the courts' role is the interpretation of national security. Therefore, this section will focus on the interpretation of national security in some of the cases most commonly discussed by scholars. These key judgments, assessed in turn, will highlight the relationship between national security interpretations, deference, and executive power. They will also highlight how the courts' interpretations perpetuate the ambiguity or lack of certainty over the meaning of national security, thus placing few meaningful demands on the executive and contributing to a wide degree of deference over decisions purported to be in the interests of national security.

(i) Rehman

In *Rehman*, which concerned the deportation of a terror suspect, the Special Immigration Appeals Commission ('SIAC') (the judicial body formed to decide immigration and citizenship appeals) had interpreted a danger to national security in the terrorism context as being that which 'promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people'.[71] The SIAC also held that national security includes 'situations where United Kingdom citizens are targeted, wherever they may be'.[72] The

[69] Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 International Journal of Constitutional Law 172, 174; Mercedes Masters and Salvador Santino F Regilme Jr, 'Human Rights and British Citizenship: The Case of Shamima Begum as Citizen to *Homo Sacer*' (2020) 12 Journal of Human Rights Practice 341.

[70] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) 161–62; Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP 2007) ch 1; Cody (n 68); Alan DP Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP 2012) 140; David Rudenstine, *The Age of Deference: The Supreme Court, National Security, and the Constitutional Order* (OUP 2016).

[71] *Secretary of State for the Home Department v Rehman* [2000] 3 WLR 1240 (CA) ('*Rehman* (CA)') [28].

[72] ibid (emphasis removed).

definition provided by the SIAC is problematic as it is insufficiently narrow to place any meaningful constraints on the executive. It includes any and all violent activity within the scope of 'danger to national security'.

In the Court of Appeal case, the *amicus curiae* provided their own definition of terrorist activities that would be contrary to national security: the promotion or encouragement of 'violent activity which has, or is likely to have, adverse repercussions on the security of the United Kingdom, its system of government or its people'.[73] Favouring this more expansive approach, the Court held that the SIAC's definition 'was flawed in so far as it required the conduct relied on by the Secretary of State to be targeted on this country or its citizens'.[74] However, beyond establishing that national security concerns can be extraterritorial, this leaves us no closer to identifying the exact meaning of national security. Here, the Court of Appeal did not narrow down the meaning of national security, but instead conflated a definition of terrorist activity that would breach national security with a definition of national security itself. Given that the meaning of national security is markedly different from identifying the conditions under which security may be attained,[75] we again face uncertainty over the meaning of national security.

Aileen Kavanagh argues that the deference shown by the courts to the executive where national security is concerned is 'a rational response to uncertainty'.[76] However, *Rehman* suggests that this process takes place in reverse and that uncertainty can in fact result from the deference shown by the courts. More specifically, by affirming the SIAC's interpretation of national security, the Court of Appeal, rather than simply responding to uncertainty with deference, instead created more uncertainty through an open-ended definition of national security. This paved the way for a broad degree of deference by widening the scope of that which could be held to be in the interests of national security, thus demonstrating that judicial deference over questions of national security can increase uncertainty over what national security means. On appeal to the House of Lords, Lord Hoffmann, arguing that 'there is no difficulty about what "national security" means', provided another ambiguous and circular definition of national security: 'the security of the United Kingdom and its people'.[77] This definition merely rephrased, rather than clarified, the meaning of UK national security.

We have so far seen that the ambiguous national security interpretations in *Rehman* allowed for a wide degree of executive power. Notwithstanding this ambiguity, counsel in the House of Lords appeal attempted to provide a clearer definition of national security. Citing Lord Diplock in the *GCHQ* case, the claimant argued that national security is merely another term for 'defence of the realm'.[78] However, this only compounded the uncertainty over the meaning of national security, with Lord Slynn in *Rehman* asserting that, although national security and the defence of the realm 'may cover the same ground... the latter is capable of a wider meaning'.[79]

Although the courts failed to offer a clear and unambiguous definition of national security, the terrorism context of the case and the Lords' affirmation of the dicta of Lord Radcliffe in *Chandler v DPP*, which emphasised that 'the methods of arming the defence forces' and 'the instruments of the state's defence' are 'not within the competence of a court

[73] ibid [38].
[74] ibid [41].
[75] Baldwin (n 2) 8.
[76] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 177.
[77] *Rehman* (HL) (n 66) [50].
[78] ibid [14]; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) ('the *GCHQ* case') 410.
[79] *Rehman* (HL) (n 66) [18].

of law',[80] might suggest that the courts favoured a strictly defence-related interpretation. Such narrow interpretations of national security, when exclusively construed in military terms, may 'convey[] a profoundly false image of reality'.[81] However, they are appropriate in the terrorism context, given that terrorism closely relates to defence-related interpretations of national security. Nevertheless, despite Lord Slynn ruling that 'defence of the realm' was wider than 'national security', he also saw national security as comprising 'the interests of the state, including not merely military defence but democracy' and its 'legal and constitutional systems'.[82] At first glance, this might appear to be in line with the executive's interpretation of national security in the NSIA's *Draft Statutory Statement of Policy Intent*.[83] However, Lord Slynn's judgment, by simultaneously framing national security as a concept that is narrower than the military defence-related concept of defence of the realm and also as something akin to the public or national interest, highlights not only the courts' failure to expound a consistent meaning of national security, but also that individual judges themselves can offer ambiguous and contradictory interpretations. Consequently, and contrary to Lord Hoffmann's assertion,[84] the exact meaning of national security remains ambiguous.

Lord Hoffmann noted that national security decisions 'may involve delicate questions of foreign policy' and that 'it is artificial to try to segregate' the two,[85] suggesting that the legal dimension of the meaning of national security and the political dimension of national security deference can influence one another in a reciprocal manner. Although ambiguous and undemanding interpretations of national security do not preclude a high degree of scrutiny, they nevertheless broaden the range of areas which, in the courts' view, ought to be left to politicians. By linking national security to foreign policy, and vice versa, Lord Hoffmann acknowledged that any foreign policy concern could fall within the scope of national security. Perhaps this only appears to affirm the idea that courts will rarely intervene in matters of national security. However, when viewed from the interpretative perspective, the bounds of national security appear to be obfuscated again. Given the association between international trade and foreign policies, it is not unforeseeable that foreign policy could include the regulation of investment by foreign entities,[86] demonstrating how the courts' interpretations of national security can further expand executive power. The expansion of that which could be held to be in the interests of national security, combined with the courts' tendency to defer decisions made in the interests of national security,[87] demonstrates that national security interpretations and the degree of deference shown to the executive go hand-in-hand.

On limited aspects, however, the Court of Appeal in *Rehman* provided a measure of clarity over the meaning of national security. It ruled that national security could be affected indirectly through activities conducted abroad, such as undermining anti-terrorism cooperation between the UK and other states.[88] Despite keeping its overall meaning ambiguous, this

[80] *Chandler v DPP* [1964] AC 763 (HL) 798.
[81] Richard H Ullman, 'Redefining Security' (1983) 8 International Security 129, 129.
[82] *Rehman* (HL) (n 66) [16]–[18].
[83] *Draft Statutory Statement of Policy Intent* (n 44) paras 1.02–1.03.
[84] *Rehman* (HL) (n 66) [50].
[85] ibid [53].
[86] Robert T Kudrle and Davis B Bobrow, 'U.S. Policy toward Foreign Direct Investment' (1982) 34 World Politics 353, 353.
[87] Stevie Martin, 'Deference, "Fairness" and Accountability in the National Security Context' [2021] Cambridge Law Journal 209, 210.
[88] *Rehman* (CA) (n 71) [40].

extraterritorial component represents a rare clarification of what national security could encompass. Crucially, however, this undemanding interpretation did not narrow the bounds of national security sufficiently to constrain executive action. As a result, although the Court partially clarified the meaning of national security, the Court's interpretation also gave effect to the executive's decision.

Perhaps it is fitting, given the terrorism context in *Rehman*, that the courts were willing to endorse an extraterritorial meaning of national security that encompassed 'the reciprocal co-operation between the United Kingdom and other states in combating international terrorism'.[89] Indeed, Lord Hoffmann, in his postscript comments written following the 9/11 terrorist attacks, wrote that the events were 'a reminder that in matters of national security, the cost of failure can be high', underscoring the need for the courts to 'respect' executive national security decisions.[90] Although this is unsurprising, what is noteworthy is the Court's willingness to stretch the bounds of national security to permit 'appropriate deference' over whether a decision was 'in the interests' of national security.[91] Equally noteworthy is the fact that the House of Lords held, on separation of powers and institutional competence grounds, that whether something is 'in the interests' of national security is 'a matter of judgment and policy'.[92] This demands that the ordinary *Wednesbury* threshold, whereby a decision must be found to have been 'so unreasonable that no reasonable authority could ever have come to it', must be met before overturning a decision.[93] By interpreting national security just broadly enough to uphold the executive's decision, while simultaneously keeping the actual meaning of national security ambiguous so as to widen the scope of that which could reasonably be held to be in the interests of national security, the Court in *Rehman* demonstrated that executive national security power hinges significantly on judicial interpretation. The Court's specific and focused clarification of the extraterritorial component of national security contrasts starkly with their ambiguous and undemanding interpretation of what national security actually means. Yet, both aspects highlight a willingness to adopt interpretations of national security that favour the executive, thus permitting a wide degree of deference.

Although Lord Hoffmann made it clear that the meaning of national security was 'a question of law', this legal interpretation has a material impact on the political question of whether an executive decision was 'in the interests' of national security.[94] Arnold Wolfers has argued that ambiguous national security definitions are of little use for 'sound political counsel' and ought to be clarified and narrowed down.[95] However, as David A Baldwin demonstrates, focusing the meaning of national security is an inherently political process.[96] The discussion in this article thus far lends credence to Baldwin's argument. In Section II, we saw how the executive shapes the meaning of national security to suit its policy objectives, whereas the courts have justified interpreting national security ambiguously on the ground that they are not active participants in the political process. The problem with the courts providing an open-ended interpretation of national security is that, if defining national security is a political issue, the decision to leave its meaning unclear and ambiguous is equally political. This tells us that not only can the lines between the political and legal aspects of national security easily

[89] *Rehman* (HL) (n 66) [17] (Lord Slynn).
[90] ibid [62].
[91] ibid [31] (Lord Steyn).
[92] ibid [50] (Lord Hoffmann).
[93] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) 234 (Lord Greene MR).
[94] *Rehman* (HL) (n 66) [50].
[95] Wolfers (n 10) 483.
[96] Baldwin (n 2).

become blurred, but also that the courts' interpretations of national security can impact executive power, as has been explored in this section thus far.

What emerges from *Rehman*, therefore, is the ambiguity in the courts' interpretations of national security. Furthermore, the adoption of national security interpretations that align neatly with executive decisions also demonstrates that the legal meaning of national security can greatly impact the political determination of whether something is 'in the interests' of national security. Although the precise boundaries between the two are unclear, it is evident that judicial deference, and thus executive power, can be a direct consequence of how the courts interpret national security.

(ii) Begum

Scholars often emphasise that the post-9/11 security context greatly impacted attitudes towards national security.[97] However, an analysis of *R (Begum) v Special Immigration Appeals Commission*, which centred around the citizenship revocation of an individual who had joined a terrorist organisation overseas,[98] will reveal that ambiguous interpretations of national security, and therefore of executive power, scarcely differed from *Rehman* 20 years earlier.

When interpreting the executive's statutory powers, the Supreme Court in *Begum* found that the 'public good', contained within section 40(2) of the British Nationality Act 1981, meant 'public interest', encompassing 'considerations of national security and public safety'.[99] The association of national security with public safety might suggest a view of national security that, when applied to the terrorism context, focuses exclusively on the military and defence. Beyond this, however, the Court offered no clarification on national security and simply affirmed Lord Hoffmann's interpretation in *Rehman*, namely that national security comprises 'the security of the United Kingdom and its people'.[100] Once again, this keeps the meaning of national security ambiguous, making the executive's decision as to whether something is 'in the interests of national security' less capable of challenge.

This highlights how, despite the almost two decades between *Rehman* and *Begum*, the courts' ambiguous and undemanding approach to national security remained remarkably consistent over time.

(iii) Belmarsh

In addition to deportation and citizenship cases, the 'war on terror' has influenced the factual matrices of national security cases surrounding detention and control orders. *A v Secretary of State for the Home Department* ('*Belmarsh*'), which concerned individuals detained without trial on national security grounds, is perhaps the most well-known example of such cases,[101] having been described as 'the most dramatic recent example of the constitutional shift away from nonjusticiability on matters concerning national security'.[102]

[97] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 174; Masters and Regilme (n 69) 342.
[98] *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765.
[99] ibid [70].
[100] ibid [56].
[101] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 ('*Belmarsh*').
[102] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 174.

Although no attempt was made to elucidate the precise bounds of national security, *Belmarsh* involved a derogation of the UK's obligations under article 15 of the European Convention on Human Rights ('ECHR'), which regards national security as the security of 'the life of the nation'.[103] In this case, the Lords interpreted 'national security' as akin to '[p]rotecting the life of the nation' under the Convention.[104] For the purposes of the ECHR, a 'public emergency threatening the life of the nation' is regarded as an 'exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life' of the state.[105] However, as we saw in *Rehman*, identifying that which is contrary to national security is of little use without national security first being given a clear meaning. Without placing meaningful demands on the executive, and by being sufficiently ambiguous and flexible as to permit executive power, the ECHR interpretation offers few meaningful distinctions from the *Rehman* interpretation. Then again, perhaps it is expected that the Strasbourg Court would lay down a flexible definition of national security, given the wide 'margin of appreciation' conferred on governments over national security matters.[106] This reiterates what we have already seen: ambiguous interpretations of national security can further the executive's power over national security matters by broadening the range of decisions that can be made 'in the interests of' national security.

Yet, the House of Lords in *Belmarsh* did not grant the executive the 'margin of discretion' that it wanted,[107] instead famously issuing a declaration of incompatibility against the UK Government's legislation. At first glance, this might appear to suggest that the courts' interpretations of national security do not necessarily confer power on the executive branch. However, the *Belmarsh* outcome has less to do with the Court's interpretation of national security, and more to do with the fact that the executive had implicitly conceded that its detention of foreign terror suspects was not necessary.[108]

The effect that the courts' interpretations of national security have on the constraints placed on the Government demonstrates that executive national security power does not arise automatically but instead depends on an interaction between the executive and the judiciary. Despite its outcome, *Belmarsh* again demonstrates how the courts' interpretations of national security are largely undemanding, widening the range of lawful decisions that the executive could make and placing few constraints on government power.

(iv) Conclusion

This subsection has demonstrated that, despite Lord Hoffmann's belief that its meaning is clear, the legal meaning given to national security by the courts is largely ambiguous. The courts' tendency to confer power on the executive through undemanding and ambiguous interpretations, together with their tendency to defer decisions made 'in the interests of' na-

[103] Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') art 15. See also Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 180–84.
[104] *Belmarsh* (n 101) [226] (Baroness Hale).
[105] *Lawless v Ireland (No 3)* App No 332/57 (ECtHR, 14 November 1960) [28].
[106] For a detailed discussion on the margin of appreciation in European Court of Human Rights ('ECtHR') case law, see Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 Current Legal Problems 49.
[107] *Belmarsh* (n 101) [175]–[176] (Lord Rodger).
[108] Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' [2013] University of Cambridge Faculty of Law Research Paper No 32/2013, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326987> accessed 10 May 2024.

tional security, ensures that the executive has vast influence over both the legal and the political dimensions of national security adjudication. Although the courts undoubtedly wield the power to scrutinise strictly executive decisions that are based on ambiguous and ill-defined national security threats, this inevitably relies upon their ability to exercise that power fully.[109] The next subsection will explore why the courts are too often unable fully to exercise their role in reviewing executive national security decisions.

B. NATIONAL SECURITY SECRECY

In *Rehman*, Lord Hoffmann emphasised the need for 'the judicial arm of government to respect the decisions of ministers', not only due to the executive's 'special information and expertise', but also because such decisions 'require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process'.[110] These comments encapsulate two sets of justifications for national security deference. The first centres around expertise and competence, which is the idea that the executive's knowledge, resources, and legal authority make it best placed to make national security determinations.[111] The second centres around democratic legitimacy and the separation of powers, which is the idea that, in a liberal democracy, national security determinations ought to be made by those who are democratically accountable.[112] Yet, these justifications obscure the practical significance of national security secrecy in determining how much freedom the courts give to the executive to define and apply national security. We will find that secrecy (the result of classified evidence and closed hearings) is an essential feature of national security proceedings that underpins the courts' application of deference, having profound implications for executive national security power both under the NSIA and beyond.

In *Rehman*, Lord Slynn noted that the executive 'is undoubtedly in the best position to judge what national security requires'. Ostensibly justifying national security deference on expertise and competence grounds, Lord Slynn also noted that the evidence upon which the executive's decision was made was not made available to them.[113] In *Belmarsh*, the Government made use of a 'closed material' procedure ('CMP'), determining which evidence was to be seen by the SIAC only and thus withheld from the appellate courts.[114] The 'need to preserve the confidentiality' of national security material necessarily limits the courts' review function, thereby tending towards more limited legal accountability and a consequent increase in executive power.[115] Although Lord Slynn couched deference in terms of executive expertise, there is a clear distinction between the ability to make determinations based on national security evidence and the ability to access such evidence in the first place.

The special advocate system, whereby relevant closed material is served on a lawyer permitted to represent the affected party, goes some way towards mitigating the deleterious

[109] Cody (n 68) 681.
[110] *Rehman* (HL) (n 66) [62].
[111] Cora Chan, 'Deference, Expertise and Information-Gathering Powers' (2013) 33 Legal Studies 598, 600.
[112] TRS Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 University of Toronto Law Journal 41, 53.
[113] *Rehman* (HL) (n 66) [26].
[114] *Belmarsh* (n 101) [117] (Lord Hope).
[115] *Rehman* (HL) (n 66) [35] (Lord Hoffmann).

effects of CMPs on procedural fairness and a party's right to a fair trial.[116] However, the advocate is allowed no contact with the affected party once the closed material has been accessed. In the words of Lord Hope in *Bank Mellat v Her Majesty's Treasury (No 2)*, this creates an imbalance between 'the party who invokes the procedure and will always have access to that material, and the other party against whom the State has taken action and to whom access to that material is always denied'.[117] These challenges risk being particularly pronounced under the NSIA. Although the courts have circumscribed the absolute power of CMPs in imprisonment and deprivation of liberty cases concerning individuals' ECHR rights enshrined by the Human Rights Act 1998,[118] it is unlikely that such rights would apply to corporate entities under the NSIA.[119]

The issue of the executive's exclusive access to classified security intelligence reared its head once again in *Begum*. Here, the SoS certified that their 'decision had been taken wholly or partly in reliance on information which in his opinion should not be made public in the interests of national security'.[120] The Supreme Court highlighted that there is likely to be deference to the executive where the SoS exercises their discretion in the light of 'national security and public safety' considerations because these decisions and the evidence upon which they are made are 'incapable of objectively verifiable assessment'.[121]

Arguing that this secrecy creates uncertainty that paralyses the courts, Kavanagh has noted that the courts often have no choice but to give the executive 'the benefit of any doubts they may have'.[122] This was the case in *Belmarsh*, where the majority felt it necessary to defer to the executive's assessment of whether there was a 'threat to the life of the nation' because they were not in possession of all the relevant facts and so could not be certain that the decision was incorrect.[123] Although Lord Scott expressed 'very great doubt' about the executive's assessment of the security threat, he too was willing to give 'the benefit of the doubt'.[124] The executive's ability to exclude evidence from judicial review, and thus gain the benefit of the doubt over national security decisions, demonstrates the significance of secrecy to executive national security power. When it came to the ultimate outcome in *Belmarsh*, the Court was able to rule against the executive only because the proportionality question could be decided without recourse to classified material.[125]

Lord Walker, however, adopted a different justification for deference, stating that national security is the policy area where the courts are most inclined to defer, with the exception of 'some questions of macro-economic policy and allocation of resources'.[126] Ostensibly, Lord Walker simply argued that deference arises from the executive's expertise and their ability to make determinations on polycentric issues (i.e. those that relate to several different

[116] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 Current Legal Problems 215, 216–18; Lewis Graham, '*Tariq v. United Kingdom*: Out with a Whimper? The Final Word on the Closed Material Procedure at the European Court of Human Rights' (2019) 25 European Public Law 43, 44.

[117] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 [96].

[118] *A v UK* [GC] App No 3455/05 (ECtHR, 19 February 2009); *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269; *Gulamhussein v UK* [Committee] App Nos 46538/11 and 3960/12 (ECtHR, 3 April 2018).

[119] However, it has been asserted that, in certain narrow circumstances, corporations could be found to have human rights. See Andreas Kulick, 'Corporate Human Rights?' (2021) 32 European Journal of International Law 537.

[120] *Begum* (n 98) [5].

[121] ibid [70].

[122] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 177.

[123] *Belmarsh* (n 101) [27] (Lord Bingham).

[124] ibid [154].

[125] Elliott (n 108) 6–7.

[126] *Belmarsh* (n 101) [192].

and often competing policy areas).[127] Polycentricity has been used to justify deference to executive expertise,[128] and the concept remains an important tool of analysis when determining the degree of deference in a variety of areas.[129] Yet, in areas such as tax law, courts often adjudicate polycentric disputes without a second thought, in the name of protecting individuals' rights against executive power.[130] Conversely, in the national security context, even where rights are at stake, we have seen that the courts are by no means guaranteed to wade into these similarly polycentric disputes. Therefore, any suggestion that the courts defer to the executive over national security matters because the latter's expertise makes them better placed to tackle polycentric issues would overstate the importance of this aspect of their reasoning. In fact, despite noting the secrecy inherent in national security proceedings, Lord Walker ignores a crucial distinction between cases involving national security and those involving resource allocation or macroeconomic policy.[131] That is, unlike other polycentric issues, the courts in national security matters are not only poorly placed to review such decisions but may also lack the same access to evidence as the executive, suggesting that secrecy remains the central factor underpinning executive national security power.

It has also been argued that deference is better explained by a fear of life and death consequences and the desire to avoid complex risk assessments that require information that judges do not have access to.[132] A closer inspection of each of these factors reveals that, even here, national security secrecy plays a significant role. Firstly, the courts' desire to avoid life and death consequences is a desire to avoid getting the relevant national security assessment wrong. It is true that, irrespective of national security secrecy, such assessments are inherently political and so would never fall directly within the courts' role. However, given the often-secretive nature of these assessments, the courts' ability to make informed security judgments is necessarily limited. Secondly, when it comes to national security cases, determining 'the extent of future risk' can often be decisive.[133] Lord Hoffmann in *Rehman* described such assessments as 'a question of evaluation and judgment' involving not only 'the probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences' faced by terror suspects.[134] The issue is that these assessments are impossible where the courts are not in possession of all the facts. Lord Hoffmann noted the resulting imbalance when he decided that a 'considerable margin' was to be afforded to the executive, resulting from their 'advantage of a wide range of [security] advice' and contributing to differences in executive and judicial 'decision-making processes'.[135] As a risk assessment is only possible where all relevant information is available, the demands of such analysis will necessarily tend towards deference, thus affirming executive power.

[127] Martin Chamberlain, 'Democracy and Deference in Resource Allocation Cases: A Riposte to Lord Hoffmann' (2003) 8 Judicial Review 12; Cora Chan, 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 Hong Kong Law Journal 7, 14. See generally Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 394.

[128] Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 45; Chan, 'Deference and the Separation of Powers' (n 127) 14–17.

[129] Jeff A King, 'The Pervasiveness of Polycentricity' [2008] Public Law 101, 109–11.

[130] ibid 111–13.

[131] Jeff A King, 'The Justiciability of Resource Allocation' (2007) 70 Modern Law Review 197.

[132] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 213.

[133] *Rehman* (HL) (n 66) [56] (Lord Hoffmann), [65] (Lord Hutton).

[134] ibid [56].

[135] ibid [56]–[58].

Nevertheless, it has been noted that, in *Belmarsh*, the Lords did not push back against the Government's decision to withhold evidence, thus suggesting that other concerns are the predominant factors in deference to the executive.[136] Then again, it is perhaps not surprising that courts acquiesce in executive desires not to share secret intelligence, given the latter's tendency to insist that such material be withheld from the courts.[137] Moreover, Chris Monaghan has emphasised that separation of powers and democratic legitimacy justifications do not tell the whole story and that deference instead follows a far more 'nuanced approach'. He argues that the particular facts of a case, the relevant statutory wordings, and the powers and jurisdiction of bodies such as the SIAC, together with the specific security context, will combine to determine the level of deference.[138] This nuanced approach is valid, given that executive judgments often involve 'an evaluation of complex facts'.[139] However, the problem with this is that the factual matrices are not only complex but are also often hidden, comprising evidence to which the courts have no access. Furthermore, the ambiguous interpretations of national security, as well as the secretive approach taken by the executive to determine whether something is 'in the interests of national security', mean that all of the factors identified by Monaghan would likely create uncertainty, likely leading the courts' approach to national security cases to tend towards executive power. Monaghan's approach is helpful insofar as it highlights that separation of powers and democratic accountability concerns are no guarantee that the courts will interpret national security in a way that favours the executive. However, such an approach takes insufficient account of the importance of secrecy in determining the extent of executive national security power.

The implications of this subsection for national security adjudication in UK law are profound. The NSIA includes provisions for the use of CMPs in judicial review actions brought against the executive. If used, CMPs would allow the courts to decide cases based on sensitive national security evidence. However, CMPs rely upon the executive making such information available to appellate courts.[140] In any case, CMPs necessarily limit the scrutiny of executive decision-making through the inability of the other party to view and therefore challenge evidence gathered by the executive branch.[141] The secrecy that is likely to persist under the NSIA, combined with the courts' tendency to defer both over what national security means and what is needed to uphold it, risks granting the executive far-reaching powers. It is now necessary to assess in detail the wider effects that this may have, both under the NSIA and beyond. This will be the focus of the next section.

IV. Implications: Adjudication and Accountability

This section will explore the implications of this article's findings for both the judiciary and the executive. It will demonstrate that, by incorporating economic security concerns within the scope of national security, the NSIA risks becoming a powerful tool of unchecked executive power. This, in turn, creates uncertainty regarding the traditional role of the courts in

[136] David Dyzenhaus and Murray Hunt, 'Deference, Security and Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 146.
[137] *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307.
[138] Chris Monaghan, '"The Court of Appeal ... Appears to Have Overlooked the Limitations to Its Competence, Both Institutional and Constitutional, to Decide Questions of National Security": Shamima Begum, the Supreme Court and the Relationship Between the Judiciary and the Executive' (2021) 26 Judicial Review 134, 144, para 31.
[139] *Bank Mellat* (n 117) [93] (Dissenting Opinion of Lord Hope).
[140] Explanatory Notes to the National Security and Investment Act 2021, para 41.
[141] Tomkins, 'National Security and the Due Process of Law' (n 116) 217.

national security matters. Therefore, this section delves into the heart of the normative analysis underpinning this article, as we will see how ambiguity under the NSIA risks undermining the values that are central to the UK constitutional settlement.

A. THE ROLE OF THE COURTS IN NATIONAL SECURITY ADJUDICATION

We have already seen how, under the NSIA, national security is left undefined, meaning that the task of giving shape to the meaning of national security in this context falls to the courts.

It has been suggested that there is unlikely to be much uncertainty over the interpretation of national security, as this will be determined by the contextual meaning of those 'national security risks arising from the acquisition of control over certain types of entities and assets'.[142] However, although the UK Government has issued a statement seeking to clarify the relevant risk factors and asset types that will likely prompt national security review, that same statement stresses that '[t]he government intentionally does not set out the exhaustive circumstances' where national security may be at risk.[143] Additionally, the executive has refused to rule out a further widening of the scope of national security in future.[144] Although some flexibility is needed to help governments respond to 'an increasingly wide array of risks and vulnerabilities',[145] it remains true that flexibility is in constant tension with legal certainty and that the requisite degree of flexibility is context-dependent.[146] The failure to elucidate the precise bounds of the context relevant for executive control over 'entities and assets' means that the courts' ability to interpret national security within that context, and thus to provide legal certainty, is necessarily weakened. We have already seen how adjustments to the meaning of national security tend to take place only where needed to give effect to executive decisions. Therefore, even if the context is clear, there is no guarantee of legal constraints on executive power. Moreover, the inclusion of economic security within national security means that investment review cases would represent a relatively novel context when compared with the traditional national security cases discussed in the previous section. This, alongside the courts' tendency to provide ambiguous and thus favourable interpretations of national security, means that the NSIA will present entirely novel challenges for national security adjudication.

The operation of precedent and the hierarchy of the courts pose a further problem for the interpretation of national security under the NSIA. We have already seen that the legal meaning of national security in traditional contexts comes from Lord Hoffmann in *Rehman*,

[142] Desai, 'The National Security and Investment Act 2021' (n 11) 422.
[143] Cabinet Office, 'National Security and Investment Act 2021: Statement for the Purposes of Section 3 – 2021 Version' (Cabinet Office, 2 November 2021) para 16 <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3> accessed 10 May 2024.
[144] Helen Thomas and Daniel Thomas, 'UK Pledges Greater Transparency of How It Scrutinises Deals' *Financial Times* (London, 3 April 2023) <https://www.ft.com/content/a00281bc-0f8e-48c6-b6d8-dec66b2a12d0> accessed 10 May 2024.
[145] Heath (n 63).
[146] Magdalena Pfeiffer, 'Legal Certainty and Predictability in International Succession Law' (2016) 12 Journal of Private International Law 566, 569; PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (Clarendon Press 1987) 415; Lutz-Christian Wolff, 'Flexible Choice-of-Law Rules: Panacea or Oxymoron?' (2014) 10 Journal of Private International Law 431, 438.

comprising 'the security of the United Kingdom and its people'.[147] In non-investment contexts, the lower courts have applied Lord Hoffmann's definition with few difficulties.[148] However, the NSIA's incorporation of economic security into the sphere of national security means that there are no guarantees as to whether such a broad interpretation will be applied in the economic context. Furthermore, given that challenges to decisions made under the NSIA will begin in the High Court, it may be some time before the appellate courts provide clarity over whether economic security concerns can legitimately fall within the scope of national security.

This creates a further problem, given the impact of national security interpretations on judicial deference. In the US context, Kristen Eichensehr and Cathy Hwang have identified three broad approaches to deference that courts might take when faced with cases involving a national security review of transactions.[149] The first, so-called 'expansive' approach, entails applying the same degree of deference seen in traditional national security cases. The second, 'constriction' approach, involves limiting deference across the board, even in cases concerning strictly defence-related interpretations of national security. The third approach, known as 'bifurcation', is a curtailed deference for economic security matters, with defence-related national security issues shown a wider degree of deference. However, this tripartite division of approaches appears artificial. Even if the courts sought to adjust their approach to national security deference, the main challenge that they would face would be determining how far a case falls within economic security and how far it relates to a strictly defence-related interpretation of national security. It is foreseeable that appeals could involve overlaps between these two security concepts. Any simplistic categorisation of possible approaches to deference would overlook the inevitable complexities in the factual matrices of national security cases.

When it comes to determining factual matrices, further complications are raised by the prospect of secret evidence. Given the NSIA's provision for CMPs, the use of secretive evidence and closed judgments would undoubtedly make it more difficult for the courts to establish a clear precedent over the correct approach to deference, further compounding the uncertainty faced by the courts, litigants, and the Government. Furthermore, given that CMPs were devised to enhance the protection of fundamental rights in the terrorism context,[150] questions remain over the courts' willingness to grant such procedures in the investment context. The alternative would see vast swathes of material kept out of the courts' reach, signalling further uncertainty as to how the review role of the courts will proceed under the NSIA.

All of these factors suggest that courts will face a largely novel situation when reviewing decisions made under the NSIA. Although national security review, CMPs, and executive branch deference are certainly nothing new, the NSIA's combining of national security and economic concerns creates widespread uncertainty. Despite arguments that the courts' role in national security matters 'evolves constantly' in line with how courts seek to straddle the divide between their constitutional bounds and the protection of individual rights and executive accountability,[151] the NSIA's incorporation of economic security into the realm of national security makes it impossible to know where those bounds now lie. What is clear, however, is

[147] *Rehman* (HL) (n 66) [50].
[148] *Foreign, Commonwealth and Development Office v Information Commissioner* [2021] UKUT 248 (AAC), [2022] 1 WLR 1132; *R (Kind) v Secretary of State for the Home Department* [2021] EWHC 710 (Admin), [2021] ACD 66; *Begum* (n 98).
[149] Eichensehr and Hwang (n 14) 584.
[150] Lorna Woods, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) 84 Modern Law Review 553, 568.
[151] Robert M Chesney, 'National Security Fact Deference' (2009) 95 Virginia Law Review 1361, 1434.

that the courts' approach to judicial review claims under the NSIA will have a significant impact on how executive power evolves in future.

B. EXECUTIVE ACCOUNTABILITY

The inclusion of economic security within the NSIA poses challenges not only for the role of the courts in national security review but also for executive accountability.

It has been argued that the NSIA risks becoming a tool of government economic and industrial policy.[152] We have already seen in Section II.C how the executive has incorporated economic concerns within national security.[153] Indeed, in the orders made under the Act thus far, the Government has ordered companies to increase UK-based jobs, research and development spending, and the use of UK supply chains, all of which better fall under the umbrella of industrial policy.[154] The Government has nonetheless pledged 'transparency', 'a very high bar for intervention' based exclusively on national security considerations, and that the Act will 'not be used as a backdoor for industrial strategy'.[155] Yet, the adoption of economic security rhetoric necessarily undermines these aims.

We saw in Section II.C that the executive sought to use the NSIA to protect UK businesses at the 'forefront of technological breakthroughs'.[156] Indeed, the Government's mooted use of the NSIA to help in its subsequently failed attempt to persuade semiconductor designer, ARM Holdings, to list on the London Stock Exchange suggests a willingness to use the NSIA in the pursuit of economic aims.[157] It is argued that, given that the NSIA does not name economic or industrial considerations as purposes of the legislation, the executive's ability to make interventions is limited to traditional security concerns.[158] However, this ignores the extent to which economic security has been brought within national security's purview. As it stands, only the courts can prevent the executive's freedom to interpret national security as they see fit and, given the courts' tendency to confer a wide degree of executive power, the prospects for legal accountability under the NSIA appear far from promising. Once again, this strikes at the fundamental principles of liberal democratic systems of government, which seek to place limits on executive power.

The role of executive national security competence, discussed in the previous sections, also poses a danger to government accountability. If national security now encompasses more than military defence, questions remain as to whether the relevant ministerial department has sufficient competence to make determinations under the Act. Despite ultimate responsibility for the NSIA lying with the Cabinet Office, the expertise required to make

[152] Desai, 'The National Security and Investment Act 2021' (n 11) 422; Helen Thomas, 'The Long, Long Reach of the UK's National Security Laws' *Financial Times* (London, 21 December 2022) <https://www.ft.com/content/f3c4c25d-bbf9-422a-b0aa-97070b0b0c88> accessed 10 May 2024.
[153] See also Thomas and Thomas (n 144).
[154] Thomas (n 152).
[155] Thomas and Thomas (n 144); Cabinet Office, 'Annual Report 2022–2023' (n 30).
[156] HC Deb 11 November 2020 (n 56).
[157] Slodkowski and others (n 57).
[158] Desai, 'The National Security and Investment Act 2021' (n 11) 422.

informed decisions may be dispersed throughout government, entailing a commensurate dispersal of accountability.[159]

The accountability question becomes more difficult in the light of secrecy and CMPs. Even where individual courts have access to closed evidence, closed judgments mean that they can only provide non-public forms of accountability limited to the legal sphere. Beyond CMPs, concerns have been raised that the NSIA is 'something of an information vacuum', typified by an opaque review process that places few obligations on the executive to give reasons for its determinations.[160] In traditional national security matters, 'the imperative of secrecy' has been regarded as 'an essential prerequisite of self-governance'.[161] However, the adoption of economic security concerns risks expanding government secrecy, and thus unaccountability, beyond the defence context. The opacity of the review process concerning Parliament, the media, and the public means that the NSIA prevents meaningful political accountability, demanding a significant degree of trust in both the judicial and executive branches.[162] Trust in leaders is essential in national security matters, as only when governments are trustworthy can they be presumed to be making decisions in the public interest.[163] The executive's ability to expand the range of policy areas that fall within the scope of national security therefore risks undermining not only scrutiny and trust in government, but also the assumption that national security decisions are made in the public interest. In addition to the public interest in national security, liberal democratic systems of government entail a public interest in accountability, open justice, and the rule of law, which also risks being watered down by an expansion of national security powers.[164] Therefore, the public interest per se cannot be a reason to permit the NSIA's far-reaching powers to go unchallenged. The NSIA's incorporation of economic concerns thus poses grave challenges for executive accountability.

Furthermore, given that research has often emphasised that high rates of business investment are dependent on a firm foundation of the rule of law and government accountability,[165] the NSIA risks endangering the balance between protecting national security and maintaining the UK's position as a major investment destination, which the Act alleges to uphold.[166] Although it may be true that the opacity of the NSIA's decision-making process also risks a 'chilling effect' on investment in the UK,[167] this opacity is, at least in part, due to the ambiguity surrounding the meaning of national security. Governments may seek to impart their preferred meaning on national security to give themselves flexibility, but this flexibility would necessarily defeat the policy underpinnings of the NSIA. This mismatch between the

[159] Sean Gailmard and John W Patty, *Learning While Governing: Expertise and Accountability in the Executive Branch* (University of Chicago Press 2013) ch 2.

[160] Marc Israel and Kate Kelliher, 'UK FDI Year in Review: A Look at the First Year of the National Security and Investment Act' (*White & Case*, 30 January 2023) <https://www.whitecase.com/insight-alert/uk-fdi-year-review-look-first-year-national-security-and-investment-act> accessed 10 May 2024.

[161] Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (WW Norton & Company 2010) 21.

[162] Woods, McNamara and Townend (n 150) 569.

[163] Cody (n 68) 669–70.

[164] Karl Laird, 'Closed Material Procedures – Should They Be Expanded to Protect Sensitive Interests Other Than National Security?' (2023) 28 Judicial Review 61; Tomkins, 'National Security and the Due Process of Law' (n 116) 247.

[165] Joseph L Staats and Glen Biglaiser, 'Foreign Direct Investment in Latin America: The Importance of Judicial Strength and Rule of Law' (2012) 56 International Studies Quarterly 193; John Hewko, 'Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?' (2002) 11 East European Constitutional Review 71, 73.

[166] Cabinet Office, 'National Security and Investment Act 2021: Call for Evidence Response' (n 16).

[167] Michael O'Dwyer, 'UK Ministers Intervene in 8 Deals Involving China-Linked Investment' *Financial Times* (London, 11 July 2023) <https://www.ft.com/content/3ae6098f-8b71-4551-af69-e0be3cebaa73> accessed 10 May 2024; Thomas and Thomas (n 144).

NSIA's aim of protecting investment and its potential practical effect of undermining investment seems to resonate with Wolfers's interpretation of the normative proposition underpinning national security, namely that nations 'consent to any sacrifice of value which will provide an additional increment of security'.[168] This is affirmed by the risk under the NSIA that the desire for enhanced national security undermines the commitment to investment that governments purport to uphold. The NSIA creates a risk of undermining the values it alleges to uphold, highlighting a certain irony within the Act. Including economic concerns within national security also risks the concept becoming all-consuming. Rather than securing the values that the nation holds dear, the steps taken to protect a nation's acquired values, in the form of the NSIA, create a risk that those values themselves, whether it be the rule of law, government accountability, the separation of powers, or the UK's openness to trade and investment, become diluted.

As well as accountability under the NSIA specifically, the Act also raises questions regarding which policy areas could fall within the scope of national security in the future. If the Government is free to shape the bounds of national security, a danger arises that future governments could abuse this by incorporating novel policy concerns. Such an occurrence would suggest that national security is capable of removing whole areas from the scope of judicial review. Indeed, it has long been argued that 'security' itself is so broad as to include a 'highly divergent' range of policies.[169] However, this suggests a theoretical possibility arising from the ambiguous nature of national security. The NSIA risks going further still, revealing a practical danger of national security powers expanding in the future. This article has demonstrated how the problems of government accountability resulting from the NSIA's inclusion of economic security concerns may extend beyond simply the investment review sphere to engulf all areas of public law. The problem, therefore, is not simply that the NSIA itself 'wields a big stick'[170] but that future national security legislation risks freeing the executive branch of legal accountability.

V. Concluding Remarks

Throughout this article, the NSIA itself has served merely as a vignette, a lens through which to assess national security ambiguity, the interaction between the judicial and executive branches, and the resulting implications for judicial review and government accountability. The NSIA demonstrates that national security ambiguity, constructed by the executive and given effect to by the courts, renders national security a tool of executive power. It is capable of expanding to other areas of policy, such as public sector technology investment and industrial strategy, as explored in Sections II and IV respectively. Thus, the issues considered and the conclusions raised in this article reach far beyond the NSIA's confines.

When it comes to power and accountability, although this article has focused on the executive branch, there remains the question of accountability for private entities. Legislation for the national security review of investment undoubtedly shifts the balance of power between the state and business interests. Given what we have seen, namely that these regimes risk

[168] Wolfers (n 10) 492.
[169] ibid 484.
[170] Desai, 'The National Security and Investment Act 2021' (n 11) 416.

excess government power, future research might explore means of checking the power of non-state actors without compromising executive accountability.

In Section III, we saw that the spectre of secrecy is likely to lurk in future national security cases and that the use of CMPs does not guarantee judicial access to secretive evidence. Beyond executive scrutiny, there remain the questions of procedural fairness, or ensuring fair trials, and open justice, with the operations of the justice system not obscured to affected parties and the wider public. Much has been written about how CMPs affect the ability of litigants to argue their case, and the NSIA is simply one part of a wider expansion of the use of these procedures.[171] Although perhaps it is high time for a review of CMPs in cases concerning business and industry, their abolition would only exacerbate the problems caused by national security secrecy. Further research is therefore needed on how CMPs can be reformed to strengthen both executive accountability and litigants' rights to due process.

Section IV brought together the discussions of executive and judicial interpretations of national security explored in the previous sections. It demonstrated that the ambiguity of national security under the NSIA has practical implications, rather than simply theoretical ones surrounding abstract constitutional principles such as the rule of law. We explored that the threats posed by the NSIA risk upsetting the delicate constitutional balance between the courts and the executive and undermining the NSIA's aim of balancing national security with the UK's position as an investment destination.

Lastly, the overarching theme of this article has been the role played by national security ambiguity in executive power. This conceptual ambiguity would undoubtedly be remedied by an unambiguous statutory definition of national security. This would entail a clear delineation of the policy areas that fall within the scope of national security, which would undoubtedly be hard to achieve given that few governments would seek to constrain themselves by narrowing the range of decisions that might fall within the scope of national security. Moreover, it is unclear whether the electorate, when faced with a party campaigning on such a platform, would wish to limit the ability of government to act in the interests of 'the safety of [its] citizens'.[172] Given the UK executive's dominance over the legislature and the advantage of national security ambiguity to governments, it remains unlikely that an unambiguous definition will be given a statutory footing anytime soon.

[171] John Jackson, 'Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?' [2013] Public Law 720; Adam Tomkins, 'Justice and Security in the United Kingdom' (2014) 47 Israel Law Review 305.
[172] White Paper Consultation Response, CP 323 (n 35) para 3.